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

TUESDAY, 31 JANUARY 2006

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

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents relevant to this inquiry which have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127).

The committee met at 9.33 am.

MARK BLUMER and

RICHARD FAULKS

were called.

THE CHAIR (Mr Stefaniak): Gentlemen, thank you very much for appearing at these hearings into the Terrorism (Extraordinary Temporary Powers) Bill 2005. I am formally required to read out this statement to witnesses before the inquiry. I hardly think that it is relevant to an inquiry like this one, but I have to read it out anyway. 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 that you are protected from certain legal action, such as being sued for defamation, for what you say at the hearing. It also means that you have a responsibility to tell the truth, because giving false or misleading evidence will be treated by the Assembly as a serious matter. Do you both understand that?

Mr Blumer: Yes.

Mr Faulks: Yes.

THE CHAIR: For the record and Hansard, please tell the committee your full name and the capacity in which you appear before the committee.

Mr Blumer: My name is Mark Blumer. I am the ACT president of Australian Lawyers Alliance.

Mr Faulks: My name is Richard Faulks. I am the national president of Australian Lawyers Alliance and also a member of the ACT committee of that organisation.

THE CHAIR: Would you like to address your submission? Given that the witnesses before the committee are clearly divided into people who oppose the very idea of such a bill and those who support it, and I note that you oppose the bill, and given the shortness of time, it probably would be better for us if you were to concentrate your comments on the bill itself and any particular problems you see with it, anything that you think should not be there or should be added to it, those sorts of things. Who would like to start?

DR FOSKEY: Chair, I would like to let you know that I do have a number of questions and I hope that there will be some time to ask them.

THE CHAIR: Yes.

Mr Blumer: I will start, if that is appropriate.

THE CHAIR: Keep it fairly brief, because we have only half an hour for you and there will be a few questions from the committee.

Mr Blumer: I will make some general comments. The response of democratic

governments around the world to the admitted problem of terrorism is to become less democratic. Lawmakers have responded by making laws and, while this is a natural enough response for lawmakers, we also look as citizens to our lawmakers to provide leadership. We see that the Chief Minister of the ACT has provided some leadership in relation to the question of terrorism and how to respond to it, and attempted to do so in the COAG framework, but eventually—I would not say was overcome—signed up to the COAG communique. So, while we oppose the bill and while we oppose the general making of laws to deal somehow with the problem of terrorism, the making of laws which take away basic rights, we acknowledge that the ACT is in the position where it has signed up to the COAG communique and therefore has agreed to pass some sort of antiterrorism legislation.

What we say in relation to the bill itself, looking at the communique, is that perhaps the bill goes too far in doing away with the basic human right to physical liberty when it allows preventative detention for up to 14 days to preserve evidence of a terrorist attack. We can acknowledge in the current climate that it would be arguable for even a democratic government to limit a person's freedom to prevent an imminent terrorist attack. I think most citizens would say, "Well, whatever it takes." But merely to preserve evidence after a terrorist attack when the person who is taken into preventative detention is not able to be charged with anything is, we believe, a disproportionate response to the problem. That is the main thrust of our submission in relation to how the bill could be improved, and we hope that the Assembly will consider that.

We are not aware of the substance of the talks at COAG. I notice that we did say that we were appending a copy of the COAG communique, but we have not done so. We have a couple of copies, if the committee members wish us to supply those, because we said we would do so. I am sure the members have a copy of that COAG communique somewhere, but we have a couple of copies if you need them. My colleague will talk about some more particular parts of the bill which we want to talk about.

Mr Faulks: My starting point, I guess, is that we are very much of the view that, if this law is to be in place, it should only be in place with appropriate judicial supervision. We acknowledge that the government, in this bill, has endeavoured to provide that type of judicial supervision in the sense that these orders can only be issued by the Supreme Court. We are very much of the view that that should remain in the bill.

We are very much of the view that any court proceedings where there is an application for an order of any sort under this act should be open, subject to the normal rules of court whereby an application could be made for proceedings to be dealt with in camera, if that was otherwise justified. We do not see that as being dealt with specifically in the bill at the moment, but we think it should be provided for.

One of our concerns is that the test which is being adopted in the bill for the issuing of what we feel is a significant invasion of rights appears to be a reasonableness test. From a legal perspective, we interpret that as being a test on the balance of probabilities. If that is the case, we think that there are some difficulties associated with that. As the committee is well aware, in the normal course, a criminal law requires proof beyond reasonable doubt. Here we have someone who is not even being arrested or charged, yet orders are being made for their detention, apparently on the balance of probabilities. If that is the intention of the government, which it appears to be, then we feel that that is

unacceptable in circumstances where liberty is being deprived of. We ask the committee to take that into account.

One of the issues that was paramount when Australia as a whole was considering the legislation was the fact that someone could be detained apparently without any right to notify family and other loved ones or any other significant person of their whereabouts. This act addresses that to some extent, and provides that there can be minimal contact with family. We applaud that. We think it is essential and we cannot see any rationale whatsoever for denying someone who has been detained the right to contact their family to tell them where they are and the fact that they have been detained.

What is of concern to me is that it appears that that right to contact family can be overridden by a preventative contact order under clause 54 of the bill. In other words, someone could be the subject of an interim preventative detention order, they could be the subject of an interim preventative contact order, and therefore be taken into custody with no right to contact anyone. We think that there is just no justification at all for overriding that basic entitlement to contact family, to at least tell that family that that someone is safe and that they have been detained. It can be limited to that, if necessary. So we ask that that be taken into account.

Related to that to some extent is the issue of compensation. We acknowledge that the bill does deal with compensation to a limited degree for those detained under this legislation, but it appears to be dealt with only in a limited way. We are concerned that someone could be detained for 14 days. The committee will be well aware of comments by the public that for someone to be effectively removed from their family, their employment and every other aspect of the community for 14 days could have a major effect on that person, not only the support of their family but also in relation to their employment.

If someone is detained for 14 days and they have no right to contact their employer, and the act does not protect the employment of that person in any way, one can well imagine that that person will be dismissed. With what appears to be an inevitable new industrial relations law which will entitle the dismissal of employees without, probably, much recourse to unlawful dismissal provisions, we are concerned about that and we invite the committee to look at those provisions and to try to protect those persons who may be detained in good faith, and we come back again to this test of reasonableness, but perhaps with no ultimate justification and released after 14 days, maybe in circumstances where they have lost their job and their family may have been deprived of income and support during the period. So I invite your consideration of that issue.

The other major issue that we have is in relation to a person's right to legal advice. The act appears on its face to accept that it is important that detained people have the right to obtain legal representation and advice, and we applaud that. What we are concerned about is that there is a provision in the bill, clause 53, which enables a police officer effectively to determine that that contact with a lawyer can be monitored. We cannot see any justification for the monitoring of communications between a lawyer and a detained person. A person is entitled to receive legal advice in confidential fashion and it certainly should not be overridden at the discretion of a police officer. One can imagine that that might be exercised in almost every case. Even though there are steps that a police officer must take if they do override that right, it does not appear that the act incorporates any provision for review of that by a court or otherwise.

Just briefly on some minor matters, perhaps, before we invite your questions, the scope of the authorised special powers in division 3.2 appears to be very broad indeed. It enables someone to be stopped, searched and questioned and property to be seized from anyone in a particular area under that special power. We are concerned about why that is necessary. We are concerned about the fact that, if you have already got a detention order capacity or a capacity to apply for such an order, there is this need for this broad authorised special power which appears to give the police very wide discretion in terms of dealing with a number of people within a specific area.

A very specific matter that we want to raise is that clause 94 appears to allow the Chief Police Officer, who is given significant powers under this law, to delegate those powers or functions in certain circumstances to someone who is defined as a senior police officer. With due respect, we feel that, if you are going to have powers that are so significant in terms of the invasion of human rights, it is inappropriate that the Chief Police Officer can delegate them apparently to someone—I may be wrong here—who is not defined but simply a senior police officer. I accept that that can only be done in certain circumstances, and not in relation to all functions. So I invite consideration of that provision.

The other issue which is of concern is the powers relating to the capacity to strip search a detained person. I accept again that the government has endeavoured to introduce safeguards in, I think, schedule 1 of the act dealing with when that might be done. But again, the right to strip search someone is available when a police officer has a reasonable belief that that is necessary. In our submission, that form of significant invasion of a person, that form of entitlement, should not be available—again, probably on the balance of probabilities that a police officer thinks it might be helpful. If someone has been detained without charge, maybe without being able to contact others, and is then required to undergo a strip search, that would arguably be a very intimidating circumstance, one that we feel needs to be revisited and probably should only be made available if so authorised by a court.

Just briefly, we feel that the provisions are very complex. I think you have had other submissions about that. That leads to the potential for people not to understand them easily. I do not for a minute suggest that there should not be numerous safeguards. In fact, we say that the provisions should not be there at all. We certainly say that they should be subject to the court authorising certain acts, but there is no doubt that the provisions in some circumstances are complex. As Mark said, we believe that they should be limited in relation to the prevention of a terrorist act, and we feel that they should not be available for the preservation of evidence. We think that is unnecessary. There are already sufficient powers to enable that to occur in our existing law and we feel that maybe the provisions can be simplified.

Our final submission is a more general one. I know that you are not interested necessarily in general ones, but Julian Burnside said in the middle of last year when the initial antiterrorism laws were introduced that the problem with this type of reaction is that what we are doing is, effectively, putting someone who is doing an act in pursuit of an ideology or a particular view in a worse position than someone who goes out and commits an act of mindless violence, if you like, someone who might be disposed to go out and commit a serious crime in general.

Obviously, we are strongly against people committing crimes of violence or destruction of property, but what we are doing with this legislation is we are saying that, if you do that or if you intend to do that with a particular pursuit of an ideology, you are going to be treated in a different way and a worse way than someone who just goes out and commits acts of violence. That is why we say that those person should be dealt with under the same law as others within our community, and we encourage the committee and the government, indeed, to take that on board and reconsider that whole idea of why someone who does an act in pursuit of an ideology should be treated differently. Julian Burnside picked that up in his article last year. That is the thrust of our specific concerns.

THE CHAIR: I note the time. I have a couple of questions that I will ask now and then my colleagues will ask questions. You mention that this legislation is somewhat convoluted. We have had a number of submissions that it is very different from other legislation interstate and that of the commonwealth and we have had a couple of submissions saying that that, in itself, is a problem because the threshold tests are higher, there is more complexity and more evidence is required to be put before a court, which would make it harder to have someone remanded in periodic detention for up to 14 days and would make the ACT more likely to be a target. Putting aside the fact that lots of people are saying that we should not have these laws at all, what do you say to the argument that, if you do have laws, they should be as consistent as possible, especially when you have a national agreement, and they should be workable?

Mr Blumer: It depends on the function of the law. You cannot put aside the function of the law. It is better if it does not work if it is a bad law and it is better if it cannot be used if it is a bad law.

THE CHAIR: Even if that means potentially having hundreds of people die.

Mr Faulks: With respect, to suggest that the ACT would become a preferred target of terrorists simply because our law provides for the protection of individual rights through judicial supervision is something that I could not agree with. The fact is that this law enables certain steps to be taken where it is considered that there is sufficient evidence that there is a problem. It does not leave that discretion with the executive. It means that it is a matter that has to be determined. It is a very serious matter. If there is evidence that someone is about to commit a crime or has committed a crime, our existing criminal law is available to deal with those persons and they should be arrested and dealt with accordingly.

If you are going to have judicial supervision, and we are very strongly in favour of that, then we say that there has to be an appropriate test. We say, with respect, that a reasonableness-type test, a burden or onus of that nature, is insufficient. We feel that to deprive liberty on such a test is not sufficient. So, even though we say that the provisions are difficult to follow, we do not agree with the fact that the threshold is too high and that somehow that is going to expose us to a greater risk of terrorist acts.

THE CHAIR: You have mentioned the 14 days—I have asked this question of other witnesses, too—and, being lawyers, you would certainly appreciate the situation here. It is difficult in that it is preventative detention but, if you have to look at the law and see

an analogy, isn't it a bit similar to, for example, someone who is charged with murder and is refused bail, and there is a presumption against bail currently in the ACT for someone charged with murder? Obviously that person would be remanded in custody for a lot longer than 14 days. If the person is subsequently tried, found not guilty and discharged, that would be the end of the matter. Isn't this somewhat akin to that? Obviously, you need a fair amount of evidence and you have to satisfy a test for someone to be remanded in periodic detention for up to 14 days and subsequently released. Something else might flow from that and that person might then be subject to further charges, but isn't there a corollary there? Isn't there some similarity between what we already have in terms of someone being remanded in custody and subsequently, as happens quite frequently, being found not guilty and this provision for up to 14 days detention?

Mr Blumer: They are charged and there is a burden of proof and of evidence.

THE CHAIR: There is a burden of proof here before you get past stage 1.

Mr Blumer: There is, but they have not been charged. There is already in place a provision that, if someone is suspected of being a terrorist, they can be charged and held in custody, and questioned. In fact, under this bill, people cannot be questioned, except in very limited circumstances. How this would be more effective to prevent a terrorist attack is very hard to understand and it is very hard to see how this bill and laws like it will be used in practice. So it may be a redundancy. It may be an action by lawmakers to make laws because that seems to be the easiest thing to do.

DR FOSKEY: Australian Lawyers for Human Rights appeared before us. I am interested in how you distinguish yourself from that association. Are the aims and activities similar?

Mr Blumer: I think I am a member of that association. We serve a different function. Sometimes our functions overlap, the same as the Law Council of Australia or the ACT Law Society. We are members of those, too. As we set out in the first paragraph, the reason we have made a submission to this committee is that we are an association of lawyers and other professionals dedicated to the protection and promotion of justice, freedom and the rights of the individual. That certainly touches on our core.

DR FOSKEY: It certainly does, yes. There are a number of lawyer associations and I am just teasing it all out. You note on page 2 of your submission that there are already significant powers to arrest people suspected on reasonable grounds of having committed an offence. You reach a conclusion, therefore, that the measures of this bill are aimed at people who are not suspected of having committed any crime. First of all, let me know if I am right in assuming that that is the conclusion you reach. Secondly, what types of people do you think that these measures are most likely to be used against?

Mr Blumer: I think it is fairly logical that, if there are already powers in place to arrest people who are suspected of committing an offence, they can be charged under those. So this has got to be about people who are not suspected of committing an offence; that is logical. Who are those people? They can only be families, associates or cousins—we are back to the old conspiracy laws—of people who have made a phone call to someone.

Mr Faulks: People who might know someone or know something about someone. It is that broad type of application of this power that is of concern to us. We say that our law is based on the assumption that people are innocent until proven guilty. These laws seem to be getting into the realm of saying, "You might be guilty of something. Therefore, we want to have the power to detain you and investigate that." We see a move away from the whole thrust of what has been the basis of our law over many years, and that is our concern. As to whether particular people might be susceptible, we do not want to get into any suggestion about any ethnic group or whatever, but once you get into the area of people who might be suspected of knowing something about something you can see that particular groups might be susceptible across a whole range of layers in society. That is our concern.

DR FOSKEY: The conspiracy laws belong to another era, I would have thought, but in this era, with the many means of communication that people have at their disposal, sometimes accidental communication as well and sometimes, not by their own actions, they are drawn into networks of communication, do you think that that actually increases the susceptibility for suspicion for some people, just taking the technological advances into consideration?

Mr Faulks: Quite likely, I guess. The answer is that our laws already provide for significant powers in the police to investigate matters by applying for orders to deal with electronic communications and otherwise and we do not see a need for any other form of law to deal with that.

DR FOSKEY: You say that it is inconceivable that any person should be detained for 14 days in order to preserve evidence when the authorities do not even have reasonable grounds to suspect that they have committed an offence. Would you consider that a 24 or 48-hour detention period would be then justified?

Mr Blumer: More justified, or less unjustified, because shorter. The commonwealth already has that power, so it is not necessary for us to have that power in our bill. We do make the point that, if it is necessary while the machinery of justice gets cranked up to have 24 hours or 48 hours, the ACT can rely on the commonwealth power.

DR FOSKEY: I take on board all the arguments that you have made—and we have heard them from most sources that have already given evidence before us—but what do you think the impact of these laws might be in terms of the likelihood of terrorist attacks? What do you think might be the impact of them? Do you think they will reduce them, increase them or have no effect?

Mr Blumer: I think they may have the effect of increasing the likelihood of terrorist attacks. If you say that every action that potentially marginalises ethnic groups causes them to feel as though they do not have the ordinary rights of a citizen, in my mind that increases the likelihood of terrorist attacks. When you take away a citizen's rights, the less they have to lose and the more likely they are to act in a way that is reckless and antisocial. So if it has any effect, I think it is likely to increase. Suppression of something when it does not need to be suppressed usually has the effect of creating—

Mr Faulks: Pressure.

DR FOSKEY: Do you think these laws will be used against the kinds of groups that we have always had with us, but maybe increasing activities in terms of neo-Nazi activities and extreme nationalism, those sorts of activities which, by default, I think, are being encouraged by the kind of discourse that we are having around terrorism and—

Mr Faulks: As I said in my final comment, we are certainly of the view that the definition of terrorist act is broad. These laws are aimed at those who do something in pursuit of a particular ideology. That is not just in the current context of what we are dealing with. It could apply to all those groups. Some may say that is a good thing. We say it is a bad thing. We say the law is there for everyone. There should not be particular laws for those who hold certain views.

DR FOSKEY: Should those who hold neo-Nazi views be just as targeted by any laws that they should be subject to?

Mr Faulks: Well, they would be. In our submission, they would be covered by this law in the same way as anyone else.

Mr Blumer: Yes, absolutely.

Mr Faulks: Look at the definition—

DR FOSKEY: Yes, and by existing laws—

Mr Faulks: Until now it has been found that those existing laws were adequate to deal with those groups. That is why we have a criminal law—

Mr Blumer: Whereas a gang that goes to the pub and beats up someone else just because they can—

Mr Faulks: Just for the fun of it.

Mr Blumer: is not covered by this because it was not for any ideological reason. There are laws in place to prevent people planning and carrying out acts of violence. Just because they are ideologically based is not enough reason.

THE CHAIR: Mr Gentleman, do you have a question?

MR GENTLEMAN: Thank you, Chair. I understand the time limits here, so I will keep it to one question. You mentioned earlier that governments try and legislate around these issues. What do you see as a government alternative to this? Do you think if we were to withdraw from foreign hostilities, for example, it would be a better move than to legislate around this—?

Mr Blumer: It is a little bit outside the ACT's bailiwick probably to withdraw the troops from Iraq, for example. I think it is up to governments, if you are speaking generally, to show leadership. Leadership is not necessarily action. Leadership might be saying to us, "Look, we have seen the evidence. There is no need for any further laws to be made. Our police and our intelligence services have enough power already. They are able to do their job. We are not going to pass any laws, despite your clamouring, citizens of Australia or

the ACT or New South Wales or whatever." That is leadership. They are not only lawmakers; they are executive government as well. They are there to say, "I have seen the information and I can tell you that we do not need this law," if that is the case.

THE CHAIR: On leadership—and it is a good point—these laws, I understand, came about as a result of some concerns raised by various authorities including, I think, the AFP and various security authorities. After the briefing the national government took those concerns on board, as did COAG and even our own Chief Minister. Is that not leadership, too, in that maybe our laws are not sufficient to cover the types of threats that Australia faces and therefore it is a question of leadership to ensure that governments put in place laws that they think would best cover that threat. That is leadership, too, surely?

Mr Faulks: It is leadership. But the point is that it has never been explained. We accept that there may be a reason for not disclosing confidential information, but it has never been explained by either the federal government, or indeed this government, why existing powers in the government and in the police are not sufficient to deal with the type of threats and why this new round of measures needs to be introduced in order to respond to that claim. That is what we invite.

The government should come out and say, "This is where the law is deficient. This is why it is not enough." That has not been done, in our submission. We accept that governments must be given confidential information and be able to deal with that, and that is a leadership role, but it has never been explained to us or to anyone why these particular laws and measures are necessary. We are being asked to trust government and, of course, we trust all of you impeccably, but it is a very broad ask. It is a very broad ask for the Australian community and that is why we are opposed to it.

THE CHAIR: Gentlemen, thank you very much for your assistance to the committee and for your appearance here today.

HELEN WATCHIRS and

ROWENA DAW

were called.

THE CHAIR: Thank you very much for appearing before the committee today. As you are aware, I have to read this out to all witnesses. You should understand that these hearings are legal proceedings of the ACT Legislative Assembly, 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 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 clearly understand that? You both nod. Thank you very much. Ladies, would you please tell us the capacity in which you appear before this committee?

Dr Watchirs: I am the human rights and discrimination commissioner.

Dr Daw: I am the human rights legal adviser at the ACT Human Rights Office.

THE CHAIR: Is there anything you would like to highlight in your submission? Then we will ask questions. We have only got about 50 minutes.

Dr Watchirs: I welcome the invitation of the committee to come here today. I think the approach of the human rights office is that we have looked at jurisprudence in terms of whether this bill is compliant or not. I have noticed that a lot of submissions have extra good ideas to make the law better. But we have taken a fairly strict line about what is absolutely necessary in terms of case law. We would support some of those ideas and, in fact, have made suggestions in the drafting of the bill in respect of things like due diligence in relation to preservation of evidence. I think they are not strictly necessary but we would support them being included in the bill.

Really we see preventive detention as a last resort and that a criminal charge would be preferable. We support the preamble, which states that it is temporary and extraordinary legislation. We do not support preventive detention per se, but there is no human rights jurisprudence saying outright that it can never happen. There certainly are exceptional circumstances and in our submission we go through the criteria that the UN Human Rights Committee has specified: that it not be arbitrary, that there be grounds and procedures established by law, that people are given reasons and that there is court control of the process.

In our view the bill is superior to the federal act, which has a number of provisions that make it not human rights compliant, and is better than any of the other state legislation. The New South Wales legislation would probably be the closest to the ACT bill that we are looking at.

We have assumed, using the section 28 test under the Human Rights Act, that there is a threat of terrorism, a grave threat, that we are not in a position to have that confidential

information and nor do we have the expertise to judge that. But we assume that the government has this information and that that is the reason for the whole COAG agreement of 27 September last year. We are going ahead on that basis.

Having a complementary scheme means that we need to fit into that. I think we have the highest level of human rights protection, and a few submissions have talked about how that will interact with other states. I think that is something that needs more teasing out because we do not want people avoiding our legislation and heading for the commonwealth, although that is only for a short period.

I think the Supreme Court, under section 30 of the Human Rights Act, is the body that has the key role in interpreting ACT laws, such as this bill when it is enacted. Also it has the power to make a declaration of incompatibility. That does not repeal the act, but it means that there is more debate within the Assembly, with a government response being required. It is our view that the Supreme Court has a very special role in judging human rights matters and we are very happy that preventive detention orders are solely within the jurisdiction of the Supreme Court. We support other submissions to the effect that special powers should also only be in the Supreme Court, rather than the Magistrates Court, because of the seriousness of these special measures and also because of the seniority of the court and the fact that it would actually be, I would have thought, fast tracked, rather than a Magistrates Court making a decision and then that probably being appealed later.

