LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

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

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 1 FEBRUARY 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 10.36 am.

CAROLYN MARGARET ALLPORT was called.

THE DEPUTY CHAIR (Ms MacDonald): I have to read this to you before we start. 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 actions 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. Do you understand that?

Dr Allport: I do indeed.

THE DEPUTY CHAIR: If you could state for Hansard your name and the capacity in which you appear today.

Dr Allport: My name is Carolyn Margaret Allport. I am the national president of the National Tertiary Education Union.

THE DEPUTY CHAIR: Would you like to make an opening statement?

Dr Allport: I thank the committee for the invitation to attend here today and seek your leave to incorporate an additional statement into the body of the NTEU submission. If leave is so granted, the statement "Proposed NTEU amendment on exemptions for Terrorism (Extraordinary Temporary Powers) Bill 2005" would be noted as part of our submission, and the amendment is presented to the committee as suggested wording for an exemption that would protect the legitimate activities of university staff, journalists, performers, artists, cartoonists and so on. This is of particular note, given the existing definitions of sedition under the commonwealth act.

NTEU is supportive of the many legislative interventions made in the draft bill to protect the human rights standards already articulated in the ACT Human Rights Act 2004. As mentioned in our submission, academics and students have already been caught in the net of terrorist legislation and may well become further at risk, given that many academics and researchers are active in the field of terrorism studies or international politics. This research field is one of the government's research priorities, and Australian researchers play an active part in international research on terrorism and human rights.

As you will be aware from our submission, we have been monitoring the development of the anti-terror laws in many other countries, not just our own. We are generally supportive of locating human rights at the heart of our work, given that our organisation is committed to social justice. In this context, we are pleased to contribute to both your difficult deliberations here as well as engage actively in the broader campaign for a national human rights bill.

In commenting on your legislation, we focused on indicating support in those areas where the commonwealth legislation had been deficient in providing the legislative safeguards necessary to ensure Australians retain the civil and legal protection entitled to them under the International Covenant on Civil and Political Rights. Thus we have

focused on the processes for the initial preventative detention order and/or control order since, under the commonwealth bill, this is a process that is initiated and controlled by the Australian Federal Police. I am not a lawyer by profession, but I have attempted to use the International Covenant on Civil and Political Rights as a general guide to assist my interpretation of the legislation.

As you see from our submission, we are pleased with the inclusion of judicial oversight, civil and legal rights and the consistent attempts to ensure transparency in the definition of rights and responsibilities. We are very supportive of the way that the bill has defined what is and what is not a terrorist act.

On the issue of the police powers to stop, search and seize, we are particularly concerned that academics and journalists may find themselves unable to retain documents or sources collected or obtained for legitimate teaching and research purposes. The professional and investigative roles played by academics and journalists need to be protected by an exemption. As suggested, we would recommend that the notified NTEU amendment replace the existing part 1, section 6, subsection (2).

Finally, we would urge the committee to amend the legislation so that it provides protection for workers against unfair dismissal, as suggested in our submission. Part 2, division 2.10, section 47, makes it a right for the person detained to contact their employer. So it seems important to take notice of the effects such a notice may have on an employer who, under the new WorkChoices law, can dismiss any employee for operational reasons.

I will be happy to answer any questions or take them on notice if I am not familiar with the area.

THE CHAIR: Thanks for that. I thank my deputy chair for starting the proceedings. I was unavoidably detained on another matter. Thank you for coming, too. Yesterday the federal Attorney-General's Department officials, including Mr McDonald, and Commissioner Keelty appeared.

A number of comments have been made by most people who have made submissions in relation to how much contact the detainee can have. Commissioner Keelty and the commonwealth officials had some grave concerns that this bill in fact was far too broad and that a would-be terrorist would be able to get messages out which would compromise security operations, perhaps even warn off other terrorists. They very much felt we should be in line with the commonwealth and New South Wales provisions. I must say I certainly can see their point there.

What is the difference here? Firstly, I should also state something that we only found out yesterday. We thought it was a very fundamentally different type of legislation, detaining before charge, but apparently there are about eight ACT acts and probably the same interstate where you can detain, in a similar situation to this, without charge. For example, if the police feel that someone might be particularly violent in a domestic violence situation they can detain for four hours. Under the health acts, people with sexually transmitted diseases can be detained indefinitely without any official charges being laid. Obviously there are various things that people would have to show before that would happen. This perhaps isn't as extraordinary as we, as a committee, initially

thought. There is that point.

My other point is probably a bit more relevant because it happens a lot more often. What is the difference between this situation where a detainee at best can be detained for up to 14 days with limited ability to tell people what is happening and that of someone charged under the criminal law with murder who would be remanded in custody? Even in the ACT we have a presumption against bail for murder; so the person would be remanded in custody and might well be in custody for months before the matter is heard. Let us say the defendant is discharged, having been found not guilty.

Those things happen in the criminal law pretty regularly, certainly here and certainly across Australia, when someone is incarcerated and subsequently found innocent and let go. I know they have been charged, but the practical effect is: in terms of employment, there are all sorts of problems. They are far greater perhaps than someone who is out of the system for 14 days.

Why should this be any different, especially when we are dealing with potentially incredibly serious offences against our society, to what happens in the criminal law anyway in the case of people who have been charged with serious offences, are subsequently acquitted but do spend months in custody?

Dr Allport: As you came in, I did make the comment that I am not a lawyer. The key word that you used in your final sentence was the word “potentially”. The difficulty for all of us, no matter which side of politics we sit on or where we come from, whether we are from the AFP or whether we are from organisations like my own or other human rights based organisations—and many other countries are also trying to deal with this—is that much of what we are trying to deal with is the potentiality of the word “terrorism”, what it means and what it might mean.

We have examples that have not been on our soil, although they have certainly affected Australian citizens. We know about bombs. We know about aeroplanes flying into buildings. We know that these things are real. What we don’t know, and what we have very little information on in terms of the broad society, is how different is this issue of terrorism to what we normally see, as you have prompted, in the criminal jurisdiction. What many of us are disturbed about is that, in the criminal jurisdiction and certainly in Australia, there is a degree of transparency in the court system which guarantees some of the human rights safeguards which are not automatically contained in the commonwealth terrorism bill.

All of the countries are attempting to deal with this issue of balancing the security of the person with the human rights responsibilities that are central to a functioning democracy. The British have to do it. They have a human rights act which is generally governed by other things, including being part of the European Union. Their debate over the legislation has had to take place in a functioning way within the context of a set of human rights principles. They argue that those safeguards are even more important in a situation where you are given some powers to detain people without a charge for longer than might be dictated to in the criminal jurisdiction and where the police are given rights of stop, search and seizure in ways that are not necessarily given to them in the criminal jurisdiction.

So it is a balancing act between ensuring security for all and maintaining some broad human rights. There is significant community concern about some aspects of the bill in terms of the human rights issues. But at the same time the community recognises that the government, at all levels, needs to take some action and needs to have a robust bill to support such action. So it is different, for the reasons that I have outlined. It is important that we recognise the complexity that attaches to this issue.

THE CHAIR: In terms of human rights we had a good dissertation by a number of people, including Mr McDonald from the commonwealth Attorney-General's office, who said that, when they did their legislation—and he had carriage of that—they had regard to the various conventions Australia is part of and had regard to human rights. Human rights is a balancing act. It is the rights of many. Even in our Human Rights Act, section 91 states that people have the right to live. Quite clearly the community has a right to live. Ordinary Australian citizens and Canberra citizens surely have a right to live and expect their governments to have laws that protect, as best they can, those rights. Obviously, on the other side, people who are wrongdoers, or potential wrongdoers, have rights too. It is a balancing act.

The Attorney-General here knows that the commonwealth and the police authorities obviously had severe concerns which were passed on to the premiers and chief ministers at COAG. Even our Chief Minister came away aware of the agreement within COAG that this type of legislation is necessary. They all know something that we don't. I suppose, given that they are a diverse bunch, we have to take that on trust.

If that is the case—and you mentioned the need for robust laws—what is the problem with having robust laws which, at worst, take away someone's liberty for 14 days? I must say I personally would be quite content, and angry perhaps, if I was incorrectly fingered and bunged in for 14 days, but I would accept it if I felt that was saving ordinary, innocent Australian lives. It could open avenues for compensation.

It is a question of balance. The 14 days is a period that is deemed to be long enough perhaps for certain things to happen, but not too long to fundamentally infringe the real civil liberties of a person. I note the UK parliament—

DR FOSKEY: Do you feel we are here to argue this with our witnesses, Mr Stefaniak?

THE CHAIR: No. There are a number of points there, but the main one is this: obviously our Chief Minister and the premiers saw the need for this type of legislation. Obviously they see some really serious, significant threat. Obviously it is a threat which has the potential to kill hundreds of Australians. I have to ask you to comment on this. We have to take that at face value. And that seems to indicate there is obviously a need for this type of legislation.

Dr Allport: In such circumstances as you have outlined, I would also make the point that it is even more important to ensure that such laws operate without an arbitrary power and on the basis of non-discrimination. It is, therefore, very important that safeguards are contained within such acts because they guarantee that legislative principle.

Our submission made no comment on the agreement at COAG for the 14 days. We concentrated only on ensuring that there were appropriate safeguards contained in the

ACT bill at the various points on which we commented in our submission. That is our approach. The commonwealth bill is law. We will continue to lobby on the issue of sedition in the commonwealth law. Our submission was written in order to provide assistance to the ACT government in its deliberations about the new anti-terrorism bill here in the ACT.

DR FOSKEY: It was at my behest that you are here. I acknowledge that you represent the union of which I was a member. In another life I might have been someone who would have been very concerned at the level of academic freedom and about aspects particularly of the commonwealth law. We are talking about the ACT law here. I have got a number of questions.

On page 1 you suggest that there is a possibility that people can be detained merely for studying terrorist-related topics. You give an instance of somebody who was questioned because of the material they were borrowing from the library. I certainly know a number of people whose work on terrorist-related activities could be of immense help to government policy, especially after hearing some of the evidence yesterday. A lot of these people live inside a paradigm that doesn't allow questioning. More than anything, I see that as a big problem.

Are you aware, or do you have any anecdotal evidence, that intelligence services are monitoring the material? Are you monitoring the material that people are accessing from university databases or libraries? Are you aware of that being done?

Dr Allport: We were very disturbed with the case at Monash University and we were very disturbed that the university itself seemed unaware of the monitoring. We have been trying to ascertain the extent of such monitoring in other universities. That is one of the ongoing issues for the union.

It made our members, who work in these areas, a little concerned about the integrity of their work. These areas are difficult areas to work in. You have to travel to areas of the world that are usually quite unsafe. In order to make sure your work is of a high standard, is truthful and, in a sense, exceptional, then you also must ensure that you have sources of integrity, which, again, requires you often to put yourself in an unsafe situation.

We are concerned that continued monitoring of the work of researchers or students who work in these areas may well lead to an increase in the culture of self-censorship simply to survive. It is something that we have seen happen amongst our colleagues in Malaysia, and reported by our Malaysian colleagues. We have also seen it being reported by colleagues from China and Hong Kong.

It is an important issue for us. We understand why an individual might feel that way, but part of our responsibility, our professional identity, is bound up with the concept of speaking without fear or favour. That is what our job is. So we are concerned that, if such monitoring is to be done, then it needs to be clearly negotiated with our institutions and with our members.

Certainly that is what has been done in the United Kingdom. There is monitoring in the United Kingdom. It is a formal agreement between the universities and the Blair

government. I am not saying it is perfect but, if we are to have monitoring, there must be some process that is negotiated, because our members, like many others, are also generally supportive and understand the terrorism threat and understand its importance to government. So we will continue our monitoring process.

We have had some issues around public statements already, given the commonwealth sedition laws that still haven't been changed, but that is a different issue. So I will leave it at that if I may.

DR FOSKEY: Given that a lot of ACT citizens are in fact employees at universities in our town, this is highly relevant to us. In the new industrial relations environment, is there any possibility that the fact that a person had been photographed and possibly named in the media as a detainee would be sufficient for an employer to sack them, because they were somehow seen as giving the faculty a bad name, jeopardising funding, et cetera?

Dr Allport: The comment in our submission around the issue of unfair dismissal was a general comment on all employees, not just university employees. In that sense, I suppose I was making a general point. We don't know what an individual employer will do. What we do know, however, is that the WorkChoices legislation provides no protection for unfair dismissal. So an employer is free to do whatever an employer wants to do. If they are an employer who understands their workers and understands the nature of this person's circumstances, they may well act in a principled way.

I fear that, because the legislation gives them arbitrary power, in this case they may also act in a negative way and simply say, "I don't want you here if you're subject to a preventative detention order." I fear that. It will be interesting to see what happens over the next year or so as this legislative regime starts to operate.

Already, of course, we have had some AFP arrests. They have all been of one ethnic group and have all been in Sydney and Melbourne. We don't have enough evidence to comment, but I fear that, in that area, it could well lead to someone being dismissed even if they were later proven to be completely unrelated to the act, whatever the act is.

THE CHAIR: Would that be grounds for reinstatement?

Dr Allport: There are no grounds for reinstatement; there is no protection. It has all gone now in the WorkChoices legislation.

THE CHAIR: You would probably get damages.

Dr Allport: So that is the difficulty; that is why it is important to think about those things. As I said in the submission, the draft act provides for the person to contact their employer, as a right. What we don't have is something that may protect their employment rights, given the arbitrary nature of a detention order.

MS MacDONALD: This has just occurred to me. You have talked specifically about people studying terrorism within universities and their coming under closer scrutiny. This will probably be speculation. I am asking for an opinion. It is possibly not the most brilliant question I am about to ask; so I apologise for that.

Dr Allport: I will do my best.

MS MacDONALD: There are lots of studies that go on in universities, not just of terrorism cells, et cetera, but within the science field, which may end up being of interest. Biological warfare is one which may end up being of interest to the authorities as well. Do you see that as being potential for intense speculation and possibly getting in the way of scientific endeavour?

Dr Allport: Certainly in our submission relating to the commonwealth legislation we made the point that there are many other areas of academic endeavour in teaching and research that could well be seen to be assisting a terrorist act simply by the teaching of basic chemistry. We have all read the newspapers; we all know how easy a process it is to assemble certain groups of ingredients to create a bomb. How many times have we read that?

We are concerned about the sciences—particularly industrial chemistry and associated areas, engineering and so on—and the degree to which some people can be picked up, which is why it is very important that there is dialogue between government and universities if they are to clarify these issues with people.

It is important here in the ACT because the ANU is the country's leader in the provision of community, legal and government advice on strategic and defence issues. It also has scholars who work in associated areas such as that. Much of the big research in the pursuit of advanced studies is undertaken at the Australian National University; so it is an issue for the ACT.

It is important that we recognise there are many disciplines that could be caught up in this. Nursing, for example, could also be caught up in this. One could speculate on many other disciplines. It is a relevant issue. You asked me for an opinion. I believe it is a relevant issue. It is something that we would like to take up as part of the broader way in which the commonwealth government plans to reform or change the sedition laws.

MR GENTLEMAN: The Chair gave you an overview of what we heard yesterday and made the statement that perhaps these laws are not so extraordinary because we have current laws that allow for detention before charge. I am not sure if the committee feels the same way as the Chair, but I can certainly say I think it is an extraordinary law.

What we did hear was that, because the ACT's draft is in compliance with the Human Rights Act, we may be a softer target for terrorists. Do you think that, if the exemptions went through for students and teachers, that would make us a softer target here in the ACT?

Dr Allport: Well, it is a difficult question to answer. I am not a specialist in strategic defence policy. However, I do have some experience of terrorism laws so I can really only answer from that perspective. What I do have experience in is undertaking cross-cultural research, and I can apply the principles that I have learnt in that research in order to answer your question.

I do not believe that simply incorporating human rights safeguards automatically makes

any government or a particular city a terrorist target. I think the prevention of terrorism is actually a very broad concept. Part of the solution to the issue of terrorism is to enhance the role played by cultural communities within our various communities around Australia. We are fortunate, in fact, in the world to actually have very diverse and very strong community organisations, many of which have a very established history of working with governments of all persuasions. It seems to me that we will be less of a terrorist target if we ensure that those community organisations are in the front line of our defence against terrorism.

I think that is particularly important. Governments generally have not put as many resources into it as perhaps they might, although, of course, these issues of resources are always difficult for government. So to argue that inserting human rights safeguards makes us a soft target neglects the research that has already been done on the origins of terrorism, its connection with a variety of broader debates within our world and the importance that attaches to governments clearly grappling with that issue of a cross-cultural environment. Building positive alliances, in this case with the various Muslim organisations within our country, would be the best safeguard against terrorism that I could recommend to the committee.

MR GENTLEMAN: Thank you.

THE CHAIR: With his last two questions Mr Gentleman partly asked you what I was going to ask you. He referred to different laws in relation to exemptions for students and teachers.

Dr Allport: Yes.

THE CHAIR: Perhaps I will ask you that first. I take it that is what you are getting at in your amendment to clause 6.

Dr Allport: Yes.

THE CHAIR: I must say that I have heard a number of people, from the Prime Minister down, say that the laws are not directed at people who are protesting industrial action or artistic work. I do not know, having not read it fully, if that is in the commonwealth legislation. But certainly in clause 6 (2) of our legislation there does seem to be an attempt to actually do what you seek to do. Maybe it is just a drafting thing, but I note that an act is not a terrorist act if it is advocacy—which would seem to cover genuine academic debate—protest, dissent or industrial action. It is not uncommon to have these types of provisions in laws. For example, they are in our police move-on powers to ensure that they cannot be used during industrial action. You cannot break up a strike with them. But why do you actually see the need to amend clause 6 when it does seem to be covered in the Chief Minister's draft?

Dr Allport: One of the principles on which we have been engaging with the various governments in this area has been to ensure greater transparency in the legislation and a clear identification and definition of terms contained in the bills. I take your point that, generally speaking, you could call the work that we do advocacy work, but is research advocacy work? I do not know whether it is or not.

The words that we have put forward support our view that it is better to have greater transparency and a clearer understanding of what the words mean. We have also written them in such a way that they mirror the exemption contained in the commonwealth's Racial Discrimination Act. They do not exempt us from everything in the terrorism bill, but they do define that the duties we do, and which we undertake as professional duties, are not terrorist acts. So in that sense that is the reason why we have suggested that it be placed where it is.

THE CHAIR: Thank you for that. It might just be a question of getting the drafting right. I thank you for those comments. My further question, which was partly alluded to by Mr Gentleman, relates to a concern I have that our bill is very different from the other state and territory bills and the commonwealth bill. Putting to one side whether we even need this type of legislation, and we have certainly had a lot of submissions saying we do not need it, I suppose it is a fait accompli because it has been agreed at COAG.

Dr Allport: I deal with reality.

THE CHAIR: What do you say to the argument that, if you are going to have a law—and crime knows no bounds and terrorism knows no state boundaries—the law should be as consistent as possible so that it can actually be used positively, and that it is not desirable to have very different laws with different standards between jurisdictions? New South Wales, for example, has very different laws from us. What do you say to that and to the other comment that, because of the more rigorous, higher standard of proof required for the authorities in the ACT, it may well be almost impossible for our Supreme Court to be satisfied in order for someone to be detained?

