**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

# STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

**(Reference: Crimes (Murder) Amendment Bill 2008)**

**Members:**

**MRS V DUNNE (The Chair)**
**MS M PORTER (The Deputy Chair)**
**MS M HUNTER**

**TRANSCRIPT OF EVIDENCE**

**CANBERRA**

**WEDNESDAY, 22 JULY 2009**

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

**By authority of the Legislative Assembly for the Australian Capital Territory**

## WITNESSES

## Privilege statement

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*Amended 21 January 2009*

**The committee met at 9.12 am.**

**ZUCCATO, COMMANDER KEVIN**, Acting Chief Police Officer, ACT Policing

**THE CHAIR**: Good morning and welcome to the public hearing of the Standing Committee on Justice and Community Safety inquiring into the Crimes (Murder) Amendment Bill 2008. This is the first public hearing and we look forward to learning more about the proposed bill. We thank those who have lodged submissions for this committee and who are appearing today. I would like to place on the public record the committee's intention regarding our report for this inquiry. Due to the serious nature of the proposed bill, a thorough examination of its potential consequences is required and we propose to report on our terms of reference by the last sitting day in August.

Commander Zuccato, first of all, I ask you whether you are familiar with the buff privilege statement and you understand it.

**Cmdr Zuccato**: Yes.

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

**Cmdr Zuccato**: No.

**THE CHAIR**: Okay. Let us go directly into questioning. Could I start by asking you: when you put together your submission, what consultation process did you go through? How can this be characterised—this view of the AFP—and how does the AFP come to a view on a piece of legislation?

**Cmdr Zuccato**: The consultation process, as is usually the case with submissions of this nature from ACT Policing, involves our policy area consulting with members from our Territory Investigations Group who are the individuals, the detectives, charged with investigating crimes of this nature. It involves consultation with the senior executive of ACT Policing and certain areas of our legal fraternity within the organisation. The consultation process is really quite comprehensive because it deals with those people who are at the coalface, those who are investigating and responding to serious matters in the Australian Capital Territory.

**THE CHAIR**: But this reflects the view of the AFP—

**Cmdr Zuccato**: ACT police.

**THE CHAIR**: ACT police, rather than the AFP nationally, because there is a different law in relation to murder in the commonwealth.

**Cmdr Zuccato**: Correct. This reflects the view of the ACT police.

**THE CHAIR**: One of the things that you mentioned, and it is mentioned by a number of submitters, was that one of the advantages of moving towards the proposed amendment, the proposed new structure, would be that there would be uniformity of law across jurisdictions and there would be a better correlation between offences and sentences available. I was wondering why the AFP thinks that is important, when

there are other standout examples where we do not have uniformity. For instance, with the terrorism laws there is currently a debate about outlawed motorcycle gangs and there are quite disparate approaches there. Could you tell us why you think uniformity is a good idea generally and in this instance?

**Cmdr Zuccato**: I think uniformity, in terms of legislation, is always something that we strive to achieve. There are obviously some challenges with respect to having a country that works under the system of federation. However, we always strive to achieve uniformity because it provides a great opportunity for precedence, for understanding of legislation across the country, for the implementation of certain powers across the board and also so that individuals have a clear understanding of what the legislation and the laws are in each of those states and territories. In particular, it provides us with an opportunity to have a consistent approach to law enforcement across the country which, when you are dealing with cross-jurisdiction or cross-border investigations, always makes our job much easier.

I attended a meeting last week with respect to organised crime and there was a recognition that we have different laws, such as the ones that have been enacted in South Australia, Western Australia et cetera, but there is also a very strong desire to approach that issue as well in terms of having uniform legislation and uniform approaches for those very reasons—cross-jurisdictional issues. The ability then to work together without impediment is very important to us. You will see from our submission some of the comments by, in particular, Justice Higgins. He draws the example with respect to New South Wales and what would constitute a murder in New South Wales on almost every occasion. I think that is important.

**THE CHAIR**: Why do you think it is important?

**Cmdr Zuccato**: I think it is important because, in particular, we are here to provide public safety services, law enforcement services, to the community of the Australian Capital Territory. When we are dealing with the perception of safety and the perception of crime, a lot of folks would hear the commentary from those cases and the commentary that follows in the media and would see the gravity of these cases and the examples that are provided. In some instances, I think they would have some concern as to why it is that the ACT takes such a view with respect to the offence of murder as opposed to our colleagues in New South Wales.

**THE CHAIR**: There seems to be a fair amount of disparity between the various jurisdictions. Some are common law jurisdictions and some of them have started to codify these things. For instance, Western Australia requires that the accused intended to cause injury that would endanger or was likely to endanger another's life and in Tasmania the legislation talks about knowing that the bodily harm that they were causing was likely to cause death. These are slightly different constructions from the one that is proposed in this legislation. Do you have a view or can you talk about the implications of those differences from jurisdiction to jurisdiction?

**Cmdr Zuccato**: What I will say in relation to the differences between the ACT and the jurisdictions, as I have read it, is that whilst the jurisdictions have different wordings per se, in terms of grievous bodily harm as it relates to intent and the consequence of inflicting grievous bodily harm, it still leaves the court with the

opportunity to reach a verdict, and the jury to reach a verdict, that as a result of inflicting such tremendous harm and injury upon a person, one would reasonably expect or possibly reasonably expect that it could result in death and therefore constitute an offence of murder. Our legislation, in its current form with section 12(1)(a) and (b), does not because it provides for that intent to kill.

**THE CHAIR**: I suppose that is the thing. You say in your submission that it is right that a person be held to account for the death of a person when they intended to seriously harm that person but that is not a universally held view. The committee has received submissions that would hold the contrary view. So why does the AFP hold the view that intent to cause serious bodily harm should equate to murder? What is the sort of underlying reason for the support of that notion?

**Cmdr Zuccato**: I think that our submission—as opposed to saying that if you are going to inflict grievous bodily harm and it results in murder, it is therefore murder. I think the intention of that is that it is not strict and absolute but that it would provide for the police, and therefore a jury and the court, to make a determination based on the facts of that particular case to derive, or to draw, an inference and therefore decide that it was, in fact, a murder because of the conduct of the particular individual at the time. I think, ma'am, it should be taken in the context of each individual case based on the facts of that particular case, as opposed to a blanket—that if you were going to inflict grievous bodily harm and that leads to death, that it is automatically a murder.

**MS PORTER**: I wish to ask about the examples that the chair gave earlier of legislation that we have in the ACT that is different, or could be different, as is the case with our terrorism legislation and the discussion that we are having at the moment about the illegal, or so-called illegal, motorbike gangs.

**Cmdr Zuccato**: Yes.

**MS PORTER**: In that case, it seems to me that the ACT government has made a decision based on the fact that there is a danger that people could be caught up in a way that is unfortunate because the law allows them to be convicted, whereas if there were other alternatives, they may well not have been, if you understand. So at the moment we have these laws which say that one thing is murder and something else could be seen as manslaughter.

**Cmdr Zuccato**: Yes.

**MS PORTER**: What gives you the confidence that if the legislation was changed, people may be caught up by a jury interpreting the legislation, and in fact be convicted of murder when, in fact, on another occasion, it would definitely have been a manslaughter charge, if you can get my drift? I am concerned in that we are talking about very serious consequences to the person once the conviction is made. We are talking about life imprisonment, 25 years imprisonment. That is a big hop from what it could be if they were convicted of manslaughter. That is why this is the grave decision by this legislature to consider that. What makes you think that people will not get caught up in this erroneously if we change the law?

**Cmdr Zuccato**: I agree that it is a very serious limit to the legislation. But as the

legislation currently stands, there is no opportunity to consider anything other than an offence where you can categorically prove that someone set out with the intent to specifically murder an individual. It provides no assistance to the court or to a jury with respect to what a reasonable, prudent person would do or not do in terms of the infliction of grievous bodily harm and what that may lead to in terms of having the forethought prior to embarking upon such activity, to think to oneself, "If I do this, this person might die."

Therefore, it does not give the court an opportunity to determine whether or not that did actually constitute a murder. Because of the ferocity or because of the recklessness of that individual, one could reasonably expect to have thought it was probably—in fact, likely—that a person was going to die. If you look in the case of Porritt, an individual was stabbed 57 times and the carotid artery was severed. So that person's actions, in our submission, in that particular case demonstrate quite clearly that that individual sought to inflict so much damage and so much harm on his mother so as to kill her.

The legislation as it stands at the moment, ma'am, restricts the court and it restricts the police to bring those charges to actually demonstrate that through the recklessness of the behaviour, the severity of the behaviour, the ferocity of the behaviour, and the applicant, without applying that prudent person rule, it prohibits us or it diminishes our ability to produce that evidence and to actually put that before a jury. It does not give the jury the opportunity to consider all of the facts of the case in order to determine whether or not it was murder or manslaughter.

I agree with you, ma'am. It is a big leap. It is an extremely big leap. But then also when you look at that case and the other examples that we have given, is it fair and just that an individual spends two or three years in prison for such a grievous and heinous crime?

**THE CHAIR**: I would like to come back to that in a minute but I was just wondering, Ms Hunter, do you have any opening questions?

**MS HUNTER**: You have gone to some of the cases that you have mentioned in your submission. If we take the first case, the Porritt case that you were mentioning, I am still not quite clear why part (b) of section 12(1) relating to reckless indifference to the cognitive cause in the death of any person was not pursued and why it was not successful at the end of the day. I am unclear as to why that was the case.

You clearly outlined the lead-up to all of that. The accused had actually spoken to the police in interviews and had said that he had committed murder and so forth. There was obviously a lot of body of evidence; so I am just trying to understand why that changed. You obviously went in with the charge of murder. Why, at the end of the day, did that end up as a charge of manslaughter? I can see Chief Justice Higgins's comments here, but I am still not clear that if you had all that evidence and so forth, why then did it not stand up?

**Cmdr Zuccato**: I think I might have to take that question on notice, ma'am. I have a view, a personal view, on why, but I do not have enough knowledge of the case and the evidence that was presented by the defence and by the prosecution.

**MS HUNTER**: I guess my point is that in a few of these case studies the DPP make the decision to pursue a charge of manslaughter rather than murder. To me, I am just unclear about what happens there that we do not go for that second limb, the reckless indifference.

**THE CHAIR**: I think that is probably where I am coming from too, and I think that it is reasonable for you to contemplate that and perhaps give us the AFP's comments in writing.

**Cmdr Zuccato**: I have a view but I do not want to mislead you by—

**MS HUNTER**: Yes, that is fine. It can be taken on notice.

**THE CHAIR**: It gives you the opportunity to go back and reflect on the Chief Justice's comments et cetera. While we are on the subject of the individual cases, there are a couple of issues that come from this. Ms Hunter touched on one. In the case of Porritt, the charges were murder and they were downgraded; the findings in judgement were a lesser crime. But in other cases here that you have dwelt on, the original matter brought before the court was in fact manslaughter, but there are a couple of issues that I wanted to dwell on.

The cases that you have touched on here, I think without exception, are cases that have been heard before a judge alone. I get the feeling, and this may be just my reading of it, that it is not so much the verdict that concerns the AFP but the sentence. I wanted to dwell on both of those subjects without reflecting upon and overreaching the sort of separation of powers and the rights and the privileges of judges to sentence as they see fit on the basis of the information before them. However, I want to touch on both those issues. Does the AFP have a concern about the propensity for serious crime like this to be heard before a judge alone? Do they have a view? Would you have a preference for a jury trial over a judge-alone trial in the first instance? We will come back to the sentencing.

**Cmdr Zuccato**: I have received no briefing on that, but from my experience in the ACT we have no preference or position on that. We are happy to have a matter heard before a judge, a magistrate or a jury, regardless; as long as the legislation suits then we are happy for either. But I think it is also important, picking up on your point with respect to these examples being heard before a judge alone, to note that there has not been a conviction for murder in the ACT in 10-odd years, and that is an extremely long time.

I point out that since I have been in the chair, since last August, we have had eight murders in the ACT, so it is not something that happens occasionally. We have actions that cause death in the ACT on a regular basis. With respect to not having a conviction for murder in over 10 years, and the last conviction was of a police officer, I think that should signal to the committee that there is something amiss with the legislation.

**THE CHAIR**: Actually, that is what we are inquiring into.

**Cmdr Zuccato**: Absolutely.

**THE CHAIR**: Is it just the legislation or is it in combination with the administration of justice, in that a lot of these cases are not heard by a jury? I suspect that the average man in the street would be quite surprised to discover the extent to which cases are heard before a judge alone. It may be unsurprising to people who are constantly using the court system, but I am wondering whether the average person knows and, if they do, what do they think about that. I would be interested in whether you might be able to reflect on that issue.

**Cmdr Zuccato**: I could take that on notice.

**THE CHAIR**: By way of a slight aside, with respect to those figures, you said there have been eight violent crimes resulting in death.

**Cmdr Zuccato**: Since August last year.

**THE CHAIR**: Since August last year. Is that a reasonable way of describing them—violent crimes resulting in death? We cannot necessarily say they are murder; we do not actually know that they are murder until the matter is resolved.

**Cmdr Zuccato**: No, I would agree with that.

**THE CHAIR**: So when you are collecting crime statistics before they are resolved as murder, manslaughter or something else, how are those figures collected? How are they characterised in your statistical collections? You have got those eight that you have referred to since August last year. When you are collecting statistics, what sort of category do you put them under?