Issues of practicality we cannot advise on, although we would refer to the quickness of judicial responses in relation to the Hague convention on the kidnapping of children, family court matters and the care and protection of children. Certainly the courts can pull out all stops where there are very urgent matters and we would expect those procedures to be available under this bill.

I would like to re-highlight a couple of matters from our submission. One deals with how you treat evidence obtained through torture. A couple of submissions have said that it should not just be torture; it should be inhuman and degrading treatment. Strictly, according to House of Lords jurisprudence, torture is the high level mark and definitely cannot be used. Similarly, the Commonwealth Evidence Act has that requirement. We do support having an even higher standard of "inhuman and degrading treatment", but I cannot say, as human rights commissioner, that this is absolutely necessary. It is just something that I think it would improve the bill. It is a process of continual improvement in the area of human rights compliance. We can include these measures and then other things may occur to us the more we read into the bill.

The monitoring of communications between lawyers and clients I think is problematic. Some people have suggested that the Supreme Court should do that. Other people have said that a public interest monitor is a better protection. I think there is really nothing in human rights jurisprudence, except to say that this would be an absolutely exceptional circumstance, like it is the United Kingdom. I think the legislation lacks the criterion that says that the police office may think this will happen. It should be something higher, like "this is likely to happen" and "it will prejudice our investigation or prevent a terrorist act occurring".

I think that if you were to add a connection between terrorism and those criteria, then

that would make it compliant. Just having a serious offence not connected with terrorism is not sufficiently human rights compliant in terms of the least restrictive intrusion into people's rights that is necessary because of this very specific terrorism threat. We are not gauging it in relation to general criminal law offences.

We support the inclusion of humane treatment in arrangements and that our office be consulted and given a copy of those arrangements, together with the Ombudsman. The Ombudsman, I understand, has proposed that we have a role in relation to systemic review of these cases. I support that, but of course it would have to be contingent on having resources to do that.

The law society has argued that a public interest monitor panel may have a conflict of interest. The people with criminal law bar expertise are the people that those whom it would be proposed to detain would engage. There may be a conflict of interest in a small jurisdiction with individual counsel serving on the public interest monitor panel then being engaged by the same person in a later detention.

Although there are protections against rolling warrants, I do not think you can protect against a person who is a determined terrorist who will have a series of acts that they will plan. We would want to prevent those terrorist acts occurring and, of course, it would be preferable to charge them with a criminal offence

We are concerned about the disproportionate impact on Muslims. In particular, since we made the submission Rowena Daw has since picked up about three points in relation to the Chief Minister being satisfied that police powers are required and going to the Supreme Court and Magistrates Court. There is not a power for the court to amend what is sought and we think that, in order to prevent that disproportionate impact on Muslims, there should be express power to amend what is sought, rather than simply accept what the government proposes. I would like to introduce Dr Rowena Daw to talk about these additional matters that have cropped up since we did our submission.

Dr Daw: Maybe I will just point you specifically to the clauses. I think Helen has actually raised most of the points in a general sense. She mentioned what is actually clause 53 of the bill, monitoring contact with a lawyer. We consider that that would not satisfy the proportionality test. It is too broadly drawn in two respects. We know that it has been taken from the United Kingdom legislation, but we think it has been taken out of context. It has a different impact.

In relation to clause 53, we would recommend two things. At the moment the clause provides that "if the senior police officer believes, on reasonable grounds, that one or more of the following consequences may happen". We think that that is too low a threshold given that, in almost every circumstance in which it would be possible to bring somebody within the detention framework, that circumstance is likely to apply given the narrowness of the circumstances under the legislation in which you can be brought under preventive detention. So we think there should be a higher threshold than "may happen", "is likely to happen" or even a requirement of necessity. We have not made a final decision on that.

Secondly, we consider that subclauses (2) (a), (b) and (c) are too broadly drawn because they do not necessarily relate to terrorist offences. As you can see, "interference with or

physical harm to a person" is extremely broad. Given the absolute importance of confidentiality between lawyer and individual, we think that is important.

Dr Watchirs referred to the role of the Supreme Court in authorising special powers. Of course, the Chief Minister will have indicated support for that and expressed that. We still consider that it is clear under the Human Rights Act that the Supreme Court has the final role, particularly in relation to the potential of such orders to be too widely drawn and to bring within them a possibility of racial profiling of Muslims and the particular protections under the Human Rights Act, section 27 and section 8 of the Human Rights Act, which deal with equality and rights of minorities.

As a consequence of those, we consider that it should expressly state in the bill that the Supreme Court has the power to amend the application. They may imply that they have, but it is not clear that they would feel entitled to, given the role of the Executive in these orders. One thing that Dr Watchirs did not have to time to mention was an extra point actually from the ANU, which we agree with and which we consider is necessary on human rights compliance grounds, and that is clause 47, which deals with the right of the individual to have contact with family members.

Initially it only requires one contact with one of the person's family members. I know that under preventive detention order it can be expanded, but we agree with the point made by Professor Charlesworth that the police should have discretion to permit additional contact with family members where that is appropriate given the right to privacy under the Human Rights Act. That does not really permit blanket rules that do not take into account individual circumstances. So we consider that would be an improvement.

Just to add to what Dr Watchirs has said about the power to detain and search any person, this is a point that has been made in a number of other submissions and I think this is a very important one. The person has a duty, when detained for searching, to provide personal information to the police if requested and can be guilty of an offence of failing to do so or failing to comply with any requirement in the conduct of a search. However, there is only a corresponding duty on the police to reveal their authority and their reasons for seeking information if the person asks for it.

These powers can be used against children under 18 who may be even more likely than an adult to feel too intimidated to ask or who may respond inappropriately or aggressively. In our view this is an interference with the individual's right to privacy and, if it is a child, is a denial of their special need for protection under section 11 of the Human Rights Act. In other words, in short, the police should have a duty in all cases to explain to the person why information is sought or why a search is needed, not just on being asked. So we consider that there should be amendments for those purposes.

Dr Watchirs: I have two small matters. Some submissions have recommended that there be a defence of reasonable excuse for things like revealing your name, identity and why you are in an area. I think that is a good idea. It is not absolutely necessary in terms of human rights compliance, but I think it would improve the act. Secondly, a number of submissions said that monitoring by lawyers should be inadmissible. I would like to point out that that is the case already under the Evidence Act. Similarly with inadmissibility of evidence obtained by torture, that is also in the Evidence Act. So I

think it is worth repeating that this applies in the ACT, given that we do not have our own evidence act.

THE CHAIR: Thank you for your submission. We have had a few people say to the committee that this is really a fundamental departure from the normal law because of the preventive detention. But it has been pointed out by the committee secretary that there are some eight ACT acts that allow for preventive detention, ranging from four hours under domestic violence legislation, where I think a police office just has to have a reasonable suspicion that someone's going to be violent, through to an indefinite detention under a health act in relation to sexually transmitted diseases.

Obviously various amounts of evidence have to be supplied to various tribunals. Under this act, a fair amount of evidence has to be forwarded to the Supreme Court before someone is actually going to be put in preventive detention. I totally agree that this is not so much a fundamental departure from our normal law because there are other laws where preventive detention can be used.

Dr Watchirs: I think whether they are proportionate or not will depend on the court exercising those powers. Domestic violence, I would have thought, would withstand that, but I do not think the STD thing would. The Castan Centre at Monash University subjected health legislation to a human rights audit and there are a number of provisions that we do not think are compliant.

THE CHAIR: You mentioned that, of all the bills, the New South Wales bill is fairly close to the ACT bill. This bill is different, it would seem. We have had one and a half days of hearing so far on the interstate bills, indeed the commonwealth bill. Putting aside the question of whether we really need this legislation or not, COAG has certainly agreed to it. The federal government has passed its legislation, so it is there. What do you say to the argument that surely it is better to have consistent law that can be applied throughout the Commonwealth of Australia rather than wildly different laws between the states, especially when you are dealing with something as important as this?

Dr Watchirs: I think that consistent laws are a great idea, but without a national human rights act or a human rights act in other jurisdictions, I would rather have human rights compliant legislation than absolutely consistent legislation. I would imagine that the Victorian legislation might be subjected to human rights scrutiny that will make it more in line with our model.

THE CHAIR: But the New South Wales act, you say, is fairly close to ours?

Dr Watchirs: I think that has been the drafting model.

THE CHAIR: A few other submissions have mentioned torture. I think the AFP submission may have been one. They pointed out that they take great offence to having references to "torture" in there on the basis that that is not how they operate. I do not think it appears in other ACT laws. Is it actually strictly necessary to mention that word here because it just seems to be really un-Australian activity to occur in a police force? Perhaps there is a better way of getting across what you want there. But they seem to have taken great offence in their submission to references to torture in the act.

Dr Watchirs: I think it is necessary because it fleshes out the human rights issues. Just last week we heard in the news about the governor of a New South Wales prison slapping prisoners about. There are always going to be exceptional cases of abuse. I know it may be sensitive. It is not saying that the police would do this and it is also unclear who is going to be holding people in detention. Are they going to be corrective services staff? They are not people charged with an offence or held under a conviction, and it will be a separate place because there is a strict provision saying they need to be segregated. So, no, I would prefer to have "torture" there. As I said, with admissibility of evidence, it is not strictly necessary because it is in the Evidence Act, but I think it makes the act clearer and it is a good public education device for people to know what their rights are.

THE CHAIR: But surely we have any number of laws, including the Crimes Act, where people can be prosecuted if they do anything remotely like torture.

Dr Daw: Could I perhaps add a point to that? Of course we are talking about the obtaining of evidence. Given the nature of terrorism being an international phenomenon, we are talking about the obtaining of evidence from overseas jurisdictions; we are not necessarily talking about torture that goes on within Australia; we are talking about evidence from investigation overseas, from countries where indeed that may not be the case.

Certainly within the UK this has been an absolutely major issue and the subject of House of Lords cases because it is to do with what you can use and what standard of proof the police need before they can use evidence from abroad. What do they need to be satisfied about? Presumably they need to be satisfied that that evidence has not been obtained by torture. So it is a way of regulating how they relate to investigative material evidence from abroad as much as from within. So it is not just—

Dr Watchirs: And there is even clear evidence of Australian citizens being subjected to this. Mamdouh Habib was held under, I think the US call it, rendition in another country and subjected to torture and admitted to things that he didn't actually do, just to stop the torture. So evidence obtained in that way is not reliable anyway. It is a standard in Australia that we commonly uphold, but overseas possibly not so much.

THE CHAIR: Thanks for that explanation. On page 3 of your submission—and this is one of the fundamental questions—you have highlighted the human rights aspects for detainees. You talked about general human rights issues. I am glad you have put that in the submission. You mentioned in the third paragraph:

> Governments have a positive obligation of taking measures necessary within their jurisdiction to protect the individual's right to life against terrorist attacks.

That is section 9 (1) of the ACT Human Rights Act. You say:

> This aim must be achieved compatibly with respect for the human rights of detainees.

You go on to say:

> There is not sufficient national human rights jurisprudence to support the notion of

a communal right to security.

I take it that is a right to security for all the citizens of a country. Surely this is a balancing act. I am a bit concerned that that may be so. That is not a reflection on your office; it is just that you are stating that as a bland fact. That is unfortunate, surely. The right to life encompasses all of us. What this legislation is designed to do is protect the community's right to life. Surely that balancing act between the right of all of us to live and the rights of any particular individual who might be up before the law is very, very important.

Dr Watchirs: You don't have rights trumping each other, but certainly, under the proportionality test under section 28, you would consider the impingement on a person's rights. The object of the act is to preserve life and to prevent terrorism; so those other rights are included in that proportionality assessment.

THE CHAIR: Surely that would, by necessity, override some aspects of an individual's rights. Obviously every individual has got the right to live with dignity and the most basic rights, but surely the community right, the right of the ordinary citizen to life, is more important if you have to do a balancing act between that right and the rights of just one person who is probably seeking to destroy other people's lives.

Dr Watchirs: You could take it too far and we could lock everybody up for what they might do to other people. People murder each other but they are not terrorist acts. There is a fundamental issue about the rule of law and how far it is bent to take into account these extraordinary days of terrorism. There have been terrorist acts in Australia. The Hilton Hotel in the 1970s was one, but it wasn't connected with the current threat of terrorism we are facing.

THE CHAIR: Thanks for that. The Supreme Court, effectively, will be running this. You say that having that tends to fast-track them. Yes, that is fairly obvious. If someone is before the Magistrates Court, there will probably be an appeal; so there may well be a good point there.

Other submissions, mainly from the federal Attorney-General's Department, and the police comment on certain problems they had in terms of a much higher threshold. Because there are higher threshold tests and because of the very different nature of this law—even though there are precedents in ACT law, it is still somewhat different from normal criminal law—it might, with these tests, be very hard to have anyone detained in the ACT. What are your comments on that? There is a concern, it seems, that is coming through from a couple of agencies that the laws here will be that much harder and much more complex for law enforcement authorities to succeed in having someone detained because of a number of complexities which are not there interstate and/or with the commonwealth.

Dr Watchirs: We are in the position where we don't have the confidential information about the actual threat of terrorism for us to assess that—the police have that information—but I wouldn't automatically defer to them to say that they need more powers. We had the former head of ASIO, Dennis Richardson, saying the current powers were fine before the new commonwealth act came into force.

THE CHAIR: Would you be happy if the ACT simply adopted the New South Wales law, on the basis that at least they are older in New South Wales, we are talking about Australia-wide issues, compatibility of laws—

Dr Watchirs: It has a good provision, in that preventative detention is also ordered by the Supreme Court; so there is a compatibility in terms of that. It is probably one of the most important issues. But having a Human Rights Act, we have a duty to have a higher threshold of interfering with people's rights and have a proportionate response to terrorism. So I wouldn't support having the New South Wales legislation holus-bolus. Some of its provisions we have kept because it is a good model, but we have that higher threshold because of the Human Rights Act, and I support that.

Dr Daw: Some of the very specific provisions which are different between the New South Wales act and the ACT act arise specifically because they are required as a result of the Human Rights Act. So I don't think we would want to support the New South Wales act in those respects. There are, for instance, absolutely fundamental things like the right to legal representation, the statement of reasons, issues around—there are about 12 issues—privacy of contact with lawyer, which have specific implications for us in the ACT as a result of the Human Rights Act. So those are the very differences between our act and the New South Wales act.

Dr Watchirs: The other consideration is that that act was drafted before the commonwealth one; so there has been a huge amount of debate and people finding different angles that will inform our debate It is healthy to consider all those new angles and make it as good a law as we can have.

THE CHAIR: One more question from me and then I will flick it to my colleagues. One of the concerns expressed in a couple of submissions—and I have asked this question of other people—is that because our laws are different, because it is harder as a result of these laws for someone to be detained in the ACT, and given the fact that you also have all the embassies here and that we are a logical target for, I suppose, terrorists, that would make the ACT much more of a beacon, much more of a target, than it would be if we had laws very similar to other states.

Dr Watchirs: It is pretty theoretical in that the two big areas of arrest have been Sydney and Melbourne. In fact, Melbourne has had an express threat by an American member of al-Qaeda. I am not privy to information about any specific threats to the ACT, but it is a theoretical argument. I haven't seen it operate in practice, and I think we should have the law based on what we see our current needs are; review that law, have a sunset clause; and, if there are more problems, then the Assembly should reassess the legislation and see, if it is not proportionate, whether more powers are needed that would make the human rights threshold lower. But at current information levels, I can't see us being a target.

MS MacDONALD: I think I heard you say earlier that the legislation wouldn't stop those people who were determined to commit a terrorist act.

Dr Watchirs: No, sorry. I was trying to say that, if they were determined to commit it, although the bill prevents rolling ones, it doesn't prevent a number of them, where the person re-plans a new terrorist activity; and, if that is the case, then probably you get to

the stage where they would be so seriously involved in terrorism that they probably would get to the point of having a criminal charge against them. I am sorry if I gave the opposite impression.

MS MacDONALD: That is all right. I wanted to clarify what that was.

DR FOSKEY: Thank you for your very detailed submission, with a lot of assisting information for us—and I also note your role as reference points for drafting of submissions—and the comments that you have made on the commonwealth legislation. I have a great deal of respect for what you offer us today. Nonetheless, I guess that a lot of the comments that you make rest on the premise—and you state this yourself—that the threat of terrorism is sufficiently serious to require legislation authorising and so on. That is in your first paragraph. You used the words "rely on the premise". This is chosen language, which doesn't really call it into question. Would you go so far as to say that you accept the premise that the threat of terrorism is sufficiently serious to require legislation of this seriousness?

Dr Watchirs: There are plenty of other submissions that don't accept that threat, including from the Australian Lawyers for Human Rights, the Lawyers Alliance and the Law Society. What I was aiming at is that it is clear that we are going to have this legislation, and we want to make it as human rights compliant as possible. I notice the Ombudsman similarly said he is not going into policy issues; he wanted to go into operational issues. We wanted to get down to tintacks about how those amendments would go. We could debate it more, but I don't see it as that productive, given we don't have access to that information.

Dr Daw: We also accept that it will be finally for the Supreme Court to assess the compatibility of the legislation or any piece of the legislation in light of the Human Rights Act, and it is really only at that point that it is possible to assess.

Dr Watchirs: And similarly in relation to compatibility as a duty on the Attorney-General under the Human Rights Act: we are not asked to give compatibility statements, so we don't go that far. I assume the attorney will give such a statement for this bill.

DR FOSKEY: We will be interested in receiving the explanation why it is given a compatibility statement, if indeed it is. On page 2, first paragraph, second line, first sentence, you state:

> The ACT Bill is designed to enable better deterrence, prevention, detection and prosecution of terrorist acts.

Could you expand on "better"? In relation to what?

Dr Watchirs: Better as in it seems to be the view of COAG that current laws don't provide sufficiently to deter, prevent, detect and prosecute terrorist acts in that it seems to be aimed more at home-grown terrorism, whereas older legislation seemed to be more based on external threats, the UK being the opposite. They had a Terrorism Act 2000 before 11 September 2001. It is a point I haven't highlighted.

The UK scheme is quite different to what we have got. I know there has been a lot of talk about how the preventative detention models come from there, but their preventative detention is for the purpose of investigation. They don't have wire-tap access to monitoring, like we do. There is a much higher threshold there because of the European convention on human rights. The federal and the ACT model of preventative detention is for incapacitating a person to not commit offences. The one about preserving evidence is quite different.

DR FOSKEY: Mary Robinson's analysis is also referred to in other submissions. The final criterion for protecting human rights in the context of implementing antiterrorism measures is that the restrictions be not arbitrarily applied. Could you expand on what you would see as an arbitrary application of the legislation?

Dr Watchirs: "Arbitrary" would be having blanket provisions. A good example would be if the operation of the police were to have racial profiling of only Muslim people. In the UK their terrorism legislation was struck down in only applying to foreign citizens, not to UK ones. That would be an example of something being arbitrary and explicitly discriminatory. Those two issues are quite similar.

DR FOSKEY: How would that be tested? If there were a perception that the legislation was being arbitrarily applied in that sense, what would then be the measure for addressing that for the community, lawyers or any other interest group?

Dr Watchirs: One mechanism that is already there is annual reporting of data on how the legislation is used, how many people have been detained, reports on use of police powers, that kind of thing.

DR FOSKEY: We would require racial profiling in those reports.

Dr Watchirs: Yes, exactly. The oversight agency's probable role could be more beefed up. I feel ambivalent about the Public Interest Monitor because of us being a small jurisdiction. The Ombudsman is very good at looking at police complaints and, I would have thought, would be a very natural place to consider those issues. Possibly we could work jointly because our method of operation is not complaints based in the Human Rights Act but looks at systemic review and audits. Certainly this would be a good example of implementation of an act that should be audited as a specific function under the Human Rights Act.

DR FOSKEY: Do you think that the protections for people with special needs, be they mental health, cultural or religious, and safeguards for children and people with impaired decision-making ability are adequate in this draft legislation?

Dr Watchirs: They are certainly taken into account. Certainly in regard to preventative detention the written arrangements and protocols could have fleshed that out much more fully. There is a problem in having it too specific in the legislation as opposed to delegated legislation. Certainly, I have talked to the Community Advocate, who will be the Public Advocate, and they were quite satisfied that their client group will be protected by the act. They are there.

The problem is that we don't have another piece of legislation to compare that some

people could do it better. We are better than other Australian legislation. I am not aware of US, Canadian, New Zealand or UK laws having better provisions. We certainly didn't have the time to go into that much detail, but if it would be of assistance to the committee we would certainly analyse that more.

DR FOSKEY: We did identify that the lack of availability of the Community Advocate over weekends and public holidays might be an issue. It is not to say that arrests don't occur. Detention may not be instigated during those periods. So there may be measures, but I am concerned that support may not be there.

Dr Watchirs: There is also the issue about the capacity of a person to be preventatively detained. It should be an issue that the court explicitly considers rather than be an automatic decision of the police officer. My understanding is that it would be an implicit jurisdiction of the Supreme Court to look at that issue when making an order. But it may make sense to make it more express so that there could be more information and education about how the act would operate in practice.

DR FOSKEY: One quite substantial question: what are the implications of the fact that there hasn't been a notified derogation from the ICCPR under article 4 on the basis of a public emergency which threatens the life of the nation? Would the absence of a derogation mean that measures in this bill would be in contravention of Australia's obligations under the ICCPR?

Dr Watchirs: The federal act, I certainly think, is in contravention of the ICCPR. I don't think we need to derogate for a threat to make this bill proportionate. Rowena Daw could explain the UK provision, because they have explicitly derogated not only from the ICCPR but also the European convention. There is a split scheme of preventative detention in their legislation.

Dr Daw: The split scheme is in relation to control orders. They have needed to derogate from the European convention on human rights in respect of some of the provisions that they have brought in. Some of those provisions are similar to our commonwealth provisions, but they are particularly in relation to control orders. But the preventative detention provisions in the UK, as Dr Watchirs has already said, are quite different. They are pre-charge preventative detention, rather than an alternative to criminal charges. It is very often the case that the person would be released without charge. But technically they are brought in on the basis of a pre-charge detention period. In that respect it is a quite different situation there. Also, the provisions of the European convention in relation to liberty, which is engaged here, are quite different to those under the ICCPR. I am being technical, I know, but there are different provisions.

Insofar as the ACT is concerned, of course, we have section 28 of the Human Rights Act. It is a proportionality test, as section 28 does not apply as such under the ICCPR nor does it apply under the European convention on human rights. So the comparability isn't there. But certainly in relation to the commonwealth act, as Dr Watchirs has said, there is very little doubt that it is in breach of the ICCPR.

