

STANDING COMMITTEE ON LEGAL AFFAIRS

Report on Terrorism (Extraordinary
Temporary Powers) Bill 2005— exposure
draft

February 2006

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Resolution of appointment

On 7 December 2004 the Legislative Assembly for the Australian Capital Territory resolved to establish a general purpose standing Committee, called the Standing Committee on Legal Affairs:

to perform the duties of a scrutiny of bills and subordinate legislation Committee and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.¹

Terms of reference

On 15 December 2005 the Assembly agreed that –

1. the exposure draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005 be referred to the Standing Committee on Legal Affairs for inquiry and report;
2. the Committee report by 28 February 2006; and
3. if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its report to the Speaker, or in the absence of the Speaker, to the Deputy Speaker who is authorised to give directions for its printing, publishing and circulation.

¹ Legislative Assembly for the ACT, *Minutes of Proceedings No 2*, 7 December 2004, p13

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SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

The Committee supports the proposed legislation in principle, subject to the recommendations below.

RECOMMENDATION 2

The Committee recommends that the preamble be amended to provide a clearer explanation for why preventative detention is needed.

RECOMMENDATION 3

The Committee recommends that the ACT Government seek further legal advice and consult with the Australian Government Minister for Justice and Customs in relation to the provisions in the proposed legislation which might be interpreted as pertaining to ‘the provision by the Australian Federal Police of police services in relation to the Territory’.

RECOMMENDATION 4

The Committee recommends that the ACT Government request the Australian Government to review paragraph 23(1)(c) of the *Australian Capital Territory (Self-Government) Act 1988* (A.C.T.).

RECOMMENDATION 5

The Committee recommends that the ACT Government should request that the Australian Government review the list of terrorist organisations proscribed under the *Criminal Code 1995* (Cth) to ensure that all relevant terrorist organisations are listed, and not only those of predominantly Muslim membership.

RECOMMENDATION 6

The Committee recommends that the ACT Government develop specific strategies to engage with people, particularly youth, who may potentially be marginalized by these laws.

RECOMMENDATION 7

The Committee recommends that Parliamentary Counsel re-draft clauses 12–14 of the draft bill so that their meaning is clearer.

RECOMMENDATION 8

The Committee recommends that people detained pursuant to the proposed legislation be detained in the ACT wherever possible. Where detention in the ACT is not possible, the reasons for this must be expressed in the application for the preventative detention order.

RECOMMENDATION 9

The Committee recommends that the 'reasonable and necessary' element in clauses 17, 19, 21, 25 and 29 of the proposed bill be replaced with 'reasonably necessary', so that the test is not so onerous and consistent with other jurisdictions' legislation.

RECOMMENDATION 10

The Committee recommends that 'is the least restrictive way of preventing the terrorist act' in paragraphs 17(3)(b)(ii) and 19(4)(c) of the proposed legislation be replaced with 'substantially assists in preventing the terrorist act'.

RECOMMENDATION 11

The Committee supports uniform best practice national security legislation and recommends that the ACT Government requests that the Standing Committee of Attorneys-General develops model legislation.

RECOMMENDATION 12

The Committee recommends that the proposed legislation be applied to persons 16 years of age or older, but that safeguards such as separation from adult detainees (such as in a juvenile detention facility) and special contact provisions for family members and oversight agencies be included in the legislation.

RECOMMENDATION 13

The Committee recommends that the ACT Government consult further with the Australian Government Attorney-General's Department about the consistency of paragraph 18(k)(vi) with Australian Government legislation.

RECOMMENDATION 14

The Committee recommends that the legislation remain silent on the issue of whether proceedings in the Supreme Court should be open or closed, and whether restrictions should be placed on the publication of proceedings.

RECOMMENDATION 15

The Committee recommends that the proposed legislation be amended to ensure that the Legal Aid Office assists with finding legal representation for a person detained under the legislation, but that the provision of legal representation be consistent with the eligibility provisions of the *Legal Aid Act 1977* (A.C.T.).

RECOMMENDATION 16

The Committee recommends that the ACT Government consider amending the exposure draft bill to provide for an administrative process to determine minor compensation matters arising from the exercise of proposed Part 3 special powers, with review of the Minister's decision by the Administrative Appeals Tribunal.

RECOMMENDATION 17

The Committee recommends that the ACT Government consider amending the *Discrimination Act 1991* (A.C.T.) to proscribe discrimination on the ground that someone has been detained under ACT legislation.

RECOMMENDATION 18

The Committee recommends that the exposure draft bill be amended to require that the information referred to in sub-clause 32(2) and 35(3) and 75(3)(a) be provided by the police officer(s) without the need for a request from the person to whom the information is given.

RECOMMENDATION 19

The Committee recommends that clause 43 be amended to require the detaining police officer to record details of the circumstances that made the conveying of information to the detainee impractical. Failure to comply with this obligation should carry a penalty.

RECOMMENDATION 20

The Committee recommends that the proposed legislation be amended to require the development of guidelines to assist in the implementation of its contact provisions.

RECOMMENDATION 21

The Committee recommends that the exposure draft bill be amended to include a right of judicial review of a monitoring order.

RECOMMENDATION 22

The Committee recommends that a definition of 'record', which includes notes as well as video and audio recording, be included in the dictionary.

RECOMMENDATION 23

The Committee recommends that a defence of reasonable excuse for not providing required information be included in clause 35.

RECOMMENDATION 24

The Committee recommends that differences in offence and penalty provisions in the proposed legislation, and other similar legislation, concerning provision of personal information, be reviewed for proportionality and consistency.

RECOMMENDATION 25

The Committee recommends that the proposed legislation be amended to remove the role of the proposed Public Interest Monitor Panel and that the ACT Human Rights Commissioner and ACT Ombudsman be allocated that role.

RECOMMENDATION 26

The Committee recommends that the ACT Government consider amending clause 95 so that the Legislative Assembly's Standing Committee on Legal Affairs is provided with a report annually that includes the prescribed annual report information from each agency involved in the implementation of the proposed legislation.

RECOMMENDATION 27

The Committee recommends that consideration be given to prescribing in the proposed ACT legislation the matters to be reported on by the Chief Police Officer and other agencies involved in the implementation of the legislation.

RECOMMENDATION 28

The Committee recommends that 'at any reasonable time' be omitted from paragraph 40(4)(g).

RECOMMENDATION 29

The Committee recommends that the consistency of clause 16 with sub-clause 51(2) be reviewed and any appropriate amendments made.

RECOMMENDATION 30

The Committee recommends that each reference to '24 hours' be amended to '24 hours or as soon as reasonably practicable'.

RECOMMENDATION 31

The Committee recommends that consideration be given to amending clause 55 to permit oversight agencies to question a detainee in relation to concerns the detainee has about a detention order, or a matter related to the application for a detention order, or the conditions of detention.

RECOMMENDATION 32

The Committee recommends that consideration be given to amending the exposure draft bill to authorise cooperation amongst oversight agencies in the public interest or the interest of detainees. This could extend to the production of cross-agency information packages for example.

RECOMMENDATION 33

The Committee recommends that the ACT government review the need for clause 86 in the proposed legislation, and consider amending the *Emergencies Act 2004* (A.C.T.) to include this clause if necessary.

RECOMMENDATION 34

The Committee recommends that a definition for ‘torture’ be included or referenced at the first use of the term ‘torture’ in the proposed legislation, and that the definition be specified instead of being a cross-reference to an international instrument appended to an Australian Government Act. The definition should also be extended to cover evidence obtained through cruel, inhumane and degrading treatment.

RECOMMENDATION 35

The Committee recommends that an explanatory note be inserted in the proposed legislation referring to the possibility that overseas evidence may be derived from torture.

RECOMMENDATION 36

The Committee recommends that the five-year sunset clause be retained.

Glossary

art	article, the paragraph(s) of an international treaty such as the ICCPR
AFP	Australian Federal Police
ASIO	Australian Security Intelligence Organisation
amendment	an alteration made or proposed to be made to the legislation
COAG	Council of Australian Governments
Cth	Commonwealth/Australian Government
eg	example
<i>et al</i>	and others
<i>ex parte</i>	a hearing where only one side is heard; in this context a hearing in the absence of the person to be detained
HRAct	<i>Human Rights Act 2004 (A.C.T.)</i>
<i>ie</i>	<i>id em</i> , that is
<i>inter partes</i>	a hearing which a decision is made determining the rights of one of the parties involved relative to the other
ICCPR	International Covenant on Civil and Political Rights
JACS	ACT Department of Justice and Community Services
MLA	Member of the Legislative Assembly
OCA	Office of the ACT Community Advocate
PIM	Public Interest Monitor Panel
PDO	Preventative Detention Order
preamble	the recital at the beginning of some legislation explaining its context and objectives
<i>prima facie</i> evidence	evidence which is sufficiently strong to establish an initial case in favour of the party adducing it, warranting another party being called to rebut it
sunset clause	a clause providing for the automatic expiry of the legislation after the prescribed term
UN	United Nations

1 INTRODUCTION

- 1.1 On 15 December 2005 the ACT Legislative Assembly referred the exposure draft Terrorism (Extraordinary Temporary Powers) Bill 2005 (A.C.T.) to the Standing Committee on Legal Affairs.² The Committee was asked to inquire into, and report on, the exposure draft bill by 28 February 2006.
- 1.2 The Committee invited submissions from a wide range of stakeholders by letter, and a public notice advertisement appeared in *The Canberra Times* on 17 December 2005. The individuals and organisations who lodged submissions are listed in Appendix 1. Witnesses who attended the public hearings on the bill are listed in Appendix 2.
- 1.3 Officials in the Department of Justice and Community Services (JACS) provided a private briefing to MLAs and advisers on 24 January 2006. JACS subsequently provided a table of provisions in comparable legislation, which is reproduced at Appendix 3.
- 1.4 The Committee thanks everyone who contributed to the debate on this important legislation, especially given that the public consultation stage occurred partly over the Christmas and summer holiday period.
- 1.5 The recent policy context for the proposed legislation is set out in the preamble to the draft bill.³ On 27 September 2005 the Council of Australian Governments (COAG) agreed that Australia's counter-terrorism laws would be strengthened. COAG agreed that the states and territories would enact legislation to provide for preventative detention for up to 14 days, and stop, question and search powers in areas such as transport hubs and places of mass gatherings.⁴ COAG

² The Bill is accessible on the ACT Legislation Register at <http://www.legislation.act.gov.au/ed/default.asp>. An explanatory statement was not provided with the Bill

³ See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, *Inquiry into the Agreement of the Council of Australian Governments on September 27 2005 relating to Strengthening Counter-Terrorism Laws— Report No 6*, November 2005, accessible: <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Legislative+Council+-+Current+Committees>

⁴ The Council of Australian Governments' Communiqué – Special Meeting on Counter-Terrorism, 27

agreed that these laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse (such as parliamentary and judicial review), and be exercised in a way that is evidence-based, intelligence-led and proportionate.⁵ The principles that COAG agreed would underpin strengthened legislation are at Appendix 4.

