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, 29 JULY 2009

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

By authority of the Legislative Assembly for the Australian Capital Territory

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WITNESSES

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Amended 21 January 2009

The committee met at 9.12 am.

HUNT-SHARMAN, MR JON, National President, Australian Federal Police Association
STEEL, MR CHRIS, Director, Government Relations, Australian Federal Police Association

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. This is the second set of hearings. There is a buff card over there, Jon, which is about privileges. Have you read and understood the implications of the privileges card?

Mr Hunt-Sharman: Yes, I do.

THE CHAIR: Thanks, Jon. Would you like to make an opening statement in relation to your submission?

Mr Hunt-Sharman: Yes, I would, Madam Chair. It is a short statement just to support our original submission. Firstly, I would just like to thank you for asking us to appear today before the ACT Legislative Assembly Committee on Justice and Community Safety. The AFPA professionally represents all employees of the Australian Federal Police, including ACT community policing members. The AFPA welcomes the government's proposed amendment to section 12(1) of the Crimes Act 1991 to include the additional fault element: intending to cause serious harm to any person.

The AFPA's strong view is that where a person intends to cause serious harm and that harm results in death, the offender should be culpable of the offence of murder. Ultimately, this is a matter of public safety and operational practicality. The current provisions enable criminals that intend to inflict serious bodily harm that subsequently results in the death of a person to escape a murder charge by being subject to the lesser offence of manslaughter. The AFPA believes that the culpability of those individuals is far better reflected with a murder offence.

Opponents of this amendment make reference to the 1998 recommendations of the commonwealth's Model Criminal Code Officers Committee, which were made over a decade ago. I have not been able to find those actual recommendations, but I certainly know the Criminal Code. Those opponents ignore the more recent 2006 recommendations of the United Kingdom Law Commission which stated that the intention to cause serious harm which results in death is a mental state that is deemed to be so reprehensible the murder offence is appropriate.

The Law Commission report went on to say, "Killing through an intention to do serious injury but without awareness that there was a risk of causing death should be treated as murder." They stated that in their view, "To have acted on an intention to do serious harm and thereby kill is already to have shown such a high degree of culpability that liability for murder is justified." They went on to say, "We do not recommend that killing through intention to do serious injury should simply be

regarded as manslaughter. Manslaughter is an inadequate label for a killing committed with that degree of culpability."

The Law Commission and its recommendations were supported by a very large group, including the permanent judges of the Central Criminal Court, the criminal subcommittee of the Council of Her Majesty's Circuit Judges, the Criminal Bar Association, the Police Federation, the Crown Prosecution Service and others.

The second issue is that opponents to this amendment ignore the fact that this would bring the ACT in line with other state and territory jurisdictions in relation to public safety. I know that, certainly from our perspective, harmonisation of all legislation across jurisdictions is very important and we believe this is moving some way towards that.

In relation to operational practicality, in most cases suspects, on legal advice, decline to participate in criminal records of interview. This makes it difficult, if not impossible, to determine the level of knowledge or belief in the mind of the accused in relation to the intention to cause death. This may be demonstrated by the lack of successful murder convictions within the ACT for over a decade.

In most cases, the police investigator must rely on the material evidence rather than any evidence gleaned from a direct explanation from the suspect. In all of the ACT cases before the committee, Porritt, Cassidy, Beyer and Collins, intention to cause serious harm which led to death, we believe, was established by the material evidence.

In conclusion, the proposed amendment excludes accidental harm or intentional actions to cause minor injury that leads to death. We obviously believe that a manslaughter charge is clearly more appropriate under those circumstances. This amendment is where a person, in the course of deliberately trying to hurt another person to the extent of inflicting serious injury or harm, actually causes death. In such circumstances, the AFPA believes that a murder charge is more appropriate and we support the proposed amendment.

THE CHAIR: Thank you, Mr Hunt-Sharman. Presumably you have had a chance to look at the evidence that was given last week because you have referred back to it. Are there any other elements of evidence that arose last week that you would particularly like to refer to?

Mr Hunt-Sharman: Not particularly. I think, certainly through questioning, I could answer those.

THE CHAIR: You are a professional organisation. When you put together your submission in relation to this you presumably took into account the views of your membership. Would that be correct?

Mr Hunt-Sharman: That is correct. In fact, within our structure we have a number of elected delegates in ACT Policing. Indeed, we have a vice-president from ACT Policing as well. We sought their views and, of course, we have got the views of members generally.

THE CHAIR: One of the points that you made was that this change would bring the ACT into line with other jurisdictions, but there are some substantial differences in other jurisdictions. Western Australia and Tasmania have a similar fault element, but there is an element that relates to knowingly endangering human life, which is a slightly different variant. How do you see that these similar but different definitions will work across Australia?

Mr Hunt-Sharman: Certainly there needs to be further harmonisation—there is no doubt about that—but what we are particularly focusing on is the issue of proportional offence, if you like, to the action actually taken. We are really comparing a murder offence with a manslaughter offence. We see that where there is intent to cause serious harm to a person and the person then dies, that is better suited within the category of murder offence.

During the process of preparing our submission it was very interesting to look at some of the historical information with regard to murder, as I am sure the committee has already looked at. Of course, I can remember the days when the murder offence was actually a death penalty. Murder was therefore a fairly narrow offence because there was a death penalty imposed on it.

In many jurisdictions there is a mandatory life sentence now, even with the offence of murder. That is not the case in this jurisdiction. You could see in a narrow definition how it would default to manslaughter as an offence, but in actual fact the debate here is: do we knowingly expand the definition of the offence of manslaughter, or do we expand the offence of murder? With the ability for judges to make a decision in regards to the sentencing, so it is not mandatory, we believe that this type of offence fits better within the murder category. I look at it in these terms: if we went back 500 years it was clearly a situation where the murder offence was very, very tight.

THE CHAIR: You are leading me to my next lot of questions. What you are saying is that, if the definition remained tight, you would be happy if there was the possibility of a more stringent sentence?

Mr Hunt-Sharman: No. We could call this labelling or not. I am going around in a circle here, but if we go to assault offences, there is clearly a range—from common assault right through to assault, grievance bodily harm and so forth. From a police practitioner's point of view, you are charging with the most appropriate level of offence. What we are seeing here is that, if that results in death, we believe that there is not the appropriate offence of murder being applied, where there is a clear intent to do serious injury, which is clearly codified. We are not talking about intention to do harm; we are talking about serious harm.

On a daily basis police officers see a range of assaults, right through to the most vicious and somewhat incomprehensible to some extent—because you look at it and you cannot even understand why someone would assault someone so severely. But you can then lay an appropriate charge in regards to it. If a person actually dies then certainly, from our professional point of view, we look at that as being far more serious than a normal assault that might accidentally lead to death, and clearly that is manslaughter.

Mr Steel: I might just make a comment. Murder has a powerful symbolic role, I think, in our society. For that reason you would not want to have a catch-all manslaughter charge and not have a murder provision at all, which is what you possibly could have with a different sentencing structure. We know that in our society murder has a powerful role and therefore it needs to reflect the culpability of certain criminal acts. That is why it is necessary to ensure that intention to cause serious harm is part of the murder offence because we believe—and I think a number of other submissions have made this point—that that particular act really does reflect the culpability of murder and not manslaughter. Manslaughter is really more of a catch-all provision outside the murder offence. Therefore, all unlawful killings outside murder are manslaughter.

THE CHAIR: Ms Porter?

MS PORTER: Thank you. Could I just ask you to expand on that a little? Are you saying that you believe that that sentence of murder, or being charged with murder, is somehow a kind of disincentive to people so that they will be more inclined to think before they inflict serious bodily harm that may lead to death? Is that what you are saying? I do not quite understand what you are saying. I would like you to clarify it.

Mr Steel: Not necessarily, although that may be part of the moral values behind the murder provision as it has developed in the common law over the centuries.

MS PORTER: Could you expand then a little bit on what you mean in terms of what you just said about murder?

Mr Steel: You could, as the ACT Legislative Assembly, provide a law which has a catch-all provision that is called something other than murder—for example, manslaughter. We could get rid of murder altogether and have a separate sentencing structure whereby people who commit unlawful killing with an intention to kill could be notionally held up for manslaughter. In our society, murder plays an important role symbolically.

MS PORTER: That is what I want you to explain to me.

Mr Steel: I know. It is important not only for deterrence, which was, I think, the point that you were trying to make—

MS PORTER: Yes.

Mr Steel: but also for victims of crime. I think the victims of crime coordinator made some comments about this as well. It is an act that is viewed with such a high level of culpability—I guess from a deterrence point of view but other points of view—it is not committed on a regular basis and it does not occur often in the ACT. I think that is another point that we made in our submission—this amendment is not going to have a floodgates effect, because the category of cases that we are talking about that have been inadequately subsumed by the current legislation is not a large category. In fact, there are only a few cases that the DPP have mentioned which really fit into that category. Certainly, deterrence would be one of the main factors, I think, behind the notion of murder, but it is a powerful notion in our society and one that we need to adequately bring into line with the community's point of view. I think that this

amendment does bring it into line with the community's perspective.

MS PORTER: Can I ask another question?

THE CHAIR: Sure.

MS PORTER: Mr Hunt-Sharman, you said before that it is difficult to get direct evidence because people will not talk about what they feel or believe, their thought processes or what they intend to do. I thought you said that it was important to prove intent and that the evidence was proved in another way—that is, through material evidence.

Mr Hunt-Sharman: Yes.

MS PORTER: I do not quite understand how the material evidence does necessarily prove intent. I do not see how it does not stop somebody in another state or territory refusing to speak either. If intent is important, I am struggling with where we get that intent from. I am also struggling with how a person could have a thought of intent in these crimes of passion that we have been dealing with here mostly.

