LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Inquiry into the Crimes Legislation Amendment Bill 2011 and the Crimes (Offences Against Police) Amendment Bill 2012)

Members:

MRS V DUNNE (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS M HUNTER

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 4 APRIL 2012

Secretary to the committee:
Dr B Lloyd (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 9 August 2011

The committee met at 10.39 am.

CORBELL, MR SIMON, Attorney-General, Minister for Police and Emergency Services and Minister for the Environment and Sustainable Development
MARTIN, MR VICTOR, Acting Senior Manager, Legislation and Policy Branch, Justice and Community Safety Directorate
QUAEDVLIEG, MR ROMAN, Chief Police Officer, ACT Policing

THE CHAIR: I welcome people to the public hearing of the Standing Committee on Justice and Community Safety inquiry into the Crimes Legislation Amendment Bill and the Crimes (Offences Against Police) Amendment Bill. This morning we will hear from the Attorney-General and the Chief Police Officer. I welcome them both. I am sure that both of you are aware of the contents of the privilege statement.

In a moment I will ask the minister to make an opening statement, if he wishes to, but before I do so I have to put on the record—and this is not the first time that this has happened, attorney—the dissatisfaction of the committee at having received your submission only this morning. There was an occasion about a year ago in relation to the Prostitution Act when the committee received the government's submission on the afternoon before the hearing, with less than 24 hours notice. I consider it quite discourteous to the committee and it makes it difficult for the committee to conduct appropriate inquiries. I would like that on the record. Minister, would you like to make an opening statement?

Mr Corbell: Yes, thank you, Madam Chair. In relation to that matter, I do apologise to the committee for any inconvenience. Regrettably, the submission was only provided to me at a relatively late point for my clearance and, as a result, it is somewhat late getting to you. So I apologise for that. Regrettably, these things do occur.

Thank you for the opportunity to make an opening statement. The government, together with ACT Policing, have made our submission to the committee. The committee is already aware of the government's views on the issue of assaults on police, and I appreciate this additional opportunity to speak to the committee about an important issue that warrants detailed and careful consideration. The need for careful consideration is, of course, the reason why the government supported the referral of this bill to this committee, along with the opposition bill on the related matter. It is also the reason why I have referred the issue to the ACT Law Reform Advisory Council for its analysis.

The bill proposed by the government has its origins in the review of police criminal investigative powers. The government was concerned about the issue of assaults on police and proposed amendments to ensure prosecutions are not inappropriately stymied on the one hand and on the other hand that sentences handed down by the court properly reflect the circumstances of the victim in cases of police assaults.

The government's bill aims to achieve two things. The first relates to preventing perverse outcomes in criminal trials involving assaults on police. Secondly, the bill seeks to ensure that a victim's special occupational vulnerability as a provider of a vital public service is given appropriate weight at sentence. The government

recognises the community's concerns that changes to fundamental tenets of the law should not unduly trespass on rights.

The government's view is that its amendments to the law of self-defence are measured and appropriate; indeed, they are approaches that have been adopted in other common law jurisdictions. They specifically target those cases where assaults on police are patently malicious and offenders should not enjoy the protection of the law in these circumstances.

It is, however, a vexed and contested area, and I certainly recognise that. I am also aware of the views of some members of the defence bar who have raised concerns about the operation of the proposed law, and it is my view that we should have close regard to those concerns in formulating our response to these proposals.

Thank you very much for the opportunity to make a brief opening statement. I will be happy to try and answer your questions. I do not know whether the Chief Police Officer wants to make any opening comments?

Mr Quaedvlieg: No, minister; thank you.

Mr Corbell: We will endeavour to answer your questions, Madam Chair.

THE CHAIR: Thank you, attorney. I was wondering if you could elaborate further on the issues relating to the human rights implications of this legislation. You refer the committee to the explanatory statement. But seeing that it is rather a late hour, it would be useful if you outlined the government's consideration of the human rights implications of the law.

Mr Corbell: I will ask one of my officials to assist you with that.

Mr Martin: The explanatory statement deals with a number of issues in relation to human rights, with specific regard to the rule of self-defence in the proposed amendments. Specifically, the matters addressed include right to life and right to liberty. I refer the committee to pages 2 to 4 of the explanatory statement for that discussion.

In considering the proposed amendments and preparing advice for the government on the changes to the law on self-defence, we looked at the issue of making certain that the limitation to the rule of self-defence was the minimum necessary for achieving the end that we were seeking to promote, and that is to address the issue of inappropriate assaults on police where accused persons are of the belief that the arrest was unlawful. The analysis provided in the explanatory statement sets out at some length the reasons for the amendments and the way that they are structured.

THE CHAIR: Could I go to the discussion paper that was attached. This is an extract from the discussion paper; is that right?

Mr Corbell: This is an extract from the relevant part of the discussion paper.

CHAIR: What agency is the author of the discussion paper?

Mr Corbell: My directorate.

THE CHAIR: And this was drawn up as part of the process of the review of police powers?

Mr Corbell: Yes.

THE CHAIR: How far down the track is the review of police powers?

Mr Corbell: That process is ongoing.

THE CHAIR: What is the likely timetable for the community seeing the government's thinking on that?

Mr Corbell: Due to the election it is unlikely that it will be completed before the expiration of the term of this Assembly.

THE CHAIR: In the drawing up of this discussion paper and the relevant bits relating to the availability of self-defence for assault on police, that chapter, what were the issues that brought this to a head? Are there particular cases or particular incidents that brought this issue to a head and resulted in it being included?

Mr Martin: A number of cases were relevant here. The committee has a copy of a transcript in relation to one particular case in the Magistrates Court. I should say that there have been other instances where similar questions about the applicability of the rule of self-defence have also been raised, where the operation of the law has addressed the issue in other ways. So this specific issue about the lawfulness of an arrest has arisen in a number of cases in the ACT. It was those cases that led the committee to be concerned about the continuing operation of the law in that way.

THE CHAIR: Mr Martin, could you, either now or on notice, provide the committee with those cases and perhaps a brief precis of what the issues were in those cases?

Mr Martin: We can take that on notice.

THE CHAIR: There is one case that you referred to. Are there others that spring to mind where you could explain to the committee what the issues were and how they contributed to this discussion paper?

Mr Martin: Yes.

MR RATTENBURY: Madam Chair, if I could clarify that, could we have the names of the cases and the number of instances that you think have arisen? I think that is what Mrs Dunne is asking about.

THE CHAIR: That is part of what I am asking. It is more than the name of the case. It is the elements of the case that raised this concern.

Mr Martin: This issue that I am addressing is drawn out in some ways by the

Klobucar case. The question of self-defence and the way that it arises in a criminal trial is something of an organic thing. The idea that self-defence applies can arise in the course of a trial by evidence adduced or evidence that is brought forward by either the prosecution or the defence. It is not something that needs to be specifically pointed to by a party for the question to be at issue.

We appreciate that, for example, in the case of Klobucar, the term "self-defence" is not specifically referred to. The matter that is relevant for the prosecution is that, as soon as evidence that points to the possibility that a person was acting in self-defence arises, the prosecution has the burden to prove beyond reasonable doubt that the person was not acting in self-defence. That is one of the challenges that arise in pointing to specific cases and the point in a particular proceeding where that matter arises.

MR RATTENBURY: It strikes me as somewhat unusual that a live issue in a case might be one that is simply implied. The matter is not being discussed. There are plenty of matters that are not being discussed but none of those is usually implied. You seem to be suggesting that, because the vibe is one of self-defence, it becomes a live issue and they are the cases that you are relying on.

Mr Martin: You make a fair point. Prosecutors and defence lawyers discuss outside the court the things that they believe are at issue in a particular case. At times they might discuss whether self-defence is at issue. At other times they will not raise that issue. There are tactical and other issues at play here. For example, defence lawyers will not want to disclose that they wish to rely on self-defence, for their own tactical reasons.

The challenge for prosecutors and for police is to gather evidence at the investigatory and prosecutorial stages to make sure that they are aware of any possibility of a question of self-defence arising and address that through the brief of evidence in the first instance and through adducing evidence in relation to whether or not the person can be shown to have not acted in self-defence. It is a significant challenge for prosecutors and police in relation to their roles.

MS HUNTER: I want to follow that up. The first page of the government's submission talks about the data provided by ACT Policing and indicates that the number of reported assault offences against police is trending downwards. The next paragraph says:

> … ACT Policing Occupational Health and Safety reports show that during 2010-11 there were 57 reported assaults. This figure has been trending upwards …

How many cases have failed because self-defence has been raised?

Mr Corbell: We would need to take that on notice. What I would say is that the question is not so much how many cases have failed, the question that the government is seeking to address in this bill is the issue of the use of violence in people's interactions with police. Fundamentally, what this bill is designed to address are circumstances where someone is involved in a violent altercation with police as a consequence of an arrest or an attempted arrest and then the claim is made that

violence was justified because the arrest was technically unlawful.

The government asserts that there are sufficient other remedies that do not justify the use of physical resistance and violence towards police officers when it comes to the issue of technically unlawful arrest. We have a system of justice in the territory, as Australia does as a whole, where people who are arrested are brought before a judicial officer promptly and issues in relation to bail or issues in relation to the lawfulness of that arrest can be dealt with promptly before a judicial officer.

In the government's view, there is no justification for violence to be used towards police officers and then the argument made that that violence was justified because the person being arrested believed that the arrest was unlawful. That is fundamentally the issue that we are seeking to address here. It is not about whether or not there is a trend in terms of the decisions of the courts around how the operation of the law as it currently stands is interpreted. It is about whether it is justified in the first place for someone to seek to resist an arrest that they believe is unlawful. There are sufficient other remedies, not just in terms of raising it upon arraignment before a court but other mechanisms through police complaints and oversight bodies and, indeed, civil actions in the event that the arrest is found to be unlawful.

Those are the ways we should seek to resolve these matters rather than continue to have a provision in the law that basically permits the use of violence. That is essentially the issue that we are dealing with.

It is important to stress that this is only in those circumstances where the person who was being arrested was aware that the person arresting them was a police officer. In circumstances where the person was not aware or it could be demonstrated that they could not reasonably be aware that the person arresting them was a police officer, the current provisions in the law continue to operate.

The circumstances we are trying to address are circumstances where a man or a woman in a blue uniform is seeking to arrest somebody and the person who is being attempted to be taken under arrest resists violently and then seeks to justify that violence on the basis that the arrest was in some way technically unlawful. That is the issue we are seeking to address.

THE CHAIR: Could I ask the government to provide to the committee the number of instances in, say, the last two or three years where the circumstances that you have described, attorney, have actually arisen where someone has been put under arrest, violently resisted and subsequently used the defence of self-defence?

Mr Corbell: That is essentially a question you asked before. Yes, we can endeavour to give you our best advice on that. As Mr Martin pointed out, the issue of self-defence arises in different ways during a criminal trial and may not always be immediately obvious. Nevertheless, we will seek to provide you with the best possible analysis we can.

THE CHAIR: Could I go back to the figures that Ms Hunter mentioned appear in your submission. These have been discussed on other occasions, from my recollection. There are two trends. One is a declining trend in successful prosecutions

for assaulting police but at the same time OH&S figures show an upward trend in assaults on policemen. Mr Quaedvlieg, do you see that there is a connection between these two sets of figures and if there is a connection, what do the police see as the reason for the decline in successful prosecutions?

Mr Quaedvlieg: The statistics that we have relate to arrests. I would not want to talk about successful prosecutions because I do not have those figures.

THE CHAIR: These are arrests rather than prosecutions.

Mr Quaedvlieg: These are arrests. We have analysed the statistics for the last six years. The numbers of arrests for assaults on police have ranged between 45 and 66 in the six years, with the 45 being in 2005-06 and the highest figure of 66 in 2007-08. Since 2007-08 they have—"trended" may be too strong a word—certainly been declining by small numbers. In the last financial year there were 48.

The figures that we have collated through our occupational health and safety statistics show a slight rise. There is not much disparity between arrests and OH&S reports. There is a small one. Again, I caution against calling that a trend. There is a slight increase in the OH&S statistics in terms of assaults on police or claims of injuries as a result of assaults on police. We put that down, essentially, to in not all cases where police are subject of an assault will there be an arrest.

It may be, for example, an offender is taken into custody for a range of serious criminal offences and during the course of that action a police officer may be injured. We may not necessarily lay a charge of assaulting a police officer during that process for the sake of there are a whole range of serious criminal matters already that are being preferred. My explanation for the slight disparity between the arrest numbers and the OH&S numbers is that.

THE CHAIR: There is not a predisposition for the police to think it is not worth the effort to prosecute people for assaults on police?

Mr Quaedvlieg: No, I do not think so. We take assaults on police very seriously. However, if we are charging an offender with a range of offences that are of a more serious nature—for example, stealing a car, fleeing from the police; various things of that nature—then if a police officer receives an injury in the course of that arrest, adding an additional charge may not actually be a dividend versus effort equation.

THE CHAIR: Is there a threshold where you think that the injury is serious enough to lay charges, irrespective of the extent of the other list of charges?

Mr Quaedvlieg: There is no formal threshold. If a police officer, in the course of those circumstances I described, receives a moderate to serious injury, we would certainly charge that person with assaulting the police officer. But if it is a bruise or a scratch or something of a minor nature then we probably would not. That is a determination that a constable will make on the day at the time. It is within the constable's discretion to make that call. I would not be in a position to dictate that.

MS HUNTER: Mr Quaedvlieg, when you were before the committee in November

last year we discussed the statistics on police assaults. You indicated your view that the key to mitigating the assaults lay in the operational arena and you were doing some work on identifying how the assaults were taking place with a view to trying to reduce that risk. I am just wondering how that work is coming along.

Mr Quaedvlieg: Thank you for that question. The work is coming along very well. Since that hearing we have been doing some very stringent analysis on the OH&S stats, as well as our use of force reporting, which is quite extensive. We have got a very good statistical compilation now to understand how injuries and assaults are occurring. We are going to make some slight adjustments in our operating methodology to try to mitigate those incidences. One of those, which I have mentioned previously—and it is of some controversy—is the introduction of the conducted energy weapon, or the taser. We have recently conducted an interim evaluation of the effectiveness of that particular use of force option within our operating domain.

We have a full evaluation scheduled for August. The interim evaluation tells me that there is a very clear appreciation amongst the practitioners—this is senior practitioners, sergeants out on the road—that they have seen a marked reduction in the mobbing-type offences that I have spoken about previously and that there is an appreciable deterrent effect by the introduction of a taser into an operational situation. That is not necessarily a taser even being drawn or discharged. But certainly the appearance of a taser has, in the views of the sergeants, effected what they have relayed to me as a palpable deterrent effect. We will evaluate that further during the full evaluation period in August. I think that is an example of one of the operational methodologies that we can introduce to try and reduce assaults.

Mr Corbell: There could also be some other drivers. It is very difficult to ascertain, but there could be other drivers. For example, the alcohol reforms have seen a marked reduction in the number of alcohol-related arrests. Obviously alcohol is a key contributor towards violent behaviour, so there could also be drivers around that.

Further, there could also be drivers associated with ACT Policing's engagement of a much more proactive approach around dealing with mental health associated matters with the placement of the mental health advisers in the police operations facility and being available to provide significant on-the-spot advice to police about how to manage particular persons who may be presenting with mental health associated issues. As the CPO says, there are a range of factors there. Obviously the availability of other use of force options is certainly a contributor. These other factors may also be contributing as well.