The commissioner for police indicated yesterday that sophisticated criminals, indeed terrorists, do take note of different laws and of gaps that they can exploit. He had very grave concerns that Canberra, by not having consistent laws, would be enhanced as a target, apart from the obvious reason that we have diplomatic missions here. He did mention that there was someone serving time in Perth who was caught before he could blow up the Israeli embassy. So there have been threats in the past, and he had grave concerns about the fact that these laws are very different and would make it much harder for police than laws interstate. I would ask for your comments in relation to that.

Dr Allport: Firstly, on the issue of consistency between legislative jurisdictions, I think we also have to remember that this is for all of us—probably it will continue to be for about six months and perhaps a little longer, depending upon how long it takes other states and territories to write their legislation and how quickly they get it through and so on—a slightly imperfect process.

We know that the Senate committee that oversaw the commonwealth's terrorism bill made a number of recommendations about the bill, which included that sedition be excised. We also know that they made a number of comments about human rights safeguards. Minister Ruddock, of course, rejected those comments, and the Prime Minister supported his position.

The result of that was, I believe, that the sedition laws are to be referred to the Law Reform Commission. I have not heard anything about that. So while ever those sedition laws continue to remain in the commonwealth legislation—and they were inserted in the

legislation; we all thought they had disappeared into the bowels of the archives—then it is obvious that there are going to be differences within the jurisdictions. I think we all actually have a responsibility to deal with that over the next 12 months.

The commonwealth, with its imperfect bill, rejected the advice of a Senate committee dominated by members of the government parties. That committee took a great deal of evidence from experts of all persuasions right across the country. I think there is work for all of us to do to ensure that in all of the jurisdictions the bills not only pass the efficacy test but also pass a general human rights test. The commonwealth has yet to ensure that its legislation does that. It was rushed through. It ignored the committee's findings so, of course, the imperfections remain. I think that part of the work we have to do is to go through those imperfections at all levels to see if we can come to some sort of consensus about the way in which these issues of security of the person and human rights are balanced in those jurisdictions.

On the issue of the threat suggested by Commissioner Keelty, again it is a very difficult environment. Commissioner Keelty is always wary of giving information to the press or putting information into the public domain. Obviously the police would be concerned to maintain maximum discretion for their activities in a jurisdiction such as terrorism. However, that does not mean that that should be at the expense of certain human rights. There are other ways to ensure that confidentiality is retained. There are other ways of dealing with these issues, and many of them are actually contained in the ACT bill.

It is a balancing act. It is imperfect legislation. But, without it, citizens have no rights. When rights are not protected, arbitrary action means that the innocent, as well as the guilty, are caught.

THE CHAIR: Thank you. Are there any further questions?

DR FOSKEY: I am aware that we are out of time and I am very disappointed, given that I called the witness—

THE CHAIR: Ask some more questions.

DR FOSKEY: We do have a witness waiting.

THE CHAIR: We do. I am happy to have another five minutes and we can start at 11.30 am. Also you can put things on notice.

DR FOSKEY: I will ask another question, then.

THE CHAIR: Let us go to 20 past.

Dr Allport: I am at your disposal.

DR FOSKEY: Thank you very much. I am not even sure whether I have asked this one. Can you tell me whether I have?

Dr Allport: Sure.

DR FOSKEY: So much has happened since I looked at it. On page 14 of your submission to the federal inquiry you raised the possibility that those laws could be used to criminalise political opponents.

Dr Allport: Yes.

DR FOSKEY: Do you think that the ACT laws could be used to stigmatise, demonise or financially damage political and ideological opponents?

Dr Allport: This part of our submission to the commonwealth is, of course, dealing with the sedition laws.

DR FOSKEY: Of course.

Dr Allport: In that sense we believed that those sedition laws did not provide enough protection for people to speak out in a political way. I did look as closely as I could, again remembering that I am not a lawyer, at the ACT act. From my reading of that act, I do not think so. However, I think it probably would merit that question also being asked of someone who is a lawyer, because it is not my profession.

DR FOSKEY: We will do that. You are probably aware of the expulsion of the peace activist, Scott Parkin. You might know better than I the reasons why he was expelled or that we used to justify it. Could you see this action as a taste of what might be in store for us under laws like this?

Dr Allport: I think so. I think we will see more of the Scott Parkin type of situation. Of course he was picked up under the commonwealth laws. I think it is very worrying that we are accepting such arbitrary arrest and detention powers when a person is clearly simply involved in protest and dissent, and presumably it would not be caught up under your own legislation. But it is also concerning, if one thinks in an historical context, that governments seek more arbitrary arrest and detention powers in an environment where we eventually end up with a greater degree of authoritarian control within our governments.

We had this in the 1930s in Australia with Egon Kisch, who was a dissenter, an anarchist from Europe. He jumped off a ship and broke his leg. It was a very famous case. I am not quite sure really what damage he was going to do when he arrived here. But Scott Parkin was a little bit like that. He was a peaceful, nonviolent protester. He had as a target an American multinational that has been a target for most protesters that I have ever known. Honeywell and Halliburton are always up there for the protester. I thought he was dealt with in a very arbitrary way and I do not believe his human rights were protected at all.

So I think there may well be more of that. If we see more of that and we see more arbitrariness in the implementation of acts such as the ACT act and the commonwealth act, we would be very concerned as educated citizens of the country that we are looking at a far more authoritarian regime in Australia, and that would give us grave concern.

DR FOSKEY: And what future, then, for student activism?

THE CHAIR: We will make this the last question.

DR FOSKEY: Given that much social change and much work for justice and so on have originated with student movements, what are the implications there?

Dr Allport: If you think about the voluntary student unionism bill that went through the commonwealth parliament and you map that with some of these issues arising from the terrorism bill, you might find that students, with or without a student union movement, become more active around these issues. You might also find that, as young people, they get caught up in a variety of activities that may leave them more prone to arbitrary arrest and detention.

DR FOSKEY: Thank you very much.

THE CHAIR: Thank you very much for coming at short notice. If anyone wants to put further questions on notice, we can email them to you.

Dr Allport: You have my details. Please feel free to contact me.

THE CHAIR: With local witnesses, we ask them to get back answers to questions on notice by the end of the week. As long as you get answers back to us probably by mid-week next week, that would be great.

DR FOSKEY: Thank you very much for making the trip.

Dr Allport: It is an absolute pleasure.

MS MacDONALD: Thank you, Dr Allport. It was very interesting.

Meeting adjourned from 11.24 to 11.39 am

GREGORY WALKER was called.

THE DEPUTY CHAIR: Welcome back, everybody. Mr Walker, 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're protected from certain legal actions, 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. Do you understand that?

Mr Walker: Yes, I do.

THE DEPUTY CHAIR: Could you please state your name and the capacity in which you appear today?

Mr Walker: I am Gregory Philip Walker, President of the ACT Law Society.

THE DEPUTY CHAIR: Would you like to make an opening statement?

Mr Walker: Yes, thank you. The position of the Law Society in relation to this draft legislation is pretty much spelt out in the submission that we've put before the committee. We do not see a demonstrated need for legislation of this sort in any event. It appears in some ways to be a knee-jerk reaction to some recent international events, particularly, I suppose, the bombings in London in July.

Philosophically, I suppose we have a concern that there does not appear to have been any significant research done into the necessity for legislation of this sort to deal with the perceived threat of terrorist acts. We're all aware that there is such a threat; there's nothing unsure about that. However, when one seeks to enact legislation to deal with situations like that and the legislation takes away a lot of fundamental, basic human rights, in particular the legislation with respect to preventative detention orders, we would have thought it would have been appropriate to have conducted some research as to how the current laws are inadequate, if they're perceived to be inadequate, and what is the minimum amount of legislative reform needed to deal with any demonstrated inadequacy.

For example, as a case study, I suppose, there was the arrest of some suspected terrorists in Sydney and Melbourne some months ago. That was done under the old laws, not under the new laws. It appeared on the face of it to have adequately dealt with the sort of situation that we're talking about here. We don't say that there may not be a need for reform of the law in this area, but no research appears to have been done as to whether there is or the extent to which it is required. Having said that, we accept that in the current political climate this legislation is inevitable, so we don't want to waste lots more time dealing with that issue, other than to state a position.

As to the legislation itself, we were certainly pleased that it exempted children from its area of operation. I understand it there was some evidence given yesterday, or some comment made yesterday, by the federal police commissioner that the word "child" or "children" is not defined in the legislation, and clearly that needs to be addressed, but I assume that's a very simple matter. I would imagine it means a person under the age of 16.

DR FOSKEY: Under the age of 18 in our legislation.

Mr Walker: Is that correct?

DR FOSKEY: Yes, which is the accepted—

Mr Walker: We have some concerns, which we expressed in the submission, about the drafting of the legislation. It's not just a superficial issue because, as I say, fundamentally we're concerned that this legislation does away with some pretty basic human rights, particularly the provisions about preventative detention orders. Precisely, clauses 12 and 13 dealing with those provisions, particularly maximum periods of detention, we see as being drafted in a fairly obscure and unclear fashion. We would be pleased if the Office of Parliamentary Counsel could have a look at that, and spell out in an A, B, C fashion precisely how these things are supposed to operate. It would appear on the face of it that there is a maximum period of 14 days under which someone can be held under a preventative detention order, but it doesn't exactly jump out of the page at you when you read the draft.

We deal in the submission with the public interest monitor; there are just a couple of, I suppose, pro forma things that we dealt with there. There are some practical issues around the panel for public interest monitors, and whether practitioners who practise regularly in the area of criminal law, who we expect would be most likely to be acting in relation to these matters, would be disqualified from being on such a panel. The function of the public interest monitor is spelt out, I suppose, in terms of the original application, but there would seem to us to be a role that that person could play in subsequent proceedings, such as applications for extension, applications to set aside, and maybe even applications for compensation if it's found that an order is made that was inappropriate.

With respect to the provision of legal aid, we don't have concerns about that other than that it appears to impose an obligation on the legal aid commission to supply a legal practitioner in any event. The commission, of course, has its own means-and-needs guidelines, and operates on a very strict budget. This would be an open-ended area because there are no guidelines and no restrictions in terms of the means and needs of a person who may be before the court with respect to one of these proceedings. The commission itself is concerned that there be some restriction in terms of eligibility rather than the issue being open-ended.

We deal in the submission with the monitoring of contact with lawyers. It's a simple issue, I suppose. Under the draft legislation, it's a decision by a senior police officer. Our suggestion is that that is a decision that ought to be made by either a magistrate or a Supreme Court judge.

With respect to clause 54, we were concerned that it was not appropriate to cause contact with a lawyer to be subject to prohibition on a contact order, given the other safeguards concerning contact with lawyers that are in the legislation.

We support, as we indicate at the bottom of the submission, that the applications for preventative detention orders be heard by a Supreme Court judge, and we suggest that

applications for special powers should also be made to a Supreme Court judge rather than either a judge or a magistrate.

We are pleased to see the insertion into the legislation of the provisions with respect to review after three years and a sunset clause of five years. One of the concerns that we had is that the political climate can change. It may go one way or the other; the threat of terrorist attacks may increase or decrease. It's important, as we see it, that the legislation be reviewed after a reasonable period of time, basically to see if it is working properly—whether the political climate has changed, whether the threats of terrorist acts have increased or decreased—so that the parliament can be aware of whether there is a need for change. We see the absolute requirement to review the whole thing after five years as a very positive insertion into the legislation.

In summary, those are the matters that the Law Society wants to put before the committee, and there may be some issues you wish to raise with me.

THE CHAIR: Thanks very much for that, Mr Walker. We note your position and the law council's position. I don't think any of us are privy to what went on at COAG, but it seems that the Prime Minister and all the state and territory premiers and chief ministers were briefed and did see the need for some sort of legislation, and accordingly that process is in train now.

Thank you for your specific points. You seem to feel that the bill—maybe it is understandable; it was drafted quickly—isn't terribly user-friendly, and you have some particular concerns in relation to just what is meant by, for example, the maximum 24-hour period, the maximum seven-day period, the maximum 14-day period, and confusion as to overlapping prevention detention orders. Has the society any suggestions as to how those clauses should be improved? What would you suggest there?

Mr Walker: We don't want to take on the function of the drafting process—

THE CHAIR: No, I appreciate that, but—

Mr Walker: Legislative drafting is a very specialised skill, and lawyers in private practice do not draft legislation, so I'm not really in a position to say that we should reword it this way or that way. But, as a matter of principle, when serious decisions are being made about these things, which are required under some of these sections, it is not difficult, as I understand it, as a drafting exercise to spell out clearly step by step what needs to be done, so that there's no uncertainty in the minds of, for example, the police or the judges before whom these things come, or a person who is suspected of being a terrorist, as to where precisely they stand and for how long they can be detained as a maximum.

Clause 13 (1), which deals with interim orders, provides for a maximum 24-hour period. It says that is "the period that ensures the person cannot be detained under the order for longer of whichever of the following periods ends first: (a) 24 hours after the person is first detained under the order". I understood that to be what was intended—that 24 hours was the maximum—but it appears to give an alternative: "(b) the maximum 14-day period". I'm not quite clear in my mind as to why that was inserted. It talks about "whichever of the following periods ends first". There may be a purpose behind it;

legislative drafting, as I say, is something that is a specialised area. However, provisions like that, drafted in that way, are likely to confuse. They have certainly confused a lot of lawyers on the Law Society's criminal law committee, who put together the substance of this submission. We just make the point that, if it confuses people who have that specialisation and that experience, it is likely to confuse others. I don't think we would like to be in the area of redrafting it, partly because it is not our job and we do not have that specialised skill.

THE CHAIR: Thank you for explaining how the process of your submission came about. So there were a number of lawyers on the committee looking at this who prepared this submission?

Mr Walker: Yes.

THE CHAIR: I take it they're all experienced practitioners?

Mr Walker: All experienced practitioners in criminal law.

THE CHAIR: Right. So, if they have problems, you would expect that a lot of other people, like the court and the police, would too. Thank you for pointing that out. There have been some comments made by several other witnesses that the public interest monitor should be and could well be the Human Rights Office. Do you have a view on whether the public interest monitor should be a completely new entity, or could an existing entity be used?

Mr Walker: The Human Rights Office, I suppose, is an appropriate body to do it. We don't oppose the public interest monitor panel being a panel of lawyers, but I suppose ultimately, given that there's a right to legal representation in the legislation anyway, there will be a lawyer there looking after a person suspected of terrorist acts. So there may not be a necessity, an absolute necessity, for another lawyer to be there to keep an eye on things. I suppose it could be the Human Rights Office. I don't think the Community Advocate would be appropriate, because that party performs another function within the legislation.

THE CHAIR: You raise questions in paragraph 17 that, if a person is a lawyer, they're likely to be a lawyer specialising in that area, and there might be conflicts of interest. In terms of legal aid, I take it that your submission there is that the normal guidelines should apply and that if someone is a very wealthy person they should obviously pay for their own solicitor rather than be given a legal aid solicitor, which appears to be what the legislation says.

Mr Walker: Yes, that's as I understand it as well.

THE CHAIR: Yes. So you think that should be amended to ensure that the normal legal aid guidelines apply?

Mr Walker: Yes.

THE CHAIR: It was said to us yesterday by federal public servant Mr McDonald, from A-G's, and probably more specifically by Commissioner Keelty, that there are very good

reasons why there should be things such as in clause 53 about monitoring contact even between lawyer and client, and also, I think, in terms of who a detainee could actually tell—for security reasons, for the sake of ongoing investigations, for not compromising national security and for the safety of public. They seemed to express grave concerns and said that there were very good reasons to restrict what would normally be the situation there. You've made a fairly brief comment in your submission. Perhaps you could just elaborate on your views in terms of the contact with a lawyer and the contact a detainee would have with a member of the family or any other person.

Mr Walker: As far as monitoring contact with lawyers is concerned, I don't know what examples have been given to the committee that would justify a requirement to do that. The circumstances detailed in clause 53 (2), dealing with the sort of cases where monitoring could apply, seem to suggest that there may be circumstances where the suspect and the lawyer are in some form of a conspiracy. If there is evidence to suggest that that is the case in a particular incidence, a whole lot of things like legal professional privilege probably wouldn't apply. I suppose I am just elaborating on what was in the submission.

There are a lot of safeguards under our laws as they are at the moment that would stop lawyers from conspiring with their clients to commit crimes. Certainly, legal professional privilege doesn't apply to those sorts of contacts; it's a specific exemption. Provisions in relation to the confidentiality of solicitor-client communications don't apply to it either. In other words, there's a public interest issue, through the case law, that overrides rights which otherwise exist. I'm not sure that in fact clause 53 changes any of that, but it does seem to presuppose that there's some sort of collusive conspiracy. If there is evidence of that, it could be dealt with in other ways.

Having said that, we're not opposing the prospect of monitoring taking place, but we certainly don't think it ought to be a senior police officer who decides whether that should happen. Supreme Court judges will be dealing with a number of applications under this legislation, and we would think that that would be appropriate with respect to applications of this sort as well.

THE CHAIR: Thanks. I won't ask you about it but I note you oppose preventative detention without charge. I note the fact that we're going to have some sort of legislation anyway—

Mr Walker: Yes.

THE CHAIR: I note with interest your comment about being pleased that there are no preventative detention orders to be made involving children. It was mentioned yesterday by Mr Keelty and, I think, by the federal Attorney-General's Department that that was a gap in this legislation that was not in other legislation. They indicated that in the other states and the commonwealth there is agreement—I do not know whether it was a COAG agreement or otherwise—that, basically, 16 and 17-year-olds should be covered by this legislation. The point was made by Commissioner Keelty and Mr McDonald that often young people are particularly vulnerable, that young people can commit crimes and, in terms of these crimes, young people might be particularly susceptible to some crazy extremist message and could well be used for the possible commission of a terrorist act and there was good reason to ensure that the legislation included them.

I think it was mentioned by one of them, too, that you might even be doing the young persons a favour by, basically, taking them out of the system before they do something crazy like blowing themselves up. I think that is a reasonable encapsulation of the reasons they gave. They indicated that there was a very strong reason to do what the commonwealth and most of the other states have done and adopt a provision whereby 16 and 17-year-olds are included. Having noted their comments for you, I would ask you to say why you do not think there should be preventative detention orders involving children.

Mr Walker: The submission in relation to that issue was originally drafted by the criminal law committee; that was the view that they took. I do not know whether they adverted to the respective age gaps, whether they considered children would be young persons up to the age of 16 rather than people between the ages of 16 and 18, so I cannot speak on their behalf. My personal view is that the ages of 0 to 16 probably ought to be the appropriate area for protection under that provision.

But, going back to your broader question, it is our view that the law provides for situations of this sort in any event. There is the law of conspiracy and there is a whole lot of other laws—in particular, child welfare laws, if you are talking about children who want to involve themselves in self-harm—that permit action to be taken when there is a welfare concern about a young person. This legislation isn't really looking at welfare concerns with respect to young people. It is looking at law enforcement or community protection concerns. In that context, we do not see it as appropriate that children be the subject of preventative detention orders.

THE CHAIR: I think that most witnesses have agreed that this legislation is somewhat different from that of other states, such as New South Wales, which have put in bills, plus that of the commonwealth. There were concerns expressed yesterday by Commissioner Keelty that, because of that, it will be difficult for police because they will probably have to apply two or three different sorts of tests, depending on the jurisdiction, and he expressed concern that that may well make us more of a target. I would like you to comment on whether, if we have to have this sort of legislation, it should be pretty well uniform round the Commonwealth of Australia and to comment in relation to whether, if this legislation is substantially different, it might well make us a greater terrorist target. You may not have a view on that or may not be able to comment on it.