Dr Watchirs: Certainly this derogation point was one taken up by President von Doussa. He wanted there to be an express derogation if the situation was that serious. I gather it is not that serious but it is at an intermediate level where we still need to have this

legislation.

One thing I didn't mention was constitutional issues. We haven't gone into that because we lack the expertise. Having the Supreme Court making decisions on preventative detention gets over the issue of persona designata of judges. I gather that Supreme Court judges around Australia are not going to sign up to being persona designata but that the separation of powers doctrine clearly applies in the ACT, as shown in the Chief Justice's decision on 5 December last year in I v S, where our office and the Attorney-General's office intervened. The separation of powers doctrine does apply in the ACT.

I don't think preventative detention is an executive decision. Whether it is a criminal or a civil proceeding is still unclear but it seems like the authorities are going towards it being a civil procedure because there is no charge or a conviction. We can't be definite about that. The point is that if it were a criminal charge then probably the threshold should be lifted even higher in relation to a number of matters.

Dr Daw: We have not gone into the range of issues which have been raised in other submissions around burden of proof—whether the burden of proof should be beyond reasonable doubt—and whether the preventative detention provisions involve a strict liability notion. There are a range of issues which are not clear under this legislation because we are assuming that these are civil proceedings rather than criminal proceedings.

From the point of view of the Human Rights Act, if they are seen as criminal proceedings—and they certainly look like it; and here we are being technical again—some of the points that have been made in other submissions would be relevant; for instance, before somebody could be preventatively detained there should be proof beyond reasonable doubt. So far these have not been decided by the courts; so we don't know what the standard is.

MR GENTLEMAN: I will come back to preventative detention in a moment. Earlier you touched on terrorist acts in Australia and mentioned the Hilton bombing. You said that there was no relationship between it and current terrorist threats in Australia. Are you aware of any terrorist act that has occurred here in the ACT?

Dr Daw: I am aware of a person being charged for threatening something. The person had a severe mental illness, was held at Belconnen remand centre and later discharged back to South Australia.

MR GENTLEMAN: They were charged under the current legislation of course?

Dr Daw: Charged but not convicted or even brought to court because of their mental illness.

MR GENTLEMAN: Do you think, with this bill in place, they would be charged under this legislation rather than the charge that was put before them?

Dr Daw: Sorry, I am not quite understanding.

MR GENTLEMAN: They were found to be mentally unstable and released later.

Dr Daw: Yes. It wasn't a serious threat. That is what I am trying to say.

MR GENTLEMAN: If that situation were to occur now, do you think they would be charged under this legislation?

Dr Daw: They would be preventatively detained. Certainly the power is there and, if there is a real threat, then this new power would be helpful.

MR GENTLEMAN: I am sure you mentioned that preventative detention removes the right to the presumption of innocence. Do you think that, following this, that is a breach of the right to a fair trial?

Dr Daw: Could I answer that because that follows. I didn't want to get too technical on this because I wasn't sure what you wanted to hear. The question is whether or not preventive detention orders are civil or criminal. Because there is no criminal charge as such, they look like civil matters. If they are criminal matters, then all the rights under section 22 of the Human Rights Act, which deals with the presumption of innocence, apply.

As it stands at the moment, overseas case law would suggest that they are not criminal because you are not charged with anything. If that is the case, then the presumption of innocence is simply inapplicable. However, it is our view, in looking at the nature of the way these work here, that they might indeed be found by the Supreme Court to be criminal rather than just civil. They look criminal. You are being detained, et cetera. If that were the case, then the presumption of innocence is applicable and we would agree with many of the points that have been made in other submissions around this.

We are very happy to provide a further written submission on this, but we haven't gone into that. We have a general paragraph in our submission around the uncertainty over the standard that should be required and whether or not section 22 of the Human Rights Act applies to these fact situations. As I said, that would involve the presumption of innocence, an issue of proof beyond reasonable doubt and a number of other guarantees in terms of the evidence and how the evidence was conducted, the publicity of the proceedings, et cetera.

Dr Watchirs: If this person's act and planning were such a serious threat, then I expect they would meet a charge of conspiracy. There would be ordinary criminal charges or special federal offences that could apply. But the innocence issue is really only if it is criminal. The detention doesn't say the person is guilty; it incapacitates them to do what the court thinks is a strong possibility would happen, using the higher threshold that is required by the Human Rights Act.

THE CHAIR: Thank you very much for your attendance today.

The meeting adjourned from 11.00 to 11.20 am.

GEOFFREY ANGUS McDONALD and

KAREN BISHOP

were called.

THE CHAIR: I thank you both very much for coming. You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections but also responsibilities. It means that you are protected from certain legal action, such as being sued for defamation, for what you say here. 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. Do you both clearly understand that? Both of you have nodded in agreement. Please give your full name and the capacity in which you appear before the committee.

Mr McDonald: My name is Geoffrey Angus McDonald. I am assistant secretary of the security law branch of the federal Attorney-General's Department.

Ms Bishop: I am Karen Bishop, senior legal officer of the security law branch of the federal Attorney-General's Department.

THE CHAIR: Thank you for your submission. If there is anything you would like to address in your submission that you consider to be of relevance to the committee, please do so.

Mr McDonald: The submission does not touch on the process that led up to where we are now and I think that there is a lot of misunderstanding about how much time was spent on preparing this legislation. From the federal perspective, it really started soon after the bombing in London. The bombing in London was what really prompted us to start looking at our laws here again. During the period leading up to 8 September, when the Prime Minister put out a press release outlining what some of the thinking was for the purposes of the lead-up to the COAG meeting on 27 September, even prior to that going out, there were initial discussions with police, state officers and the like. During August 2005, much went into the discussion of the content and consideration of the content, so that by the time we introduced the federal bill it took into account changes that were recommended by the states and territories as well as other commentary that had been made about the process. By that time, we had a pretty well litigated piece of legislation in terms of the consideration of the legislation.

The reason we had COAG was to get consistency between the laws and, if there was ever a jurisdiction that needed to have laws that were consistent with the state nearby and also the fact that we have Australian Federal Police policing the national policing and the community policing, I guess it would be the ACT and I guess our submission is that we think probably more can be done to make the law more consistent with the federal and New South Wales legislation. We have touched on various issues in our written submission to you and I will not go into every detail that we have got here. Obviously, we are here to answer any questions about them.

THE CHAIR: Perhaps you could just summarise them.

Mr McDonald: I think the thing that concerns us the most is the issue of providing disclosing information to people that may be respondents to this preventative detention legislation. I guess on that, as I have said with the Senate legislation committee, this is emergency legislation. In your case, the ACT, you call it extraordinary temporary powers. They are, and they are powers that will only be used in extraordinary circumstances. Those circumstances, as you see with the grounds for getting preventative detention, are such that they really are about an imminent terrorist attack or straight after a terrorist attack, and the last thing we need to be doing is disclosing too much information to the enemy before we even know the extent of the enemy.

The reality is that it could cost lives, so I suppose the main thing that we want to say is: please consider that. We understand, we have considered very carefully, the impact on individuals and the potential for injustice in the sense of an individual being treated unfairly. Everyone wants to avoid that. However, we have a responsibility to try to minimise the impact of the attack. With the ACT law, as we have outlined here, we are quite concerned about the position with disclosure. At COAG there was a lot of debate about this issue. It was a big issue for the other states as well as for us, and quite significant changes were made to what we were originally proposing on 27 September to try to accommodate this. I suppose one of the main examples of one of those changes was to at least give the person a summary of the basis of the allegations.

We have, of course, the ASIO legislation, which I mention here. It is federal legislation. We are obviously concerned about the interaction between this and that federal act, and that is an important factor that you need to take into account. There is also the National Security Information (Criminal and Civil Proceedings) Act, which is important federal legislation that we suggest you acknowledge in the legislation. It has not got, in the way that our legislation has, a signpost to that legislation. I think that is extremely important.

We note that a different approach has been taken with children. Without wanting to minimise the understandable motivations behind not putting children in it, we just ask you to consider the fact that the general rules of criminal responsibility go much lower than 18 years of age—that, in fact, 14 is the usual age—and that this issue was considered very carefully when the initial terrorism legislation was prepared in relation to ASIO questioning and the like. Sixteen was considered to be, operationally, about as high as we could go.

The truth of it is that elsewhere in the world children within this age bracket have been involved in suicide bombing. Young people do get involved in crime. Sometimes they are more vulnerable than others. In the area of suicide there are particular vulnerabilities of young people. Consequently, we are saying that certainly the age limit there is reasonable. There would be some, and I am not putting this, that would argue that it should be lower. However, what we have there is regarded by everyone as being the most acceptable level in our society.

There is an issue to do with the monitoring of the contact with the lawyer, which we have mentioned here. We know this is unpopular. I can assure you it was very unpopular in the context of the federal bill as well. But we have a situation here where we have to enforce it. It still goes back to the disclosure aspect of it. We do have to be able to try to minimise the chances of information getting out and we need to have effective means of enforcing it.

Finally, much has been said about the human rights issues in the ACT. Obviously, we have been monitoring that very carefully. We gave it a lot of consideration. We are confident that the model that we have at the federal level is consistent with human rights obligations. In some ways, the human rights debate has always been framed in terms of the rights of freedom of the individual against the amorphous state, or the community as a whole, or something like that. In fact, security is an important issue for everyone's freedom, individual freedom for the whole community, so when we talk about the balancing act we are thinking about the individual as much as trying also to look at it from a community concept.

On constitutionality, we do not get into the details of constitutional advice and the like in the sense of detailed constitutional advice. However, we have made the notation there that, clearly, having the ACT Supreme Court making the orders is something that would appear to have overcome a major restriction that we have at the federal level, in that we would have great difficulty having a 14-day period at the federal level without encountering problems. Our judgment was that we could make it for 48 hours using the system that we have got.

There has been debate. You might recall that various state solicitors-general were making comments about the federal legislation or the federal scheme and there were quite varied and conflicting views expressed. There are some people that argue that it is not appropriate for a court to be making these decisions. I think the main thing there is for the ACT internally just to satisfy itself about that issue.

The position on the constitution is that, if there were a problem with having the orders made by the Supreme Court, you may well have a problem with using an alternative if it is for 14 days because you would probably have the chapter 3 problems that we encountered; you may have them. Constitutionally, it is something whereby moving from the model that you have here would need to be looked at very carefully. The reason I am cautious about that is that the Australian Federal Police are a commonwealth body.

There are a couple of areas that we have highlighted where the ACT law looks a bit more draconian than the federal law. There may be explanations for that. That is just mentioned in the last couple of pages of our submission. There could be mechanisms there that we were unaware of. I hope that has been helpful. If you have any questions, I would be very pleased to answer them.

THE CHAIR: You have highlighted a few areas and given some explanation just now. On page 2 of your submission you refer to the large volume of information required of an applicant under section 17 in making application for a preventative detention order.

Mr McDonald: Yes.

THE CHAIR: You highlight some problems in relation to proposed section 18 (k) (vi) and say that it is potentially inconsistent with the federal law in that it requires information about periods of detention of a subject under a warrant issued under the ASIO act. You are concerned that the requirement is contrary to section 34VAA of the ASIO act, whereby it is an offence to disclose certain information. So that particular paragraph of the ACT law is actually in contravention of a federal law. What would that

mean? I take it that, under the constitution, the federal law would override the ACT law.

Mr McDonald: You could have that problem, yes.

THE CHAIR: So action would need to be taken in relation to that particular paragraph because it is incompatible and indeed would seem to be an offence under federal law. That seems to be quite a big problem.

Mr McDonald: Yes. Just one thing about the volume of information being required. One little line that we discussed which I think sums it up very carefully is that, in the event of a terrorist attack or immediately before one, the last thing we want is to have the law enforcement and security agencies spending their whole time in front of a computer typing up and preparing information. Also, at the federal level we talked about, especially with that 48-hour thing, the initial period, the last thing we needed was to have them in the corridors of courts and the like. So there was a quite deliberate effort in the original legislation to try to streamline it as much as possible and that is why we had this idea of there being a summary of the grounds to try to facilitate that.

THE CHAIR: I think you mentioned too that, if the information were to get into the public domain, that would obviously assist further terrorist acts.

Mr McDonald: Yes, that is right.

THE CHAIR: Basically, getting back to my other point, it would seem that part of this law is consistent with that particular section of the commonwealth law and therefore, firstly, it might not apply and, secondly, it might be invalid, illegal or whatever because it would seem to be contradictory to the extent of being an offence under federal law. So that is something that we definitely need to look at and fix up.

Mr McDonald: Yes.

THE CHAIR: Are there any other areas where federal law overrides or contradicts sections of this bill, where a similar problem obviously would arise?

Mr McDonald: Yes. I think there is a concern with the National Security Information (Criminal and Civil Proceedings) Act. I think it is important that the legislation provide that signpost about that act and its application.

THE CHAIR: What provisions of our bill are inconsistent with that? I think that it is important for the committee to see where we are overridden by federal laws or are inconsistent and need to make changes.

Mr McDonald: I will just get you the exact provisions.

MR GENTLEMAN: Chair, would it be the supply of information to the public interest monitor?

THE CHAIR: I do not know if that is consistent or not. There are obviously federal acts that apply to certain sections of this bill which seem to cause a problem.

Mr McDonald: Yes. We should really have had those. We will find those.

THE CHAIR: Could you find them and give us a list?

Mr McDonald: Yes.

THE CHAIR: I would like a list showing where the federal law is obviously significantly different legally so that it would apply rather than the ACT law, where the ACT law is incompatible with the federal law and just what practical effects that would have, and whether the federal law would simply override the ACT law or whether it would be better to tidy up the ACT law so that it does not offend an overriding federal law.

Mr McDonald: Yes. A big problem here is operational as well. It is just not good to be having different procedures as well from the police perspective.

THE CHAIR: Yes, different procedures between the states and the commonwealth. That is another question.

Mr McDonald: Yes.

THE CHAIR: You refer on page 3 to access to sensitive or national security information. I take it that the section you are referring to there is the commonwealth criminal code, 105.7.

Mr McDonald: Yes.

THE CHAIR: You talk about the national security information act. You are concerned about similar safeguarding of sensitive or prejudicial information in this bill and are worried about the police providing to a detainee all the information on which the application is based, which then obviously would totally compromise further operations or put innocent civilians' lives at risk and prejudice national security. You think it is vital that the legislation contain appropriate protections for that. You note in the next paragraph that complementary legislation enacted in other jurisdictions contains such safeguards, and you mention New South Wales. Is the New South Wales act an appropriate safeguard to adopt?

Mr McDonald: Yes. This is an example of the other states having adopted something that is pretty much in line with what the commonwealth has done. The ACT has a pretty proud record actually of working towards national consistency with criminal law, especially with your enactment of a criminal code; I would like to acknowledge that.

THE CHAIR: With our criminal code, yes, a bipartisan approach.

Mr McDonald: So, as in the past, we would like your assistance in this area.

THE CHAIR: You obviously have grave concerns there. In relation to children, other states and the commonwealth have that lower age limit of 16 years. We do not have an age limit, but are children able to be given preventative detention orders under the ACT bill? I am just not quite sure of what you are getting at there.

MS MacDONALD: You seem to be saying that it is unclear because it is actually not specified. Is that correct? Is that what you are saying in your submission?

Mr McDonald: Yes, we were saying that. It is an area where it is important that it be clear.

MS MacDONALD: Would you submit that 16 years should be the limit?

Mr McDonald: That is basically what the consistent model is right round the country. We are suggesting that, if there was ever an area where we need to have clarity between the jurisdictions and consistency, then that is it. It is the same with the age of criminal responsibility. We have pretty well achieved uniformity on that. So, with this, I think it is important for it to be very clear.

MS MacDONALD: Presumably, the reason that we would be putting forward that it could not be under 18 years, 16 to 18 years, is the Human Rights Act.

Mr McDonald: As I understand it, not being a total expert on human rights, the ACT Assembly is still free to legislate in these areas, that your Human Rights Act is a guiding statute. We would, I guess, be saying, as is clearly acknowledged by the ACT government with this legislation, the total package, that it is a balancing act protecting individuals' security and protecting freedom.

THE CHAIR: I have just been advised by the Clerk, whom I referred to on this matter, that a good way of summarising our bill is to say that, whilst it is possible to detain children, it is very hard. In terms of the commonwealth bill and other bills where you have a cut-off at 16 years of age, does that mean that a 15-year-old could not be detained under the commonwealth legislation and, say, the New South Wales legislation?

Mr McDonald: That is right.

THE CHAIR: I take your point that young people can be very vulnerable to ideas, suicide bombings and suicide, and suicide bombers overseas certainly have been under 18. I take your point about 14 years being the age for criminal culpability. Would it not be sensible perhaps to have some provision for young people, be they 14 to 18, just to cover those sorts of situations, because even 16 is an arbitrary cut-off?

Mr McDonald: It is arbitrary, but I guess my position is that, after a lot of consideration, the federal parliament certainly came out at 16. I know that that is the government's position, so I am not really proposing or outlining support for any alternative.

THE CHAIR: Sure.

Mr McDonald: What I was trying to do with my statement about that was to put it into context. So, despite what some have said about our laws, they are fairly careful.

THE CHAIR: And you are saying—correct me if I am wrong—that for consistency, because there is certainly some doubt as to the effectiveness of the ACT bill, which probably in effect makes it very hard for any young person, we should adopt 16, which

everyone else has adopted.

Mr McDonald: Yes. There is a good chance that we could have an attack that crosses borders, that goes beyond one state, and you could have different people tied up at different ages. So it is an easy sort of area where we can get greater consistency.

THE CHAIR: Page 4 of your submission refers to release from detention. Having looked at the ACT bill, there are provisions which seem to say that a detention order lapses when a person is released and you have concerns here obviously in relation to that person then going off and committing further acts and being prohibited from being further detained because of the multiple preventative detention provisions in clause 12 of our bill.

Mr McDonald: Yes.

THE CHAIR: You suggest at the bottom that we make an amendment to ensure persons who are temporarily released after, say, 14 days can be returned to custody under a valid preventative detention order. Perhaps you could address that. Obviously you feel that it would seem that it would be impossible for someone in the ACT to be redetained and that, of course, could well cause very significant problems.

Ms Bishop: Perhaps how the particular sentence was written is misleading, but we were trying to get at a hypothetical scenario where a person is detained under a preventative detention order and at the end of perhaps four days the police release the person to ASIO for questioning under an ASIO questioning warrant or, alternatively, the person is released from preventative detention so they can actually participate in questioning about an offence; so they are technically released from preventative detention only four days into the preventative detention period. The way we have read the bill is that it says the person cannot be returned to preventative detention. So, even though they have been released for perhaps only an hour for questioning and it could run for another 10 days, it seems that the bill would prevent the person from being held in preventative detention for the duration of that period. That is what we are concerned about.

Mr McDonald: And it is very important that the police feel able to freely question the person in relation to offences quite separately from this regime. This regime has been quite deliberately crafted to keep a separation between formal questioning and the preventative detention, so that all the safeguards that we have with formal questioning, which are designed to get good evidence, plus to treat people in an appropriate manner, are there and can be used and there can be no concern about this affecting that decision making.

If you cast your mind back to the attack in London, and I can remember hearing about it at an early stage before they really knew what was going on—it was an unfolding process. Law enforcement was gradually getting more and more bits of information. When it is big like that and in several locations, sometimes the picture is not clear for some time as to the extent of what is happening or whether more attacks are planned, and that sort of thing and you could easily have a situation where a person needs to be questioned either under the ASIO legislation or under the crimes investigative powers to do it in an effective manner.

THE CHAIR: What you are saying is that it needs to be crystal clear that if someone is detained—here it is for seven days and you can get an extension, but let us say that someone is in detention for a seven-day period—that detention can be interrupted for questioning, which is quite separate. It is possible that, from the questioning, charges will be laid.

Mr McDonald: True.

THE CHAIR: The preventative detention would then lapse logically. But you need your questioning, you need obviously further evidence. If charges are not laid, that person should quite clearly after those few hours go back and continue with their preventative detention, and then you can reapply for a further seven days to take it up to 14. What about after that 14-day period? When I read that initially I thought you meant that after the 14 days it would be very difficult, if not impossible, to have someone come back under preventative detention.

Mr McDonald: You would have to make a fresh application, and that is appropriate.

THE CHAIR: That is appropriate; you have got no problems with that.

Mr McDonald: Yes.

THE CHAIR: So your concern here is basically with the interruption. You are quite happy that, under our proposed bill, you can make a fresh application.

Mr McDonald: Yes.

THE CHAIR: But here it is that interruption you are concerned about and you are saying that at present that would kill off the preventative detention, which clearly does not seem to make sense if you are only a couple of days into it. I understand.

Mr McDonald: Yes. We mention the police questioning and I think I touched on the ASIO questioning. It could be that the person has information of an intelligence value. We do not really want to have any sort of impediment to gathering evidence and information that might be relevant to the safety of the community. Often these procedural aspects seem harmless enough on the face of it, but have a practical impact.

THE CHAIR: I have one more question and then my colleagues will ask some. You have addressed detention arrangements and monitoring by a lawyer. You are concerned about having it made known where the person would be. The facilities in the ACT are limited, such as the remand centre and perhaps Symonston. Could you address that? We might have a practical point here. The other thing is monitoring with a lawyer present. You have some real problems there with the breadth, it would seem, and the number of people a detainee can contact through a lawyer. You have a concern about the monitoring provisions, together with the fact that our provisions are very different from those of other states in terms of the number of people they can actually contact. I would like you to address your concerns in relation to information getting out and compromising security.

Mr McDonald: The reality is that lawyers are not immune from being corrupted by

malicious elements in our community. There have been plenty of situations in the past. We have heard of mob lawyers and the like. We are in a position here where it is critical to prevent information being given, even about the fact that someone is being detained under the ASIO powers or even under this, which will give a tip-off to other conspirators.

It was commented upon in our Senate committee hearings that this was a pretty tough provision. It has been commented upon in the context of the ASIO legislation as well. But it is meant to be tough. At the end of the day, the inconvenience and concern about this aspect are outweighed by the concern about the passing on of information that could be valuable to these groups.

In the federal law, we put a lot of thought into communication with family members, siblings, workmates, the like, to reassure people that, while the person was not available, they were safe. We thought that that was an important thing. Quite clearly, a critic of that could say even that might still give people a pretty good hint whether the person was in detention. All I can say about that is that it is a balancing act, and it was felt that we needed to go that far. In the ASIO legislation, it is totally at the discretion of the Director-General of Security. With family members, you could have a situation where the mother is totally unaware of any involvement but the father might be intricately involved in it.

So we have got quite a few complex provisions to work our way through. I would ask you to look at the commonwealth law carefully and you will see what we have been attempting to do there.