- 1.6 The ACT Government, as a member of the COAG, had earlier agreed to strengthen counter-terrorism measures in 2002 and 2004. The relevant COAG agreements include references to the new challenges of combating terrorism and multi-jurisdictional crime; the September 11 2001 terrorist attacks in the United States; the threat of harm to Australians from international and organised criminal groups; the current global and domestic security environment as portrayed by the Directors-General of the Office of National Assessments and the Australian Security Intelligence Organisation (ASIO); and the July 2005 bombings in London.
- 1.7 The Committee was told that the bombings in Indonesia in 2002 and 2005, and Madrid in 2004 also influenced the development of this legislation, but the London bombings were probably the most influential, with substantial discussions continuing amongst officials in the lead up to the September 2005 COAG.⁶ There have also been a number of similar terrorist incidents in other countries in recent years.⁷ Australia's national counter-terrorism alert has remained at medium since 12 September 2001.⁸
- 1.8 The Commissioner for the Australian Federal Police (AFP), Mr Mick Keelty, emphasised the importance of anti-terrorism measures, when he reminded the Committee and the broader community on 31 January 2006 that Canberra houses the seat of government and some 90 diplomatic missions, and that the Israeli Embassy in Canberra had been the target of a planned but aborted

September 2005, is accessible at <<http://www.COAG.gov.au/meetings/270905/COAG270905.pdf>>

⁵ para 3, Preamble, Terrorism (Extraordinary Temporary Powers) Bill 2005; 'Strengthening Counter-Terrorism Laws', COAG Communiqué: Special Meeting on Counter-Terrorism, 27 September 2005, accessible at <<http://www.COAG.gov.au/meetings/270905/>>

⁶ *Proof Transcript of Evidence*, Canberra, 31 January 2006, pp42, 49

⁷ see generally S. Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan and Bin Laden from the Soviet Invasion to September 10 2001*, Penguin Books, 2004

⁸ COAG Agreement on Terrorism and Multi-Jurisdictional Crime April 5 2002; COAG Agreement on Counter-Terrorism Laws, June 25 2004; and COAG Communiqué: Special Meeting on Counter-Terrorism September 27 2005 accessible at <<http://www.COAG.gov.au/meetings/270905/>>

terrorist attack in 2000, and that Canberra continues to be a target.⁹ Terrorism expert, Mr Clive Williams, confirmed in February 2006 that embassies continued to be the most likely terrorist target in Canberra.¹⁰ Others queried the likelihood of a terrorist act being committed in Canberra, suggesting that other cities had more iconic targets as well as diplomatic missions, and that Canberra was unlikely to be a place ‘where terrorists might be likely to congregate’.¹¹

- 1.9 The exposure draft bill proposes legislation which will complement current ACT legislation such as the *Major Events Security Act 2000* (A.C.T.), *Crimes Act 1900* (A.C.T.), *Crime Prevention Powers Act 1998* (A.C.T.), *Criminal Code 2002* (A.C.T.), *Dangerous Substances Act 2004* (A.C.T.), *Enclosed Lands Protection Act 1943* (A.C.T.), *Emergencies Act 2004* (A.C.T.), *Firearms Act 1996* (A.C.T.), *Road Transport (General) Act 1999* (A.C.T.), *Road Transport (Safety and Traffic Management) Act 1999* (A.C.T.), and *Trespass on Territory Lands Act 1932* (A.C.T.).
- 1.10 A wide range of Australian Government counter-terrorism legislation also applies in the ACT. This includes the *Australian Security Intelligence Organisation Act 1979* (Cth), *Crimes Act 1914* (Cth), *Criminal Code Act 1995* (Cth); *Surveillance Devices Act 2004* (Cth); *Telecommunications (Interception) Act 1979* (Cth), *Crimes (Overseas) Act 1964* (Cth); *Australian Federal Police Act 1979* (Cth); *International Transfer of Prisoners Act 1997* (Cth); *Aviation Transport Security Act 2004* (Cth); and *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

Human rights, proportionality and preventative detention

Relevant human rights standards

- 1.11 The ACT’s legislation has been drafted to take into account the human rights standards in the International Covenant on Civil and Political Rights (ICCPR) as incorporated in ACT law through the *Human Rights Act 2004* (A.C.T.).

⁹ ACT Legislative Assembly, Standing Committee on Legal Affairs (Reference: Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005), *Proof Transcript of Evidence*, Canberra, 31 January 2006, pp41, 47

¹⁰ C. Naylor, ‘Embassies top targets for attack, expert says’, *The Canberra Times*, 7 February 2006, p5

¹¹ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p20. Similar views were noted in D. Edirisuriya, Internship paper, ACT Legislative Assembly Committee Office, February 2006.

Various legal advices were also provided to the ACT Government as the legislative proposals were developed.¹²

- 1.12 Many submissions expressed appreciation for the opportunity to provide comment on this important proposed legislation,¹³ and for the human rights safeguards it includes.¹⁴ Several suggested that the ACT legislation could be a model for other jurisdictions, or was better than other jurisdictions' legislation, and that of the Commonwealth in particular.¹⁵ The compatibility of due process safeguards with effective policing was noted.¹⁶
- 1.13 In contrast, two submissions said that the proposed ACT legislation should be amended to conform better to Australian Government legislation. The AFP and the Australian Government Attorney-General's Department said that the Commonwealth preventative detention regime 'more properly' balances individual rights and national security or public order.¹⁷ Australian Government representatives expressed the view that the exposure draft bill was more draconian than the federal law in a couple of areas, and that Commonwealth legislation is consistent with international human rights obligations.¹⁸
- 1.14 When assessing the proportionality of anti-terrorism measures in human rights terms, a range of rights and obligations must be considered.

¹² ACT Attorney-General, Mr Jon Stanhope MLA, 'Exposure Draft of Anti-Terrorism Laws', Media Release, 539/05, 15 December 2005

¹³ Submissions no 2, 3, 4, 5, 6; Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, p36

¹⁴ Submissions no 2, 3, 4, 7, 8, 10, 16; Ms McKinnon, *Proof Transcript of Evidence*, 31 January 2006, p56; Dr Allport, *Proof Transcript of Evidence*, 1 February 2006, p1

¹⁵ Submissions nos 4, 6, 7, 8, 9, 10, 16; Australian Lawyers for Human Rights, ACT Community Advocate, *Proof Transcript of Evidence*, 25 January 2006, pp55, 65; ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, pp10, 20; Prof Charlesworth, *Proof Transcript of Evidence*, 31 January 2006, pp61–62; ACT Human Rights Commissioner, *Proof Transcript of Evidence*, 31 January 2006, pp10, 18, 20; Prof Charlesworth, *Proof Transcript of Evidence*, 31 January 2006, pp63, 65; Mr Jon Stanhope MLA, *Proof Transcript of Evidence*, 1 February 2006, pp42–43

¹⁶ Prof Bronitt *et al*, *Proof Transcript of Evidence*, 1 February 2006, p28

¹⁷ Submission no 19; see also submission no 15

¹⁸ *Proof Transcript of Evidence*, 31 January 2006, pp25, 38; Letter from the Assistant Secretary, Security Law Branch, Australian Government Attorney-General's Department, Mr Geoff McDonald, dated 8 February 2006, responding to questions arising from public hearings, referring to Australian Government Attorney-General's Department Submission 290A to the Senate Legal and Constitutional Committee, 14 November 2005, accessible at <http://www.apf.gov.au/senate/Committee/legcon_ctte/terrorism/submissions/sub290a_att_a.pdf>

- 1.15 The ACT Government is under a positive obligation to establish a framework of laws, precautions, procedures and means of enforcement that will, to the greatest extent reasonably practicable, protect life.¹⁹ These responsibilities must, however, be met without unreasonably derogating from other human rights.
- 1.16 The UN General Assembly, the UN Security Council, and the UN Commission on Human Rights have each adopted numerous resolutions reaffirming the imperative for terrorism to be combated, and that any measures taken to combat terrorism must comply with international legal obligations, in particular international human rights, refugee and humanitarian law.²⁰ Regional institutions, such as the Council of Europe, have also developed guidelines to assist with human rights compliance.²¹
- 1.17 There are many human rights relevant to the measures proposed in the exposure draft bill, but which of those are directly activated will depend in part, on whether the detention provisions are regarded by the Supreme Court as civil or criminal.²² The range of relevant rights in civil proceedings includes the—
- right to liberty and security and to be free from arbitrary arrest and detention (HRAAct ss18(1)–(7), ICCPR art 9)
 - right to a fair trial, including the right to be heard, to present evidence and call witnesses in defence (HRAAct s21, ICCPR art 14(1))
 - right to freedom of movement (HRAAct s13, ICCPR art 12(1))
 - right to privacy and reputation (HRAAct s 12, ICCPR art 17(1))

¹⁹ HRAAct s9, ICCPR art 6(1), *LCB v United Kingdom* (1998) 27 EHRR 212; *Osman v United Kingdom* (1998) 29 EHRR 245, *Edwards v United Kingdom* (2002) 35 EHRR 487

²⁰ eg *UN General Assembly resolutions* 46/51 of 9 December 1991, 48/122 of 20 December 1993, 49/185 of 23 December 1994, 50/186 of 22 December 1995, 51/210 of 17 December 1996, 52/133 of 12 December 1997, 54/109 and 54/110 of 9 December 1999, 54/164 of 17 December 1999, 55/158 of 12 December 2000, 56/160 of 19 December 2001 and Assembly resolution 58/174 of 22 December 2003; *United Nations Security Council Resolutions* 1566 (2004), S/RES/1566 (2004); 1540 (2004), UN Doc S/RES/1540 (2004); Resolution 1526 (2004), UN Doc S/RES/1526 (2004); Resolution 1456 (2003), UN Doc S/RES/1456 (2003); Resolution 1373 (2001), UN Doc S/RES/1373 (2001) and *UN Commission on Human Rights resolutions* 2003/37, 2003/68, 2004/44, 2004/87 and 2003/68. See generally: <<http://www.ohchr.org/english/bodies/chr/special/counter-terrorism.htm>> and United Nations, Economic and Social Council, Commission on Human Rights, Sixty-first session, Item 11 (a) of the provisional agenda, Civil and Political Rights, Including the Question of Torture and Detention, *Report of the Working Group on Arbitrary Detention*, Chairperson-Rapporteur: Leila Zerrougui, 1 December 2004, UN Doc E/CN.4/2005/6

²¹ Council of Europe Guidelines on Human Rights and the Fight Against Terrorism (July 2002), Guideline II, in *The Fight Against Terrorism: Council of Europe Standards*, CoE Publishing, 3rd ed. 2005

²² ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, pp21–22

- right to enjoy rights without distinction (HRA ss8(2), ICCPR art 2(1))
- protection from torture and cruel, inhuman or degrading treatment etc(HRAct s10, ICCPR art 7)
- protection of family (HRAct ss11(1), ICCPR art 23(1))
- protection of children (HRAct ss11(2), ICCPR art 24(1))
- peaceful assembly (HRAct ss15(1), ICCPR art 21)
- freedom of association (HRAct ss15(2), ICCPR art 22)
- freedom of expression (HRAct s16, ICCPR art 19)
- humane treatment when deprived of liberty (HRAct s19, ICCPR art 10(1)(2)(a))
- freedom of thought, conscience and religion (HRAct s14, ICCPR art 18)