Mr Walker: We have not done a comparative analysis; I preface my comments by saying that. I did read the commissioner's comments, at least as reported in the press this morning. This legislation is, no doubt, more human rights compliant than legislation in the states, for the reason that we have a Human Rights Act and it has been the focus of the Attorney-General, I have no doubt, in the drafting of this legislation that it be compliant with the Human Rights Act to the extent that that is possible. There are probably areas of the legislation that may breach the act, but they are there for a particular reason as a result of the agreement between the attorneys-general.

It is not clear from what I have read, certainly from what I have read in the press, that this draft legislation is otherwise softer, if I could use that term, than legislation in other states and territories. There was an example given, I think, that the commissioner was

saying that in the ACT a police officer had to form the view that it was reasonable and necessary to detain somebody to prevent the commission of a terrorist act, whereas some or all of the other legislation uses the term “would substantially assist”, that the detention of a person would substantially assist the prevention of a terrorist act.

To be honest, I am not sure that I see the difference. If you split the term “reasonable and necessary” into its two components and leave aside the term “reasonable”, on one view of it I suppose a police officer here would have to decide that it was necessary to detain the person to prevent a terrorist act, but in practice if a police officer is of the view that it would substantially assist the prevention of a terrorist attack to detain a person, that officer must surely form the same view about whether it is necessary.

I do not know; there may have been other examples that the commissioner gave or other matters that he specifically dealt with that were of concern to him. If that was put forward as an example of this draft legislation being in some ways weaker than legislation in other states and territories, it is a very subtle difference and it would take a very discerning suspected terrorist to work it out and decide to operate within the ACT rather than in other jurisdictions.

THE CHAIR: I would have thought that those terrorists would not sit down and go through legislation, just like most criminals do not ask themselves where would be the best place to commit an offence because they might not get caught and, if they did, not much would happen; they tend to stay on their patch a bit. I have to defer to the commissioner, being far more experienced than I am in things like that, but he seemed to be indicating that crime and terrorism are that sophisticated and people actually do take note of those things. He did seem to have a real concern. One of the examples he gave was the very example you gave and I note your comments on that. He did mention that and he seemed to have a concern.

DR FOSKEY: Which one was that?

THE CHAIR: That was the concern about terrorists and criminals actually looking at differences in legislation, which, as I just indicated, did surprise me.

Mr Walker: That does not surprise me because terrorism as we understand it—terrorism, obviously, could be many things, but organised and sophisticated terrorism, and we obviously know that that exists because we see examples of it—operates a bit like a good business. I can understand that you would be looking around for a situation that is appropriate for your operations. For example, if there is an Australian jurisdiction that does not have stamp duty it becomes attractive to particular types of organisations which might otherwise be liable for it.

I do not have a problem with that as a concept. It is just, as I say, the example that I saw in the press that was supposed to illustrate that this legislation is weaker than that of other jurisdictions does not ring true to me, unless there are other examples. There may be other examples. As I say, we have not done a comparative analysis. We are not a body that is resourced to be able to do all of that. But, unless there is a stronger example of it, the whole basis of that proposition seems to me to be arguably flawed.

DR FOSKEY: Mr Keelty certainly did provide some questions for us to follow up today

and I would like to do that. He referred to the Jack Roche case, which involved a plot to bomb the Israeli embassy in Canberra. I believe that such an event, which would have been awful, was prevented by the good work of the police forces using the laws of the day. Is that your understanding?

Mr Walker: That is what happened, yes.

DR FOSKEY: So you do not think that that incident is a reason that Canberra needs stronger terrorism laws than Commissioner Keelty believes we have in front of us.

Mr Walker: Absolutely not. If it was given as an illustration of Canberra being potentially a likely terrorist target, that does not make sense either, or Canberra being a place where terrorists might be likely to congregate.

DR FOSKEY: Could you expand on why you do not think it does illustrate that?

Mr Walker: Canberra is the seat of government. It has Parliament House and things of that sort and, no doubt, they are potential terrorist targets, but so are the Sydney Harbour Bridge, the Opera House and many areas in Melbourne and other places.

DR FOSKEY: Do some countries—for instance, Israel—have consulates or embassies other than in Canberra?

Mr Walker: Indeed.

DR FOSKEY: Another point he made was that the ACT bill is so cumbersome that police will have so much trouble obtaining a detention order that they will all be stuck in front of word processors rather than out protecting citizens.

THE CHAIR: That was Mr McDonald, wasn't it?

DR FOSKEY: It may have been Mr McDonald and it may have been Commissioner Keelty. Do you think that that is a problem with our draft bill and do you foresee any practical difficulties with the police putting together an application to a judge to obtain monitoring approval?

Mr Walker: We made some specific comments about the drafting of the legislation and, again, I do not speak from a point of view of expertise in how you put legislation together, but by and large it seems to me to be comprehensible. It points out the sort of evidence that is required, the standards that are required, the application is to be in writing and so on and so forth and served on the other party. I am not quite sure what the commissioner or whoever it was who made the comment was getting at there, but I do not find the legislation in this form difficult to work with other than in some specific instances, but none of those relate to the mechanics of making application for an order.

DR FOSKEY: I think that he meant that if getting a detention order in the ACT was so difficult, there were so many steps, police would be quite unable to get out on the beat. I am not sure that that was the implication.

Mr Walker: That this particular task will be so time consuming.

DR FOSKEY: Yes, the task of just getting a detention order in itself.

Mr Walker: It ought not to be made to be easy. You will remember that the initial proposals that followed the COAG meeting in September basically referred to the concept of senior police officers doing it and that was deemed, not only by this Attorney-General but subsequently after he made his concerns clear to the population of Australia other attorneys-general and, in fact, the commonwealth, to be inappropriate. So it was then determined that it be done by a Supreme Court judge. If it is to be done by a Supreme Court judge, there are procedures that ought to be followed.

If the police have difficulty in doing that, that is something that goes with the territory. If what he is getting at is that it should be made easier in the sense that you turn up in court and say that you believe that Mr Smith is likely to commit a terrorist act and you have some pretty good reasons for believing that and would like to detain him for seven days, that does away with the whole point of having it done judicially. If a judge is to be constrained by evidence of that sort or applications that are unnecessarily informal, but is required to make serious orders restricting people's liberty, that is, in our view, inappropriate, and the procedures that go with it will just have to go with it and be part of the territory, as we see it.

DR FOSKEY: Yes. I assume the police were given extra resources. That is a way of dealing with that issue. It has been said to us by witnesses to these hearings that these laws, in conjunction with the federal government's new terrorist laws, are the biggest change to the rule of law since the Magna Carta. Is that a fair statement?

Mr Walker: I do not think that is too broad a statement.

DR FOSKEY: Could you just expand on that?

Mr Walker: To put people into custody without charging them with an offence is alien to our legal and political culture. It is an enormous jump. As I say in the earlier part of our submission, it is one we do not believe has been thought through and properly justified. But it is just one of the cornerstones of our culture that, if you put someone into custody, at the very least you have to have formulated with some precision the justification for doing it. It is normally called a criminal charge.

DR FOSKEY: I have one more question, possibly two, but I would like to give Mr Gentleman and Ms MacDonald a chance. Do you think that Canberrans might be under an increased danger of terrorist action by the way that these laws, the ACT version of the laws, could be used to threaten or demonise or stigmatise certain cultural, religious or racial communities?

Mr Walker: The question probably falls a little bit outside of the area of expertise or area of knowledge that I bring to the committee. But I suppose, just from my own point of view, when you look at the legislation and the concepts behind it and when you look at some of the things that have happened in Sydney in the last month or so, it seems to me that there is a bit of a religious and cultural divide, and, in some ways, in terms of nationality. There is a stereotype of a terrorist, and it is not an IRA bomber. It tends to be people associated with—

DR FOSKEY: It is not someone with an Irish accent, you mean?

Mr Walker: Absolutely. So in the same way that the incidents at Cronulla, Cronulla beach, and subsequent incidents probably split the community and tended to marginalise certain groups, I could see that an emphasis on bringing in legislation of this sort when arguably existing legislation is adequate to deal with the circumstances can promote the same sort of problem that can have the potential to marginalise areas of the community.

DR FOSKEY: I guess the application is a factor. The law is one thing; the application is another.

Mr Walker: Yes.

MR GENTLEMAN: I would like to follow up on what Dr Foskey was saying. You are lawyers that are well versed in this sort of legislation. What changes could you advise the committee to make to this bill that would go some way to alleviating the potential for discrimination, based on race, for example?

Mr Walker: There are two issues there. One is the fact that legislation of this sort, when enacted, tends to highlight an issue and, probably, in the minds of many people, highlight a stereotypical view as to what sort of people are likely to be terrorists. I do not know that anything that I can think of in terms of a change to the drafting of the legislation is going to get over that problem. As Dr Foskey said, the application of the legislation itself at least has a potential for causing the same problems. But I honestly cannot give any drafting suggestion that would deal with that problem.

MS MacDONALD: May I ask a question? Dr Foskey raised the issue about the changes being the most significant since the Magna Carta, and you talked about detaining people. I did actually ask Commissioner Keelty a little bit about this yesterday. I do not know the full detail, but you have said that it is the most significant change since the Magna Carta. I am not necessarily disputing that, but I was of the opinion that during the IRA bombings in London the British had the capacity to lock people up without charge for something like seven days. Is that not the case?

Mr Walker: I do not know. That is my understanding. I understood the question to be in the context of Australian law, as it was introduced here, the English law that became the Australian law and that has been our law since then. But I did understand that there were powers of that sort.

MS MacDONALD: I know it is peripheral, but it does actually impact because we are talking about human rights and looking at the human rights act that has been introduced in Great Britain and, consequently, the Birmingham 6 and the Guildford 4 and the issues surrounding their detention in which torture was used and all that sort of thing. I just had a few things going through my head and I just wanted to ascertain—

Mr Walker: We do not say that there cannot be justification for changes as radical as that. We are not saying that. We are saying that none has been advanced in a reasoned and researched way. It seems to be a knee-jerk reaction to what in fact happened in London.

DR FOSKEY: We are told that that was the spur for this legislation.

MS MacDONALD: Although Mr McDonald did say yesterday that they had been working on it for some time. I got the impression that that might have even predated the 7 July attacks last year. I do not know whether or not that is the case, but certainly he did mention the 7 July attacks in London.

DR FOSKEY: He did, and I thought he indicated that that was a long time. From 7 July to their introduction in December was a long time.

MS MacDONALD: I will leave it at that.

THE CHAIR: It has just been pointed out to me by our very learned committee secretary, who has proved to be a godsend in terms of pointing things out to the committee, that you mentioned the fact that the bill is a very significant departure from traditional legal concepts. In terms of preventative detention, though, I am reminded of the trend, in a couple of states anyway, where sexual offenders who have been charged and convicted have actually effectively served their term remaining in preventative detention, or some form of it, because of the danger they pose out in the community.

Certainly that has occurred in Queensland, and I think New South Wales has recently changed its laws. The difference there is they have actually been convicted of an offence. But there seems to be a trend towards that. It was also pointed out yesterday, again by our learned secretary, that there are about eight ACT acts which provide for some form of preventative detention, ranging from, I think, up to four hours under the domestic violence act through to an indefinite period for people with sexually transmitted diseases. There are obviously various forms of proof required in each of those examples. I think the committee felt that this was terribly unique. It may not be quite as unique as we initially thought. That does not necessarily make it right or wrong, I suppose.

MS MacDONALD: We talked about some instances of detention that are applicable in the ACT, such as four hours for domestic violence, to indefinite for a sexually transmitted disease. That was actually mentioned to Dr Watchirs yesterday and she said the difference is in—her words elude me at the moment, but she was talking about the fact that people are still allowed contact with people and they are not being told that they cannot actually get in contact with any family member or anything.

DR FOSKEY: And proven causes.

MS MacDONALD: And proven causes. So we are looking at very different circumstances from what we are now looking at with the proposed legislation.

Mr Walker: In essence, that is the issue, is it not? It will be an offence to conspire to commit a terrorist act. If you can prove that, we have no problem with the concept that someone can be charged and probably refused bail and so forth. It is a question of what you have to prove. In a domestic violence situation, quite often the facts will be clear and obvious so that the detention can be justified on the basis of something that is known. It is the same with sexually transmitted diseases. There is no doubt that it can be absolutely clear and proven.

When you start to get into the area of what a senior police officer reasonably suspects, though, all you really base it on is suspicion. It is not just a matter of procedure. There are procedures in the ACT and elsewhere where people can be detained without formally being charged either by the police or before a court. That is not the problem. It is a question of what is the basis for the detention. In the case of this sort of legislation, it is suspicion. That really cuts right across the legal and political culture and is inconsistent with the other examples that have been given of detention without formal charge.

To deal with the issue that the chair raised, there is the legislation in some states. I think Queensland has had it for the longest and I think the ACT is considering it, and there were some more submissions that arose in relation to that some months ago. Again, it is the other way around. In that example the individual is a proven and convicted sex offender and it is just a question, then, of how you dispose of someone like that. Do you increase the period? Do you have a maximum prison term for offences like that, which would mean the detention would be served inside the jail, or do you have an arrangement where you are released after a certain time and your movements and dealings are monitored for a period after that, or do you do it under the old parole system whereby you can be released on parole but you are subject to a number of different controls? It is a different model, as we see it. This legislation deals basically with putting people in jail based upon someone's suspicion, and that really is a very radical departure from the jurisprudence we have had.

MR GENTLEMAN: I would like to come back to the difference between possible ACT and state laws and, therefore, the possibility of the ACT being a softer target compared with others. We heard yesterday, and we mentioned it again today, about the Jack Roche case in the ACT. I have been involved with commonwealth security here in Canberra for 12 years. I think that case was mentioned because, as far as I am aware, it is the only terrorist case that has happened in the ACT.

These particular laws are being drafted, as we have heard, on the back of the suicide bombings in London. I am going to ask most of the witnesses, but I will ask you today: do you believe that suicide bombers would concern themselves with the difference between state laws in the selection of a terrorist target? You touched on it before.

Mr Walker: In the case of a suicide bomber, by definition, no. It is not a person who is going to be concerned about whether it is easier or harder to be put into preventative detention.

MR GENTLEMAN: And that is what we are modelling this bill on.

Mr Walker: A suicide bomber may be an individual within an organisation and generally is one of the most vulnerable members of the organisation.

DR FOSKEY: The least powerful.

MR GENTLEMAN: Yes, that is right.

Mr Walker: Yes. The organisation of which that hypothetical person is part might be concerned about the differences because they would be looking at it from, as I say, an

operation of business point of view, to use the commercial analogy. But the individual, having made a decision to do something along those lines, would probably be blithely unconcerned, I guess.

DR FOSKEY: Do you think that such a person is more likely to be informed by a big black headline on the front of a paper than actually looking at the truth of the law itself?

Mr Walker: That is a difficult question. I think not. I think if someone were sufficiently sophisticated to be concerned about which is the best place to operate a business, generally that level of sophistication would be followed up by a degree of research and some analysis, and possibly even some legal advice.

DR FOSKEY: I hope they read the transcripts of these hearings because then they will be much better informed.

Mr Walker: Indeed.

MR GENTLEMAN: Finally, too, if I could, Mr Walker, on association and human rights, last week saw the 30th anniversary of a peace camp that was held here in the ACT. Over 10,000 people attended the Cotter recreational area—

DR FOSKEY: Do you mean the Down to Earth Festival?

MR GENTLEMAN: The Down to Earth Festival with Jim Cairns and Junie Morosi.

DR FOSKEY: Yes. I was there.

MR GENTLEMAN: The Wyuna community.

DR FOSKEY: It was not a peace camp. I can tell you all about it.

THE CHAIR: I hope it was peaceful.

DR FOSKEY: It was peaceful, but it had other concerns.

MR GENTLEMAN: It did. That is right. There were other groups that attended—the Hare Krishna and the Ananda Marga. If these laws had been in place in that period, we would possibly see prominent people like—

DR FOSKEY: Like Dr Foskey.

MR GENTLEMAN: Dr Foskey arrested because they are associated with a possible terrorist group, the Ananda Marga, in particular.

Mr Walker: Arguably it comes down ultimately to a matter of definition, does it not? That is the problem that legislation that is perhaps designed to deal with a particular situation can find itself in when dealing with other situations that it was not intended to deal with. Maybe while the government of the day is relatively benign and well motivated that does not become a problem. But you have got to look at legislation of all sorts, particularly legislation of this type, which radically moves away from existing

jurisprudence. You have to test it under the test of what would happen under a malevolent government or a corrupt police force. I am not suggesting for a second that we are talking about corrupt police working with this legislation, but you have to test it by the severest test, not the most lenient. Of course, under the severest test quite probably the sort of gatherings that Dr Foskey was involved with could put her in breach of the law.

DR FOSKEY: Those were the days.

THE CHAIR: Thank you very much, Mr Walker, for your attendance and assistance to the committee. Thank you also for specifically pointing out a couple of improvements that could be done to the drafting. That has been very helpful.

Meeting adjourned from 12.36 to 2.04 pm

SIMON BRONITT,

MARK NOLAN,

MIRIAM GANI and

PRITA JOBLING

were called.

THE CHAIR: Ladies and gentlemen, I need to read this out to you. These things are usually not terribly relevant for these types of proceedings, but occasionally we get hearings where individuals are involved. It is a general caution. You should understand that these hearings are legal proceedings of the Assembly and are protected by parliamentary privilege which gives you certain protections and also certain responsibilities. For example, in relation to anything you say here, you are protected against the laws of defamation. It also means you have got a responsibility to tell the committee the truth because giving false or misleading evidence will be treated by the Assembly as a serious matter.

As I said, it probably doesn't apply in these proceedings, but I have to read that out to every witness. Do you understand that? For the transcript, everyone nods. If you would please tell the committee your full names and the capacity in which you appear before us.

Prof Bronitt: My name is Simon Bronitt. I am at the ANU College of Law, which formally was the ANU Faculty of Law. I am also the Director of the National Europe Centre. I am here in my personal and private capacity.

Dr Nolan: Mark Nolan. I teach at the ANU College of Law as well. I am here in my personal and private capacity.

Ms Gani: Miriam Gani. I am a senior lecturer at the ANU College of Law. I am here in my private and personal capacity.

Ms Jobling: Prita Jobling. I am a research assistant at the ANU College of Law. I am here in my private and personal capacity.

THE CHAIR: Thank you very much. If you would like to point us to anything in your submission or speak further to that, then we will ask some questions. We have had the benefit of your submission. Anything you would wish to highlight, and we will ask you some questions.

Prof Bronitt: I take the opportunity to make a brief opening statement and thank the committee for allowing us to appear before you. This is a joint submission. In the nature of all joint and several liabilities, we bear joint liability for everything that is in it. Having said that, some of us have expertise in certain fields. In relation to some of the questions you may field, with your permission, we might, in a sense, pass them on to colleagues that might be better positioned to answer the particular question you might have.

We have made various submissions to the anti-terrorism bills since 9/11. This work that we do on terrorism law is part of a large ARC-funded research project on terrorism law and reform. I should say, at the outset, that one of the concerns that we have had, as academics and teachers of criminal law, is that the processes of public policy formation in this field have been very swift and often, in our view, not sufficiently justified by reference to the existing powers in ordinary criminal law.