MS HUNTER: With the use of force options you have mentioned the tasers. There has also been the introduction of the spit hoods. Are there any others?

Mr Quaedvlieg: The use of force continuum is quite extensive. The taser was an introduction into that. The spit hoods are really a tool for our watch-house staff to avoid being spat on by offenders who have shown a propensity to spit whilst they are being brought in. The use of force continuum starts at negotiation and communication and goes right through to a lethal option, which is in the firearms. In between those two options there are a range of others, such as handcuffs, batons, OC spray, open-

hand and closed-hand strikes and a variety of others, or a combination thereof.

MR RATTENBURY: Attorney, I want to ask about the other bill that is before the committee—the offences against police bill—the opposition bill, for ease of reference. I note the remarks you have made in your submission. From my investigation of the bill it seems to be the case that one of the issues with using the current commonwealth provision is that, in a sense, it is a difficult offence to prove. I note you have not addressed this in your submission.

As to the current offence of assault against a commonwealth official, there are elements where I understand the prosecution finds it difficult to prove that the accused knew that they were assaulting a commonwealth official. It strikes me that the issue therefore in addressing assault on police and being charged with it goes to changing that definition. It is not something you have addressed in your submission. Is that something the government has considered?

Mr Corbell: Assault against a commonwealth official is a commonwealth offence. It is not a territory offence. From a practical perspective, the territory cannot change the definition of that provision. However, I think the issue from our perspective in relation to the opposition's bill is that the opposition's bill changes the presumption. It puts the onus on the defendant. It requires the defendant to prove that they knew the person they were assaulting was not a police officer. That reverse onus, in our view, engages and raises a number of human rights concerns and we have reservations about it.

In relation to the opposition's bill, fundamentally I think the key factor is that, whilst it may make a prosecution easier in relation to assaults against police, the government is not convinced that it will have any significant deterrent value on the incidence of assault against police. That is, the opposition bill is founded on the premise that, if you increase the penalty, it will help prevent the incidence of assaults against police. The opposition bill increases the penalties for those offences by making them aggravated offences, and they are about 30 to 40 per cent higher than the current penalties for the basic offence. Certainly, the advice I have is that an increase in the penalty in and of itself is unlikely to have any impact on the incidence of assaults against police, although it will increase the severity of the penalty that is imposed for people found guilty of that offence.

MR RATTENBURY: Mr Quaedvlieg, would you like to add anything on that subject?

Mr Quaedvlieg: Thank you, Mr Rattenbury. You are aware of my views on this. I have written to you. I am happy to state them on the public record. Whilst I would welcome a specific provision for assault police for the purposes of collating our statistics, I do not believe that increased penalties, particularly in the range of those proposed, would act as a deterrent effect on offenders assaulting police. I say that because in the vast majority of cases those offences are committed by people in a very spontaneous and impulsive manner. Quite often those people are affected by alcohol, drugs or some emotional disposition which was existent prior to police turning up at the scene.

I do not believe that assaults on police in the large majority of cases are premeditated. If you take the analogy of looking at capital offences where there are life sentences, and in some countries' jurisdictions there is the death penalty for capital offences, that still is not a deterrent effect for what are essentially crimes of passion. So whilst there may be some marginal deterrent effect for those offences against police which are premeditated, I do not believe that in real effect, in a pragmatic sense, the increase in penalty will actually reduce the number of assaults on police.

MR RATTENBURY: Attorney, I obviously appreciate that we cannot adjust the commonwealth law, but thank you for that piece of advice. The Chief Police Officer has spoken previously about the separate issue—and this is perhaps where I was going, if I was not clear enough for you—of a separate offence of assault against a police officer. Have you sought advice on whether that is possible under ACT law? Is it something that the government is giving consideration to?

Mr Corbell: The government's response on that issue is to provide for a special consideration at sentencing for vulnerable, at-risk occupations. The government bill, the bill before the committee currently, amends section 33 of the Crimes (Sentencing) Act to include a requirement for a sentencing court to give special consideration to whether the victim of an assault was in a vulnerable or at-risk occupation. That includes police but it also includes other people carrying out public duties—ambulance officers, care and protection workers, health staff.

The government bill seeks to ensure that in giving consideration to the sentence that is imposed where an offence is proven, the special occupational vulnerability of a worker is taken into account—that is, they were more vulnerable because they had to engage with this person, either because of their duties as a police officer or because they were seeking to care for them as a paramedic or a nurse, for example. Therefore the sentence that is imposed should be commensurate with that particular vulnerability.

So, unlike the opposition bill, we are not proposing to increase the maximum penalty that is available; instead we are proposing to require the court to take into account the particular vulnerability of the victim where they are performing a public duty.

MR RATTENBURY: Am I correct in understanding that implicit in that is that you do not intend to create the separate offence in order to be able to identify the trends in assaults on police?

Mr Corbell: Generally speaking the government adopts the policy position of not proposing aggravated offences—

MR RATTENBURY: No, I did not mean that. The Chief Police Officer was talking about having—

Mr Corbell: Separate offence.

MR RATTENBURY: an offence of assault against in order to distil out the situation.

Mr Corbell: That is correct.

MR RATTENBURY: You are not planning to do that?

Mr Corbell: That is correct. We believe the provision in the current government bill provides sufficient scope in that regard.

THE CHAIR: I want to go back to Mr Rattenbury's last point, and your point, Mr Quaedvlieg, that the police saw some value in having an offence like assault police on the books so that it is easier to collate statistics around it. What is the purpose of collating statistics if, on the surface, you do not seem to be proposing to do anything much about those statistics?

Mr Quaedvlieg: Madam Chair, I am sorry if I misrepresented my position. The collation of statistics is very important, and we do that. We currently do that across the array of offences that are available under both ACT and commonwealth law in terms of assaulting police. My point was that if there was a single assault police offence, that would make us lazy administrators but it would certainly be easier to collate. That does not mean we do not collate it now and that we do not take action on that now. We do it for the purpose of identifying trends.

THE CHAIR: I want to pursue one thing with you. I am very mindful that the questions I am going to ask are about the opposition's bill. As the chair of the committee, I do not want to be seen as being an advocate in this space for that bill. In that bill it is not just assault police; there are a range of other offences which would have an aggravated component to them—stalking and the like. You have made the point before that often assault on police is unpremeditated, spontaneous and the result of what might be described as an emotional outburst. But some of the other elements in the opposition bill are things which are much more obviously premeditated, like stalking a police officer, or stalking a member of a police officer's family for the purposes of stalking a police officer, or intimidating. Would you see that there is benefit in addressing those issues, either by an aggravated offence or by some other approach?

Mr Quaedvlieg: Thanks for the question. I feel I am not in a position to give you a qualified response to that. I have not done any in-depth analysis of those other offences. My focus has been very much on the issue of assaults on police.

I would like to clarify the point. When a police officer is assaulted, we have a range of statutes under which we can prefer a charge. It may be common assault, it may be assault on a commonwealth official, it may be under the Crimes Act or the Criminal Code of either the ACT or the commonwealth. That disaggregates the specific offence of assaulting police; hence that is our issue in terms of trying to collate the statistics in a viable way, to try and distil out.

For example, if we look at a host of charges retrospectively of assaulting a commonwealth official, to delve into which ones of those were police, we would have to do some analytical work around that. Hence my comments that, if we had a specific assault police offence, I do not think that would totally eradicate that problem because police would still potentially charge under other available statutes. But over time we may tend to be biased towards a specific police assault offence, and that may help us to collate the statistics a little more easily.

Madam Chair, could I take on notice your question in relation to those other offences? I would be cautious about giving an opinion on that right now.

THE CHAIR: Okay. Could I go back to the discussion paper and the police powers. I did notice, in the little time I have had to peruse this, that you rely almost exclusively on US jurisprudence in coming to conclusions here. Why is it the case that you have relied on US jurisprudence? Is that an indication that there is not similar jurisprudence in other countries like the UK or Canada, which we would probably go to before we went to the United States for precedent?

Mr Corbell: The United States is the jurisdiction where the jurisprudence is the most markedly different from other common law jurisdictions such as the UK or Canada. Obviously in addressing this question we always have regard to development in all common law jurisdictions and make judgements about whether or not it is applicable in the territory. In this respect we have had regard to the US jurisprudence.

I might ask Mr Martin if he would like to elaborate on that.

THE CHAIR: Before Mr Martin elaborates can I just go back, to make sure that I did not misunderstand you. Did you say, attorney, that the United States jurisprudence was the most markedly departed from common law jurisprudence?

Mr Corbell: No. I said it was most markedly different from the jurisprudence in other jurisdictions, on this matter, such as the UK and—

THE CHAIR: That goes to my question: why did we go to a jurisdiction or a set of jurisdictions that was markedly different?

Mr Corbell: On this question?

THE CHAIR: Yes.

Mr Corbell: In the context of analysing alternative approaches to addressing this question it is simply common sense to look at how other jurisdictions address it and whether or not it is of relevance to the territory. It does not mean that there is a bias in favour of looking at one jurisdiction over another; it is simply the logical consequence of scanning developments in other parts of the world to have regard to whether or not a particular reform is appropriate here.

There is some jurisprudence from the UK, if I recall correctly, which makes some observations about how the position or the argument around self-defence has evolved, including the issue of why it initially existed and the way it should be viewed in the context of the operation of today's modern criminal justice system. If I recall correctly, that is from the United Kingdom courts, which have made the observation that the operation of self-defence law is different now from the basis on which it first evolved, in that it first evolved in the context of fairly arbitrary arrests, often potential lengthy periods of imprisonment before being brought before a judicial officer and so on, and therefore the justification for it could be viewed to be quite different from that which exists in a modern civilised society. Mr Martin would probably be better able to

elaborate further on that than I can.

Mr Martin: The attorney has encapsulated the thinking around the way we regarded jurisprudence on the question in a fairly succinct and accurate way. The jurisprudence and commentary on this issue coming out of the United States is very clear. The issue of how self-defence operates with respect to police is something that really will be impacted on by the relevant offences that are being used by police and prosecutors to target instances of assaults on police.

One of the issues that we have in the modern-day United Kingdom is that the resist arrest offence used as common practice is something that does not really pick up on that issue of that unlawfulness on its own of an arrest. Certainly the idea that a person is responding to a battery on a person by a police officer is relevant and so it is something that is not as terribly clear as it is in the United States.

Historically in the United Kingdom we are clear that the origins of the rule of self-defence with respect to the specific question of unlawful arrest are fairly clear and it is clear from the commentary that we have looked at that jurisdictions have addressed this issue in a variety of different ways. Certainly the position in Australian jurisdictions is that they retain the more conventional rule of self-defence which includes an act done in self-defence to an unlawful arrest. As the attorney said, the US commentary was very clear and decisive on this.

THE CHAIR: I think you have skated around my question, Mr Martin: why have you relied on the jurisprudence of the United States rather than countries whose legal systems are more like ours, like the UK and Canada in the first instance and before we got to the United States? Is that because the argument that you want to make is not as clearly made in those jurisdictions? What does jurisprudence in the UK, for instance, say on this matter and is there contemporary jurisprudence on this matter in, say, the UK?

Mr Martin: I think the answer is that the issues we were looking at were simply not as terribly well drawn out in other jurisdictions as they have been in the United States. That is a simple answer for a complex question.

THE CHAIR: Okay. So why would that be that these issues do not seem to have arisen in, say, the United Kingdom?

Mr Martin: I am not able to answer that question.

THE CHAIR: It seems from what you are saying, Mr Martin—correct me if I am wrong—that there is a substantial difference between the case law in the United Kingdom and the case law in the United States. One should not make generalisations about the actions of arrestees in different cultures. Do they act differently? Are people in the United States more inclined to resist arrest and therefore we have created a whole lot of case law that does not exist in the United Kingdom, or is the law and the way that we treat the law in commonwealth countries substantially different? That does not seem to have been addressed in the discussion paper and I am trying to get to the bottom of why it has not been addressed in the discussion paper; why our first port of call is the United States.

Mr Corbell: I think it comes back to the territory's view about whether or not the operation of the self-defence provisions in relation to unlawful arrest should continue to operate in the way it has been operating. In our view, we do not believe the operation of the law any more reflects contemporary understanding of how these matters should be addressed. The basis of the law as it currently operates is that the use of physical force to resist arrest is justified even where the person knows that the person is a police officer and the issues of the technicality of the arrest are subsequently dealt with in a hearing before a court. That is where we are starting from. That is the question that we are seeking to address.

THE CHAIR: Yes. I understand the question you are seeking to address.

Mr Corbell: The question we are seeking to address is: is it appropriate to justify that violence? Whilst in other jurisdictions, as Mr Martin said, the jurisprudence is not as clear on this question, there is one jurisdiction, and multiple administrations of criminal justice within that jurisdiction, that has looked at this issue more closely and therefore we have drawn on that experience.

THE CHAIR: I go back to my original question, which I think you still have not answered: why did you go there? Is it just simply because you could not find jurisprudence that supported the government's position elsewhere? On the issue, it seems to me on the basis of this discussion paper that you came to a conclusion that it would be desirable to change the law in this area and then you went looking for a justification for it. I am looking for some clarification, perhaps from Mr Martin.

You seem to be saying that the law in other Australian jurisdictions is currently as it stands in the ACT. Is there discussion about the desirability or the need to change the law from what it currently is to something like what the government is proposing or to some other change in other Australian jurisdictions, and is there a similar discussion about these needs in common law jurisdictions, for instance, like the UK and Canada? If you cannot answer all those questions now, I am happy for you to take them on notice.

Mr Corbell: You have posed a number of questions, Madam Chair. We were not looking for a justification for a preordained position. The question was genuinely raised–and you can see it in the context of the police powers discussion paper—about whether or not that particular rule was relevant, remained relevant, or was the operation of that rule based on an antiquated notion of the protections available to citizens in relation to these matters, and in a jurisdiction where we are trying to promote an environment where force is not resorted to, where the emphasis is on de-escalating, not escalating, the potential for violence, in the particular context of the safety of police who are trying to do their job on behalf of us all, what other options were open to us to deal with this question.

We looked at a range of different jurisdictions and jurisprudence to identify alternatives; they are couched in the police powers discussion paper as alternatives but recognising that we do not live in 19th century England, we do not live in an environment where using violence to resist an arrest was perhaps seen as an appropriate response. In a modern democratic society with an independent judiciary

that operates in a timely way to have people who are arrested brought before a magistrate who is truly independent the question does need to be raised, why is there a requirement to absolve the use of violence in these particular circumstances? That is the question we are seeking to address.

I accept that it is a contested area and I accept that there is a range of strongly held views on both sides, both of which have strong foundations in the development of the criminal law over time. We have to make a judgement about that.

THE CHAIR: It might also be useful to help to inform the committee, when we get the figures on the information about the recent cases, to indicate the extent to which this is a live issue rather than an interesting academic discussion in the discussion paper.

Mr Corbell: I think it is a live issue because we have two bills in the Assembly both of which are seeking to address the issue of violence against police.

THE CHAIR: Yes, but this is a particular sort of violence against police.

Mr Corbell: We have a majority of members of the Assembly saying, "We are concerned about violence towards police and the impact that has on the ability of police to do their job and the risks that police are put to in doing their job." I think it is very clear that it is not just an academic exercise; there is a genuine concern about violence towards police. The government's bill seeks to deal with a particular element of that. The opposition's bill seeks to deal with it in a broader way in a different manner. Nevertheless I do not think you can simply say that it is an academic question because we have two live pieces of legislation on the table, both of which are seeking to address the issue of assaults against police.