Mr Hunt-Sharman: What I am saying here is that obviously we respect the right to silence, and certainly under our legislation a suspect is given an opportunity to have legal counsel. In probably 99 per cent of cases they then decline to speak under criminal caution as a result of that legal advice. What you are relying on is other evidence, which might be witnesses or it might be the actual act of violence.

The difference here is that we are looking at the intent to cause serious harm to any person. That does not necessarily need an admission or false denials from the suspect. It can be established more easily through other means. If you go to the murder level, you are talking about our having to prove intent to murder. That goes back to the original offence many years ago where it was a death penalty. To establish that is always a much higher bar, if you like, because it was historically a death penalty and indeed today, in many jurisdictions, it is mandatory life imprisonment.

What the police would only have to establish is that there was intent to cause serious harm. When I say "only", it is still very difficult because serious harm is clearly codified; it has to be proven. It is intent to cause serious harm to the person and then that leads to the death of that person, if this amendment is accepted. We are, if you like, talking about levels of murder. You have a very strict one and, in modern times, you can even go to terrorism and say that it is mass murder or torture leading to murder and so forth. That is where it is pretty clear. You can then start to show intent to commit murder. The obvious one is a bomb—they have planted a bomb and it is going to kill a whole lot of people.

What we are talking about here is for the police to be able to prove that there was intent to cause serious harm. The secondary factor of that is that has led to the death of a person. Maybe I am showing my age here, but not that long ago if someone had an altercation it may have led to fisticuffs, but before it got out of hand there would be a response by the public to break that fight up. I do not condone this in any way, but there might be a winner and a loser; no-one actually suffered any serious injury.

Unfortunately, there is a trend today that they have that fight and they are then encouraged to keep on fighting, or indeed the group get involved and, once a person is down on the ground, they start kicking them in the head. There are a number of cases where people have suffered brain damage and are in the hospitals in Canberra as a result of this type of absolute vicious assault. The question is: why didn't the person die?

In many cases, the police officers look at it and they can see a range of assaults, even with domestic violence, from common assault right through to vicious assault. They can see the difference, right from the most vicious weapon to a saucepan. They see that but then, when they look at the appropriate offence if the person dies, they go, "Whoops, it doesn't fit into murder; it defaults down to manslaughter"—when for the same person who in that minor fight accidentally kills a person manslaughter might be more appropriate.

The important thing here is that we are not throwing away manslaughter. Manslaughter is still there to be used for the most appropriate offence. What we are looking at is the most vicious serious harm where you would expect the person to die and, if they live, the charges are grievous bodily harm or malicious wounding, or whatever. But if they die, where do the victim, their family and the public see that incident? You can say it is either at the very high end of manslaughter or it is at the lower end of murder. We would say that it has not been defined and that is why it has dropped down into manslaughter. We believe, just like the UK commission in its recommendations did, that it should be moved up to murder.

THE CHAIR: There are a couple of issues I want to come back to, but, Ms Hunter, do you have any questions at this stage?

MS HUNTER: Mine is a follow-on from Ms Porter's question. In your submission you state that intention to cause serious harm would be more appropriately met on the basis of material evidence collected by police. You have spoken a little bit on this, but I just wonder what you mean by "more appropriately". Is it more appropriately or more easily?

Mr Hunt-Sharman: Again, this is not about making the police job easier; it is about looking at the law and, if you like, reforming it to keep it up to date with the types of crimes that have developed over the years. What we are saying here is that this intent to cause serious harm leading to death is becoming more common as a crime type, and other jurisdictions have decided to define that into the murder category.

The United Kingdom Law Commission certainly sees it that way as well—that it should be moved into the murder category. It is very much from the practical point of view that you know that the violence is so violent that if it had not led to death there would be very serious assault charges and then if it leads to death the perception is that it falls into a category of offence called manslaughter which could be quite accidental to cause the death. It is that perception. It is a public perception and certainly the police perception that it is being put into the wrong category.

MS HUNTER: Is there some ACT evidence of an increasing number of these types

of crimes? Is that sort of data available?

Mr Hunt-Sharman: Obviously I am not the AFP—and I am sure the AFP would be able to find data—but there is certainly data across Australia showing that.

Mr Steel: The Australian Institute of Criminology publishes an annual report on that. It is certainly something we can provide on notice.

Mr Hunt-Sharman: Again, it is one of these situations where I believe the law should be ahead of the crime. Often we are not, but even if there was no offence of this type or this level of activity in the ACT, my argument would be that it is coming; it will come. It is just a fact of life with the greater population—a whole range of things. If those issues are occurring in other jurisdictions, not just within Australia but in the United States, Canada and UK, we should be prepared for that type of offence, rather than this default that is occurring at the moment where it is dropping into what we say is the wrong category.

THE CHAIR: I want to drill down a bit into that issue. I take the point that Mr Steel made, and I will paraphrase it. Your concern is about someone who wilfully goes out to beat somebody up, often with an implement, is reckless about that and shows they do not particularly care and they end up killing someone. You think that that should be a murder conviction, rather than a manslaughter conviction, because there is a different status, a different public perception, about the severity of murder as opposed to manslaughter?

Mr Hunt-Sharman: I would say yes but also no—yes, there is a perception. The other issue is proving the intent to kill. I think the DPP would be better placed to talk about that.

Mr Steel: And recklessness, with a high probability of death, which is quite different from intention to cause serious harm. What we are talking about is intention to cause serious harm.

Mr Hunt-Sharman: Going back to that murder situation, you are looking at recklessness or negligence or whatever in relation to causing that death—it almost has to be in their mind—whereas if it was any one of us committing this type of act we would know at a certain point the reasonable, prudent person would be saying, "The actions I'm now doing may well lead to death."

MS PORTER: Mr Hunt-Sharman, how do you know that? I am sorry, but I think some of these things we are talking about are crimes of passion. I do not know that you actually know that in the middle of a crime of passion they stop and think, "If I go any further I will in fact injure this person so much that they may die"—as a state of mind.

Mr Hunt-Sharman: That is correct. I am not talking about their mens rea; I am talking about if we were observing this.

MS PORTER: If you are observing it?

Mr Hunt-Sharman: If we were observing that—

MS PORTER: Not if you were participating in it?

Mr Hunt-Sharman: No, I am sorry. I am saying that if we were observing this we would say, "This act is going to the point that it could kill somebody."

MS PORTER: Thank you for clarifying that. I was a bit confused by what you were saying.

Mr Hunt-Sharman: I am sorry. I agree. There are obviously defences in regard to mental state and so forth and—

Mr Steel: That is why the Porritt case is so problematic, I think, because there are all those discounts. That is why it is probably not a good example of the category of cases we are talking about. But objectively, if you did have a case where the facts involved stabbing the person 57 times, without other discounting factors you would assume, objectively, that that would be—

MS PORTER: I am sorry, Madam Chair, I am just a little bit unhappy about this continual "stabbing 57 times" when other evidence given before us said that it was 57 incision wounds.

THE CHAIR: Yes.

Mr Steel: This is what I was trying—

MS PORTER: Just for clarification, could we use the right terminology?

Mr Steel: Sure. What I am trying to say is that we should remove ourselves from the Porritt case because it is problematic due to the actual facts that are involved in that.

MS PORTER: Yes.

Mr Steel: We could hypothetically, I guess, put a case where there are 57 incision wounds, without these discounting factors. From an objective standpoint, it is hard to believe that the person perpetrating those offences would not have the intention to kill or the belief in their mind that stabbing someone, making those incision wounds 57 times, would cause death or have the probability of death occurring.

Mr Hunt-Sharman: So the intent is to cause serious harm. It is that layer down again. It is the intent to cause serious harm that subsequently leads to death. They have not got the intention to kill, obviously. But anyone observing an incident like that would say, "This is likely to kill someone," and indeed it does. It is back to us, whether it is judge and jury—the reasonable person looking at the case from a police practitioner's point of view. They see these absolutely violent offences that may not lead to death. They see those and they see the minor assaults and they can see that range of charges, but when it comes to murder there is not that range. It is very narrow.

THE CHAIR: Yes, but I am coming back to the point that there is a range of

culpabilities in unlawful killing, from somebody tripping somebody up and their hitting their head on the pavement on the way down and dying as a result of one blow to the head all the way through to the planting of a bomb intending to kill however many people get in the way of it. So there is that range. Some jurisdictions—not common law jurisdictions—have a catch-all name for that with different gradients of severity. We have manslaughter which, as you say, has a delineated definition of not very serious manslaughter through to very serious manslaughter. We just have manslaughter and murder on the top. You seem to be saying that you want to take some of those things which are currently considered manslaughter at the top range out of that definition and put them into the murder definition. How does that make policing easier, better, more appropriate?

Mr Hunt-Sharman: I go back to the judiciary. It is almost by default that it has fallen into this category at the top of manslaughter. What we are now looking at here is—

THE CHAIR: How is it by default? There was a decision. We do not quite know the reason for it, but in 1990 there was a clear decision to take that grievous bodily harm element out of murder in the ACT and put it back in manslaughter.

Mr Hunt-Sharman: Yes.

THE CHAIR: So how is that a process by default?

Mr Hunt-Sharman: I know we are probably all wondering why that happened and so forth.

THE CHAIR: Yes, we have not managed to get to the bottom of it.

Mr Hunt-Sharman: We have certainly had comments by the judiciary here that they have been required to find the offence of manslaughter rather than murder compared to other jurisdictions. If we are again comparing other jurisdictions, there has been a conscious decision to start moving that type of offence, where there is intent to cause serious harm, into the category of murder.