We think there is a large regulatory shift from prosecution to prevention. Sure, prevention is better than cure, to use the medical phrase, but we are concerned that these powers are not really effectively preventative. We are concerned that they are redundant, in the sense that there are existing new broad offences under federal law—more than 100 offences in fact. We believe that these, when used properly, combined with effective policing and resources for effective policing, will lead to incapacitation and promote deterrence

You have probably heard that countless times by various people, and people rebutting that proposition. We don't propose to dwell on that really because we can move from that, if you like, principled objection to more specific detailed objections relating to the proposed legislation. You obviously have the benefit of our written submission.

We have clustered, in summary, four points that we would like to highlight. One of the points is the jurisdictional issue, which is around paragraph 17. The bill is presented as part of a national scheme, but there is no model or uniform legislation really if you compare it to something like the Criminal Code, which took 10 years and still is only a project in train. There was no template here for the Legislative Assembly to follow. Certainly concern is expressed about lack of consistency. It may be problematic. We think it is pretty endemic in our system of federal and state-territory criminal law.

The quest for uniformity, however, we think, need not be a rush to the lowest common denominator and, in some respects, the federal model might be regarded as the lowest common denominator in terms of human rights protection and procedural safeguards. We believe the ACT has attempted to set higher standards and we believe that these are desirable. They are not, I think, as often is suggested, and was suggested I think yesterday, antithetical to good policing.

It is often suggested, and a common myth in fact, that due process safeguards obstruct policing, and that is certainly sometimes fuelled by the media. But empirical research dispels that myth. You can have high levels of procedural protection and you can have effective policing. A good example of that is the taping of interviews in the ordinary criminal procedure, largely introduced to deter verbals—the fabrication of confession evidence—and resisted by police. What it has meant now is that police in this jurisdiction, as in others, are enthusiastic users of that technology. They have recognised that not only has it enhanced the credibility of their evidence but in fact it has largely led to the reduction in objections to that type of evidence. I believe that some of the claims that are often not based on evidence. And I know that one of the concerns that the drafters of the bill have had to make sure that the policy is rooted in evidence-based policy is that you can have high levels of procedural safeguards and effective policing.

Moving on to our second point, the criminalisation threshold, there are several offences

contained in this bill. Some are applied to police officers. It is unclear in respect of most, if not all, of these offences whether it is intended that these should be strict or absolute liability. That is a technical term relating to whether or not the offence requires a specific level of fault in relation to the offence. We believe that some of these offences, for example, relate to the mistreatment of suspects, detainees, or are bars on questioning and breach the bar on questioning.

We think all the fault elements should be carefully reviewed and that defences, if they are to be included, should be expressed clearly. If there are duties on the police relating to due diligence, they should be articulated in the legislation rather than left to the courts to develop subsequently when individuals are prosecuted. I think there are some concerns about the nature of some of the offences which apply sometimes to police officers, sometimes more generally to other individuals.

The third point we want to make is really about the aims of the bill and some confusion over what the aims of the bill are. Some of them are stated—prevention of terrorist acts, preservation of evidence—but some are implicit. I think the implicit aspects of the aims relate to evidence-gathering and investigative functions. I think the drafters have, in their mind, tried to delineate between, on the one hand, preventative functions and, on the other hand, custodial-investigative functions.

However, there are loopholes. One loophole that we have identified relates to the bar on questioning. It is true in the bill there is a prohibition on the admissibility of questioning that goes on during preventative detention. Our concern is that is a fairly narrow provision and may not be an effective deterrent really to the use of informers, covertly, to gather incriminating evidence that could be subsequently used in ordinary criminal proceedings. We are also concerned about the covert use of surveillance, with or without warrant, during preventative detention. There seems to be no bar on engaging in that kind of investigative activity. I think those loopholes in the legislation need to be addressed.

Our fourth cluster of concerns relates to the levels of rights protection—the right to silence, legal professional privilege, the right to counsel, and so on. There are indications in the bill that there is an intention to ensure high levels of protection of those classic procedural rights, but we think, particularly for rights like the right to remain silent, detainees need to be aware of these rights in order to be in a position to exercise them. So we feel that there should be, in a sense, a caution in any process of detention that individuals have a right to remain silent.

Similarly, in relation to the right to counsel, we think that individuals should be advised of that right and that the right to counsel should not be limited merely to discussion of challenges to the legality of their detention. Clearly, individuals who may be subject to detention may be simultaneously, concurrently, under investigation for a range of criminal offences and, one would hope, terrorist act offences under the commonwealth Criminal Code. In those circumstances they should have an unfettered right to legal counsel.

Our concern also relates to the monitoring of lawyers and when they are communicating with clients. We think that the determination of those conditions, which essentially forfeit the classic legal professional privilege, should not be at the behest of a senior

police officer but rather should be something determined by a judicial officer. So our proposal borrows from the search warrant processes relating to search warrants exercised over lawyers' offices. This is around paragraph 40.

We believe that, in relation to any monitoring of persons detained, that should be done without police involvement. The police obviously would be in a position to determine that they would like certain communications to be monitored, but they shouldn't have access to the transcripts of that evidence. Rather, it should be taped, sealed and presented before a Supreme Court judge to determine whether or not these communications are privileged. That would be consistent with the practice in the field of search warrants over potentially legally protected communications under legal professional privilege.

They, I think, are some of our main points. Obviously our submission ranges more widely than that. It is obviously quite detailed. We are happy to take questions in relation to any of the matters we have raised, either in this opening address or in the submission.

THE CHAIR: Thanks for that. I must say, from the outset, I don't suppose any of the committee and very few people who appeared before it were privy to the COAG discussions and the briefings COAG got in terms of why we have this legislation, to start with. Suffice it to say we have a diversity of premiers and chief ministers plus the Prime Minister there. Our Chief Minister came away with the view, which he has stated on several occasions, however reluctantly, that this type of legislation is necessary.

This is the ACT draft bill. Other states have introduced and passed, I think, their bills, as has the commonwealth. We probably never will be privy to that, but obviously it was sufficient to have a diverse group of premiers and chief ministers agree to do this. So I suppose we have to take that into account and accept that at its face value. We have got it. I may have got some of that wrong. Are you in fact privy to any AFP or ASIO briefings on the terrorist threat to Australia? We certainly aren't. I ask you in case you might have been.

Prof Bronitt: I am sure I would be committing an offence if I divulged them to you.

THE CHAIR: True. Maybe not if you say you are privy to briefings. I think you can say that and then not go any further. I go to your four points. Thank you for encapsulating them. You indicated that one of the problems is that there doesn't seem to be any model legislation, unlike the Criminal Code. The ACT, on both sides of the fence, has got a pretty proud history of supporting the Criminal Code. It is slowly progressing. Some other states are a bit tardy, but that is the model. We have model legislation. There are other bits of model legislation we enact from time to time here.

On that, though, Dr Helen Watchirs stated that the New South Wales legislation was sort of a model; it was all done very quickly. She also said that was done before the commonwealth legislation, but that was used as an informal template. I wouldn't put it any higher than that. I don't think her evidence went any higher than that. Are you aware of that?

Prof Bronitt: I was legal adviser to the New South Wales Legislation Review Committee, which is the committee, similar to this one, that advised on that bill. I would say that there is loose cooperation between the drafters of the legislation around

Australia. They have worked with a consistent principle in terms of length of detention, but in terms of the conditions, the criteria and the drafting styles, from the various bills I have reviewed, I wouldn't say that New South Wales has provided a template. Of course the legislative process for each jurisdiction imposes its own peculiar concerns. In our jurisdiction it is clearly compliance with the Human Rights Act that is foremost in the minds of legislators. In other places the concerns are expressed in different ways.

THE CHAIR: It might be impossible, but do you think it is desirable to have template legislation in something like this, where there is largely total consistency? You will never completely get it, I am sure.

Prof Bronitt: I think consistency would be helpful, but I actually see one of the issues as not so much consistency, or even broad harmonisation, but rather cross-jurisdictional enforcement, cross-border enforcement, which is, as far as I can see, not addressed anywhere in any scheme. This is the issue: you have a detention order taken out in one jurisdiction, say in New South Wales; the person may or may not be resident in that state; how on earth are the various law enforcement officials to operate? There doesn't seem to be a mutual recognition system. If you take, for example, our scheme for protection orders, we have elaborate schemes of recognition of those orders in the field of domestic violence. Unless I am misreading something—and I don't want to mislead anyone—from my research, I can't see anything in any proposal that I have examined.

The concern, of course, is that each jurisdiction is claiming universal jurisdiction—the right to detain people anywhere in the world in relation to things that may have no direct connection to the territory or in fact Australia. The breadth of the terrorism act definition makes it clear that these things extend far beyond our own national interests to engage in the war on terror at the international plane. It seems to me that the potential scope for these cross-border issues is realistic and not adequately addressed. So uniformity to me seems to me to be a secondary concern. In a federal jurisdiction we just live with a high degree of inconsistency in legislation. I am not a great believer personally of having everything nice and neat and that having all the same serves anything better.

THE CHAIR: I see your points in paragraph 22 in relation to some practical difficulties and I think you seem to make a good point. Going on to the second point you made, you say that the ACT's higher standards of proof are not really anti proper policing. You mentioned the records of interview, which I'm certainly well aware of and always thought were a good idea. They were around at the time I was finishing prosecutions and they certainly have proved to be very effective for everyone concerned. We do seem to have a higher standard of proof, and there are some different standards there, as pointed out to us in a couple of other submissions. The commissioner of the AFP, who was here yesterday, did seem to think that that was a real problem.

There is the practical problem of the police having to learn two or three different ways of doing things, depending on where they are, which is a pain, I suppose, for the actual police officer; but I suppose they're used to that, because that applies in many areas of Australia. It's not desirable, but it's a fact. He indicated that he did have very considerable concerns that this would actually make it harder for them. He had fears about the ACT very much being a target and he did feel that there was a very strong need from a policing point of view for general consistency across the country and that this particular legislation caused a number of difficulties. That is different from your

statement that, just because it's got higher standards, it doesn't necessarily mean it's anti proper policing. I perhaps see that a bit differently from the question of the verbals and the recorded interviews, on which I agree with you.

Prof Bronitt: It seems to me that there's a constant rhetoric in policing around Australia, and it's not particular to the AFP, the federal jurisdiction or the ACT, that they don't have enough powers. I don't even think necessarily that the objection is uniformity, because the federal/state/territory divide makes AFP policing a very complicated cooperative venture anyway. So cooperation I don't think is the real objection. The probable objection underlying that sentiment is that they want the broadest set of powers with the minimal perceived procedural impediments to the exercise of those powers. I suppose I come from a different point of view—and it's not an idiosyncratic view; it's one shared by many in the legal profession and on the bench—that police power should be exercised responsibly within a clear set of legislative criteria and should be subjected, particularly when it is rights invasive, to judicial oversight.

THE CHAIR: I don't think he was actually disagreeing with that, and nor was Mr McDonald from the Attorney-General's Department; maybe you just have a different interpretation.

Prof Bronitt: It's the level of threshold. I suppose it's the level of evidence that's required, or the criteria that have to be met in relation to that, but I feel quite strongly that the legislation should respect principles that we have deemed to be fundamental. The burden really is on the law enforcement officials to produce evidence that this legislation, this procedural protection, is actually going to prevent them engaging in their policing task, beyond mere assertion. I think that's very difficult for them to establish when there's plenty of evidence to show that complying with search warrant procedures, telephone taps, listening devices and surveillance warrants does not interfere with good effective policing. In this area, when we're dealing with preventative detention, procedural threshold should be at its highest, not at its lowest.

THE CHAIR: It may make it hard. Obviously, if there is a higher standard, it makes it harder for the court to actually be satisfied. We're not privy to this, but there are obviously some very strong reasons, which the premiers and the PM have accepted, for this type of legislation. Even they say it's extraordinary.

You mentioned in your third point that you're concerned with the covert use of surveillance. I've written down "no bar". Surely in something like this, though, when we're dealing with shadowy groups—we're dealing with, effectively, people who want to destroy as many innocent citizens as possible and cause as much damage as possible—covert surveillance is an essential tool for law enforcement agencies. It's something that's been used in Western democracies for several decades and is a crucially important tool, I would think, in terms of apprehending or stopping people from causing absolute mayhem and wreaking havoc or death on ordinary law-abiding citizens.

Prof Bronitt: My objection isn't to covert surveillance generally. There's a whole regime of telecommunication interception and surveillance devices legislation that's being used all the time in relation to terrorism activity, and I have no difficulties with that. My concern here is the more specific one relating to the apparent bar in the legislation relating to questioning during preventative detention. There is the idea that,

because the detention is for preventative purposes, police are not permitted to engage in investigation. That, you could say, is the ostensible aim of clause 55, making it an offence for police officers to ask questions beyond the mere elicitation of personal identification details to ensure they've detained the right person.

My concern here is that, while that is, on the surface, an indication that no investigation is to occur, the bill does not prohibit covert surveillance, so you could set up listening devices, you could equip other detainees, in fact decoys—people who aren't in fact detainees but posing as detainees. All of these might seem like Hollywood fantasies, but in fact they're standard policing practice around Australia, to use informers to conduct what we call covert interviews. This has been a matter of High Court consideration in a case, which we mention in the submission, and there are some real concerns here about the elicitation, unfairly, through interception, of incriminating evidence, which would go under the radar in relation to this prohibition on—

THE CHAIR: But there are cases on it.

Prof Bronitt: Swaffield and Pavic.

THE CHAIR: There are cases on that anyway.

Prof Bronitt: My view is that we shouldn't wait till the matter gets to the Supreme Court, to a prosecution, to see this evidence then thrown out. We should regulate clearly what the limits of any covert surveillance of people in detention are. It seems at one level there is an intention here to prohibit investigative activity during preventative detention. Yet I suppose what I'm pointing out here is that there is what I call the covert loophole. There seems to be nothing stated about covert surveillance, passive surveillance or the use of informers, and I feel that these are issues that you could regulate now as best practice, or you could just leave it to the courts eventually to come to terms with this at some point.

THE CHAIR: Surely that would absolutely stymie the ability of the authorities to prevent a terrorist act if you went too far that way. This is all a question of balance. We've had a number of witnesses who, although they might have slightly different views on it, say that it's a question of balancing the rights of the community with the rights of an individual. Yes, this is very different legislation, although we have had it pointed out to us that there are some ACT acts in which there is some form of preventative detention, which until yesterday we were pretty unaware of. Yes, it is largely novel, this sort of legislation, but what it's actually aiming to counter are pretty horrendous, horrible acts. Even though we've had some in Australia before—someone's in jail in Perth for wanting to blow up the Israeli embassy, and Ananda Marga—

DR FOSKEY: Chair, could I interrupt briefly, because there are only 15 minutes with these really valuable people.

THE CHAIR: I appreciate that. Surely there's that rights-balancing issue, including the very legitimate right of the community under section 9 (1) of our Human Rights Act to live. That will be my last question; I appreciate my colleague's concern.

Prof Bronitt: It's a very difficult one to answer succinctly and swiftly, other than to say

that some rights are fundamental and I'm not satisfied that many of the behaviours that we are concerned about and that the preventative detention provisions are aimed to address can't be addressed through the provisions of the ordinary criminal law, and more effectively dealt with through prosecution. With terrorist act offences in the commonwealth or abroad—anyone who is plotting to kill and cause mayhem—these are all crimes that can be dealt with under the existing criminal law. So I have a very strong concern about the unintended effects of this legislation.

THE CHAIR: Thank you, professor.

DR FOSKEY: Thank you. I'm sorry to interrupt you, chair, but there's just—

THE CHAIR: That's all right; I appreciate the limited time. That was my last question.

DR FOSKEY: I really do want to commend you on your submission, because I think it was extremely helpful and I'm assuming that a lot of your suggestions will be taken into account when the bill is redrafted. We'll see how we deal with those in our report. I'm going to impose upon you a little more. I was wondering whether you could consider preparing a list of recommendations. One of the things that we've heard from people who perhaps more share your views is that the federal government's new terrorist laws, and by implication our laws, are the biggest changes to the rule of law since the Magna Carta. Would you like to comment on that?

Prof Bronitt: I'm the one that teaches legal history, so the Magna Carta is usually overrated. Most of our procedural protections are actually of recent origin in the criminal process. I think one of the great myths is that the Magna Carta, although we have a monument here to it, is significant in the broad sweep of history. All the procedural safeguards and due process in the things that we're familiar with are a product of the 19th and 20th century and they were hard-fought battles. Yes, these things do go against the trend of focusing on prosecution as the principal way in which you address wrongdoing.

I worry about preventative detention. I have seen it in the UK, in my life before I emigrated to Australia. I've seen the effect it has wrought on families in Northern Ireland and I can point to some empirical evidence that will show you the levels of rates of murder on the IRA, before detention, internment, was introduced and after. So I think these are very significant pieces of legislation and they are uncharacteristic of at least the trend in the 20th century in our criminal justice system.

MS MacDONALD: I have asked about the issue of preventative detention laws as they applied in the UK during the IRA era and haven't been able to get much information. Can you elucidate for me what that actually has entailed and if those were in play prior to 7 July last year?

Prof Bronitt: The commonwealth submission that we did, which I think we appended, contains some of the detail on that, so I could direct you to that. Certainly you can see that in some senses the Northern Irish detention law had the veneer of judicial involvement later in its period of implementation in the 1970s. It detained thousands of young men fitting a particular profile, for administrative purposes, for preventative purposes, during which they were subjected to inhuman and degrading treatment. There

are clearly safeguards here against inhuman and degrading treatment, but I have to say that in an era of fear and insecurity the boundaries of what is inhuman and degrading get pushed. I'm sure that, if you talk to any of those investigating officers of the time, many of them would say that they didn't think they were doing anything other than what was in the public interest. What they did do, however, was to galvanise and radicalise a whole community, a republican community, against the Stormont government, and the rest is history. The troubles really date from internment. There were some isolated and growing tensions there, but the real troubles erupted post internment. So that's one of the concerns.

We talk about evidence-based approaches to policy. I just talk about history, and you can learn things from history. I think most people who have studied that period of British history regard it as an unqualified disaster. The truth is that, if you had introduced internment before 7/7 in England, you would probably have radicalised a much larger segment of the Islamic community of young men between 18 and 21 to take up arms, before those people took to the London tube.

DR FOSKEY: Thank you for that. We've heard that both this bill, and more incredibly, I suppose, the federal government's bill, are not in breach of Australia's international treaty and human rights obligations; we were told that yesterday. Would you agree with either of those propositions?

Prof Bronitt: We're not experts in international human rights law, so I think we would probably defer to our colleagues.

DR FOSKEY: To Professor Charlesworth?

Prof Bronitt: Yes, we'd just be faking it.

DR FOSKEY: Fair enough. At least we know that you know what you're talking about when you do talk. You make an interesting point on page 2 of your submission to the federal inquiry that under criminal law the onus is on the police to ensure that a suspect is dealt with fairly and in accordance with the rules governing detention and questioning in order to ensure that the strength of the police case is protected at the final hearing to establish guilt. With preventative detention orders there's no such imperative acting to encourage police to respect the rights of the detainee. I wonder if you could comment on this aspect of the shift from prosecution to a quasi-administrative detention regime.

Dr Nolan: Can I clarify whether you are referring to the ACT submission or the Senate submission?

DR FOSKEY: The federal one, the submission to the federal inquiry, page 2.