Practically, the tipping-off issue is an extremely hard thing to legislate about in a way that is fair to everyone, but we have done our level best to get that balance. That balance has been worked out after an incredible amount of deliberations with the states and territories. Everyone has seen the public consultation side. I can tell you that debating this legislation with 30 different state lawyers who are looking for as many suggestions as possible was quite a process. In the end we have come up with what we have got there.

It is an area where, if a decision is made to leave out these protections, you would feel very uncomfortable should there be an attack which could be put down to the release of information in this way. I am a longstanding citizen of the ACT and am well aware of the importance of Canberra on the national scene. It is a place, obviously, where people live and go through the normal things in life. But it is no minor, provincial backwater and is seen externally and nationally as a very important place and a place where this sort of thing can happen.

MR GENTLEMAN: Mr McDonald, you mentioned a short time ago that there is a good chance that we will see an attack that crosses borders. What makes you say that?

Mr McDonald: I point out that the ACT border is, of course, not a big one and that we could have a situation where, even locally, it could cross a border. The idea of synchronised or multiple attacks is not at all new. Obviously in London there were multiple attacks. But there are other examples. A lot of people forget that in Istanbul a few years back they organised an attack on a bank—I think it was a HSBC bank, which

is a British bank—in Istanbul; then there was a gap and then another explosion that occurred in another part of the city in front of the British consulate. So the chances of coordinated or periodically spread-apart attacks are well and truly there.

MR GENTLEMAN: The London attack, though, occurred in one city. I understand that the bombers came from different counties. But it certainly wasn't spread over different borders.

Mr McDonald: It is evidence of the idea of a multiple attack and I just don't see why terrorists would necessarily see a state border as something which would stop them doing that. In the UK, of course, there are a lot of different police districts and so on. Of course in this country we are fortunate to have state-based police. That means we have fewer police forces and more coordination than a lot of other countries. In London it was the case that the Metropolitan Police pretty well covered the whole area.

MR GENTLEMAN: Indeed; in Australia, if you were to receive information that there was going to be a multi-terrorist attack, wouldn't you use commonwealth legislation to prevent it in good time?

Mr McDonald: The point of this legislation is that you can detain a person for 14 days rather than 48 hours. The commonwealth legislation, because of the Constitution limitations, means that it can only take us so far. There will be circumstances where the commonwealth legislation may well be the most convenient and best way to go. However, it is conceivable that there will be circumstances where a longer period of detention would be considered necessary and, in that case, the commonwealth has to rely on the states and territories.

I should also add that there are a lot of aspects to this where the state police are more equipped to deal with what I would call the street-side of some of these attacks. For example, in the stop-and-search power side of things—cordoning off areas and stuff like that—the resources of the state police are quite essential to the process. The cooperation between federal and state authorities is something that is nice—and it is nice to see it happening—but it is also absolutely necessary; we wouldn't be able to do it properly without that cooperation.

MR GENTLEMAN: You would imagine it would be quite fluid, though, here in Canberra with the AFP, of course.

Mr McDonald: In Canberra the AFP would not be able to use federal legislation to detain anyone for longer than 48 hours. You may have a situation where the devastation is such that you are able to assess right from the beginning that 48 hours isn't going to be enough. If that is the case, they may well even decide that it is better to detain the person under the local law.

MS MacDONALD: This is a bit of a hypothetical question. If the committee decided to recommend to the Assembly not to adopt the exposure draft bill and said, "No, we don't think that it is a good idea to do so, on the basis that it would be too hard to implement with the Human Rights Act; we don't think it would be compliant; we have concerns about what is in it, even in the limited scope as applied by this exposure draft bill in comparison to other states," how would the AFP and the commonwealth deal with that?

There would surely be legislation which could deal with detaining somebody who has committed a crime.

Mr McDonald: First of all, I am not really in a position to be able to predict what the federal government would do if we had that situation. So it wouldn't be appropriate for me to even guess. However, where we would be short, where we would have what we would call a vulnerability in this city, would be the point that I was making earlier; we would only be able to detain people under the federal law for a shorter period.

MS MacDONALD: Say 48 hours?

Mr McDonald: Yes. In the area of stop and search, dealing with the crisis management, we would be limited because our stop-and-search powers are limited to commonwealth places. There will be a lot of protection over my side of town but not here.

MS MacDONALD: You would have noticed the grand security arrangements when you walked in the door, too!

Mr McDonald: I wouldn't want to try to create the impression that there would be absolutely nothing we would be able to do, because, clearly, we see that these laws will be used in extraordinary circumstances; and, hopefully, in the event of something, we will be able to arrest a lot of people for offences. You can detain people in that way, which is always preferable. However, we could have a situation where we don't have that luxury.

With the London attack, the British police and everything that they have in their system were extremely well drilled. Even with that well-drilled exercise, there was still a horrible feeling of uncertainty for everyone watching about what was happening, where it was from and stuff like that.

We are in Australia; everyone is attempting to ensure that the authorities are as well drilled as possible. Sometimes all the drilling in the world won't give you the answers. That is where preventative detention, which is a regretful and extraordinary power, is necessary. We felt that there was a vulnerability without it. Interestingly, all the states and territories have acknowledged that, going right back to COAG.

DR FOSKEY: Thank you very much for appearing because it is very apparent that you know the commonwealth legislation inside out and backwards and forwards. I was interested in your comment that, in fact, the commonwealth legislation was a long time in the making. You referred back to the attack on London. I assume you meant that was the starting point. I am interested in why it was, if you teased it out, that that attack in London made it seem apparent to the commonwealth that we needed new legislation of this order.

Mr McDonald: It has been quite a process, going right back to 2002. The shock in early 2002 that something like September 11 could happen was a shock for many people. The legislation that resulted from that very much related to, I guess, the circumstances of that attack. Then as time has gone by we have seen other attacks, other approaches. The September 11 attack was very much like an external attack, in that people came in from outside.

What we saw, with the London attack, was that clearly the possibility that home-grown people might launch an attack wasn't totally new to authorities. However, it really brought into focus in London that this was a complete reality and that the organisations and cells were independent. There is a lot of assessment still going on of the London attack. The idea of these cells almost being self-sufficient and there being, as a result, very little intelligence about them in advance certainly raised a lot of issues. It said to the British and to us, "We have got to be very careful about not thinking that we know everything."

These laws are very much aimed at addressing that situation. When we have some of these attacks we may be in the dark about all the connections. That is where preventative detention comes in, where you need that extra time. There are other aspects of the commonwealth package, which I won't go into here, that relate to issues like that.

DR FOSKEY: You also said that, despite drilling, the London bobbies and the London forces—the police—were still unable to prevent an attack. Another aspect of that was that they also, in the process of dealing with that issue, did shoot and kill an innocent person. That would seem to me to be as much an issue for concern and we need to make sure that any legislation that is carried will make that almost impossible to occur.

Mr McDonald: Yes. Everyone recognises that was a shocking thing to happen. There are proceedings in the UK, and obviously I can't talk about the detail and the particular incident. However, it is an incident that could have happened regardless of whether we had these types of powers or not. There will be situations where the individual—police officer or otherwise—will make a judgment about whether it is necessary to shoot or not. In that particular case, from what I know of it, it is really hard to see how that could have been a reasonable conclusion. However, that is being investigated; I don't know enough about it.

We had quite a, let us say, vacuous debate about the commonwealth law supposedly being about shoot to kill; that the provisions were in some way encouraging that, rather than shooting being a last resort. The facts of course are totally different to that. The commonwealth law simply followed provisions that had been used since 1994 at the commonwealth level and here in the ACT, which basically say that shooting was an absolute last resort—a last resort that is only used where someone is in danger of being killed or seriously injured.

DR FOSKEY: Can I get to the detail of your submission. I have a number of points. Given we have got 15 minutes, I will try to be brief.

Mr McDonald: I will try to be a bit briefer in my answers, too.

DR FOSKEY: You are so well informed. On page 2 of your submission, you say that it would be preferable for the commonwealth test to be applied when applying for a preventative detention order. You say that the test of "reasonable and necessary" is a higher standard than the commonwealth's "reasonably necessary". That is interesting. They are similar words. What problems can you see arising for the AFP in applying these different standards?

Mr McDonald: I guess, with "reasonably necessary", the "reasonably" is applying to the necessity of it. This alternative provision says, "You have got to be able to show it is absolutely necessary."

DR FOSKEY: Reasonable and necessary.

Mr McDonald: "And, in the process, what you do is reasonable." That is the distinction. For the AFP, it is a hard thing making these judgments. We talked about it in the context of using lethal force. I can tell you it is a hard thing for police to be making decisions about detaining people as well. Quite often there will be situations where the police that are a supplement to the ACT community policing might need to be in support of the national policing function of the AFP. They will be operating under different provisions. It would be a terrible shame. It is not only a terrible shame; you can have confusion, which results in someone being detained when they shouldn't be or, alternatively, someone isn't detained when they should be.

I point out that, even in the circumstances you are talking about—different police forces—the states that we have mentioned there, New South Wales and Queensland, have used the same grounds as they have at the federal level. They can see, in terms of the police cooperation perspective, that there are some advantages in working under the same regime.

Of course we could have situations where—and our legislation certainly provides for this, and the state legislation does—a person is detained initially under the federal legislation for the 48 hours and then, after they get into it, they think, "We need to keep this person for a longer period of time." Then you have to go to the state legislation to get the extension. I keep using "state", but I mean the ACT and state. The grounds are different. That would be pretty bad, I think. It is a more important issue than it might at first appear.

DR FOSKEY: They are issues we can tease out later with Mr Keelty. There is obviously a legislative difference between the investigative function of detention carried out by ASIO and detention carried out under the proposed preventative detention orders, but I don't see that there is a practical difference to the person being detained, except maybe the amount of questioning involved. Do you think there will be a legal impediment to informing the court about a previous ASIO detention? Would it be the case that a detainee would commit an offence if they told a magistrate that they had just been locked up for 14 days by ASIO?

Mr McDonald: I need to confer with my colleague. The issue about whether you would be able to tell the magistrate is something I would like to take on notice. I want to look at that a little bit more closely. You asked, "For the person being detained, what is the practical difference between the ASIO powers and the police investigative side of it?" The real practical difference is the questioning. It is an extremely important practical difference.

In the context of the police investigative powers, it can be the difference between your going to jail for a very long period of time and not, because during questioning you may make statements that can be used in evidence against you. In the case of the ASIO side of it, the questioning can result in quite a lot of inquiries being made that may impact on

your relationships with other people and the like.

Preventative detention is not about making people vulnerable to being questioned. Being questioned is something that people are not used to and something where there needs to be extreme care. Consequently, we do things like tape the questioning; we ensure the person has sufficient rest. The ASIO powers are very heavily monitored every step of the way.

DR FOSKEY: I have got a lot of questions that are clearly not going to be answered. I am interested, for instance, in the operational relationship between ASIO and the AFP. Could you explain that? Is the AFP likely to hold information which ASIO is not privy to?

Mr McDonald: That is something better asked of the AFP, if they are coming. I think they are coming here. The primary function of police is, of course, gathering evidence for the purposes of prosecuting offences. With ASIO, the primary function is gathering intelligence with a view to protecting the community. Sometimes protecting the community, believe it or not, is not assisted by early prosecution action.

So the reality is that both agencies have to work very closely together. It is all very nice in theory to have that dividing line between the two—and it is an important dividing line because there are different objectives that have to be watched for—but there has to be immense cooperation.

You will get situations where the AFP will come across stuff of great intelligence value which the AFP needs to make a judgment about. And you will have other situations where ASIO will come across information that has great law enforcement value and they will have to be very careful about their judgments as well. It is a dynamic that is very, very interesting.

DR FOSKEY: I am sure "interesting" is the word. I understand that ASIO receives and shares information with allied intelligence agencies. How does ASIO deal with information that it knows has been extracted under torture? Will the AFP be aware that intelligence passed onto them might have come under this sort of pressure?

Mr McDonald: Information that has been obtained by torture, apart from the fact that it really is a question for those agencies—and I know those agencies just would not tolerate going along with such a thing—is absolutely useless. There is no way, in our courts, you could use information like that. It is specifically prohibited; it is inadmissible under our investigative procedures in Australia.

DR FOSKEY: ASIO would inform the AFP that such intelligence did come to hand?

Mr McDonald: That is an operational thing. There is a lot of information exchanged between the agencies. I have an idea of how all this works, but obviously it is more appropriate for the operational agencies to talk about that.

DR FOSKEY: On page 4 you say that there might be problems with the requirement that a person be detained in the ACT. I note your concerns that a person may not be able to be moved for medical reasons, but I don't see that the ACT couldn't come up with

enough spaces to house multiple detainees. For instance, they could hire out the top floor or two of a Canberra hotel. The more serious concern that I have is that the commonwealth AFP may transport detainees out of the ACT in order to detain them under a less restrictive state regime. Are you aware of any mechanism that would prevent this happening?

Mr McDonald: At the moment the ACT transfers people in detention to other states. This idea of detaining someone somewhere else is not new to the ACT. There is quite a bit of flexibility about the type of detention that can be used, especially if the person is being detained for a short period of time. The period of time here could be less than 24 hours, which of course is specifically referred to in the federal legislation, to up to 14 days.

The clear advantage with the short period of time is that if you can only keep someone for a short period, then you don't have all the custodial issues. I can see such people being kept for short periods in police stations and other facilities—perhaps even what you have described. Operationally, there may be some problems with a hotel, but certainly there is nothing in the legislation that says that custody has to be in a jail or something like that. However, when the period of time is longer, for a period like 14 days, then a lot of custodial issues start coming into it.

One issue that I, sadly, had to deal with in the past was the issues coming out of the Aboriginal deaths in custody inquiry, issues about making sure that the custodial facilities are safe. There are issues about having people there who can deal with all the medical issues and so on.

Getting to the point: there may be situations where it is necessary to find custodial facilities that are more suitable. But I guess we need to remember the commonwealth regime is only for 48 hours. With the ACT, it is for 14 days. It is the ACT regime that has to deal with the longer periods of detention.

DR FOSKEY: Can I finish with a human rights question—that is, unless you are going to extend the time, Mr Chairman? You say that the Australian government considers the commonwealth preventative detention regime more properly reflects the correct balance between respect for individual human rights and the protection of individuals from terrorist threats.

By contrast, just about every submission that has come to this committee, especially from legal and human rights qualified professional bodies and individuals, contradicts that assertion. How would you explain the reticence by these people that we have heard from who are skilled in the law, and who practise in the area of human rights, to agree with you?

Mr McDonald: I just point out that our Office of International Law—our legal advisers on international law issues—have the benefit, in addition to qualifications as human rights lawyers, of conferring with human rights bodies around the world. They have the benefit of working with other nation states in implementing human rights obligations.

DR FOSKEY: Did you consider Mary Robinson's provisions for what counter-terrorist legislation—

Mr McDonald: We have looked at masses of viewpoints on the legislation, and there has been no opinion, in all the opinions that have been promulgated in the last six months—nothing—that has shaken us from the view that our legislation is consistent with human rights obligations. And we would like to remind such people of what I had to say earlier, which is that human rights conventions have always recognised that government has a responsibility to protect people's security. What right is there left in one's existence if one is dead? How much freedom does a person have if they are incapacitated by burns and they are disabled as a result of someone else exercising some of the democratic freedoms that are available to them in this country?

The Universal Declaration of Human Rights was put down at the UN in 1948. That was straight after the Nazi regime in Germany and the terrible things that we saw during the Second World War. The people that developed the initial declaration were well in touch with the need to have balance. Clearly, some of what happened during those years was through governments abusing powers, and a lot of what was motivated behind those was about government abuse of power. However, it has always been the case, right from the beginning, that government can protect the community from the brown shirts and other elements which seek to take away the human rights of fellow citizens.

DR FOSKEY: Yet there are concerns that the commonwealth legislation and even this legislation, which is somewhat more human rights compliant, does perhaps target particular sections of the community, those brown shirts that you are referring to. Nazism was by its nature extremely nationalistic. I want to hear from you that you are confident that the commonwealth legislation will attack all attacks on people's right to life, liberty and ability to live safely. I am also concerned that there is an either/or approach to human rights in this situation.

Mr McDonald: I couldn't agree with you more. It is not really an either/or. In fact, all the legislation in Australia, whether it is federal or state or territory, including the ACT—all the legislation—shows quite clearly that the legislators, or the people who prepared the legislation, don't think it is an either/or. There is an incredible effort in this country, and more so than in a lot of countries that you might think might be more liberal than Australia.

DR FOSKEY: Such as?

Mr McDonald: For example, if you look at the Canadian law, you don't see the amount of detail that we go into in terms of police procedures. And the effort that this country goes to, to have a balance, is quite considerable when you compare it to other countries.

The other thing that you mentioned was whether this law targets particular groups and whether I can be confident it won't be used in a discriminatory fashion. I think that is the gist of it. I want to assure you this law is in no way discriminatory. It applies to any group that gets involved in politically motivated violence, and there has been great care to ensure that that is the case.

In terms of what is happening at the moment, it is obvious that there is an enormous threat from international terrorist organisations. Consequently, the focus of this legislation is terrorism, and only terrorism. And if the terrorism happens to be emanating

from a particular part of the world or parts—in this case, it is parts—then so be it. The legislation is not discriminatory.

MS MacDONALD: Mr McDonald, as the granddaughter of Holocaust survivors, I make the point that I am particularly concerned to make sure—you made the comment before about protecting people from the brown shirts—that this committee, this government and this Assembly make sure that any legislation that is enacted ensures that the government doesn't turn into the brown shirts, which is what happened in Germany in 1933.

Mr McDonald: Democratic processes don't guarantee, always, that people that are democratically minded take power. Insofar as it is possible, Australian legislators are generally conscious of that. The history that you are referring to has a lot to do with why we take it seriously.

THE CHAIR: Thank you very much, Mr McDonald, especially for your attendance and assistance to the committee today. I thank you for making yourself available and for your detailed submission. We would appreciate getting an answer to that one question on notice, which relates to those areas where this is incompatibility with federal law—whether federal law applies. There are problems that we need to look at to fix up those anomalies especially. I look forward to getting that as soon as possible, if you could, because we have to report by 28 February. If you could get that to us by the end of the week, that would be ideal, but early next week if you can't.

Mr McDonald: Thanks a lot.

The meeting adjourned from 12.41 to 1.33 pm.

MICHAEL JOSEPH KEELTY,

STEPHEN LANCASTER,

PETER JON WHOWELL,

PAUL ROBOTTOM and

KYLIE WELDON

were called.

THE CHAIR: Welcome to the afternoon session of the inquiry into the ACT government's draft Terrorism (Extraordinary Temporary Powers) Bill 2005. I welcome Commissioner Keelty and officers of the AFP. Before we start, I just need to advise that all witnesses 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 that you are protected from certain legal action, such as being sued for defamation, for what you say at this public hearing. It also means that 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. For the benefit of the transcript, would you please give your full names and the capacity in which you appear before this committee .

Commr Keelty: I am Michael Joseph Keelty, Commissioner of the Australian Federal Police.

Cmdr Lancaster: I am Stephen Lancaster, Acting Chief Police Officer of the Australian Federal Police.

Mr Whowell: I am Peter Jon Whowell, manager of the AFP legislation program.

Mr Robottom: I am Paul Robottom, acting national manager of intelligence with the Australian Federal Police.

Ms Weldon: I am Kylie Weldon, a federal agent of the AFP and acting team leader of the joint counter-terrorism team in Canberra.

THE CHAIR: Thank you for your submission. I understand, from having read your submission and also with the benefit of federal Attorney-General's Department officers before lunch, you have a number of concerns with this draft bill. Perhaps, Commissioner Keelty, you could summarise those concerns to the committee today, and we will then elaborate through questioning.

Commr Keelty: Thank you, chair. I acknowledge that you have shortened your lunch break to enable me to give evidence because I am due somewhere else this afternoon, and I thank the committee. I would also like to apologise on behalf of the Chief Police Officer, Audrey Fagan, who is on leave this week. Commander Lancaster is here in her place. I thank the committee for the opportunity to come and discuss the exposure draft. I might have something to say about the title of the exposure draft towards the end.

As the committee would appreciate, the AFP has a significant role, in partnership with the Australian intelligence community, with state and territory police, other government agencies and the private sector, in protecting the Australian community from terrorist threats. That includes, obviously, the ACT. Ongoing operations that are currently in the media and before the courts are a demonstration of the involvement of the AFP, as is the AFP's attendance at every major terrorist incident in the world in recent times—most notably, the bombings in Indonesia, the first Bali bombing, the second Bali bombing and the bombing outside the Australian Embassy in Jakarta, but also the Madrid bombings, the London bombings and the bombings in the Middle East in recent times. So the AFP brings to the table significant experience about the aftermath of terrorist attacks and also the investigations into terrorist activities not only in Australia but also around the world.

Of course, if the thrust of good policing is crime prevention, we say that the bill needs to address the issue of crime prevention, the aim being to stop a terrorist attack before it occurs. To assist the committee in its inquiry, I wanted to make some other comments and they are that, following the AFP's involvement in the investigation of terrorist incidents both here in Australia and overseas, we are in a position to make, I think, comments of experience about the proposed bill. I do not want to be critical of other submissions before you, but I would suggest to the committee that many other submissions do not have the experience that we in the AFP certainly have.

The existing form of the proposed bill does have some limitations but at the same time it seeks to address limitations in the existing legal framework in which the AFP operates, in particular the need for the AFP to be able to act to protect the community where there is not enough evidence to arrest and charge a suspected terrorist but law enforcement has reasonable suspicions that a terrorist activity may be imminent or that it has in fact occurred. Here it is important to recognise that terrorism is different from other offences that the AFP investigates. The outcomes of terrorist activity are much more unpredictable and potentially catastrophic—much more so than other crimes that we investigate. The AFP does need appropriate powers to respond to that threat.

The ACT is of particular importance to the AFP because it not only houses the seat of government, some 90 diplomatic missions and some 1,000 staff attached to those missions across the Australian Capital Territory but is policed by the AFP in a community policing role, complementing the role that the AFP performs nationally and internationally. In responding to terrorism, we are focusing on minimising the risk to the community that comes from the gap between the behaviour criminalised by existing offences and our authority to collect evidence to charge individuals and the methods employed by terrorist groups to plan and execute their attacks. In stark terms, we are trying to narrow the space between when we can intervene to prevent an attack occurring and the opportunity for terrorists to launch such an attack. These are powers that we will use judiciously and cautiously to protect the community.

I might note that we have had the commonwealth legislation enacted for over a month. We have not acted, I don't think, in a way that might meet the concerns of some, and I might also point out that ASIO has had some detention and other powers for over 12 months and there has been little or no outcry from anyone in the community about an abuse of power. So my suggestion to the committee is that those calls and cries that the sky will fall in are no more than an aberration. There are a lot more accountability

mechanisms about policing and about the way we do the work we do than we have ever had before, and appropriately so.