THE CHAIR: There have been comments, and they are repeated in your submission and some of the other submissions, that judges have remarked that in other jurisdictions this may come into the category of murder. I do not see any evidence that they are bemoaning the fact that in a particular case a murder verdict is not open to them. They are making the point, but I do not see it as bemoaning the fact. One of the points—and I would not mind your comments on this—was that there were cases where these comments were made and then the judge gave what appeared to be quite light sentences.

Mr Hunt-Sharman: Yes.

THE CHAIR: Having made this comment, someone was then sentenced to three years with a shorter non-parole period. There seems to be a disconnect between what has been characterised to this committee as the justices bemoaning the fact that they cannot have a murder conviction and the apparent light sentence. Three years is down the shallow end of the manslaughter pool, it would seem to me. I think the most

serious sentence for manslaughter we have seen in some time is about 15 years. They have got 20 open to them for manslaughter.

MS PORTER: Yes, 20.

THE CHAIR: There seems to be a disconnect in what people are representing the judges as saying. They are saying, "We can't find murder in this case," but at the same time they are not sentencing as if they wanted to find murder in this case. They are sentencing at the shallow end.

Mr Hunt-Sharman: This is why, to some extent, I thought it was important to make a reference to the Law Commission report in the UK. It is obviously a very detailed report; it is very lengthy. Their words are that they received a very large measure of support from those that they consulted, and I gave the list before. We are talking about the judges, the Criminal Bar Association and so forth. They have actually looked at the whole issue. The whole review was exactly about this. Should it fit into murder; should it fit into manslaughters? What do we do with this intent to cause serious harm? They go to harm-injury. It is basically the same. They have looked at it and they have given an opinion. I do not want to sit here and try to give an opinion of the judiciary. That is for them.

Mr Steel: I do not think that they were trying to do that in the cases either. I do not think it was in their role to do it in the cases and in the decisions. When those quotes were used, they were used in the context of other people pointing out the fact that it would fall under the murder provisions in New South Wales. I do not think it was using the judges as supporting their argument. I think they judges were simply just pointing out the fact without making any policy argument.

Mr Hunt-Sharman: Certainly, as I say, this other detailed review is very interesting in that they had the support, after considering many many factors, to move it into the murder category. I quite strongly rely on that because it has been analysed and supported by such a large group. The second part, which is a separate issue, is the sentencing part.

THE CHAIR: How does it make policing better, easier?

Mr Hunt-Sharman: What I do know, in my position—and no offence to the media—is that what people may hear may be the sensationalised facts of the case rather than all of the facts. In the processes, it obviously goes through the police officer charging and the DPP independently deciding whether to prosecute. It then goes to the court for the judiciary to look, obviously, at the legislation, which is our issue here. They look at the case law and all the evidence and the mitigating circumstances, as you pointed out earlier. They look at all that and then they decide the sentence. It would be inappropriate for me to try and second-guess sentences. I have faith in the system. I can understand why people could have a concern, but they are not sitting there right through the court case and they have not got the expertise, any of them, to make a call on that. That is up to the judiciary.

THE CHAIR: The other question was: how will the shifting of this out of the top end of manslaughter into murder affect or improve policing?

Mr Hunt-Sharman: From the police professional point of view, we would say that we see a range of assaults and a very large range of manslaughters. When there is intent to cause serious injury or serious harm to the point that that leads to death, we see murder as being the most appropriate offence. There are a number of factors there, which include the deterrent effect, but for all those people that suffer from the situation of an innocent person being murdered or bashed to death or brutally killed then we have to think of them as well and what the public expectation is.

I think there is a view out there that manslaughter is a soft offence. Certainly, Madam Chair, I agree—there is a whole range in manslaughter. I think the problem here is that manslaughter has become such a broad offence that it is almost picking up accidental death. We know that the Law Commission in the UK have looked at this and they have decided that putting it into the manslaughter category is not the appropriate place when there is intent to cause serious harm but no intention of the individual to kill that person. So that gets back to that mens rea—

Mr Steel: They recommend a far narrower manslaughter offence. There are three categories in fact—first degree murder, second degree murder and then manslaughter—rather than having manslaughter covering what would be known as second degree murder.

Mr Hunt-Sharman: Just to clarify that: first degree murder, in their definition, is actually a mandatory life sentence. That is the old intent to kill and you would have been sentenced to death type of situation.

THE CHAIR: So what you are contending is that this is the way jurisprudence is going to go in the future with this more higher-end treatment of serious, reckless—I should not use the term "reckless" because it has a particular definition—

Mr Hunt-Sharman: Almost reckless, yes.

THE CHAIR: Yes, I see the point. As there are no further questions, I thank the AFPA. You will receive a copy of the transcript. I have made the point before that we take this very seriously—this is a very serious change. If you see anything in the transcript which you even vaguely think needs clarification, please do not hesitate to be in contact with the committee. We encourage you to add any clarification you think is necessary to make sure that your evidence actually reflects what your position is.

Mr Hunt-Sharman: Thank you. Once again, on behalf of the members of the Australian Federal Police Association, thank you for giving us the time to appear before you.

THE CHAIR: You are very welcome.

Short adjournment.

HINCHEY, MR JOHN, Acting Victims of Crime Coordinator, Victim Support ACT

THE CHAIR: Good morning, Mr Hinchey, and welcome to the hearing of the Standing Committee on Justice and Community Safety in relation to changes to the definition of murder. Can I draw your attention to the buff card which relates to privilege? Have you had a chance to read it and do you understand the implications?

Mr Hinchey: Yes, I have read it and I understand the implications.

THE CHAIR: Thank you. Mr Hinchey, would you like to make an opening statement?

Mr Hinchey: Yes, I would. I am the acting victims of crime coordinator. I am also the acting director of Victim Support ACT. I am aware that the committee has a big responsibility in relation to the consideration of amending the murder laws in the ACT. As victims of crime coordinator, I am aware that the rights and interests of offenders are of primary concern within the justice system. I appreciate the fact that we have to get the balance right and that, in considering whether to amend the murder laws, we must not impinge upon the rights of any accused persons in the ACT. We just wanted to make that statement to the committee—that I come before you with a balanced view, but also with the intention to represent the interests and the voice of victims in this territory. I can see that the conversations with the committee have been around maintaining that balance and maintaining a fairness within our justice system.

I would like to point out to the committee that the ACT has the lowest imprisonment rate of any Australian jurisdiction. I think the next highest to us would be Victoria. We are well below the national average rate and I think that gives a perception in the community that ACT courts are lenient. I do not subscribe to that theory in itself, but the fact that we do have the lowest imprisonment rate might be something that the ACT is rightfully proud of. When we look at the seriousness of crimes that are committed that are not attracting the sanction of murder, that perception of leniency, I think, might be exacerbated. I also make that point to the committee. That is my opening statement.

THE CHAIR: Mr Hinchey, you are here as the victims of crime coordinator. In putting together your submission and coming here today, what consultation process did you go through? Who do you consult with on these matters?

Mr Hinchey: The former victims of crime coordinator made a submission to this committee. Ms Holder is on leave at present and returns next year. The consultation process that Robyn would have undertaken in putting forward that submission would be over 10 years of work with victims of crime in this jurisdiction. Robyn has been responsible for a number of publications that represent the interests of victims. Those publications, I think, express the views of people in this community.

There is a current project underway that Robyn contracted to commence and that was to look into the murder laws in the ACT. Part of that process is interviewing families of homicide victims to gain some insight into their experience within the criminal justice system. That would be the context of the consultation that Robyn would have

undertaken in making that submission.

THE CHAIR: I suppose the thrust of Ms Holder's submission is that, while seeking recognition for victims of crime and their families, I suppose what might be called the label of murder has a more significant impact and, therefore, the deaths at the more serious end should attract that murder label, almost as an element of atonement or of helping families to come to terms with the death of their loved one. There is a greater sense of justice in it if someone is labelled with a murder conviction rather than a manslaughter conviction, even if that manslaughter conviction might attract a high-end sentence.

Mr Hinchey: That is a fair observation. I think that the sanction of murder reflects the desire of loved ones of people who have been killed through violent acts of others—I think that they have a desire for the worth of their lost ones to be reflected in the sanction of murder. That gives due respect to the lost one and the families of murder victims—so yes.

Victims generally want recognition of the harm that has been done to them. My experience with victims outside the victims of crime coordinator's role is through restorative justice. What we see repeatedly is that if victims have an opportunity to be heard and to have their views known and to have some recognition of the harm done to them, their desire for retribution is quite at odds with public perception. Victims do not necessarily want to see offenders punished to the extent that it might extinguish any hope for the offenders. But they do have a desire for justice. Their sense of justice is that what has happened to them and their loved ones should be recognised in the criminal justice system. Currently what we are seeing is that the worth and the value of human life are not being accurately reflected in the interpretation of the murder laws, or the murder laws as they currently stand.

MS HUNTER: John, I just wanted to follow on from that. Is it because of the charge that they end up being convicted with, which is manslaughter rather than murder, or is there some element around sentencing in all of this?

Mr Hinchey: We see often in the media families who are dissatisfied with sentencing. What we do not see is the harm that is done to families of murder victims when the description of how their loved ones were taken from them is diminished by calling it manslaughter.

The public have a general perception—and forgive me if I am interpreting what the public might think—but victims see manslaughter as an event that took place without a great will or desire to achieve the death of someone. They see murder as the result of an intention to inflict serious harm on someone. That might be interpreted as intention to kill, but when someone has an intention to inflict serious harm and that results in death the families of the deceased call that murder, and to call it anything else is not doing justice to the deceased, to the murder victim. That is what victims believe to be true. I think that is a fair thing to think.