Legitimate restrictions on human rights

1.18 The UN Security Council's Counter-Terrorism Committee has advised governments reporting on counter-terrorism measures that such measures should be guided by the human rights principles in international law, which – strike[s] a balance between the enjoyment of freedoms, and legitimate concerns for national security. It allows the limitation of some rights in specific and defined circumstances. ... Laws authorising restrictions should use precise criteria; and may not confer unfettered discretion on those charged with their execution. For limitations to be lawful they must:

- be prescribed by law
- be necessary in a democratic society, be for public safety or public order, namely the protection of public health or morals and for the protection of the rights and freedoms of others, and serve legitimate purpose
- not impair the essence of the right
- be interpreted strictly in favour of the rights at issue
- be necessary
- conform to the principle of proportionality
- be appropriate to achieve their protective function; must be the least intrusive instrument amongst those which might achieve that protective function
- be compatible with the objects and purposes of human rights treaties

- respect the principle of non-discrimination
- not be arbitrarily applied.²³

- 1.19 The rights protected under the *Human Rights Act 2004* (A.C.T.) can be limited by reasonable limits set by ACT laws that can be demonstrably justified in a free and democratic society.²⁴ As noted above and discussed further below, under the International Covenant on Civil and Political Rights (ICCPR), the need for restrictions on protected rights must be demonstrated and proportionate to the pursuance of legitimate aims. Restrictions must not impair the essence of a protected right.²⁵
- 1.20 Section 28 is an important provision of the Human Rights Act because it provides guidance on the extent to which human rights can be protected in the ACT, which is the only jurisdiction in Australia having such legislation.²⁶ Once a right is seen as infringed by a measure, the onus falls on the government to establish that the infringement is justifiable. A court will look at the substance and not the form of the power that is being exercised to determine whether the infringement is reasonable and proportionate to the objective of the law.²⁷ Whether any limitation on a protected human right is reasonable needs to be assessed when interpreting the legislation as far as possible consistent with human rights,²⁸ and before the likelihood of a declaration of incompatibility²⁹ being issued is assessed. Some restrictions on the protected right may be permissible under international or domestic law and this needs to be assessed. Then the issue becomes whether the interference is disproportionate to the legitimate aim pursued by the measure.³⁰

²³ United Nations Security Council Counter-terrorism Committee, 'Proposals for 'Further Guidance' for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001)—Compliance with International Human Rights Standards', accessible at <<http://www.un.org/Docs/sc/Committees/1373/ohchr2.htm>>

²⁴ HRAct s28

²⁵ UNHCR General Comments No 31, 26 May 2004. See also the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), cited in Submission no 16

²⁶ s28 is similar to provisions in the *Canadian Charter of Rights and Freedoms* and the *New Zealand Bill of Rights Act 1990*: D. Edirisuriya, Internship paper, ACT Legislative Assembly Committee Office, February 2006

²⁷ This approach is exemplified in *A v Secretary of State for the Home Department* [2004] UKHL56

²⁸ HRAct ss30, 31

²⁹ HRAct s32

³⁰ D. Feldman, 'Proportionality and the Human Rights Act 1998', in E. Ellis (ed), *The Principle of*

- 1.21 There is not yet an extensive jurisprudence in the ACT on human rights under the Human Rights Act. One of the most often applied tests regarding reasonable limits on rights was enunciated by Dickson CJ in the Canadian Supreme Court in *R v Oakes*,³¹ and has evolved in later cases.³² The onus of proving that the limitation on the right is reasonable and justifiable rests on the person seeking to uphold the infringement of the right. The proponent must satisfy the court, firstly, that the objective of the measure limiting the right is sufficiently important to warrant overriding a protected right, and relate to societal concerns that are pressing and substantial. Secondly, the measures being used to meet the objective of the legislation must be rationally connected to that objective; and in reasonable proportion to the importance of the objective. Thirdly, the measures must also be fair and not arbitrary, and there must be as little interference as possible with the right affected.

Declarations of incompatibility

- 1.22 The ACT Supreme Court can issue a declaration of incompatibility once it is satisfied that a Territory measure is inconsistent with a human right, cannot be interpreted consistent with the Human Rights Act, and is not a proportionate, justifiable limitation on the right. This is an additional protection for human rights that stakeholders in the ACT should be aware of. While a declaration of incompatibility does not affect the validity of the law, the ACT Attorney-General must present a copy of the declaration to the Legislative Assembly within six sitting days of receiving it, and table a written response within the next six months. If the Supreme Court is considering making such a declaration, it must notify the ACT Attorney-General. The Act also provides that the Supreme Court must notify the Human Rights Commissioner if it is considering making a declaration of incompatibility.

Proportionality in the Laws of Europe, Hart Publishing, Oxford, 1999, pp117–144 at pp122–3.

³¹ [1986] 1 SCR 103 at pp105–6 accessible at <http://www.lexum.umontreal.ca/csc-scc/en/pub/1986/vol1/html/1986scr1_0103.html>

³² eg *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 240 where Lord Hoffmann observed that in some areas of public policy, such as macro-economic policy, the courts should, in the absence of a ‘florid violation ... of established legal principles’, least constrain the decision-making power of the elected arms of government. See also *Egan v. Canada* [1995] 2 S.C.R. 513, *RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3 S.C.R. 199, *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825; *R v Sharpe* [2001] SCR 45, *Worme and another v Commissioner of Police of Grenada* [2004] UKPC 8. See also *A v Secretary of State for the Home Department* [2004] UKHL56

Assessing the proportionality of the proposed bill

1.23 The objectives of the exposure draft bill, and counterpart legislation enacted by the states and the Australian Government, are to implement the COAG agreement noted above, and to protect the community from terrorist acts, ie to protect life and public safety. These are pressing and substantial concerns. As noted above, the threat assessment is currently 'medium'.

1.24 The right to liberty is one of the rights most compromised by the proposed legislation. In relation to this right, in 1982 the UN Human Rights Committee said –

1. Article 9... is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. ... the important guarantee laid down in paragraph 4, ie the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. ...

...4. Also if so-called preventive detention is used, for reasons of public security... it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.³³

1.25 General comments are relevant to the interpretation of the Human Rights Act because subsection 31(1) of that Act enables 'international law', and the judgements of foreign and international courts and tribunals to be considered in interpreting a human right. 'International law' is defined in the dictionary of the Human Rights Act as including the ICCPR and other international treaties that Australia is a party to, general comments and views of the UN human rights treaty monitoring bodies, and declarations and standards adopted by the UN General Assembly that are relevant to human rights. Consideration may also be given to the principles of treaty interpretation in articles 31–33 of the Vienna Convention on the Law of Treaties.

³³ Office of the High Commissioner for Human Rights, General Comment General Comment No. 08: Right to liberty and security of persons (Art. 9): 30/06/82, accessible at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument)>

- 1.26 Relevant jurisprudence of national and regional courts, such as the UK House of Lords, the New Zealand Court of Appeal, the Supreme Court of Canada and the European Court of Human Rights can influence the interpretation of the Human Rights Act. The UK Human Rights Act gives effect in UK domestic law to the rights guaranteed by the European Convention on Human Rights, which are similar but not identical to the provisions of the ICCPR implemented in the ACT through the Human Rights Act.
- 1.27 The UK has 14-day preventative detention. In December 2005 the United Kingdom Parliament's Joint Committee on Human Rights considered a maximum pre-charge detention period of 90 days incompatible with the European Convention on Human Rights. The Committee said that the proportionality case for any increase from the permitted 14-day limit had not been made out on the evidence.³⁴ The Committee noted that the European Court of Human Rights had ruled, in *Brogan v UK*³⁵ that detention without charge for more than 4 days without judicial authorisation breached the human right to liberty and security. The UK subsequently derogated from the Convention and the European Court of Human Rights subsequently found detention without charge for 7 days was justifiable in the circumstances.³⁶
- 1.28 In *A and others v Home Secretary*³⁷ the House of Lords held that the detention of non-citizens suspected of terrorism under the *Anti-Terrorism, Crime and Security Act 2001* (UK) was a disproportionate response to the threat of terrorism and not strictly required by the exigencies of the situation and amounted to arbitrary arrest. The importance of the Court's supervisory role was stressed. In response to that decision, the government introduced a number of measures, including control orders, which permitted house arrest and controlled supervision of terrorism suspects. These were justified with an express derogation from European Convention rights.
- 1.29 The ACT Chief Minister and Attorney-General, Mr Jon Stanhope MLA,

³⁴ United Kingdom Parliament, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters – Third Report*, London 2005, paras 64–92, accessible at <<http://www.publications.parliament.uk/pa/jt/jtrights.htm>>

³⁵ (1989) 11 EHRR 117

³⁶ *Brannigan and McBride v UK* (1994) 17 EHRR 539

³⁷ [2004] UKHL 56; [2005] 2 A.C. 60

explained that he had agreed to introduce new counter-terrorism legislation in these terms –

I agreed to the new laws on the basis of assurances from the Prime Minister that the proposed commonwealth laws would be based on clear evidence that they were needed in a democratic society and that the desired effect could not be achieved in less intrusive ways; that they would be effective against terrorism; that they would conform to the principle of proportionality; that they would comply with Australia's obligations under international law-in particular, its obligations as a signatory to the ICCPR; that they would involve rigorous safeguards against abuse, including respecting the principles of non-discrimination; that they would be subject to judicial review; and that they would contain sunset clauses.³⁸

- 1.30 Mr Stanhope explained that the counter-part ACT legislation complied with international human rights standards, and responded to constitutional advice, while also being effective in countering terrorism. He explained further the need for special police powers in relation to areas to combat the threat of terrorist activity with its 'covert, complicated and sophisticated' nature, particularly in areas where specific individuals posing the threat may not be able to be identified.³⁹
- 1.31 The preamble to the exposure draft bill refers to the COAG agreements on strengthening counter-terrorism measures, and the 'clear case' for Australia's laws to be strengthened. But there is no clear explanation of why persons suspected of being involved in terrorist activities need to have special legislation enacted to combat the threat that they pose.⁴⁰
- 1.32 The Senate report on the Australian Government's 2005 legislation noted that the AFP needed to be able to 'protect the community when there is not enough evidence to arrest and charge suspected terrorists but law enforcement has a

³⁸ Legislative Assembly for the ACT, 'Terrorism (Extraordinary Temporary Powers) Bill 2005 – Exposure Draft, Proposed Reference to Standing Committee on Legal and Constitutional Affairs', 2005 Week 15 Hansard (15 December), p4931, accessible at <<http://www.hansard.act.gov.au/hansard/2005/week15/4931.htm>>