The current terrorism environment, highlighted by the attacks in London last year, in Madrid in 2004 and in Indonesia since 2002, is characterised by the potential for terrorist attacks to occur in any number of ways, including single attacks, coordinated attacks on multiple sites within one city or across a number of cities or as a campaign of attacks over an extended period of time. I really think this is a very important point. The ACT stands to be an island within the rest of Australia if its legislation is not consistent with the other jurisdictions that surround us. I say "us" because I am a long-time resident of the ACT.

Importantly, the attacks show the evolution of the methodology used by terrorists, from large-scale bombings to suicide bombs, and more recently the home-grown terrorist; that is the person who is yet to be identified by intelligence agencies and who has never come to the attention of police prior to an attack occurring. To be able to prevent or investigate such attacks, the AFP believes that, whilst the proposed preventative detention powers would enhance its ability to prevent and investigate terrorist activities, the bill needs to be as compatible as possible with the legislation of the commonwealth, the states and the territories.

Our submission outlines our concerns with provisions of the bill that may impede the interoperability of the ACT policing element of the AFP with the rest of the AFP and other jurisdictions in conducting counter-terrorism operations. For example, we are concerned about the test proposed for application for and making of preventative detention orders, the frisk and search provisions—particularly those provisions relating to persons aged between 16 and 18—and the protection of sensitive information that may be used in applying for and making preventative detention orders.

In the case of the proposed stop, question, search and seize powers, the London and Madrid bombings, in particular, demonstrate the need for police to have the appropriate powers to ensure that areas of mass gatherings and public transport facilities are safe. In that I include major shopping centres. Imagine the chaos that occurs after a bombing. Imagine the speed with which the police have to act on available information and the accountability mechanisms that follow, both in coroners courts and in commissions of inquiry. The proposed extended powers are necessary to increase the AFP's capacity to prevent terrorist attacks and to respond effectively to attacks in a way that is consistent with police in all jurisdictions in Australia. The AFP believes that this bill does not enable us to do that.

To call the bill extraordinary and temporary I think raises a question about the policy-makers and their intent. These are serious crimes. The AFP is involved in the serious investigation of those crimes, and I as the commissioner am concerned on a daily basis about the welfare and safety of our people who are at the forefront of these investigations, both here and overseas, and of the wider community.

Thank you for the opportunity to make the opening statement. My colleagues and I will be more than happy to answer questions from committee members about the specifics of the bill. In particular, I draw on the experience of the Acting Chief Police Officer because of the application of the community policing element of the AFP here.

THE CHAIR: Thanks, commissioner. You mentioned in your statement and in the submission some specific areas where this bill, in your view, falls far short of what is required, where it is incompatible with interstate law and federal law. You mentioned four areas of specific concern. Could you perhaps summarise those and say what the AFP would recommend to this committee in terms of what needs to be fixed up so that you can do your job of protecting the community properly.

Commr Keelty: I might ask the Acting Chief Police Officer to talk specifically about the issue in relation to persons aged between 16 and 18, if that is acceptable to you.

THE CHAIR: Certainly. We can start off on that area, but I would like you to address those areas of concern that you feel make it very difficult for you to do your job of protecting the community.

Cmdr Lancaster: We would like to address the issue of people below the age of 18. The bill does not specifically define what a child is, whether that is below the age of 18 or 16. I know from the COAG agreement that there was some agreement that 16 years of age was going to be the level. We all know from our courts, across Australia and across the world, that children under the age of 18 can commit serious crime. We also know from our intelligence and from operational review that terrorists actively recruit vulnerable groups. This includes young males, young females and lowly-educated people, just to name a few.

In some ways, a preventative detention order for persons under 18 can almost be seen to support some elements of the human rights because it can remove that person, even before we have a prosecution case, from the grips of terrorist persons who are actively trying to recruit them or have already recruited them. So in some ways it aligns with some elements of the human rights aspects.

We have significant provisions within legislation already, and even within this bill, to cater for those with impaired judgment. I would like to put to the committee that it is similar to people under the age of 18, or between 16 and 18. Any parent with a child within that age group would know that their judgment is often influenced by a lack of experience or a lack of maturity. These people are the ones that are actively targeted by terrorist organisations. These will be sought, as a last option. There are appropriate safeguards, we believe, in current legislation that exists in criminal law, to cater for young persons under 18 or between the ages of 16 and 18. In fact, the provisions for a judgment-impaired person within the bill as it exists also, I believe, put in safeguards that apply to children. Criminal legislation accepts that children under 18 can commit serious crime. My fear is that the bill does not reflect that they can commit terrorist offences.

THE CHAIR: So you say that the criteria in the bill for mentally-impaired persons could be used to cover young people under 18.

Cmdr Lancaster: Absolutely. That was the agreement in COAG. They felt that special rules should apply for those with judgment impairments and for young persons.

THE CHAIR: And is the AFP view that COAG said that 16- and 17-year-olds should apply? I think other state legislation has that. But criminal responsibility, as the A-G's

people said, goes from 14 upwards. Are you saying that that should apply or do you say really that the bill needs to cover 16- and 17-year-olds? Do we also need to cover 14- and 15-year-olds?

Cmdr Lancaster: I think COAG agreed to set the bar at a level that would appeal to most people across the broad spectrum of the community. I think 16 was agreed as probably the most appropriate. That would be based on intelligence and other operational activities that happen overseas and within Australia.

THE CHAIR: Commissioner, you had concerns in other areas?

Commr Keelty: Yes, and, with your consent, before we go off that point, for the benefit of the committee, there have been some issues raised in other areas about the strip-searching of young people. I thought the committee might benefit from knowing that the commonwealth offences set out in the Crimes Act 1914, and for ACT offences under the Crimes Act 1900, there are provisions that stipulate a number of requirements that could be adopted for the use of special powers, such as conducting the search in a private area; the search being conducted by an officer of the same sex; the search being conducted in the presence of a parent or guardian or someone else capable of representing the young person's interests; no removal of more garments than the constable believes on reasonable grounds to be necessary to determine if they have the item being searched for or for their involvement in the offence; and, finally, no more visual inspection than the constable believes on reasonable grounds to be necessary to determine their involvement in the offence. I just thought it would be worth while to point out to the committee that there is existing legislation that we would suggest is of useful reference in terms of the young person's rights.

Another area that we want to talk about is the test proposed for the application for and the making of preventative detention orders. We would say that there are some inconsistencies between the proposed bill and the test that is being applied elsewhere in the commonwealth legislation. The AFP is concerned about the test to be applied under the bill for an order and the test proposed by the Supreme Court to make a preventative detention order. In the case of a police officer applying for an order, the difference between section 17 (3) of the bill and section 105.4 of the commonwealth Criminal Code may cause difficulties operationally for the AFP. The difference of particular concern to the AFP is section 17 (3) (b) (ii) in the bill which appears to complicate the test for applying for a preventative detention order by requiring that the police applying for the order are satisfied on reasonable grounds that detaining the person under the order is the least restrictive way of preventing the terrorist act.

The commonwealth legislation and legislation proposed elsewhere use the words "substantially assists", rather than "least restrictive". We believe that "least restrictive" is very subjective and very difficult to measure and define. It is an additional element of the process of applying for an order that is not part of any other test. In fact, if you think about it, "least restrictive" is so subjective it may be even possible to test in practice. So we would encourage the committee to look seriously at having some consistency with the existing legislation.

Comdr Lancaster: Can I say that it also brings in the provisions of section 28, being the compensation aspect. If you're talking about a section that is very subjective, that is

going to be also subjective in the courts when they deal with compensation issues. What we are trying to do is encourage robust and honest investigations. If a person has to step through these hoops all the time and feel like they are going to be punished or in some way criticised for their action when they are acting in good faith at the time, it does leave a very difficult position in which to be able to conduct those investigations.

Commr Keelty: The second part of that was the difference between the test proposed in the bill for the Supreme Court to make a preventative detention order and the test that currently exists for the AFP under the commonwealth Criminal Code. The test for the ACT Supreme Court to make a preventative detention order is different from the test for the commonwealth and also the New South Wales Supreme Court. With respect, chair, I think this is a real operational issue for us, where we may have some people crossing borders. Without wanting to refer to matters that are currently before the court, I think there is sufficient publicity given to the use of the new powers. Members of the committee will be aware that persons in two jurisdictions have been charged and are currently before the courts in both those jurisdictions.

Section 19 (4) requires that a court be satisfied on reasonable grounds of the test in section 17 (3), whereas the commonwealth and New South Wales legislation only require the issuing authority of the court to be satisfied of these matters. We ask the question: why is there a higher threshold in the ACT proposed bill? There do need to be complementary tests applied here, particularly if an operation spans across more than one jurisdiction, including the ACT, but also if the police involved are the AFP working under AFP operations. The more gaps there are and the more differences there are in the legislation, the more the ACT makes itself vulnerable to exploitation. That is not an overstatement. We know from our experience that criminals, including terrorists, will exploit differences in legislation. We know that they will go to wherever the weakest link in the legislation is, and we are again speaking from experience.

The final point, going back to my opening comments, relates to the protection of sensitive information that may be used in applying for and making preventative detention orders. The bill is silent on the protection of information used by police to apply for preventative detention and prohibited contact orders. The AFP strongly believes it is important that the court be able to protect information used in proceedings for preventative detention as its public release may adversely compromise national security and the security of individuals or groups identified during the proceedings.

One of the aims of terrorists is to create or induce fear and, through the inducement or creation of fear, to change minds, particularly of governments, but also to change the activities of the public. For that reason it is extraordinarily important that we are transparent—I totally agree with that—and that we are accountable. I am not talking about that. But we do need to take care about the information that is being disclosed—that it doesn't deliver for the terrorist something that they want. But, equally, there is a commercial interest here.

For the benefit of the committee, I sit on what is known at the federal level as the government advisory group on security. I sit with the CEOs of Australia's largest corporations, and it is clear that branding is an issue when it comes to terrorism. I do not want to use examples because they are too easily translated into real life. But you can imagine that, if a particular brand is attacked in a jurisdiction, that has a downstream

effect on that brand in other jurisdictions. That brand may be a place of mass gatherings or a place of mass transport. I am sure the committee can infer the meaning of what I am saying.

There is no provision in the bill, as there is in the commonwealth Criminal Code, to protect national security information that may be used by police by not making it available to the detainee. This is an important safeguard to ensure sensitive information is not provided to a person who is being detained, to prevent a terrorist act. The preventative detention regime of the Criminal Code provides that the person subject of an order is entitled to a summary of the grounds of the order and these ensure that such a summary is not required to include information the disclosure of which is likely to prejudice national security within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004.

The AFP believes that the New South Wales legislation provides a suitable model for closing court proceedings, restricting the publication of these proceedings and protecting the information used by police in making applications under the bill. We say that the foundation for good policing is good policy and good law. The foundation for good criminal justice is good law. Where that is left to interpretation, it makes it difficult for us to have consistency, particularly across jurisdictions. So we would ask the committee to consider having some consistency.

One final area that that opens up is that the draft bill provides for detainees to have contact with their lawyers privately and at any time, subject to any prohibited contact order. There is no requirement for a detainee's lawyer to hold a relevant security clearance. In the ACT, this has become problematic in previous prosecutions that we have had where national security issues have been at the heart of those prosecutions, and the AFP is concerned that such contact with lawyers and others proposed under the draft bill could compromise counter-terrorism operations and investigations.

The AFP prefers the commonwealth and New South Wales approach to contact between a detainee and their lawyer which limits such contact to seeking and receiving legal advice in relation to their detention, and provides for the mandatory monitoring of that contact. COAG agreed on 27 September 2005 that in some circumstances contact between a detainee and their lawyer could be limited. An example would be if there were information available to suggest that the lawyer could be linked to the terrorist act for which the person was detained.

COAG also agreed that communication between a detainee and their lawyer could be monitored to ensure that it related solely to the permitted purpose. Legal privilege would always apply to conversations between a detainee and his or her solicitor. Any information obtained by police monitoring of such conversations could only be used to prevent a terrorist attack occurring and would not be admissible in evidence before a court.

The experience of the AFP has been that many legal representatives do tend to act for a large number of clients. Even in the context of the legal professional, it places an encumbrance on that person because they may be receiving vastly different pieces of information from a large number of persons. We say that, again, consistency helps in the overall envelope of national security.

THE CHAIR: I have a few questions and then I will throw it open to my colleagues. From what you say, from an AFP point of view would it be simpler if, say, the ACT simply adopted the New South Wales legislation and introduced that?

Commr Keelty: It would be. That would be a way forward. I understand why there might be a difference of opinion on certain issues, but I think in this bill we do need to have consistency. If ever I have seen people with the intent, motivation and capability to do something catastrophic, it is the terrorists. Let us not forget, chair—I mean this in a respectful way—that the ACT has been the target of a planned terrorist attack. There is a person incarcerated in Western Australia who pleaded guilty to the planned bombing of the Israeli embassy here in Canberra just prior to the Sydney 2000 Olympics. The fact that that person pleaded guilty is something that the committee ought to take note of. Canberra is a target.

THE CHAIR: You mentioned security areas too, and I do not think anyone else so far has touched on that in evidence before the committee. Are there any problems with the draft bill in relation to security areas? If so, what would you want to see to protect the community? What do you mean by security areas? What type of things would need to be encompassed in legislation if this bill is deficient in that regard?

Commr Keelty: The area I was addressing there was in terms of the closed court proceedings. Do you wish me to elaborate further than what I have already stated?

THE CHAIR: I am a bit unclear there, but I do not want you to give away national secrets or anything.

Commr Keelty: There will be occasions where information comes to us from a third party. The proviso of that information being passed to us is that it not become public, because the source of information may well be at risk if it was disclosed. We are dealing in an extraordinarily difficult area, particularly in terms of human source information and particularly if that human source information is at risk either here or overseas. To work in a covert way to infiltrate these groups is not something that takes a short period of time; it can take many years. There are lots of examples like that where sensitive information could reveal just how much progress has been made by either the intelligence or the law enforcement agencies. We are dealing with a very sensitive issue but one in which we need to have the protection of the community at heart.

Cmdr Lancaster: The fundamental principle of good law enforcement is also good information exchange, and it does not necessarily have to be sensitive from a human source; it could also be a simple distribution of information between us and other states or between us and internationally. We have to make sure that we have the safeguards in place to give the insurance to these people that, if they provide us with the information, we will be able to secure that information and it will not get out in the community or to people who shouldn't get that information. If we don't have that in place, if we can't show that we can protect it, as sure as the sun comes up tomorrow they will start shutting down information to us.

THE CHAIR: Yes, I understand. Looking at the ACT bill, it seems to me, because of all the hoops that the police will have to jump through, that it might be very difficult to have

someone detained for seven days and then a further seven days. That might be very difficult; the Supreme Court might simply not do it. Apart from coming back to government and saying, "Look, your legislation is really defective; for goodness sake, fix it up quickly," which would still take weeks and possibly even a couple of months, what contingencies would you guys have if it were the case that it was very difficult here to have someone detained because, amongst other things, of the nature of this legislation and how it would be interpreted by our Supreme Court?

Commr Keelty: Obviously, we don't want to act outside the law, and that's one of the reasons why we have been so vocal on the policy-making. To me in my position, one of the things that benefit the police is clarity. Police need to know what powers they have and the community need to know what powers the police have, as do people who oversight the police. If a person could not be detained because of a flaw in the legislation, it would simply mean a weakness in the ability of the police to protect the community.

THE CHAIR: You've mentioned a few problems there—difficulties of interpretation; it has to go before the ACT Supreme Court; it is very different legislation from that interstate—which as a practicality might make it very hard to detain someone. I hear what you say. I suppose you basically get back to saying that that's why it's important to get it right now—so that you don't have to face that situation down the track.

Commr Keelty: That's correct. Whilst, as I said, the objective of policing is to prevent crime, we've seen examples of division of labour, if you like, amongst terrorist groups. A lot of the activities that they will undertake are otherwise lawful activities. I don't want to touch upon matters before the courts in other jurisdictions; that would be inappropriate. But I will use a hypothetical example: if there are three components to a bomb but each of those components in itself is lawful to obtain, quite clearly a division of labour sets aside a suspicion that the three people going separately to get those components are in fact engaged in a common purpose.

I know there has been some suggestion that the existing law must be working well; otherwise charges would not be laid. But the reality is that sometimes you will not have a conspiracy because as time has moved on people become very much aware of the sorts of techniques that are applied to expose conspiracies, such as listening devices and telephone intercepts. But the consequences of this crime are so dire that it is something that we do need different powers for.

THE CHAIR: Thanks.

MS MacDONALD: You touched on the issue of the perception in the community that the existing legislation must be working all right so why do we need to change things. It is interesting that you raise that because, when you talked about the planned attack on the Israeli embassy and that we had somebody in jail who had pleaded guilty to that crime, it brought to my mind what the powers in this bill would do to enable the police to detain people for a long period and that's what the police, I suppose in conjunction with ASIO, are keen to do. Can you comment, on the particular incident you raised of the planned Israeli embassy attack, on how you managed to get through with that? Was it just good luck?

Commr Keelty: Yes, it was. The attack didn't happen. There was a plan to bomb the Israeli embassy here in Canberra and the Israeli consulate in Sydney. Part of the evidence provided by the prosecution in that matter was the surveillance tape taken by the person responsible for this, but no-one knew of the existence of that plan prior to it becoming known to us and then the charges being laid some time later.

I'm trying to use an example where it may assist you, of a single person acting alone. We became aware of a plan such as that and became aware that one of the steps in the plan was, as I mentioned before, to obtain an otherwise legitimate substance that may well be part of a compound that could later be mixed into a bomb-making compound. It makes it very difficult for police, particularly if surveillance is avoided by the individuals.

I'm trying to relate to the example we're talking about but without using it, because it's obviously a historical event. An example might be where we are starting to receive information about somebody who might have the intention, the motivation, and we are wondering about whether they have the capability to access the materials. They access one of the materials but we know that they have four more materials to access and we lose surveillance of them. The danger that that then imposes on the community is extraordinary.

One of the things I will say is that, of all the submissions that you've got, if something goes wrong, there is one person who has to come back and appear before you and be accountable—and that's me; not the authors of the other submissions. If we have a terrorist attack here in Canberra, one of the first people who will be down here before the Assembly will be me, and the Chief Police Officer, to explain what went wrong—not the other people who have put submissions before you.

It's a very different thing. It's something that we are conscious of and careful about—that we are dealing with an inchoate crime, the very embryonic stages of a crime being committed, and sometimes there will be snippets of information that require corroboration. But how long will the community tolerate us trying to find corroboration for the information while the risk of a terrorist attack is in existence?

MS MacDONALD: My details are very sketchy, but let us take the case of Great Britain. They have had powers to detain for quite a long time, haven't they?

Commr Keelty: They have. I will come back to the committee if I have got this figure incorrect, but my recollection is that there were 35 detention orders used in the London bombings on 7 July. I think I can talk openly to the committee about this now because I think there have been some documentaries in recent days that have talked about the London bombings. It is now apparent and more widely understood that the failed bombings on 21 July included three detonations of detonators on the underground, the tube, as well as one on a double-decker bus. I am looking across to my counter-terrorism people here to make sure I'm not disclosing anything I shouldn't. Clearly, the 21 July attack was a copycat attack. So, if the modus operandi for the attacks on 7 July was to have, for example—I have to be careful as I don't want to offend commercial entities—X brand backpacks and we know through financial tracing et cetera that eight X brand backpacks were used, if we see eight X brand backpacks walking through Civic, we certainly won't have a belief but we may have a suspicion, and there is an expectation from the community that we at least stop that person and find out what is going on.

MS MacDONALD: I appreciate all the comments that you have made but my question was more that in Great Britain for a number of years, well before July last year, they had the power to detain and that was certainly in place when the IRA were undertaking massive terrorist attacks against the people of London, and Great Britain in general, because of the occupation of Northern Ireland. My concern is that, even if you have those powers to detain—those were already in existence there—that doesn't necessarily mean that you can deter somebody who can be seen as being a cleanskin, who has never committed a crime before. That is what happened on 7 July; they were four people who had never committed a crime before and weren't under investigation; there was no inkling that these young men would undertake this crime. If we do look to increase the amount of time that we detain people, is it going to make our society any safer?

Commr Keelty: My answer to that would be yes. I should point out that the UK have now sought an extension of their existing detention powers, to extend the time for that. Anything that appropriately and properly empowers the police to prevent something from happening has to be a good thing. One of the things that we—you and I, that is—don't know about at the moment is just how many detention orders have been issued in the UK, unrelated to the London bombings, that have resulted in the successful prevention of a terrorist attack occurring. I am not sure that even that would be a public figure.

I understand your reasoning here: that the detention powers, despite their existence in the UK, didn't prevent the 7 July bombings. But that could be a wrong assumption, because we don't know what other bombings the detention powers in the UK have in fact prevented. The AFP hasn't got the will or the desire to detain somebody about whom we have no interest, particularly, I should say on that point, people of the Islamic community. They are the people in the community whom we need to embrace and work with, in order to work through these issues. I note that neither your bill nor other legislation being introduced is aimed at those people. But, if you can detain someone to at least seek some corroboration of the information that has been provided, it does protect the wider interests. I know it involves an individual and the deprivation of that individual's liberty for a temporary period, but it does assure and reassure the wider community that they can get on with everyday business because the police have got the powers and they are appropriately being used.

DR FOSKEY: I want to go straight to a point you make in your submission. Do you believe that the AFP has the power to take detainees out of the ACT if they are detained under ACT preventative detention laws? What if they are detained under commonwealth preventative detention laws? Do you have any legal advice that touches on this subject?

Commr Keelty: In respect of the ACT laws, we believe that we can't currently take detainees from the ACT under this bill. That could pose a practical problem for us, particularly if we have a large number of people detained and we want to provide them with detention in an appropriate facility where they are separated, as part of either an ongoing operation or an investigation into them. We see some practical issues there. Thee are not a lot of options here in the ACT to appropriately detain those people.

Part of this is about their own dignity and their own welfare and safety while they are being detained as well. Under the commonwealth law, unless I am otherwise advised, I

think we can detain them in any jurisdiction within Australia. It might be worth my while to point out to the committee—please, chair, stop me if I'm telling the committee something that you are already aware of—that the AFP operates the national witness protection legislation, and we have witnesses whom we place in locations where they are protected. We have been talking through the sort of environment where you might place a person who's under detention. Again, witness protection for the ACT is something that would be almost impossible if we were trying to limit ourselves to the ACT jurisdiction, because of the practicality of the size of the ACT and that people are easily recognised here.

DR FOSKEY: Will the AFP check the veracity and the reliability of intelligence passed on to it by ASIO, DSD, ASIS, the joint intelligence organisation and so on, and how does the AFP deal with information that it knows or suspects has been obtained under torture or enhanced interrogation techniques?