We have got an opportunity now in this jurisdiction to right that. I can see from previous discussions with this committee on the alteration to our laws that occurred soon after self-government that the reasoning behind that could not be found. I do not

know why that occurred. This jurisdiction now has an opportunity to reconsider that and to make a change for the better. I think that change should be made. We would not want to be in a situation in 10 years time when we have seen the deaths of others through the violent actions of people in our community not being labelled as murder.

THE CHAIR: You say this would be a change for the better, Mr Hinchey. What makes it a change for the better?

Mr Hinchey: It is a justice issue. It is a change. If victims who lose a loved one have to suffer the rest of their lives with the knowledge that a loved one was taken from them by violent means and they look to the justice system to have some sort of satisfaction about justice being served, it is a change for the better for them and it is a change for the better for our community that have a perception that the violent deaths of people should be reflected in calling it for what it is—intentional, serious harm-doing to others. I think the community interpret that as being justified in calling it murder.

THE CHAIR: So you think that this is reflected in community opinion?

Mr Hinchey: That is my opinion. I do not have a body of knowledge that would support that, but if you took a short survey of people in the street I think that is what you would find.

MS HUNTER: Is that sort of work undertaken? As the victims of crime coordinator, your office would obviously be on top of and look at a range of research that is coming out. Do you know whether that sort of survey is undertaken at all in the ACT or is it happening somewhere else in Australia?

Mr Hinchey: I have not seen it. I am looking for a project to do while I am doing this job and that might be a worthwhile one to follow. We have a murder project underway, as I mentioned, so it might be worthwhile to canvas the opinion in the community.

THE CHAIR: Could you expand on what the current murder project is?

Mr Hinchey: It is just reviewing the laws across Australia as to what those laws are currently. I think you have been given the same type of information. It is to look at the history of that, to look at how the law could be reformed, to achieve what the community might believe to be the right way to do things. Part of that is to interview the families of all homicide victims in the ACT to get their opinions and to do a literature search on some—

THE CHAIR: So when you say that you are interviewing families of homicide victims, how far back do you go?

Mr Hinchey: As far back as we can go to contact people. The problem is in contacting them. I think we have interviewed fewer than 10 families at this stage. That is not enough really to form a reliable body of evidence, but we would be trying to find more.

MS PORTER: So some of these would be recent incidents and some of them would be less recent?

Mr Hinchey: When you say recent incidents, yes, incidents that would date a number of years, because it takes such a long time.

MR PORTER: You talked about the fact that people want to be heard and about your experience in restorative justice. It is true that in the ACT at the moment that opportunity to be heard through a restorative justice process is not available to people with the seriousness of the crimes that we are discussing at the moment.

Mr Hinchey: That is right, although that capacity does sit within the legislation and it just requires a decision to push forward with that. That will come in due course, I believe.

MS PORTER: Do you think that it would make a difference if, in fact, it had been introduced or will be introduced here in the ACT—that it will enable people to have more of a voice? I am only saying that because I have had conversations with people who have lost relatives through violent incidents in other places and they have said that, at the end of the day, they did not want heavy sentences or any kind of retribution, as you said. They actually did not want anything other than to be heard and to recognise what had happened to their relative. That, for them, was sufficient. Someone in the ACT told me that she felt that the media had misrepresented her pain and that all she wanted was to have a chance to say how she felt about her dead relative—not that she wanted the person to be charged with murder.

Mr Hinchey: That is right.

MS PORTER: She felt that she had been misrepresented because she just wanted an opportunity to talk about it. Do you think that if we had this restorative justice capability—if it was introduced and was made more available to people who experienced these kinds of things, the families and the friends—it would make a difference?

Mr Hinchey: It would certainly make a difference to them, and I believe it would make a difference to the offender because for serious offences the legislation requires that a finding of guilt or a plea of guilt be made. People on both sides of the justice system get satisfaction. Offenders and their victims come away from their experience with restorative justice feeling better about themselves and in a better position to move on from what has happened.

We are seeing that within the juvenile justice system. Victims are demonstrating that they do not necessarily want retribution. A lot of times we see victims come to conferences with the desire for certain things as outcomes to those conferences and they pass those opportunities up after hearing from the offender, talking with them, understanding what happened, being able to express to offenders how they have been affected.

That is often enough for victims. I would not say that it would satisfy victims of very serious crimes, but it helps. We may all have been aware of restorative justice

processes where deaths have occurred. I think it is something that is not a replacement for the traditional justice system. I think it is a wonderful addition to it and I think it can inform the traditional justice system, as we are seeing in the Children's Court. Our local children's magistrate is a strong supporter of restorative justice and uses restorative justice to inform decision-making in that court. I think it is a good thing.

MS PORTER: Madam Chair, can I just go back to the initial point?

THE CHAIR: Yes.

MS PORTER: I go back to the initial point you made about our having the lowest number of people in prisons. I note that you say that you do not necessarily think that is a bad thing, but I think historically we have not had a corrections centre in the ACT, apart from a youth detention centre.

Mr Hinchey: Yes.

MS PORTER: We did not have any opportunity to sentence people to a facility in the ACT. I do not want to put anything into the minds of the people that were imposing the sentences, but there may have been a reluctance to send them to an institution that they were concerned about sending them to.

Mr Hinchey: Yes.

MS PORTER: And to be away from their families and friends.

Mr Hinchey: Very true.

MS PORTER: They may have felt that that was not a good option if they could avoid that at all costs.

Mr Hinchey: That is right.

MS PORTER: It is not that we want to see our imprisonment rate rise, but we could see, I suggest to you, that judges would take into account the fact that there is not only a facility here but it is one that is based on restorative practice.

Mr Hinchey: It is being built on human rights principles. I think the prison that we have in the ACT would measure up quite well with any prison in Australia. It would not be surprising to see magistrates and other courts take up opportunities to give offenders the opportunity to participate in the programs that are currently running and will be run at that prison. That may not necessarily be a bad thing.

THE CHAIR: Ms Hunter.

MS HUNTER: Evidence was given earlier by Mr Hunt-Sharman from the AFPA that he felt that serious harm was becoming more common. Obviously, your office deals with victims of crime all the time. Is that your perception—that serious harm is increasing in the ACT?

Mr Hinchey: I could not say. I do not have that information, I am sorry.

MS HUNTER: Okay, thank you.

THE CHAIR: As there are no further questions, Mr Hinchey, thank you very much for your attendance today.

Mr Hinchey: Thank you for the opportunity.

THE CHAIR: There will be a transcript provided to you. We ask you to look at it carefully. If you think that there is anything that you need to clarify or elaborate on we would welcome your submission.

Mr Hinchey: Thank you very much.

Meeting adjourned from to 10.20 to 11.01 am.

KING, MR LARRY, Executive Director, ACT Law Society
GILL, MR SHANE, Barrister, ACT Bar Association and ACT Law Society

THE CHAIR: Welcome to these hearings of the Standing Committee on Justice and Community Safety inquiring into the Crimes (Murder) Amendment Bill. I draw your attention to the buff card there that relates to privilege and ask you to read it so that you can acknowledge your understanding of the privilege provisions. I think members of the Bar Association probably should understand the privilege implications!

Mr King: I have had a bit of advance reading, so thank you.

Mr Gill: We would like to dispute it, Madam Chair!

THE CHAIR: Yes. I welcome the representatives of the ACT Law Society. I understand you are speaking on behalf of the Bar Association as well in your submission. Would you like to make an opening statement?

Mr King: Thank you, Madam Chair. I have the honour to be the Executive Director of the Law Society of the Australian Capital Territory. The Law Society does not usually get involved in debating government policy. We have traditionally taken the view that the policy of the government is the policy of the government and they have a right to introduce it. Our normal role is then to examine any legislation that might accompany it with a view to ensuring that it balances the principal interests in society and, where possible, takes care of some of the minor interests and is easy to comply with. The reason we do that would be obvious. Our members typically are the ones that have to grapple with it and explain it to their clients. If it is an unequal law, an unfair law and difficult to comply with then we take the view that it is a bad law.

On this occasion, we are taking issue with the policy itself. We believe that tampering with the definition of murder is a backward step, for reasons that we will explain. It does not resolve conflicts within society and, as we will also explain, the legislation itself is technically complex, will not be easy to comply with and will not mean anything at all to anyone until some poor judge has to explain it.

Having said that, I might throw to my learned friend, Mr Gill. He is a barrister, a member of the Bar Association and, I hope, a member of the Law Society, although I have not checked his credentials.

Mr Gill: I am certainly a member of Law Society committees—whether or not I am a member of the Law Society. I am here to speak on behalf of the Law Society and the Bar Association. I value the opportunity to make an opening statement. I thought that probably the most useful place to start was by reading the law as it currently stands and the law as it will be if the amendment is passed. As it currently stands, murder is defined in section 12 of the Crimes Act. It is not one of the offences that have made it across to the Criminal Code yet. It states:

> A person commits murder if he or she causes the death of another person—
>
> (a) intending to cause the death of any person; or

(b) with reckless indifference to the probability of causing the death of any person.

That is as it currently stands. The amendment is designed to add a subparagraph (c), which would mean that a person commits murder if he or she causes the death of another person intending to cause serious harm to any person. While that sounds relatively straightforward on its face, there has been inserted into the amendment a definitional provision which is drawn from the code. So a portion of the Crimes Act legislation will adopt a portion of the code legislation. The code legislation that has been adopted is the definition of serious harm. In the code, there is a dictionary. The dictionary defines serious harm, and it also defines harm. So it has to be taken that, in looking at the code definition of serious harm, one also has to look at the code definition of harm.