THE CHAIR: Thank you, attorney and Mr Quaedvlieg, for your attendance today.

Meeting adjourned from 11.34 am to 2.42 pm.

KUKULIES-SMITH, MR MICHAEL, Chair, Criminal Law Committee, ACT Law Society**Error! Bookmark not defined.**
GILL, MR SHANE, Member, Criminal Law Committee, ACT Law Society

THE CHAIR: I reconvene the hearing of the Standing Committee on Justice and Community Safety inquiring into the Crimes Legislation Amendment Bill and the Crimes (Offences Against Police) Amendment Bill 2012. I welcome representatives of the Law Society, Mr Kukulies-Smith and Mr Gill. Have you had your attention drawn to the blue privileges sheet and do you understand the contents?

Mr Kukulies-Smith: I have.

Mr Gill: Yes.

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

Mr Kukulies-Smith: In respect of the Crimes Legislation Amendment Bill, essentially, as we understand that bill, there are two stated purposes and changes to the law proposed therein. The first is in relation to amendments to section 31(1) of the Crimes (Sentencing) Act and the inclusion there of an additional factor which magistrates and judges would be required to take into account on sentence. The society does not have a lot to say in relation to that. It is the experience of practitioners that, where police or ambulance officers or other public officials as categorised in that proposed amendment are the victims of assaults and similar, magistrates and judges routinely take that into account as an aggravating factor in relation to sentences that are handed out.

That being the case, from our point of view there does not seem a great deal of need to specifically reference it. At the same time, there does not seem a great deal of difference that would be made in a practical sense to having that specified either, so we do not see any particular harm that needs to be guarded against by not including it. It is a relatively neutral position from the society in respect of that position. We are just making the observation that it does seem to already be playing out as a factor—and it is always an aggravating factor—in relation to sentences for people who commit offences, most commonly assaults and the like, against people in those categories.

In relation to the amendments that are proposed to self-defence, the abolition of self-defence in respect of unlawful imprisonment by police, the society has significant concerns in relation to the proposed amendments. Firstly, in relation to the need, we note that there is only the one case referred to. In the attorney's presentation speech reference is made to one particular case. It is not sufficiently delineated so we are able to identify with certainty which case that is. However, I understand from discussions with the Bar Association that in their time before this committee they are going to present a case which falls within that category, where they will draw some quite different conclusions to those of the attorney. That being the case, the society is happy to endorse what the bar say in relation to that—being aware of what they are likely to say in respect of that—and not take up our time dwelling on that further.

In relation to self-defence, the society is concerned that it be identified that self-defence itself is not, and should not, be regarded as a legal loophole. It is a substantive legal right. It should be treated in that fashion and, therefore, extreme caution should be exercised when amending that right.

In respect of the powers of arrest that presently exist, the society makes the point that the actions that constitute an arrest would, but for the legislative powers of arrest, actually be unlawful acts. The application of force, the restraint of a person, which are necessary ingredients of any arrest—to differing degrees, obviously, depending on circumstance—themselves, in essence, are unlawful acts, but they are legalised for police to use them for the purpose of arrest.

That being the case, police always need to be cognisant—and the legal system should be such—of that considerable power that they are given, and it needs to be exercised responsibly. The society has concerns if people cannot rely on self-defence where there are reasonable grounds. And that is the key: that under the tests for self-defence there need to be found to be reasonable grounds in an objective sense, as assessed by a magistrate, judge or jury, before a person will be able to successfully rely on that to avoid criminal prosecution.

We do not feel there is a need to moderate that further where it is already the case that the court, the finder of fact—whether that be a jury or a judge or magistrate in a particular case—needs to be satisfied there are reasonable grounds for the belief of an accused or a defendant before they could actually rely upon self-defence in respect of an arrest, and successfully rely on that, to avoid criminal prosecution.

Finally, we note that it is suggested in the explanatory statement that there are other remedies in modern society to unlawful arrest and there is no need for people to defend themselves against that unlawful arrest. It is suggested that they get the opportunity for bail hearings within 48 hours under the Bail Act or, in any event, there are potentially civil remedies. There are two concerns with that.

The first, as to the question of bail, is that rarely, if ever, is the lawfulness of a person's arrest a factor at a bail hearing. Usually that is a matter that would ultimately be reserved for the final hearing of the matter, whether that be a hearing in the Magistrates Court approximately four to six months later or whether that be a criminal trial considerably further away than that.

The other issue is that, in respect of civil damages being available if it is an unlawful arrest, it seems to the society somewhat strange that we could have a situation where a person is criminally convicted for their actions because they are not allowed to rely on self-defence even though their actions have been assessed to be a reasonable response to an unlawful arrest and they have taken them in response to that. They could be denied the opportunity to rely on self-defence, and thereby be found guilty, yet at some later stage be awarded civil damages, some monetary sum, to represent the inconvenience, pain and suffering and the like that was suffered to them as a result of the illegality. That is a significant concern. The person would still be left in that scenario with a criminal conviction, with that criminal mark against their name. That is something which should not be taken lightly.

THE CHAIR: Mr Gill, do you have anything to add?

Mr Gill: Yes. Part of the reasoning in the explanatory memorandum is to talk about circumstances where the arrest is technically unlawful. It is useful to look at the place of arrest within our legal scheme because the deprivation of liberty is the most serious thing that our state can do in relation to an individual. So in talking about something as being technically unlawful, that an arrest is technically unlawful, it is useful to look at the substance of what is being dealt with, not simply to gloss over the circumstances of an arrest as being something for which there might be some slight technical hiccup which is being defeated by some sort of trickery in the courts.

When you look at arrest, custodial impositions by the court are the last resort. You cannot jail somebody unless that is the last resort. Arrest fulfils a similar function. Arrest can only take place where that is the resort that has to take place in relation to the administration of justice. So an arrest is a lawful circumstance by which you can deprive of liberty and it can only occur under fairly confined circumstances. It ought not be used except in those confined circumstances but it does get used outside those confined circumstances. We understand that because repeatedly the territory courts have identified police arresting people under circumstances where they could not do so, where they ought not to have done so. That, usually, is not to say that the police were malicious in their conduct. Usually it is accepted that there was good faith on the part of the police officer. But the law simply did not justify the arrest taking place.

We are in a circumstance where there are narrow grounds to arrest, frequently arrests occur outside those narrow grounds, and not for reasons of bad faith. We say that to talk about an arrest as a technical problem is not to comprehend how serious it is to arrest somebody outside those narrow grounds.

What is proposed here is a law which deprives a citizen of the ability to self-protect in circumstances where they are being arrested and they ought not be arrested. We say that it is not a pristine area of policing. Frequently the boundaries of arrest are trampled over. On many occasions it is known to legal practitioners as the practice of the trifecta, which might or might not be known to the committee. The trifecta is where somebody comes before the court, they are charged with resist police, assault police and offensive language to police in the course of the arrest, but not facing a substantive charge. So all of that has come out of the interaction with the police and the person has ended up in custody under those circumstances when ultimately there is no primary charge.

What I thought could be helpful is to talk about a scenario as to how the proposed law might operate, and I think it is a realistic scenario. Say, for example, I was out in Civic with my 17-year-old son and he was set upon and assaulted by people. We understand that this happens reasonably regularly. During that assault he is struck to the head several times, the police attend, he is still very upset when the police attend, he is a bit dazed, he says some untoward things to the police, having just been punched in the head on several occasions. Say the police officer says to him: "Enough from you. You go stand over there, next to that bench over there." What needs to be understood is that the police officer has no power to make that direction, other than where you can tell people to do things in day-to-day life. There is no lawful authority to compel somebody to do something.

Say my son, who has been assaulted and has been told by the police officer to "stand over there next to that bench" does not comply with that direction and starts wandering off. The police officer might yell at him and say, "I said to stay there." That direction, even though there is no lawful basis for it, is covered under the law that is proposed, and a person who resists a police officer in relation to that direction is a criminal. So say my son ignores the yelling from the police officer and the police officer runs to him, tackles him to the ground and my son strikes his head on the footpath. Say there is a struggle that ensues from that. Or say it is an officer who is equipped with capsicum spray or a sergeant equipped with a taser and who uses the taser because he will not comply with that particular direction, which is custody under the terms of the amendment. No matter how disproportionate that action is, no matter how much I can see that it is doing potential physically permanent harm to my son, if I intervene there with anything other than words, I am marked as a criminal.

Why would a person intervene with other than words? Because words are not effective. And what member of the community would not intervene under those circumstances? I would say there is no member of the community that would simply stand back and see their son treated in such a manner. Why would no member of the community do that? Because axiomatically it is right to intervene at that point. But if I laid a hand on that police officer, if I pull at his shoulder and say, "Stop it, stop it," then I have committed a criminal act. So something which for centuries has been recognised within the law as part and parcel of living within our sort of society, that right to take reasonable action in defence, is denied to me. That is a reasonable circumstance for me to act. I would be labelled as a criminal at that point. And that, we say, is a problem with the law. It is a fundamental problem because it strikes at the heart of what anyone would regard as right conduct.

It is simply the case that sometimes words are not enough to result in a circumstance like that. So we say it is considering those sorts of reasonable, likely to occur scenarios that helps to understand whether or not this is a good law. The Law Society says that it is not a good proposal. It is not a necessary proposal and it is not a good proposal.

THE CHAIR: Can I go to your very last sentence, Mr Gill, that it is not a necessary proposal. Do you have any understanding of how the government came to the view that this, in their view, was a necessary proposal?

Mr Gill: I am not certain how it arose. I first saw it arise as part of the police powers process. There was a process by which a committee was established to make recommendations as to police powers. At the end of that committee this proposal made it into the draft discussion paper. I do not know how that came about.

THE CHAIR: Have you seen the draft discussion paper?

Mr Gill: I have but it was some time ago. I was a participant on that committee for the Law Society.

THE CHAIR: The committee received an extract from the draft discussion paper only this morning. I was struck—and I asked the attorney about it this morning—that

all of the modern jurisprudence that they referred to was United States cases. I was trying to get some advice from the attorney and the government about whether there was no similar jurisprudence in countries whose legal systems are more like ours, like the UK and Canada, in the first instance. I was wondering whether the Law Society was aware of recent jurisprudence in the UK, Canada and perhaps New Zealand where these issues have been canvassed.

Mr Gill: I do not know whether the Law Society is aware of any such jurisprudence. The central jurisprudential point that we say renders this not a necessary change is that overarching requirement of there being an objective reasonableness to the act of self-defence. If one looks at the court process, it is a very difficult thing to say that you are behaving reasonably when you physically resist a police officer in self-defence. It is not a claim that is frequently made. It is not a claim that is frequently successful because, again, it is axiomatically difficult to say that I needed to use force to protect myself from someone who is clearly executing their lawful duty. So it is only under rare circumstances that a decision maker will say, "Yes, on the circumstances that you perceived it was reasonable to resist that uniformed police officer."

That is one of the reasons why we say it is not a necessary change, because it is a rarity that such a claim is made or even less so is made successfully, because of that overarching requirement of reasonableness. It is not enough to say, "I was acting in self-defence." You have to present to the court circumstances which present that as being a reasonable thing. Normally it is not reasonable to raise a hand against a uniformed police officer, and the courts accept that.

MS HUNTER: I want to go back to the point that you were the Law Society representative when the work was being done on police powers and that this issue had not come to light then. There was no discussion amongst that group?

Mr Gill: I do not remember it being raised until right at the end of that process. It came as a surprise to me when I heard it being introduced.

MS HUNTER: Are you able to talk about the discussion that took place, why it was put forward and the reason or motivation?

Mr Gill: No. It came late. There were discussions between various representatives. I do not recall what discussion took place within the committee itself. The bulk of the work of that committee was looking at the overarching question of police powers. It was not the focus of what we had initially come together to do. It was a little out of left field.

THE CHAIR: Could I follow up on that because it was something that struck me when I was preparing for this. In a sense, it is not actually about a police power. I understand the remit of this committee. The discussion paper looks at how you might amend, improve and change, as necessary, current powers in various pieces of legislation to ensure that police are doing their job as well as possible. This is proximate but is not actually about the exercise of police powers.

Mr Gill: Again, it is ancillary to it. I can see how it might arise. A lot of the focus of

the police powers discussion paper was on consolidating police powers so that they are easier to comprehend, looking at multiple sources, to make it easier for the courts and the police to say that this is the range of powers and these are the circumstances in which they can be used. One can see how this could potentially arise but I think it was outside the fundamental purpose of that committee. That committee functioned as a disparate advisory committee in that there were a lot of different opinions coming in that discussion paper. It was a very freely spoken committee but this did not arise until very late in the piece.

MR RATTENBURY: Let me come back to the evidence that you gave right at the start. You talked about the Law Society not really being aware of self-defence being used in the ACT. Could you elaborate on that? Is it in very few cases, no cases, that you are award of?

Mr Kukulies-Smith: I was referring there to the particular case that is cited in the explanatory memorandum. We are not aware of which case that is specifically. It is not sufficiently identified that the society can say that this is a decision of Magistrate X on this day or that this is the trial of Y or anything of that nature. In terms of the general reliance upon self-defence in respect of the actions of police, it is the experience of practitioners that it is relatively infrequent. In terms of it being raised, it is even less successful, for the reasons that Mr Gill has outlined.

There is an overarching need to demonstrate to the satisfaction of the court that there were reasonable grounds for it. That acts as a crosscheck. That prevents the ex post facto use of it. Clearly, without that reasonableness as a crosscheck, it would be relatively easy to use it as an ex post facto explanation for conduct. Where you have to actually link it back to the circumstances and demonstrate to the satisfaction of a court that there were reasonable grounds for your belief and for your actions, that acts as a necessary and sufficient crosscheck.

MR RATTENBURY: In his introductory speech for the bill, the attorney said that the purpose of the amendment was to prevent opportunistic abuse of the current law on self-defence. In my mind, listening to that, he implied that it was happening quite frequently. Am I clear in understanding that you are not aware of it being commonly used?

Mr Kukulies-Smith: I am not aware of it being commonly or extensively used in a fashion for it to be described as opportunistic, certainly not.

MR RATTENBURY: The other bill that we are looking at today seeks, among other things, to increase the penalties for assaulting police. This is what I am trying to understand more clearly as well. There seems to be a reluctance on the part of the DPP to pursue charges under the commonwealth Criminal Code of causing harm to a commonwealth public official. I do not know whether you have examined the bill. I wonder whether you could comment on whether proposed section 48C(2) of the bill brought forward by the Canberra Liberals carries across those same requirements and thereby replicates the issue that is sought to be resolved. You are welcome to take this on notice if you have not looked at it.

Mr Kukulies-Smith: In terms of the reluctance of the DPP, my experience is that

there has been a change under this director to the previous director in terms of the use. It is far less common that I have seen the commonwealth offence charged. It used to be relatively routine. If an assault involved a police officer, the commonwealth charge would be preferred against a client. Certainly that is no longer the case, in terms of my experience and the experience of other practitioners I have spoken to.

MR RATTENBURY: Do you have any sense of why that is?

Mr Kukulies-Smith: It is my understanding that is a decision of the director. I do not see a—

Mr Gill: One is a summary offence and one is an indictable offence.