**Cmdr Zuccato**: We would characterise them in terms of, say, pre-trial, what the individuals have been charged with.

**THE CHAIR**: So in those eight cases, have there been charges laid in any of those?

**Cmdr Zuccato**: I am pretty sure that in all of them they were charged with murder.

**THE CHAIR**: On those, because you have talked about those eight cases, without necessarily identifying them, could you give us a breakdown of where they are—

**Cmdr Zuccato**: Sure.

**THE CHAIR**: and what people were charged with et cetera.

**Cmdr Zuccato**: We can do that.

**THE CHAIR**: Just the background for the committee. I would like to go to the issue of sentencing. In all of the examples that you have given here, the sentences, except for the case of the child death, seem to be quite low. There was 15 years, I think it was in the Cassidy case, where a child was killed. But in the case of the others, there seem to have been quite low sentences. In the case of Porritt, it was five years, with 22

months to serve, and he had already served 22 months in custody. I understand that Mr Porritt is in hospital somewhere; is that the case?

**Cmdr Zuccato**: Yes.

**THE CHAIR**: In other cases, three years with six months imprisonment?

**Cmdr Zuccato**: Yes.

**THE CHAIR**: In the case of Collins. They stand out, and I suspect that they would stand out to the man in the street, as fairly low sentences. Is this an issue that worries the AFP?

**Cmdr Zuccato**: I think so, yes. I would say so.

**THE CHAIR**: Certainly, the tenor of your submission is that the AFP seems to be concerned about the lightness of sentence. Is the issue so much about the classification of the conviction or is the issue about the sentencing? Do you see that three years with six months imprisonment is too light a sentence for manslaughter?

**Cmdr Zuccato**: On a case-by-case basis is what we need obviously to have regard to.

**THE CHAIR**: Yes.

**Cmdr Zuccato**: In relation to that particular case, I would consider that the sentence is quite light for such a serious matter and such a serious chain of circumstances. However, the AFP, insofar as ACT Policing is concerned, can only provide the best evidence it possibly can to the DPP for prosecution and then it must rely on the court, case law and precedents with respect to sentencing. Our opinion or otherwise with respect to the adequacy of the sentence is not really for us to determine. One would think, though, in terms of a person's rehabilitation, that for such serious matters it would take possibly a lot longer than two years to be rehabilitated in the system if there were underlying issues and matters that led that person to commit such an act of significant violence.

In relation to the other part of your question that dealt with—and correct me if I am wrong—whether we are saying that we would prefer to lay charges of murder so that the sentences were higher, that is actually not the case.

**THE CHAIR**: No, I do not think that is actually what I meant. That is a little bit simplistic. What I am asking about is not so much what you want to charge people with but whether the organisation is dissatisfied, irrespective of what people are charged with and convicted of, that the sentences seem to be relatively light for considerable acts of violence.

**MR RATTENBURY**: Chair, if I might pick up on that?

**THE CHAIR**: Yes, sure.

**MR RATTENBURY**: In your submission you make specific reference to it. You

refer to "the inability of the ACT judiciary to deter the commission of serious offences through sentencing". You made reference to that specific point. Picking up on what the chair is saying, and I have the same interpretation, my sense is your concern is in fact with the sentencing rather than the offence that people are charged with, given that the potential penalties for manslaughter are much higher.

**Cmdr Zuccato**: I would like to be very careful and make the point that the judiciary is—I will not say constrained but it needs to follow precedents et cetera. Therefore we are not dissatisfied with the judiciary per se and their approach to these charges and in delivering these sentences, but we are dissatisfied with the ability to determine the sentence based on the gravity of the offence, given that the legislation has not enabled us to successfully prosecute for murder.

**THE CHAIR**: I think we are actually talking at cross-purposes here. I think we understand the point you are making in that you would prefer to be able to prosecute people for murder and you think that the current legislation is an inhibition to that.

**Cmdr Zuccato**: Correct.

**THE CHAIR**: Running alongside that is the issue about whether or not people are receiving sentences that would reflect perhaps the community standard of—

**Cmdr Zuccato**: The gravity of the offence.

**THE CHAIR**: The gravity of the offence.

**Cmdr Zuccato**: Yes.

**THE CHAIR**: I would like you to contemplate whether you think—and it is a difficult area for all of us, so as not to encroach upon the role of the justices—

**Cmdr Zuccato**: Correct.

**THE CHAIR**: and they have particular powers and responsibilities. But is there a sense that, irrespective of whether someone is convicted of murder or manslaughter, it is not a very long sentence, and is that the case just in the ACT or is that the case across the country?

**Cmdr Zuccato**: I can only talk for the ACT. I can certainly have our policy people do some research with respect to the sentences that are handed down in other jurisdictions, if that would assist.

**THE CHAIR**: My understanding is that the national average is about 13 years for murder.

**Cmdr Zuccato**: Okay. With respect to your question, as the submission states, the answer to that is yes, we would like to see the sentences that are given, even for manslaughter, fit the crime; in particular, the circumstances of each conviction for manslaughter.

**MR RATTENBURY**: So how would we effect that, given the comment you have made about the precedent that the justices are constrained by? In the context of the inquiry that this committee is undertaking, changing the definition of murder is not necessarily going to change those precedents. So is it that we have another issue as well?

**Cmdr Zuccato**: Our concern is not just for the sentences; our concern is for ACT police to have the ability to successfully prosecute an individual for what we would consider to be murder. As our submission states, we are not satisfied that we are able to do that under the current legislation.

**THE CHAIR**: Do you think there is a higher level of community stigma about somebody who is convicted of murder rather than someone who is convicted of manslaughter, and do you think that would have a deterrent effect?

**Cmdr Zuccato**: I obviously think that it would have a deterrent effect. In some cases, I think it obviously would, yes. But I think that it would have a deterrent effect in that merely having an appreciation that one could get charged with murder may give an individual pause before they undertook or went down a certain path in the ACT.

**MS PORTER**: So that presupposes that the person is thinking logically at the time, from what you have just said.

**Cmdr Zuccato**: It does not presuppose in all instances, but certainly in some instances, possibly, yes. As I said earlier, all of these examples that were given and the cases that we are discussing today need to be considered in terms of the circumstances of each offence.

**MS PORTER**: Of course.

**Cmdr Zuccato**: Because one individual has decided upon a particular course of action, we cannot presuppose that he or she is aware of the precedents in the ACT in terms of sentences. But if I was contemplating murdering an individual, I might use that in terms of my risk assessment at the time. If I want to kill an individual, what is the consequence, how long am I going to do, and what is the value to me in terms of committing that crime?

**THE CHAIR**: That would be perhaps the sort of thought processes of someone who is systematically working through the perfect crime, but a lot of these cases—

**MS HUNTER**: Which would be charged under the current provisions.

**MS PORTER**: So that is the point—

**THE CHAIR**: Yes, but the thing is that—

**Cmdr Zuccato**: It would be charged under the current provisions. However, if I was charged under those provisions, the first thing that I would use as my defence is, "I only meant, really—I was planning to do all of that, but I really only meant to really hurt you."

**MS PORTER**: Can I just continue my question—

**Cmdr Zuccato**: The reality of the situation is that, once I get to court, the defence I am going to use is, "I didn't mean to inflict such enormous injury on you that you were going to die." And that is the reality of it, which—

**MS PORTER**: Okay, so—

**Cmdr Zuccato**: Sorry, ma'am, if I could just finish: which is exactly the case in Porritt. Porritt was in a chat room saying that if it was legal, he would kill his parents, that he wants to kill his parents. He admits murdering his parents to the police when he was interviewed, and yet in court, the defence that he used was that he did not want to kill.

So the reality of it is that the legislation, as it sits at the moment, provides the perfect opportunity for someone to use a defence that they wanted to inflict such harm as to hurt them gravely, but not to kill them. And that, if I could be bold, is what I was going to say in terms of my personal opinion with respect to (b), which I have taken on notice.

**MS PORTER**: So—

**MS HUNTER**: Just following up on that, but with the defence—

**MS PORTER**: Sorry, can I just finish my questioning?

**MS HUNTER**: It is just that it is following on from that exact thing. But that was the defence; it was accepted by the judge?

**Cmdr Zuccato**: Correct.

**MS HUNTER**: So it is because a judge accepted that defence that obviously it resulted in that way.

**Cmdr Zuccato**: Correct. It was accepted by the judge, and if you look at his determination, it was accepted by the judge because he only had (a) and (b) to consider. If in fact he had (c) and (d) to consider, I am quite confident that he would have adjudicated differently. If he had (c) and (d), he would have been able, in terms of his ruling, to take into consideration all of the actions, with respect to Mr Porritt as an example, in terms of the level of assault, the damage and the ferocity of it, and his prudent, reasonable expectation that if you stab someone 57 times, they will die. Whereas I do not think that (a) and (b) adequately provide a judge with that ability.

**MS PORTER**: Going back to my original line of questioning, if we accept that a lot of people are not actually thinking logically at that time, and I don't know about Mr Porritt, I wasn't in his head, but I doubt that he was counting the number of times he was stabbing at that particular time: "This is 51, if I do it six more times, I'll probably kill my mother." I can't imagine in my own head that a person in that state was doing that logically.

Given that we are accepting that people are not necessarily in their logical mind, even as they are driving up to the doorstep or whatever they are doing—that they are thinking, "If I do this then this may result in this person dying, and then if I do that, the ACT have changed their laws, and that may mean that I might be convicted of murder and not manslaughter; therefore I might go to jail for 13 or 25 years or my whole, entire life"—I do not see how us changing the law is going to prevent more murders. Through history it has been shown that, no matter how severe the punishment is, it does not stop people committing crimes. We know that we used to hang people if they were convicted of murder. We no longer do that. But it did not stop people committing murders. We know that. That is why I am interested in how us changing the law is going to prevent more people killing people. I do not understand the connection.

I do not necessarily want you to comment if you do not feel comfortable commenting on that statement that I have just made. But my second question is: what evidence do you have regarding putting someone away for 25 years? You say that is to rehabilitate them, and I think we would all hope that, by putting a person in jail for longer, they would be rehabilitated, and that is certainly our aim in the Maconochie Centre, as you know—that that will happen. But what evidence do we have that putting people in jail for 25 years does rehabilitate them and will not cause them to commit another murder if they are released?

**Cmdr Zuccato**: I do not have any statistics in relation to that, but what I will say is that the whole judicial system is based on the precept of rehabilitation. Also, the public expects that if you commit a crime, there is a degree of punishment associated with that.

**MS PORTER**: Punishment or rehabilitation?

**Cmdr Zuccato**: Both. At the end of the day, it is both. You do not simply go to prison to be rehabilitated. If that was the case then it would encourage people to commit crime.

**MS HUNTER**: The punishment being the loss of liberty.

**Cmdr Zuccato**: Absolutely. Obviously, we want people to go in there and be rehabilitated, and we participate in that process as law enforcement, in having people go in there and work with offenders, and work with offenders when they come out through our crime prevention people. We have a significant interest in ensuring that they are rehabilitated, firstly, for themselves, and with our responsibility as law enforcement to the community, and secondly in order to stop recidivism et cetera. But the public also expects that the punishment will fit the crime. I think that, as with all other states in Australia, those jurisdictions have made that determination through having laws that include the infliction of grievous bodily harm, or reckless actions that one would consider to be, at the end of the day, if someone perished, murder.

It is for the court then to determine whether or not I should have, in the course of hitting a young child over the head with a saucepan several times, stopped and thought, as a normal, reasonable person may do, about whether or not I should

continue with that conduct, and whether I should be in a position to control my own emotions to the degree that I cease or do not do that at all.

**MS PORTER**: But how does us changing the law get them to think like that? You said it may give people pause. How does us changing the law give them pause? That is what I am trying to get to. You have explained your thinking around the rehabilitation and the punishment issue and the length of sentencing. But I still do not understand the connection between us changing the law and stopping people behaving in that way.

**Cmdr Zuccato**: The examples that we have been discussing are crimes of passion, I guess—crimes that occur as a result of a trigger. With respect to my answer to that question—and I touched on it earlier—I give this example. I might be a criminal in the ACT, and, as an example—I know this is kind of fanciful, but it is in terms of answering your question—if I was planning to harm someone or to kill somebody, and if it was for an inheritance or someone had offered me money to kill somebody, I could have been researching whether or not I should or should not do it. It is a simple example again. If I was looking at getting $100,000 as payment, a $1 million house as an inheritance or a share of an inheritance, and I was conducting risk assessment on whether I should do that, I would think to myself, "It's likely I'm going to spend three to five years in jail and end up with X amount of dollars," or, "It's likely I'm going to spend the rest of my life in jail." That would have an impact on the decision that I make as to whether to proceed with a planned killing—murder, if you will.

Taking out the emotion, in terms of having a domestic dispute, a fight over some cannabis or whatever, in terms of planning or thinking about undertaking an act of such violence—and in fact I think the last case of murder was such a planned offence—if I was doing that as a planned activity, that would certainly, I believe, impact on whether or not I would move forward.

**MS PORTER**: Would that action that you are talking about not be caught up under an existing law? I would have thought it would have. No?

**Cmdr Zuccato**: It is the defences that you can bring if you are charged with murder. I think that is the key here. As we touched on earlier, if I was making a determination as to how I was going to kill somebody, and say I chose to murder a colleague or a spouse by using extreme violence, the defence that I could then use in the ACT was that I meant to hurt them but not kill them. I know that we have discussed whether or not (b) provides us with the ability. In my view, it does not. But I have undertaken to provide you with something more specific based on research other than just my personal experience.

**THE CHAIR**: There are a couple of things because we are going to have to hear from the next witness in a minute. I would like to ask a couple of questions and then ask other people to quickly finish up with their questions. In some of these cases did the AFP, in consultation with the DPP, ever contemplate an appeal against the sentence? Whose job is that? Is that yours or is it the DPP's?