³⁹ 2005 Week 15 Hansard (15 December), pp4932–3

⁴⁰ See Recommendation 1

reasonable suspicion that terrorist activities may be imminent or where an act has occurred'.⁴¹ The report also referred to intelligence information that was unreliable because it could not be revealed without jeopardising the source, or was insufficient to support a charge or may be inadmissible in court. The criminal justice system therefore could not respond appropriately to the threat disclosed by the evidence.⁴² The Senate report noted stakeholders' views that existing criminal law was adequate to deal with the terrorist threat and noted that the Muslim community was particularly concerned that the new laws might further alienate and radicalise disaffected people, especially Muslim youth.⁴³ The AFP, in evidence to the Assembly's Standing Committee on Legal Affairs, rejected the latter view, saying that the purpose of preventative detention laws 'is to provide police with the appropriate powers to protect the community'.⁴⁴

- 1.33 In May 2005 the then Director-General of Security, Mr Dennis Richardson, described the current terrorist threat in these terms –

[I]n each of the five years between 2000 and 2004 inclusive, there was either a disrupted, an aborted or an actual attack involving Australia or Australian interests abroad. In 2000, we had the planning by Jack Roche ... to attack the Israeli Embassy in Canberra and consulate in Sydney. In 2001, we had disruption to the planning by Jemaah Islamiah in Singapore to attack Western interests in Singapore – mainly US, but including the Australian High Commission. In 2002, we had Bali. In 2003, we had the disruption to the planning by Willie Brigitte and others in Australia to carry out a terrorist attack here. On 9 September 2004, we had the attack against the Australian Embassy in Jakarta.⁴⁵

⁴¹ Australian Senate, Legal and Constitutional Affairs Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005, November 2005*, p5

⁴² Australian Senate, Legal and Constitutional Affairs Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005, November 2005*, pp5–6

⁴³ Australian Senate, Legal and Constitutional Affairs Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005, November 2005*, pp5–6

⁴⁴ AFP, Communication dated 13 February 2006 – response to additional questions following public hearing

⁴⁵ Quoted in Parliament of the Commonwealth of Australia, *ASIO's Questioning and Detention Powers: Review of the Operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, Parliamentary Joint Committee on ASIO, ASIS and DSD, November 2005, p101

- 1.34 In November 2005 16 men were arrested in Melbourne and Sydney for suspected terrorism activities. Preventative detention provisions were not then in place.⁴⁶
- 1.35 The ACT Attorney-General, Mr Jon Stanhope MLA, advised the Committee that he, as a member of COAG, had the benefits of advice from the directors-general of ASIO, the Office of National Assessments and the AFP, and that their professional opinions were accepted concerning the need for stronger counter-terrorism laws. Mr Stanhope also provided the example of intelligence leading to a reasonable belief, but not hard evidence, that persons intended to detonate one or more bombs, and that it could be necessary to prevent that person from communicating with terrorist colleagues by detaining him or her.⁴⁷
- 1.36 The Committee notes that an important safeguard in the proposed legislation is that the Chief Police Officer must ensure that police officers who exercise powers under the proposed legislation are adequately trained about their obligations under ACT human rights legislation.⁴⁸ The AFP advised that they already provide this training for ACT police officers.⁴⁹
- 1.37 Several submissions welcomed this training requirement.⁵⁰ The AFP and ACT Government witnesses emphasised that the legislation was indeed necessary to address limitations in the current legal framework. The community needs to be protected from potentially catastrophic terrorist acts. Law enforcement agencies need to be able to prevent a terrorist act, when there may not be enough evidence for an arrest and charges when those agencies have reasonable suspicions that a terrorist act may be imminent.⁵¹

Stakeholder perceptions

- 1.38 Many submissions and witnesses at public hearings argued that the need for the proposed legislation had not been demonstrated and/or that current laws

⁴⁶ ABC News Online, 'Suspects in custody after anti-terror raids', 8 November 2005, accessible at <<http://www.abc.net.au/news/newsitems/200511/s1500718.htm>>

⁴⁷ *Proof Transcript of Evidence*, 1 February 2006, pp43–44, 60

⁴⁸ cl90

⁴⁹ Submission no 15

⁵⁰ Submission no 7

⁵¹ *Proof Transcript of Evidence*, 31 January 2006, p41

were adequate to deal with terrorism.⁵² Some stakeholders acknowledged that government leaders had clearly been persuaded of the need for the legislation at COAG, noting that the public was not privy to the information provided and subsequently relied upon to found new preventative detention laws.⁵³ One witness criticised the growth of the 'security industry' and pursuit of a 'politics of fear',⁵⁴ while two noted that there did not appear to be any significant research done on the need for this type of legislation.⁵⁵ Others expressed concern that the proposed legislation could marginalise and radicalise some ethnic groups and make them feel they do not have the same rights as others.⁵⁶ Some stakeholders regarded detention to preserve evidence as particularly disproportionate and unjustifiable.⁵⁷

- 1.39 Several noted comments by intelligence and law enforcement officials in 2005 that additional powers were not needed,⁵⁸ and said that a warrant and prosecution-led response to terrorism, using existing criminal law, was preferable to preventative detention.⁵⁹
- 1.40 Several opposed the introduction of the possibility of detention without charge on legal and political philosophy grounds.⁶⁰ Several commentators regarded the proposed legislation as inconsistent with international human rights standards.⁶¹ Two submissions referred to the need for a 'public emergency' derogation from the ICCPR if human rights standards are breached by the

⁵² Submissions no 5, 7, 8; 9, 10, 11, 16, 17; Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, pp23–24, 26; Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, pp44, 55; Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, pp5, 8; Prof Charlesworth, *Proof Transcript of Evidence*, 31 January 2006, p65; ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p13; Prof Bronitt *et al*, *Proof Transcript of Evidence*, 1 February 2006, p28

⁵³ See for eg Submission no 16; *Proof Transcript of Evidence*, 31 January 2006, p57

⁵⁴ Submission no 9; Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, p35

⁵⁵ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, pp13, 22; Prof Bronitt *et al*, *Proof Transcript of Evidence*, 1 February 2006, pp28, 37

⁵⁶ Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, pp7

⁵⁷ Submission no 17

⁵⁸ Submission no 9; Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, pp17, 35; ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p16

⁵⁹ Submissions no 5, 7; Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, pp42, 44; Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p7

⁶⁰ Submissions no 2, 5, 7, 11, 17; ACT Law Society *Proof Transcript of Evidence*, 1 February 2006, p21

⁶¹ Submission no 5

proposed legislation,⁶² while others noted that governments appeared not to regard current security threats as constituting an emergency.⁶³

- 1.41 Others noted the highly adverse impact preventative detention orders could have for individuals and families and their reputation.⁶⁴
- 1.42 Most witnesses accepted, however, that preventative legislation was likely to be introduced and passed, and offered constructive comments in the hope of improving it. The Committee is extremely grateful for the high quality submissions that many organisations made to the Committee.
- 1.43 Several submissions concluded that although improvements could be made to the proposed legislation, it was, or at least had endeavoured to be, a proportionate response to the threat of terrorism, in human rights terms.⁶⁵ The ACT Human Rights Commissioner acknowledged that there is no human rights jurisprudence saying that preventative detention, of itself, breaches human rights.⁶⁶

Committee comments

- 1.44 While the Committee respects the many and varied opinions it considered during the course of the inquiry, it regards the ACT legislation in broad terms as both necessary and proportionate. Dr Foskey felt that the legislation is a good attempt to be proportionate but does not agree that the legislation is necessary. The Committee's view is based on the evidence provided by witnesses concerning the possibility that terrorists may target Canberra, the preconditions that must be satisfied before an application for a preventative detention order can be made,⁶⁷ the central role of the ACT Supreme Court, the information that must be given to detainees, the availability of compensation, and general compliance with international human rights standards in the other clauses of the proposed legislation. Many of these features distinguish the legislation from other jurisdictions'.

⁶² Submissions no 5, 17

⁶³ Submission no 10

⁶⁴ Submission no 4; Prof Bronitt *et al*, *Proof Transcript of Evidence*, 1 February 2006, p34

⁶⁵ Submissions no 10, 17

⁶⁶ *Proof Transcript of Evidence*, 31 January 2006, p10

⁶⁷ CI 19

- 1.45 In the Committee's view, preventative detention for 14 days is a proportionate response to the threat of terrorism. In particular, the relatively short period of detention and the provision for judicial oversight indicate a system compatible with international human rights standards. The proposed legislation also contains a substantial range of additional human rights safeguards.⁶⁸
- 1.46 The Committee acknowledges that many stakeholders do not regard the legislation as necessary or proportionate, and notes that many more people have died on Australia's roads and from obesity-related causes rather from terrorists acts in Australia to date.⁶⁹ Climate change is also increasingly regarded as a greater threat to long-term security than global terrorism.⁷⁰ The Committee agrees with commentators that there is a wide range of legislation already available, but apart from Dr Foskey, the Committee accepts that in extreme circumstances where the available evidence is insufficient to enable terrorists to be detained under existing criminal law, extraordinary measures are warranted.
- 1.47 When considering proportionality issues, the Committee also noted that preventative detention is not unprecedented in Australia or elsewhere. In the A.C.T., for example, non-punitive detention is permissible under the *Tuberculosis Act 1950* (A.C.T.) (for up to 6 months), *Sexually Transmitted Diseases Act 1956* (A.C.T.) (for as long as the Magistrates Court considers appropriate for treatment), *Mental Health (Treatment and Care) Act 1994* (A.C.T.) (for up to 3 days for emergency treatment and up to 7 days under a treatment order), *Intoxicated People (Care and Protection) Act 1994* (A.C.T.) (for up to 8 hours), *Major Events Security Act* (for as long as is reasonable and necessary to remove a person from the venue), *Casino Control Act 1988* (A.C.T.) (until a police officer arrives after being notified), and *Domestic Violence and Protection Orders Act 2001* (A.C.T.) (for up to 4 hours if an emergency order is to be sought against a person). This legislation is generally less restrictive of rights than the anti-terror laws, but their aims are similarly preventative in the interests of community health and

⁶⁸ See: ACT Attorney-General, Mr Jon Stanhope MLA, 'Exposure Draft of Anti-Terrorism Laws', Media Release, 539/05, 15 December 2005

⁶⁹ Submission no 9

⁷⁰ E Grace, 'The Climate Bomb: A Risk Assessment of Climate Change', *The Diplomat*, Vol 4, No. 6, March 2006, pp16–17

safety.

- 1.48 Legislation authorising preventative detention has been applied in war-time against ‘aliens’,⁷¹ concerning chemical, biological and radiological emergencies, migration, contagious diseases, to ‘inebriates’, ‘habitual criminals’, the mentally ill,⁷² where a serious offender poses a danger to the community, and where an offender has been charged and seeks bail.⁷³ Several cases have upheld indefinite detention.⁷⁴
- 1.49 The Committee has carefully considered the many high quality submissions it received, and the evidence it heard. The Committee accepts that given the COAG agreement, the ACT Government is obliged to implement legislation consistent with the agreement, but the Committee has various outstanding concerns which are the subject of various recommendations.

RECOMMENDATION 1

The Committee supports the proposed legislation in principle, subject to the recommendations below.