Mr Kukulies-Smith: Yes. There are differences in terms of summary and indictable. The other issue that can arise is where there is a substantive offence. Once the commonwealth offence is charged, if it goes to the Supreme Court, it requires a trial by jury. There were situations that I am aware of historically where a person was charged with a territory offence and, as part of the course of conduct, was also charged with a resist commonwealth public official. That then led to the potential for that person to make an election for trial by judge alone in respect of the territory offence but of course there is no similar provision in respect of the commonwealth offence where, constitutionally, it is required to be a trial by jury. There is that practical element.

I am not aware whether or not that is the reason that the director's office has taken the position that it has. I am aware, from discussions with both the director and other prosecutors, that it is a preferred position. Certainly I can put it that highly. Perhaps it is more within their office. As has been stated to me, it is preferred not to charge the offence. As to the specific reasons, they are some that I can see would be relevant but I do not know if they are the reasons of the director's office. It would be a question better asked of the director.

MR RATTENBURY: Thank you for the insight.

THE CHAIR: Does somebody have another line of questioning?

MR RATTENBURY: We are having a discussion on the second bill, whether we should increase the penalties for assaulting police. Certainly we have had evidence suggesting that they tend to be not crimes of passion but spontaneous reactions to a situation. Do you have any sense of whether increasing the penalties will help to deter assaults against police?

Mr Gill: I do not think a lot of thought is usually occurring when the hinder takes place, and a consideration of particular penalties is not at the forefront of a person's mind under those circumstances. The practical best deterrent is people thinking they are going to get caught: if they hinder they will get arrested; if they commit some other crime they will be caught. That seems to work as a more effective deterrent than saying, "We're going to tack six months onto the theoretical maximum penalty for a particular thing." When it comes to hinder police I think you are right generally that it be categorised as a spur of the moment thing—normally a spur of the moment thing

that the person ultimately pleads guilty to and says: "I'm sorry. That was out of line. I ought not to have done that." That is how the majority of these matters are disposed of.

MR RATTENBURY: Does that help you—

THE CHAIR: Before I go on to that, I just want to go on to a line that I canvassed with the Chief Police Officer this morning. Mr Rattenbury characterises the provisions in the second bill—which is an opposition bill; it is not my bill but it is an opposition bill—the offences against police bill, as increasing the penalties for assault against police. But there is a range of offences. I asked the Chief Police Officer a similar question this morning.

I take the point that the Chief Police Officer made and you touched on, Mr Gill, that if somebody is out and is arrested and resists arrest or clocks the policeman that is not premeditated. But from time to time there are offences against police, including things like stalking members of families to intimidate—those sorts of things—which are much more premeditated. The aggravated offences are envisaged to cover those as well and I was just wondering whether you had applied any thought to whether there might be more merit at that end of the scheme in terms of deterrence.

Mr Gill: Again those circumstances would effectively aggravate the offence even without an amendment to the law. So somebody who stalks a police officer, because the police officer's position is a police officer, will be punished by the courts much more harshly than for a normal stalking event. Somebody who kills a police officer will find themselves at the life end of the spectrum, if they are not already at the life end of the spectrum. So there is a mechanism by which those who regard it as a more heinous form of crime already—it is really a social policy question about whether you bring into effect an aggravated offence provision.

The only real negative to that I would say again is that you are adding a degree of complexity to the law. We have got complex and confused sentencing provisions already. That is the only thing that would tell against adding the aggravated offence. Otherwise we would say that sort of matter is taken into account already. But, if the Assembly was to say there should be an aggravated version, the only negative there is to say that that simply adds a degree of complexity to sentencing law.

THE CHAIR: But presumably not beyond the wit or skill of a magistrate or a justice of the ACT Supreme Court?

Mr Gill: No. I am sure he or she could deal with it.

Mr Kukulies-Smith: The other potential factor is that, once the aggravated offence is there, if it is not charged for whatever reason, or if as part of plea negotiations it becomes an agreed position that a lesser charge is appropriate, if that itself is not an aggravated form of offence, then potentially the fact that the person is a police officer could be precluded from sentencing consideration because of the principles in De Simoni and the issue where there is another offence which has the particular aspects as elements of the offence then the decision to charge the lesser offence means that those aggravating factors become excluded from the sentencing. So it could in certain circumstances have the opposite to the desired effect in terms of the sentencing

outcome or it could have the effect that, because more becomes at stake in terms of the potential sentencing range, a matter is less likely to be able to be resolved by way of a guilty plea; it may become more likely that it is defended because it is definitely a factor; the severity of penalty and seriousness of an offence is reasonably commonly regarded as a factor in terms of rates of defended or not defended. The more serious an offence is, the more likely they are to be defended.

THE CHAIR: I have a couple of quick issues before we get to the end of our allotted time. I think you, Mr Gill, talked about the trifecta—assault police, hinder police and whatever the other one was—as sometimes being the only matters that are brought before a court. I sort of understood that to mean that that was perhaps an indication of an inappropriate arrest; that the other matters are falling over. Could you elaborate on that a little?

Mr Gill: Potentially. It is a practice that has been known in the territory for many years and it is referred to as the trifecta by practitioners; it is the oddity that somebody has been arrested and taken into custody, yet when they come to court all the offences that they are charged with relate to the arrest itself and not to some substantive—

THE CHAIR: Not to a previous offence.

Mr Gill: Sometimes that can be justified. The difficulty is that the point of arrest can often be taking place in circumstances where it should not, so the issue of going to the trifecta is to say, yes, the police have a difficult job; it is not always exercised appropriately. It can be exercised inappropriately without crossing the good faith boundary that is put here. Essentially the good faith aspect here is a police officer believing that they are doing the right thing. If you question a police officer in retrospect, most of the time they will say, "Yes, I capsicum sprayed that person; I thought it was the right thing at the time," even though when you reflect on it it was manifestly excessive.

So the issue with the trifecta is that we are dealing with an area where if you look at it from a middle-class perspective you think that of course the police ought not be touched and they are doing the right thing all the time. It is a difficult area for the police; it is also a very difficult area for the punters. It is an area in which traditionally police have gone too far, and it is also an area where punters have gone too far in resisting the police. That is why when you look at the current self-defence provisions we say that they actually straddle it quite appropriately because they say you are not in a position where you become a criminal for acting to stop something that is wrong.

THE CHAIR: Could I go back to Mr Kukulies-Smith's evidence where you said that the issue of wrongful arrest hardly ever arises in the consideration of bail applications. This seems to be the principal argument put forward by the government, that in a society where there is the rule of law and access to bail it is not like it was in the 16th or 17th century where people were press-ganged and established a right to resist being press-ganged or locked up without trial for long periods of time. Your evidence—and you just sort of touched on that—seems to refute the contention of the government on this.

Mr Kukulies-Smith: The issue there is that at a bail hearing the evidence of the

police and the statement of facts in relation to a matter are accepted as being true for the purposes of the bail determination. It is almost inevitable that that statement of facts will, on its face, disclose a lawful arrest. It is very uncommon that they will, on the face of the police's own statement of facts, disclose the matters which may later be found to be the cause of the arrest being determined to be unlawful. So it is for that reason as much as any other that, when a bail hearing is conducted, where the prosecution evidence is essentially taken at its highest for the purpose of determining whether a person should or should not have liberty, the police assertions are not looked behind.

As I said a moment ago, it is very uncommon, if at all, that the police assert their own actions to have been unlawful. They present them in a way—and that is one of the issues that I understand the Bar Association are going to address the committee on this afternoon. They will give an example of a real case. The Bar Association will show the evidence that the police gave and then some footage that is of the same event, and contrast one with the other in relation to the issue of good faith, which is part of the bill, in terms of assessment of police action in excluding self-defence.

The same issue and the same point that they will make on that will illustrate what I am saying in relation to the way police present a statement of facts, the way that is constructed and the way that necessarily is accepted.

Bail courts are busy places and they do not have time, and that is why magistrates and judges defer the digging-in, the assessment and the presentation of conflicting evidence about that until the hearing or the trial. For that reason it just gets accepted at that stage and, as I say, it is very unlikely and improbable that the police will actually present a statement of facts that discloses unlawfulness to their actions.

THE CHAIR: Moving on from that, would it be possible that, where someone did attempt to deck a policeman, that would be perhaps brought forward as evidence as to why bail should be opposed? So it is possible that the argument put forward by the government is actually 180 degrees out of kilter with what might actually happen in a bail court?

Mr Gill: The person's alleged conduct at the time is brought before the court on bail. If they have resisted the police, that might be a reason to say they are likely to commit further offences or that they are not likely to be compliant with bail conditions so they ought not be released. So, yes, it is something that can tell against bail.

Mr Kukulies-Smith: It is similarly the case with running away, which would frequently be part of that physical altercation with police, or potentially part, if they are trying to get away from what they perceive to be unlawful imprisonment. That may be, and is, when it does occur, often a feature. That in itself can then feed into other grounds for bail, such as flight risk. It can be presented that that is evidence of a flight risk—the attempt to flee or evade police custody.

THE CHAIR: Thank you, Mr Gill and Mr Kukulies-Smith, for appearing on behalf of the Law Society and for your contributions today. A copy of the transcript will be sent to you, for anything that might need clarifying.

There were a couple of things that were raised which we sort of asked you to take on notice. If you could reflect on those and if you have anything to add, we would welcome that. Thank you very much for your attendance today.

HUNT-SHARMAN, MR JON, National President, Australian Federal Police Association
McMAHON-HOGAN, MR ROGAN, Member, Australian Federal Police Association
SMITH, MS ANGELA, Member, Australian Federal Police Association

THE CHAIR: I welcome representatives of the Australian Federal Police Association to this hearing of the justice and community safety committee inquiry into the Crimes Legislation Amendment Bill and the Crimes (Offences Against Police) Amendment Bill. I draw your attention to the blue privilege statement, to make sure that people are aware of and understand the implications of the privilege statement. Mr Hunt-Sharman, would you like to make an opening statement?

Mr Hunt-Sharman: Yes, I would, Madam Chair. On behalf of our members I would like to thank you for the opportunity to appear here today in regard to these two important bills. Since 1942 the Australian Federal Police Association, in various forms, has continuously represented federal law enforcement officers. Our members have continuously and successfully provided policing in the Australian Capital Territory. Those members are indeed part of our local community.

The AFPA and our membership operate in an increasingly complex and dynamic law enforcement environment, national security environment and indeed employment environment, not just in the ACT but throughout Australia and internationally. Broadly, the AFPA supports any initiative which attempts to deter violent assaults and other offences against police in the course of their duties. We strongly support a bipartisan approach to ensure that both important legislative reforms occur in a timely fashion. Legislation such as what is proposed will bring the ACT more in line with other jurisdictions which already have appropriate laws relating to offences against police officers.

The AFPA believes strongly that one central facet of our legal system is to dissuade potential offenders from offending by way of the punishment administered for a particular offence. The role of deterrence is twofold. The greater the perceived certainty and severity of punishment, the less crime will occur, and the greater the actual certainty and severity of punishment, the less crime will occur. We believe that both proposed pieces of legislation go quite some way in achieving the two mentioned forms of deterrence—if you like, a proactive and a reactive situation.

The quantifiable risk to police in the line of duty is a significant concern to the AFPA. While we are supportive of both bills, we believe that neither bill goes far enough in addressing the threat of assault which currently exists to our members. We strongly support the implementation of a specific offence of assaulting a police officer in the execution of his or her duties as an officer of the Crown. Alternatively, we encourage the Attorney-General to amend the current position to enable Australian Federal Police officers to charge an offender for causing harm to a public official, being a law enforcement officer, under section 147 of the Criminal Code 1995, which has been the case until quite recently.

I would like to quickly speak on the background of the sworn police officer role

before I go to the details of the bill. Irrespective of rank, it is from the office of constable that each police officer derives their authority and power. On appointment, each police officer swears an oath to the Crown to faithfully discharge the duties of the office of constable. Holding the office of constable means a police officer must—must, I say—protect life and property and execute their duty independently, without fear or favour. As a result of the sworn oath and warrant, the office of constable confers on a police officer the authority to arrest and control public order.

These are not simply delegated powers as a result of our employment. Those who hold the office of constable are servants of the Crown. We are not employees. That is, officers are not classified as employees when executing their powers under the Crown; rather, each sworn constable is an independent officer of the Crown. They are not merely agents of the police force, police commissioner or government. Each police officer has personal liability for their actions and inactions and can be sued accordingly.

Specifically, police officers have authority under the Crown for the protection of life and property, the prevention and detection of crime, the maintenance of law and order and keeping the peace. Police officers cannot legally be instructed to arrest any person. It is a decision that they must make independently, using their experience, knowledge and discretion, to take the most appropriate course of action to fulfil their function as an officer of the Crown. Our members are fully accountable and do not have protection afforded to them by their employer when actually executing this authority.

Those holding the office of constable do so in full knowledge of the increasing dangers they face and the responsibility and accountability they have, both on and off duty. In this context the AFPA is uniquely placed to make comment on these two proposed bills before the committee today.

The Crimes Legislation Amendment Bill 2011, we believe, is an excellent bill that needs to be introduced. We support the government in ensuring that an offender will no longer be able to rely upon the argument of self-defence when they have acted violently towards an officer of the Crown who has acted in good faith in direct execution of their duties.

The AFPA has been concerned about the significant loophole in the legislation in the ACT which may allow offenders to violently retaliate against police officers who are executing their lawful duties and acting in good faith during an arrest. It is almost outrageous to consider the premise that an offender may circumvent a lawful arrest and actually assault a police officer in the process. Such a loophole poses a significant threat to our members and also may serve to encourage offenders to actually utilise force during an otherwise lawful arrest.

Although the AFPA supports the closure of this loophole and strongly supports the government's legislation, the AFPA does not believe this bill goes far enough in addressing or deterring the threat of violence against officers of the Crown. The AFPA urges the government to reconsider the drafting and passage of legislation to acknowledge a specific crime of assaulting a police officer of the Crown.

In regard to the Crimes (Offences Against Police) Amendment Bill 2012, the AFPA

welcomes the intent of the proposed amendment. The bill creates a penalty for 15 serious offences against a police officer. Further, the bill makes penalties for these aggravated offences which are significantly higher than the current penalties for the basic assault offence. The AFPA and its members are of the explicit opinion that the current charges and relevant penalties do not go far enough to dissuade members of the public from acting violently towards officers of the Crown.

Police officers have authority under the Crown for the protection of life and property, the prevention and detection of crime, the maintenance of law and order and, importantly, keeping the peace. Given their intrinsic role within society, it is justifiable that those officers should be afforded additional legislative protections, not because of their employment category, not because of their individual rights, but because each sworn constable is an independent police officer of the Crown. Indeed, many jurisdictions, including the commonwealth, acknowledge the exceptional, independent and distinctive office of constable and, accordingly, have a specific offence relating to the assault of a police officer in their respective criminal codes.

Officers of the Crown fulfil a crucial and often challenging community safety role. These officers perform their functions in some of the most demanding and distressing situations, frequently with little reward or gratitude. It should be incumbent upon legislatures and the judiciary, in dealing with offences of this nature, to show an appropriate measure of support for these police officers of the Crown who undertake a difficult, dangerous and often thankless task. As referred to by Chief Justice Gleeson in R v Hamilton, the risks faced by police officers are substantial and significantly greater than those experienced by the general public.

This bill addresses the very real risk of assault to Australian Federal Police Association members when they are off duty, where an assault occurs as a consequence of or in retaliation for actions undertaken by the officer in the execution of the officer's duties. We think that is a great improvement. The bill acts as a deterrent for revenge attacks and prevents an offender from attempting to circumvent the effect of the proposed legislation by waiting until the officer is not in uniform or is, indeed, off duty.