Dr Nolan: Can you please restate that again, please?

DR FOSKEY: Yes. Under criminal law the onus is on the police to ensure that a suspect is dealt with fairly, but under these preventative detention orders there's no such imperative acting to encourage police to respect the rights of the detainee. In the first instance, under criminal law it's because of getting evidence to establish guilt and having that evidence as admissible.

Dr Nolan: Yes, a number of times in the exposure draft you see inadmissibility rules, or admissibility rules, being used as the way to control police behaviour or the behaviour that persons exercise against detainees. They're not always police officers it seems. So when you are working towards prosecution as the end point, using admissibility rules to control behaviour seems sensible. Someone who is gathering evidence for a prosecution will deal with a detainee who is detained for questioning in a way that will preserve as much evidence for their prosecution. If a preventative detention regime is not focused on prosecution, any of the admissibility rules that we have in this legislation may not be as much of a protection of the rights of those detainees as they would be if, for example, police officers were detaining suspects for the view towards charging and prosecuting.

So if we were in the standard criminal law system, prosecution is the goal and those admissibility rules should protect the rights of the detainees who have been questioned. We don't have that goal here. The goal here it seems is preventative detention; it's not aimed purely and simply at preserving evidence for prosecutions and not losing evidence to inadmissibility.

Ms Gani: Can I just add something to that answer? That's one of the reasons why the offence provisions that do relate to police officers are incredibly important, because admissibility is not of the same level of importance. Instead, the drafters have tried to put offences in to contain the behaviour and to make appropriate the behaviour of the police officers. But the offence provisions as they're currently drafted are quite vague and do not spell out some really important duties that might be appropriate to impose on those police officers if you are then going to make them criminally liable for their behaviour. So the offence provisions step in to impose on the behaviour different constraints that admissibility does in other contexts.

DR FOSKEY: Just to follow on from that: in your submission to us, in paragraphs 34 to 39 you also point out the only safeguard against inappropriate questioning of the detainee, even by covert means or by someone other than a police officer, is the rather remote possibility that a police officer may be prosecuted under the act. Do you recommend that traditional procedural safeguards regarding questioning should be incorporated into this bill?

Dr Nolan: That is my view. To take you to a very specific example of that, in paragraph 45 of our submission there is some discussion that the persons, not necessarily police officers, who are able to question detained persons need to record those questions in that questioning session, but for some reason there's a slippage back to use of audio only, rather than video and audio. So there's an example of where this bill is proposing that those people who question the detainees will question them with a standard which is much less than currently exists in the Civic watch-house in the ACT. So video and audio recording in the ACT is what protects police officers and those detained for questioning in the ACT at the moment. That same standard is not asserted in this legislation.

DR FOSKEY: I have observed, after hearing quite a number of people and reading the submissions, that there seems to be a real divide between two cultures here, and that's part of the issue. We have the law enforcement culture and we have the lawyers, human rights and other groups who are more focused on the law. It is so important at the moment to find ways in which ideas can be heard and discussed between groups. You

are saying things today that would have been fantastic if they could have been said yesterday to the people who put certain views. We may write a report that will incorporate these views, but it would have been great to have had some more dialogue, given that I believe the same intent is held by both sides, although I know there are a multitude of viewpoints in between. I'm just wondering if there are fora at which you can share your ideas with law enforcement officers and the Attorney-General's Department at the federal level?

Prof Bronitt: The answer is through the ordinary processes of parliamentary democracy, through committees like this and through opportunities to make submissions. It's very frustrating, because it's so time consuming, to engage in this kind of work and we do it because of our commitment to the public interest. I should say that there is also this sense that there is a polarisation—the them and us. We are all deeply concerned about the threat of terrorism, but we want things to be effective and best practice. Similarly, it's not that we want to hamstring the police. No-one wants to go back to the good old days where there was no law regulating police investigation; it was all left to vague Judges' Rules and conventions.

We're in favour of a highly regulated approach. The point that you're raising is the issue of the involvement of law reform committees or law reform commissions. I think one of the big mistakes is our sense that we must act now—even though this legislation is going to be here for a decade, possibly two, maybe with us forever—is that we're not putting into the processes of legislation formation the investment of a proper law reform commission report that can look at international best practice. That isn't really what John Howard picks up from his visit to London and who he's last spoken to there as to what works. It requires a detailed technical survey of legislation and law enforcement policies being trialled elsewhere, and doing empirical work to see whether those jurisdictions that have enacted those laws are actually yielding results or making things worse. That's expensive and one of the frustrations for us, I suppose, is to see that that isn't undertaken and that, in the rush to be seen to be responding quickly, we don't sacrifice the rigour of legislation formation.

DR FOSKEY: Another point made is that we haven't seen the analysis of the existing body of law that we had to indicate why it's necessary to have a whole new layer of law. That would complement the work that you are talking about.

THE CHAIR: I'm told by the secretary, by the way, that there's a national security conference at the end of the month, where I suppose all the diverse views can get together and perhaps take up the point that Dr Foskey has mentioned to you.

Prof Bronitt: I was at the Homeland Security Conference. You're quite right to identify these two cultures. The people who are concerned with the regulatory and privacy issues are secreted into one session in the afternoon and then the operational enhancement—

DR FOSKEY: So there are separate strands.

Prof Bronitt: It's to do with the more militaristic culture of law enforcement that is clearly detectable in most countries in the last 30 years. It's a very general academic, sweeping statement, but I think there is definitely a shift from the idea of police as citizens in uniform to a different type of policing, which is with a much heavier emphasis

on proactive policing than they would have been prepared to countenance 20 years ago, 30 years ago.

MS MacDONALD: In an ideal world would there be a bill to go through and, if so, how long do you think it should take to do? That's a very loose question, the last part.

Prof Bronitt: You can do law reform very quickly if you've got the resources. Look at the Australian Law Reform Commission: six months. We've already been procrastinating on this one since COAG, August. If you put the commitment and the resources in there, you can move very quickly. People are there to work on these things. Anyway, we stand outside of government, so it's a different role for us in terms of responding to proposals.

Ms Gani: Can I just add to the first part of your question? It's arguable that everything that this bill does can be as effectively done by the commonwealth offences legislation, where the focus is also on prevention, because the definition of "terrorist act" in that legislation includes the threat of action. So you can prosecute at a very early stage under that commonwealth legislation and perhaps the focus should be on arrest and prosecution, rather than preventative detention, taking things back and then trying to get a prosecution out of it.

Prof Bronitt: One of the questions that I raise is: how effective are short detentions of 14 days going to be anyway? Locking people up for—

DR FOSKEY: Is there anything you can suggest that we could do, apart from just locking people up, to be effective?

Prof Bronitt: If there are people who are engaging in terrorist acts, or threatening to engage in terrorist acts, clearly the first strategy must be prosecution under the available offences, whether they're territory based or commonwealth. That would be our fist line of defence, or attack, and it seems to me that's obviously the right way to go. So for us there's a question of redundancy, whether this legislation is needed, whether it's therefore going to have unintended effects, if it's going to be used for different purposes rather than prevention, which might be to do with managing persons of interest rather than people who are really engaged in terrorist action. So, again, it's hard to see how this legislation adds to the existing panoply of offences that exist in Australia, but we see the danger of the unintended effects that preventative detention might have.

MR GENTLEMAN: I realise the time constraints, but I'm just wondering if you may be able to give us a constitutional comparison and why we've been asked to draft these laws. Can you explain to the committee why the federal legislation can only preventatively detain for 24 hours?

Dr Nolan: Again, we'll take the same approach that we took with the human rights questions. As criminal lawyers we've put a lot of effort into this submission talking about the criminal procedure issues, the issues of offence definition. We're not as confident talking about the constitutionality of federal legislative power versus the territory's legislative power; so maybe we should leave it there and hope that you have got some guidance from constitutional lawyers as well during this committee.

DR FOSKEY: We haven't actually.

MS MacDONALD: Fiona Wheeler has agreed to think about doing that; she's yet to confirm that she's—

Prof Bronitt: I think the short answer, and it's an untutored one because I don't really know, is that I think they just received advice from a senior constitutional lawyer that they would be safer in terms of constitutionality by limiting the period of detention to two days.

Dr Nolan: We have referred to some of those issues in the Senate submission. They're to do with the Supreme Court exercising their functions as a court and the extent to which that is inconsistent with chapter 3 of the commonwealth constitution. The cases such as Fardon that are referred to in our Senate submission, which included input from Dr John Williams, a constitutional lawyer, answer some of those questions about why the commonwealth may be nervous about extending detention under commonwealth powers beyond 48 hours. But it does put states and territories in an interesting position, because they pick up the detainee 48 hours after detention, if it goes that way, and then have to cope with the rights and interests of the detainee for a much longer period—up to, for example, an extra 12 days. So, if that's the case, the states and territories have to take more pause to think about the interests of detainees than the commonwealth needed to, because for constitutional reasons they were not prepared to detain people for longer than 48 hours. But some of the constitutional arguments are in our Senate submission that we annexed to the submission to your committee.

THE CHAIR: Ladies and gentlemen, thank you very much for your assistance and for your very detailed submission.

Meeting adjourned from 2.57 to 3.09 pm.

JON STANHOPE,

RENEE LEON,

PETER GARRISSON and

BRETT PHILLIPS were called.

THE CHAIR: Thank you all for attending. I need to read this out. No doubt you have heard it before. You should understand these hearings are legal proceedings of the Assembly and are protected by parliamentary privilege, which 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 public hearing, but it also means you have got a responsibility to tell the committee the truth because giving false or misleading evidence will be treated by the Assembly as a serious matter. Naturally, everyone clearly understands that; everyone is nodding. Thank you very much. Could you please give your full name and the capacity in which you appear before the committee.

Ms Leon: Renee Leon, Chief Executive, Department of Justice and Community Safety.

Mr Stanhope: Jon Stanhope, Attorney-General.

Mr Garrisson: Peter Garrisson, Chief Solicitor.

Mr Phillips: Brett Phillips, Acting Deputy Chief Executive.

THE CHAIR: Thank you, attorney, and your officials for attending and for following the inquiry. We have had a wide range of submissions, generally of very good quality and with a lot of different views. Are there any comments or opening statements that you wish to make in relation to the draft bill that the committee is looking at?

Mr Stanhope: Thank you, Mr Chair. I have a statement which I wish to deliver. Might I just say, however, that I am grateful for the invitation to attend before the committee. We are very happy to assist the committee in exploring issues in relation to the Terrorism (Extraordinary Temporary Powers) Bill. I would propose to make an opening statement. I am very pleased that Ms Leon, the Chief Executive, Mr Garrisson, the Chief Solicitor, and Mr Phillips, the Acting Deputy Chief Executive of the department of justice, are in attendance with me today. Either I or any of them, in relation to more legal or technical issues of the bill, are very happy to assist the committee in response to your questions.

I would like at the outset to provide some framework for the development of the bill which is under investigation today. As we are all aware, each of us is here today because Australia is having a debate that I believe essentially it shouldn't be having—a debate about which of our freedoms, rights and liberties we are prepared to surrender in return for greater physical security. The debate we ought to be having, of course, is how our rights can be secured, how our democracy can be protected from the threat of terrorism, not the extent to which we are prepared to do the terrorists' job for them and give those things up without a whimper.

I believe—and it is inherent in this legislation—that we can protect our rights and secure our democracy while still responding to the heightened threat posed by terrorists. I believe that this bill, which is before the standing committee, achieves these aims. I don't believe that the ACT's laws will leave the territory exposed. All that this exposure draft will do is ensure that we do not lightly surrender the very way of life that we seek to protect from terrorist attack.

Some comment has been made in the past few days about inconsistencies between the ACT's bill and the commonwealth's suite of counter-terrorism laws. I have two observations to make in response to those comments. By and large, those inconsistencies are a consequence of the fact that the ACT has consciously sought to draft laws that comply with our human rights obligations in consistency with the rule of law. It is a mark of how far we as a nation seem to be straying from our democratic traditions and the rule of law that a government can be criticised for seeking to uphold basic fundamental rights and respect for the rule of law. Once upon a time, of course, governments were pilloried for seeking to undermine human rights and the rule of law.

The second observation I would make is that the provisions of the ACT bill draw on the best, fairest and most human rights compliant provisions contained in the equivalent complementary legislation of the states. We have gathered together the best of the best. This is not extraordinary legislation, on-the-edge legislation; it is in fact model legislation, sober legislation.

I was interested yesterday to hear that, while the AFP commissioner was keen to label the ACT's bill unacceptable in a number of respects, in response to a question from a member of the committee he said that there was little need to engage in or comment upon the complementary legislation of other jurisdictions, on the ground that those laws differed so little from the commonwealth's template. In fact, as I have explained, virtually every provision in the ACT's model exposure draft draws on provisions from other states. If we are exposed, as described by Commissioner Keelty, so is every other state.

In fact, I suspect that the real reason for the lack of commentary on those other legislative packages probably has more to do with the fact that there has been little opportunity or encouragement to comment. There has been no parliamentary inquiry, for instance, in any other jurisdiction.

The ACT has actively sought the comments and opinions of not just the police but of a whole host of interested parties. We want community involvement; that is why, unlike the other jurisdictions, we went down the path of issuing an exposure draft and conducting these hearings. We sought, and we now warmly welcome, the opinions of the AFP and of others. I look forward to seeing what this committee, your committee, makes of those comments and opinions and assure you that all comments and your report will be considered most carefully and most thoroughly.

While the government has sought to draft the best law possible, we are, of course, open to persuasion. But in the spirit of robust and open debate, I would like to comment on a couple of the issues raised by Commissioner Keelty yesterday. No-one denies, and no-one has ever denied, that the national capital is a potential terrorist target. I believe it is. That is why I agreed at the COAG meeting of 27 September to introduce the

legislation which you are investigating.

Indeed, Commissioner Keelty has, in the past, commented on some of the more obvious reasons why all Australians might possibly face a heightened risk of becoming victims of a terrorist attack. Commissioner Keelty, of course, notably commented on our involvement in the invasion of Iraq and the consequences of that. I admire Commissioner Keelty for confirming what all Australians know to be true but which the Prime Minister and his ministers deny.

But to imagine that terrorists are going to sit around comparing the language in the New South Wales and the ACT provisions and do a comparative analysis of issues in relation to preventative detention orders and decide that, because the ACT requires a court to be satisfied on reasonable grounds, while New South Wales only requires that it be satisfied, they will choose an ACT target rather than a New South Wales or a Victorian target is, frankly, a bit preposterous—that Osama bin Laden has his lawyers doing a comparative analysis of the ACT, New South Wales and Victorian legislation to determine his next target. Perhaps Commissioner Keelty can cogently argue that the ACT requirement that courts have reasonable grounds for granting a preventative detention order will impose an extraordinary burden upon the system but, on the face of it, it is difficult to see that the requirement is a particularly onerous one.

If one is not to have reasonable grounds for the application, what tests should be applied? Gut feeling or a vague apprehension? My advice is that the ACT wording imposes no additional burden on the courts or any practical obstacles to the issuing of a preventative detention order. I would be keen to see any evidence to the contrary. I note that Commissioner Keelty provided no such evidence.

As for the suggestion that the ACT laws will result in a lower level of protection for sensitive information or proceedings, here in the ACT, as everywhere else, we will be subject to the National Security Information (Criminal and Civil Proceedings) Act of 2004. The commonwealth Attorney-General's Department, I am advised, alluded to this in its own evidence yesterday.

Still, as I say, the government are open to persuasion on the wording of the draft. We have no interest in introducing unworkable legislation; we have no interest in imposing administrative hurdles for the sake of them. I reiterate: that is precisely why we are going through this process.

I might say that, while in many ways I am quite proud of this draft, I also regret the fact that such laws are even needed. This is in many ways quite unpalatable legislation. As has been pointed out, what we are contemplating here is the incarceration, albeit temporarily, of individuals against whom no criminal charge has been laid. I never imagined that, as Attorney-General, I would be required to consider laws of this kind but I accept, reluctantly, that we have come to this pass.

What I do not accept is that an exercise of such importance and such gravity should be conducted in an atmosphere where political leaders feel compelled to compete for the title of toughest on terrorism. I have no intention of engaging in such a contest. What I will do is deliver laws that will protect the people of Canberra without needlessly undermining their human rights and their rights under the law.

The government's exposure draft has been developed in light of various legal opinions on human rights and constitutional issues. It also takes into account the bipartisan Senate committee's recommendations in relation to the commonwealth regime, most of which, of course, were simply brushed aside and ignored by the federal government. A number of safeguards, including, as I have said, many incorporated into the legislation of other states that were considered the best in terms of human rights compatibility, constitutionality and adherence to established principles of justice have been picked up in this bill.

Making the ACT bill compatible with Australia's international human rights obligations has not diminished the effectiveness of the law in comparison with the commonwealth or state laws, nor has it limited the scope of the laws or the community's capacity to tackle terrorism. This draft is consistent with the COAG agreement, subject to adjustments necessary for the Australian Capital Territory. It shows that it is possible to fully integrate respect for human rights with tough and effective counter-terrorism measures.

Thank you, Mr Chair. Either I or my colleagues would be happy to respond to any of your questions.

THE CHAIR: Thanks for that, attorney. One thing we have stressed with a lot of witnesses is that probably you, Commissioner Keelty and possibly Mr McDonald from A-Gs are the only witnesses we have had who might have been privy to what was discussed at COAG. In a way, on the threshold question, we are operating in a bit of a vacuum. You came away from COAG and you obviously had very disparate views from the Prime Minister and probably other territory and state leaders on this. You came away from COAG, as did your colleagues, saying, "Yes, there is a need for this type of legislation, however regrettable that might be."

We don't know the detailed basis of what led to that. There seemed to be some threat to this country, to the states and to the ACT even, that caused this type of legislation to be introduced. Obviously we can't go beyond that, as a committee, but we have to operate, I suppose, not knowing the full reasons, as you might and the commissioner might. Obviously there are those reasons. I suppose that is a bit of a threshold thing for us, and we have to operate in a bit of a vacuum there. You obviously were satisfied, as were your colleagues, that there was a need for this type of legislation, because it is very different from the norm. We accept that.

Mr Stanhope: Let me respond to that for the sake of context, Mr Chair. As you are aware, COAG had the benefit of advisings from the directors-general of ASIO and of ONA and the Commissioner of the Australian Federal Police. We were privy to detailed briefings on an assessment of the risk of terrorism in Australia. I have previously spoken of the nature of that particular briefing and the basis on which decisions were made. At the end of the day, I and each of my colleagues, of course, have to invest significant faith in the integrity, the capacity and the professionalism of those people who lead Australia in relation to security, intelligence and policing. They are bound in duty to protect the community in relation to issues such as terrorism.

You, in your comment, basically suggested we need to take, as a committee, as a matter of fact or faith, that there is a particular threat from terrorism that we are facing. So do

I and so do all other members of COAG. We received briefings but, at the end of the day, one is faced with making a decision on certain advice that the directors-general of ASIO and ONA and of the Australian Federal Police are providing me with. It is their professional opinion that we face a significant or substantial real risk of terrorist attack in Australia. We, as professionals, believe that powers of this order are necessary. Then I and any other leader accept that advice.

Let us not overstate the nature of those secret briefings or advice that I or other members of COAG received. At the end of the day, I have no option but to accept the professional opinion of heads of security and of policing in Australia who advise me that, in their professional opinion, laws of this order are necessary.