**Cmdr Zuccato**: It is the DPP's in consultation with us. I will have to take that on notice.

**THE CHAIR**: Okay, that is fine.

**Cmdr Zuccato**: I understand Mr White might be here today.

**THE CHAIR**: Yes, he is in today as well. It will be something that I raise with them as well. Ms Hunter, I got the impression that you have a question.

**MS HUNTER**: I wanted to pick up on an issue that was raised in another submission to this inquiry. It was putting forward a view that the staffing profile of ACT Policing made it one of the most inexperienced police forces. It is in some ways that connection with the AFP and the movement between the police forces. There was a bit of a view put forward that an average of six years experience or so could be a factor in the lack of murder convictions going on. I wanted your view on that.

**Cmdr Zuccato**: The lack of experience within the ACT police is a phenomenon that is being experienced globally within law enforcement and, in fact, globally within almost every vocation, for a variety of different reasons. Gen Y is one: they hop from one job to another. There is also the ageing population et cetera. So that is not something that is specific to the ACT; it is also experienced within AFP nationally. As I said earlier, I have worked internationally for the last 20-odd years and in particular that is something that has been felt all over the world—a lack of experience based on the movement of people in and out of the job.

**MS HUNTER**: Sure, and I do accept that it is a worldwide thing.

**Cmdr Zuccato**: Can I just answer that question?

**MS HUNTER**: Yes.

**Cmdr Zuccato**: I do not believe that is the case in relation to the ACT police because in order to get into the TIG, the Territory Investigations Group, there is a process that is followed. There are interviews, there are certain courses that one has to do, and there is a selection process. So the TIG, if you will, is the pinnacle of what a detective would like to get into in terms of working on these types of cases. The sergeants that are in there and the superintendent that runs the TIG are extremely experienced and there is a lot of QA that goes on with respect to these jobs.

**THE CHAIR**: Sorry, QA?

**Cmdr Zuccato**: Quality assurance.

**THE CHAIR**: Thank you.

**Cmdr Zuccato**: What I will also say is that, from my experience, having only worked in the ACT for 12 months, the level of detail that these individuals go to, in terms of investigating potential murder cases or cases that involve extreme violence, would be national best practice in terms of what I have seen elsewhere. They really do go to the nth degree, with good reason, with these types of matters. So in relation to that comment, I agree that we have a junior police force but I think that we put a lot of

importance on having the right people to investigate these types of crimes.

**MS HUNTER**: And they are backed up by good forensic facilities, resourcing?

**Cmdr Zuccato**: They are backed up by the AFP's forensic resources, which are probably the best in the country if not world's best practice.

**THE CHAIR**: Commander Zuccato, thank you very much for your time and your input. You will get a copy of the transcript of your evidence and you can review it. You have undertaken to write to us on some matters.

**Cmdr Zuccato**: Sure.

**THE CHAIR**: I am very mindful that this is a very difficult issue and if you feel the need to clarify anything, you can write to us about those matters.

**Cmdr Zuccato**: Thank you, Madam Chair.

**CORBELL, MR SIMON**, Attorney-General, Minister for the Environment, Climate Change and Water, Minister for Energy and Minister for Police and Emergency Services
**GOGGS, MR STEPHEN**, Acting Chief Executive Officer, Department of Justice and Community Safety (portfolio area: Attorney-General)
**DAVIS, MS THERESA**, Senior Manager, Criminal Law Group, Department of Justice and Community Safety (portfolio area: Attorney-General)

**THE CHAIR**: Good morning, minister, and welcome to the first day of hearings of the Standing Committee on Justice and Community Safety inquiry into the Crimes (Murder) Amendment Bill. I am sure that you are aware of the issues involved in the buff card.

**Mr Corbell**: Yes, thank you, Madam Chair.

**THE CHAIR**: Minister, would you like to make an opening statement?

**Mr Corbell**: Yes, thank you, Madam Chair, I would. I thank you and members of the committee for the opportunity to give you evidence this morning. I have with me Stephen Goggs, who is the Acting Chief Executive of the Department of Justice and Community Safety and Ms Theresa Davis, who is one of the senior policy officers involved in the development of this bill. I would like to thank you for the opportunity to address the committee and to start by outlining why the government believed it was important to introduce this bill.

The Crimes (Murder) Amendment Bill was introduced because the government has taken the view that the community expects that offences of violence that result in death where serious harm is intended be treated as murder.

**THE CHAIR**: I am sorry. Can you just repeat that again for me, minister?

**Mr Corbell**: Yes, I can. I have introduced the bill because I believe and the government believes that the community expects that offences of violence that result in death where serious harm is intended be treated as murder. It is unfair to the Canberra community that such offences are treated as murder in every other part of the country but they only attract the potential conviction of manslaughter here in the ACT.

The government has made it quite clear from the outset, and indeed as the name of the amending legislation suggests, that this is not a law about manslaughter; it is a law about murder. The alternative verdict of manslaughter remains for charges of murder, and the option of charging manslaughter instead of murder also remains.

I know that a number of different viewpoints have been raised with respect to the bill. What I would like to stress to the committee is that this is not a radical change to the law of murder as it is known in Australia. It is not a departure from what the community understands and expects the law of murder to be. Indeed, it is consistent with the general concept held in each other jurisdiction in Australia that where a death is caused through an intentional act of violence, when serious harm is intended, that

death is potentially murder.

This near uniformity speaks of a common policy imperative that has been recognised across the country, that causing death while intending to cause serious harm is conduct so serious, so repugnant to our community, that such conduct should be subject to the ultimate sanction and recognised as murder. It is important to remember that in the ACT a proven charge of murder is subject, potentially, to a maximum penalty of life imprisonment.

I note that submissions have been made to this committee claiming that this law is a departure from the recommendations made by the Model Criminal Code Officers Committee with respect to the way in which fatal offences should be drafted. I reject this assertion and this is why: the Model Criminal Code Officers Committee never made any recommendations on model provisions for murder. A discussion paper from the Model Criminal Code Officers Committee was released 11 years ago and submissions were received from the public but no final recommendations were ever made by that committee. There has been no recommendation made by the Model Criminal Code Officers Committee about what the model uniform provisions for this offence should be. So there are no model code provisions. It cannot be said, therefore, that the territory is failing to adhere to a decision to adopt the model code provisions, because there are none.

I also draw to your attention the fact that while the model Criminal Code discussion paper advocated a move away from including an intention to cause bodily harm, grievous bodily harm or serious harm in the definition of murder, no Australian jurisdiction has adopted that position in the 11 years since that paper was published.

It is not the case, as stated in at least one submission to the committee, that none of these jurisdictions have turned their minds to the law or reviewed their laws in this area. The Northern Territory, for example, amended the Criminal Code in 2006, adopting many of the principles of the model Criminal Code, yet retaining the element of an intention to cause serious harm in the offence of murder.

I turn to the bill before the committee today. The bill introduces a third element to the offence of murder so that an intention to inflict serious harm where that serious harm results in death is an intention to commit murder. The definition of "serious harm" is taken from the Criminal Code, which provides that it is any harm, including the cumulative effect of more than one harm, that (a) endangers, or is likely to endanger, human life; or (b) is, or is likely to be, significant and longstanding.

I know there has been some discussion and commentary about the definitions. This definition of "serious harm" has been adopted in preference to the common law "grievous bodily harm" used in the Crimes Act 1900. The common law definition for grievous bodily harm is "really serious bodily injury". This definition, in the government's view, lacks certainty. It requires a jury to decide whether any injury suffered is "really serious". In contrast, the code definition provides a number of criteria against which the seriousness of the harm can be measured—that is, it must endanger or is likely to endanger human life or is, or is likely to be, significant and longstanding. It is a much clearer set of criteria than simply the common law definition of "really serious".

It is worth drawing to the committee's attention the fact that the Northern Territory amended the Criminal Code in 2006 and they amended their definition of murder. Where previously it had included an intention to cause grievous bodily harm, the new definition of murder introduced in the Northern Terrirory in 2006 includes that a person causes death while intending to cause serious harm to another. That definition of "serious harm" adopted in the Northern Territory is the same as is found in the ACT Criminal Code and it is that definition that has been incorporated into the murder provision in this bill.

The Northern Territory example is important because this has been tested in the Northern Territory Court of Criminal Appeal. They have examined the provision and the way in which the intention is to be interpreted in the case of Ladd v The Queen and has not made any adverse findings that indicated that that provision is uncertain or that the inclusion of the second limb of the definition of "serious harm" is inconsistent with the serious crime of murder.

So there is no suggestion that the definition is difficult to interpret or inconsistent or confusing. In fact, the process that has been gone through in the Northern Territory indicates that it is quite clear and a definition can be interpreted readily and effectively by the courts.

I would like to finally respond to some of the comments that have been made in submissions to the committee about consultation and allegations that the government has failed to consult in relation to this amendment. Firstly, it is important to make clear, as I am sure members would be aware, that this was an election commitment of the Labor government in the lead-up to the most recent territory election. We have made it very clear that we intended, if re-elected, to introduce promptly an amendment of this form.

Once the government was formed, I upheld that promise and that commitment by introducing the bill in the first available sittings of the Assembly. At that time I wrote to all relevant stakeholders, including the Australian Federal Police, the Director of Public Prosecutions, the Law Society, the Bar Association, members of the judiciary and Civil Liberties Australia enclosing a copy of the bill.

I would like to quote what I said to those stakeholders in my letter:

> The government wishes to deliver on its election commitments in a timely way and believes the legislation should be tabled in the Legislative Assembly to allow interested parties to comment on the proposal before the Assembly considers the matter. I am sure that you will want to contribute to the debate surrounding this amendment. As such, I am enclosing a copy of the legislation for your attention and I welcome any written comments in relation to the government's policy and the proposed amendment.

In due course, Madam Chair, I received a number of written submissions. This was, of course, to be expected. Many of these submissions have subsequently been provided effectively to this committee as submissions for this inquiry. This was not a surprise amendment. It was certainly one which the public knew about and which had been discussed and made clear and public during the election process.

I should also note that when I introduced the bill, I did so expressly on the basis that I was seeking comment from the relevant stakeholders on the form and content of the bill, and that the bill would not be debated until stakeholders had had the opportunity to comment. The government expressly remained open to amendments if necessary and, indeed, that was the purpose of the process that I adopted.

In response to my request for submissions when I wrote to stakeholders, I received none for six weeks. On 20 January I received a submission from the Australian Federal Police and a letter from the Chief Justice of the Supreme Court. I sent a reminder letter to all stakeholders at the end of January informing them of my intention to bring the bill on in the February sittings. On 30 January I received a submission from Civil Liberties Australia, followed by a submission from the ACT Bar Association on 5 February, the Law Society on 16 February and the DPP on 16 February as well.

The bill, of course, was back before the Assembly on 10 February. I think the government has been quite clear and reasonable in its attempts to engage with stakeholders on this issue. I do not accept the assertions that the government has failed to engage in a process to seek stakeholders' views.

That said, the matter is now before this inquiry. We welcome that and we are very willing to engage in the discussion here. Can I conclude by reminding the committee what this is fundamentally about. It is about saying that where someone is killed as a result of injuries caused to them by another person where that person intended the injuries to be very serious—to be serious—that they should be subject to the sanction of murder.

Those sorts of deaths are abhorrent in our society. In any other jurisdiction in the country the charge of murder is available. It is not available here in the ACT. The maximum penalty for manslaughter in the ACT is 20 years. The maximum penalty for murder in the ACT is life.

I would like to draw to your attention a case which I think encapsulates the dilemma that we face and the issues that I think drive the need for this reform. In the recent territory case of Cassidy, which I note the DPP has drawn to your attention, the convicted person hit his partner's four-year-old daughter repeatedly over the head with a heavy metal saucepan, having become angry with her because she wet her pants.

The young child subsequently died as a result of her injuries. The accused, the person who was convicted, was charged with and pleaded guilty to manslaughter on the basis that he had no intent to kill. He repeatedly beat a four-year-old over the head with a frypan and she died as a result of that. In my view that should attract a charge of murder and the penalty should be available.

Those are the sorts of issues that we are attempting to address here in the territory. I think the reform that has been proposed is a reasonable one, one that is consistent with the common law and one that exists in every other jurisdiction around the country. I would be very happy to try and answer your questions.

**THE CHAIR**: Thank you. I will start. Minister, you spoke on a number of occasions in your opening comments about the government's intent and that this was a pre-election commitment. You stated in the Assembly in December that there was a strong concern voiced in our community over recent months that legislation does not adequately cover the circumstances in which taking a life can be classified as murder.

How did the government come to that opinion? What process did the government take to establish that this was in fact the community's feeling about this offence and the difference between murder and manslaughter?

**Mr Corbell**: Clearly, there has been some commentary about cases involving charges of murder and findings of manslaughter and, indeed, charges of manslaughter in recent years. There has been public commentary in the press about the outcome of various cases and a range of public commentary around that. I guess that matter has brought the issue to the government's attention.

We looked at the policy settings that we had in place here in the territory. We compared them with the policy settings that exist in every other state and territory in the country and came to the conclusion that there was something amiss with our legislation whereby there is not this ability to charge a person with murder where they have caused serious harm to a person and that person has subsequently died as a result.

That is a deficiency in our law and we believe it should be rectified because I think it would be the case that the view of the average person in the street would be if you did serious harm and they died, that is effectively murder. But under ACT law at the moment it is not.

**THE CHAIR**: You have touched on chapter 5 of the MCCOC report on the Criminal Code. That is a 1995 report and you said that no recommendations were made in that case. I honestly do not know the answer to this but when MCCOC reported on other changes to the Criminal Code, did they make recommendations for change or did they just publish reports?