RECOMMENDATION 2

The Committee recommends that the preamble be amended to provide a clearer explanation for why preventative detention is needed.

Constitutional issues

- 1.50 The exposure draft bill raises several constitutional issues, which cannot be resolved through the Committee process as they fall properly within the

⁷¹ *Al-Kateb v Godwin* [2004] HCA 37

⁷² *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28

⁷³ eg *Inebriates Act* 1898 (UK), *Convicted Inebriates Act* 1913 (SA), *Inebriates Act* 1912 (NSW), *Habitual Criminals Act* 1957 (NSW), *Sentencing Act* 1991 (Vic), *Criminal Law (Sentencing) Act* 1988 (SA), *Criminal Code* (WA), *Sentencing Act* 1995 (WA), *Powers of Criminal Courts (Sentencing) Act* 2000 (UK), *Habitual Criminals Act* 1905 (NSW), *Prevention of Crime Act* 1908 (UK); *Crimes Act* 1914 (Cth) *Migration Act* 1958 (Cth), *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic), *Criminal Law Consolidation Act* 1935 (Vic), *Health Act* 1937 (Qld), *Mental Health Act* 2000 (Qld) cited in *Fardon v AG* [2004] HCA 46, paras 13, 83, 217. See also *R v Moffatt* [1998] 2 VR 229, *Veen v The Queen* [No. 2] (1988) 164 CLR 465; *R v Lyons* [1987] 2 SCR 309, *McGarry v The Queen* (2001) 207 CLR 121

⁷⁴ *Al-Kateb v Godwin* (2005) 219 CLR 562 and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2005) 219 CLR 664

province of the courts. Several submissions referred to these concerns, suggesting that further advice should be obtained.⁷⁵ For example, the Australian Government's Attorney-General's Department suggested that the Committee should seek an assurance from the ACT Government in relation to the powers it was conferring on the ACT Supreme Court and the AFP in relation to 14-day detention.⁷⁶ Several submissions and other advice suggest that detention without a proper assessment of criminal guilt may breach the doctrine in *Kable v DPP* (NSW) [discussed below].⁷⁷ Another submission and evidence suggested that the interaction of Australian Government and ACT legislation should be examined fully, noting that some provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) and the *Australian Security Intelligence Organisation Act 1979* (Cth) and the exposure draft bill could operate in an inconsistent manner, possibly resulting in the federal provisions prevailing.⁷⁸

1.51 Dr Fiona Wheeler, Reader in Law at the Australian National University and a constitutional law expert, said in her submission⁷⁹ that

...a live question arises whether the preventative detention power given to the Supreme Court of the ACT under cl 19 of the Draft Bill is sufficiently analogous to that upheld in *Fardon's Case* [explained below] to survive *Kable* doctrine challenge.

Whilst Part 2 of the Draft Bill has clearly been constructed in light of *Fardon's Case* in an endeavour to protect the power given to the Supreme Court of the ACT from constitutional attack, the *Kable* doctrine is

⁷⁵ Submissions no 5, 10, 19; Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, p.43; Attorney-General's Department, *Proof Transcript of Evidence*, 31 January 2006, p25

⁷⁶ Submission no 19

⁷⁷ *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 (*Kable's Case*) cited in Submissions no 5, 20 and discussed in the opinion provided to the ACT Government Solicitor by Stephen Gageler, Selborne Chambers, 'In the Matter of Constitutional Issues Concerning Preventative Detention in the Australian Capital Territory', 26 October 2005, accessible at <http://www.chiefminister.act.gov.au/docs/Gageler_advice_261005.pdf>. See also Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, p50

⁷⁸ Submission no 5, p11; Attorney-General's Department, *Proof Transcript of Evidence*, Canberra, 31 January 2006, pp25–27, referring to s34VAA of the *Australian Security Intelligence Organisation Act 1979*(Cth) and para 18(k)(vi) of the exposure draft bill

⁷⁹ Submission no 20, also attaching F Wheeler, 'The *Kable* Doctrine and State Legislative Power Over State Courts' (2005) 20 *Australasian Parliamentary Review* 15–30

uncertain in scope. Thus, it remains unclear whether cl 19 would be constitutionally valid. In particular, the modern High Court has not had to consider whether (and, if so, under what conditions) Australian Courts can be validly empowered to issue preventative detention orders on national security or ‘terrorism’ grounds. The facts of *Kable’s Case* and *Fardon’s Case* both concerned detention to prevent an anticipated breach of the general criminal law.

Although this submission focuses on the validity of cl 19 of the Draft Bill, a further question arises whether cll 63 and 70 — which empower the Supreme Court of the ACT and the Magistrates Court to issue preventative authorisation orders and investigative authorisation orders — may also potentially infringe the *Kable* doctrine. Again, given the uncertain scope of the doctrine, it is unclear whether these clauses would be constitutionally valid.

- 1.52 Dr Wheeler noted that the *Kable* doctrine applies to Territory courts.⁸⁰
- 1.53 The legal adviser to the Committee acting as a scrutiny of bills and subordinate legislation Committee, Mr Peter Bayne, also provided an advice to the Committee elaborating the *Kable* issues. This will be summarized in the Scrutiny Committee’s report on the bill after it has been introduced to the Assembly.
- 1.54 In *Kable’s case*, the High Court found that a New South Wales Act that empowered the Supreme Court of New South Wales to make a preventative detention order was invalid. The Act was directed at a specified individual and purported to confer upon the court a function which substantially impaired its institutional integrity, and which was incompatible with its role as a repository of federal jurisdiction.
- 1.55 The ACT Attorney-General has advised the Committee that in his view the *Kable* doctrine has limited application and that the separation of powers does not apply to a Territory court. In Mr Stanhope’s view, the procedures and safeguards in the Bill are consistent with the proper exercise of judicial power in the Territory. Mr Stanhope said he was unable to release the joint opinion of

⁸⁰ citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* [2004] HCA 31 (17 June 2004)

the Solicitors-General, which in any event, was less relevant to the model adopted in the proposed bill.⁸¹

- 1.56 In *Fardon v Attorney-General for the State of Queensland*⁸² a majority of the High Court⁸³ upheld a provision of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) which empowers a State court to order the continuing detention of persons convicted of serious sexual offences after the expiry of their sentence where there is an ‘unacceptable risk’ of the prisoner committing a serious sexual offence in the future. The legislation had been challenged on the basis that the Queensland Parliament had conferred on the Supreme Court a function incompatible with the Court’s ‘institutional integrity’ as a court, and as a potential repository of federal jurisdiction.
- 1.57 In *Fardon’s* case various factors were assessed when determining the validity of the legislation. These included –
- that the Act was a general law (or a law applicable to a class of person)⁸⁴ authorising preventative detention in the interests of community protection⁸⁵ and was not directed at a particular person⁸⁶
 - the legislation authorised the Supreme Court to act in a manner which was consistent with its judicial character, including that the issue be decided on its merits⁸⁷ and the reasons be made public⁸⁸

⁸¹ Letter from the Attorney-General, Mr Jon Stanhope MLA to the Committee Chair, Mr Bill Stefaniak, dated 14 February 2006, concerning the constitutionality of the proposed Terrorism (Extraordinary Temporary Powers) Bill 2005

⁸² [2004] HCA 46(1 October 2004), accessible at
<http://www.austlii.edu.au/au/cases/cth/high_ct/2004/46.html>

⁸³ Gleeson CJ, McHugh J, Gummow J (with Hayne J agreeing with Gummow J except re possible validity of federal preventative detention legislation), Callinan and Heydon JJ (joint judgement) upholding a decision of the Queensland Court of Appeal. Kirby J dissented referring to the unreliability of predictions of future violence, freedoms protected under the Constitution, punishment for beliefs and future crimes which fell outside of the narrow area of permitted executive interference with personal liberty (citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 71 per McHugh J)

⁸⁴ For Gummow J the fact that the legislation applied to persons already convicted of offences (prisoners) where there was an unacceptable risk that the offences would be committed again was significant – paras 108, 112. See also Callinan and Heydon JJ para 233

⁸⁵ Per Gleeson CJ, para 19; McHugh J para 44

⁸⁶ Per McHugh J, para 34

⁸⁷ Per Gleeson CJ, para 19; McHugh J, para 34 (emphasising the need for judicial power to be exercised)

⁸⁸ Per McHugh J, para 44, Callinan and Heydon JJ para 230

- the legislation conferred a substantial judicial discretion as to whether an order should be made, by reference to a specified criteria ('unacceptable risk' of serious danger to the community), and if so, the type of order⁸⁹
- the onus of proof was on the crown⁹⁰, which had to establish 'unacceptable risk' to a 'high degree of probability'⁹¹
- the rules of evidence applied⁹²
- the legislation imposed a duty of disclosure equivalent to that on a prosecutor in a criminal trial⁹³
- there was a right of appeal⁹⁴ and genuine periodic review of judicial orders made under the legislation⁹⁵
- hearings were to be conducted in public and in accordance with the ordinary judicial process,⁹⁶ and are 'not a disguised substitute for an ordinary legislative or executive function'.⁹⁷ Gummow J referred to open and public enquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as relevant to the right or liability in issue, the identification of the relevant law and the application of the law to the facts⁹⁸
- the court could not be seen as a mere instrument of government policy⁹⁹
- courts should not decline to implement the provisions of a statute on the ground of objection to its legislative policy. That could damage public confidence in the impartiality of the judiciary¹⁰⁰ and the institutional integrity of the Supreme Court¹⁰¹

⁸⁹ Per Gleeson CJ para 19; McHugh J paras 34, 44; Gummow J para 109, Callinan and Heydon JJ para 227

⁹⁰ Per Gleeson CJ, paras 6, 19, 34

⁹¹ Per McHugh J para 34, Gummow J para 97, Callinan and Heydon JJ para 223

⁹² Per Gleeson CJ para 19, McHugh J paras 34, 44, Gummow J para 97, Callinan and Heydon JJ para 221

⁹³ Per Gummow J, para 94

⁹⁴ Per Gleeson CJ para 19, Callinan and Heydon JJ para 232

⁹⁵ Per Gummow J paras 110, 113; Callinan and Heydon JJ para 231

⁹⁶ Per Gleeson CJ para 19 (cf paras 41–42), Gummow J para 115, Callinan and Heydon JJ para 234 (cf. Kirby J paras 148, 162–3, 175–6)

⁹⁷ Per McHugh J, para 34. See also Gummow J para 91, 116; McHugh J, paras 34, 42, 44, Gummow J para 107

⁹⁸ Gaudron J in *Re Nolan ex p. Young* (1991) 172 CLR 460, quoted with approval by Gummow J, who referred also to Deane J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 – paras 92, 115 – for whom the application of the Act to prisoners and annual reviews of continuing orders together supported the maintenance of the institutional integrity of the Supreme Court – para 114

⁹⁹ Per Gleeson CJ, para 19; Per McHugh J, paras 34, 42, 44, Gummow J para 107

¹⁰⁰ Per Gleeson CJ para 23, Gummow J para 102 referred to the perception of declining public confidence in the institutional integrity of state courts as an indicator, but not the touchstone, of