Both bills attempt to address similar issues. We thank the government and the opposition for considering the concerns raised by the Australian Federal Police Association on behalf of our members over the last few years. The AFPA is of the opinion that the ACT legislature must seriously consider the creation of a specific offence of assaulting an officer of the Crown. This would bring the ACT in line with a host of other jurisdictions within Australia and internationally.

Whilst we foresee that the bill proposed by the opposition might encroach upon section 22(1) of the Human Rights Act 2004 in regard to reversing the burden of proof, we believe the opposition's proposals should be supported by the government, with necessary amendments. While the government's bill addresses some concerns held by the AFPA and its members about assaults during the lawful execution of an officer's duty, the bill fails to address the very real risk of assault to AFPA members when they are actually off duty and an assault occurs as a consequence of or in retaliation for actions undertaken by officers in the execution of their duties.

Neither bill acts as a deterrent to attacks on police purely due to their status as an officer of the Crown. We do, however, welcome the government's concerted efforts to remove the argument of self-defence to a perceived unlawful imprisonment where the victim is a police officer acting in the course of his or her duty.

The most recent policy decision concerning the removal of access to the appropriate charge of assaulting a public official, being a law enforcement officer, has already caused significant demoralisation throughout the police force in the ACT. It should be remembered that our members often work in joint operations nationally and internationally. At the federal level, our members have the ability to charge offenders with assaulting a commonwealth officer, being a law enforcement officer, when engaged in police operations. On advice from the DPP, our members now do not have access to such a charge when it involves an ACT offence.

I give an example of the concern we have. With the recent affray at the tent embassy, where the Prime Minister and the Leader of the Opposition were under physical threat of harm, if you look at that situation, an AFP police officer in the ACT who attended the scene and who may have been assaulted may or may not have access or legal recourse under the offence of causing harm to a public official, under section 147 of the Criminal Code. It is based on proximity and jurisdictional argument. We believe this needs to be cleaned up in some form.

Finally, there is a workplace health and safety need for a specific offence of assaulting police officers of the Crown. The risk is twofold. Without a charge, police are placed in the difficult situation where an offender has little to no additional legal deterrent to assaulting an officer. Further, where an individual may be a repeat offender and may possess a propensity for assaulting police, a crucial piece of operational safety intelligence is missing due to the removal of the specific offence. What I mean by that is that where we can, we will conduct criminal history checks and other checks, including safety alert checks, in regard to a person before we approach them.

Quite a number of people have common assault charges against them. It is almost treated as, yes, they have committed a crime but not specifically against police officers. Where the risk and the danger are, where someone has the propensity to assault police, is that you really do need to know that information beforehand. By not having the specific charge or, indeed, the charge outlined in the opposition's legislation, that does not get picked up in the information intelligence.

On that note, I think I am finished. I know it was quite a long statement. I did particularly want to pick up the issue of police officers not being employees when they are actually executing their duties.

THE CHAIR: I take that point. I will start by going back to your comment that section 147 of the Criminal Code was previously available but is now no longer available. Could you elaborate on that?

Mr Hunt-Sharman: Yes. Until quite recently—

THE CHAIR: What does "quite recently" mean?

Mr Hunt-Sharman: Two years, one year?

Ms Smith: It is technically still available to us but it is not being supported by the DPP.

THE CHAIR: What is section 147?

Ms Smith: This is the cause harm to a commonwealth official.

THE CHAIR: That is 147 of the commonwealth Criminal Code?

Ms Smith: The commonwealth Criminal Code Act 1995.

THE CHAIR: That is my problem. I misunderstood. I thought you were saying that it was previously in the ACT Criminal Code and had been taken out.

Mr Hunt-Sharman: No. We previously used that where there had been an assault of a federal police officer. I think the interpretation by the DPP is somewhat arguable, by the way, because the reality is that you are still a federal police officer executing your duty, being the execution of the duty due to being assigned to the ACT to be a community police officer. However, that is not the ideal situation. I can understand the DPP's interpretation of that.

I think this is the important issue. When people talk about assaults of police and so forth, some of those figures have disappeared because there have been no charges—I have just got the date—since August 2011. That is an issue in regard to data collection.

THE CHAIR: I want to check. You made much of the point of the role of a constable. Could I get you to elaborate that that role extends to police officers when they are off duty as well?

Mr Hunt-Sharman: That is correct.

THE CHAIR: I think the argument has been made—and it was touched on in the comment by Justice Gleeson—that there is a higher demand on police officers than on members of the public and even on other public officials. If you are on duty or off duty and you are a witness to a crime or you are required to act, you do so. You do not necessarily bundy off.

Mr Hunt-Sharman: That is right. In fact, we must. We would likely be charged for failing to act even if we are off duty and something occurred. We put ourselves on duty. Basically, we are 24/7 police officers in regard to the office of constable.

MR HARGREAVES: There are a couple of things I wanted to pursue around this special office of constable bit. I understand exactly how it works, as you might know. Is it, in fact, a statute or a convention that we apply?

Mr Hunt-Sharman: That is interesting. It actually comes from common law. It is in statute in certain jurisdictions. For example, I used the powers of the common law in regard to making an arrest when I was in the New South Wales jurisdiction, not for a

federal offence.

MR HARGREAVES: So it is in common law?

Mr Hunt-Sharman: It is in common law.

MR HARGREAVES: If somebody impinges upon a police officer's duties as the special office of constable then they have recourse to the law for redress under common law. That is something you cannot take away from anybody. I just wanted to explore with you its relationship to section 147 of the Criminal Code. If I recall correctly, you said that, because they are exercising their duties as an office of constable, they are not an employee.

Mr Hunt-Sharman: That is correct. In fact, under the AFP Act there is a section in there that deems a police officer—"AFP member" is the actual legal term—an AFP member, an employee for the purposes now of the Fair Work Act. With regard to industrial coverage—

MR HARGREAVES: But in the context of exercising the power of the constable—

Mr Hunt-Sharman: You are not an employee; you are an independent officer.

MR HARGREAVES: Yet you are suggesting that section 147 of the Criminal Code actually talks about harm to a public official. A public official, generally speaking, is an employee of the Crown; is that right? Is there any inconsistency there?

Mr Hunt-Sharman: When you look at the federal legislation, a law enforcement officer is in the same category as a judicial officer. I would suggest to you that what they are picking up there is that both the judicial officer and the police officer are servants of the Crown, not employees.

MR HARGREAVES: I can suggest that Mrs Dunne, in fact, is a servant of the Crown or, in our case, the republic of the ACT, and therefore she would be regarded in the same way.

Mr Hunt-Sharman: Indeed. In the federal legislation you actually would be covered. There are greater penalties for assaulting a judicial officer and a law enforcement officer than there are for assaulting a politician—no offence.

MR HARGRAVES: I think we should do something about that. If I assaulted a police officer I would get clocked twice.

Mr Hunt-Sharman: In actual fact, that section that has been written in the Criminal Code in the commonwealth is, I think, a very good section. It captures a whole category of public officials, right through to the Governor-General and so forth.

MR HARGREAVES: This is where, in my view, there would be some confusion on the part of Joe Public out there. There would appear to be an inconsistency by saying that one is not an employee because one is a public official, if you like—not an employee but a special office of constable—and more akin to the type of role vis-a-vis

the community as the judiciary. Yet we are trying to say, "Let's copy the Criminal Code, which actually applies to employees." Would one not be better off tossing section 147 and concentrating on that special office of constable and doing that in legislation?

Mr Hunt-Sharman: Yes, we would agree.

Mr McMahon-Hogan: I have learnt that that confusion can be entirely eliminated. On behalf of the AFPA, we certainly agree that any confusion could be eliminated if the ACT were to pursue specific legislation related to law enforcement officers, that being the Federal Police, within the ACT. If we are not reliant upon commonwealth legislation, and given the arguments raised by the DPP as to why we should not be, it is entirely valid that the ACT should pursue independent legislation.

MR HARGREAVES: Just to finish off on this, Madam Chair, what worries me is that we are creating a penalty regime under the law for an offence which will apply beneficially towards the police officer. A police officer should be treated, in my view—a special office of constable—somewhat differently. I agree with that, but we are not applying the same thing necessarily to all other emergency or civil assistance. We have police officers, firies and ambos turning up to exactly the same place. An example occurred not very long ago, just outside Cube. When the ambulance officers attended presumably they would have attended with the same fears that the police officers would have, which you were talking about, and I am not able to say, "This guy is a serial copper thumper." The ambos would be entitled to the same sort of information, I would assume, because they are going to exactly the same place and to exactly the same people.

Mr Hunt-Sharman: Except for one thing—and a good example of this is with regard to the September 11 terrorist attack. There is a terrific shot of the Brooklyn Bridge where you have got all these cars, bumper to bumper, heading out of the city and one police car heading in. The point I make there is that we must act. The fireman and the ambulance officer can run away. We are not supposed to run away. We are actually there to act to enforce the law.

MR HARGREAVES: With respect, my understanding is that if an ambulance officer attends a scene where somebody is injured and fails to act, they also are liable at law. It is not as though they have a choice. Just because there is somebody there who may be going to thump them, they do not have a choice. If they do that, they are gone, and the policeman at the scene is the guy that is going to charge them.

Mr Hunt-Sharman: In the government's proposed bill where it categorises emergency services personnel we agree with that. But there is still a difference with regard to the independent office of constable in that we have to, and must, enforce the law. That is the difference. It only sits with us and, if you like, the judicial officer.

THE CHAIR: Mr Rattenbury.

MR RATTENBURY: Thank you for appearing at our very interesting inquiry into how we minimise assaults against police. I think my interest is in finding the most effective way to do that and looking past some of the symbolism. To that end, I have a

few questions. We have had some discussion about the value of increasing penalties versus operational changes. The Chief Police Officer has suggested to us in evidence this morning, and certainly late last year before this committee as well, that the most effective way to prevent officers being assaulted is through operational changes, whether that is the size of the team or equipment or a range of matters. Do you have any comment on that?

Mr Hunt-Sharman: If you have got enough people on the ground, police on the ground, it is probably an argument, but the reality is that that is not the case. We obviously want operational procedures to incorporate as much as possible workplace health and safety. We are totally in agreement with the Chief Police Officer in that regard.

The additional issue here is that with regard to having a specific offence for someone causing harm or assaulting a police officer of the Crown, as we have said, there is a preventative side to this. A person may know there is a specific penalty for assaulting a police officer and be more reluctant to do it, but certainly if they are not that way inclined and have got a history of assaulting police officers and they do not care about assaulting police officers then it is important for us to know that they are being charged with assaulting police officers and that they are a risk to our members.

MR RATTENBURY: Do you have any data on how many people are serial assaulters of police officers? Are there any statistics on that?

Mr Hunt-Sharman: There are statistics around the country, but because we have not got a specific offence in the ACT this data is tending to drop off. I can say that with regard to the compensation claims under Comcare, it is quite significant and it is climbing. That is talking about serious assaults. It is climbing. I understand that we are having one police assault per week at the moment.

MR RATTENBURY: I believe that is not a significant change over the last five years. It is roughly a minor increase—not that any of them are good ones, I might say.

Mr Hunt-Sharman: No. I think the other difficulty there is that if we are not going to be recording an offence, it is very difficult to then see if this data is climbing. If the Comcare claims are climbing and, therefore, serious injuries, one would have to think that assaults are climbing as well. I might hand over to Angela.

MR RATTENBURY: Or is the intensity of the assaults climbing?

MS HUNTER: Yes, not necessarily the number but the seriousness.

Mr Hunt-Sharman: Certainly the seriousness must be with regard to the compensation claims—

MR RATTENBURY: The evidence does bear that out.

Mr Hunt-Sharman: With regard to the numbers, it would be better to ask the Chief Police Officer of the ACT, but Angela is the watch-house sergeant and probably has some views on the assaults on police from a practical, operational point of view.

Ms Smith: I have been an officer for six years. Anecdotally I would suggest that the assaults have gone up. There is far more spitting into police officers' faces, which causes an enormous amount of distress for people because they then have to undergo a barrage of tests. Just last weekend we had one fellow who head butted one police officer and elbowed a female police officer in the face. There are two assaults on one night. So one a week I would think is probably downgrading it slightly. Then you have got to look at what we charge and what gets convicted and there is a gross difference there.

MR RATTENBURY: I want to clarify something. You referred to section 147 of the Criminal Code being withdrawn. You have talked about there not being an offence on the books. I think there was some confusion earlier. It is not that the section has been removed from the act, is it? You are using that to describe the fact that the DPP is exhibiting a reluctance to press the charge. Am I correct?

Mr Hunt-Sharman: They have given a directive not to use the charge.

MR RATTENBURY: A directive?

Ms Smith: They are very reluctant. They are changing the charge. They are downgrading them to common assault or assault occasioning actual bodily harm. So we are losing that higher charge and it is being downgraded. This is where we are losing assault—where the data comes from the assault police.

MR RATTENBURY: And what is your understanding of why the DPP has that reluctance?

Mr Hunt-Sharman: I certainly can provide you with an extract that came from them, from one of the DPP officers through to me, which will give more specific detail. I am happy to do that. However—

MR RATTENBURY: I think the committee would find that very helpful if you could provide that to us.

Mr Hunt-Sharman: However, I will say that what it stems from is an ACT offence that you are charging someone with. Therefore, if you were charging someone with an ACT offence and you get assaulted while you are charging them with an ACT offence they believe you are not assaulting a public official under the commonwealth legislation. I think it is debatable.

I did not read out our recommendations but one of them I might just very quickly mention. Recommendation 1 on the government's bill is that the committee support the Crimes Legislation Amendment Bill 2011, and in regard to the opposition's bill our recommendation is that the committee support the Crimes (Offences Against Police) Amendment Bill 2012 with any necessary amendments—that is to cover the human rights situation if there is a problem—or any alternative recommending adoption of a specific criminal offence of assaulting a police officer or in the alternative again recommend that the ACT Attorney-General amend the current policy position to enable Australian Federal Police officers to charge an offender for causing

harm to a public official under section 147 of the Criminal Code. So it may well be that this can be resolved by a policy decision.

MR RATTENBURY: I asked the attorney this morning whether the government was considering creating a separate offence in the ACT. It is an issue that you have raised and I think an issue that neither of the current bills address, which you have also identified today. So there appears to be a gap in the law. The attorney indicated the government did not want to do that at the moment; that was not their position. Have you had any discussions with the government as to why that is the case?

Mr Hunt-Sharman: No, not really. As a general conversation there has been this deployment issue about what is the difference between an ambulance officer, a fireman and a police officer. We have made that pretty clear what we believe. Although we support the government's bill in identifying a greater penalty in regard to assaulting that category of employees, we go to that higher level; we are not addressing the independent office of constable or indeed the judicial officer issue.

MR RATTENBURY: We heard evidence from the Law Society, just before you, about the issue of self-defence in the government's bill. They said that they felt that the capability to argue self-defence should be retained because the law requires that there be an objective reasonableness about that and the courts of course had to find an objective level; that was a very high benchmark and therefore it was very rare that it was used anyway and even more rarely successfully argued. Do you agree with their view that it is appropriate to retain a safeguard like that in law given their sort of analysis of the way the offence plays out?