**Mr Corbell**: No, MCCOC ultimately make recommendations to the Standing Committee of Attorneys-General and put those proposals to SCAG—

**THE CHAIR**: What you are saying is that what happened in the chapter 5 case was stand-out different from the other processes that had gone through?

**Mr Corbell**: My understanding is that it did not progress beyond the discussion paper stage but I might ask Ms Davis if she can clarify that.

**Ms Davis**: I have been a member of the MCCOC over the last 18 months and my understanding is that, while a number of the chapters had discussion papers issued and then final reports prepared, with respect to chapter 5, I am very certain that the discussion paper was released, the submissions were received but the jurisdictions who were working on that chapter ran out of resources. They have never finished the final report; it has never been presented to SCAG. So that chapter is different from the other chapters of the model Criminal Code.

**THE CHAIR**: But that is a resourcing matter?

**Ms Davis**: Yes.

**Mr Corbell**: The point should be made nevertheless, Madam Chair, that no recommendation was made.

**THE CHAIR**: Okay.

**Mr Corbell**: And it is wrong to suggest otherwise.

**THE CHAIR**: The other thing that I would be interested to know, and perhaps the department could assist us in this regard in relation to this inquiry, is this: you have referred, minister, to the 2006 changes to the Northern Territory law. When were the most recent changes made to other laws in relation to murder? I do not expect you to answer that off the top of your head. I was wondering whether the department might take that on notice to help the committee's inquiry.

**Mr Corbell**: Again, Ms Davis may be able to be of assistance.

**Ms Davis**: I cannot help you now but I will take it on notice and provide you with an update of when the last changes were made.

**THE CHAIR**: Thank you. Ms Porter?

**MS PORTER**: I will just play the devil's advocate here for a while, minister. You say that the community would expect this to be the case and it is not at the moment. The incidents that we have referred to, particularly the ones that we have just been looking at with the AFP report and the one you have just referred to, are really emotive issues; therefore, one would imagine that the community would respond in this way to those particular ones, because they are very emotive.

**Mr Corbell**: Yes.

**MS PORTER**: When we have looked at other issues, though, that have been emotive issues for the community, the ACT government has in fact made different decisions—the issue around terrorism and the legislation and the recent suggestion that we should have stronger laws with regard to motorcycle gangs. So we have made different decisions and the community has been somewhat critical of us on both of those occasions—certainly that has been the case with the commentary in the media. So how do we say that this is in fact different?

**Mr Corbell**: I would argue that it is not different. It is again a proportionate response, in the same way that when we have had the debates about terror laws or about laws around association with criminal gangs, motorcycle gangs or whoever it may be, the government has always sought to argue a proportionate response to those issues.

We know that the international human rights jurisprudence on this matter, on this particular issue of this construction of murder that the government proposes, has been

considered to be consistent and a proportionate response in the human rights jurisdiction. So it is not a disproportionate response; it is not a response that is contrary to our human rights framework. Indeed, the government has provided detailed advice on how it is consistent and has been upheld in respected courts internationally that also operate within a human rights framework where these issues have been tested. So I would say to you, Ms Porter, that the position is the same. It is a proportionate response; it is a response that is consistent with human rights law.

**THE CHAIR**: So you do not hold the argument that was put forward by the AFP that consistency of legislation is the appropriate path to go down?

**Mr Corbell**: I did not hear the AFP's comments, but I think there is an argument to say that, with respect to the community standard on this matter, I do not believe it is different in the ACT compared to the rest of the country. I do not believe that someone walking down the main street of Civic compared to someone walking down George Street or King Street in Sydney or in Melbourne or wherever has a different view about what sort of sanctions should be available in these circumstances.

These are abhorrent circumstances. The killing of one person by another is the most serious matter in our criminal law, and for good reason. It threatens fundamentally the social order of our society. So that is why we say that the sanction should be the most severe available, potentially. It does not preclude sentencing that reflects the facts. The government's view has always been that sentencing should be made on the circumstances around the particular facts and in accordance with precedent and so on. But the sanction should be available. And why is it that in the ACT the sanction of the sentence associated with murder is not available but it is available in every other place in the country?

**THE CHAIR**: Well, I would like to—

**Mr Corbell**: And I do not think it is because the community view is any different.

**THE CHAIR**: Could we go to that, actually, because it is my understanding that before the Crimes Act was patriated to the ACT in fact the crimes ordinance was changed by the commonwealth in 1990 or 1989 to take out the provision which this legislation proposes to put in. What is your understanding of why that happened?

**Mr Corbell**: I do not know. My officers may know that, but I am not familiar with the history.

**Ms Davis**: With respect to the investigations that we have conducted, we have not been able to show up any documentation explaining why that change happened. We had our librarians cover our research to make sure we had not missed anything and we have not been able to find any documents that explain why that change happened. So I cannot assist you on that, I am sorry.

**THE CHAIR**: Okay.

**MS HUNTER**: I have a similar question there, but I wanted to follow up on the case that the minister mentioned, which was the Cassidy case. I am just not understanding

why the second part of section 12—"with reckless indifference to the probability of causing the death of any person"—could not have been used. Why did the DPP—and you may not be able to answer this—choose to go with the charge of manslaughter when we do have a second limb here? I am just not understanding why this second limb is not used in a number of these cases that have been raised in the AFP submission and a couple that have been raised in the DPP submission.

**Mr Corbell**: In the first instance it is probably a question better directed to the DPP. They would be more familiar with all of the facts around the case and the decisions they took, which were, of course, matters for them. But I think that is a separate question. Reckless indifference is a different construct from what the government is proposing with this amendment, which is to establish this third limb, if you like, or this third element, which is about the fact that, if you cause the injury and it can be demonstrated that you intended to cause the injury, you are subject potentially to the charge and the penalty associated with the charge if it is proven.

So it is not about being recklessly—the element there, if I read it correctly, still relates, recklessly indifferent, to the possibility that you are going to kill somebody. So you still need to have it in your mind, or you have to be able to demonstrate that the person should have known that what they were doing was going to kill somebody and yet were just completely indifferent to that. Whereas here, what we are saying is that it is sufficient to say you conducted yourself in such a way that you caused harm that endangered, or was likely to endanger, human life.

**MS HUNTER**: I guess what I am not understanding—

**Mr Corbell**: So it is a different test. And it is—

**MS HUNTER**: And I guess what I am not understanding with that different test is that you have mentioned a very heavy frypan and a four-year-old child—how does that not fit in to reckless indifference? Fifty-seven stab wounds—how does that not fit in to reckless indifference? That is what I am not getting clearly.

**Ms Davis**: I do not think I can assist.

**Mr Corbell**: I think that is better a matter for the DPP. It is difficult to comment on those matters without knowing the full details of the particular case. The DPP has raised the matter in his submission, and I note that I think the DPP is going to give evidence. So I think it is probably a matter that is better tested with the DPP.

**Ms Davis**: The question regarding the 57 stab wounds, there was a charge of murder in that case. It was open on the facts of that case. It is then a question of how the law is applied by the court and by a jury, if a jury is hearing it.

**THE CHAIR**: Mr Rattenbury? There is a line of questioning that I want to come back to here.

**Mr Corbell**: In relation to Cassidy, it is just worth making the point that the judge in his sentencing comments did make it clear that in any other jurisdiction the nature of the conduct of the accused in that case would have been sufficient for a finding of

murder, but it was not the case in the ACT. The judge did not say, "Look, why didn't you charge Mr Cassidy using that second limb of the murder offence?" In fact, he basically said that, on the law as it was constructed, it was not open to the court to find a charge of murder in relation to that matter.

**MR RATTENBURY**: You have placed quite some emphasis on the Cassidy case. Do you believe the sentence was inadequate?

**Mr Corbell**: No, I have a strong view that I do not comment on sentences in individual cases. That is a matter for our judges and magistrates to determine properly within the realm of their responsibilities. What I am saying, though, is that these cases highlight that there is potentially a deficiency in the law because I think the community standard would be that those sorts of matters should attract the sanction of murder. And that is really what the government is saying at the end of the day. The sanction of murder should be applied in these circumstances. It is not criticising the sentence that is made; it is not criticising the charges that are brought. Those are matters that are properly decided within the existing policy framework as established by the Assembly through legislation. What I am saying is that I think the legislation should be changed.

**MR RATTENBURY**: Quickly following on from that, one of the themes that came through the AFP submission seemed to be a frustration that the sentences were manifestly too low. They stated that as being the crux of the matter. They seemed to draw a distinction between that and what charge was formally drawn. Would you like to comment on that?

**Mr Corbell**: Again, I do not wish to, and I will not, reflect on individual sentencing decisions. Those are properly matters for the courts to determine. What I would say, though, is that it is the case that where you have a maximum set at a particular level, any court is going to work down from that, with only the most serious of matters receiving the maximum penalty and then a gradation down depending on what the court considers the seriousness or gravity of the matter and the sanction that should be applied. With manslaughter, the maximum penalty is 20 years. Clearly, not all cases of manslaughter are going to attract that penalty. Many proven cases of manslaughter will attract significantly less than that. If the threshold is higher because the Assembly determines that the ultimate sanction should be higher, then courts will take that matter into account.

I am not saying that the existing sentencing options are insufficient as they relate to these particular offences. What I am saying is that there are some matters which currently do not fall within the appropriate sanction. The offences that I and the government believe do not fall within the appropriate sanction are those offences where someone causes serious harm to a person, intends to cause that harm and then that person dies as a result. At the moment we would argue it sits within the wrong area of sanction or it is confined only to manslaughter, whereas it should be murder, and obviously if murder cannot be proven, there is still the option of a finding of manslaughter. We believe that both options should be available, as they exist in all other jurisdictions.

**THE CHAIR**: Before I go on, what you are saying there, minister, is almost that if

you charge people with murder the option of manslaughter is not available, and that is clearly not the case.

**Mr Corbell**: No, I am not saying that. What I am saying is that it is the case, that if you charge someone with murder but the court, a jury or a judge decides that the charge of murder is not proven, it is still open to the court to make a finding of manslaughter. But the issue is that with the type of behaviour that is discussed in the bill at the moment, that behaviour does not qualify for a charge of murder. It only qualifies for a charge of manslaughter.

**THE CHAIR**: I think Mr Rattenbury has covered the area in relation to sentencing that I raised with the AFP. The other issue I raised with the AFP, which I think to do the issue fairness should be canvassed more widely, is the issue of the propensity of these serious charges to be heard not by a jury but by a judge alone. Does the government have a view that this is an area that is of concern to them and that there might be remedial actions in this area as well as part of the suite of addressing what you see as the common man's view about how murder should be treated?

**Mr Corbell**: I think they are separate issues.

**THE CHAIR**: I do not disagree with that.

**Mr Corbell**: And I think the issue of the sanction that is available for this type of behaviour is the threshold issue for this committee and whether or not what the government proposes is appropriate. But in relation to the matter that you raise, yes, I do have a view and the government does have a view about the current provisions around election for a trial by judge alone.

Our territory's provisions are the most generous in the country. There is no doubt about that. In many other jurisdictions around the country, election for trial by judge alone is much more limited. In some jurisdictions it requires the consent of the prosecution and in other jurisdictions it is not permitted at all.

For example, in the commonwealth jurisdiction all these matters must be determined by trial by jury. It is a constitutional requirement. So there are a range of views, a range of approaches around the country. My view is that, and I have already raised this matter with the Supreme Court and discussed the matter with other stakeholders, there is scope for reform in this area to provide for some changes in the circumstances in which judge-alone trials should be permitted.

My personal view in a matter of this severity, murder, is that it should be a matter for a jury to decide. I think there is a very important role for maintaining juries at the centre of our criminal justice system, for maintaining citizens at the centre of it in determining guilt or innocence in these matters. It is a concern to me that we do not see that as often as we do in other jurisdictions here in the ACT.

That is a matter I intend to pursue in this term. It is a difficult matter; it is complex; it is a matter that will undoubtedly be strongly resisted by the defence bar and others for obvious and legitimate reasons to protect the interests of their prospective clients. But there are other matters at play. However, I think that is a separate question from the

question that is before the committee.

**THE CHAIR**: Thank you. We agree that it is a separate question. I think all of us agree that it is a separate question. But do you see that the issue of the propensity for judge-alone trials might undermine in the public's eyes their confidence in the justice system? You say that you know what the common man thinks about what murder should be. Do you know what the common man thinks about how murder trials should be conducted?

**Mr Corbell**: I think there is still a view in the community which is widespread that that these matters are determined by a jury.

**THE CHAIR**: But do you know that?

**Mr Corbell**: A jury of your peers determining your guilt or innocence, particularly on serious matters. My view would be that it is often more difficult for the courts to maintain legitimacy in terms of their decision making on sentencing, for example, or on findings of guilt or innocence where juries are not involved. I think it opens the court up to potentially more adverse criticism, fair or unfair, if the matter is determined by a judge alone, whereas if a jury determines the matter, I think citizens generally would take the view, "Well, there are 12 of us in there"—10 or 12 or however many it is—"determining the matter and they have come to a conclusion and I might not agree with that but the jury has heard it and the jury has made a decision." I think there is a greater safeguard in the legitimacy of decision making where a jury is involved compared with if it is solely a judge.

Now, that is not to say there are not matters where it is appropriate for a judge to hear a matter alone. There are well-established arguments, some of which I think are quite valid, about why it is appropriate for a judge to hear a matter alone. But I think they are the exception and, as I say, I think there are perhaps some opportunities to address that balance here in the territory.

**MS PORTER**: One of the things that the AFP said in their presentation to us this morning is that they thought that by introducing this additional limb it would act as a deterrent in that the sanction would be higher and people would actually stop and think and say to themselves, "Okay, if I do this and I carry out this behaviour, then I stand in danger of being accused of murder rather than manslaughter because now the ACT has introduced this amendment to the legislation."