I thought it might be useful if I embed those two definitions into the provision so that we can get a better sense of the whole of the provision. What that provision would mean is that a person commits murder if he or she causes the death of another person intending to cause any harm—harm being "physical harm to a person, including unconsciousness, pain, disfigurement, infection with a disease and any physical contact with the person that a person might reasonably object to in the circumstances (whether or not the person was aware of it at the time);" and "harm to a person's mental health, including psychological harm, but not including mere ordinary emotional reactions (for example, distress, grief, fear or anger); whether temporary or permanent, but does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community," 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 to any person.

So when one takes the definitional provisions and puts them into the proposed subparagraph (c), one can see that it is not, perhaps, as simple as it appears on face value. Currently, the provision which deals with murder defines murder as being related to intentions that relate to the death of a person. So it restricts the murder definition to circumstances where somebody intends to kill somebody, or is recklessly indifferent about causing the death.

Murder as an offence and, as the most serious offence, focuses upon the most serious of intentions—that is, to take someone's life, or being reckless about the taking of someone's life. As it currently stands, it is a simple offence. It is readily understood. It is not full of technical twists and turns. It is focused on what is the heart of murder, and that is death. It connects the most serious offence to the most serious forms of blame worthiness to the most serious forms of culpability.

The balance of unlawful causing of death is covered by the offence of manslaughter. So it is not the case that there is a loophole that persons who do not fit into the serious harm provision miss out entirely on accruing criminal liability. In fact, the way that the provision works is that manslaughter is a statutory alternative to murder. What that means is that if somebody faces trial on murder and is acquitted of murder, the jury is automatically entitled to—and is directed to do so—consider manslaughter,

depending on what defence has been raised. So it is not a case of going to a jury with murder and then persons walking away because they are not dealt with under manslaughter.

The maximum penalty for manslaughter is 20 years imprisonment. The maximum penalty for murder is life imprisonment. In terms of sentencing somebody for a serious manslaughter—for example, a manslaughter where somebody has intended to cause serious harm to another person and that has caused the death—one might think that that is a pretty high-range manslaughter. In determining a sentence for manslaughter, the court has to take into account section 33 of the Crimes (Sentencing) Act, which sets out the matters which a court is to take into account in sentencing. That includes the nature and circumstances of the offence, the injury, loss or damage caused, the effect on the victim and the effect on the victim's families and the degree of responsibility of the person who has committed the offence.

That is not an exhaustive list, but, importantly, one might see that that focuses on the sorts of things that mean if somebody kills somebody intending to cause some harm but not intending to kill them those factors will see a more significant sentence imposed on that person. So those who kill but at the moment do not do so with the intention to kill and do not do so being reckless about killing still face a most significant penalty. They are not simply able to walk away scot-free, and it is the sort of penalty that can encompass all sorts of degrees of responsibility.

As for what is proposed, perhaps it is more useful to say why it is that both the Bar Association and the Law Society oppose the changes. The first is that, as the law stands now, it is simple. It is easy to understand and it is directed to the core of the culpability, and that is the intention in respect of death. The amendment that is proposed extends the definition and it waters down murder. By "watering down", we mean that at the moment there is a core value for murder. What is proposed is to encompass other lesser matters as part of the offence of murder.

If the impetus for the changes is the individual case—and I note that you have been referred in other submissions to many individual cases—it is probably useful to make this observation: the individual case is not resolved by making a more complex and difficult law. If there is a dissatisfaction with the individual cases, that really should call for better courts, better prosecution, better investigation and a better legal aid office. The reason we say that is because in that way, by improving those aspects of the system, we can see that justice is done in the individual case, so the focus in the individual case is on ensuring that the innocent are properly acquitted and that the guilty are convicted. It is by improvements to the system as a whole that we see a benefit accruing, rather than making a much more complex provision here in the hope that it might catch some people. We say that the proper focus, if the individual case is the problem, is not something that is wrong with murder law at the moment; it is matters which are wrong with the system in general.

One of the justifications that have been raised for the change is that it will harmonise territory law with other jurisdictions. I think, members of the committee, you have agitated those matters with the various speakers about whether, in fact, that is the case—that it would harmonise. If I can just take two very simple examples. The change that is proposed brings the ACT out of step with the commonwealth law in

respect of murder. There are a number of murder provisions in the commonwealth code. Two of them are relevant to what we are looking at today. They are at sections 71.2 and 115.1 of the commonwealth code and they deal with the murder of a UN official, or somebody taking steps outside of Australia to cause the murder of somebody within Australia—so a terrorism offence. What is at the heart of the murder definition in both of those is what we have in the territory at the moment. It is an intention to kill or recklessness as to killing that is required for murder to be made out in either of those two offences.

What is proposed here takes us out of step with the commonwealth code. One might see the commonwealth code as being generally the model that is being adopted in the codification that the territory is engaging in. There are differences because the commonwealth legislates as to matters which are not of interest to the territory, but it would take the territory out of step with that particular approach.

The biggest concern, however, is the uncertainty in the reach of the new offence if the amendment is made. That is really asking the question: how far will the offence extend? The concern of both the bar and the Law Society is that the offence will now extend to call things murder that ordinary members of the community would not rightly regard as being murder. It is always easy to pick an example which does not fit with things. One can go to all sorts of fantastic examples, but it is probably useful to go to one particular example where, under the new proposed amendment, it might be considered murder and would not be considered murder at the present.

Picture a young man out on the town—and in this particular instance the young man has previously been assaulted while out on the town. The previous assault that this person endured caused him to have a broken jaw, a plated jaw, which is not at all uncommon as one roams through Civic. Assume that years after that has occurred, this person is out on the town and accompanied by a girlfriend. That girlfriend is accosted by another person who touches the girlfriend and makes salacious remarks to her. He is promptly told to back off by the man who has previously had a broken jaw and laughed at. What the man with the broken jaw does is throw a single punch at this person.

Now, the man with the broken jaw who throws the single punch well knows that a single punch can cause serious harm. It can cause permanent disfigurement. It can cause a break in the jaw, which is quite a serious matter. In throwing that punch, he is completely aware of the fact that that is the sort of harm that could be done to this person. But the person that he throws the punch at stumbles backwards, puts their arm through a plate glass window, slices the arm open and bleeds to death promptly.

The culpability there relates to the throwing of the punch. There is no question that that person has in their mind the intention to kill, or even a thought that death could possibly come from the throwing of a single punch, but in throwing the single punch, he is aware that serious harm could flow. Now, in that instance, under the new law, that person would be convicted of murder, despite not having that culpable mind of thinking, "I am going to kill this person," or "I don't care if I kill this person." What is of particular concern is that the complexity which flows from the amendments will cause a breach of offence that is very difficult to predict and is not necessarily connected to what the community as a whole would see as being murder.

That is probably not the shortest opening statement, but that is the opening statement.

THE CHAIR: Just to begin, thank you for your opening statements. I am presuming that, in putting together your submissions, both the Bar Association and the Law Society reflected the views of its membership. How did you consult with your membership?

Mr Gill: The Bar Association submission was put together with the approval of the bar council, which is the elected body that represents the bar.

Mr King: The Law Society has a criminal law committee which meets at regular intervals. It has a large membership, drawn widely from not only defence lawyers but also prosecution lawyers and legal aid from the DPP and from the Department of Justice and Community Safety. That committee has considered this in some detail. We have, through the medium of our fortnightly newsletter *Hearsay* and our quarterly magazine *Ethos*, made the membership aware of the thinking of the criminal law committee and have sought their views. I guess to the extent that we have received no dissenting view from the position adopted by the criminal law committee, we are entitled to conclude that our membership supports what we are doing.

THE CHAIR: Could I go to an issue that you touched on, Mr Gill, which was the issue of uniformity. You made the point that this proposed reform is a departure from the commonwealth provisions. It has been put to this committee on a number of occasions that there is virtue in having a uniform approach to these provisions and that it is desirable to have a uniform approach across the states and territories. Do you see that there is any particular uniformity across the states and territories in the way that the laws are dealt with?

Mr Gill: It is difficult to see it as being uniform. I think in most other states and territories there is an aspect of the offence which talks about grievous bodily harm or serious injury. But the way in which those individual provisions work does not seem to be harmonious. They do not all seem to operate in the same manner. So the reach of what they call murder would be different between the different jurisdictions.

THE CHAIR: That seems to be the case. It seems that the proposal before us today is most closely reflected in the Northern Territory, but there seem to be other departures which would be not as broad as proposed in this reform. For instance, WA requires that the accused intended to cause bodily injury that would endanger or was likely to endanger another's life and the Tasmanian provisions are that the offender must have known that bodily harm was likely to have caused death.

Mr Gill: That is quite different to what is proposed.

THE CHAIR: It seems to me to be substantially different from what is being proposed here. Even those two provisions, the WA and the Tasmanian ones, while they seem to be more stringent than what is proposed here, there still seems to be some disparity between those as well. Do you see that there is anything particularly virtuous about having a uniform code across all the jurisdictions?

Mr Gill: If it is good law then it is good to have a uniform code, but the difficulty is in obtaining uniformly good law between the different jurisdictions. I think that that was one of the purposes of MCCOC. I understand from the testimony of Ms Davis that it has not gone so far as to deal comprehensively with murder. There was a discussion paper which has advocated the position the territory currently has, but as to uniformity we say uniformity is only good if it is good law.

THE CHAIR: Do you see that, especially for this jurisdiction, someone could die violently in the ACT and be subject to quite different provisions than if the same offence happened in Queanbeyan? Do you see that that is a problem?