Mr Hunt-Sharman: As we understand it this has been an issue that has been addressed in other jurisdictions. It is not giving police greater powers; it is addressing, if you like, a loophole that exists in our legislation in the ACT but has been addressed over the years in other jurisdictions. I have not got specifics on the detail of the issue but our members have certainly raised it as a concern that there is this loophole in the current legislation. Angela, have you got anything further on that?

Ms Smith: No.

MR RATTENBURY: Forgive my ignorance: there are about 900 sworn officers in the ACT?

Mr Hunt-Sharman: Yes.

MR RATTENBURY: How many of those are your members?

Mr Hunt-Sharman: About 99.9 probably. No, it is very high. It would be about 90 per cent.

MR HARGREAVES: Ms Smith, I will paraphrase what you said; correct me if I am wrong. You said that there was a difference between the amount of charges laid and convictions. But from your experience—and I know this will have to be anecdotal—what is the difference between the number of events and the number of charges laid? I would suspect that you would not lay a charge in every single case.

Ms Smith: No, not every single case relates to a charge. There are occasions when police officers just do not lay a charge because we have lost faith in whether we are going to get a conviction. We are losing faith in that judicial process.

MR HARGREAVES: Would that be a fairly common occurrence in the domestic violence mediation? You can actually advise someone to be taken away from the scene for four hours, to calm down and cool down. Do you get that kind of physical threat towards officers in that scenario?

Ms Smith: In a domestic violence situation, there are situations where there can be threats, but in my experience it has not been that bad. The problems that we get most of the time are out in Civic on a Thursday, Friday and Saturday night, when there is a lot of alcohol involved. There is a very wild atmosphere out there. That is when the assaults generally occur. I would think that the domestic violence situations are not overly dangerous for us.

MR HARGREAVES: The scenario I had in mind was domestic violence centred around the over-consumption of alcohol and the arguments that ensue. The perpetrator of the violence is then taken out of the situation to calm the whole thing, but they are already intoxicated or have a violent mindset. I was wondering about instances of that kind of thing translating into the relationship between the officer and the perpetrator. I hear what you are saying—that it is not that frequent.

Ms Smith: No, not with domestic violence. By the time we get to a domestic violence situation there is probably a little bit of a calm-down; there has been a bit of a gap from when the violence has occurred until when we arrive, so generally things have probably calmed a little bit. We pull the male out. We try to go in there and negotiate him out straightaway. It is generally the male, I have to say. It is a completely different situation from what happens in town, where we are walking into violence. That is our big problem area. With domestic violence situations, no.

MS HUNTER: The attorney this morning mentioned that there had been some slight decrease in the number of assaults. That could be for a range of reasons, as the CPO said as well. But he also referred to the recent reforms around liquor licences and more police on the beat. In your experience is that making any difference out there on the streets on a Thursday, Friday and Saturday night or are you saying that it is exactly the same as it was before these changes came through?

Ms Smith: I would think that it is exactly the same. I do not know what data the CPO is pulling out. I have no idea. But in my experience as a police officer on the street, and currently in the watch-house, I think the violence is exactly the same.

MS HUNTER: I think it was more the attorney who had that point.

Mr Hunt-Sharman: Just picking up on a point that Mr Hargreaves made, in regard to intoxicated persons being brought in for their protection in custody, there is often a situation of assault at that point. They will assault the police officer at that point. So that is where you might end up with a charge of—it is not assaulting police anymore but certainly a common assault or more, occurring at that point. So that is one issue.

Even with all of the safeguards in detaining people in the watch-house itself, there is that heightened abuse with an intoxicated person at that point.

MR HARGREAVES: The special office of constable carries with it the right for a constable not to lay a charge, as much as it does carry an imperative to lay a charge, doesn't it?

Ms Smith: A discretion; that is right.

MR HARGREAVES: I guess that is where I was coming from. I understand that the standing orders from the commissioner require certain actions under certain circumstances, and you have no choice. But you still maintain the right, do you not, in the special office of the constable, not to lay a charge? And it is that right that you invoke in that instance you have just talked about. If someone is intoxicated, you take them off and you decide not to proceed with—

Mr Hunt-Sharman: That is right.

Ms Smith: There is always the discretion. We always have a discretion.

MR HARGREAVES: How often do you use it?

Mr Hunt-Sharman: That is interesting. With respect to the comment about the trifecta, I must admit I had not heard that terminology before, until this hearing. I turned around at the time to Angela and said, "That doesn't happen, does it?" She said, "No." They do not lay all the charges as it was described in the previous evidence. It tends to be the most appropriate offence.

Ms Smith: That is right.

THE CHAIR: We will have to leave it there. I thank the Australian Federal Police Association for their attendance today. There will be a transcript which will probably, because of the two short weeks, not appear until towards the end of next week. I would ask you to peruse that and, if there is anything that needs clarification, get back to the committee.

Mr Hunt-Sharman: Madam Chair, I have got copies of my speech, which is probably in more detail. I was jumping through it. I would like to table that.

THE CHAIR: Thank you very much.

Meeting adjourned from to 4.10 to 4.19 pm.

WHYBROW, MR STEVEN, Barrister, Australian Lawyers Alliance
PAPPAS, MR JACK, Barrister, and Member, ACT Bar Association
PURNELL, MR FRANCIS JOHN, Senior Counsel, and Member, ACT Bar Association
WALKER, MR PHILIP ANTHONY, President, ACT Bar Association

THE CHAIR: I reconvene the hearing of the Standing Committee on Justice and Community Safety inquiry into the Crimes Legislation Amendment Bill and the Crimes (Offences Against Police) Amendment Bill. I welcome the representative of the Lawyers Alliance, Mr Whybrow, and representatives of the Bar Association, Mr Walker, Mr Purnell and Mr Pappas. For the purposes of clarity, we have agreed during the break that both groups will appear together, on the basis that there is an overlap in the material that might be presented. I draw your attention to the privilege card, which basically says that you must tell the truth.

Mr Whybrow, being the person who is scheduled to appear next, would you like to make an opening statement in relation to this inquiry?

Mr Whybrow: Thank you, Madam Chair. As well as representing the Australian Lawyers Alliance, I am a member of the ACT bar. Can I indicate that I have seen Mr Walker's submission. The ALA would adopt the comments and the particular arguments and references to the law in there.

I will not speak for long because my more experienced and learned colleagues will likely say things that I would say. Given that I was the only member of the quartet who was here when Mr Hunt-Sharman was speaking on behalf of the police association, there were a few things that I did wish to clarify from a different perspective.

He raised, for example, the apparent inexplicable reluctance of prosecutors to charge the existing offence of causing harm to commonwealth public officials, which appears in the commonwealth Criminal Code. My explanation, perspective and understanding of why there is that reluctance is because the commonwealth has ramped up that offence so significantly.

Mr Rattenbury and Mrs Dunne, you may remember that last year there was a proposal by the Attorney-General to change the jurisdiction in the Magistrates Court to five years for summary offences. Part of the underlying rationale for that was that we were getting clogged up in the Supreme Court with too many people not consenting to jurisdiction and going to the Supreme Court for trials on relatively minor matters.

I am of the view that the reason the DPP is reluctant to charge the existing offence is because if you are a commonwealth law enforcement officer and you cause harm to a public official, it is a 13-year offence. It is an indictable offence, and it can only be dealt with in the Magistrates Court if the defendant consents. The nature of a lot of the people who commit these offences, perhaps when they are drunk or out, may well be to cause as much grief to the system as possible and they are going to say, "I don't consent to jurisdiction," and we will have a lot of Supreme Court trials taken up with relatively minor offences. Nobody is suggesting that a police officer being assaulted is irrelevant or a minor matter, but in the scheme of things it would be relatively minor.

That is my explanation as to why it is not being pursued so much. It is because the DPPs do not wish to have the superior courts clogged up with these matters.

Mr Hunt-Sharman also referred to what I understood to be a reason for these either more significant penalties or a record-keeping way of OH&S for offenders, so that for repeat offenders they would have a record. All of us here, I suspect, have had some familiarity over the years with the police systems, PROMIS and the computer systems, and know that they already record these sorts of things. You do not need a criminal record before the dispatch caller sending somebody to 1 Smith Street Giralang will say, "There's an alert on this residence"—or "this person"—"for this, that or the other." They may never have been to court in their life, but they will have that intelligence and be given a heads-up. My submission would be that that is not an appropriate reason for making changes which, as you will hear from others, is a fundamental erosion of the right to your liberty.

The only other thing I would say at this stage in relation to the sentencing considerations is that the ALA does not have any particular difficulty with the new section 33(1)(ga), which effectively sets out what is current sentencing practice. If a particularly vulnerable member of the community is the subject of an offence of violence, the court will take that into account. If it is a child, if it is an elderly person, if the victim is a check-out operator at an all-night supermarket or service station and subject to armed robbery, the courts recognise these as vulnerable people who need protection. So the sentence for the offence needs to be taken into account. That section effectively indicates, and can be promulgated to the public quite clearly, that "If you assault these people, if you do these things, you will be subject to a higher penalty."

One of the difficulties with this legislation that frankly I cannot really understand and break down on self-defence is that it is not going to make any impact on somebody who is drunk in Civic at night, sees their girlfriend about to get jumped on by four policemen or not as to the niceties of whether they can act in self-defence. It is making the conduct which otherwise would not be criminal, if they can meet the very high and difficult standards of reasonable, proportional and necessary, into something that is criminal. From our perspective it does not increase the protection for police. As Mr Hunt-Sharman said, it does not give them more powers, but it certainly has the potential to make them less accountable, because a lack of honest belief is not the same as acting unreasonably. Under this legislation the police officer could act totally unreasonably but have an honest belief that he is allowed to and there is not recourse for the person at the time.

They are the issues of a broad brush that I wish to open with. In relation to sentencing, here is perhaps a good example of how the fact that somebody is a police officer is already taken into account as a relevant consideration. We know, fortunately, that we do not have a very high murder rate in the territory, but of the people who are convicted of murder very few are sentenced to life imprisonment. Even Mr John Conway, ironically a then serving police officer, received a sentence of some 27 years with 22 or something like that non-parole.

The last person that I can think of who was sentenced to life imprisonment for murder was David Eastman. He murdered the assistant commissioner of police—and that was

a significant factor in putting the seriousness of that offence into the scale. We did not need a special law or a special aggravated offence because the victim was a police officer to provide for that more elevated form of sentencing. Our submission is that these amendments are not necessary because the existing law already has mechanisms in place to deal with all of these matters.

THE CHAIR: Thank you, Mr Whybrow. Can I turn now to Mr Walker and ask if he would like to make an opening statement before we go to some more general questions.

Mr Walker: I have prepared a paper, which I regret to say was only completed about three-quarters of an hour ago, and I have approached the issue somewhat differently from my colleagues left and right who have more direct practical experience with the criminal law.

What was of concern to me and to a number of members of the association was the material prepared by the justice and community safety department in support of this proposed change to the law. There appear to be some misconceptions in it and there appears to be a somewhat one-sided presentation of authority on the subject.

Before taking you to that, let me say a couple of things that arise from what I heard this morning. I heard the Attorney-General regularly refer to people getting off on a technicality. Mr Purnell or Mr Pappas may be able to give you better detail than I can, but there was never an explanation as to exactly what this technicality or these technicalities were which were supposed to see people escape conviction for assaulting police.

In some instances these things are not terribly technical at all; just deciding to arrest somebody without even considering whether they have committed an offence, more out of venting of the spleen, makes the arrest unlawful. That is not a technicality. The elementary requirement that you should consider whether somebody can be brought to court by a summons rather than arrest is not terribly technical.

Before actually making the assumption that people escape conviction for a technicality and forming some view that that means that there is some rather obscure point of law that gets people off, one might expect that you would be favoured with some explanation of what these technicalities are and how often convictions are avoided. The basis of the paper I have prepared is that it seemed to me from reading what was prepared by the Attorney-General's department that self-defence was variously presented as if it was a loophole or that it was some particular defence the justification for which had run out.

I spend the first half of my paper indicating that the thesis on which our whole system of law works is that you start free at liberty, and anybody who attempts to constrain your liberty must show lawful authority in order to be able to do so. Another fundamental proposition of our law is that you do not get any special treatment because you happen to be officialdom. Governments are bound by law just as much as citizens are. You do not have any special entitlement to disobey the law and trample on people's rights and liberties just because you happen to be an official of the state. Those are matters which ought to be considered in any such debate of this kind.

I have provided you with some references to show that not only are they principles which have existed in our law for about 700 or 800 years; they have not been acknowledged. There has been little citation of modern Australian authority, which is where I would start if I was looking at this area of the law—not with cases from US state supreme courts but with cases from Australia. If I really decided that I was going to skip over the jurisprudence of the commonwealth and I had to go to the United States, I would probably start with cases from the US Supreme Court. The Supreme Court does uphold the right to resist unlawful arrest and I am surprised to find that those Supreme Court cases were not cited in the paper presented by the department, because they were referenced within one of the cases which the department did cite.

I am also surprised that the department did not cite part of the same case where the chief justice, who was indeed a dissentient, said that she preferred the approach of many states in the United States which still recognised that right of self-defence and the approach in the British Commonwealth of Nations. She cited authorities from England and from Canada that were consistent with that position. I was surprised when this case received such attention by the department that those cases did not warrant a mention in the discussion paper; nor did other state Supreme Court cases in the United States which had considered the same issue and reached different conclusions.

Before finishing on this, let me just inform you of the case which seems to be the lead case from the United States, Hobson and Wisconsin, and what it was decided on, and I will leave it to members of the committee to determine whether they think the change that court made is one that they would countenance. The Supreme Court of Wisconsin and the Supreme Court of Alaska are elected supreme courts in the United States. As best as my research has found, the Californian Supreme Court is not. In Alaska and Wisconsin the courts are elected.

In Hobson and Wisconsin, as I said, the lead case that has been cited for overturning this, the facts were that Ms Hobson was the mother of a five-year-old. The police thought the five-year-old had stolen a bike. The police went around and wanted to question the five-year-old. Ms Hobson decided she was not going to have her son inquired of in this fashion.

Reading from the judgement—and it is worth reading—Ms Hobson, according to the officer, became a bit irritated and refused to allow Officer Shoate to speak with her son. She said that her son did not do anything and had not stolen any bike. Officer Shoate then told Ms Hobson that he would have to take her son to the police station to be interviewed about the stolen bike and gave Ms Hobson the opportunity to go along to the station. She replied that the officer was not taking her son anywhere. At that point in the conversation, because of Ms Hobson's resistance, Officer Shoate called for backup—I kid you not—police officers to assist him. Shortly thereafter, officers Eastlick, Anderson and Alisankus arrived at the Hobson address.

According to Officer Eastlick's report, when the three backup officers arrived Ms Hobson was standing with her son on the front steps of her residence and was yelling, swearing and saying "bullshit" in a very loud voice. Officer Shoate then repeated to Ms Hobson that they were going to take her son to the police station, to

which Ms Hobson again replied, "You're not taking my son anywhere." Officer Shoate then advised Ms Hobson that she was under arrest for obstructing the officer. Officers then attempted to handcuff Ms Hobson. Ms Hobson pushed the officer away—assault No 1—and struck one officer across the face. She was arrested and charged with battery of police.

The court ultimately went on to find that there was a defence of resisting unlawful arrest in Wisconsin and, in a manner which is entirely inconsistent with anything I have seen in Australia, decided that that defence would apply for Ms Hobson but would be ruled out prospectively for anybody else in the state of Wisconsin thereafter. This is a court, by the way, not a legislature. But it is, after all, I suppose, an elected court. Henceforth, anybody in Ms Hobson's position is viewed in Wisconsin, and apparently to be viewed in the Australian Capital Territory, as meriting punishment. That was the Wisconsin case.