Do you think the public, the community or the common man, as the chair refers to it, actually think that by the government introducing this we will actually stop people committing these acts? Is that what you believe people think?

**Mr Corbell**: That is not the motivation for the government's reform. These matters are always notorious. These linkages that are sometimes made are always notoriously difficult to prove one way or another. I think what is important is that if people commit these offences, the sanction is appropriate. Whether or not it prevents them from committing the offence, you could say that the existing provisions around murder were sufficient to prevent people from committing murder but people still commit murder. I do not think it is as straightforward as that at all, and it is not really

the issue as far as I am concerned.

The issue is: is the sanction that is currently available for this behaviour appropriate? Does it meet a commonly accepted community standard? I know it is a bit repetitive but I think this is the key issue. The community standard in the ACT I do not think is any different from the community standard in New South Wales or Victoria or Queensland or South Australia or the Northern Territory or Western Australia or Tasmania. This type of behaviour is abhorrent and why should not we impose the same standard in terms of the sanction that exists elsewhere? It is a proportionate standard; it is a standard that is consistent with the common law; it is a standard that is also consistent with human rights jurisprudence in other places.

**MS PORTER**: So if you ask the common person on the street, his or her motivation would be that this is the standard that I require because it is the reasonable standard, not driven by a feeling of helplessness against this abhorrent act. I want to make sure that this does not happen again and by putting out this message, it will not happen again. That is not the motivation, you are saying, minister. The motivation is that we need to make this available so that the message is clear that—

**Mr Corbell**: As I say, it is about saying what the community would expect the sanction to be for that behaviour. Let us think about it this way: there has been quite a campaign around the country called "One punch can kill". People can king-hit other people and they die as a result. That behaviour under the ACT's laws probably would not equate to murder in many instances.

However, there is now a growing recognition around the country that when it comes to that sort of violent, aggressive behaviour where someone strikes another person intending really to king-hit them, cause serious harm—they have been punched in the head and they die as a result—there is a movement right around the country saying that people have got to understand that even this sort of behaviour is just not acceptable. It is just not acceptable. People are dying as a result of people's actions.

In other jurisdictions that is better taken account of, I would argue, than it is here in the territory. So it is that sort of community standard. The current Young Australian of the Year is the person who developed the "One punch can kill" campaign to raise awareness about the dangers of that type of behaviour. That I think is a good reflection of what the community standard is around this type of behaviour.

**THE CHAIR**: Ms Hunter?

**MS HUNTER**: No.

**THE CHAIR**: I would like to go back to the MCCOC report. Part of what MCCOC says, and this is probably a sort of gross simplification by way of summary, is that using the category of serious harm in a murder offence is outdated and can result in inconsistent verdicts. I think that the Law Society and Bar Association when they give evidence might dispute your view about this being a straightforward change.

That view about "serious harm" in the murder classification is supported by other law reform commentary, in WA most recently. In the 70s, 80s and 90s in the UK there

were various law reform commissions that made recommendations in this regard. Are you saying that the law reform process is out of step with what might be called the common man? I used to call it "the man on the 333 bus" but it does not exist any more. Do you think that there is a disjunct between what the academic thinkers are saying on these things and what people in the street are saying on these things? Where do you think the situation should lie?

**Mr Corbell**: I think the simple answer is yes; in this circumstance, yes. That is reflected in the fact that no parliament has accepted that view. No government has proposed changes in that form. Indeed, many jurisdictions have provisions that go well beyond what the territory government is currently proposing.

There are other forms of what is known as felony murder or constructive murder where a person can be involved in the commission of serious offences where someone gets killed. The classic example is the armed robbery that goes wrong and one person shoots another person and they die in that armed robbery but everyone else who is involved in that armed robbery—even the person that is driving the getaway car—can be accused of murder. Those provisions exist in some jurisdictions.

I am not suggesting that they should exist here. The link is broken, in my view, between the actions of the individual and the death in those circumstances. But the link is still quite clear in this circumstance. The person has intended to cause harm, serious harm, and another person has died as a result of that. The intent is still there.

No, you do not have to prove intent to kill. You do have to prove intent to cause serious harm and you do have to prove that that harm resulted in the person's death. The causation is still there in my mind and I think it is very clear in the way that the government is proposing to construct the bill.

**THE CHAIR**: You have exceeded your time, minister. Does anyone else have any more questions before we move on? Thank you very much, minister and officials, for your time this morning.

As is always the case, you will receive a copy of the transcript. As this is a very important matter—I really emphasise this in this case—if you think that there is anything that needs clarification feel free to write to the committee on the matter.

**Mr Corbell**: Thank you.

**Meeting adjourned from 10.48 to 11.02 am.**

**WHITE, MR JON**, Director, ACT Office of Director of Public Prosecutions

**THE CHAIR**: Good morning, Mr White, and welcome to this hearing of the Standing Committee on Justice and Community Safety into the Crimes (Murder) Amendment Bill. You have read the buff privilege card before and you are aware of its implications?

**Mr White**: Yes.

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

**Mr White**: No, I would not, other than to say that I would like to thank the committee for inviting me here and giving me the opportunity to make a contribution. I am familiar with the written contributions that have been made, and of course I have also favoured the committee with a brief written submission.

**THE CHAIR**: I take the point you make in your submission that you are not dwelling on the policy but on the practicalities of it.

**Mr White**: Yes.

**THE CHAIR**: We have asked other people about consultation. You are an independent statutory office. Is this your view, the view of your office, the corporate view? How would you characterise the views that you are expressing today?

**Mr White**: I would characterise them as the views of the office.

**THE CHAIR**: Okay, thank you for that. Did you make this point or have I dreamt it? It does not matter, anyhow. One of the things is that the law was changed in the ACT in 1990.

**Mr White**: Yes.

**THE CHAIR**: Do you have an understanding about what was the motivation for taking out the provision which the government is currently proposing to put back in?

**Mr White**: I do not. In fact, I have tried to find out the background to that and I cannot. I note that none of the submissions that the committee has received seems to have thrown much light on what exactly happened. It was a strange time in the territory's existence, just after self-government, but at a time when the commonwealth still retained power over the criminal law, as I understand it. So it could well have been that it was a decision taken in the federal Attorney-General's Department, and possibly not at a senior level, and that it was not particularly remarked upon at the time. But having said that, there is a real lack of explanation as to why the change took place.

**THE CHAIR**: Could you give, for the sake of the *Hansard* and for those who will follow this, a brief exposition about why the DPP thinks that the law should be changed in this way?

**Mr White**: Again, I start with a caveat: it is not for me to advise the government or the Assembly on what the law should be, and these are matters of public policy. I see my role more as outlining the relevant considerations, particularly as they have an effect on my office.

A major issue that I would highlight with the committee is the issue of consistency across Australian jurisdictions. The law dealing with homicide is particularly a law that deals with public policy. The reason that in all jurisdictions other than the ACT an intention to inflict grievous bodily harm resulting in death is sufficient for murder is because that law sanctifies human life. The law has developed over centuries to sanctify human life in that way. The law is not in that form to make it easier for prosecutors or for any other purpose. It is simply a reflection of the high value placed on human life by the common law. Those, of course, are issues of public policy for the Assembly, with respect, and yourselves, and I do not wish to be seen to be traversing into issues of public policy.

In terms of the practical aspects of the matter, I would respectfully suggest that there is great virtue in having consistency between Australian jurisdictions with such an important law as murder. As I said in my submission, it does seem strange that acts which in Queanbeyan would constitute murder, in the ACT would not. That, in very simple terms, is one of the main aspects that I would draw the committee's attention to. Other matters really are matters of public policy for the Assembly.

**THE CHAIR**: On the subject of consistency, it seems to be the argument that has been used by a number of people, but it seems to me that a reflection on the provisions would not actually indicate that there is a high degree of consistency. For instance, Western Australia has a provision which says "intends to cause bodily injury to endanger life", and Tasmania has a similar provision—"intends to cause bodily harm which the offender knew would be likely to cause death". It seems to be an add-on from what is currently proposed in this legislation and what exists in other jurisdictions. In the Northern Territory, like the ACT, it is "intends to cause serious harm". In New South Wales and Victoria, it is "intends to inflict grievous bodily harm", with no reference to "likely to cause death".

**Mr White**: Yes.

**THE CHAIR**: I see that as more than a fine distinction. Do you see that as being sufficiently consistent or do you see that there is still some inconsistency?

**Mr White**: I agree with you, with respect. There are differences. The two particular jurisdictions to which you refer both have their own codes, and clearly they have made some changes in codifying the law along the lines that you have suggested. I suppose they have probably reached a position halfway between the ACT's current position and, say, the common law position in New South Wales. So that is true, but there is an acknowledgement in relation to the intention to cause serious harm. So I would assert that that is closer to the common law position than the position that obtains in the ACT.

**THE CHAIR**: Thank you for that. Ms Porter?

**MS PORTER**: Not at the moment. I am thinking.

**THE CHAIR**: Okay. Ms Hunter?

**MS HUNTER**: I want to go to the case that you have mentioned here in your submission. It was around the Cassidy case. That was raised in the AFP submission, along with a couple of other cases. I want to understand why the DPP took the decision in this case to go with the charge of manslaughter and why you did not look at that second limb under the murder section.

**Mr White**: I would have to say that those decisions were made in the office before I became DPP. However, I would be very confident in asserting that close consideration was given to the second limb and that the decision to charge manslaughter was made in full cognisance of the issues that were raised by the second limb.

It is, of course, very difficult to extrapolate too much from fact situations. As I said in my submission, it is a matter of pure speculation as to whether Mr Cassidy would be guilty of murder under the proposed provisions. However, the facts of that case seemed to be indicative of an intention of Mr Cassidy that did not go further than the causing of harm to the child. In other words, there was no foresight of any other consequences further than the immediate consequence that would be visited upon the child by the admittedly shocking beating that was administered to it. Recklessness really is a concept which requires foresight of consequences and if it is not possible to show foresight of consequences when an act is done then it is not possible to charge recklessness.

I might say that recklessness, as a proof in criminal matters, is just as difficult as any other form of state of mind, of mens rea, to prove. It is not some lesser standard; it is a particular standard. It is not something which is akin to negligence; it is a particular standard that is recognised by the criminal law. As I say, it requires some advertence to the probable consequences of the act. If there is no advertence at the time of the commission of the act to the probable consequences then the Crown cannot make out recklessness.

**MS HUNTER**: So in these situations, isn't there a sort of reasonableness put on there—that any reasonable person in the street would conclude that, with a very heavy frypan and a four-year old child, that would be highly likely to lead to the death of that child? I am still not quite following through.

**Mr White**: The answer is no, there is no standard of reasonableness. Recklessness requires a subjective intention—what criminal lawyers call subjective intention. In other words, it has to be established that the actual perpetrator, or alleged perpetrator, had a particular state of mind. It is not good enough to assert that anybody in that situation would realise what the consequences of the act would be, or anyone of normal intelligence or any other such formulation. Those are formulations which go to negligence, and that is why Cassidy was charged with manslaughter.

One of the manifestations of manslaughter is gross negligence. Again, it is very unusual for the criminal law to punish negligence. Manslaughter is one of the few

crimes where negligence is punished. Again, the explanation for that lies in the sanctity of human life. In other words, where you are engaging in activity which is putting at risk the life of another human being, the law puts a very high standard on you, and if you act with a gross degree of negligence which results in the death of a person then you are guilty of manslaughter. But negligence is very distinct from recklessness. They do not fade into each other in any way, in the way in which they are proved.

**MR RATTENBURY**: One of the issues that has come up through the discussions this morning has been one of the level of sentencing arising out of a number of cases. Certainly, in the AFP submission they made reference to the inability of the ACT judiciary to deter the commission of serious offences through sentencing. They highlighted a number of cases, including the Porritt case, the Collins case and a number of others. The question that has arisen in committee discussions this morning, to some extent, is: is the issue one of the definition of the offence or is the issue more that we have a problem of inadequate penalty? Does the DPP have a view on that?

**Mr White**: With respect, that is conflating two issues. Cassidy is a good example of a very severe penalty for manslaughter. I think Cassidy was sentenced to 15 years, with 10 years on the bottom, from memory. But sentences for manslaughter can range from that sort of range right down to, in some instances, bonds, and immediate release without imprisonment, depending on the circumstances of the manslaughter. There is plenty of flexibility available to sentencing judges in relation to sentences for both manslaughter and murder.

I prefer to do any commentary on the level of sentences through the courts. I have attempted to scrutinise carefully any sentences that are handed down with a view to appealing against any sentences that I thought were inappropriately light. I have done that in a number of instances. I think that is the better way for DPP to give its commentary on level of sentences, rather than to pontificate upon it in committees.

**THE CHAIR**: In what instances in the past little while has there been either consideration of or actual appeals in relation to leniency of sentences?

**Mr White**: Since I have been DPP, there have not been any occasions to consider murder or manslaughter sentences, but we have recently appealed, for example, on a sentence involving sexual assault of a minor, where the perpetrator had inveigled his way into the affections of the victim and perpetrated offences against both her and her friend. We have appealed against the sentences that were handed down there. So that is an example, and there have been a number of others where we have considered or appealed against sentences.

**THE CHAIR**: One of the cases that the AFP highlighted in their submission was the case of Cassidy, which was three years with six months non-parole.

**MR RATTENBURY**: No, I think that was the Collins case.

**Mr White**: Collins, yes.

**THE CHAIR**: Sorry, Collins. Did the DPP contemplate or appeal against the

leniency of the sentence?