Mr Gill: It only becomes a problem in the way that the culpability is dealt with. If something is called a murder in Queanbeyan and it is sentenced on a particular level of culpability and it is not called a murder in the territory but the court takes into account exactly the same factors that were available in Queanbeyan about the conduct that the person had engaged in, we say that, as long as the culpability is assigned correctly, there is not a grave problem between having a different provision here and a different provision in Queanbeyan. The biggest benefit of the provision here is the certainty of the reach that murder will apply to people with a particular form of culpability, rather than being deemed to apply to people who have not even thought about the possibility that someone might die.

THE CHAIR: Can I also go to the example that you gave. The example was that at a club or pub someone hauled off and jobbed somebody once and they fell back. The attorney in his evidence seemed to be going down the path of advocating for the one-punch-can-kill lobby and that would indicate, whether or not you thought about it, it should be considered murder—if someone died as a result of that. This seems to be not the view of the Bar Association and the Law Society.

Mr Gill: No, because effectively that deems people with knowledge and awareness that they do not necessarily have. The current offence focuses on the person's intention. Was it an intention to kill or was it recklessness about death? The attorney's advocating for one-punch-can-kill is a great advertising campaign, but it is not a good basis on which to assign criminal liability.

MS PORTER: Could you just explain a little bit more about this phrase that is in the second part of what we currently have, which is "reckless indifference"? We understand what that means for us—well, I do—but not necessarily what it means legally.

THE CHAIR: Remember you are speaking to a group of non-lawyers.

MS PORTER: Yes. Could you explain what that means actually in the law?

Mr Gill: Perhaps I can give a definition that might not get 100 per cent in a criminal law exam at university. Basically, it involves somebody having recognition of the likelihood of something occurring. So in this case the recklessness is recognition on the part of somebody that a person could die from what they are doing. That is probably not going to get a 100 per cent mark at a criminal law exam, but it is a reasonable working definition of what recklessness would mean. So for the person

throwing the punch, or the person kicking someone in the head, it is having the recognition: "I could kill this person and I'm going to go ahead and do it anyway."

MS PORTER: At the time that you do it. What is the indifference bit? Does that go with the recklessness?

Mr Gill: Yes.

MS PORTER: The two phrases go together?

Mr Gill: Yes.

MS PORTER: So you are aware but you are indifferent to the awareness?

Mr Gill: Yes.

MS PORTER: You then decide to disregard that. Is that how it goes together?

Mr Gill: I think that is a fairly good way of explaining it.

MS PORTER: Thank you. I think it was you, Mr King, who said before that you wanted to represent the principal interests of society. Did you say that in your opening remarks?

Mr King: I said that, Ms Porter.

MS PORTER: We have had other witnesses come before us who have said we should change the law because the community or society—whatever way you like to describe it—would see that it should be changed because they are unsatisfied with what currently happens and, further, that victims are unsatisfied because if a person is sentenced to manslaughter instead of murder it does not respect the death of that person. Can you explain to me how you interpret your suggestion that we should not go ahead with this as a principal interest of society?

Mr King: It is much easier to determine what the principal interests of victims are because there are victims groups. They are well-organised and they are quite vocal, if you will pardon the pun. It is a bit harder to tap what the community in general want. You have asked me: how do I assert that I reflect the views of my membership? I could turn that back: how do you know that you are reflecting the views of the community? You only know because a statistically significant number of the community let you know and, of course, you are never in that position.

We take the view that when we look at a legislative proposal by government it has to pass two tests. It has to balance the principal interests in society. It has got to take care of the major interests and, if possible, it should cater for minor interests as well. But if it is looking after the vast majority of people—and this law as it is presently cast is—then it is a good law. The second test, of course, is that it has got to be easy to comply with. The present definition of murder is understandable and easy to comply with. The proposed definition, as Mr Gill has explained, is convoluted when you take into account the dictionary definition of serious harm.

MS PORTER: Thank you.

THE CHAIR: Ms Hunter?

MS HUNTER: The point is made in, I think, the Bar Association's submission—and certainly from what you have been saying—that by inserting a third mental element for murder the definition of murder is unnecessarily complicated and, as a result, has the potential to confuse juries. Already there is some degree of confusion in the debate because we have the Attorney-General stating in a written response to the chair of this committee that it is the government's position that the relevant legal test, the third element, is a subjective one. This is in contrast to the work that was done by the scrutiny of bills and subordinate legislation committee in a report that we did. It is of the opinion that, in light of High Court decisions, the test is an objective one. Are you in a position to discuss the legal tests that, in your opinion, would be involved in the proposed third mental element?

Mr Gill: It is very difficult to answer that question. By distinguishing between subjective and objective elements, I take it that the distinction that has been drawn there is the subject of intention versus the objective seriousness. It is difficult to say what the result would be. The code has been in operation for some time now. I am not aware of particular litigation in respect of that provision, or particular authority in respect of that provision, so it is difficult to answer.

I guess that the way a judge would direct a jury would be to talk about: "What was the harm that was in the person's mind and, jury, do you think that that is serious harm?" I think that that is the way in which a judge would commence to direct. In a criminal trial for murder, assuming that there is a jury sitting, the division of responsibilities is that the judge directs as to the law and the jury determines as to what in fact occurred. But it is the judge's role to set out for the jury each of those tests, the legal tests, which they have to be satisfied about.

If there was an objective and a subjective part of the offence that would mean that the judge would need to direct the jury: "You need to be satisfied beyond a reasonable doubt as to the intention." The judge would then need to direct the jury that they would need to be satisfied beyond a reasonable doubt that it was serious, but not necessarily that it was recognised as serious by the person. There are further complications which may come. I have not tried to deconstruct it to see how a judge might try to direct on those elements, other than to read out the definitions. If the starting point is that complex, one can only pray for help when we get to giving directions to the jury about that.

MS PORTER: Some of the evidence that has been brought before us has been around: "It's very difficult for us here in the ACT because often witnesses will utilise their right to silence. We can't get evidence as to what was in their mind because they're not going to tell us. If we go ahead with this amendment, this will allow us to use material evidence to prove that intent rather than relying on the witness statement, which may be an inaccurate statement in any case." I wonder whether you wish to comment on that suggestion—that we need it for that reason, because of the ability of the witness to remain silent.

Mr Gill: That is an ability, which is an Australia-wide ability, to maintain silence. The idea behind it is that a person ought not be forced to incriminate themselves. There are many ways in which matters are proved where the accused person has remained silent. I have just poured myself a glass of water without telling you why I was pouring the water. You could infer that I did that because I was either thirsty or nervous, so the court—

THE CHAIR: So which one is it?

MS PORTER: Yes, which one is it?

Mr Gill: I am going to invoke my right of silence now! The court typically and in a daily fashion draws inferences from the way people behave. If a person attacks another person in a particular way, one does not need words from that person to determine whether or not there is an intent to kill. The court is able infer that. A judge will routinely direct a jury about drawing inferences, that we draw inferences in our daily lives. We do not need words. Words might help, words might clarify that there was no such intention on the part of the person, but the right to silence is not a reason to go down the path of enacting a law which will catch people in an uncertain manner.

THE CHAIR: One of the other issues that we traversed across with the attorney and some of the other witnesses was the propensity in the ACT for there to be judge-alone trials in the case of murder. All of the notorious cases that were brought out for the committee to consider tended to be judge-alone trials. I was wondering what the Law Society's and the Bar Association's views were about the propensity for judge-alone trials, particularly in serious matters like murder—whether we might be considered out of step and whether you see this as part of the desire to have some reforms in this area.

Mr Gill: I have to say that I have not come prepared to talk about that, so there is not a particular bar position that I can advocate at the moment. But there is an observation that I would make about trial by jury and trial by judge alone. One of the advantages of trial by jury is that it brings the community into the decision-making process. So there are ordinary people who, normally, are not exposed to the day-to-day decisions of the court that have to come to a unanimous view, if that is at all possible, about guilt or innocence. That is a strong protection that we have in our society. There is a drawback in relation to jury trials—that is, once the jury makes the decision there is no knowledge of how that decision has been arrived at.

With a judge-alone trial, clearly it is a judge alone making the determination. It is not 12 members of a jury. The judge is obliged to set out the reasoning process for coming to the decision. The drawback in respect of juries is that there is not a transparent reasoning process. There is a transparent process of how matters come before the jury but not transparency in reasoning. But the safeguard is taken in having the 12 people come to unanimity. With a judge, the protection there is that the judge sets out the reasons.

Perhaps one of the reasons why you have got these graphic examples before you is that what you have been given is the judge's reasoning as to how the matter was

arrived at. So there is transparency there, which is open to public criticism as to whether or not the judge got it right, because we have those reasons. Without answering your question, because I do not think I can today, I would just point to those two fundamental factors.

Mr King: It is the same with the Law Society. This is a much-debated issue. I do not think we have ever come to a concluded view on it, and I do not think we would outside of a much wider debate within the legal profession Australia-wide. I think this is something that would be determined—if it is determined at all in the near future—around the table of the directors of the Law Council of Australia on which the Bar Association and the Law Society each have a director. But it does not affect why we are here today, and that is, if you have a trial by jury or a trial by judge alone the present definition of murder is the best definition of murder.

Mr Gill: There is probably one other observation I could make which might useful. One of the complaints—I think it is a complaint—that have been brought to this committee is that there has not been a murder conviction for some time in the territory. It needs to be remembered that the acquittals are not all in respect of this definitional matter. There have been people who have been acquitted for all number of reasons, including outright acquittals because they have been defending themselves. In stepping back and saying there has not been a murder conviction for some years, it is important to remember that there is any number of reasons why a person might be acquitted, and properly acquitted. The question ought not be one of: we have not got a particular score of murder convictions and that is a bad thing. The question should be: are we administering justice well?