THE CHAIR: It brings a whole new concept to judicial activism!

Mr Walker: There is, interestingly enough, one case cited from Victoria in support of this. Again, I am fascinated that this is cited by the department. It was the Queen v Kumar. It was about how provocation is no longer appropriate. In that case, the de factos had a fight in the morning. Ms Kumar indicated to her de facto that he was a bastard. He took exception to this because it was a slight on him and a slight on his parents. He went away for a few hours, came back with a knife and a meat cleaver and murdered her. In those circumstances, it is not surprising to find that a judge might raise some questions about the appropriateness of provocation but I really wonder whether it is a useful guide for your purposes.

The final aspect of what I want to say concerns the bill of rights analysis. I have provided, on page 7 of my paper, the right which seems most engaged in relation to this legislation, and that is that everyone has the right to liberty and security of the person. In particular, nobody may be arbitrarily arrested or detained. As you may well be aware, there is an exception to section 28 of the act where the legislation proposes to infringe these rights. The starting point seems to me that this right clearly is infringed, because it says that you commit an offence if you endeavour to protect your own liberty.

In the explanatory memorandum, much space is devoted to the consideration of subsection (2), which I quote at the top of page 7 of my paper. In fact, in the attorney's speech to the house, he refers to whether the legislation is reasonable or justifiable. Subsection (2) is only an elaboration of the principal section in the Human Rights Act which contemplates abrogation of human rights. That is section 28(1). Section 28(1) gets no mention. Section 28(1) sets the bar as:

> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Not justified, not reasonable but demonstrably justified in a free and democratic society. You will search in vain for a reference to that provision in the explanatory memorandum. To the extent that it requires something to be demonstrably justified, it was remarkable to hear, when questions were asked this morning about how big a

problem this is, the questions had to be taken on notice. To the extent that there is any demonstration of the justification, that demonstration is clearly something we must await.

The other aspect of it is that it is said that there are technicalities which get people off, on the basis of self-defence. Why don't we start by looking at what the technicalities are if that is, in fact, a true statement of the position? If at the end of that we conclude that they are not technicalities, that they are justifiable limits on the right of police to arrest, then if there is a problem and people are escaping because police are unlawfully arresting them, perhaps we should look at the training given to the police. One might think, when one is dealing with rights which have existed for centuries, one would start with those more obvious attempts to deal with the matter rather than doing away with these kinds of rights.

THE CHAIR: Thank you, Mr Walker. Mr Purnell, would you like to make some brief comments?

Mr Purnell: Thank you. I start off from the premise that if something ain't broke why fix it? I am fortunate enough to have had 38 years practising in the ACT, six as a prosecutor and 32 at the independent bar. I am aware of two cases only where self-defence has been properly raised in relation to arrest. Other people may know of others. In both of those cases, there was failure.

Typically, the situation will be that you have got off-duty policemen, wearing civilian clothes, outside Mooseheads at 3 am. They have been drinking. They might recognise somebody who has a warrant out for them or somebody they do not like or they heard something said in Mooseheads. An altercation occurs, usually one on one, and then the two other civilians, not showing they are police officers, may come in to try to assist their friends.

The other typical situation, which is a little more difficult, particularly in terms of raising this, was where you have a police officer who was out to arrest, usually a male, and the girlfriend or wife will say to the police officer: "Leave my husband/boyfriend alone. Stop hurting him. Go away, you so and so." She might try to do something. It is extremely difficult to get up on self-defence.

What has been raised in this proposal is a furphy. The explanatory memorandum is unworthy of grounding in merit the raison d'etre for the proposed changes. I have some handouts for you on what is self-defence. I am not going to take you through all of that because you are being bombarded with paper. On the first page, you will see what the test is from the High Court. Then I make some comments about the proposal. On the next two pages I have made some attacks on the explanatory memorandum and some comments about the bill of rights. That is all I want to say at this stage.

THE CHAIR: Thank you, Mr Purnell. You said you were aware of two cases where the issue of self-defence had been properly explored. What exactly do you mean when you say that?

Mr Purnell: It was raised as an issue in a case and litigated as such in the Magistrates Court. On both of those occasions it did not succeed.

THE CHAIR: It did not succeed.

Mr Purnell: From my own personal point of view and experience, that is two attempts in 38 years, both of which failed. It is absolutely wrong to say self-defence is a technicality. It is a right that should be preserved. It is damned hard to succeed on it, and even more difficult when a police officer is involved—more difficult than between citizen and citizen. That is my experience.

THE CHAIR: Mr Pappas, would you like to make some opening comments at this stage?

Mr Pappas: Yes, thank you. I too come here today as a member of the ACT Bar Association. Can I pick up on something that John Purnell has just said? I agree with John. I have been practising for 30-odd years and very largely practising in the same areas as John in criminal law. I have perhaps seen more of the day-to-day goings on of street crime than John has. I appear more regularly in contested hearings in the Magistrates Court than John does these days, I think it would be fair to say. In my experience, it is very rare to succeed on a self-defence argument, particularly where you are dealing with on-duty police who are badged and dressed as such.

I will come to these cases of Klobucar and Smith in a moment. Both of those are said, on one view, to raise the issue of self-defence. They both, in fact, raise the question of whether the police were properly exercising a power or a duty. To some extent that is tied up with the question of self-defence because if they were not lawfully arresting someone then someone was entitled to resist that arrest, or at least that was the end point of the argument.

What really annoyed me, I must say, and brought my attention to this issue was the presentation speech by the attorney. He said something which sounds as though it was replayed in things said to this committee earlier today. He talked about this amendment being "to prevent opportunistic abuse of the current law on self-defence". That comment is on page 3 of the presentation speech. He talks about police acting in good faith. In one case, which is the Klobucar case, although not identified by name, police are said to have taken a fellow without any use of force and, when he arrived at the back of the police vehicle, the man took a female officer in a headlock and wrestled her to the ground.

That is simply just not so. I have got some CCTV material which I can show you in a moment, but before I do that can I say that this amendment is predicated, it seems to me, on an assumption—perhaps a fond hope—that police are always honest. In my experience, that is not so. Unfortunately, it seems to be a growing trend for police in this territory to be dishonest.

I have made available to the committee—and I hope you have it available to you—some papers in relation to the Klobucar matter. One is a statement of Joanna Maree Jones, who was the police sergeant who was in charge of the squad from the aptly named city beat squad that arrived to investigate this incident at the Bailey's Corner. On page 3 of that statement you will see that the sergeant describes a Mr Lopez as being unconscious on the ground. You will be able to see him in a moment. It was

suggested that the defendant, who was Mr Klobucar, lifted him by his shirt and then dropped him back onto the concrete:

> The defendant continuously tried to rouse Mr LOPEZ despite both myself and Constable QUADE directing him to leave Mr LOPEZ alone.

Going on to page 4:

> I then went back to where Mr LOPEZ was lying. The defendant continued to try and move to Mr LOPEZ. I saw Constable QUADE put his hand out and stop him twice.

Can I just take you then to the statement of Officer Quade, which you should also have. At page 2 he says:

> Upon arrival I observed a man in a yellow t-shirt lying on the ground; two other males were standing at the side of the injured male.

That is true enough. At the bottom of page 2:

> I observed the defendant standing in front of Maurizio RAO … pushing his chest into his and making violent threats towards him.

You will see that.

> The defendant was putting his face into Mr RAO's.

That is probably not a terribly inaccurate description.

> Mr RAO appeared not to be talking back or responding. … I approached the defendant and pulled him away from Mr RAO …

All of that is accurately portrayed on the CCTV footage. But if I take you to the bottom of page 3:

> Sgt JONES, Constable ALCHIN and I re-attended to Mr LOPEZ on the ground. the defendant continued to intervene and tried to rouse Mr LOPEZ causing his head to bounce on the ground. Due to the head injury Mr LOPEZ had sustained I had concerns with the defendant shaking him. I pulled the defendant up from the ground as he was kneeling next to Mr LOPEZ and took hold of his right arm. At the same time Sgt JONES took hold of his left arm.

What you will see on this CCTV footage, members of the committee, is that there had been an incident. Mr Lopez had been knocked unconscious, it appears, by Mr Rao. Mr Rao has never been charged with that. There has been no follow-up on that by the police at all. The police arrive with Mr Lopez lying prone on the ground. Mr Klobucar is the gentleman in a grey hoodie top and his offsider, Mr Le Clair, is in a white top. You will see on the left is the white hoodie. Mr Rao is the man with the tattooed upper arm. Mr Klobucar is the man standing in front of him and obviously agitated. You can see the prone Mr Lopez. The police had not yet arrived. You will see Mr Rao very conscious of the fact that the police are coming because when he sees them—and the camera zooms in in a second—he actually points to Mr Klobucar that they have

arrived.

At the moment, if you accept for the purposes of this argument that Mr Rao did in fact knock this chap's friend unconscious—and there he is lying on the ground—Mr Klobucar's behaviour, although agitated, is hardly over the top.

THE CHAIR: I am sorry, Mr Pappas, Mr Klobucar is the fellow with the stripy—

Mr Pappas: The stripes on the shoulders, the darker top, yes. Mr Le Clair's friend is in the white hoodie. Yes, he faces in Mr Rao's face and there is the policeman, Mr Quade, asking him to go away and he does go away. If you continue to look, you will see he does look down at his friend Mr Lopez, but there is no suggestion of him lifting his head or otherwise causing him any harm.

This goes on a little bit further. The girl just there with the blonde, short hair, who was about to be directed out of the picture by Mr Rao, was a witness to the assault but subsequently claimed not to have seen it. She is an employee of Mr Rao's. You will see the police are there talking to Mr Klobucar. He has got his hands up on his head. That is Sergeant Jones now talking to him. He appears, to my observation, to be pleading with her, or at least talking to her in an earnest fashion. He does not go back near Mr Rao. He walks over to the prone Mr Lopez and you will see in a moment him bend down and stroke his back. Later on you will see he is dragged backwards about 20 metres to a police car. As the evidence showed in that case, there was the sergeant's command, "He's in", which one of the police said was code in the city beat squad for "arrest them and we'll work it out later".

There is some further footage of the resist arrest, if you like, at this stage. There is no suggestion of Mr Klobucar taking the female officer in a headlock or anything like it. He pulls away from Officer Quade and is quickly pursued across the pavement and wrestled to the ground by the police. He is then sprayed three times in the face with oleoresin capsicum spray—you can see the aftermath of that in a minute—and he is not decontaminated, notwithstanding the requirements that that happen. So that is the reality of life on the streets in Canberra at 3.30 am which the attorney, I suspect, is not familiar with, or certainly not firsthand.

If we can go to the other matter at McDonald's, that is a shorter passage of tape. Mr Smith and his friends, two of them, had been out. They ended up at McDonald's. The police were called because someone else—it was not suggested Mr Smith or his friends—had broken a window or a piece of glass in a door. You have in the material, I hope, a Constable Carl Ruhen's statement. On page 2 you will see he says he was at the counter. He says:

> … while I was looking at the patrons of the restaurant.
>
> I observed the restaurant to be half full of patrons … I observed a table … These males were laughing loudly and they caught my attention.
>
> I then observed a male, who I now know as Raphael MAY … swipe an empty … bottle of beer on the floor, which smashed.
>
> I waited about 2 minutes for Mr MAY to pick up the smashed bottle, he didn't.

I approached Mr MAY …

If you look at the tape that is playing at the moment, those two gentlemen, Mr May is on the left, with one of his friends—and this is Mr Smith, the slightly taller boy in the white T-shirt, coming over. They stand there, they order their food and they move to a table in the middle of the restaurant, which is hardly half-full. Perhaps we can move to the next time point.

THE CHAIR: This is at Macca's in—

Mr Pappas: That is at Macca's in Cooyong Street. That is looking from behind the counter at the servery area. Very shortly I think you will see police arrive to investigate this other matter. No, that is well after the event. The police are now in the middle of the restaurant. If we can just play it from there, that is Constable Ruhen standing back from the counter. At no stage does he look into the body of the restaurant. He will move to the counter in a minute and look to his side at the girls there. He will take out a notebook.

THE CHAIR: Mr Pappas, what was the incident?

Mr Pappas: The incident was that Mr May said, "I didn't smash the beer bottle and you didn't see me smash it." That is clearly illustrated. Constable Ruhen certainly did not wait at the counter for two minutes before approaching Mr May. Someone smashed a beer bottle. The police demanded that Mr May pick it up. Then they were told to go home, they had had a good night. Mr Smith said: "Well, we've done nothing wrong. Why should we go home? Leave us alone."

The point is that police do not tell lies in police statements unless they have something to cover up. There is just no point. In a moment you will see that the people here at the front, the civilian people, do look around because there is the sound of a smashing beer bottle, apparently, and the boys in question are in the middle-top of the photograph at a table. You can just make out one of them in a white T-shirt. At any moment now the policeman will look around, as everyone else does, because they hear a sound.

THE CHAIR: Why were the police there?

Mr Pappas: They were investigating a broken pane. They are looking around because there is a sound. Sorry, it was nothing to do with these young men.

THE CHAIR: It was another incident?

Mr Pappas: Another incident altogether which is captured on other CCTV footage. Someone had broken a window on the way out. They had kicked the bottom pane in a door.

The policeman goes straight over, and because these fellows remonstrated, "We've done nothing wrong; why should I pick up the bottle when I didn't break it?" Mr Smyth is arrested, Mr May is arrested. Mr Smith is shown on another tape as

being wrestled to the ground. The justification for that in the statement of Officer Ruhen, at page 4, is:

> Due to the aggressive demeanour displayed by the Defendant—

that is, Smith—

> in the presence of Police and numerous members of the public who were dining in the restaurant, Police were of the opinion they needed to take some form of intervention to ensure the safety and well being of the patrons and staff.

What you will see from this other angle, which shows the boys sitting at their table, is that there are two females sitting at a bench with their back to this interaction with the police, and they do not even turn around until the police grab hold of Smith and start wrestling him to the ground. So there is no suggestion; it is well after this when the boys move to that table which is in the middle of the picture. That is the three boys there. You can see the two patrons on the side wall. Officer Ruhen has just come over.

THE CHAIR: So that is the police coming in there?

Mr Pappas: No, they are other police arriving. Here is Officer Ruhen coming from the front counter to speak to the three boys. That is Mr May looking up. He is told to pick up the broken beer bottle.

THE CHAIR: Where is the broken beer bottle?

Mr Pappas: Do you see the policeman pointing at the ground?

THE CHAIR: Yes.

Mr Pappas: There is in fact a beer bottle apparently there.

THE CHAIR: I did not think they served beer at Macca's.

Mr Pappas: I do not think they do.

MR HARGREAVES: It is bring your own.

Mr Pappas: If you continue to watch this, what you will see is that effectively Mr Smith fails the attitude test because he remonstrates with the police, who did not see him break the bottle because he did not break it. And "Why should we go home? We've done nothing wrong."

THE CHAIR: But he did pick up the broken bottle?