I came away from COAG accepting that it was necessary for us to enact laws of this order, and that is why we have this bill on the table before us. But I also came away from COAG saying explicitly, as had the Prime Minister at COAG, that the laws that were agreed on and would be drafted and introduced would be consistent with Australia's international legal obligations, most specifically our obligations under the ICCPR. I don't believe the commonwealth legislation meets that promise, but I believe this legislation does.

THE CHAIR: Thanks for that. That leads to a couple of questions, because it is very detailed. I will let my colleagues ask some questions. We have had about 19 written submissions, and probably a couple more to come, and certainly a wide range of evidence from various groups. Yesterday we had Mr McDonald and his assistant, Ms Bishop, from the federal A-G's Department, plus Commissioner Keelty and his assistants. I would imagine they might have been privy to the same briefing you had.

Mr McDonald specifically said that he looked at those human rights conventions. Of course the commonwealth doesn't have a human rights act but it does abide by those conventions. He thought the commonwealth legislation was certainly consistent with our obligations there. He talked about the 1948 convention and went into some detail there. Are you saying that you don't feel that the commonwealth legislation is consistent? Mr McDonald, who, I assume, had a primary role in the department, clearly indicated that he felt that it was.

Mr Stanhope: I don't know, Mr Chair, whether you asked Mr McDonald to table his advice. I hope you did and I hope he agreed to table the commonwealth's advice in relation to the consistency of the commonwealth's legislation with the ICCPR. It is something that we have all been waiting quite breathlessly to see.

The commonwealth makes a number of assertions in relation to the bill. One is: "It is consistent with the ICCPR, but won't provide the advice. It doesn't represent any conflicts in relation to the separation of power, but won't provide the advice." Yet, on the other hand, the ACT's human rights commissioner, Dr Watchirs, who has appeared before your committee, in her submissions on the commonwealth legislation insists that it isn't consistent with the ICCPR.

Notable international and human rights academics, with impeccable credentials, all insist that the commonwealth legislation is not consistent with the ICCPR. I have to say to you, Mr Chair, that I can't list them here today. But I have taken a close interest in this matter,

have followed it closely, have provided significant opinions for public consumption on the commonwealth legislation and of course have provided our exposure draft.

I am not aware of a single opinion that has been produced or written by an acknowledged expert on international or human rights law who believes that the commonwealth legislation is consistent with the ICCPR—not one. I am not aware of a single published opinion from a notable, learned academic or practising lawyer which suggests that this is consistent, but I am aware of a number of opinions which suggest that the ACT legislation is.

THE CHAIR: We have a couple of submissions, namely, the federal Attorney-General's submission which goes into some specific detail of where the ACT bill varies from the other states and territories and the commonwealth, together with the AFP submission, which the commissioner clearly addressed yesterday, as did Mr McDonald with his own submission.

Firstly, let us go to the differences. Commissioner Keelty stated, as did Mr McDonald, a number of areas where the tests are much higher in the ACT legislation. For example, in the AFP submission, there is a difference between section 17 (3) of our bill and section 105 (4) of the commonwealth Crimes Act. It was to do with operational problems. "Substantially assist" was in the legislation of the other states and the commonwealth, which they thought was better than the "least restrictive", which is in our bill. There is reference in our bill, in several parts, to "reasonable and necessary", whereas in other states it seems to be just "reasonable".

It is pointed out in their submissions, as you will see if you have had a chance to read them, that the tests in the ACT are somewhat different and indeed stricter than the tests in the commonwealth bill and certainly in the New South Wales bill. I would imagine that is so with the other ones as well. Commissioner Keelty especially, but also Mr McDonald, saw that as a problem. Apart from the fact the AFP, who obviously are going to operate across Australia on this, might have two or three different standards that they have to be aware of in going to respective courts to get orders, he certainly thought it would be that much harder in the ACT for the authorities and the police to go to our Supreme Court and obtain a detention order. Plus there is the fact that there is that much more material they would have to go through, and there is a time factor too.

I suppose the significant thing there is mainly that the tests are different. It would make it that much harder for the law enforcement authorities, and it probably goes against the trend, in probably the last decade, for governments, wherever possible in areas like this, but in general areas, to do template legislation. The ACT has certainly got a very proud record, both under your government and previous governments, of adopting template legislation in a number of areas, not the least of which is the Criminal Code, yet our bill seems to be very different. That was a real concern he expressed. As you are no doubt aware, there is very real concern about police being able to successfully detain someone who is perceived as a threat.

Mr Stanhope: I will defer certainly to the ACT Chief Solicitor, Mr Garrisson, on some of the technical aspects of "reasonable" and "reasonableness". I reiterate that there is, probably throughout the ACT bill, a provision or a section which is taken from each of the states of Australia—just about. I would have to get a detailed listing for you, but we

have taken provisions from South Australia, from New South Wales, from Queensland and from elsewhere. So our bill is a mish-mash of provisions from around Australia. There is no consistency between the states in the legislation. No template was followed or utilised. Indeed our legislation takes provisions from a significant number of states.

I haven't read Mr Keelty's submission or the transcript of his evidence, but to suggest that the ACT is out of step, that our legislation is different from the other jurisdictions, denies the fact of what I am saying. We have taken provisions from a number of jurisdictions. So, to the extent that we are out of step, each jurisdiction is out of step. The difference is, of course, that ours is the only bill that has been subjected to parliamentary scrutiny, because no other state or the Northern Territory has initiated an inquiry into the legislation.

THE CHAIR: I thought Victoria did.

Mr Stanhope: Victoria have, have they? Have they completed it?

THE CHAIR: Yes. I don't even know that the Northern Territory has introduced anything yet.

Mr Stanhope: The Northern Territory haven't introduced it yet. So we need to deal with that. There is not the commonwealth legislation, consistent template state legislation and ACT legislation. We took our bill and relied on what we regarded as the best and most human rights compliant provisions around Australia in relation to the way in which we crafted our bill.

There are differences across the board. For instance, there are two jurisdictions, the ACT and New South Wales, which require that an order can only be made by the Supreme Court. Yet one of the criticisms that have been made of the ACT, as we are inveigled to adopt the New South Wales bill, is that we require orders only to be made by the Supreme Court. That provision was taken from New South Wales. But no other state has adopted precisely that formulation, although Western Australia goes some way towards it. So the states are enormously different in the way in which the legislation has been structured and formulated.

But on the point that you make on the different standards, the test on a police officer making an application for a preventative detention order in the ACT is that the policeman must be satisfied on reasonable grounds. Might I say that test was formulated in a joint opinion of Australian solicitors-general, including the ACT Chief Solicitor, but I think excluding New South Wales. The test that was formulated by the solicitors-general, which the ACT adopted, was that an officer seeking a preventative detention order be satisfied on reasonable grounds that it was necessary before making the application.

The test in the Commonwealth, New South Wales and other states is that the police officer must have reasonable grounds to suspect. All of us would perhaps agree that there is really no difference between "satisfied on reasonable grounds" and "reasonable grounds to suspect", although Commissioner Keelty took objection to the fact that the ACT provision reads "satisfied on reasonable grounds", whereas the commonwealth and New South Wales provision reads "reasonable grounds to suspect". This is a very

technical and pedantic difference that anybody, indeed the commissioner, would be arguing about in relation to the test for making an application.

There is a difference, however—and I will ask Mr Garrisson to go to this—in relation to the making of a preventative detention order. The language that is used by the ACT in its bill, as opposed to that provided by the commonwealth, New South Wales and, I presume, the other jurisdictions in that context, is that the ACT Supreme Court is to be assured that the order is the least restrictive means of preventing a terrorist attack and is an effective way of preserving evidence, in the first instance; whereas in the commonwealth and New South Wales the language is that it would substantially assist in preventing a terrorist attack and is necessary to preserve evidence. There are a range of issues there. There is one other test on reasonableness, which I don't have in front of me.

THE CHAIR: It is "reasonable and necessary" too, apparently, and that appears in a few things; for example, section 17.

Mr Stanhope: That is right, and then there is the "reasonable and necessary"—

THE CHAIR: Mr McDonald had big problems with that.

Mr Stanhope:—as opposed to the commonwealth test, which is not even "reasonable", but that it would "substantially assist".

THE CHAIR: Mr McDonald, to his credit, suggested, "Why don't we have 'reasonably necessary'?"

Mr Stanhope: That is perhaps a suggestion which, on reflection, we would be more than happy to consider. But to suggest that the notion of "reasonableness" is somehow unreasonable in the context of a provision which, at its heart, is all about locking up somebody that you don't even suspect or don't have any evidence has committed a crime, you have to go to the nature of the provision and the issue that we are dealing with here. We are dealing, essentially, with a quite remarkable proposal that we lock up, without charge—

THE CHAIR: But it is quite a remarkable problem, though, isn't it?

Mr Stanhope: It is a remarkable problem, but this is a remarkable response to a difficult issue that we legislate now to lock up, without charge, a citizen in situations or a circumstance where we don't have evidence that they have committed a crime; we just are concerned. In the ACT our position is, of course, that we believe that the long-held legal notion of "reasonableness" in relation to the making of decisions of that order is reasonable.

It is also a term or a concept around which there is enormous jurisprudence. An issue that the committee might want to consider in relation to that—and I don't know whether you took this up with Commissioner Keelty or Mr McDonald—is: what does "substantially assist" mean? Has it been subjected to judicial analysis? Is there any case law on what it means? Is it going to be the same in every case? What does "substantially assist" mean? We know what "reasonable" means, but do we know what "substantially assist" means? Has it been subjected to judicial analysis? Is there any case law on it?

It is interesting to me that there is criticism of a notion which is consistent with almost all of our legislation and the legislation of all other states and territories and the commonwealth indeed—this notion of decisions being made on the basis of a reasonable suspicion or understanding or prospect—and we are introducing a completely new notion: we will make this decision on the basis of a belief that the action of locking somebody up without charge will "substantially assist", but we are not asked to consider the reasonableness of the evidence on which we are making a decision.

I ask Mr Garrisson to go to the difference in operation of the ACT provision as opposed to the commonwealth and New South Wales provision. How does it make it harder to have to operate under the ACT law?

THE CHAIR: I understand the officials, when they first saw us last week, indicated they would give us a breakdown of the differences between our legislation and the other legislation. I don't know if you have got that available yet.

Mr Phillips: We do have it available.

THE CHAIR: If you could send that to me, that would be great. We are probably ending today. While we are on it, the attorney referred to the solicitors-generals' "reasonable" test. Obviously if we could have that available to us, that would help. Mr Garrisson, you were going to say something.

Mr Garrisson: Thank you for that opportunity. The issue really is that the structure that the ACT has adopted in this legislative scheme is designed around compliance with human rights obligations and to address constitutional issues which have been raised in a number of different forums. To that end, having adopted a full judicial model in relation to it, it is also appropriate to adopt language or terminology with which the courts are familiar and with which those who are appearing before the courts are also familiar.

The requirement that the Supreme Court be satisfied that it is the least restrictive means to prevent a terrorist act—for example, in relation to the basis for making the PDO—is in fact consistent with the fundamental principle, in human rights terms, that you don't lock people up without good reason. How does one persuade a court or, in the case of the commonwealth, an issuing authority, which is not necessarily a court, that it would substantially assist in preventing a terrorist act? The mechanism for determining that is unclear. What does "substantially assist" mean?

THE CHAIR: That is what they are trying to do, though, isn't it? I take it that the aim of this legislation is to stop a terrorist attack.

Mr Garrisson: Indeed. But in the context of the ACT's obligation, under its own Human Rights Act, the test to be adopted needs to be one that is least restrictive of personal liberty. Therefore, it is entirely consistent with those concepts for the court to be satisfied that you really do need this, that there is no other way of doing it, and that it is the least restrictive means of preventing the terrorist act. A number of different tests are set out throughout the legislation.

THE CHAIR: Is "least restrictive" a test that is used generally? One of the points of

both Commissioner Keelty and Mr McDonald was that, if you have very high standard tests here, it makes it that much harder for a court to grant the order. Is there a lot of case law in relation to what "least restrictive" means, for example?

Mr Garrisson: It is calling for the exercise of discretion by the court. Unlike some other jurisdictions, the court, as a court, will be considering the material that has been presented by the requesting authority; it will be considering material that is put by the person against whom the application has been made; and it will be applying ordinary judicial principles in terms that it is satisfied, on reasonable grounds, will prevent a terrorist act and all of those other matters that are set out.

The discussion, to an extent, can become a little circular. The point that I wish to make is that it is difficult to single out particular provisions and say, "Why have you got this and why have you not got that?", when in fact the act has to be seen as a totality in terms of responding to the ACT's commitment to both the Human Rights Act and to meeting some of the more complex constitutional issues that have been raised again in different places. This is the best answer, so far as the advice that has been provided is concerned, to meet those requirements.

THE CHAIR: Do any other states or the Northern Territory have the same tests as we have in this act?

Mr Garrisson: It depends which provisions you are looking at.

THE CHAIR: Any, really. I would imagine there are about a dozen provisions where these tests are involved. Some of them are the same. I wonder whether there are similar tests for similar provisions in other acts that have been enacted so far.

Ms Leon: Perhaps the detail of those comparative provisions will be able to be considered by the committee when we provide you with that table, which is on its way to you.

THE CHAIR: It has been done and is on its way. Can it be expected in the next few days? I appreciate there are short time frames.

Ms Leon: Perhaps I can give you some context for the meeting of the test of the least restrictive means necessary. It is a test that derives from international human rights law. The reason for having a test of that nature is: where there are going to be limitations on human rights, such as the right to liberty, it is a long-established principle that such limitations should be necessary, proportionate and therefore the least restrictive in intrusion on the exercise of those rights. Certainly judges in Australia and in the ACT have been and will increasingly be exposed to international human rights jurisprudence that explains the operation of tests of that nature.

Of course, while there are a series of international and other decisions that explain it, it is also a commonsense test. It is not difficult to put evidence before a court, which the parties will do in such a case, that there would be other means of preventing whatever evil is sought to be avoided that don't involve depriving the citizen of their liberty in circumstances which, as the Chief Minister has indicated, are very serious circumstances where someone is to be deprived of their liberty for up to two weeks without charge. So

the view has been taken that, if that deprivation of liberty is to be done in a way that is consistent with our international obligations, and particularly with the obligation not to arbitrarily deprive people of their liberty, that should only occur when it is necessary to do so, when there are not alternative means to protect the community that don't involve depriving a person, on suspicion, of their liberty.

THE CHAIR: I don't think anyone could accuse our courts of not having very strict and thorough cognisance of the human rights and other rights of people before them—defendants, people on bail, detainees in any capacity. I suppose the concern that has come through a couple of witnesses is that our tests are somewhat different. To an extent, from what you are saying, what they are being asked to do is a rather unique and somewhat new situation. But they will be naturally cautious, and it may be very difficult under the bill, as currently drafted, for the AFP to have anyone detained. That does seem to be a real fear expressed, certainly by the AFP but probably in the more general form by the federal A-Gs too.

Ms Leon: I am not aware that the AFP have gone so far as to say they don't believe the provisions will work for the exercise of preventative detention. I think the most that can be said of the AFP's submissions is that they are highlighting the fact that there are some differences between the tests and they are wishing that there was a single template in operation across the country.

I note that there wasn't any commitment made or sought at the COAG meeting for uniform national legislation. There wasn't an agreement to adopt a model bill; there was an agreement that each of the states and territories, within their own jurisdiction, would enact legislation that conformed to the principles agreed at COAG. As the attorney set out, not every state has enacted identical legislation, other than the ACT. Each state has gone down its own legislative drafting path and enacted provisions that are desired by that jurisdiction. But the agreement of heads of jurisdictions was that each of the sets of laws introduced in each state or territory would conform to certain principles, and that is what the ACT legislation sets out to do.

Mr Stanhope: To conclude, what Ms Leon is saying is that the formal communique goes to this issue and it is probably appropriate to test the commonwealth legislation against the communique, just as it is to test the ACT legislation against the communique. We agreed that the strengthened counter-terrorism laws must be necessary.

You raised this notion, as Mr McDonald did yesterday. He had concerns about the fact that we are utilising the concept of necessity in the requirement for the issuing of a preventative detention order. The wording is taken from the communique, which the Prime Minister signed, that the laws must be necessary, effective against terrorism, contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence based, intelligence led and proportionate.

I am not an international lawyer but at the heart of what Ms Leon was saying is that the notion of "proportionate" in international human rights law leads one—and the ACT Human Rights Act by extension—to ensure that the provisions are as least restrictive as possible. And that is in order to comply with the COAG decision that the provisions must be evidence based, intelligence led and proportionate. The communique, the decision that was taken at COAG—and, I have to say, taken at COAG with the explicit

agreement of the Prime Minister—was that the legislation would comply with the ICCPR. In order to do that, in order to achieve that, we are required to ensure that the bill is consistent with certain understandings or doctrines around proportionality and the need for the impost to be the least restrictive possible.

THE CHAIR: I have one final question and then I will hand over to my colleagues. In her evidence Dr Watchirs mentioned the New South Wales law, which I think probably pre-empted the commonwealth bill. She seemed to think it was not bad. She did not actually say it was the second-best law, but certainly she thought there was significant regard to human rights in it and she seemed to indicate that some of that had been incorporated already.

Given what you have said, but also some of the concerns raised by the AFP and the federal government, did you consider perhaps adopting that or even adopting it largely, especially if, as Dr Watchirs indicated, it is fairly compliant with human rights? She seemed to think that it was not too bad a bill. She pointed out that your bill was better, but she seemed to indicate that that was a pretty good bill.

Mr Stanhope: I cannot answer that question, Mr Chair, as to what analysis ACT officers did of the overall human rights compliance of another jurisdiction's legislation. As I indicated before, we certainly looked to the legislation of the states in relation to precedents for our own bill. I have seen an analysis, but I do not have it to hand. Ms Leon has just indicated that the comparative analysis will be provided. Our position is that we looked at the legislation of each of the states and we took those provisions that we believed represent best human rights practice and are most consistent with the rule of law. Our bill represents what we believe to be the best thinking in terms of drafting of policy of each of the jurisdictions around Australia.

MS MacDONALD: Attorney, I will start by noting the comments in your opening statement about your reluctance to be going down this path in the first place, that you would have preferred not to have to go down this path, but that you were convinced at COAG and by some of the comments that have been made by Commissioner Keelty that the ACT is a target, along with other areas.

Mr Stanhope: Potentially.

MS MacDONALD: A potential target, sorry.

Mr Stanhope: We need to be careful in our language. I have no reason to believe that the ACT will not be a terrorist target in the environment that we are in. I have no advice that the ACT is a terrorist target, but there is no basis on which any of us can assume that it is not. I think we do need to be careful in our language.

MS MacDONALD: I apologise. I did not wish to cause any alarm. Noting those comments that you made and given that at least one group that came before the committee yesterday was of the opinion that this bill should not be adopted at all—I did actually ask this question of Mr McDonald of the Attorney-General's Department and I think I alarmed a few people when I did it—what would be the consequence if the committee were to recommend to the Assembly and to the government not to adopt the bill and the Assembly went down the path of not adopting the bill?