**Mr White**: I believe not. I cannot assist the committee as to the reasons for that because it was before my time.

**MR RATTENBURY**: Similarly, with the Porritt case, this one has had a particular profile. Did the DPP consider an appeal in that circumstance, and can you take us through those considerations and why or why not an appeal was made?

**Mr White**: Yes. Bear in mind that we are talking about appeals against sentence, because the Crown has no ability to appeal, as the law currently stands in the ACT, in relation to verdicts, including verdicts by judge alone, in a judge-alone trial. The process that the DPP goes through really comes down to whether the resulting sentence is one so as to shock the public conscience. That is the test that is applied.

We have to be conservative in exercising our right of appeal because there is always inherent in a Crown appeal an element of double jeopardy—in other words, a person who has faced justice, been dealt with, stands to have their sentence increased, say, six months after they originally got their first sentence. That is something that the law disapproves of. In many instances, where the Crown appeals, the appeal court will say, "Indeed we accept that the original sentence was too lenient; however we will not interfere with the sentence because of the principle of double jeopardy." In other words, because the person has received their punishment, adjusted their life accordingly, and it would be inappropriate to visit greater punishment on them. That principle of double jeopardy is a very powerful disincentive for us to appeal. So if we find a sentence where the result is such as to shock the public conscience and we think that we can successfully resist any issue of double jeopardy, we will appeal.

**MS PORTER**: Could you explain to me what you mean by "shock the public conscience"?

**Mr White**: That really is, I suppose, a matter of judgement in terms of what the community, for whom of course we act, would think about the sentence that is handed down in the circumstances. I will not, with respect, use an example of a current appeal, but I give the example of an appeal in relation to a serious sexual assault where the offender has been treated lightly, on the basis, for example, of subjective material as to the offender's upbringing and so on. That is something which the community might have considerable concerns about and we have to reflect that. That is a matter of judgement.

**MS PORTER**: Yes, that is my question: how do you—

**Mr White**: Yes, it is a matter—

**MS PORTER**: Whose judgement?

**Mr White**: My judgement; the judgement of my office.

**MS PORTER**: So how does your office make that judgement? How do you arrive at the judgement?

**Mr White**: We consider the facts of the case in particular. I think that is the most important thing to consider, rather than considering other cases that may have differed from that case. We consider the range of sentences that are customarily handed down for offences of that type and we make a judgement on that basis.

**MS PORTER**: The reason for my question is that often you read something in the newspaper about a judgement. You may read over time or watch on the television, as it goes on, the various things that are said and done. Evidence is brought before the court et cetera. At the end of the day you hear what the result of all of that was—the sentencing of this person or the non-sentencing of the person, convicting of the person or not. When the public hears that, they have only got the minimal information given to them—

**Mr White**: Yes.

**MS PORTER**: that is presented to them, unless they have attended the court every day. Even under those circumstances, I would say that I have been to court and watched proceedings and I still come out at the end of the day thinking, "Well, I don't know."

**Mr White**: Yes.

**MS PORTER**: So we think, "That is light" or "That is heavy" or whatever, but how are we to know? That is why I am asking how are we to know on what basis does it shock the public conscience? Is it because they have read something in the newspaper that makes them feel that that sentence was light when they are not lawyers, they have not sat through all the evidence and they have not had that evidence presented to them in the way it should be? Whether or not it shocks their public conscience, should it be a reason for us to be questioning those judgements?

**Mr White**: Well, I—

**MS PORTER**: That is why I am trying to get to the bottom of it.

**Mr White**: I understand what you are saying. I do have most of those advantages that possibly an ordinary member of the public may lack in terms of an understanding of the evidence that has been presented and all the background factors in any case. Clearly, often subjective factors relevant to the circumstances of the offender are presented to court and are known to the prosecution because of that. So the concept of shocking the public conscience is not a concept that refers to some tabloid outrage in the community. It is an attempt to encapsulate the role of the Crown in acting on behalf of the community and appropriately reacting against unduly lenient sentences.

**MS PORTER**: When we are presented with the evidence that changes to the law in this instance should be made because the community or the common man expect it, who is that person?

**Mr White**: I do not know. I find it very difficult, with respect, to comment on that. I am not sure who was saying that. I am not. I am not saying that.

**MS PORTER**: It is a standard that the community expects.

**Mr White**: Yes.

**MS PORTER**: Am I saying it how it is being presented to us? Is that right?

**THE CHAIR**: In fairness to the Director of Public Prosecutions, he is not responsible for making public policy.

**MS PORTER**: No he is not, but I am asking him who he imagines the community might be. You are saying the community that is shocked, that has a public conscience, is not, in fact, that person out there on the street. It is you and your office making that judgement.

**Mr White**: In terms of that judgement, yes. In terms of matters of public policy ultimately, if I might say so with great respect, you are the representatives of the community. You, if I might say so with respect, have to reflect the very divergent views of the community. No doubt, you often struggle with that. You will no doubt often have constituents who have different views on matters that come before you. Often you will have difficulty reconciling yourselves to those views, no doubt. In matters of public policy that is the way our democracy operates. In matters of the administration of the law, the DPP, which is an independent-of-government organisation, is tasked with that role.

**MS HUNTER**: I want to pick up on the public conscience issue and also the issue raised around a reluctance to appeal against sentences that may appear lenient or you feel are lenient because of double jeopardy. I just wanted to go back to the Porritt case. That obviously did have an effect out there in the community—

**Mr White**: Yes.

**MS HUNTER**: It had a strong reaction from many quarters. Why was the decision taken not to appeal against what many would say was a lenient sentence in that case?

**Mr White**: The Crown presented a case in Porritt which was a case of murder. The matter was tried in that instance by judge alone, and that judge was not satisfied beyond reasonable doubt that Mr Porritt had intended to kill his mother or acted with reckless indifference.

The public debate on the matter has quite naturally dwelt on a number of features of the case which seem to indicate that that conclusion of the learned trial judge was possibly somewhat surprising in some people's minds, given the evidence that was called on behalf of the prosecution. However, that is a matter for the trial judge. The trial judge found that the accused person was not guilty of murder but was nevertheless guilty of manslaughter.

That meant that the DPP in considering any appeal had to look at the appropriate level of sentences for manslaughter of a like nature, given the way in which the trial judge had found the facts. So we are effectively confined to the verdict delivered by the

tribunal of fact, which in this case is a judge alone, and the way in which those facts emerge.

One may have a sense of outrage or surprise at the facts as they seem to emerge, but the role of the DPP in considering sentence was something quite different and something much more confined. I trust that answers that question.

**MS HUNTER**: I did not quite follow it to the end, but—

**Mr White**: Right, okay.

**MR RATTENBURY**: I believe the observation was, given that it was a manslaughter conviction, there was a narrow window of precedent?

**Mr White**: Yes, that is so. In other words, the matter cannot be approached on the basis that it was the serious murder that the Crown had alleged it was in presenting its case. It has to be approached on the basis of the—

**MS HUNTER**: But in itself it was still a horrific murder with evidence to support that. So I am still not clear why —

**THE CHAIR**: It was a horrific death, I think we have to say.

**MS HUNTER**: Sorry, thank you, chair.

**Mr White**: I do not want to get too involved in a commentary on the case but I would have to say that His Honour found that the victim had apparently attacked the accused and that in defending himself he caused a death. In that situation, possibly, maybe it would be wrong to characterise it as a horrific death. Certainly, any death would be unfortunate but His Honour found facts which suggested no intention whatsoever and in those circumstances there was a very narrow basis on which he could be sentenced.

**THE CHAIR**: One of the other issues that has arisen in questioning—you probably will not be surprised that I will ask you this question because I think we have had discussions on this in the past—is the issue about a propensity in the ACT for there to be judge-alone trials in serious matters. The Attorney has expressed his views on that—

**Mr White**: Yes.

**THE CHAIR**: He would like to see some changes. Do you see that this as an issue in these matters? Does the DPP have a view in terms of administration of justice perhaps?

**Mr White**: Yes, and again, at the risk of—

**THE CHAIR**: Traversing into public policy.

**Mr White**: traversing my earlier caveat, these are matters for the Assembly. It may well be that the Assembly will be called upon to consider this issue. The jury system

is a great system for bringing the public and the common sense of the public into the determination of factual issues. When the factual issues are matters of great importance or great interest to the public, the strength of the jury system shines through particularly well. So for very serious offences, I think there would be a strong argument for suggesting that the community, through a jury, should be able to adjudicate and bring common sense to bear on issues of fact.

The Porritt case provides an example. There were two quite clearly contrasting cases presented to the tribunal of fact in that case. The Crown case clearly was not that the death was as a result of effectively an accident. That case was not accepted. But those sorts of factual issues are issues that juries are very good at determining. So my position is that in relation to serious cases where there is a community interest and where we are dealing with common-sense factual issues, a jury should be given the opportunity to determine those cases.

Possibly, although there is a role for judge-alone trials, that should be carefully moderated to ensure that the sorts of cases that we have been discussing this morning could be determined by juries.

**THE CHAIR**: And what would your office's view be about where the role for judge-alone trial sits?

**Mr White**: There are instances, for example, where by reason of publicity it would be very difficult for a person to obtain a speedy and fair trial. Those cases are fairly exceptional I might say because, again, juries—I do have some experience of presenting cases to juries—are immensely able to deal with those sorts of issues of prejudice and put things out of their mind. But there will be cases where, because of a rash of publicity or whatever, there are issues about whether a person can obtain a speedy trial and a fair trial. Judge-alone trials are perfect for those.

Another example of judge-alone trials being advantageous is often given as complex corporate fraud cases. I do not personally agree with that because I think most cases of corporate fraud come down to very simple propositions of dishonesty. Juries are very good at dealing with issues of dishonesty.

**THE CHAIR**: The mechanism may be complex but the motivation is possibly quite simple.

**Mr White**: Exactly. Dishonesty is the sort of basic community standard that juries should be engaging with, as they should be engaging with issues like recklessness and negligence, which we have discussed earlier in the hearing.

**THE CHAIR**: Is it the case that it is easier in the ACT to elect for a judge-alone trial than it is in other jurisdictions?

**Mr White**: Yes, it is. I will try to give not-too-long an answer, but in some jurisdictions, notably the commonwealth and Victoria, there is no availability of judge-alone trials. Under the Australian constitution there is a guarantee of trial by jury for persons charged with commonwealth offences. That right cannot be waived by an accused person or the Crown.

Victoria, which of course is the other jurisdiction in Australia with a Human Rights Act, has written into its Human Rights Act a right to a trial by jury. It was thought in Victoria that trial by jury was a basic human right. The position in other jurisdictions varies but most jurisdictions at least have the involvement of the Crown in the decision as to whether a matter should go for judge alone. Notably in the ACT, the decision to go for a judge alone is purely an election to be made by an accused person. The Crown has no say, no influence in that decision. It may be thought that it is appropriate at least to give the Crown a say in whether matters go to judge alone—in other words, effectively a right of veto as to judge-alone trials.

**THE CHAIR**: Any other matters? Shane.

**MR RATTENBURY**: In evidence earlier today and in our discussions with the Federal Police, in talking about the limitations of the current definition of murder, the Federal Police put to us that a key problem at the moment in the ACT is the use of the defence, once it gets to court, "I simply intended to hurt them, not kill them." Is that, in your experience, one of the current impediments to murder convictions? Is that a significant issue in your mind?

**Mr White**: It is an issue, bearing in mind, as I said in my submission, that I do not see the proposed change to the law leading to a flood of murder convictions. The factual scenario does not arise that often where that line that you have alluded to could be run. So I do not see that, frankly, as a major issue one way or the other. But that is the difficulty really that I eluded to earlier in probably more highfalutin terms in relation to the difference between recklessness and intention—recklessness as to causing death and intention to cause grievous bodily harm.

**MR RATTENBURY**: If I might ask you generally, the Attorney this morning has put to us that one of the government's motivations is that there has not been a murder conviction in the ACT for some time. Do you have a view on why there has not been a murder conviction? It is quite a sweeping statement the Attorney makes which, I think, there is possibly a number of answers to.

**Mr White**: Yes.

**MR RATTENBURY**: Are you able to elaborate what the possible reasons are?

**Mr White**: I hope you are not inviting me to take issue with anything that the Attorney—

**MR RATTENBURY**: Of course not.

**THE CHAIR**: No.

**Mr White**: But—

**MR RATTENBURY**: In fact, far from it; I was simply using his comments as a reference point.

**Mr White**: Yes. Look, can I just say I do not think there—

**THE CHAIR**: I think the AFP said that as well.

**MR RATTENBURY**: Yes.

**Mr White**: I think this appears in some of the submissions. I do not think there is a reason. That is my answer. These cases are always complex and there are a number of reasons which we have touched upon in the course of the hearing. But there is no one single reason and the proposed change to the law would certainly not have a magical effect of changing the situation, because it will only apply to a limited number of cases with particular fact situations.

**MR RATTENBURY**: A question has been raised in one submission that alludes to the possible resourcing issues in the DPP as being a source of some challenge in getting murder convictions in the ACT. Would you like to comment on that suggestion, which was provided in a submission to us?

**Mr White**: No, except to note that I am very grateful for the additional resources that have been given to my office in the current budget and to inform the committee that we are currently busily recruiting against the extra positions that were created. We are always in the public scrutiny and quite appropriately so. The performance of the office is appropriately a matter of community concern and we hope to rise to any challenges that are presented to us.

**THE CHAIR**: On that note, does anyone else have any more questions? Mr White, thank you very much for your attendance this morning and your assistance to the committee. You will be provided with a transcript of this and I am emphasising this particularly: if you think that any matter has not been clearly expressed, please get back to the committee, because it is a very important issue and we want to do it right.