Mr Pappas: He did. He was directed to, and he did it. In a moment, if you watch for a little bit longer, the police will grab hold of Mr Smith, who is now getting up to go over and say that he has done nothing wrong. The two people I am talking about you can see on the right top of the screen. They do not appear to be paying any attention to this at all. So that gives a lie, I say, to the notion that because of this aggressive

behaviour there was a need to protect the patrons of this half-full restaurant. At any minute now they will take hold of Mr Smith and wrestle him into the back corner here, handcuff him and put him in a police wagon, because he had the temerity to say to the police that they were overstepping the mark.

Unidentified person: What time was this?

Mr Pappas: This was at three-something in the morning, I think.

THE CHAIR: No, 1.08 on 12 March last year. Could members of the audience not—

Mr Pappas: I am sorry; I did not realise who was asking the question.

THE CHAIR: I just realised where the question came from.

Mr Pappas: It should be borne in mind that the police have the capacity to give a move-on direction. The failure to move on is a criminal offence. The police could, in appropriate circumstances, simply direct Mr Smith or any of those three boys, if they thought they were guilty of violence or likely to be guilty of violence, and send them away from McDonald's. They could have just given them a direction to leave, and they can tell them to go by a particular route. They have that power already. If they thought they were so affected by alcohol as to be a danger to themselves or others, they can take them into protective custody. But that is not what happened here.

Without sound, it is hard to know exactly what is going on. It is a bit difficult to see where the real threat of danger to other patrons in the restaurant is. There are three or four police; I think there were five in total, including a senior sergeant who gave some very truthful evidence and caused great difficulty for the prosecution because the other evidence was clearly not truthful. We have got them surrounded like the Indians surrounding a wagon train now.

I am sorry; I thought I had the time correct on this. This is Mr Smith backing away there. That is the application of the minimum necessary force, apparently, to deal with this young man.

THE CHAIR: How old are these people?

Mr Pappas: From memory, Smith was about 21 or 22. He was either an apprentice mechanic or had finished his qualifications. The others were about the same age. Mr May works for a government department, with some sort of security clearance. I remember that. I do not recall much about the other chap. The people up in the far corner have finally looked around because the only real disturbance is the police wrestling with Mr Smith, who is saying, "I've done nothing wrong."

The third tape is perhaps the most graphic. It is an illustration of what John Purnell talked about earlier, where a woman has remonstrated with police about a man being arrested. He comes out of premises—

THE CHAIR: A little bit the worse for wear.

Mr Pappas: It is not apparent that he is, or that she is, for that matter. You will see him come out in a minute in company with the police.

THE CHAIR: Sorry, that was not him on the ground?

Mr Pappas: No. That is just a citizen.

MR RATTENBURY: That is just standard Saturday night behaviour.

THE CHAIR: I do not go to Civic much on a Saturday night.

MR RATTENBURY: I'm sure I saw you last weekend, Mrs Dunne!

Mr Pappas: You will see the man come out. He is spoken to by police. A female comes up and is clearly speaking to a policeman who has his back to her. Then he turns around and you will see what happens. That is not particularly out of character for what I have come to experience in terms of the way in which the city beat squad conduct themselves.

THE CHAIR: Where is this?

Mr Pappas: It is midway along East Row, as I understand it, probably where the Phoenix bar or something similar is located. It is very hard to pick up the time on the bottom of the screen, so it is difficult to go to the particular point. This is the man being arrested. That is the female. We have only seen the end of it. Here he is. There is the policeman walking over; a fellow with a beard. He is very compliant. You will see that the chap has put his hands behind his back. He has been told he is going to be arrested.

Here is the female. That is all you see. She does come back and have a slap at him and then you will see what happens to her because the next is two police grappling with her and then holding her down on the ground like some wild animal. The other camera angle will give you a very good close-up of the way in which she is then restrained.

There is the man with his arms behind his back, on the left. He is standing there quietly. He is handcuffed. That is the woman on the ground—

THE CHAIR: Face down.

Mr Pappas: face down, and in a minute we will zoom in on her. She appears to me to have been handcuffed at that stage. You can understand that some members of the public do not think that this is appropriate. There she is, with her face pressed into the pavement, one policeman on her top and another on her legs, and there is the paddy wagon arriving. She will be lifted up in a minute and put in the wagon.

When this CCTV footage was shown to a representative of the Director of Public Prosecutions, the charges against her, which were the usual trifecta of assault police, resist arrest and hinder police, were withdrawn, the matter proceeded no further and this lady decided in the circumstances that she would do nothing about it in terms of a

civil remedy, so the matter did not go to a hearing.

The only reason I brought that material is to say that you can see from those police statements that the police do not always tell the truth. When they do not tell the truth it is generally to cover up something they have done that is not in accordance with the rule of law or improper conduct on their part.

People are subjected to quite violent treatment by the police. The police have got an obligation, when they are forced to use force, to use the minimum amount of force necessary in the circumstances. But they do not. It is as simple as that. It does come back to police training and it does come back to the way in which some members of the police force feel that they can do whatever they like and try and justify their behaviour after the event.

I was very upset to see that the Klobucar case was used as the example for why there was this need for a change to this legislation, when demonstrably the police were not acting in good faith. The magistrate at the end of the proceedings invited the prosecutor to effectively offer no further evidence; otherwise she would need to make some very hard findings about the credit of those police. To then see that appear in a presentation speech as a representation of police acting in good faith without any use of force in arresting Mr Klobucar was disturbing, and that is what caused me initially to write to the attorney.

The only other thing I want to say is that it should be borne in mind that the only part of the Magna Carta that still applies in this territory is clause 29 and that has been the law since 1200 and a little bit. The relevant bit is a guarantee, in the same way that section 18 of the human rights legislation is a guarantee, of liberty. The Magna Carta at clause 29 talks about no free man shall be taken or imprisoned but by lawful judgement of his peers or by the law of the land. I have paraphrased but in essence that is a guarantee that has been known to the law since 1297 and—in my submission to the committee at least—it is not something that we should lightly overthrow based on a false analysis of a case that was in the scheme of things an unusual case. Like John, I am not aware of very many instances of self-defence ever succeeding, particularly when you are dealing with police who are in uniform and apparently on duty.

Mr Purnell: Can I add something really important that you may not have appreciated from Jack's examples: if the attorney's proposals go through, once the police give evidence that they have acted in good faith, if that is accepted by the magistrate then the bench may never see any of this material, because the prosecutor would say it is irrelevant. So you can see that citizens could be very badly placed in terms of the administration of justice with this proposed amendment.

MS HUNTER: Mr Pappas, you mentioned the trifecta. The police association do not seem to have heard—

Mr Pappas: Resist arrest, hinder police and assault police.

MS HUNTER: Yes. We did hear from the AFPA and they had not heard of that term before.

Mr Pappas: Hadn't they?

Mr Walker: I have heard of it—and I am an administrative law barrister.

MR HARGREAVES: Mr Walker, you are an exceptional one at that.

Mr Walker: Jack is right: those three almost always go together.

Mr Whybrow: They have been a bit phased out since they made those amendments making it a 13-year offence to do any of those things to a commonwealth official. So they have been told not to charge the trifecta so much. But it is a well-known terminology.

MR HARGREAVES: I have a funny feeling I know where you four amigos are coming from, but I would like your take on this notion that the special office of the constable requires special treatment; that that is where they differ from ambos, firies, because they have this special discretion to charge, not to charge, to lay a charge; that they have this special responsibility to community safety. That has been used as one of the reasons to support this. It is not a power; everybody knows it is not a power. It is an extra penalty. But what I am hearing you say, John, is that in fact it can mask and prevent justice being done. I would be interested in your take on this notion of the special office of the constable, given your reference to the Magna Carta. I would have thought the Magna Carta would have primacy over that.

Mr Pappas: It is the law of the territory, the Magna Carta, and any amendment to the law can be effected. It is not one of those that is sacrosanct and cannot be amended by the Legislative Assembly.

Can I come back to the nub of what you are putting and that is that police need special protection. The truth is that it is almost exclusively these days police who exercise a power of arrest. The citizen's power of arrest is a thing almost of the distant past. I can remember the last time I saw a citizen's power of arrest. It was a chap from the navy who was stopped for speeding and purported to arrest the policeman who pulled him over, for speeding himself. The policeman very compliantly stayed on the side of the road and called for backup so that he could be arrested. It was extraordinary. It was down near Black Mountain, but that was 25 years ago, and he was a very strange client. But the police exercise this power and you have got to wonder why it is that they feel the need—it must be something that has come in and been driven by the police; I cannot see that it has been initiated in any other quarter—for this additional protection if in fact they are acting lawfully. If they are acting lawfully there is no problem.

MR RATTENBURY: On that, though, there seems to be this issue around the reluctance of the DPP to use the charge. Mr Whybrow, you spoke to that. Your view is that it is because of taking it up to the Supreme Court.

Mr Whybrow: It is a disproportionate penalty, a 13-year offence. That is more than for recklessly causing grievous bodily harm. For spitting on a police officer, somebody is being subject to a 13-year offence. In that sense, that is what I perceived

as a reluctance.

On self-defence, even if you have been arrested unlawfully it does not give you the right to belt somebody, necessarily. It is still an assault. It still has to be proportionate, reasonable and, as you referred to earlier, objective. In any of the circumstances where it would get up, they are almost indicative of that person not being held criminally responsible in the first place.

The other issue that I have a problem with is honest belief. There are well-known people of interest to the police around who cause them grief and who turn up from time to time, after years at a time, and this creates issues for police. As long as the young constable has an honest belief and his sergeant says to him: "John Roberts down there is on bail. He didn't report today. You've got the power to go and get him. Watch out, he's a dangerous bugger. You've got to take him down from behind. Say, 'You're under arrest,' and put him down," he honestly believes he has got the power to do that. The sergeant knows he has not but wants to cause this guy some grief.

Under this legislation, this person has no right to take any action against this sort of conduct by the police, because the poor constable has got an honest belief. There is no incentive for rigorous training because they just have to have an honest belief. Good faith or bad faith is a very hard test to meet.

The opposite to honest belief is dishonest belief. That is the corollary. You have got to show a very high level of mala fides. You do not get to go behind that and say, "The superintendent told me." You just say, "I was told I was allowed to do it and I genuinely understood it." Those sorts of things would happen. There are people who cause such annoyance and problems for the police that those sorts of things would happen. Mr Pappas would, I am sure, be the first to say that would almost certainly happen to some members of the community.

For the attorney to also indicate, "Hang on, this was a hundred years ago. They can all get brought to the Magistrates Court immediately and these issues can be resolved," the Magistrates Court does not go into the defendant saying, "They unlawfully arrested me." The Magistrates Court says: "You get bail," or "You do not get bail. I haven't got time to decide whether this was a lawful arrest or an unlawful arrest." Those issues of the appropriateness of what happened do not get resolved.

People who are usually the subject of this in all of these situations are not people necessarily with the resources to go to the Ombudsman or to bring a civil suit or to take the other remedies the attorney has suggested would still be available to them. Indeed, a lot of them will be people labouring under addictions or mental health issues who simply would have no ability to assert any right if they were the subject of this type of conduct, whether or not they defended themselves. The police know they are not allowed to.

When that woman was pushed over and fell back onto her head and the policeman decided to grab her then, the passerby intervened and said, "Hang on; calm down,"—the red rage of that person—they have committed a criminal offence under this legislation.

Mr Pappas: As Steve said, if you are going to have someone in that position, you are probably going to have a legal aid solicitor. There is no way on earth they are going to be able, at that stage, to have seen any footage, to look at any police statements, and all the magistrate is concerned with is the charge and other criteria can go to the bar. Whether the arrest was unlawful or whether there was self-defence will never be raised at the bail application time.

Mr Purnell: Can I add something to what Steven said. The problem is bigger than he painted. A dishonest belief asserted in an apparently honest fashion is almost impossible to disprove. I can assert to you that I believe in one omnipotent god. I defy you to disprove that. You might look at my lifestyle and say that I never go to church. You might say other things about me that tend to suggest that I do not have that honest belief. But how do you prove it?

The other evil in this legislation is that the honest belief only has to be established on the balance of probabilities. The policeman only has to say, "I honestly believed I had the power," and he or she can dishonestly make that assertion and it is almost impossible to disprove on the balance of probabilities.

THE CHAIR: Could I go to a couple of technical matters. One was that Mr Gill from the Law Society raised the issue of how this matter came into the discussion paper. Was the Bar Association in the negotiations and discussions that led to the discussion paper, the extract of which we received this morning? No-one was involved in the work on police powers?

Mr Walker: None that I am aware of. I am just getting a nod from Svetlana, the chief executive officer, and she is not aware of anybody being involved. I can check for you, if you like.

THE CHAIR: It would be useful, if you could check.

Mr Walker: I will do so.

THE CHAIR: Do you have a question, Mr Hargreaves?

MR HARGREAVES: No. I think we have to be conscious of the time.

MS HUNTER: I have a final one. This committee is also inquiring into the Liberals' bill that has been put on the table. I was wondering whether anyone had any views they would like to put forward on that.

Mr Whybrow: I have some difficulties with that bill. It seems to go through every offence where there is an act of violence and add two years to it. There seems to be no rhyme or reason to some of them. For example, pick out the one of stalking. That would cover a police officer having an AVO situation with their neighbour and if they happened to have an incident while the person is on their way to work or on duty, all of a sudden it becomes an aggravated offence. It seems to be done so that the police will have this special protection and the community will know not to assault, harass or act in a violent way towards police, and doing it in the very clumsy way of saying, "Let's up the penalty."

The penalties for all of these offences are reasonably significant and people do not get five years for an assault occasioning actual bodily harm. You usually do not get to the worst-case scenario. You do get towards the higher end if, as I indicated before, it is David Eastman. If the person is a police officer, they are a vulnerable person. The current range of penalties takes this into account.

The fact that there are specific aggravated offences for pregnant women may well be indicative of the fact that we are talking about another potential life here that is being affected, not just the victim. There is consequential damage potentially being caused.

The concern with creating special classes of victim is a worrying one because why should the police be in any special, different category to the poor ambo who is trying to wake up the druggie. They have done all their stuff but he has to be neutralised with the Naltrexone and he fells the ambo.

The current sentencing laws allow for all of these things to be taken into account. You are going to have interest group after interest group lobbying to say, "We want one too." The police are a powerful association and have a strong interest. It is the tough on crime type of thing that potentially is able to get votes. It is the emperor's new clothes. There is nothing to it. It does not achieve anything, other than lead to possible injustice, complication and more work for various of us here as we try to deal with what would be an unjust situation that is unnecessary. That is the perspective from my point of view.

MR HARGREAVES: I have not looked at it.

Mr Walker: Basically, for every offence of assault, if it is a police officer, add two years to the maximum penalty.

Mr Pappas: It is a blunt and ineffective instrument. That is my comment. The great unwashed do not think before they act. They do not think, "He's a policeman and I'm going to be exposed to a further two-year penalty." It is just a nonsense. It is a bit of window-dressing that does not achieve anything that cannot be and is not achieved by the current legislation. I think that is another way of saying what Steven said.

THE CHAIR: I thank members who have attended this afternoon. Thank you, Mr Pappas, for the visual presentation. A transcript will be distributed, presumably towards the end of next week. There are a couple of issues that you took on notice about the preparation of the discussion paper and, I think, a couple of other things. If on perusing the transcript you think there is something that needs to be clarified or you need to get back to us, we would welcome that fairly soon. Thank you for your attendance.

Mr Walker: I just noticed that mine is missing page 4.

THE CHAIR: We picked it up. Page 4 was the important page.

MS HUNTER: I picked that up earlier.

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

The committee adjourned at 5.30 pm.