- the person to be detained had a right to appear at the hearing.¹⁰²
- 1.58 Several members of the High Court distinguished the *Kable's case* in *Fardon*. McHugh and Gummow JJ (with Hayne J agreeing) described *Kable* as being of very limited application because of its unique political context.¹⁰³ Callinan and Heydon JJ distinguished *Kable* on the facts, because the legislation at issue did preserve the essential hallmarks of a judicial process, unlike in *Kable*.¹⁰⁴ Kirby J found the *Kable* principle applicable.¹⁰⁵ The *Kable* doctrine was also held inapplicable in *Baker v The Queen*.¹⁰⁶
- 1.59 According to Dr Wheeler, and several other commentators,¹⁰⁷ there continues to be uncertainty about the constitutional validity of Commonwealth, State and Territory preventative detention under anti-terrorism laws. The Victorian Joint Parliamentary Scrutiny of Acts and Regulations Committee recently considered the constitutionality of counterpart Victorian legislation¹⁰⁸ and noted that *Fardon's case*, by majority, held that state legislation will not infringe Chapter III of the Constitution provided it protects genuine adjudicative processes, cannot act as the alter ego of the executive or legislature, and its integrity and independence is not compromised.¹⁰⁹
- 1.60 While the Committee cannot resolve the constitutionality issue, its preliminary view is that the provisions of the proposed legislation do not appear to compromise the judicial integrity of the court. Mr Stefaniak noted that because of the uncertainty in relation to this constitutional issue it was better to err on the side of caution, and to propose amendments to the interim preventative detention provisions. For 7 or 14-day preventative detention orders each of the

invalidity; the latter being institutional integrity

¹⁰¹ Per Gummow J para 117

¹⁰² Per Gummow J, para 94

¹⁰³ Per McHugh J paras 33–4, 43

¹⁰⁴ Callinan and Heydon JJ paras 219–233

¹⁰⁵ on 5 grounds – Kirby J para 148

¹⁰⁶ (2004) 210 ALR 1

¹⁰⁷ See for example 'Bracks reconsiders terror laws', accessible at

<<http://www.theage.com.au/news/national/bracks-reconsiders-terror-laws/2005/10/25/1130006095354.html>> and 'Beattie warns terrorism laws unconstitutional',

<<http://www.abc.net.au/news/newsitems/200510/s1489783.htm>>

¹⁰⁸ Terrorism (Community Protection) Amendment Bill 2005 (Vic)

¹⁰⁹ Parliament of Victoria, Parliamentary Scrutiny of Acts and Regulations Committee *Alert Digest No 1 of 2006*, accessible at <<http://www.parliament.vic.gov.au/sarc/2006alerts/06alt1.htm>>

Fardon factors noted above is satisfied except for the threshold tests and standard of proof, the scope of judicial discretion (which is more limited here). These limitations are justifiable, as discussed below.

1.61 The Committee notes that most jurisdictions confer powers on the Supreme Court to issue preventative detention orders, but police officers can issue police orders and interim orders in some jurisdictions where it is urgent and impractical to apply to a court –

- In NSW, the Supreme Court can make interim and final preventative detention orders.¹¹⁰
- In Tasmania orders can be made by the Supreme Court, or in urgent cases or where it is not reasonably practicable for an application to be made to the Supreme Court, by a senior police officer.¹¹¹
- In Western Australia the Commissioner of Police can issue a Commissioner's warrant with the prior approval of a Supreme Court judge, but if there is an urgent need and a judge cannot be contacted, the Commissioner can issue the warrant without that approval.¹¹²
- In Victoria the proposed legislation provides for urgent 24-hour *ex parte* orders (ie in the absence of the proposed detainee) issued by senior police officer, interim orders for up to 48 hours issued *ex parte* by the Supreme Court, and 14-day and other contact orders issued by the Supreme Court *inter partes*.¹¹³
- In contrast, under Commonwealth legislation, a senior member of the AFP can make 24-hour orders. A retired judge or a serving judge, Federal Magistrate or senior Administrative Appeals Tribunal member acting in their personal capacity (i.e. *persona designata*) can make continued orders.
- In Queensland also, interim Preventative Detention Orders can be made by senior police officers; and judges and former judges of the Queensland Supreme Court appointed by the Minister under the Act can make final orders.¹¹⁴

1.62 The Committee considers it important that an appropriate degree of judicial oversight – that of the Supreme Court – is available for preventative detention hearings, rather than to confer powers on non-judicial officers or the Magistrates Court. Various stakeholders in the legal profession and/or with

¹¹⁰ s26H, 26I *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW)

¹¹¹ *Terrorism (Preventative Detention) Act 2005* (Tas), ss5, 7

¹¹² *Terrorism (Extraordinary Powers) Act 2005* (WA), s7

¹¹³ *Terrorism (Community Protection) (Amendment) Bill 2005* (Vic)

¹¹⁴ See s7 *Terrorism (Preventative Detention) Act 2005* (Qld)

human rights expertise, share this view.¹¹⁵ The Chief Executive Officer of the Legal Aid Office (A.C.T.), Mr Chris Staniforth, welcomed the proposed role for the Supreme Court, noting that if detention proceedings could be initiated in the Magistrates Court, decisions would likely be tested in a superior court, thereby removing any savings in money and time that might have accrued if the matter had first been heard in the Magistrates Court.¹¹⁶ The ACT Human Rights Office supported giving jurisdiction to the ACT Supreme Court because of its special role under the Human Rights Act, the sensitivity and significance of the issues likely to arise in hearings under the proposed legislation, and the need for appropriate and tailored procedures.¹¹⁷

- 1.63 The Committee notes the Human Rights Commissioner's comment that the ACT Supreme Court is well able to respond to urgent applications.¹¹⁸
- 1.64 The Committee notes further that the ACT Supreme Court is required to interpret *all* ACT legislation through the lens of the *Human Rights Act 2004* (A.C.T.), so the prospect of its institutional integrity being compromised by this proposed legislation is more remote than in other jurisdictions.
- 1.65 There is uncertainty about the constitutionality and human rights proportionality of *interim* preventative detention orders however. This arises from various considerations. One is the *Kable* doctrine noted above, and the concern that interim orders can be issued *ex parte*, which may compromise the institutional integrity of the court. Chief Justice Higgins of the ACT Supreme Court commented in a judgement in December 2005 on the importance of the separation of powers in the A.C.T., and the need for legislation not to compromise the institutional integrity of the court. Higgins CJ noted, in view of the *Human Rights Act 2004* (A.C.T.), the importance of persons having access to a 'competent, independent and impartial' tribunal for a 'fair and public hearing' before a final order is made. An order issued in the absence of a person was

¹¹⁵ Submissions no 1, 10, 11, 16, 17, 18; Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p2; ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p11; Ms McKinnon, *Proof Transcript of Evidence*, 31 January 2006, p57; ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p14

¹¹⁶ Submission no 1

¹¹⁷ Submission no 10

¹¹⁸ *Proof Transcript of Evidence*, 31 January 2006, p11

quashed in that case.¹¹⁹

- 1.66 According to the ACT Human Rights Office, detention orders made *ex parte* would be a proportionate response where the person is likely to evade the court if notice of the hearing was provided. Clause 21 of the proposed legislation was consistent with this approach.¹²⁰

Limitations under the *Australian Capital Territory (Self-Government) Act 1988 (Cth)*

- 1.67 There may be some additional uncertainty in relation to some of the provisions of the proposed legislation because –
- the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* excludes from the scope of Territory legislative power ‘the provision by the AFP of police services in relation to the Territory’¹²¹
 - of the *Kable* doctrine, discussed above.
- 1.68 Current police services in the ACT are governed by the ‘Arrangement between the Minister for Justice and Customs of the Commonwealth and the Australian Capital Territory for the Provision of Police Services to the Australian Capital Territory’, made pursuant to the *Australian Federal Police Act 1979 (Cth)*.¹²²
- 1.69 The legal opinion provided to the ACT Government by Stephen Gageler SC¹²³ concluded that paragraph 23(1)(c) of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* does not restrict the Legislative Assembly from conferring substantive or procedural powers on AFP officers, and merely prevents the ACT from legislating for ‘police services’. This conclusion was

¹¹⁹ *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (2 December 2005)

<<http://www.courts.act.gov.au/supreme/judgments/si%20bhnf%20cc%20v%20ks%20bhnf%20is.htm>>

¹²⁰ Submission no 10

¹²¹ para 23(1)(c)

¹²² subsection 8(1A)- The Minister and the Australian Capital Territory may enter into arrangements for the provision of the police services in relation to the Australian Capital Territory that are in respect of Territory functions as defined by section 3 of the *A.C.T. Self-Government (Consequential Provisions) Act 1988*, and, where the arrangements have been entered into, the provision of those services shall be in accordance with the arrangements. ‘Territory functions’ include ‘law and order’: s3 *ACT Self-Government (Consequential Provisions) Act 1988 (Cth)*, s37 and Schedule 4, *Australian Capital Territory (Self-Government) Act 1988 (Cth)*

¹²³ Opinion provided to the ACT Government Solicitor by Stephen Gageler, Selborne Chambers, ‘In the Matter of Constitutional Issues Concerning Preventative Detention in the Australian Capital Territory’, 26 October 2005, accessible at
<http://www.chiefminister.act.gov.au/docs/Gageler_advice_261005.pdf>

based on the definition of ‘police services’ in the *Australian Federal Police Act 1979* (Cth)¹²⁴ and paragraph 9(1)(b) of that Act which authorises the police to exercise powers and perform duties conferred or imposed by or under any law (including the common law) of the Territory.¹²⁵

- 1.70 A Federal Court judge has described the provisions of these Acts in relation to the powers that members of the AFP can exercise as ‘not particularly helpful’. Justice Emmett said that AFP functions include ‘the prevention of crimes and associated activities such as the investigation of complaints about the commission of crimes with a view to the identification of offenders’.¹²⁶ The unique nature of the arrangements for policing in the ACT was also discussed in *Lissner v Commonwealth & Ors* where Master Connolly declined to strike out an application by the ACT that it be removed as a party to the action because it could not be held liable in damages for an action done by the AFP.¹²⁷
- 1.71 The Committee is well aware of the importance of AFP services in relation to the A.C.T., and the need for the democratically-elected and accountable ACT Legislative Assembly to be involved in governance arrangements for ACT policing. The Committee notes that section 9 of the *Australian Federal Police Act* was enacted in 1979 before the *Australian Capital Territory (Self-Government) Act 1988* (Cth), and queries whether it is consistent with the provisions of the *Self-Government Act* denying the Territory legislative power to legislate for police services.
- 1.72 The Committee considers that it is timely for paragraph 23(1)(c) of the *ACT Self-Government Act* to be reviewed so that the Assembly is not prevented from legislating for matters concerned with the provision of police services in the A.C.T..