**Mr White**: Yes. I appreciate that. Thank you.

**Short adjournment.**

**ROWLINGS, MR BILL**, Chief Executive Officer, Civil Liberties Australia
**WILLIAMSON, MR LANCE BRIAN**, Director, Civil Liberties Australia

**THE CHAIR**: Good morning, and welcome to this public hearing of the Standing Committee on Justice and Community Safety inquiry into the Crimes (Murder) Amendment Bill. I welcome representatives of Civil Liberties Australia, Mr Bill Rowlings and Mr Lance Williamson. Are you familiar with and understand the implications of the buff card?

**Mr Rowlings**: Yes.

**Mr Williamson**: Yes, we have both appeared before.

**THE CHAIR**: Would somebody like to make an opening statement?

**Mr Williamson**: I will make an opening statement, Madam Chair. Civil Liberties Australia welcomes this opportunity to address the committee on the Crimes (Murder) Amendment Bill 2008. As the committee is aware, CLA has provided a written submission on the issues of concern to us.

We support the proposition that a crime of murder is, by its nature, a most heinous crime that needs to be recognised for what it is—a deliberate and calculated act of taking a human life. Society has an expectation that those who undertake such an act should face the most serious of consequences that society can bring to bear. However, CLA supports the view of many law reform commissions and advisory bodies that modern concepts of criminal culpability do not support that the intent to cause grievous harm is a mens rea for murder. CLA does not support a cheapening of the crime of murder by devaluing its seriousness. The bill under consideration does that by widening the definition of murder.

As noted by CLA and others, the current ACT legislation is based on the lengthy discussion paper by the Model Criminal Code Officers Committee in its consideration of fatal offences against persons. What is not clear to CIA is why it has become necessary to re-enact a regime of law regarding murder that the ACT has previously so deliberately repudiated.

It is understood that there is a view that we need not adopt all the outcomes of the work of the Model Criminal Code Officers Committee, implying that we can effectively depart from a commitment to adopt a model criminal code and effectively forum-shop what we like. If this is the view of government and the legislature, there needs to be a set of clearly articulated principles that determine what should and should not be adopted. This has not been done in this instance.

Of course, in the current legislative regime, people prosecuted for murder have not got off, as the alternative conviction of manslaughter can be proved instead. So is this bill more about the sentencing regime than guilt? If so, the committee should address the issue, the penalty regime, rather than lower the barrier as to what constitutes murder. Also, the Crown has the option of appealing a sentence if it considers it inappropriate in all the circumstances.

It would appear that there is a view that public expectation requires a successful prosecution of murder charges in the ACT, and that a finding of manslaughter is insufficient. As noted by others, the ACT is a small jurisdiction and hence the incidence of murderous intent might well be lower than in other states. That, coupled with the relative education and affluence of ACT residents, may also make the incidence of murder less than some would apparently like.

If there is a public expectation that more charges of murder should have been successful, one wonders how this expectation is generated. Was it by the media, looking for a sensational headline? Murder is a better headline than manslaughter. Or was it by over-exuberant police, prosecutors and others regarding their expectations—although one should expect that they best understand the strengths and weaknesses of a case and appreciate the most likely outcome according to the law. Or is this bill about the efforts of some to change society's expectation to accept that murder is something that lacks the element of the intent to kill?

CLA commends the government for providing the Human Rights Unit advice with the bill and hopes that this will be an ongoing feature of all important bills of this nature in the future. Of course, as we noted in our submission, just because a government can legally propose a bill that is compliant with the Human Rights Act does not mean it should.

Finally, CLA reaffirms its view that consultation is not something that occurs after the event. Consultation should be a proactive process that occurs prior to the preparation of drafting instructions and tabling of a bill. In this instance, CLA's involvement was after tabling, when the opportunity to realistically have a dialogue with government had passed.

CLA also notes that this bill is a significant step in turning back the legislation on murder. One could expect that the government should have sought the views of bodies such as the Bar Association and the Law Society beforehand. Also, given the importance of this bill, a referral to the ACT Law Reform Advisory Council should have been a given.

To accede to this bill would suggest that justice has not been well served in the ACT. CLA does not believe this is the case. Thank you.

**THE CHAIR**: Thank you, Mr Williamson. I think I will start where I have started with most other witnesses. You have come with your views on this bill. What consultation processes did you go through to come to this view?

**Mr Williamson**: Within—

**THE CHAIR**: Within your organisation.

**Mr Williamson**: our organisation? I think one could characterise it over time. We discuss many issues either formally or informally with our membership. We have a range of informal meetings. We do not meet formally to discuss particular issues, not generally anyway. In this case the views that we have expressed in our submission have been generated more through the informal discussions over time with a range of

our members. As I said, we have not had one formal meeting at which we have sat down and said, "Let's draft a submission." It is a process whereby we understand broadly what the issues are, what the membership view is, and then go about drafting our position.

**THE CHAIR**: What you are expressing here is the view of the membership. How do you see that it fits with the views of the general public, or do you know in any empirical way?

**Mr Rowlings**: I do not think we know in any empirical way about it.

**Mr Williamson**: Empirical way, no.

**Mr Rowlings**: When you have an issue like this, you go to the people who know about it. So in our case we go to barristers and solicitors who are using the law or are involved in the law. That is where we have consulted on this. I have spoken to at least six barristers on this issue and two or three solicitors, as well as speaking to people in government. So it is part of an ongoing dialogue. We did not go out and consult on this, and I suspect none of the others did particularly, either.

But who do we represent? We have about 160 members in the ACT and about 250 around Australia. So we represent a sizeable population group in the ACT. There are smaller organisations and bigger ones.

**THE CHAIR**: Yes.

**Mr Williamson**: As you would appreciate, our membership is concerned more generally about particular issues, and that is why they join an organisation like ours.

**Mr Rowlings**: But the reason we made a submission, of course, is that we were invited to.

**THE CHAIR**: Yes. I just wanted to understand the process that you went through. You wrote to the minister and to me as a member previous to the inquiry as well.

**Mr Rowlings**: As a member of parliament, not a member of CLA.

**THE CHAIR**: Yes, as a member of parliament. I wanted to go to some of the issues that you raised in your opening statement which we have explored here today. In some ways perhaps it was characterised by Mr White, the Director of Public Prosecutions, when he said there are a number of elements to this issue. One of them is about the change in the law, and I will come to that in a moment. But there are other elements, and you touched on those and we have explored those with other witnesses this morning—those that relate to sentencing, and those that relate to the issue of giving evidence before a judge alone rather than a jury. I would like to start with that first.

Does Civil Liberties have a view about what appears to be the propensity in the ACT for there to be judge-alone trials in serious cases? Do you see that as part of the equation that may result in fewer murder convictions than might otherwise be the case,

in the first instance?

**Mr Williamson**: Again, one needs to start with the legislation as we currently have it. I would expect that, if we had a jury trial on a particular case, on a murder case, the judge would be instructing the jury on the elements of the law, and hence would be, I suppose, positioning the jury as to what was most appropriate. I think one needs to be a bit careful about jumping to conclusions about whether a judge-alone trial would produce a different outcome from a jury trial. I cannot answer that.

**Mr Rowlings**: I think the answer is no. The system works very well in the ACT. The only people who can really comment on sentencing are those who sat throughout the court hearing from start to finish. If you were not there for every part of that, and heard the pros and the cons and every nuance of expression, you cannot decide what the verdict should be or what the sentence should be. The problem comes from outside commentators with limited knowledge making statements when they cannot have a full knowledge of what they are talking about. So we are quite happy with the system. If you sit through the court and want to comment, fine, but if you do not then leave it to the judge. That is his job.

**THE CHAIR**: And hence your comment, Mr Williamson, that at any time the Crown can appeal in relation to sentences?

**Mr Williamson**: That is true. In fact, I know Mr White touched on it and invariably others have. I quoted a number of cases in our submission. It comes down to the question you were asking earlier of the previous witness about public expectation—how this is generated.

What strikes me, for example, in the Porritt case, is a discussion with my wife some weeks ago when I started thinking about today. She said: "Well, what do you expect? He stabbed her 57 times." I said: "Well, no, that's wrong. That's factually wrong. He didn't stab her 57 times. There were 57 incised wounds." The Chief Justice made the point in his sentencing that the autopsy report had been misquoted. So the newspapers have created this expectation that this was a frenzied killing with 57 stab wounds. In the mind of the general public it creates the situation where, to do 57 stab wounds, it has got to be a deliberate act.

What you need to be careful of is how these expectations are created. In the cases that have been cited, I think it goes back to Mr Rowlings' point. You need to understand, and be there to understand, the evidence. At times the evidence is portrayed differently in some forums. I noticed in the Cassidy case there were a number of quotes in various submissions that, if this had been in New South Wales, this would have been murder. They never quoted the previous paragraph where the judge was saying words to this effect: "I can actually impose a far stiffer sentence for homicide than I can for murder, if I so wish." When you read the sentencing submission, you start to think, "Well, maybe the judge was actually creating a line of thought that would lead him to a 15-year sentence." But we have been given the quotes as if to say, "If this was somewhere else, I would do this differently and you'd be in big trouble."

**Mr Rowlings**: Criticism of the judiciary, which is what the sentencing question is about—are they giving long enough sentences?—is completely unfair unless the

judiciary is going to be represented here. I also have some serious concerns about why the AFP is presenting evidence to this committee and why the DPP presents evidence to this committee. Maybe, at the end of this discussion on the particular issue, we should talk about whether that is an appropriate thing to do. These people are not responsible for creating the law or commenting on the law. Their job is to implement the law. If the people who are implementing it on the judicial side are to be questioned about their sentencing, you really should ask them to come here and appear before you. I do not think they will, of course; nevertheless, you have to hear all sides of the argument.

**THE CHAIR**: I wanted also to ask the CLA more generally about the propensity for judge-alone trials in the ACT. There has been commentary today that this may be an area where there is a need for reform. Does CLA have a view about the possibility of winding back the provisions that would allow for judge-alone trials?

**Mr Rowlings**: I don't have a view on it, except that the system we have got in the ACT has worked very well. This circumstance that we are in now has been occasioned by one case really, the Porritt case, leading up to an election where law and order became the issue. So it is very, very dangerous to change the law on the basis of one case or perhaps on the basis of a couple of cases.

The system in the ACT works extraordinarily well. It is efficient et cetera. We have got four judges in the ACT. They have got six in the Northern Territory in the Supreme Court. So our judges must be doing very well by comparison. If there is a problem, give them more resources. Give them another couple of judges if there are issues around that and they can sit more panels.

But no, the issue about whether the ACT is lenient always surprises me. One jurisdiction in Australia has to be the most lenient and what is wrong with being lenient? There is nothing wrong with a lenient jurisdiction. One of the jurisdictions has to be more than any others, by definition of the word.

So this criticism that says, "You're too lenient," doesn't really strike home terribly well with me. If they are giving appropriate sentences, having sat through all that they have heard, that is their decision. That is why we make them judges and why we make them independent.

**Mr Williamson**: It is not something that as an organisation we have turned our mind to deliberately. It is something we could, but we have not. Therefore, I think the views are those of both Bill and myself. However, I do make the point, and I think you made the comment earlier on, that if the DPP is unhappy because the public has been shocked by the sentence, he has the option of appealing.

So it is not as though it is a case of all in or all out—once a decision has been made it cannot be changed. It can be appealed. But, as I said, we have not turned our minds specifically to a trial by judge alone being the only way forward.

I did note that the DPP made the comment that he cannot intervene. In the ACT it is only the defendant who can elect but, again, I would draw from his earlier comment in that discussion that the constitution gives the individual the right to a trial by jury and

this is the individual exercising a right. The DPP, if he could interfere, would actually I think invariably be going against the intent of the constitution, that is, to elect for a trial by jury.

**Mr Rowlings**: By judge alone, you mean.

**Mr Williamson**: Yes.

**THE CHAIR**: Could I now go to the proposal in the bill to change the definition of murder, which is characterised by Civil Liberties Australia as a watering down of the provisions. You refer to the MCCOC report and in your submission you refer to a good half-dozen law reform type inquiries, in various common law jurisdictions, in relation to capital crimes.

The summation of all of that is that you agree with these law reform bodies that say that in fact the insertion of grievous bodily harm provisions is an outdated model and that it should be brought up to date so that—excuse me if the paraphrasing is not quite right—the crime and the definition of the crime should be about intent to kill. As it currently stands in the Criminal Code, in the Crimes Act, it is a more pure form than that which is being proposed by the executive. A lot of those law reform reports are law reform reports which are now probably 20-odd years old. Are you aware of a more modern inquiry that might support your case?

**Mr Williamson**: I suppose that in many respects the quote and the reference actually come from the Law Reform Commission in Western Australia, which is 2005 or 2006; I have forgotten which year. To my mind, especially in Australia, that is the latest piece of work that has been done in this sort of area. They are the quotes it is giving. From memory in reading its report, it did not quote any other reference that was contrary to this. In other words, these seem to be the most recent that I am aware of anyway and, by referring to that report, which is the most recent I understand in Australia, that is the current situation. I am unaware of any more recent Law Reform Commission that has gone the other way.

**THE CHAIR**: The other thing that is clear is that there seems to be a disparity. The attorney expresses the view that by making this change we would bring the ACT into line with what has happened—what is the case elsewhere. But it seems to me, and it seems to be supported in the view of the DPP, that there is, in fact, quite a diversity in the murder provisions in other jurisdictions, particularly in WA and Tasmania where there is the intent-to-kill provision in the grievous bodily harm provisions. Does CLA have a view about the uniformity or lack of uniformity in other jurisdictions?