THE CHAIR: Thank you for attending today. We take this particular inquiry very seriously indeed. We will, as usual, provide you with a copy of the transcript. We encourage you to closely examine the transcript. If you think that there is an element of your evidence which needs clarification we would strongly encourage you to come back to the committee with that clarification. Thank you very much for your time.

Mr King: Thank you.

Mr Gill: Thank you.

COLLAERY, MR BERNARD, Barrister and former Attorney-General

THE CHAIR: Welcome back to the Assembly, Mr Collaery.

Mr Collaery: Thank you.

THE CHAIR: And welcome to the hearing of the Standing Committee on Justice and Community Safety inquiring into the Crimes (Murder) Amendment Bill. I draw your attention to the buff card which relates to privilege. Could I ask you to indicate, when you have read it, that you understand the privilege implications of the card.

Mr Collaery: Yes, I do, Madam Chair.

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

Mr Collaery: Yes, thank you, Madam Chair. I have come here this morning principally because one of the Assembly committee persons, Dr Jaireth, rang me last night about the origins of the 1990 changes. I think, Madam Chair, you asked a question about that.

THE CHAIR: We have been very interested in the 1990 changes and how they came about.

Mr Collaery: I have come for that reason, but I want to say at the outset that I fully endorse all that my colleagues Mr Gill and Mr King have said. I would like to expand and take some liberties on some of those matters too, if I may. Going to your immediate inquiry about the changes to the law in 1990, just before the ACT took responsibility for that area of criminal law, in the early days of self-government, we appointed a law reform committee and there was a standing criminal law consultative committee. The late Justice John Kelly was appointed by me to chair the law reform committee. There were eminent practising barristers, other lawyers and government lawyers contributing to the Criminal Law Consultative Committee, which tended to sit over at the Supreme Court. The law reform committee sat at the Assembly somewhere, or in the government law office.

There had been going since 1987 a series of profound references on the review of commonwealth criminal law which snowballed into a whole series of discrete reviews. There was a committee chaired by the late Sir Harry Gibbs. Eminent government lawyer Andrew Menzies was on it and also there was Justice Ray Watson. Those of us who remember the late Ray Watson will recall that his wife was murdered when he was a family law judge. He was an author of an eminent legal text.

They sat for years and produced a mammoth document, the drafts of which I saw as attorney, and it became apparent that we would never get a uniform criminal code for Australia. I will not go into that at length. It just became apparent to everyone. I was hopeful that some of the work of that committee would not be lost. So in discussion with the Criminal Law Consultative Committee I suggested that we adopt some of the best work of that committee in the area of intention and criminal offences.

The ordinance that you now have before you printed down came in through us with

the consultation of the then Attorney-General, Michael Duffy, just before the business was repatriated to us. The government passed the ordinance in May 1990. It became operative a fortnight before the 30 June 1990 deadline—I think around 15 June. I see that I tabled it in the Assembly in August. I think we drafted the torture convention into that. We added that, but essentially the work had been done by those review committees. It had been vetted by Justice John Kelly and his eminent advisers, academics, government lawyers and practising barristers. That became the statement of the law insofar as murder was concerned and, essentially, as we speak now.

That is the origin of that 1990 change. It was to draw upon the huge review of law in Australia, New Zealand, Canada and the United States as to how we would deal with matters of intent. Ms Porter, you were talking about recklessness, and I think heedlessness. That is explained usefully around page 40 of that document which your committee will get. It is the review of commonwealth criminal law. It has never gone further, but more than 10 years work went into that 1990 ordinance. A great deal of thought went into the definition of murder.

THE CHAIR: So what you are saying, Mr Collaery, is that the decision to wind back the New South Wales Crimes Act as applied in the ACT in relation to murder, before responsibility for administration of the Crimes Act was patriated to the territory, was a deliberate and consultative decision between the commonwealth and you as the Attorney-General?

Mr Collaery: And, can I emphasise, with the Criminal Law Consultative Committee, which the local bar was quite involved with, and with our law reform committee then chaired by Justice John Kelly. It was a conscious work of the first Assembly. It did not give rise to any controversy at the time. It created certainty. It lined us up with the commonwealth. We were still hopeful then that we would eventually get uniformity, but I think I can now say that was a faint hope. But then we still lived in hope that we would get Queensland and Western Australia, principally—they were called "code states"—to come our way on that definition. That is the historical background to how the ACT turned at the outset of self-government. We adopted the commonwealth definition and we emphasised, again, the common law—so centuries of law reflected itself in that after self-government.

That leads me, if I may, Madam Chair, to address the general question of why we need a change. I quickly read the transcript of the hearing to date. I see emphasis on sentencing. One issue that needs urgent reform is that the penalty for manslaughter is less than for armed robbery. Armed robbery is 25 years; manslaughter is 20 years. I see there has been quite a bit of discussion about the Porritt case. I was not in that case, but I do not think it would make any difference if Porritt were to be put to his trial again. Under the law as it is proposed to change or as it is now, there would not be much difference.

I think there are two things that are interacting but getting a bit confused. There is some community concern about perceived low sentences and the cure for that is perceived to be a change in the law. As Mr Gill said, culpability is the great leveller across all the offences. Culpability is really what the judge, on sentencing, is addressing at sentence stage. Sentencing may level out the community concern. I cannot see how, looking at the transcript and looking at the evidence to date, where

there has been a technical explanation as to why we need to change the definition of murder. The learned attorney, Mr Corbell, refers to community expectations, community concern. That concern seems to be about sentence rather than the definition of murder. I endorse what Mr Gill said.

I want to make a comment, if I may, about conviction or sentencing—or whatever the community concern is. It seems to be an emotive concern, and if you are a victim that emotion is well placed perhaps. When we created the Office of the Director of Public Prosecutions we made sure that the salary for that position was around commensurate with that of a judge of the Supreme Court and that the other little perks that went with it were about the same too. Progressively, the salary and other advantages available to the Director of Public Prosecutions are being seriously eroded. It is about two-thirds now of that of a judge and the conditions are more aligned with bureaucrats than the extreme importance of attracting to that post a most eminent criminal barrister silk. There should be only one appointment to that post and that has to be an eminent barrister practising silk.

This is no reflection whatsoever on the current appointee, Mr White, but I do not think he has conducted a murder trial. I am personally aware of at least one criminal silk who may have applied but for the conditions of service. I think the Assembly needs to look carefully at this. There is absolutely no pejorative reflection on Mr White. The Assembly needs to look at what has happened with the status of the DPP. I noticed in the transcript that Mr White was reluctant to be drawn into any contretemps with the attorney. We need to ensure that the Director of Public Prosecutions is led by a silk who has been a public prosecutor, public defender—both, mixed—who has the level of eminence that would ensure that the DPP office is run with the particular skill necessary to make the hard decisions.

If you change the law to what is proposed, you are going to make it harder for the DPP. You are going to add to those issues for decision-making by the DPP another range of forecasting. These are the additional elements that create uncertainty that Mr Gill referred to. So you are really going to make the task harder for the DPP. Are you likely to get a better conviction rate? I do not think that that is the language that we should be addressing. Not only do we need to boost the salary, which has been done recently—the budget of the DPP has been increased—but also we need to re-boost the standing of the DPP. I am sorry I have to make those comments. They will not be welcomed in some quarters but they should be said.

As to the jury question that was raised, Mr Gill and I have conducted jury trials on both sides of the border. What he said is correct. I agree with that. I saw in the transcript that there was a suggestion from someone that the DPP might have a veto against an election for a trial by judge alone. That would be horrendous. That would turn that issue into a pre-trial tactic. There are some people who have great difficulty getting a fair jury trial. An accused baby-shaker has a difficult time in the media. It is difficult in many respects when you are defending a baby-shaker accused.

I recall a celebrated case here that I defended when after the trial, where there was a judge-alone acquittal, the grandmother of the baby came forward and said that she knew who the father was. The inference at the trial was that the youngster had shaken the baby because it was not his. She said there had been five cot deaths in the family.

There was a genetic disposition to arteriovenous malformation. The real father had some brain angioma. But that was after the trial. The public reaction to the acquittal was not pleasant. If a proper family history had been taken by the prosecution—and the grandmother said she had flown down from Brisbane, gone to the hospital where the baby was; the baby survived and fortunately is running around now as a six-year-old or seven-year-old—and if there had been a properly resourced police investigation, the young carpenter—his life was ruined, despite the result—would not have been put to trial.

He was on the front page of the *Daily Telegraph* day after day. He was excluded from custody of that child, or being in the house, but he was allowed access to their other children. It was a great lesson in how difficult it is at times to get a fair jury trial. His decision to have a trial by judge alone was appropriate. Rarely does a situation like that arise after acquittal, but we knew with certainty it was a proper acquittal. But the public did not perceive it as such and he has never been able to answer back.

There are juries that just before Christmas want to do their shopping and are quite anxious to get on with it. The jury system is not perfect. It was extolled by the attorney in his evidence as something he wants to see a centrality about. Recently the Assembly put through the evidence (miscellaneous provisions) legislation, reducing the prospect of an accused facing his or her accuser in just about all violent crimes—not only for vulnerable victims, such as sexual offence victims, but for all violent crimes.

When there has been a two-fisted struggle in a bar and the police have to decide who was the perpetrator and who was the victim, there is a grey line. But the Assembly recently has passed a law that puts the one who may have thrown the first punch behind a screen, not in front of the jury in person. There will be a challenge in the next fortnight to that section of the law in the Supreme Court. I cannot address it because we will be conducting the challenge, but I saw the attorney's reference to the strength of the jury and how the community and the public should be fully there as being somewhat inconsistent with that law that puts a remarkable number of "victim" accusers behind a screen, where that person alleges he was the victim and the other was the perpetrator.