Mr Stanhope: It is a very hypothetical question, Ms MacDonald. I do not know what the committee is going to recommend, but the government will be passing—

MS MacDONALD: I do not know what we are going to recommend either, but my question is more—

Mr Stanhope: It is almost too hypothetical for me to respond to. It is the government's firm intention to introduce and pass a bill in the general form of the bill under consideration. At no stage have I contemplated or considered that we would not be doing that. So let me just say that. But if I were to regard your question as perhaps more theoretical, as to the implications or consequences of not legislating in this way, these are matters for judgement always.

MS MacDONALD: Just before you answer, can I put this as well? Given the submission that was made by the Lawyers Alliance that we should not adopt this bill, is it living in a fantasy world, I suppose, to think that we can avoid introducing any legislation at all?

Mr Stanhope: I think that a very real option that is open to any jurisdiction is to rely on the criminal law as it stands. There is a very strong argument to be made that the issue we face—terrorism—is a form of criminal behaviour, that the offences that the criminals that we now latterly describe as terrorists commit are all offences that are proscribed by the criminal law which applies in Australia and in the ACT, that our police have adequate powers, that we can trust in our intelligence services and that essentially we are overlaying the criminal law with a raft of new provisions and procedures and crimes.

Of course, this is a theoretical debate around an appropriate response to criminals who are terrorists, and that is all they are. They are criminals, and to some extent we give them a status or a glorification that perhaps they do not deserve and which at some levels is perhaps counterproductive. There is a debate to be had about that. It is important that we do not oversimplify our responses to terrorism and that we do give serious consideration to the issues. In the debate that we have had I think there is a whole range of issues around the edge that have been ignored, and I believe we ignore them at our peril.

I am always concerned at simplistic responses. The classic law and order response to a significant, essentially social issue does include dangers and potentially counterintuitive results that we do not dwell on because sometimes we get caught up in simplistic responses to difficult issues, and I think unfortunately many of us have done that in relation to this particular debate. I believe there is not nearly enough focus on the causes of this sort of criminal behaviour. The alienation, the anger and the viciousness that lead to the mindless killing of innocent civilians do need deeper study and a lot more understanding by governments and authorities and officials than we are giving them. But that is another debate.

My decision at COAG to support this national response by the commonwealth and the states and territories was based on a concluded belief that there were gaps in the capacity of our police and intelligence services and authorities in certain cases to render us as safely as they might. It is possible to construct scenarios, and I believe it is possible to construct a scenario in which a preventative detention order is justified. I do believe that

one can construct a scenario in which our intelligence service, our police service, have some intelligence that is not verified, has not been proven, does not justify the laying of charges, but in relation to which they have a strong sense, for instance, that a bomb is to be exploded. They have a strong sense, they have some intelligence, they have a belief, but they do not have the evidence so they cannot charge. They cannot arrest and charge.

This is what we are talking about. It is about intelligence that is not complete. It is about an understanding that an event will occur, perhaps a bomb in a crowded place, potentially risking hundreds of lives, and if they can just get this person off the street and put away, they might prevent that explosion. Presented with that scenario, it is virtually impossible for a government not to respond by legislating provisions such as these.

What we are now debating is the balance, the proportionality, the way in which we can achieve that policy objective while respecting human rights and the rule of law to the greatest extent possible, while recognising that, to some extent and at a potential cost, we are trashing those things. Some of the other submissions that you have received I think go to that point. The Australian Lawyers Alliance makes the point that, to some extent, to identify particularly a group that might be targeted by legislation like this in the current environment so that they feel that they are being marginalised, being targeted, might produce a result that would never ever have been contemplated but for the sense of grievance that legislation like this that they believe targets them produces.

It is difficult. It is complex. It is hard. We are toying with long-held principles of law and that is why I regret so deeply that we could not find another way through this issue. But, faced with those scenarios that our intelligence and police officials paint, I do not believe that any government committed to safeguarding its citizens can simply walk away from the issue. As a decision maker, a legislator, it is essentially not an option for me to say that my intelligence service, my police service, tell me that they imagine a scenario that they cannot prove. It is a belief and not knowledge, but it is a strong belief and well founded and they are professionals. In that situation we do need to construct a response.

My agreement to the constructing of that response has always been based on the belief that we can be proportionate. International human rights and the ACT's Human Rights Act allow us, through principles of proportionality, to respond to the policy imperative by impinging on human rights. But it is about getting the balance, the proportionality, and there has not been much interest around the nation in having that debate or achieving that outcome, and I am determined that we do.

MS MacDONALD: I would like to ask about the issue of torture. The police have taken exception to mention of torture within the exposure draft. Can you elaborate on why this bill expressly prohibits the use of evidence obtained by torture?

Mr Stanhope: I might just ask Ms Leon to lead off on that and I will add a comment.

Ms Leon: The prohibition on the use of evidence obtained, either directly or indirectly, by torture is in order to ensure compliance not only with our international obligations but also with community standards about the inappropriateness of using torture in any of our justice system operations. I would note that the existing evidence law does not completely preclude the use of evidence obtained by torture. It establishes a presumption that the evidence will be excluded if it is obtained in consequence of such a matter as

torture, but the court does retain the discretion to admit evidence of that sort. So the provision in this bill is intended to completely close off the possibility that evidence that has been induced by torture could be admitted into a court in these proceedings.

I know that the AFP expressed some concern that this might suggest that officers of the AFP engage in acts of torture, which, of course, is not intended at all. You will notice that the legislation says "obtained directly or indirectly by torture". When we are talking about material that is derived from intelligence, it may often be derived from intelligence agencies with which Australia has a relationship. It may be derived from agencies that do not have the same high standards as the AFP in relation to the non-use of torture. It may be derived indirectly from second-hand contacts in countries that have much lower standards in relation to their questioning methods.

What is sought to be achieved by this legislation is that should such intelligence coming from sources where torture may well have been used be the basis for an application to detain a person, then evidence of that sort ought not to be admitted—and this, of course, founds the Evidence Act presumption—not only because evidence obtained by torture is likely to be quite unreliable but also, and fundamentally, because torture should have no place in the justice system of the ACT or any other civilised part of the community.

DR FOSKEY: Yes. I have got a follow-up to that. When I heard that evidence yesterday I raised the difficulty that the AFP might face when it is presented with intelligence that is extracted under torture or could have been extracted under torture by intelligence agencies with whom we deal. On each occasion that I asked I was told that it was not a problem because the evidential value of torture evidence was minimal; that is, that it would not be used because it is no good. I felt that those answers missed the point.

Mr Stanhope: Rather.

DR FOSKEY: Yes, and that it is the use of such information to actually guide operations and mark people out as suspects that is the problem in relation to this legislation. We already know in hindsight—and some of us suspected it at the time—that intelligence can be sexed up, to use the term; for instance, mothers throwing their children overboard or, most particularly, the weapons of mass destruction for which we went to war in Iraq which have since been proved to be false. It is not a facetious sort of concern at all. I wonder if you are concerned that there is a danger that some of our intelligence agencies or others with whom we deal might feed faulty intelligence to the AFP.

Mr Stanhope: I have no knowledge or understanding at all as to how our intelligence services operate or with whom they deal. I support the essential point that you make, Dr Foskey. I believe that torture is absolutely abhorrent. We should have no truck with it. I make no apologies for this provision—absolutely none. As far as I am concerned, we need to be absolute in our opposition and our willingness to express our opposition to torture. It is simply, totally, absolutely, fundamentally unacceptable and should not be countenanced. I am concerned—and I think this goes to the heart of the comments you make—at any expression of opinion which seems to give some credence to the potential use, perhaps here or there, of information derived from torture. It is just, I believe, such an uncivilised prospect and position to put that we should dismiss it out of hand. We dismiss it out of hand by being prepared to introduce provisions such as these.

I have to say that some of the debate going on around Australia and the world in relation to the legitimacy, morality or otherwise of torture or rendition or the obtaining of information by torture is, I think, remarkable. The extent of the debate and the lack of willingness by leaders around the world simply to say no to torture is something that concerns me gravely in an environment where we claim the moral high ground in the war on terrorism.

I find it remarkable that, in the context of some of the moral positioning that we engage in in this so-called war, we then stoop to behaviour that, when used by our opponents, we use to justify the position we take against them. We fall straight into the behaviour which we condemn and which we have actually used to justify the invasion of sovereign nations. We do it ourselves.

I make no apology for this. I think this is just black and white. So far as I am concerned, it is the same equivocation that we have engaged in as a nation in relation to the death penalty. The death penalty is all right as long as it is imposed on Muslims in Indonesia, but for goodness sake don't start executing young Australians! Torture is all right as long as you are getting information to save Australians, but we will invade you if you use it yourselves. It is simply preposterous.

THE CHAIR: Mr Gentleman, you had a few questions?

MR GENTLEMAN: I'd just like to follow up on that line of intelligence sharing. You've discussed advice that you've received, Attorney. I did ask Commissioner Keelty yesterday to provide us with the briefing that he gave COAG and he avoided that question. He said that COAG had received briefs from ONA, ASIO, et cetera, prior to his brief but he said that the AFP considers information reliably by a system called the admiralty system so that intelligence sources are rated—A1 for example. I wasn't able to continue my questions due to the time constraints. But, if we in Australia have acted on intelligence advice in the past that has been found to be untrue, as Dr Foskey said relating to weapons of mass destruction, and the agency continued to have the same rating with the Australian Federal Police, would you be sceptical of the briefings that you received from that agency? I'm not aware that they have that rating.

Mr Stanhope: I understand the force of the point you make, and I've seen it used in this particular debate. Some of the intelligence upon which the "coalition of the willing" relied in the invasion of Iraq has now been so absolutely and totally discredited that it, of course, raises the question of why we should ever believe anything else that our security services deliver. It's a fine point, but it's a logical conclusion that we simply don't have the comfort or the capacity to take, in my opinion.

I'm the first amongst many to acknowledge that the invasion of Iraq was a fit-up from start to finish; I don't believe they did rely on faulty intelligence at all. I think they knew exactly what the intelligence was. I don't think for a minute the intelligence was wrong; I just think it was the use and the explanation of the intelligence by politicians that was the problem. The intelligence agencies probably did a fine job; it's just that their information was completely and totally misused and misinterpreted. Anyway, we don't have that comfort.

Terrorism is a reality. Bombs in Bali, bombs in London, bombs in Spain and multiple deaths in each of these places are a fact, and there is no basis or ground for believing that such an attack will not occur in Australia. In fact, the advice of our intelligence and security organisations and our police force is that there are reasons and intelligence to believe that those sorts of attacks will occur in Australia. No government, no parliament, can ignore those realities and we do need to respond.

DR FOSKEY: This sort of follows from your suggestion, which I heartily endorse, that it's the political use of intelligence and the information of any kind that may be the problem. After Mr Keelty's evidence yesterday, would you still have the same high level of trust that the AFP might not itself be used as a political tool to further the political or ideological agenda of the current federal government?

Mr Stanhope: I have enormous confidence in Commissioner Keelty and in the Australian Federal Police. I quite genuinely believe that we have in the Australian Federal Police the best police force in the world. I'm one of those that say that. It doesn't just roll off my lips; I actually believe it. I think we have a fantastic police force and I think Commissioner Keelty is a credit to the Australian Federal Police and to Australia. He does, however, have political masters.

THE CHAIR: He has what?

Mr Stanhope: He works for the commonwealth; he is a commonwealth servant. I have enormous respect for Commissioner Keelty—enormous respect—as I do for the Australian Federal Police. But I regret some of the conclusions drawn by Commissioner Keelty in his evidence yesterday. I don't believe that they're based in evidence and I do regret the way in which he expressed some of his concerns about this legislation. Having said that, my faith in Commissioner Keelty and the Australian Federal Police is rock solid.

THE CHAIR: Just on that: I would share your faith. I've known him a long time. Certainly you have said on a number of occasions that you have great faith in him and the AFP, and I would certainly endorse that.

Mr Stanhope: I do.

THE CHAIR: He mentioned—and I think you raised it and indicated that you thought it was preposterous, and I must admit it surprised me, and probably the committee to an extent, because some of us were talking about it about two hours before he said it—that, apart from the ACT being a target, he felt that if we had laxer laws that would certainly enhance us being a target. He indicated that crime—I assume he meant it would be organised crime—and terrorists did look for those types of things. I suppose that did surprise me; I would have thought that maybe that wasn't exactly first and foremost in a criminal's mind, to check legislations across jurisdictions and even terrorists—

Mr Stanhope: It was in relation to that particular—

THE CHAIR: but he was very clear on that, which I suppose to an extent surprised me.

Mr Stanhope: Well, it does surprise me.

THE CHAIR: But, having a very high regard for his ability—and I would have to defer to his knowledge there; he probably knows far more than you or I or anyone else in this room—views like that should be taken seriously in terms of ensuring that our legislation is workable and that right across the country it is as compatible as possible.

Mr Stanhope: It's that comment of Commissioner Keelty's that I earlier described as preposterous—the suggestion that a terrorist organisation or gang intent on, say, exploding a bomb in Australia would do a comparative analysis of the ACT's antiterrorism bill vis-a-vis that of New South Wales, Victoria, Western Australia or South Australia, and then determine: "Goodness me, there is a slightly enhanced test for the issuing of a preventative detention order in the ACT. Let's go and explode our bomb there." I think that's preposterous.

THE CHAIR: Yet he said it.

Mr Stanhope: Yes, but I think it's preposterous.

Ms Leon: Perhaps I could also just draw your attention to the AFP submission, which doesn't actually make that claim that you're referring to.

THE CHAIR: No, but he said that in evidence and he was very clear about it. I must admit I said I was surprised, but I defer to his greater knowledge, and—

MR GENTLEMAN: Surprised that he made the statement?

DR FOSKEY: It's an issue.

THE CHAIR: No, he was quite clear about the statement. Yes, because I suppose I wouldn't necessarily have thought that myself; but he made it and I'm sure he knows far more about big-time crime and terrorism—

Ms Leon: Obviously the department will read carefully all of the transcripts of evidence when they come from the committee—

THE CHAIR: Yes, sure. Thanks.

Ms Leon: and I will be interested to see the commissioner's comment in its context. But I do note that, in the considered submission of the AFP that was put to the committee, the extent of concern that was expressed about, for example, the different tests on reasonable suspicion was that it may cause difficulties operationally and that it appeared to complicate the test for applying for a preventative detention order—not any reference to the possibility of increasing the likelihood of a terrorist attack in Canberra.

It may be that the commissioner was referring to a hypothetical situation: where one jurisdiction has considerably laxer laws than another, that might give rise to an easier operation for terrorists in that jurisdiction. But, as the attorney has set out, the differences between the jurisdictions on these tests are very slight, in the sense that it's not going to prevent the efficacy in the workings of the legislation to the extent that a terrorist cell could operate unimpeded in the ACT whereas they could not in New South Wales.

I think the point made in the AFP submission is about providing operational difficulties for the AFP in having to deal with slightly different tests in each jurisdiction. While I can sympathise with their desire for uniformity across all jurisdictions, given that they're a national force, I'm sure that this isn't the only instance where state and territory laws differ slightly in the tests that they apply and which need to be administered across jurisdictions.

THE CHAIR: You say you'll check the transcript. I think that's reasonable and fair because I think we're going from a recollection—it was about 24 hours ago, at least, when he said it; so you can check the transcript.

Mr Stanhope: Just on that and just to be fair, I didn't listen to the proceedings of the committee yesterday. I haven't read the transcript. I'm relying on media reports. So to that extent my comments are based on media reports and certainly not on the transcript.

THE CHAIR: Thanks, Chief Minister.

Mr Stanhope: I might just say in the context of the debate, however, that it shouldn't be forgotten that the commonwealth has the power, already legislated, to preventatively detain—admittedly only for 48 hours. But it can do it itself. ASIO has the power to detain for seven days for the purposes of questioning. So for the commonwealth or a commonwealth official to come in here and say, "Look, you're putting the territory at risk" in an environment where they can do it themselves, either through ASIO for seven days or through the Australian Federal Police for 48 hours, adds to my concern around the implications of the statement that Commissioner Keelty is reported as having made. I'm happy, however, to defer further comment until I've seen the transcript.

DR FOSKEY: I was present yesterday and I would say that there are issues of a different culture. Mr Keelty and to a certain extent the Attorney-General live and work in a culture wherein this is the realm of threat and so on. I don't feel that that comment, which he did make a couple of ways in his evidence, was helpful to the sense of security that people might have in the ACT. I do think it's important that you are able to respond to it, and the committee did want to give you that opportunity today because we are seeking a balance. I would like to suggest that the government look for ways to assist in the flow of information—discussion—between the two perspectives that we've heard in the last two or three days of evidence, where we have people coming from a law perspective and a human rights perspective, and people coming from a security perspective where we believe we heard a couple of times that respect for human rights has to be traded off in relation to community security.

I believe that the legislation that we are considering is an attempt to do both things and that it's a positive step forward for both camps—and, of course, there are heaps of people in the middle too—but that's the way the evidence has come to us. It just seems to me that we need to get some dialogue happening in some way. It was pointed out to me today from one group that people may go to conferences—there's apparently one coming up on homeland security—but each group will go into different streams and they won't talk to each other. So Australia does seem to be heading down a path where we're having this diversion, yet everyone actually cares about the same thing. I don't know what your government can do about that.

Mr Stanhope: To the extent, Dr Foskey, that it's fair to say that the ACT government has taken a slightly different path from other governments around Australia on this issue, I have sought, to the best of my ability, to ensure that views that I have are represented in the debate and I seek to reflect that through this legislation and through the position I take on these issues. It's a fairly hard old row to hoe at times, and a reasonably lonely one. But I understand the point you make. I think it's important that we continue to try to ensure that all aspects of the implications of what we do in this area are understood and debated. I have sought, to the best of my ability, to do that, and will continue to do it.

THE CHAIR: Ms MacDonald has a few more questions. But, before I forget, when we had the benefit of your officials, they very kindly gave us a very thorough briefing to start with. It's impossible to see what's going to happen with this legislation, but I asked a question in relation to what would happen if, say, the AFP went before the court and sought a declaration for someone to be detained and the judge refused that. I take it from reading the legislation that there would be a single judge. If the authorities had very significant concerns that the judge had got it wrong, would it be similar to, say, a bail application? My understanding is that if you apply to the Supreme Court for bail and are knocked back, you can the next day, and maybe with a bit more information, apply again. You might well be knocked back again but if you were before, say, judge X on one day, the next day you would go before judge Y. Is there the ability in this legislation for that to happen if, for example, in the first instance the AFP were knocked back and had some very grave concerns and wanted to basically try again? Could they, say, go to judge Y the next day?

Mr Garrisson: They can make a fresh application.

THE CHAIR: So there is that provision. Hopefully we might never see any applications. My only other question on that would be this: if there are any problems with the way the law pans out, what does the government intend to do in terms of quickly rectifying any problems?

Mr Stanhope: It's very hypothetical. We don't believe there will be, but, if there were issues, at the end of the day the government's position is that we accept, as you would expect, as a fundamental obligation the obligation to ensure that citizens of the ACT are safe. That is the first obligation, among many, in relation to this particular issue and this particular piece of legislation. We will do whatever we need to do to ensure that the people of Canberra are safe to the extent that we can make them safe through a legislative response such as this.