RECOMMENDATION 3

¹²⁴ s4 of that Act defines ‘police services’ as including ‘services by way of the prevention of crime and the protection of persons from injury or death, and property from damage, whether arising from criminal acts or otherwise’

¹²⁵ when performing functions in the Australian Capital Territory—the powers and duties conferred or imposed on a constable or on an officer of police by or under any law (including the common law) of the Territory

¹²⁶ *O’Malley v Keelty, AFP Commissioner* [2004] FCA 1688, paras 5–6

¹²⁷ [2002] ACTSC 53 (7 June 2002)

The Committee recommends that the ACT Government seek further legal advice and consult with the Australian Government Minister for Justice and Customs in relation to the provisions in the proposed legislation which might be interpreted as pertaining to ‘the provision by the Australian Federal Police of police services in relation to the Territory’.

RECOMMENDATION 4

The Committee recommends that the ACT Government request the Australian Government to review paragraph 23(1)(c) of the *Australian Capital Territory (Self-Government) Act 1988* (A.C.T.).

Meaning of ‘terrorist act’

- 1.73 In the proposed legislation, the definition of ‘a terrorist act’ is substantially the same in content as that in the *Criminal Code Act 1995* (Cth), but structured differently.¹²⁸ The proposed statutory definition was welcomed in some submissions,¹²⁹ while others sought to extend exemptions under it. One submission commended the bill for not defining or linking detention to terrorist organisations.¹³⁰
- 1.74 A terrorist act is defined as an act that does any of the following to a person or property wherever situated¹³¹ –
- causes ‘serious harm’¹³² that is physical to a person
 - causes serious damage to property
 - causes a person’s death
 - endangers the life of someone other than the person doing the act
 - creates a serious risk to the health or safety of the ‘public’¹³³
 - seriously interferes with, seriously disrupts or destroys an electronic system¹³⁴

¹²⁸ s100.1, noted in submission no 13

¹²⁹ Submissions no 17, 18

¹³⁰ Submission no 13

¹³¹ ie whether in or outside the ACT (including outside Australia) – sub-cl 6(3)

¹³² serious harm means any harm (including the cumulative effect of more than 1 harm) that endangers, or is likely to endanger, human life; or is, or is likely to be, significant and longstanding – incorporating the Criminal Code Act 2002 dictionary definition

¹³³ public is defined as including the public or any section of the public of a state, another territory or a foreign country

¹³⁴ ‘electronic system’ is defined as including an information system; a telecommunications system; a

when done with the intention of advancing a political, religious or ideological cause¹³⁵ *and* with the intention of coercing, or influencing by intimidation the government of the Territory, the Commonwealth, a state, another Territory or a foreign country (or part of a state, another Territory or a foreign country) or intimidating the public.¹³⁶

- 1.75 Advocacy, protest, dissent or industrial action is not a terrorist act if it is done *without* intent to cause serious physical harm to a person, or the death of a person, or to endanger the life of someone other than the person doing the act, or to create a serious risk to the health or safety of the public.¹³⁷
- 1.76 This means that advocacy, protest, dissent or industrial action *can be* a terrorist act if it does not fall within sub-clause 6(2), and it causes serious physical harm to a person, serious damage to property, causes a person's death, endangers the life of someone other than the person doing the act, creates a serious risk to the health or safety of the public or seriously interferes with, disrupts or destroys an electronic system *and* the act was done with the intention of advancing a political, religious or ideological cause *and* with the intention of coercing or influencing by intimidating a government or intimidating the public.¹³⁸
- 1.77 The National Tertiary Education Union requested an amendment to the definition of 'terrorism', which would have extended the exemption for advocacy, protest, dissent or industrial action to include academic work.¹³⁹ The Committee does not regard this as necessary as the other definitional requirements in clause 6 would already exclude legitimate academic and other research from the definition of terrorism.
- 1.78 The bill proposes that its functions in relation to terrorist acts may be exercised whether the terrorist act has been, is being, or is likely to be carried out in or outside the ACT (including outside Australia).¹⁴⁰

financial system; a system used for the delivery of essential government services; a system used for, or by, an essential public utility; a system used for, or by, a transport system: sub-cl 6(4)

¹³⁵ 'public' includes the public (or any section of the public) of a State, another Territory or a foreign country: sub-cl 6(4)

¹³⁶ cl6, emphasis added

¹³⁷ sub-cl 6(2)

¹³⁸ cl6

¹³⁹ NTEU, *Proof Transcript of Evidence*, 1 February 2006, p2

¹⁴⁰ cl7

- 1.79 A global definition for ‘terrorist act’ is currently being negotiated in a draft United Nations (UN) Comprehensive Convention on International Terrorism and has not yet been agreed.¹⁴¹ Should that definition differ substantially from this definition, amendments may be necessary should the Australian Government wish to ratify that Convention.

Proscribed terrorist organisations

- 1.80 As at February 2006, the Australian Government had proscribed 19 terrorist organisations including Al Qa’ida, Jemaah Islamiyah, Abu Sayyaf Group, Jamiat ul-Ansar (JuA), the Armed Islamic Group, and Salafist Group for Call and Combat/GSPC.¹⁴²
- 1.81 Whilst the exposure draft bill does not deal with organisations as such, the Committee appreciates the concerns expressed by the Canberra Islamic Centre, that only Muslim organisations are proscribed under the Australian Government’s Criminal Code and that Muslims have been the subject of more terrorist-related investigations than other ethnic groups.¹⁴³
- 1.82 The ACT Human Rights Office also expressed concerns about the current anti-terror regime impacting disproportionately on Muslims, and it warned against racial profiling in the administration of the Act.¹⁴⁴ The ACT Law Society said that some sections of the community appeared to be marginalised and stereotyped under this type of legislation, with the religious and cultural divide evidenced by events on Sydney beaches in December 2005.¹⁴⁵
- 1.83 The Committee is well aware that most people, irrespective of their religious convictions, condemn terrorism. The fact that Muslim organisations have been listed as terrorist organisations in no way implicates Muslims who do not support *jihad* through terrorist activities, and who are valued members of the

¹⁴¹ See work of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 on Measures to eliminate international terrorism, accessible at <<http://www.un.org/law/terrorism/>>

¹⁴² See Criminal Code Regulations 2002, Statutory Rules 2002 No. 67

¹⁴³ Submission no 12

¹⁴⁴ Submission no 10; *Proof Transcript of Evidence*, 31 January 2006, p12

¹⁴⁵ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, pp21-22

Australian community.¹⁴⁶ The Canberra Islamic Centre noted in evidence that local Muslims have good relations with the ACT Government and community police.¹⁴⁷ The ACT Attorney-General also emphasised that he regularly engaged with Muslim groups in the ACT and had a 'genuine commitment to stand with them in solidarity'.¹⁴⁸ Another witness suggested that Australia's diverse cultural communities were 'in the front line of our defence against terrorism' and that more resources should be dedicated to building positive alliances.¹⁴⁹

1.84 The Committee notes that while other organisations advocating violence do appear to be active in Australia, the Australian Government legislation is not discriminatory. Groups fulfilling the legal definition of terrorist organisation can be proscribed, but other organisations found to be 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)' can also be caught by the legislation if prosecuted for activities that are found to be terrorist activities by a court. This is an open-ended, non-discriminatory definition.¹⁵⁰

1.85 The Committee is aware of concern in the broader Australian community about extremist groups such as the Citizens Electoral Council and Ku-Klux-Klan. Neo-Nazi groups were implicated in the December 2005 riots in Cronulla.¹⁵¹ The Committee assumes that Australia's intelligence and law enforcement agencies continue to monitor these groups to assess whether any application of counter-terrorism legislation is warranted.

RECOMMENDATION 5

The Committee recommends that the ACT Government should request that the

¹⁴⁶ AFP, *Proof Transcript of Evidence*, 31 January 2006, p50

¹⁴⁷ Mr Wood, *Proof Transcript of Evidence*, 31 January 2006, p76

¹⁴⁸ *Proof Transcript of Evidence*, 1 February 2006, p66

¹⁴⁹ NTEU, *Proof Transcript of Evidence*, 1 February 2006, p8

¹⁵⁰ See Division 102 of the *Criminal Code Act 1995* (Cth). The relevant definition refers to an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or an organisation that is specified by the regulations for the purpose.

¹⁵¹ D. King, 'Far-right groups admit to role', *The Australian*, 13 December 2005, p.4; 'Extremist groups', *NSW Legislative Assembly Hansard*, 25 June 2001, p.15179; K. Marks, 'A town like Malice', *European Network for Indigenous Australian Rights: News*, 23 May 2001; A. Indikt, Editorial Taking Extremism Seriously', *Australia/Israel and Jewish Affairs Council Review*, April 1999

Australian Government review the list of terrorist organisations proscribed under the *Criminal Code 1995* (Cth) to ensure that all relevant terrorist organisations are listed, and not only those of predominantly Muslim membership.

RECOMMENDATION 6

The Committee recommends that the ACT Government develop specific strategies to engage with people, particularly youth, who may potentially be marginalized by these laws.

2 PREVENTATIVE DETENTION ORDERS

Interim preventative detention orders

- 2.1 The proposed legislation enables an interim preventative detention order to be applied by the ACT Supreme Court to a person for up to 24 hours, which can be extended for up to another 24 hours.¹⁵² The court may issue an interim order *ex parte*¹⁵³ if satisfied on reasonable grounds that the person is not in custody or being detained, that detaining the person pending a hearing is reasonable and necessary to prevent a terrorist act or to preserve evidence of or relating to a terrorist act, and is satisfied of other matters mentioned below.
- 2.2 The reasons for the decision must be given when the order is made.¹⁵⁴ The person being detained (or their representative) need not have been served with a copy of the application, nor been given any notice of the place, date and time of the hearing for such an order to be issued.¹⁵⁵ As soon as possible after the person has been detained under an interim detention order the detaining police officer must give the person a copy of the application and written notice of the place, date and time of the resumed hearing.¹⁵⁶
- 2.3 The requirement that even applications for interim detention orders be considered by the ACT Supreme Court was welcomed by some stakeholders as an important human rights safeguard.¹⁵⁷
- 2.4 The AFP¹⁵⁸ and Australian Government's Attorney-General's Department expressed concern that the exposure draft bill does not require that information which is likely to prejudice 'national security' (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*

¹⁵² cl13, 21, 24

¹⁵³ sub-cl 21(6)

¹⁵⁴ para 21(5)(a)

¹⁵⁵ sub-cl 21(1), (4)

¹⁵⁶ sub-cl 21(7)

¹⁵⁷ *Proof Transcript of Evidence*, 31 January 2006, p57

¹⁵⁸ Submission no 15

(Cth))¹⁵⁹ to be excluded from the information given to a detainee about their detention. New South Wales or Commonwealth Criminal Code provisions were suggested as a model.¹⁶⁰ The Victorian Legislative Assembly recently adopted similar provisions.¹⁶¹ The reason for the requested amendment was that if a detainee were to be given all the information underpinning an application for detention, this could deter potential informers who could justifiably fear retribution.¹⁶²