I think extolling consistency when we are not creating consistency—because by passing that law this Assembly is the only law-making body in Australia, so far as we can see, that has extended CCTV protection beyond vulnerable witnesses. So any bozo now who claims to be a victim can get behind a screen, distant from the jury, so they will not see the rippling muscles, the tattoos and the general countenance, demeanour and disposition of a victim. That is inconsistent with the right to a fair trial, in our view. It is inconsistent with what the attorney was extolling before you as the core basis of a jury trial. We use words like "uniformity" and "consistency" sometimes somewhat loosely. Those are my opening comments, Madam Chair.

THE CHAIR: Mr Collaery, when you were consulting with your law reform commissioner, Mr Justice Kelly, you were dealing with the commonwealth attorney, who was Mr Duffy, I believe.

Mr Collaery: Yes.

THE CHAIR: Was there any public consultation, or was there any divining of community opinion about that at the time?

Mr Collaery: No.

THE CHAIR: Thank you. Members, do you have other questions?

Mr Collaery: Perhaps I should correct that. The law reform committee had quite a number of community-type representatives. I think I appointed the late Rod Campbell from the *Canberra Times*, Nick Seddon from the ANU, Justice Kelly, then Justice Terry Higgins, and the late Terry Connolly continued that process. The committee was disbanded, I think, by Gary Humphries when he was attorney. I think it provided a great assistance to me as an attorney. Rather than have to chance my arm the way attorneys now have to do in this Assembly and propose the reform, it went to the law reform committee first. It tested the waters, explained it, provided a report to the Assembly people and made the burden which is on this very important committee a little lighter. If I could put a word in: in the sense that we appointed a community law reform committee, Terry Connolly and I relied heavily on that committee for law reform—but no public consultation. If I had public consultation on the death penalty, we would probably bring it in. We have got to be frank about some of these—

THE CHAIR: It may also be useful to discern what the public view is, for better or worse.

Mr Collaery: Yes, you have got me there. You are right; I agree.

THE CHAIR: Are there other questions? I think Mr Collaery's opening comments covered all the things that I was contemplating asking. Members?

Mr Collaery: If you are going anywhere, I think the Western Australian one seems to be the one that one could stomach the easiest, although I fully support what Mr Gill and Mr King said. The Northern Territory one does not appeal. It is too sweeping, again. I just question why in this jurisdiction we are seen by one of the people who commented—Mr Corbell, I think—that we are "a generous jurisdiction". We are not generous. The ACT is an aware, informed jurisdiction. Why do we have to be uniform? We were the first jurisdiction to make the mere possession of child pornography a crime in Australia.

We can be different. We could line up with the commonwealth and still press for a uniform Criminal Code. So why go out of step with the commonwealth necessarily? Why not continue the attempt to get uniformity by pointing out to the Northern Territory and Western Australia the difficulties they are getting in their trial situations? The DPP has a simple, focused offence of murder. It is an easier decision to prosecute on. It is easier to run in the courtroom. Perhaps we increase the penalty for manslaughter. Perhaps we can deal with the community's concern in that way.

MS PORTER: I do have a quick question, Madam Chair. One of the witnesses that came before us this morning said that the reason that he perceived we needed this change was that there are a growing number of these violent crimes that lead to the

death of the person or violent attacks that lead to death. It is getting worse and it will continue to get worse. Have you got any comments about that?

Mr Collaery: Murder is, as defined presently, a pretty well-intended act. It requires a level of culpability that is high and it is at the top of our scale. Although the nationalist would say sedition and treason, it is at the top of our scale. A conviction for murder and to be a murderer is an absolute sanction—it is an absolute display of community opprobrium.

You water down the meaning of murder by bringing in all of these subsets of manslaughter—didn't intend, didn't fully intend, reckless, heedless events. You are watering down murder. It is a paradox. This bill really waters down, in my view, the concept of murder, as it is watered down in some of the states and one of the territories. Murder should remain the very worst thing you can do, the very worst thing you can get convicted of. It is for someone who fits the current definition.

The example that Mr Gill gave of the event in town is so apt. It is a different thing when you have got the accused in your office. There are some trials coming up that I cannot address. There is at least one trial for murder that I cannot address. You will have someone in front of you who is clearly shocked, absolutely appalled, by the end result; they cannot believe it. Self-defence is run, and many of those, as Mr Gill mentioned, are properly acquitted for self-defence.

I think we should keep murder as murder and we should work on manslaughter. Increase the penalty straightaway, in my view. How can it possibly be justified that for armed robbery it is five years more than for manslaughter? For those whose children go into the city at night and come back in the mortuary, the answer is a whole wider range of issues than to bring in the single fall in their life from grace of one person who did not intend the act and there has been a chain of unfortunate events.

An increased penalty for manslaughter and a heavier sentencing regime for known and identified thugs—such as the crimes that we have had—who commit those crimes is the answer rather than watering murder down and bringing in a whole range of offences so that we do not get the ultimate sanction in our society. If someone pretty well intends to kill someone and does all those things, all the external things—the actus reus, mens rea and all those things—they are murderers. They should be put beyond society.

If you do the change to this law, you will send to jail people who do not really feel they are murderers, who will not accept the sanction—the term "murder" means less. I really feel, from the victim's perspective, having been on both sides, that we need to think very carefully about lining up with the states and territories, particularly New South Wales, where it is not working.

THE CHAIR: Could you elaborate, Mr Collaery, on your contention—and this flows from what Mr Gill has said—that the changes in the states have made it more complex. You are saying that it does not work?

Mr Collaery: I think the changes present a field day for lawyers in the states—if you have been waiting for your trial to come on in a district court and have been watching

the performance of someone before you on all those additional elements that have come in in New South Wales. The classic over-legislative reaction is home invasion in New South Wales. You have got to remember how the police will treat this amendment. The police, properly, try and get everyone under the umbrella. Give them a wider umbrella and they will try and get everything under it.

New South Wales got rid of break, enter and steal and break and enter offences and created a series of home invasion sentences—sections 111, 112, 113 and 114 of the New South Wales Crimes Act. That came about because of what was happening, particularly in western Sydney. The crime gangs there were breaking into houses and robbing. Nowadays there are some aggravated domestic violence offences where the husband has gone back to the house and punched his hand through the door—I have done one of those trials—and he is charged with home invasion. It is the flavour of the month home invasion in the New South Wales—25 years. There are mandatory non-parole periods in it. It has resulted in home invasion been cheapened now. It has been cheapened.

I defended a man in Queanbeyan some years ago who took a baseball bat and entered a drug den because his eldest son had told him his younger son was in there shooting up with some drug dealer. He was charged with home invasion, for rescuing his son. Just before the jury was empanelled, we said we would plead necessity and rescue, because the boy was under 18, and the New South Wales DPP dropped that charge. But you have got to know that if you extend the compendium the police will use it. Some people charged are properly acquitted, but you will see those who should not have been charged, who are properly acquitted, are acquitted murderers—they have been acquitted of murder.

You are raising the stakes on both sides and you are giving to the police the capacity to draft more elements into their brief to the DPP. You are giving the DPP the challenge of a larger brief and more complex issues—those additional issues that Mr Gill mentioned—to decide. I am firmly against it from both sides of the record. I think this amendment needs to be thought through and put off the burner until you increase the penalties for manslaughter. The community, through the courts, lets those thugs know what manslaughter is. You could deal with the definition of recklessness at the same time.

THE CHAIR: On the subject, though, you are saying, Mr Collaery, that the police will widen the number of people that they will charge with murder. That is something that they do not do alone; they do that in concert with the DPP. The public arm of law enforcement and the prosecutorial arm have to act together. The DPP does not seem to be seeing the difficulties that you and Mr Gill have envisaged. Do you want to comment on that?

Mr Collaery: I feel that there is a lot of public pressure on the police. The police very properly deal face to face with the victims. The victims ring them up and the police officers get to know the family. It is an immense emotional ordeal for the investigating officers as well with these crimes of violence. There will be more involved briefs delivered to the DPP. The focus then shifts to the DPP. The police can say it is with the DPP and that is when—I come back to my earlier comments—you need enormous levels of self-confidence, independence and strength in the office of

the DPP.

The DPP can say to the police, "I'm not going to run murder for you. It's not sufficient. We will do a lesser charge." One's heart goes out to the DPP when they are publicly held up as having a very low conviction rate. My view is that that is a very unfair criticism. There are so many complexities about trials and so many issues about effective investigation, effective police assets, experienced police and the support the DPP needs to get the convictions when they think they are properly due. I agree with Mr Gill in his comments, but I go a little further in saying that, having been on both sides, if you make this an amendment the police will draft into a brief more and more of those factors. It will make the trial more complex and will result in extended trials and more chances for astute lawyers to find defences. I feel the DPP is better off with the simple definition.

I wonder what a DPP interstate would say to you about how they fared under their amendments, which are similar provisions—how they would say their trial work was going, faced with having to get all that extra evidence up and accepted by the jury. The jury is the judge of the fact. The trial of fact is for the jury. The jury make the decisions on fact. More and more facts are going to have to be put to the jury for that balancing. If you make this amendment, many trials for murder will become more complex, in my view.

THE CHAIR: Anything else, members?

MS HUNTER: No, thank you.

THE CHAIR: Mr Collaery, thank you very much for your time this morning and for coming at such short notice, and particularly for casting light on the origins of the current state of the law. It was much appreciated. There will be a transcript that will be sent to you. We do take this matter very seriously. We encourage you to look closely at the transcript and, if you feel that you need to clarify anything, please do not hesitate to contact the committee.

Mr Collaery: Thank you.

THE CHAIR: That concludes our hearing for today. Thank you very much to members and staff.

The committee adjourned at 12.12 pm.