Commr Keelty: On the first point, yes, we always seek corroboration of intelligence and information provided by other sources, regardless of who they are. We need to do that because we are ultimately dealing with evidence, which is a higher test than intelligence, and for it to be admissible evidence before a court it has to be significantly corroborated before we act.

MS MacDONALD: Excuse me, commissioner. Can you just explain, when you say "significantly corroborated" what do you mean by that, taking into account that we are not from the same security type background as you are?

Commr Keelty: I will give you an example. If a piece of information comes to us from a third party agency and it is untested—in other words, nobody has tested the veracity of it—or if it is from a source that previously has not provided information to the agency, that would come at a much lesser standard to us, in terms of our application of the measurement of the value of that intelligence, and we would seek to have secondary intelligence or evidence to try to corroborate that initial piece of information. The AFP has an intelligence measurement scale, which we call the admiralty scale. We use the letters from A to F, the alpha scale, on the sources of information and then we superimpose over that numbers 1 to 6 to make a judgment about whether the information is likely to be true or not. So we do have a methodology, which I am happy to supply in writing to the committee, that we apply to intelligence to ensure that we get corroboration.

MS MacDONALD: I personally don't need that to be provided. I was just curious to know how you did that.

DR FOSKEY: Have you answered the second part of the question?

Commr Keelty: No, I haven't; I was about to. In terms of intelligence provided that it is suspected has been extracted through torture or other forced techniques, clearly that material is of much less value to the AFP because its admissibility in prosecution matters is very limited because it would fail the test of fairness and the test that applies to the normal evidence gathered by the AFP under our own existing legislation. So, whilst the intelligence may have some value, that value would be watered down by virtue of the circumstances under which it was obtained.

DR FOSKEY: On page 4 you express unease with the system of compensation in this bill. In fact, you expressed it in your verbal evidence today. Is this a problem with wording or do you think a person who has suffered unfairly shouldn't receive monetary compensation? Can you explain why the possibility of a detainee receiving compensation should lead an AFP officer to act otherwise than in a careful and precautionary manner?

Cmdr Lancaster: The issue of compensation is in sections 28 and 85 about setting aside preventative detention orders. Obviously the payment of compensation is an issue between the governments and the courts and how that should eventuate. The way we look at compensation is that our issue is that it is always dealt with with the benefit of hindsight, and we act in good faith at the time of receiving that information. If we are shown that our actions at the time of receiving that information and our actions following that were inappropriate, then of course we have no issue with compensation. But, for example, looking with hindsight at the events of September 11, it is a pretty easy investigational conclusion to come to that something catastrophic might possibly occur. It is difficult for police to be held accountable for something when they are, in real time, trying to interpret the information before them. So we have no problem with the issue of compensation but we believe that it should be judged on the merits of the information as received by the person at that time and whether their action from that was appropriate at the time as well. That is similar to what is in the courts at the moment. We do not believe the aspect is clearly spelt out in the legislation itself.

DR FOSKEY: On page 5 you object to the provisions of proposed section 40 (4), which requires written notice to be given to the Ombudsman and the Human Rights Commissioner regarding locations where detainees might be held. What problems do you see with the Ombudsman and the Human Rights Commissioner being made aware of these locations at the time the orders are made?

Cmdr Lancaster: These areas where we are going to detain such people are at such a level that we are trying to protect the person being detained and the people detaining them as well. People in the media are aware where the detention place is situated. Clearly, we have to have flexibility in these detention locations; we can't have the same ones over and over again. We shortcut the intelligence of terrorist organisations or people involved in the area of terrorist offences. They can quickly do their own counterintelligence and find out where these places are situated. The security of those premises is paramount for policing.

DR FOSKEY: But the issue is of letting the Public Advocate and the Human Rights Commissioner know. Why is there a problem with those people knowing where the detainees are?

Cmdr Lancaster: Because I believe that, if we had to do it today, there would be limited places where we could place people at the moment. The focus should be more on clear protocols and minimum conditions that we have to satisfy as opposed to the bricks and mortar of where the place is. If we have a minimum standard that we have to go by, we think there are sufficient safeguards in place, be it the Ombudsman and HREOC. If we don't satisfy those provisions, we have to answer those charges.

DR FOSKEY: We do have trust in our police; we have trust in the AFP. Nonetheless,

we know that in some states there has been a requirement for commissions of inquiry. We haven't had such an inquiry of the AFP, to my knowledge. But so much of what you are saying is about, "Trust in us; we're looking after you" and so on, and about individual human rights and the security of the community. But in the very recent past there was the Fisher review and its recommendations, and just recently we have had a national police anticorruption commission set up. It is important that we acknowledge that there can be problems, even with the best of intent.

Commr Keelty: Certainly. To add to the previous question you asked about notification: one of the issues we did have there was if it is written down; we did have control of the information once it is written down and provided to other areas. Going back to your current question: I commissioned the Fisher review.

DR FOSKEY: For which we are awaiting a copy, but that's by the by.

Commr Keelty: It's public. I'm sure it's public. I acknowledge that from time to time police will act corruptly, or inappropriately, and there are mechanisms in place to deal with that. One of the new mechanisms, which you have just pointed out, is the office of law enforcement integrity, once it commences its operations, which is in addition to the Ombudsman's office and the role of the courts.

One of the things inherent not only in this bill but also in the legislation proposed in other jurisdictions is the involvement of the courts. It won't be police acting totally independently for a very long period of time. They have to bring a person before a court—in the case of the ACT the Supreme Court—to get an order made, so if the police were acting inappropriately, or if the determination of the court was that the circumstances didn't require a detention order being issued, they would understandably make a judgment along those lines. So it's not as if we are just off on our own sort of experiment here. We are going to be held accountable, in the first instance to the Supreme Court, but then, if any prosecutions arise out of the activities that we have undertaken, of course the court will have a look at the activities of the police as part of that.

DR FOSKEY: What is your attitude to the annual review of the application of this legislation, the annual report to the Assembly?

Commr Keelty: I don't have a problem with that. We do that with other legislation. We have a thing called the controlled operations legislation and we have the witness protection legislation, which I mentioned to you earlier, which we report annually to federal parliament on, and I have no difficulty with reporting annually to the Assembly on the application of the powers under this proposed bill.

Cmdr Lancaster: From an ACT perspective, I feel compelled to say something. I hear about honesty of police and I would just like to indicate that the statistics for complaints against police, particularly in the ACT, have significantly declined over the last 12 months, and even over the last two or three years. If you look at the Productivity Commission report that came out very recently, the satisfaction with policing in the ACT was at 75 to 80 per cent for doing a good or very good effort, of being satisfied with police attendance. When you look at our interaction with the public, I think that is a very positive sign that the ACT police try very hard in their job and are very professional in

the way they do it.

DR FOSKEY: I'm quite sure that's the case.

THE CHAIR: I have a final question, and I think Mr Gentleman is going to put some on notice. You mentioned, and I think Dr Foskey touched on it at some stage, that you have some concern with the word "torture", which is used in about three different areas, which seems to be related to information obtained, obviously outside of this country, by other agencies, possibly through torture. I think you've explained how, literally, there are a lot of things in place already so that that it is not used and you require cooperation et cetera. I said that the use of the word "torture" comes up on three different occasions. I cannot recall seeing that in other acts either. What is your concern there and do you have any suggestions as to what we should do about that, obviously keeping the general principles in place in terms of your operation?

Cmdr Lancaster: I will answer that. I know that, in relation to all our evidence and intelligence gathering, we comply with UN conventions against torture, and it is accepted, even in our normal run-of-the-mill business of investigations, that within the Criminal Code and the admissibility of evidence into court no evidence obtained under duress or torture is admissible in court. Clearly, it is not spelt out in that legislation either or in the Criminal Code that we can't use torture. I believe that is an important issue because the inference, by having it put bluntly in there, is that the police may refer to torture or have referred to torture in the past, and I just think that's not appropriate. There are plenty of safeguards in place and plenty of evidence, or legislation in place, that the AFP or any police agency can't use torture within Australia and they abide by the UN conventions against torture.

THE CHAIR: I've never seen it in the Crimes Act or in the Criminal Code, as you say, and clearly those protocols have always been in place. You're saying that there is no need for it—

Cmdr Lancaster: It's documented in legislation.

THE CHAIR: The intent will still apply because of other rules and laws that apply in this country.

Cmdr Lancaster: Under the Evidence Act I believe you will find reference to it.

MR GENTLEMAN: I would like to ask a few questions but, acknowledging the time constraint, I will put the rest on notice for you. Commissioner, are you making similar submissions to other states that have introduced legislation with provisions that differ from the commonwealth's?

Commr Keelty: No, because to my knowledge there is not a lot of difference in the other jurisdictions from the commonwealth legislation.

MR GENTLEMAN: You stated earlier that you'd be here in front of the Assembly if there were a drama with the bill in the future, if an event happened. As the senior police officer, are you going to take charge of these events, if they occur in the ACT, for example, as you've done here today?

Commr Keelty: Yes, I will. I'm accountable for the actions of the members of the Australian Federal Police wherever they are serving.

MR GENTLEMAN: Can you tell us what COAG was told at the briefing you gave and that caused them to adopt this approach?

Commr Keelty: No, but the Chief Minister could advise you of that.

MR GENTLEMAN: So is there a particular security concern you have with advising the committee?

Commr Keelty: No, not at all. Just on that point, it was a security advising provided by the Office of National Assessments and the Director-General of ASIO. That preceded the COAG meeting. My only discussion with the COAG meeting was in respect of aspects of the Bali and London bombings that are largely public knowledge and have largely been addressed here today, but at the time I addressed COAG a lot of those issues were not publicly known.

MR GENTLEMAN: Finally, before I let you go, other witnesses to this hearing have said that there is a better way to contest terrorism than to legislate around it. In August 2004 there were several reports in the media that, due to Australia's involvement in Iraq and Afghanistan, the risk of terrorist attacks had increased. In your opinion, if Australia were to withdraw from those hostilities, would the terrorist threat decrease?

Commr Keelty: I think the reasons for the terrorist threat are many and varied. It is clear that Australians have been the target of terrorist attacks in Indonesia—in Bali on three occasions. It is clear that the people of Canberra could have collaterally suffered injury or damage had the planned attack on the Israeli embassy here occurred. The reasons for terrorist attacks are many and varied and there is nothing that will make us immune from them. This is a really important point about why we need consistency in the legislation across Australian jurisdictions, particularly for the ACT; that we don't by default cause ourselves to be the subject of a terrorist attack because the police don't have the right powers.

MR GENTLEMAN: Thanks again for your comments.

THE CHAIR: Thank you very much, ladies and gentlemen, for your excellent submission and for the very forthright and clear way you have addressed the committee. You might have given some of us a bit of a reality check in relation to this. Thank you also for your opening statement in terms of putting a lot of this into context. None of the other witnesses before the committee were able or in a position to do anything quite like that, and that has been of great assistance. I certainly hope nothing goes wrong. If you ever have to come back before the committee for that, I'm happy to summon back everybody else who gave evidence, but hopefully we won't ever need anything like that.

Short adjournment.

GABRIELE PORRETTO,

HILARY CHARLESWORTH and

GABRIELLE McKINNON

were called.

THE CHAIR: I welcome the next witnesses. You should understand that these hearings are legal proceedings of the Legislative Assembly 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 at this public hearing. It also means that 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. For the purpose of the transcript, would you please give your full names and the capacity in which you appear before the committee.

Dr Porretto: I am Gabriele Porretto and I am a Sparke Helmore lecturer and research associate at the College of Law of the Australian National University.

Prof. Charlesworth: I am Hilary Charlesworth, Professor of International Law at the Australian National University.

Ms McKinnon: I am Gabrielle McKinnon, a research fellow at the Australian National University.

THE CHAIR: Thank you for your submission. Would you like to make any additional comments?

Prof. Charlesworth: I would like to begin by briefly giving the apologies of one of the co-authors, Andrew Byrnes, who is not able to be here. I am going hand over to Gabrielle McKinnon for our opening statement.

Ms McKinnon: I would like to start, as our submission does, by acknowledging and commending the commitment of the ACT government to ensuring that this ACT corresponding legislation is compliant with international human rights standards and with the ACT Human Rights Act. Our submission concludes that, overall, although we have some concerns about the lack of public information available to really justify a preventative detention regime, we do consider that the bill contains important safeguards, which substantially address our criticisms of the federal antiterrorism legislation. We have gone on to suggest some further improvements that we have noted from our reading of the exposure draft.

To summarise, it is clear that preventative detention of a person without charge does impose a serious restriction on human rights, in particular the right to liberty, which is protected under section 18 of the Human Rights Act, which provides that everyone has a right to liberty and security of a person, and in particular that no-one may be arbitrarily arrested or detained.

As you would well know, these rights are not unlimited. Section 28 of the Human Rights

Act provides that human rights may be subject only to such limits imposed by territory laws which may be demonstrably justified in a free and democratic society. So section 28 puts the onus on the government to justify this issue of necessity, the need for these laws. In terms of necessity, it has been difficult to know, given that the public debate around the federal antiterrorism laws has proceeded in an environment where there hasn't been a great deal of specific information about the level of terrorist threat, on what the federal government was basing its assertions that we need these laws. That makes it very difficult to independently assess whether there is a necessity to pass preventative detention laws in the territory right at this moment.

However, we do acknowledge that it is not easy and that there may be some counterproductive effects from just publicising to all and sundry the particular security information that the laws are based on; we accept that. We also accept that the ACT government has formed a view based on all the confidential briefings and evidence available that these powers are necessary and appropriate to protect the territory from terrorist attack. We acknowledge that the court is likely to give a degree of deference to the legislature in these matters of security provided that the measures are proportionate to the legitimate aim of preventing terrorism.

Considering the issue of proportionality of the laws, the United Nations Human Rights Committee, in its general comment on article 9 of the ICCPR, has stated that if preventative detention is used for reasons of public security, it must not be arbitrary; information on the reasons must be given; court control of the detention must be available, as well as compensation for the case of a breach. It is important to note that you cannot cure the issue of arbitrariness just by making a law. It is not equated to just against the law; arbitrary must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

In this context, what is really critical in passing legislation that is going to be human rights compliant and compliant with the ACT Human Rights Act, is the level of safeguards and the extent to which those safeguards make the legislation proportionate. On that note, we note that the preamble to the bill enshrines a commitment to ensure that the measures in the bill respect and promote the values and the rights and freedoms guaranteed by the International Covenant on Civil and Political Rights. It is also important to note that, when this legislation is passed, it will be subject to the interpretative provision of section 30 of the Human Rights Act, which will mean that, if there is any provision that perhaps on its face might not automatically comply with the Human Rights Act, the court is empowered to take a more broad and generous interpretation, subject of course to the purpose of the act.

The safeguard that we are particularly impressed by in this draft exposure bill is that the ACT Supreme Court is given responsibility and jurisdiction over the granting not just of final orders but also of interim orders, which means there is a proper hearing rather than it being a "behind-closed-doors" executive action. We think that is probably the key advantage of this bill over the federal legislation and it is appropriate that this power is given to the court rather than the executive.

Other safeguards that are important are the threshold test being not mere suspicion but being satisfied on reasonable grounds. This legislation doesn't criminalise the disclosure of information, unlike the federal bill, and we think that the exclusion, under section 11,

of children under 18 is an essential and commendable safeguard that complies with section 11 of the Human Rights Act, which requires that children be accorded special protection in recognition of their particular vulnerability. Also, under section 40, the detention arrangements are consistent with human rights and the segregation of detainees from convicted or even remanded prisoners. We congratulate the government for those safeguards and think they are very important. We have, though, suggested some amendments, just from our reading of the bill. Is it appropriate for me to skim those quickly?

THE CHAIR: Yes.

Ms McKinnon: Firstly, we suggest that there should be a presumption that the hearing for a preventative detention order—not the interim order but the final order—should not proceed if the person is unrepresented. We note that there is a lot of protection for legal representation in the bill. Section 14 (4) provides that a person is entitled to be represented by the lawyer of their choice and that the Legal Aid Commission is obliged to provide representation for a person detained, on request. However, it is still possible in our view that the person may not have arranged the legal representation by the time they get to hearing. For example, if the person is detained late in the evening on an interim order, they are brought straight to court, as is appropriate, the next morning. If the Legal Aid Commission hasn't been able to arrange representation, or the person hasn't contacted the commission in that time, it is appropriate that the court not proceed in those circumstances, unless there is a good reason for doing so, until the person is represented. We note particularly that section 14 (8) currently provides that a final application may be heard in the absence of the person or their lawyer if the court is satisfied that the person was properly notified. We think that section could be dangerous without the guarantee that the person should be represented. So there should be a presumption. We also think that the court should have the power to order the Legal Aid Commission to represent a person in proceedings who would otherwise be unrepresented. We know it is unlikely to be an issue, and certainly the Legal Aid Commission is likely to cooperate, but that is appropriate.

Our second suggested amendment is just a requirement that, where an order is made under section 17 (5) for the purpose of preserving evidence—a terrorist attack has occurred and the police need an order to preserve evidence—it is appropriate in those circumstances that the applicant satisfy the court that they are carrying out the investigation with due diligence; that they are not keeping the person on ice for another couple of weeks just because it is a bit hard or there is some other reason why it's convenient. They have to be pursuing it with all due diligence and expeditiously. We note that this is a requirement of the UK Terrorism Act 2000.

The third amendment relates to the use of evidence obtained as a result of torture. We note that Australia's obligation under article 15 of the UN convention on torture doesn't just prevent the use of evidence where people have been tortured; it includes torture or cruel, inhuman and degrading treatment. We note that that provision has been picked up in clause 45 of the bill, which talks about cruel, inhuman or degrading treatment in detention. But in terms of the evidence we would submit that it would be appropriate to include the whole gamut of torture, cruel, or inhuman and degrading treatment, in particular, in view of the debate that's going on at the moment in international circles about whether you actually need to suffer internal organ damage for it to be torture or is

just superficial wounding actually torture. We would hate for the ACT to be caught up in that debate. If the evidence has been obtained as a result of anything cruel, inhuman, or degrading, there should be a real question mark as to whether that evidence should be admitted.

We also think the prohibition on the use of that evidence should not just be for these preventative detention proceedings; it should be for all proceedings in the territory. It's not appropriate that it would be excluded for a preventative detention order but then okay for a criminal prosecution, for example. We just note that that wording is also relevant to clause 18 (1) (f), where the police have to give a statement that the evidence hasn't been obtained through use of torture.

I have a couple of points about the carrying out of preventative detention orders. They really relate to the police conduct and interaction with the person. In the first case, where the person is being detained under clause 32, a person is given the right to ask for the officer's name, place of duty and ID, and, if asked, the officers are bound to provide that information. We think it would be a better safeguard if the officers had to give that information upfront to the person. When they're banging on the door to take someone away, a person may not know or have the wherewithal to ask about their rights. It shouldn't be up to the person to know their rights; the police should give that information. In particular, if the police are going in in plain clothes, it's appropriate that they identify themselves as police officers. That's a another thing.

Under clause 35, also, where police are going to ask other people for their name and address to try and track down someone to detain them, that's made a strict liability offence, to refuse to provide your name and address, and there's a maximum penalty of $1,100. In those circumstances, the police should be obliged to warn the person that it's a criminal offence not to give their name and address when required. The reason is that, as a lawyer, I'd be advising people that no, you don't usually have to give your name and address if the police just happen to track you down in the street. Under normal circumstances you would have the right to remain silent. Given that this displaces that normal law, it's appropriate that the police tell someone, before they get in trouble for committing an offence that they didn't know about.

We're particularly concerned that clause 35 makes it a strict liability offence not to assist the police, which means that you can't provide any defence. If you don't speak English and the police have asked you for some information, you may not understand the nature of the request. We can't see that it's proportionate not to have a reasonable defence in those circumstances, even though the penalty's not huge.

In relation to contact arrangements under the bill, we certainly acknowledge that they're much less restrictive than the federal counterparts, but we think there are a couple of things that could be improved. In clause 47, we consider that the police should actually be given discretion to allow more contact than just the one standard phone call, if they think it's appropriate. It may never be used, but it seems unfortunate that only the court, under the current provisions, has the ability to say that a person can have additional contact with family members. If the police really have no concerns about a particular family, why shouldn't they be able to make a decision, as an executive matter, to give more contact? It can only work in everyone's favour, in our view.

Finally, in clause 53 it seemed to us that there should be some specification that, where lawyers' contact is monitored—it's not the general rule that it is monitored, which is good—there should be a statement somewhere that those communications are inadmissible in proceedings against the person. It may well be that I've just missed that, or we've missed that, going through the legislation, but on a couple of readings through I haven't been able to find that. Please correct me if I'm wrong there. Legal professional privilege should not be damaged by the monitoring.

It's not particularly a human rights issue, but we did query why, when creating a public interest monitor, who we think has a really important function under this legislation, the government wouldn't consider using the Human Rights Commissioner in that role, rather than setting up a new body of lawyers who have to be trained and resourced and kept up to date, especially if you're not going to use this legislation very often, as we imagine might be the case. If you have to keep people up to date on what's going on, why not use someone who's an expert in the area and who also should be overseeing this legislation? If you're not going to make the Human Rights Commissioner the public interest monitor, we think that there should be additional notification provisions put in the legislation so that the commissioner is kept informed whenever someone's detained, and of the ongoing developments. That was a bit of a long-winded summary, but thank you.

THE CHAIR: Thanks. Apparently legal aid is meant to organise the public interest monitor. Your idea is that we have a Human Rights Commissioner, so why not use that. That will probably save money, too, because I think legal aid don't have enough money and they'd need to appoint a new person. So you say to utilise the Human Rights Office for the public interest monitor.

Ms McKinnon: It would be appropriate, obviously, to raise that with the Human Rights Commissioner, and I can't say I've done that in person. There may be some additional resources required for the Human Rights Commissioner, but we imagine that it would be less.

THE CHAIR: From the human rights perspective, we had the Human Rights Office here earlier and they indicated what to me was a disturbing comment, and that was that, whilst international human rights law recognises the collective right of the communities—in fact I suppose you could say section 9 (1) of our Human Rights Act has the right to life, the right to live—there wasn't a huge amount of jurisprudence in terms of human rights for that community. There is quite a lot in relation to individuals but not to the human rights of a community and the security of a community.

Prof. Charlesworth: The only reason for that is that the rules of the bodies that produce this jurisprudence, the Human Rights Committee of the UN or the European Court of Human Rights, just say that only individuals may make complaints. It's true that you don't get whole communities making claims because they're just forbidden through the jurisdictional rules. But I would say that much of the jurisprudence that exists in this—there are 50 years of jurisprudence existing—is equally applicable to communities. So technically that's correct—I didn't hear the comment—but that's only because of those jurisdictional rules. That doesn't affect the applicability of the ideas to a community as a whole.