Similarly with this inquiry and your report, we will genuinely respond to the sorts of issues that have been raised by the Australian Federal Police and Commissioner Keelty and that have been commented on by the federal Attorney-General's Department. Already in my understanding of the issues that have been raised I'm thinking that there may be issues there that we will need to respond to—for instance, in relation to the reasonable and necessary test, the suggestion which you have just made that the federal Attorney-General's Department said that "reasonably necessary" was better than "reasonable and necessary". I will take advice on what "reasonable and necessary" means, and whether or not it does suggest a double test or standard; I'll take advice on those issues. It's not an issue I had previously considered, but I now will. Similarly, in

relation to the point you make, if there are significant problems with the legislation which we discover through its operation, of course we will respond immediately.

MS MacDONALD: Attorney, there has been much talk since the COAG meeting about the issue of the rights of detainees. Yesterday Commissioner Keelty and the commonwealth were suggesting that detainees need to be kept virtually incommunicado. What rights under the exposure draft do detainees have for outside contact, and do you think you've reached the right balance between protecting our security and humane treatment of a detainee?

Mr Stanhope: I believe we have. My understanding is that the ACT provisions are very much based on the provisions of the United Kingdom preventative detention regime, and issues in relation to contact or communications made available to detainees are pursuant to the UK legislation, but I would ask Ms Leon perhaps to confirm that. There is an issue: the scenario that the Australian Federal Police and our security officials construct is a reasonable scenario. Say there is intelligence on a particular person that they are engaged in a terrorist act; that they are intent on exploding a bomb. There isn't evidence of that, but there is a sufficient level of belief, a reasonable belief, that leads to an application for and the granting of a preventative detention order. The person is detained. There's a major operation that has been constructed involving numerous parties and different numbers of bombs. The person who has been detained is a pivotal link and, without his presence, perhaps the whole scheme will collapse—unless he makes a phone call, and passes on a message: "I've been detained. We're in strife. Set the bombs off immediately."

That's the scenario, and it's a feasible scenario, and the concerns about contact relate and go to that. It involves the passing on, in a dangerous situation of an imminent terrorist attack, of information from a person who it's believed but not known is involved, say, in a potential bomb attack but who has a number of colleagues engaged in a joint endeavour and all they need is the word. They're sitting somewhere with their bomb, waiting to set it off, waiting for a phone call, and the authorities say, "Look, ring who you want," and they do, and the bomb goes off. That's the scenario, and it is important to construct some boundaries around the contact that a person in preventative detention is able to have. We've relied very much on the United Kingdom experience. We've sought to balance the rights of that detained individual with the rights of securing the safety of the community, and my advice is that the regime that we've constructed will achieve that. But I might just seek some clarification and perhaps confirmation that this is very much based on the UK experience.

Ms Leon: I think, in a nutshell, the difference on this point between the commonwealth legislation and the ACT legislation is that the commonwealth starts from the position that you've paraphrased, as being that the person should be essentially held incommunicado, whereas the ACT legislation starts from the position that this is a person against whom there isn't sufficient evidence to charge the person. So we're in the serious situation we've talked about where a person is being detained on something less than evidence that would support a criminal charge. The person ought not be held incommunicado as a starting point but, if there are grounds, if there is reason to believe, that a scenario of the sort that the attorney has outlined might exist, there is good reason for limiting the otherwise reasonable contact with family members of a person who's been detained. Then the police officer who is applying for the preventative detention order can also

apply for a prohibited contact order in relation to the person who's being detained.

So, instead of a starting point of incommunicado and leaving it at that, we start from permitting a reasonable degree of contact for the purposes of informing family members and the like, but allowing for restrictions on that contact, under judicial supervision, where the police officer can make out that it's necessary to do so to, for example, avoid the kind of operation that's in force outside—to prevent a terrorist act, to prevent someone from being harmed, to preserve evidence, to prevent interference with further gathering of information, and to avoid jeopardising law enforcement proceedings around terrorism. So there's quite an extensive list of grounds on which a police officer, while applying for a preventative detention order, can also apply for limitations on contact with other people, in order to prevent the kind of scenario that the attorney has outlined from occurring.

So the bill doesn't say that there's only incommunicado detention or opening the door to complete freedom of communication between terrorists; it creates a regime that entitles the police, where they suspect that the kind of imminent terrorist operation that the attorney has outlined might be enabled to proceed if contact were allowed, to seek a court order to prevent contact in that kind of circumstance.

THE CHAIR: Thanks for that. Could you just check, when you're looking at the transcript, exactly what the AFP said in relation to that. Although I did make reasonable notes, I'm uncertain as to exactly what they said. I know they also had concerns about protecting national security and a summary of grounds, and any order that should ensure that there were no national security breaches within that. They suggested that there was some protection offered in the New South Wales model which they liked. That would be all in the transcript, and perhaps you could just look at those sorts of issues in that detail. I know they had concerns around this area in terms of just how much information could be divulged which would really compromise security and put people in danger.

Ms Leon: We certainly will examine the transcript, but I would also note that of course there is existing commonwealth legislation that is set up in order to protect national security information and which the AFP or other agencies would certainly be at liberty to rely upon in relation to any material that was sought to be disclosed.

THE CHAIR: There are a couple of practical problems that a few people have mentioned. I think the submission of the ANU law college referred to clause 22 and the physical problems of detaining people. I made a note from the AFP submission that they feel they can't detain outside the ACT as a result of this bill. They were concerned about facilities and they felt that something should be altered to enable people to be detained outside the ACT. There was some discussion that at present there was provision in other laws for people to be remanded in custody outside the ACT; there was some concern there just in relation to the physical problem of where you put people. A couple of other submissions alluded to some of those practical problems too.

Another area that I think we weren't too sure on as a committee related to young people. Correct me if I'm wrong, but it would appear that under the ACT draft bill you can't detain a juvenile, whereas in the other bills you can detain 16 and 17-year-olds. Again there was a concern there. Either Commissioner Keelty or Mr McDonald or both indicated that quite frequently, and especially if you're talking, sadly, about even suicide

bombers, extreme organisations prey on younger people, who might be more inclined to swallow what they've been taught, and use them as foot soldiers. Young people particularly might be at risk there. The example was given of 16 or 17-year-olds who were used and that, if they could be detained, you could not only prevent some calamity occurring but in a way help the young person because it would stop them from committing that horrendous crime and also from blowing themselves up. Correct me if I'm wrong that you can't detain anyone under 18 in the other law.

Mr Stanhope: That's true.

Ms Leon: Under a preventative detention order there's no provision for detaining a person under 18.

THE CHAIR: Okay. Thanks for that. There was significant concern expressed in relation to that, and again very great support, certainly from Commissioner Keelty and also Mr McDonald, that we should be consistent with, I assume, most of the other states and certainly the commonwealth, where the age of 16 has been given as a cut-off. I ask: why aren't there provisions in relation to young people, given that in our normal criminal law young people can be charged with and convicted of crimes, and indeed there's a presumption that they know what they're doing from 14 upwards?

Ms Leon: I think there are two aspects that I should draw attention to in responding to that. One is the one that you have made, which is that the bill needs to be seen in the context of the entire criminal law, and the kind of extreme scenario that has been portrayed where it's thought the young person might be about to commit a suicide bomb attack. It's not as though the only tool available to us is the use of a preventative detention order. Were there evidence that a person was about to be used for a suicide bomb attack, we do also have a panoply of criminal law available, and we need to not look at the bill in isolation from the full range of other legislation, both territory criminal law and the national security ASIO legislation that's available to us.

So we're looking at this as part of a suite of legislation and saying that, where it comes to preventative detention, the government's view is that it goes too far to apply that to children because, and significantly because, in relation to children we have obligations in international human rights law and additional obligations as a community to offer protection and appropriate treatment to young people.

In relation to international law of human rights, the Convention on the Rights of the Child provides that the detention of children is only to be a measure of last resort, and therefore international law sets out a distinction between the detention of adults and the detention of children, which the ACT legislation seeks to reproduce by making a similar distinction in this legislation so that it will be human rights compliant.

THE CHAIR: Isn't there a great gap there, though, if the other jurisdictions do cut it off at an arbitrary age of 16? You can have some pretty horrible 17-year-olds who have committed horrendous crimes—probably far more horrendous than those of other people in the same institution who might have committed a crime when they were 18 or so. It's not as though you can say that they will be seen to be less of a threat if they're 17 than if they're 18—unless you say there are sufficient laws to cover that. If there are sufficient laws to cover that, I wonder whether there would be sufficient laws to cover everyone,

unless you can point me to some specific laws that would enable steps to be taken against juveniles.

Ms Leon: In a way you ask us to go down a very slippery slope about the distinction between adults and children that is made throughout the law, and I wouldn't want anyone from this department to say that we think there's no place for distinctions between adults and children or to say that as 17-year-olds are almost 18 we should treat them as if they were 18.

THE CHAIR: No. I'm saying that 17-year-olds kill people just like 18 and 50-year-olds do.

Mr Stanhope: Just like 15-year-olds do.

THE CHAIR: Sometimes.

Ms Leon: Nevertheless, criminal law does recognise differences, and any age limit inevitably has some arbitrariness attached to it. Nevertheless, the law of Australia provides for significant differences in treatment, both procedurally and in terms of criminal responsibility, depending on the age of a child, and the fact that this law also makes distinctions between adults and children is not unique or exceptional.

I would also note that there was no discussion or agreement in the COAG communiqué that this regime should apply to children under 18 and that, although we have had a number of possible scenarios presented in discussion today, I'm not aware and the government is not aware of any evidence that the kind of recruiting of young children for suicide bombs that's been referred to in overseas jurisdictions represents any kind of current threat in Australia. So, if we are to depart from the notion that preventative detention of children would infringe the principle of detention as a last resort for children, one would want there to be fairly strong evidence of the necessity for such a provision.

THE CHAIR: I hear what you say about COAG—and that's certainly news to me and, I'm sure, the rest of the committee—but everyone else seems to have made 16 a cut-off. What is the genesis of that?

Mr Stanhope: It goes to commitments that were made at COAG and the understanding that was implicit in the COAG agreement that we would, in our individual responses and the commonwealth response, respect our international legal obligations. I agreed to this legislation. I would not have agreed at COAG but for an explicit commitment that the legislation would be consistent with our international human rights obligations. This is not fanciful. It's a commitment that has flesh on the bones of international human rights. It's not just the ICCPR; it's also the International Convention on the Rights of the Child. I'm sure I have heard you, chair, speak with approval of the International Convention on the Rights of the Child. The International Convention on the Rights of the Child makes it very clear that children must only be detained as a last resort. It's a fundamental human right obligation on those of us that accept our international human rights obligations. You know you can say to me: "Well, why have you included this in your legislation? Why doesn't your legislation specifically provide that we should be able to preventatively detain our children, irrespective of whether or not we believe them to

have committed an offence?" The question can well be answered—and I don't say it facetiously or in a smart-alec way—that I believe the question is: why hasn't the commonwealth and each of the states insisted or ensured that their legislation complies with the agreement that they made at COAG, that the legislation that we each of us would introduce would be consistent with our international human rights obligations?

THE CHAIR: But those international human rights obligations do recognise that there will be occasions when young people will commit offences and will be detained. Young people obviously then have to be kept separate from adults, and a number of provisions are in there to ensure proper human rights protection for young people. But it does recognise that when young people actually do commit crimes they are going to be detained, and certain things must flow from that to satisfy differences between young people and adults. By the same token, those conventions recognise that young people in some instances are going to be actually detained in a custodial situation.

Mr Stanhope: Yes, but not in a preventative detention regime, as far as I am aware. I would have to take advice on this, Mr Chair. I am attracted to the expression that Ms Leon used, the "slippery slope". Where do you draw the line, Mr Chair, in relation to who it is that we will preventatively detain? Here we are taking a massive step essentially away from centuries of understanding of how the rule of law operates in countries such as ours, countries with this strong British tradition.

If I might paraphrase the Prime Minister in his Australia Day address, we can be grateful for the enormous heritage of the great British institution of democracy and the rule of law. I support the Prime Minister's view that we need to ensure that we all understand the roots of Australia's commitment to the democratic institutions and the rule of law. Let us apply it. Let us not just learn the history of it. Let us actually apply in practice that great heritage of respect for the rule of law, as we understand it in the Western common law democracies.

We are here abandoning the rule of law in relation to adults in preventive detention. Let us not be under any illusions about this. That is what we are doing. We are taking a great step away from centuries of tradition. If we want to be historical about it, it is 800 years, back to Magna Carta. In this rush to legislate against terrorism we are abandoning and ignoring habeas corpus. What we are saying is let us draw something of a line in the sand. Let us sit here and agree that we will, for the sake of protecting the community from the terrorist threat, move away from that long commitment to that essential and fundamental aspect of the rule of law—no deprivation of liberty other than on a charge. That is what we are saying here.

We are saying: "We are going to move away from it. We are going to abandon this principle in this particular situation for this particular reason, but we are going to draw the line when it comes to children. We will do it for adult Australians, but let us draw a line. Let us agree to do it for adults, but not for children." That is all we are saying.

THE CHAIR: Are you going to follow up that question of transfer of jurisdictions?

Mr Stanhope: Yes.

Ms Leon: We are going to. I am happy to explore that. As you know, we transfer

prisoners to custody in New South Wales prisons at the moment. We are happy to explore whatever practicalities need to be explored in terms of the AFP suggestions in that regard.

Mr Stanhope: Though we will, of course, have a magnificent new prison in two years time, Mr Chair.

THE CHAIR: I will believe it when I see it, Chief Minister.

DR FOSKEY: Mr Stanhope, you said that the debate that we are engaged in concerns which of our rights we are willing to surrender in this case. During this inquiry we have heard some very considered evidence that suggests that, in surrendering our freedoms or our rights, we will actually expose ourselves to even greater danger by nurturing the feelings of alienation that often lie at the root of terrorist behaviour. We have heard some evidence, for instance, about the impact of the British laws of preventive detention of IRA suspects, potential bombers, and that that actually incited some people to become involved in the struggle against the oppressor.

I wonder if you have sought advice on whether these laws will be an effective response to the threat of terrorism and what other measures you might introduce to complement the laws to overcome that sense of alienation? I am just reminded of something that the British use, which is that, when detainees are from a particular community, then elders and respected people from that community are actually brought in to talk with those people to counsel them. This goes against the idea of isolating people and not allowing them to talk to anyone but to use that opportunity to expose them to other ideas that might counter the problem. You have probably forgotten what my questions are.

Mr Stanhope: No.

DR FOSKEY: You have not? Come back to me if you have.

Mr Stanhope: I understand the point. I alluded to it earlier and I think it is an issue. This is a legislative response that we are dealing with here to an identified serious threat facing our community. I accept this as a reasonable response to the threat that we potentially face. I think it does fill a gap within the armoury that I believe our police force, in particular, requires. That is their advice to me and I have accepted that. But I have accepted it and agreed to legislate within a human rights framework.

This is a legislative response to the issues we face as a community. I have not specifically sought advice on whether or not this particular law will be effective in dealing with terrorism. I believe that it is a response to a particular issue that does fill a gap or provide an extra piece of armour that our police forces and our security forces may be able to rely on either to prevent an attack or to render us safer than we might otherwise be. I accept that. I have accepted the utility of this particular provision while regretting enormously the imposition on human rights and on the rule of law.

I believe that there are dangers in legislation of this particular order and I believe we need to respond. I have responded by making regular visits to Islamic organisations and institutions within the territory, by forming a specific Muslim advisory committee, by dealing with them directly and by standing in solidarity with Canberra's Muslim

Australians. There is some political correctness around legislation of this type. We are engaged in a struggle, through the use of language, not to scapegoat particular people and to prevent this legislation specifically targeting people of Muslim or Islamic faith or engendering in them a feeling that they are being targeted. Let us acknowledge that. Let us not walk away from it. Let us not pretend that this is not legislation that we believe in its application will apply, 99 times of 100, to Muslim Australians. That is not what Muslim Australians believe and it is not the reality of the situation. We all know in our hearts that if, heaven forbid, the legislation were ever utilised, that is the group within our society that it would be most likely to be utilised in relation to. That is a reality.

We need to work with that community and to genuinely understand the anxiety that governmental responses to the threat of terrorism within Australia engender within sections of our community. We need to be aware of the potential for legislation that targets different groups, or that different groups within society believe targets them individually and unfairly, to generate feelings of resentment that lead to anger, which might lead to the sorts of responses we are seeking to address.

We need to be awake to that. We need to be aware of it and we need to respond to it. I am seeking to respond to it by regular engagement with Muslim organisations within the ACT, regularly visiting the mosque and other Islamic-based centres within the ACT, and a genuine commitment to stand with them in solidarity. I urge all members of the Assembly to do the same.

THE CHAIR: Chief Minister, I note the time. This morning we had a submission from the law society. I would ask you perhaps to check the transcript and their submission. The president, Mr Walker, indicated in his submission, specifically in paragraphs 9 to 14, that it is difficult to actually understand some of the clauses of the legislation, and he referred to clauses 13, 12 and 14.

When I asked him how he would fix it, he said that he was not going to go into the art of drafting, and I think his answer was quite appropriate. He did indicate that his committee of fairly eminent criminal practitioners were the ones who drafted the law society submission and he said that if they have problems understanding it, probably the courts, the police and everyone else will.

Mr Stanhope: The point is taken, Mr Chair. We will respond to that concern to see whether or not we cannot simplify and clarify the legislation.

THE CHAIR: Another concern expressed by Mr Walker and also, I think, in the legal aid submission, and several other people have probably touched on it, is that clause 48—it might be clause 49—seems to indicate that someone from the legal aid office must be provided. They would like the normal guidelines to appear.

It was pointed out that if you had the millionaire client who would normally not get legal aid, surely the normal rule should apply there. I think even the two gentlemen who appeared on behalf of the local Muslim community indicated that, quite clearly, normal legal aid rules would be right and people who had a lot of money obviously would have their own lawyer.

So there just seems to be a glitch in that part of the legislation. Those are fairly minor

points. The first one is not minor, I suppose. The second one might appear to be a minor point.

Mr Stanhope: We would be happy to respond to those points.

THE CHAIR: I think there was consensus among the committee that those concerns raised by those various groups are probably fairly simple to address.

Ms Leon: Mr Chair, I might just take the opportunity of clarifying a statement I made a little while ago about the COAG communique. I was talking about the detention of children under the age of 18 and I referred to the fact that the communique does not require that the preventative detention orders apply to children under 18, and that is so. But I will just note that in an attachment to the communique there is a reference to preventative detention. Preventative detention categorically would not apply to people under 16 and special rules would apply for people between the ages of 16 and 18. So it contemplates the possibility of preventative detention for children between the ages of 16 and 18, while not in the terms of the communique requiring that it be applied to children of that age.

THE CHAIR: That would then explain what other people have done.

Ms Leon: In the ACT the view has been taken that the rules that we will apply will be rules that are consistent with our international human rights obligations, which are that it is inappropriate to apply preventative detention.

THE CHAIR: That would also explain what has happened elsewhere. You have already given your reasons for what you did.

Ms Leon: That is correct. So thank you for the opportunity to clarify that.

THE CHAIR: Thank you for that clarification. If there are no more questions, I would like to thank the Attorney and his officials for coming today and also again to thank the officials for their briefing to us prior to the hearings.

We would appreciate it if you could get those various documents we have requested to us as soon as possible. We have a lot of evidence to go through. We have to look at the transcript. There are some quite complex issues. The committee certainly intends to adhere to the date set for reporting to the Assembly. If possible, we might be a bit earlier. Certainly we have a fairly tight reporting time and we have obviously got a lot of work to do now. Thank you all for your attendance.

The committee adjourned at 5.00 pm.