**Mr Williamson**: The view of what you are seeing in the laws in each of the other states is a varying time line of when they enacted the laws they have. The position we put in our submission was that just because in more recent times those jurisdictions have not changed or updated their law to the model code, it does not mean to say that they do not agree with the model code. It potentially means that they have not turned their mind to changing the law around the model code. At this stage, I think the laws are representative of a time and place for each of those legislatures on what they did and where they have been, not necessarily a reflection of what they think today.

**Mr Rowlings**: Just to explain, do you know where the model code comes from? Perhaps there is some confusion.

**THE CHAIR**: Yes, I think, well—

**Mr Rowlings**: It comes from the Standing Committee of Attorneys-General, which has a body on it, the Model Criminal Code Officers Committee. That code we have quoted is the code for Australia adopted by every Attorney-General. It is just a matter of implementation, of when it is done in each state. So it is absolutely endorsed by everybody. It is just that here has been the first one to implement it. You would expect that over 20 years, or whatever the period for the changes to crimes legislations is, the others would pick it up. That is how the system works. In emergencies they will enact mirror legislation straightaway. It has happened with the anti-terrorist stuff, for example, but normally it takes time to filter through.

**THE CHAIR**: Does CLA have a view about the material effect of the divergence in legislation in various jurisdictions? Is there one that you see to be superior?

**Mr Williamson**: The difficulty I have had in putting together the submission is—how can I put this?—one is dealing with lawyers. You have all sorts of views and nuances, and at the end of the day I think the discussion—

**THE CHAIR**: Tell us about it.

**Mr Williamson**: got down to, "What is the principle we are working by here?" The principle seems to be, "Did I intend to kill; yes or no?" If I intended to kill, it is the most serious of crimes. It is a murder. If I did not intend to kill then the issue becomes one of principle. Is it a murder or is it something else, and I mention manslaughter. The other states have added variations because they are at this stage where intent is but one element, and they can have two or three other strands to go with it. But the basic question and the principle is: is the intent to kill the issue? Is that murder and is that the only thing that constitutes murder or do you add all these other conditional things—serious harm or whatever terms you want to use?

**MS PORTER**: Or such as, it seems to have been suggested, "I should have known that it would have."

**Mr Williamson**: Again, you are starting to be very subjective: you should have known. Is it likely? I mean, the High Court has discussed the likelihood in the Wilson case and things like that. As I said, in a legal sense you can start to go down rabbit holes all over the place. I think you have actually got to come back to what is the principle and what is society's expectation here.

I go to a comment made in the Law Reform Commission in WA, which was quoting an English law reform commission. It effectively said that a lot of people have a view about the public but it is not actually the public's thought on murder, it is actually not supported by the facts. The English did a study and said words to the effect: "The public expect intent, and if you have not got intent, you did not murder. You might have killed, but you did not murder."

That is where I think the issue is one of principle. I think you have got to come back to what are we trying to determine here? The other jurisdictions, as I said, have brought in other conditions over a death that then say, "No, you did not intend to kill them, but you killed them; so we will call it murder." As the Canadians have commented in the Canadian courts, murder attaches with it a high social stigma. It is not just a crime; it is the worse crime that occurs in society and it attaches a stigma that goes with it. That stigma is different from that of manslaughter or anything else. I think the issue might become one of what is it we are trying to do here in principle: convict someone for an intent to kill or because in the act of doing something, someone died?

**MS PORTER**: This study you are talking about that was done in Britain, how recent is that?

**Mr Rowlings**: While Lance is looking for that, can I answer that question sooner or later? Why are the tests tough for murder? They are tough because in a murder case you are effectively taking away someone else's life. You are putting them away for life; that is what the sentence normally is and it means 20 years generally. Therefore, you have to be certain if you are going to do that. But under this proposal, you only really have to be half-certain or half-right. You impute an intent in somebody else and that is where it is a much lower level of the bar and that is where the danger lies in a law like this.

**Mr Williamson**: I could be wrong here but reading my notes, probably it was about 1989. But do not hold me to that. As I said, that was a quote made by the Law Reform Commission of WA. They drew upon that in the last couple of years.

**MS HUNTER**: I am hoping you can help me out here too, chair. I just wanted to go back to that discussion around the model Criminal Code, because you have drawn on that. According to the Attorney-General, who gave evidence this morning, there were no final recommendations around chapter 5. Is that right, chair? That was put forward?

**THE CHAIR**: That was his assertion. There were other chapters of the model Criminal Code that had come with a discussion paper followed by submissions from the public followed by final recommendations from the officers committee.

**Mr Williamson**: I would have to defer to him on that. I have read the report but I cannot recall whether it was actually a conclusion or a recommendation.

**THE CHAIR**: I think that he is right in that and officials who have worked on MCCOC have said that that was the case, that there had been no final recommendations. But it seemed to be because they had run out of steam or run out of resources or both—

**Mr Williamson**: Both, yes.

**THE CHAIR**: So I am sort of wondering whether that diminishes—the attorney seemed to be sort of saying that it was not as definitive as other work that MCCOC had done. Do you have a view about the quality of the advice that is in the officers'

paper compared to other parts of the officers' work?

**Mr Williamson**: No.

**Mr Rowlings**: Just as a principle, if we have a model code organisation that develops law for all of Australia, that is what we should be following rather than implementing individual laws. That is what you are asking—how do we compare the laws in other places. This will be yet another law which will be different from the other laws in the other territories, whereas the one we have at the moment abides by what is probably going to be the model code. So if we were to implement this law, we are actually worsening the situation rather than making it better.

**Mr Williamson**: What I have not been able to find is any of the work done back when we actually adopted the model code. I just have not been able to find anything.

**MS HUNTER**: That was my next question—

**Mr Williamson**: We haven't found—

**MS HUNTER**: because we have asked that question this morning. There have been extensive searches but no-one has actually managed to find out why, how—

**Mr Williamson**: Why we did it.

**THE CHAIR**: We will probably have to write to the commonwealth attorney, because it was work done by the commonwealth before the Crimes Act was patriated to us. Someone should be able to answer the question.

**Mr Williamson**: I just do not know, but one would have to say that at that time—and that was around the time of the work done on the model Criminal Code, that would be fairly fresh in your mind—invariably, the thinking of the day was, "That's where we should be."

**Mr Rowlings**: And if you are writing to them, you might ask if they plan to do it as well. If they were planning to address this in the next five years, it might be well worth waiting until we get a model code without changing our own legislation.

**THE CHAIR**: Are there any other questions?

**MS HUNTER**: I wanted to follow up on the point that you made in your submission—your proposal that maybe the ACT should be looking at increasing the penalty for manslaughter, and that there is a newly established ACT Law Reform Advisory Council and maybe this was one of the jobs they could take on. Could you talk a little bit more about that.

**Mr Williamson**: I have to say we were somewhat surprised that a bill of this nature had not gone to the Law Reform Advisory Council, because by its nature we would have thought that something as important as this would have been given to the council for study, for comment, so that both the Assembly and yourselves would have a body of opinion, learned opinion, that has been worked through on the issues, both with the

law as it is and with the law in the various states—all the issues you have been struggling with today—and brought together to come to some opinion.

What you and the Assembly do with that is a different question. But I thought that was the reason why this body was created—to do that sort of work. It was somewhat of a surprise to us that it had not been referred to them for consideration. It surprised us, especially as it was a newly created body. You would have thought that, for something as important as this, so early in its life cycle, it would have given—

**Mr Rowlings**: It was created about nine months ago or something like that.

**Mr Williamson**: them some meat to get hold of and really start to come to grips with who they are, what they are and how they can help the community.

**MS HUNTER**: I understand that you have this proposal that it should be going to this committee, but does CLA have any position on what the increase in penalty for manslaughter would be?

**Mr Williamson**: No. Our comment there was more of a reaction. If people think that sentencing was wrong, we should be addressing not the law about what is and what is not murder, but the sentencing regimes and what goes with it. If that is the issue—we do not know if that is the issue, but if some perceive it to be the issue—then we should address the issue.

**Mr Rowlings**: A lot of the discussion this morning has been around that area, and you raised it yourself. So there is something in the back of everyone's mind that it is not quite this murder thing; it is something else.

**THE CHAIR**: There is one other thing that I would be interested in, and I am not quite sure whether I am asking you as an organisation or as two individuals. In the wake of the Porritt case and in the run-up to the election, were you conscious that there was a proposal abroad to amend the legislation if the government was returned?

**Mr Williamson**: Personally, I was not, but I was overseas. The only news I was getting about Canberra was from the *Canberra Times* website. So if it did not appear there, I was unaware of what was going on more broadly in the community. So personally, no, I cannot answer. I am unaware.

**Mr Rowlings**: I was aware that it was going on because we keep an eye on these things, the nuances and who is saying what and so on. It was generally out, immediately after the Porritt case. But the reason for that was that there was police agitation for the law to be changed. And that is one of our major concerns.

In recent times, when we come to hearings like this or we see the Attorney-General or whatever, we are constantly on the back foot fighting what is a battle by the Australian Federal Police to introduce strict liability for everything, to make their jobs easier. They want more convictions. This is designed to get more convictions, and it has been acknowledged around the table. So if you have law that is written to get more convictions, it is not a just law; it has been written with an aim or a purpose. You want law that is balanced.

**Mr Williamson**: Principled.

**Mr Rowlings**: Principled. But with a continuing series of laws, the earlier ones that you would be aware of are the sexual assault reform program laws that were brought in, apparently because the DPP and the police claimed that it was over this way in favour of men; it was put over this way in favour of women. It is entirely inappropriate. The balance has been shifted dramatically. It is not in the middle; it has gone way over the other way.

This is what is happening with what is occurring within the police force. One of our criticisms is that, whenever something goes wrong in terms of police or the courts, where police are concerned, the police are never criticised for the fact that it is possibly their failure to act or to do something properly that is behind the problems.

We are well aware that there has been significant criticism within the DPP—although you will not get it from the gentleman today—that what they are getting on smaller cases, not murder cases, are last-minute briefs given to them at 5 o'clock for a 10 am hearing the next day. Part of this goes back to the fact that police in the ACT are about eight to 10 years younger, on average, than they are anywhere else. They are inexperienced, because of the way the AFP puts police through the ACT Policing context.

This is a broader problem than just this issue, although this issue highlights some of it. And these issues need to be addressed. At some stage, you have to ask: are the police in any way responsible for the lack of getting convictions? If there is a suggestion that they are, we believe quite strongly that there are problems within the police, with the way the police act, that should be addressed as much as anything else should be addressed. So they are some of our concerns. They are systemic concerns that are not being addressed just by looking at this bill. The problems lie behind it.

**Mr Williamson**: I think the issue is one of experience as opposed to numbers. The ACT has one of the most inexperienced police forces in Australia. Something like 60 per cent of the police force have less than five years experience, which is completely out of kilter with other jurisdictions. In New South Wales it is about 35 per cent.

**Mr Rowlings**: And it ripples up the line.

**Mr Williamson**: So experience is an issue about dealing with crime, dealing with the community, understanding the law and dealing with the law. The more experienced officers you have got, of course, the better outcomes you have.

**Mr Rowlings**: Which is why I am going to be very interested to hear what the police evidence was here because, as I alluded to at the start, the problem of police coming here and telling you how to write laws is entirely inappropriate. And it is not my word that it is inappropriate. I sat in this room or the other one when Keelty, the police commissioner, said: "It is not the police role to draft the laws, nor is it to comment on the laws. We only comment on the ramifications of the laws." He said that during the anti-terrorism hearing in this room, or certainly before this committee.

With respect to whether the police should be here presenting what their case is for having stronger law, I think that is wholly inappropriate. It is not their role to do that. You are the parliamentarians; you tell them what the laws are.

**THE CHAIR**: Are there any other matters that members—

**Mr Rowlings**: You seem—

**THE CHAIR**: It is for us to take your comments and not necessarily to indulge in a dialogue.

**MS PORTER**: No, we cannot have a dialogue with you.

**THE CHAIR**: I have been resisting the temptation all morning.

**MS PORTER**: As much as we would love to sit and have a dialogue with you, that is not our role.

**MS HUNTER**: But just to let you know, I did raise that issue about inexperience when the AFP were here this morning. There was a response from the AFP.

**MS PORTER**: There will be comment on that.

**Mr Rowlings**: I am very keen to see their submission. You asked earlier for comments, and if there is something that we feel is inappropriate in what they are saying then we would certainly make a comment. Could I make one more comment? When you introduce laws like this, they are done in relation to the Porritt case, the other case or whatever, but they are never acted out in exactly the same way.

The laws are not used for exactly the same case. For example, I think it is very courageous of the AFP to suggest that they support this legislation, because it is my understanding that it would be quite easy for police officers to be charged under this particular clause if there is a stun gun death, for example, because there is serious intent to cause harm, which is what they do when they fire a stun gun at somebody—sorry, to inflict injury, or whatever the right word is. "Intending to cause serious harm to any person." I would think that, certainly, the firing of a stun gun where a death results could result in the police being charged with murder under this legislation.

You will also find, with respect to a football fan at a Kanga Cup match and somebody king-hits somebody on the sideline and they die, that will be murder under this legislation. Whether or not that is appropriate is for you to judge, but not many in the community would think it would be.

**THE CHAIR**: Thank you very much for your attendance here today. A copy of the transcript will be provided to you for checking. If you find that there is anything that is unclear in your evidence, please take the opportunity to communicate that to the committee. We consider this to be a very serious inquiry and we are going to do everything we can to get it right.

**Mr Rowlings**: Good.

**MS PORTER**: Yes, thank you very much.

**Mr Rowlings**: Thank you for your time.

**The committee adjourned at 12.24 pm.**