THE CHAIR: I understand what you say. I think the federal Attorney-General's

Department public servants were saying there have been human rights conventions—in fact back to the 1948 convention—in terms of reconciling conflicts in human rights. I think it was the Assistant Secretary Mr Geoffrey McDonald who was saying towards the end of his time here, before lunchtime, that the right to life, the right of innocent individuals of the community to the right to life, surely is a crucially important civil right of theirs. He was also saying that in the commonwealth and other legislation certainly regard was made to the various conventions and that, when you look at those conventions, human rights is always a balancing act and it recognises the right of a state to protect itself against criminal and violent activity and the right of a state to protect the rights of its individual citizens, collective citizens, to live. You have to balance that against the right individual wrongdoers, or would-be wrongdoers, have. He was saying that effectively he thought the commonwealth, the legislation they did, had it right.

Ours seems to be significantly different, which you've alluded to in your submission. If ours is significantly different, it would seem, certainly from our hearing of federal A-G's and the AFP, that there would be much more significant difficulties for them in a number of areas in terms of different tests, much more stringent tests, before they could get an order to detain people, and a problem of duplication, or of different rules that the law enforcement authorities have to abide by to get orders in different states, and that obviously may not be a terribly desirable thing for efficiency with what might be a common problem across the commonwealth.

I suppose my question is: putting aside whether we should have this legislation or not—quite clearly it has gone ahead federally; COAG obviously wanted it, and most other states and territories have actually introduced and passed it—it seems that it's going to happen. Given that, isn't it best to ensure that your legislation is workable and is as consistent as possible with other similar legislation—in other words, commonwealth legislation and the legislation of at least New South Wales—in such an important area as this? I have a concern from what we've heard so far that our legislation is somewhat more difficult than, and somewhat different too, that legislation.

Prof. Charlesworth: It's clear that this legislation is quite different from the federal legislation. We've noted that in many ways. We only came in at the end of the police submission and they referred to practical problems, but I'd be quite interested to know what those problems were. The view that we would take is that the ACT has got the balance between respect for right to life, the one that's threatened by terrorism, and respect for a whole other range of liberties much better than any other jurisdictions. The easy answer, of course, would be to get all the other states and territories to follow this model, and then you wouldn't have this problem. But it seems to me in principle it's problematic to refer to asserted practical difficulties by the police. I only heard a brief comment; I don't know if they gave more examples of the practical difficulties it would cause. It's true that police will have to take more care in the ACT before they go detaining people. But to me that's certainly not a problem in principle. The police often have to in different jurisdictions engage different measures from state to territory. I just see it as another function of federalism.

THE CHAIR: They gave a couple of specific examples. For example, they say that clause 17 (3) of the ACT bill is different from 105.4 of the commonwealth Criminal Code. The test there is "substantially assist", whereas in the ACT it's preventative detention being the "least restrictive". It's a very different test—

Prof. Charlesworth: But police have to do that in so many contexts every day, because criminal codes vary across jurisdictions. They say it's not so easy for the federal police, but I think protocols could easily be developed. It's true they'll have to turn their mind to different things when they want to put somebody in preventative detention, but it's not insuperable. These are relative. It seems to me that the ACT legislation is quite plainly drafted; it's not involving tremendous tensions. It's true that, if they want to arrest somebody under the ACT law, they'll have to think about things slightly differently, but I can't see why that difference in approach should affect the principle that what we should try and achieve here is a balance between a community's right to be free from terrorism, which is undoubted, and all the other rights that are under threat by what we have regarded as pretty draconian Australian legislation. I think the Australian antiterrorism legislation is among the least rights-regarding internationally.

THE CHAIR: Another area they mentioned was that we have a test, which appears in a few sections, of "reasonable and necessary", which is a lot harder to prove than the New South Wales test of "satisfied"; it doesn't even say "reasonable". Necessary might be very hard to prove. They are concerned, as are the federal A-G's, about the number of different tests. It's all very well to say that police have to do that a lot, but over the last decade or so—and this has been very much a bipartisan thing—states and territories have been trying to solve those sorts of problems by having codified and unified law; for example, the Criminal Code itself. Yes, there are certain states who aren't probably playing the game as much as others, but certainly the ACT has faithfully tried to adopt a unified approach there, and at least there seems to be a push nationally from a lot of areas of the law for unified approaches, and this seems to depart from that in fairly significant aspects, compared with other legislation.

My concern there is it may well be very difficult for the law enforcement agencies to have someone detained, even for the initial seven-day period, simply because of the more stringent tests they have to go through. As the commissioner said, despite the fact that people may think it wouldn't make a difference, criminals, organised crime, and terrorists very much do have regard to legislation and very much would be attracted to a weaker jurisdiction. He gave that as clear evidence, probably just before you got here. That causes me very great concern because, if that is so, we are very much more likely to be a target if our legislation makes it that much more difficult for the authorities to enforce it.

Prof. Charlesworth: One response I make is that we're only dealing here with one aspect of the whole suite of anti-terror laws. We're dealing with a very, very controversial issue, and I suppose generally the ACT laws, as I understand them—the general protections against the anti-terror laws—are consistent with commonwealth laws. Here we're dealing with an issue, preventative detention, which is such a strange and, I think, quite dangerous legal beast. What you're really saying is, "We don't have enough evidence to charge you, but we've got some suspicions on the go that will allow us to detain you in these quite constricting ways." So the ACT is only, if you like, going it alone in a very particular aspect, where the commonwealth has proposed these very, very draconian mechanisms to respond to antiterrorism.

It seems to me that there is a capacity for error—many people have pointed this out in criticism of the federal anti-terror laws—and for effectively keeping people in

preventative detention when there's not adequate evidence. What you're allowing through preventative detention is for people who are accused and charged with a criminal offence to be in a lot better legal position than people who come under the preventative detention regime. So the irony of it is that a hardened criminal, who has actually done the act, is going to have many more rights. If you're unfortunate enough that the police don't have quite enough evidence, but have some doubts, about you, you're going to be in this limbo of preventative detention. That's the reason why we feel very strongly on this issue of preventative detention. The safeguards should be much, much higher, because preventative detention itself is something quite unknown in the common law. That's something that's antithetical to all the principles of common law.

THE CHAIR: Until about 11 o'clock this morning, I would have agreed with you on that. It was pointed out to me by our learned secretary that actually in ACT law we have detention without trial or charge in about eight different acts, ranging from four hours under the Domestic Violence Act, through to an indefinite period under the Health Act in relation to sexually transmitted diseases. So, despite what a lot of us probably thought, it's actually not a completely foreign concept.

Prof. Charlesworth: But not with all these strictures—the strictures on contact, for example contained there. It's true that there are forms of preventative detention, but they don't have all this baggage attached to them. That's the particular harm in this case, that, if you're held under the federal legislation, for example, there are exceptionally limited contact rights: you can't give full information; you're safe but you can't be contacted for some time; the wording in the federal legislation, and so on. So it's not any old preventative detention; it's a very particular form which takes away most of the rights that we've assumed we have—contact with lawyers, and so on.

THE CHAIR: Yes. We have had evidence today from both sides but certainly of the need for those restrictions because of the very difference in nature of the offences they're trying to prevent, and the people—to use another term, the enemy, the criminals, whatever you want to say—they're trying to prevent from doing some acts which are really quite horrendous, and the nature of that operation which leads to these type of restrictions being put in place.

I've asked one question of a number of other people that appeared here the first day. The maximum detention under this is 14 days, and, yes, that's going to restrict people's ability for contact and to do certain things. But isn't that not dissimilar in some ways to the situation of, say, someone who's charged with murder? Even in the ACT we have a presumption that they would be remanded in custody, and that person would be remanded in custody for a lot longer than 14 days. Let's say there's a trial and the person is acquitted. It happens quite frequently in Australia in the criminal law that people are in custody for a considerable period of time, suffering all the inconvenience that someone under this would—and possibly more so because it would be a lot more than 14 days—and who ultimately are acquitted. I know they've actually been charged with an offence, but in practical terms to that person I don't know if there's a huge difference there, especially when one looks at the danger these laws are supposed to protect the community from.

Ms McKinnon: All I can say about that is that the difference is that the police have sufficient evidence to charge that person. The person has actually committed an act in the

past, rather than suspicion that the person will commit some act in the future. That's clearly a big difference. The other issue, I guess, is court supervision. If you're charged by the police with a criminal offence, in every jurisdiction you're brought before the court and the court decides on issues of bail. So it's ultimately the court that has that power.

THE CHAIR: But the court has here too.

Ms McKinnon: Yes, that's why we think it's appropriate that the court has jurisdiction over these issues here, rather than it being a matter of the executive deciding that another seven days is appropriate, for example. I think there is the issue that we're talking about detention to prevent something from happening rather than because the police have sufficient evidence to believe that the person has committed an offence in the past.

THE CHAIR: I've just got one more question in relation to your six points. On page 6, you say that a person who's taken into custody under a preventative detention order may ask for—

Ms McKinnon: In relation to legal representation, is it?

THE CHAIR: No. I was going to say that it might be dangerous for the police officer to give their place of duty, but that seems to be in the law at present.

Ms McKinnon: Yes. Currently it says that, if asked, the police should provide that information. Our point is that you shouldn't have to wait for people to ask, or to know they have a right to ask, before providing that information, if it's relevant.

THE CHAIR: I see what you mean. I'd misread that. I was more concerned about the place of duty, not so much the name or the identification. I think it's essential someone proves they're a police officer, but because of the nature of what we're looking at here I thought the place of duty might unduly put the police officer at risk, and indeed his or her colleagues at work. But I misread that, so don't worry too much about that. I see what you're saying there.

DR FOSKEY: Thank you very much for your commentary on the merits of much of the bill. We've heard today from a couple of sources that the ACT should copy either the commonwealth or the New South Wales legislation for operational and ease of compliance reasons. Your commentary gives us a clear argument as to why this would in fact be a derogation of our duty to uphold human rights in the ACT. If other jurisdictions feel comfortable ignoring some of those considerations, it's a pity, but it is interesting to hear us being put as the jurisdiction at fault because we have given human rights a pre-eminence here. In fact, some of us found ourselves in the position of defending the bill, whereas there are issues with the bill as well, and I'd like to explore those today.

You say that the ACT government played an important role in the national debate in drawing attention to breaches of human rights in drafting of the federal legislation. Can you give me some idea of the main breaches of Australia's human rights obligations in the federal preventative detention regime?

Prof. Charlesworth: There are a great deal. First of all, it seemed to us, and I haven't

seen any human rights lawyers who've argued to the contrary, that it was a clear violation of article 9 of the ICCPR, which provides for the right to not be arbitrarily detained. If you looked at the capacity to obtain the interim preventative detention orders under the federal legislation, it could be done in a way that wasn't subject to complete judicial review. So it did seem to us that it met, very clearly, the test for being a form of arbitrary detention.

That's in a nutshell, but there is a whole set of related rights—and Gabriele might remind me if I miss some of them. There is limited access to legal counsel—again, you'd be a lot better off as an ordinary, common or garden criminal who'd been charged, because then you would be able to choose a lawyer, you'd be able to meet with them in private and so on—a range of access to legal representation. There is the capacity to communicate with one's family, which is extremely limited; the fact that you can only communicate with a single family member, and you can only give them very limited information. Then there is what I think are truly shameful provisions, which provide—if my memory is correct—in the final draft, up to five-year prison sentences if there is some communication, even accidental, of the fact. If I wanted to tell my mother that my child had been held in preventative detention, and that slipped out, or if my mother asked a pointed question and I didn't answer it and she guessed, these are all subject to these criminal sanctions. Those are the ones that immediately spring to mind.

Dr Porretto: I just wanted to mention the fact that you can also apply preventative detention to children, just to provide another example of particularly heinous measures in the federal legislation.

DR FOSKEY: Today we heard it argued very strongly as to why that was considered a reasonable thing to do. You'll find the transcripts of interest I suspect. Have you heard any evidence or any argument by either the ACT or federal governments that you think would justify these laws on the basis of proportionality or any other grounds?

Prof. Charlesworth: I think that's where we're obviously hamstrung by lack of knowledge. Obviously, our Chief Minister heard something at the COAG meeting that convinced him and his advisers that these were necessary. With the rest of the public, we're not privy to that information. I think it's fair to say that we haven't seen anything on the public record that explains why the scheme should be undertaken. But we do concede in our submission that that may well be; we obviously don't have all the information. But we're not qualified really to speak on that topic. I think most people would agree that it's not clear on the public record why this is necessary, but we're not security experts and we can't speak any further about that.

DR FOSKEY: Yes, it's certainly a problem. I take your point regarding the need to clarify that information extracted under torture mustn't be relied upon, in part because of the encroachment of doublespeak terms like "enhanced interrogation techniques", a phrase that really means torture. Are you aware of any occasions on which an Australian official has denounced the practices of rendition and torture in totalitarian regimes by our Western allies? How do you suggest that we ensure that the standard of prohibiting evidence obtained as a result of cruel, inhuman or degrading treatment applies in the ACT?

Prof. Charlesworth: I'd just say that I'm not aware—and I don't know if any of us are

aware—of any public statements by Australian officials. If you're speaking of the last 12 months, when there's been a lot of international controversy, it's possible that our federal Attorney-General has said something, but I don't think we're aware of any statement of condemnation. Of course, the rendition program is currently such a controversial issue in Europe and United States, and I haven't heard a clear statement of that.

On the issue of allegations of torture at Guantanamo Bay, in which we have as a country a direct interest, my understanding is that the Attorney-General has turned to, or relied on, American assurances that there was no torture at Guantanamo Bay. I think he has publicised those. But that's the only response there.

On the issue of preventing the use of material gained through torture in the ACT, as Gabrielle has pointed out, our argument is that that should be extended to not just torture, because there are such definitional debates, but to include cruel, inhuman or degrading treatment as well. If the ACT law were to be amended in that respect, that would will go a long way to prevent it. Although the acoustics weren't such that we heard it necessarily accurately, I took it that the police delegation were very critical of the inclusion of that provision in the ACT law. If I heard it correctly—but please tell me if I got it wrong—I understood the argument to be, "Well, that's inappropriate and it's perhaps incorrect to put that explicit in this legislation, and it's anyway covered by the Evidence Act." I don't know if that was the argument being put.

One of the responses that we would make is that, yes, it's correct that it is covered in the Evidence Act, although the Evidence Act doesn't include the cruel, inhuman or degrading treatment. But one of the big issues here is relying on evidence that may be the product of torture not in Australia but overseas. We support strongly the inclusion of this provision in the law; all we want to do is to extend it, on the basis that one wants to exclude evidence that has been wrung out of somebody in a damp prison in Egypt or Kazakhstan or wherever. It seems to me that it is necessary, and I was surprised by that argument.

Ms McKinnon: It's no imputation on the federal police, or it doesn't assume that the federal police would be doing the torturing. That's certainly not what we'd assume.

MS MacDONALD: Yes. We did actually ask some questions about the issue of torture. Dr Foskey asked some questions. I forget the exact terminology they used, but they do have what they call an intelligence scale, called the admiralty scale, in which if they receive intelligence from a source from which they haven't received anything before and they don't know the veracity of that source, they try to corroborate it with a secondary piece of evidence. They also said that evidence obtained by means of torture overseas was of very limited value.

DR FOSKEY: But I did ask whether they checked with the sources of their information—JIO, ASIO et cetera—as to how the information had been extracted. Thinking about it, I don't know that we got a really good answer.

THE CHAIR: I think their concern was that you could imply the torture was actually done in Australia.

Prof. Charlesworth: But asking them to certify that torture hasn't come that way—

THE CHAIR: And that's covered; the whole question of torture's covered by the—

DR FOSKEY: But whether they ask about evidence from other—

THE CHAIR: You don't actually have torture in the Crimes Act and the Criminal Code, but you have those protocols that Ms MacDonald mentioned, plus just the general criminal law, where torture is illegal; it's various degrees of assault, up to murder.

Prof. Charlesworth: This doesn't, though, necessarily exclude material that may have come into Australia, clean as it were but initially extracted by torture. I take the ACT law to be simply enshrining the principle that the House of Lords came down with, I believe in December last year. In a quite striking decision, the House of Lords rejected the use of any material that was obtained by torture. In an era of antiterrorism, we've seen that there has been perhaps an increased willingness to use measures that I think would technically constitute torture in the fight against terror. I think there's been a general weakening of the prohibition, and I think this law, very helpfully now, erects some barrier. We think it could go a little further.

THE CHAIR: Just quickly on that: are there any UK acts where torture is actually mentioned? They must have the same situation as ours. They probably resent an implication that they use torture in the UK, just like our AFP would resent any implication which could be drawn from an act here, when quite clearly what it's aimed at is torture overseas by whoever, and information coming into Australia which is then used. It just strikes me that there might well be similar sections in, say, the UK that have been used and that might alleviate the sensibilities and concerns that the AFP expressed.

Ms McKinnon: I must say I'm not aware of that particular provision but—

Prof. Charlesworth: We can check and let you know. I'll just say, though, on the issue of imputation, that it seems a curious argument, if I may say so, because even one provision in the federal legislation says that people who are held under preventative detention may not be subject to—I forget which provision it is—

Ms McKinnon: Cruel, inhuman or degrading treatment.

Prof. Charlesworth: Cruel, inhuman or degrading treatment; it actually says that, which is, I think, a very good provision in the federal law. But the federal police might say: "Well, that's very insulting. There's an imputation there that we might hold them in such a way." So to make the imputation argument doesn't strike me as a very useful one. The point of law is often to make explicit things that people assume are implicit and will be done. It seems to me there's some signalling value that one puts these things up in a very public way.

DR FOSKEY: It could be a straw man sort of argument, and it could be part of a tendency to put human rights advocates in one camp and the people who care about our security in another, which also it was felt was something that was happening.

You suggest that police in plain clothes should identify themselves as police. The man who was shot in the London subway might have had a different reaction had he known

the plain-clothes policemen were police. Do you know if any of the other states or countries that have so-called counter-terrorism laws require officers to identify themselves?

Ms McKinnon: I'm not aware of that, but I can check that. I know in other laws in New South Wales there are often provisions for officers to identify themselves if they're in plain clothes when they carry out arrests or when they exercise other powers. I haven't checked the provisions of that legislation, but I can take that on notice.

DR FOSKEY: That would be helpful. Finally, it has been suggested that even though questioning is proscribed under the bill, evidence obtained through either covert surveillance or in the course of conversations which the detainee initiates themselves, could be used as evidence against them. Is this a concern that you would share?

Ms McKinnon: I think I understand the point: there's a prohibition on direct questioning by police of people in detention, but if the detainee were to, for some reason, volunteer some information, that could then be used against them. Is that what you—

DR FOSKEY: Or that it's covert surveillance through perhaps a conversation listened to with a lawyer.

Ms McKinnon: That would certainly be of concern. I have a feeling that might have been addressed in the submission of Professor Simon Bronitt. Are you aware of that one? I know I've seen that—

DR FOSKEY: Was that a submission to the federal—

Ms McKinnon: No, that was a submission to this inquiry.

Dr Porretto: Simon Bronitt, Miriam Gani, Mark Nolan and Prita Jobling from the College of Law.

Ms McKinnon: They gave some very detailed suggestions for amendments, perhaps more from the criminal law perspective. We certainly would endorse those.

DR FOSKEY: Okay. That's the end of my questions.

MR GENTLEMAN: Most of my questions have been asked on your submission, but I have one related to the outline that you gave earlier, and it's also in your presentation, that court hearings should not proceed in the event of legal representation not being present, unless this has been waived or in other exceptional circumstances. Would you be able to expand on or define what you think exceptional circumstances would be?

Ms McKinnon: I suppose when we were thinking about that we didn't want to get into a situation where someone could avoid a preventative detention hearing altogether by just being obstructive, refusing every lawyer who's given to them, or for other reasons taking too long to actually obtain a lawyer. There has to be some balance when ensuring that the person is represented and that all measures are taken to provide representation to that person; you don't want to give them a reason to prolong things unnecessarily if they're just being uncooperative. I think that's all we had in mind.

MR GENTLEMAN: Thank you very much.

THE CHAIR: Following from that, your next sentence is that the court should have the power to order a Legal Aid Commission to represent a person in proceedings who would otherwise be unrepresented. The Legal Aid Commission in their submission are concerned that there's provision there where they must represent people. Their concern is: what about the millionaire client? They want the same rules to apply as to whom they represent normally, which are people who satisfy a means test. Their view is, obviously, that if you can afford to have a lawyer you should. That just seems to be a little bit contrary to the court having power to order them to represent a person.

Ms McKinnon: I suppose my thoughts would be that the court would take those matters into account, and if they were dealing with a millionaire client they would probably be unlikely to make such an order. But it did strike me that it was unusual that you would have a requirement for legal representation by legal aid without any means test, but perhaps it just represents—

THE CHAIR: Yes, and they had concern with that because of their budget, and it just was completely different from all other sets of laws in relation to legal aid representation.

Ms McKinnon: There may need to be some measures—that they may not be able to produce bank account statements or things from detention.

THE CHAIR: All right. Thank you very much for your assistance to the committee, for your submission and your evidence here today.

Meeting adjourned from 3.35 to 3.54 pm

AHMED YOUSSEF and

AZMI WOOD

were called.

THE CHAIR: Thank you very much for attending. I will just read out the little card I have to read out to every witness. Gentlemen, 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 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 clearly? Thank you very much, gentlemen. Could you please tell the committee the capacity in which you appear before the committee?

Mr Youssef: I am the president of the Canberra Islamic Centre and a member of the advisory committee about Islamic affairs to the local minister. Otherwise, that is it. Background, I have been in Australia for 37 years.

DR FOSKEY: Since you were about one?

Mr Wood: I am from the Australian National University. I am an academic there. I specialise in international criminal law, but I am also doing studies on Islamic Sharia law.

THE CHAIR: Gentlemen, if you would like to speak to your submission, we will ask you some questions.

Mr Wood: We would like to thank the Legislative Assembly and all the parties who were involved in producing what we see as perhaps the most benign interpretation of the commonwealth legislation, and we are grateful to live in this jurisdiction. It is sad that we have to say that because, in itself, it is a fairly repressive piece of legislation. To congratulate people on considering passing fairly oppressive legislation is a sign of the times and it makes me very sad to have to do that.

We also think that the crimes, the relevant crimes, are crimes of motive. Crimes should go on intent and actus reus and mens rea, but this goes a bit beyond that. Perhaps, as the Chief Minister explained, there were special reasons for his agreeing to it that we are not privy to, and I suppose we accept that on its face value.

Unfortunately people who have been welcomed into our country, like Nelson Mandela and other people, would be liable under this act for stuff that they have done previously. They belonged to liberation movements that advocated the use of armed force to change prevailing regimes, regimes that were recognised by the United Nations. So I just make a point on that.

Although the legislation, both the ACT legislation and the federal legislation, the complementary legislation, do not appear to be neutral, on the face of it, at this point in time it seems that the Muslim community particularly is affected. We are not suggesting

that that is intentional, but that is how it appears, perhaps through necessity. All the proscribed groups in Australia are those associated with Muslims or Muslim nations, even though there are other emigre groups in Australia that may support groups overseas that are on the UN or United States lists of proscribed organisations.

We have noted that the ACT consultative committee of Muslims is broadly representative of Muslims, and we recognise that that is a good thing. We are not so sure that the federal group is as representative as we would like it to be, although we understand there is obviously a limit to how many people they can put on these committees. It is always a matter of striking the balance, and perhaps what we are not sure of is whether the right balance has been struck.

We also accept that jurisdictions such as the United Kingdom do have legislation similar to what is being proposed, both in the federal arena and in the ACT. We recognise that the ACT does have a bill of rights, though it is perhaps not as strong as the ones in the UK or in Europe. But I think that any legislation that potentially deprives people of their rights should be framed in a very narrow way to prevent misuse or abuse of the law. This is obviously a process that you are going through to make sure that that does not happen.

One of the other points that we have made is that citizenship in Australia is a legislative right. It is not a constitutional right, as such. Some members in federal parliament were saying that people should be stripped of their citizenship—I am not quite sure what the test was—for potential involvement in terrorist activities or ideologies, or perhaps even their opinions.

There was a migration law case that actually went up to the human rights commission in Geneva. It transpired that the guy is still in detention. He cannot be deported anywhere and he is not to be released into the Australian community. So what we fear is that, if a person who has migrated to Australia is somehow stripped of their nationality, they could, in effect, be detained at length.

Our community would like to thank the ACT government for not enabling control orders because we think that that is quite an oppressive piece of legislation. You can be in breach of it without actually knowing that you are in breach of it, so we are glad that you do not have that.

Perhaps one last thing is that we suggest that anybody who is held in preventative detention be allowed to practice their faith. We are sure that it will not not happen, but we would like to see a positive right. Some people are very concerned about the food and stuff like that, just as a humanitarian issue, too, that they are allowed to avoid certain foods and drinks and to partake of certain foods and drinks.

One of the issues that came up was, I think, legal aid talking about fairly rich clients. We would like to suggest that most of the people in our community who would be likely, unfortunately, to be guests of Her Majesty under these laws are not likely to be very wealthy people. We would like them to have some sort of legal representation and also access to translating and interpreter services. While there are very wealthy people who, no doubt, would be taken in, I do not think they would need legal aid. Legal aid is fantastic, but if I had $1 million, I would get the lawyer of my choice. Do you know what I mean? I am not sure whether that is a big issue, really, but we would like that particular

right to remain.

The American cases talk about the use of material witnesses and the detention of material witnesses. I think someone else, AMCRAN, the Australian Muslim civil rights group, has addressed that issue, and we would respectfully ask you to consider that opinion fairly strongly. People have been held for quite long periods of time under that legislation.

We have made some specific suggestions as well. Clause 50, part 2, division 2.10 provides that people detained should have access to interpreter services, if at all possible. I am sure there are many obscure languages for which it may be difficult to find an interpreter, but generally they should be provided with an interpreter.

One of the things we have got out of discussing this issue with the community is that young men with too much testosterone probably get carried away with all these things, and it is their mums who will be the ones who know most about it who will be likely to be held in detention. In most cases it is the women who are least likely to be fluent or competent in English and we fear that this might adversely affect them. We are not talking about the merits of what is happening, but just about people suffering more as a catch issue.

Clause 53 (3) (b) deals with consulting with the public interest monitor. We would like the public interest monitor to be given written notice, including a statement of reasons, including the legal basis for the detention of an individual. Section 53 (10) provides that the discussion should not be monitored. We think that this is a very good thing, except in certain instances where the person is not very fluent in English. There is a propensity to say yes to everything. Some people, when they are asked a question, will say yes without really understanding what is being asked of them. So if there is a specific case of someone who is not fluent in English, for example, this conversation should be recorded so that, you know, we do not have somebody coming back and saying, "Look, he has admitted to killing 10,000 million people, but obviously he did not understand what he was being asked." That is just something to help in those circumstances.

Part 3, division 3.4 deals with the issue of target areas. It just seems a fairly broad power that, once a target area has been identified, the police can enter any place in that target area. I tried very hard to read into it a reasonability or a test of necessity, but I did not seem to be able to do that and I was wondering whether we could suggest that you look at that provision again so that there is some test before people enter somebody's premises within that area. Part 3, division 3.5, clause 82 (2) (d) is just a bit of a throwaway thing, I suppose. We thought there should be a presumption that the person from whom the object is taken should be presumed to be the rightful owner.

THE CHAIR: Thank you for that. I have just a few questions. I will come back to Nelson Mandela. I suspect he may not have been if he came here now because—

Mr Wood: No, not now.

THE CHAIR: You talked about 1990 or something.

Mr Wood: I mean a person in that situation. Nelson Mandela was in prison. But there

are emerging people who are in liberation struggles and all sorts of things.

THE CHAIR: We have heard evidence today—

MS MacDONALD: You could say, for example, Aung San Suu Kyi, who is—

Mr Wood: Yes.

THE CHAIR: Possibly, yes. I take your point about Nelson Mandela. He turned up in about 1990, which was before apartheid finished. He was released, but he was still very much involved with the ANC. I take your point about that.

You talked about the Muslim community feeling affected. You said that is not the intention of the legislation, and I think that is certainly the evidence we have heard today. You mentioned that all the groups are, in fact, Muslim groups. You mentioned there were some other groups overseas and that the United States had described other groups as well. What groups were they?

Mr Wood: The Tamil Tigers I think is one that comes to mind.

THE CHAIR: Yes. Is the IRA proscribed, for example? That might be a logical group to put in.

Mr Wood: It was, yes. There is a fairly large list of groups that are proscribed by the UN and also by the US.

THE CHAIR: Yes.

Mr Wood: Australia has 13, I think, and all 13 of them are associated with Muslim groups.

THE CHAIR: Right. Certainly a lot of those are not actually proscribed groups for federal legislation.

Mr Wood: They are, yes.

THE CHAIR: They are? I just wanted to make sure I understand you. I thought you were saying that the groups under this legislation and the federal legislation that are actually proscribed do not include all the relevant groups. For example, they do not include the IRA.

Mr Wood: Yes. I think the issue that we got from our community is that the groups that are proscribed in Australia happen to be the ones who are associated with the Muslims, while those who are not associated with Muslims have somehow not been proscribed. It is just making a point, really. I am sure there are reasons for why they did what they did, but it does not always come up that way to people in the public because we do not—

THE CHAIR: No, and that is obviously something that you prefer. I mean, I take it you are not saying there is any problem proscribing the various extreme Muslim groups that might be there, but that there are other groups, too, which are proscribed around the

world that we would include?

Mr Wood: Yes. We certainly accept that the United Nations has a legal mandate to do that.

THE CHAIR: I understand what you are saying there.

Mr Wood: As member states I suppose we accept that that is part of our obligation as being the family of nations.

THE CHAIR: Yes. I note that, if anyone is incarcerated or in preventative detention, there are guidelines to this legislation to ensure that they are able to practice their faith and eat the type of food that they are required to eat under their beliefs. I am sure that our Attorney-General, who is also the corrections minister for the ACT, would certainly ensure that those guidelines would apply. Whilst it is not in the legislation, that is the normal sort of thing we put in guidelines. I do not anticipate that being a particular problem because my understanding would be that that is provided to people who are incarcerated in most states of Australia.

Mr Wood: True.

THE CHAIR: I think even the Australian Army now has different types of food in ration packs for religious beliefs. That surprised me. It is a lot better than the normal C & D rations if you are of any particular faith.

Mr Wood: It all tastes like chicken anyway.

THE CHAIR: That is probably something we could quite easily ensure occurs, and would occur anyway.

Mr Wood: It is just that in the federal legislation there is a specific reference to humane treatment. In the ACT I suppose the bill of rights covers it, but I am not quite sure.

THE CHAIR: I would say it is covered. It is an interesting point you raise and we can certainly raise that to ensure that that applies. Are there any other questions?

DR FOSKEY: Thank you very much. It is good to have your perspective. We also got a submission from AMCRAN, but they are not able to appear, so you have a big job.

Mr Wood: We work very closely with them.

DR FOSKEY: So you are aware of their submission?

Mr Wood: Yes. I have a copy of their submission here.

DR FOSKEY: The anti-terror laws are one thing, but I think if you look at them in the context of some other legislation and restrictions that the government could introduce, and certainly the US government has introduced restrictions on remittances overseas, that is something that may be considered since it is seen as a way of financing terrorist activities or terrorist groups but nonetheless is often a very legitimate way for families to

support people back home. In fact, I believe that at least twice as much of the money goes overseas in the form of remittances as goes to poor countries in the form of aid. So it is obviously very significant. Are you aware of these things happening and what would be your concerns about that? I know it is a little bit off the mark, but I do have more specific questions. I just wanted to place this in context.

Mr Wood: We are well aware that many people do send money to families. There are mechanisms to trace this, but I think a lot of people do send money using the hawala system and I do not think there is any mechanism there to trace this money.

DR FOSKEY: So that puts people at risk?

THE CHAIR: What system is that?

Mr Wood: Hawala. It is an informal system. Many countries have exchange control issues and regulations. They do not allow the free flow of cash because of reserves or whatever their reasons might happen to be. So what happens is you go to a person who deals in that country—and these people are fairly well known—and you tell them, "I want $US1,000 in Pakistani rupees," for example. The costs are very low because it is very informal. He or she sends a text message to grandma or whoever lives at the other end. You are told to turn up to a certain address and you turn up there—it is an honour system and it seems to work very well—and they will give you the equivalent of whatever they said they were going to give you. They give you a good rate of exchange. It is very easy. You do not have to worry about going to banks and being ripped off by banks. They are refusing to accept travellers cheques. It is really difficult to cash travellers cheques or use credit cards in places that do not have electronic funds transfer.

I do not really know how anybody could track this sort of money anyway. There is a concern that people are sending money to humanitarian groups overseas. I think people have been sending money through the Red Cross or Muslim Aid. There is another Muslim organisation called Human Appeal International. These organisations somehow work in with our legislation and send the money overseas in a much more transparent sort of way, but for families I think the option is still largely the hawala system.

THE CHAIR: A family member would go overseas, for example, to Rawalpindi, have $US1,000 in cash, which they are quite entitled to take into Pakistan, go and do the exchange and then they give the money in Pakistani rupees to their family members, aunties, uncles, cousins, whatever, and that way they—

Mr Wood: Yes, and sometimes, as part of it, because they cannot buy certain consumer goods in their countries, they would ask you to buy something, a toaster, whatever it happens to be. Then you take it along and they will give you the equivalent of that money as well. It is very informal. It works in places where there is no formal banking and this is the only sort of banking there is.

DR FOSKEY: I had better get back to the submission. What do you think that the government and Mr Keelty mean when they uses the term "home-grown terrorists", which, to give you a bit of background, was used quite a lot today as justification for this legislation, which is seen to be important based on the bombings of the London underground which were performed by home-grown terrorists?

Mr Wood: I am not sure whether I can comment for Mr Keelty.

DR FOSKEY: On the term.

Mr Wood: I suppose they are referring to people born and raised locally, growing up in our community amongst us, and then using local knowledge to carry out the aims of people in other countries who have a different agenda. I suppose that is what it means.

THE CHAIR: That is a pretty good definition.

DR FOSKEY: It is a different one, but it is a really good one. Given that that is the target of this legislation, we are told, and that you talked about the federal government's advisory groups and even the ACT's advisory group, I was just wondering whether there has been any attempt to consult with young people specifically as that group is assumed to be the home-grown terrorists.

Mr Wood: I am not sure whether I can speak for everybody.

Mr Youssef: Not to my knowledge, no, not yet. Maybe there is something in Melbourne or in Sydney, but not to my knowledge here at all.

DR FOSKEY: Do you feel that the elders, the leaders, whom the governments do consult can speak for those young people?

Mr Youssef: It is better to contact them directly and seek their opinions.

Mr Wood: The police have contacted us regularly and do contact the community very regularly. The outreach programs, the liaison programs or whatever they are called tend to be very good in the ACT. They are regularly in touch with the community. Whenever there is an issue they contact Ahmed, me or a few other people. I think it works quite well. The problem is that young men or women who want to do whatever they want to do are not the social type of person, if you know what I mean; they tend to be loners. I do not think it would be possible or it would even be reasonable for us to get to these people because I think they tend to work on their own and work in fairly discrete ways. We hope that this scourge will never come here, not that we wish it on anybody else.

DR FOSKEY: Maybe there are grounds there for a bit more exploration and research as to who or where the likely home-grown terrorists and so on are because, as you say, they are not people we know about right now. I believe that many of the people who have been subjected to raids have been released without charge. Do you know if this received as much media attention as their arrests?

Mr Wood: No. We are not quite sure why they do it the way they do. It is quite different in the way they operate in the ACT. I am not sure whether they are trying to send out a message in Sydney and Melbourne or what they are trying to do.

THE CHAIR: It is just an old story and they are sensationalists.

DR FOSKEY: It appears that the police had quite a role to play in the media attention

given to the arrests late last year; so perhaps it is not just the media.

Mr Wood: The media conveniently happened to be present.

DR FOSKEY: Yes, but they had to be told. Do you have any idea why the people arrested under the antiterrorism laws that immediately preceded these laws were dressed in orange overalls and shackled hand and foot? Were you aware that that was the case?

Mr Wood: Yes, we were aware.

DR FOSKEY: Are you aware of any other prisoners being treated in this fashion?

Mr Wood: No. It seems like they are trying to make a point with these people. In many cases, with these young men it was mainly just testosterone-driven stupidity really. They have got bigger mouths than brains, I think, and they just mouth off things. Really, they are looking for attention, they are looking for the media, like the cases in Sydney.

THE CHAIR: Still, I think one of them shot at the police, if you are talking about the Sydney incidents, and was shot in the hand in response, I think. That is a pretty serious situation.

Mr Wood: As I remember, there were several raids. The one that was a drive-past shooting, yes.

THE CHAIR: I am not talking about that. A few years ago there were drive-past shootings at, I think, the police station at Lakemba, but the incident that I think that Dr Foskey is referring to was several months ago and it was under different laws, earlier laws. One of those involved basically a bit of a shootout in which one of the defendants, I presume—I do not think they have been tried yet—actually shot at police and was shot in response.

Mr Wood: Was that in the UK?

DR FOSKEY: No, Melbourne or Sydney.

THE CHAIR: No, in Sydney.

THE CHAIR: I think that is probably just a bit more than testosterone. Anyway, we are dealing with these laws.

DR FOSKEY: Can you tell me off the top of your head the names of some of the groups that have been proscribed by other countries? The Ku Klux Klan springs to mind, but some of the other groups that we have not proscribed that have the potential.

Mr Wood: The Tamil Tigers. I do not have the list with me, but I think there are about 23, something like that. It is on the UN web site.

DR FOSKEY: That is of interest, if you could advise us when you go to have a look.

Mr Wood: It is on the UN web page. They have a section on terrorism.

DR FOSKEY: Are you aware of any situation where detainees or prisoners have not been allowed to practice their beliefs or meet their appropriate diet?

Mr Youssef: I think as a provision it should be there, because they will try to pressure them with every possible means and part of it will be the food.

DR FOSKEY: And that is, in fact, a form of undue duress.

Mr Youssef: Yes.

DR FOSKEY: I think that the important thing is that that is recognised, that it is not quite an innocent thing.

Mr Wood: That was the case in Guantanamo Bay, the use of food as a reward or punishment, access to the Koran as a reward or punishment, saying your prayers without loud music in the background as a reward or punishment. There are well-documented issues with this.

DR FOSKEY: The Prime Minister said the other day—on Australia Day, appropriately—that citizenship is a privilege. This is in relation to what you said. I was actually at the citizenship ceremony where he said that and where people were given the opportunity to utter a new affirmation, all of which adds up to an idea of the responsibilities of being an Australian citizen. I was just wondering whether you have observed anything that indicates that there has been an increase at the official level in the use of measures, rituals or symbols which accentuate a certain kind of Australianness. Is that something that you may have observed as well?

Mr Youssef: Not to my knowledge, no.

THE CHAIR: I was just told by the secretary, who is a font of knowledge, that there is not anything in the ACT draft bill in relation to the proscribing of groups. Clause 6 describes what is a terrorist act and covers every conceivable person who might go down that track. It does not proscribe any groups; it just describes a terrorist act, and effectively everyone is covered by that.

Mr Wood: As to membership of an organisation, you do not have to actually carry out an act. Actually belonging to an organisation is—

THE CHAIR: That is federal.

Mr Wood: Yes, that is federal, sorry.

THE CHAIR: I just wanted to clarify that. It is certainly not in the ACT bill.

Mr Wood: No, sorry.

THE CHAIR: I hear what you are saying. Federally, you think that they should add some other organisations which are added in the US and elsewhere.

Mr Wood: I am not sure, but these are comments that we hear back from the Muslim community. I think it is in everybody's interest that a certain segment of the community does not feel marginalised or targeted in any way.

THE CHAIR: In Australian history, we had Ananda Marga in 1978. I do not know if they are still operative, but you would probably proscribe them if they were. The IRA has been active here, but I do not think it has done anything here. I imagine the Tamil Tigers probably have representatives here.

DR FOSKEY: They do.

THE CHAIR: Obviously, you would have some extreme Muslim groups which are proscribed. Okay, that seems to be probably the main sort of danger at present, but these acts are very general and they would cover any group which might suddenly appear or which might has adherents here who want to further their aims.

Mr Wood: Certainly anybody who carried out an act.

THE CHAIR: Whilst I can understand the concern about Muslim people being targeted, I suppose the "threat" at this stage would appear to be from extreme groups on the far fringes of that general community which, I am sure, the vast majority totally renounce, just like the vast majority of Irishmen probably do not particularly like the IRA and the Ceylonese do not particularly appreciate the Tamil Tigers, but that is simply, I suppose, the current threat.

Mr Wood: I think it is just an issue of perception.

THE CHAIR: It can certainly cover absolutely everyone and if some other group rises up—to take your example, for some reason there is an Australian chapter of the Ku Klux Klan that suddenly becomes a big problem—obviously the emphasis would shift there.

DR FOSKEY: Just to finish, you talk about the federal government's handpicked group of Muslims. Is there another way that a more representative body could be formed that more people in the community might feel happier about?

Mr Wood: I think it is very difficult to please everybody. Whatever formula you come up with, someone is going to feel left out. I wish Solomon were around; I might have deferred the question to him. I know that there has been some criticism of the current group, but I am sure any other group would have similar criticism.

DR FOSKEY: Maybe a broader form of consultation altogether.

Mr Wood: Could be, yes. It is difficult.

MR GENTLEMAN: I have a couple of questions. Thanks for coming this afternoon. I would like to come back quickly to the conversation we had about targeting specific groups. In clause 3 of your submission you talk about Muslim groups being targeted in Australia and you have referenced statements made by Christopher Pyne, Howard government statements and, in fact, a letter directly to you from the Department of the Prime Minister and Cabinet. Do you think that under this legislation there will be further

racial profiling? What could the committee recommend to the Assembly to alleviate Muslim group targeting in this way?

Mr Wood: I think the point we were trying to get across is that when certain people are elevated to a level where they are considered to be representing the community and when it transpires that in the past they have made some pretty awful statements about other people, and if these people are classified as being moderate and somehow, by implication or otherwise, everybody else is seen not to be moderate, that is a bit problematic. We have some references here to what people have said in the past in the public domain. This is what has been alleged against these individuals. Some of them happen to be in the Prime Minister's group. The Prime Minister said that he did not want to give a platform to people with extremist views; I think that is what he said. Some of the views expressed by these individuals, if they are correct, seem to be fairly extremist. The large group of which Ahmed Youssef is the president, which has 1,200 members or something like that, was not included in that. By implication, this large group of people is somehow not moderate and is extremist, though I am sure that people do not intend things to work out that way.

MR GENTLEMAN: Sometimes by omission.

Mr Wood: By omission it becomes the case. It is always easy to be wise after the event, but when the problems do arise and are identified and something is being done to rectify these problems, I submit that it would be to the benefit of all citizens.

DR FOSKEY: Speaking of rectification, I think I said there were Tamil Tigers here or it may have appeared that way. In fact, I want to withdraw that. There are representatives of the Tamil community. I do not want to have the other thing attributed to me.

MR GENTLEMAN: You mentioned in your overview that the UK antiterrorism laws are similar. They still have a bill of rights, but not as strong as ones in Europe, and the bill of rights in the ACT, or our Human Rights Act, is not as strong as some of the European acts. How could we strengthen our Human Rights Act to bring it into line with those bills of rights in Europe?

Mr Wood: They have the European Court of Human Rights where you can litigate on these things. For a small jurisdiction like ours it would be very difficult to replicate this thing as the cost would be prohibitive. I am not sure, but I would think so. But it would be nice if we had something like that on a national level. I know that that is not your domain but, being members of both jurisdictions, federal and the ACT, it would be nice. I think it is good that there is an act here. People were talking about a floodgate effect. They can see that it is not going to create a huge amount of litigation. Maybe the other jurisdictions will follow, and we hope that they do, so that there are positive rights that people can use.

THE CHAIR: I have one last question. I think you came halfway through the last lot of evidence. We have heard over the last two days of hearings, as you have mentioned yourself, that this bill is very different from the federal bill and the other state legislation. Put aside for one minute whether we need this type of legislation. It has been decided at COAG that it will happen federally and right across Australia and obviously it will be going ahead. None of us was privy to what the Chief Minister was told and no-one is

going to tell us, I would think, so we can only guess. They have decided to go ahead. But the ACT bill is somewhat different. You say that it is a much more benign interpretation. The fear has been expressed by the commissioner of police that, because there are higher tests and it is legislation of a different type, it will be harder for the authorities to have someone put in periodic detention and that that would be a problem in that it would perhaps make the ACT more of a potential target and it would be better, if we were having legislation, to have it consistent with everywhere else. Do you have any comment in relation to that? I do not mind if you do not.

Mr Wood: We have seven jurisdictions and we have lived with that all our lives. We do have a state system and we do have a federal system and each jurisdiction is entitled to have its own laws. We have lived with it for all these years. I am not quite sure why we need uniform legislation in this particular area. I can understand what he is saying.

THE CHAIR: It is very much for security reasons and crime knows no boundaries.

Mr Wood: But I do not think it would make the ACT somehow more vulnerable to terrorist threats. It is a guess on my part, more hope on my part.

THE CHAIR: There being no further questions, I thank both of you very much for your submission and your assistance to the committee by appearing here today and giving evidence.

The committee adjourned at 4.40 pm.