- 2.5 The Australian Privacy Foundation noted the importance of a detainee being given information about the reasons for their detention.¹⁶³
- 2.6 Detention under an interim order is only for 24 hours (unless extended for up to an additional 24 hours) and judicial review is available. Whilst detention may lead to social stigma and distress amongst relatives and friends who become aware of the detention, the provisions of the exposure draft bill appear to comply with the standards considered appropriate by the UN Human Rights Committee in General Comment No 8. These are that the preventative detention must not be arbitrary, and must be based on grounds and procedures established by law, the reasons for the detention must be given, there must be court control of the detention, and compensation for breach of the provisions. If criminal charges are later laid, the full protection of the relevant human rights standards must be available.¹⁶⁴
- 2.7 As a preliminary comment on human rights compliance, the Committee notes that the bill provides for grounds and procedures established by law, and information about the reasons (which are prescribed in detail in the proposed

¹⁵⁹ ie Australia's defence, security, international relations or law enforcement interests (s8)

¹⁶⁰ Submission no 15, and correspondence from the Australian Government Attorney-General's Department dated 6 February 2006 responding to questions arising during the public hearing — referring to Commonwealth Criminal Code sections 105.7(2A), 105.8(6A), 105.11(3A), 105.12(6A), 105.52(4), and 105.52(6) and sections 26J(2) and 26P of the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW)

¹⁶¹ Victorian Parliament, Legislative Assembly, *Terrorism (Community Protection) (Amendment) Bill*, cl13ZA2

¹⁶² Submission no 19; *Proof Transcript of Evidence*, 31 January 2006, pp24, 26. See s26J(2) of the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005*(NSW) and ss23(4) of the *Terrorism (Preventative Detention) Act 2005*(Qld)

¹⁶³ Submission no 8

¹⁶⁴ ICCPR General Comment 8 (Sixteenth session, 1982), Article 9: Right to liberty and security of persons, UN Doc A/37/40 (1982)

legislation) for the detention must be given both to the person detained, and to the Supreme Court judge issuing the order. There is court control of the detention. Compensation is available in the case of a breach of the prescribed procedures. These issues, and the other safeguards in the bill that prevent the detention from being ‘arbitrary’ under human rights law, are discussed in more detail below.

Preventative detention orders

- 2.8 The proposed legislation will allow a person who is not a child¹⁶⁵ to be taken into custody and detained for 7 days, with the possibility of a 7-day extension following submission of specified information to the court’s satisfaction,¹⁶⁶ under a preventative detention order.¹⁶⁷ This is proposed as a measure of last resort to prevent a terrorist act that is expected within that period of time or to preserve evidence of, or relating to, a terrorist act that happened within the previous 28 days.
- 2.9 Subject to proposed restrictions on the maximum period of time persons can be detained under preventative detention orders, a preventative detention order can be applied for after an interim preventative detention order has been issued; to extend or further extend a preventative detention order; or after the making of a corresponding preventative detention order.¹⁶⁸
- 2.10 A preventative detention order based on the same information used as a basis for an earlier detention order may be issued within 7 days of the first order lapsing because the person has been released from preventative detention, if the person has been detained under the *Crimes Act 1914* (Cth) in relation to an offence against the Commonwealth *Criminal Code*, part 5.3 (Terrorism); or the *Australian Security Intelligence Organisation Act 1979* (Cth), part 3, division 3 (Special powers relating to terrorism offences).¹⁶⁹
- 2.11 The Committee regards the provisions dealing with these time-frames to be

¹⁶⁵ cl11. Under the Legislation Act dictionary ‘child’, if age rather than descendency is relevant, means an individual who is under 18 years old

¹⁶⁶ cls 25, 26

¹⁶⁷ sub-cl 13(2), para 13(1)(b)

¹⁶⁸ para 12(4)(c), sub-cl 7

¹⁶⁹ sub-cl 12(7)

unnecessarily complex and difficult to understand, as do members of the ACT legal profession. The ACT Law Society, for example, said that 'the provisions as to the duration of orders are incomprehensible',¹⁷⁰ and that the Office of Parliamentary Counsel should re-draft clauses 12 and 13.¹⁷¹ The Committee agrees that the clauses should be drafted more clearly.

RECOMMENDATION 7

The Committee recommends that Parliamentary Counsel re-draft clauses 12–14 of the draft bill so that their meaning is clearer.

RECOMMENDATION 8

The Committee recommends that people detained pursuant to the proposed legislation be detained in the ACT wherever possible. Where detention in the ACT is not possible, the reasons for this must be expressed in the application for the preventative detention order.

2.12 The Committee notes that the report of the NSW Legislative Council's Legislation Review Committee on the Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005 (NSW) questioned the need for that Bill's 14-day preventative detention period.¹⁷² The Australian Muslim Civil Rights Advocacy Network suggested that the maximum detention be five days if an interim order has been issued.¹⁷³ Another submission suggested that if a preventative detention order is issued to preserve evidence, the legislation should require that the analysis of evidence be required to proceed with due diligence so that people are not detained for an unnecessarily long time, as provided for in the UK *Terrorism Act 2000*.¹⁷⁴

2.13 The proposed legislation restricts the ability of law enforcement officials to

¹⁷⁰ Submission no 11

¹⁷¹ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p14, 15

¹⁷² See Legislation Review Committee Digest No 15 of 2005, accessible at <http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/0/79A01AA5B58E8F0ACA2570C800135F54>

¹⁷³ Submission no 6

¹⁷⁴ Submission no 16; *Proof Transcript of Evidence*, 31 January 2006, p58

obtain multiple preventative detention orders. If a preventative detention order has been made for a person under ACT law or under corresponding Commonwealth or state or territory law,¹⁷⁵ another preventative detention order cannot be applied for to prevent the same possible terrorist act within that period, or based on the same information.¹⁷⁶ However another preventative detention order may be applied for to preserve evidence of or relating to a terrorist act that has occurred,¹⁷⁷ or in relation to a different terrorist attack, if information about that became available only after an order has been made in relation to the other expected attack.¹⁷⁸ But if the basis for a current preventative detention order is the preservation of evidence another order cannot be issued on that basis during the currency of that order.¹⁷⁹ The proposed provisions would not prevent the exercise of powers under other ACT or Australian Government legislation however.

Questioning in detention

- 2.14 Persons detained under preventative detention orders may only be questioned for very limited purposes, such as verification of identity, ensuring the person's safety and wellbeing and allowing the person to contact people in accordance with the legislation.¹⁸⁰ Such questioning must be video or audio-recorded, and a copy of the recording retained for at least one year.¹⁸¹ A maximum penalty of 200 penalty units or imprisonment for two years or both can apply to a breach of this prohibition,¹⁸² and any answers or other thing obtained directly or indirectly from questioning would not be admissible in evidence against the person in a civil or criminal proceeding.

- 2.15 This restriction on questioning is an important safeguard for the detainee as it

¹⁷⁵ the Commonwealth Criminal Code division 105 or state or territory legislation declared by regulation to be a corresponding preventative detention law: cl9

¹⁷⁶ cl12, sub-cl 12(6)

¹⁷⁷ sub-cl 12

¹⁷⁸ sub-cl 12(2)

¹⁷⁹ sub-cl 12(3)

¹⁸⁰ cls 8, 55

¹⁸¹ sub-cl 55(3), (4)

¹⁸² sub-cl 55(2). The *Legislation Act*, s133 deals with the meaning of offence penalties that are expressed in penalty units. If the person charged is an individual— each penalty unit is \$100; or if the person charged is a corporation— each penalty unit is \$500

protects the privilege against self-incrimination, which is a common law principle and a fundamental human right.¹⁸³ Several witnesses mentioned that there should be a positive obligation in the legislation to inform detainees of their right to silence, and that a prohibition on the use of covert surveillance and informers during detention should be included in the bill.¹⁸⁴ The AFP agrees that the absence from the proposed ACT legislation of some of the safeguards in Australian Government law prohibiting the use of information derived from covert surveillance,¹⁸⁵ 'creates uncertainty about how the information is to be treated'.¹⁸⁶

- 2.16 The *Anti-Terrorism Act (No 2) 2005* (Cth) prohibits a member of the AFP, or an officer or employee of the ASIO, from questioning a person while the person is being detained under an order made under a corresponding State preventative detention law, which includes ACT law. A contravention of this subsection may be an offence under section 105.45 of the Act.¹⁸⁷ However the exposure draft bill provisions would not prevent a detainee released from a preventative detention order from being detained under Commonwealth law and questioned, in accordance with procedures under that other legislation.¹⁸⁸
- 2.17 Persons falling within the legislation need to be detained but also to be available to assist with legitimate investigations under other Acts which have appropriate safeguards in place in relation to questioning practices and

¹⁸³ *Funke v France* A 256-A (1993) discussed in DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, 1995, p213. *Saunders v The United Kingdom* 19187/91 [1996] ECHR 65 (17 December 1996) and *Kansal v The United Kingdom* 21413/02 [2004] ECHR 181 (27 April 2004) noted in Steve Foster, 'Human Rights and Civil Liberties', Supplement for Period December 2002-December 2005, Longman 2003

¹⁸⁴ Prof Bronitt *et al*, *Proof Transcript of Evidence*, 1 February 2006, pp29, 33

¹⁸⁵ The AFP refers to subsection 105.38(5), 105.41(5) and (7) of the Criminal Code which provide that such communications are not admissible in any proceedings in a court and create criminal offences for situations where a police officer or interpreter monitoring contact discloses information heard during the course of lawful contact between the detainee and a lawyer

¹⁸⁶ AFP, Communication dated 13 February 2006 – response to additional questions following public hearing

¹⁸⁷ sub-s105.42(3) *Anti-Terrorism Act (No 2) 2005* (Cth). 'Corresponding State preventative detention law' means a law of a State or Territory that is, or particular provisions of a law of a State or Territory that are, declared by the regulations to correspond to Division 105 of this Act – 100.1(1) of the Criminal Code

¹⁸⁸ See cl39. Under comparable Commonwealth provisions a person can be released from preventative detention so that warrants issued under s34D of the *Australian Security Intelligence Organisation Act 1979*, or Division 4 of Part IAA, and Part IC, of the *Crimes Act 1914* can be implemented: see 105.25 and 105.26 *Anti-Terrorism Act (No. 2) 2005* - Schedule 4

procedures.¹⁸⁹ The Australian Government's Attorney-General's Department expressed concern that if a person is released from preventative detention for questioning under other legislation, the detainee may not be able to be returned to preventative detention after release because the order will have lapsed.

Disclosure

- 2.18 The exposure draft bill does not include provisions prohibiting disclosure of the fact that a person has been detained under a preventative detention order, unlike the Commonwealth Act.¹⁹⁰ The ACT Government considers this a positive aspect of the exposure draft bill.¹⁹¹ This is discussed further in the section headed 'Communication restrictions'.

Consistency across jurisdictions

- 2.19 The 27 September 2005 COAG agreement on strengthening counter-terrorism laws does not require uniform national counter-terrorism legislation. It does, however, refer to the National Counter-Terrorism Committee considering options for harmonising State and Territory legislative provisions.¹⁹² Several key stakeholders, including the AFP, advised the Committee that there should be as much consistency as possible in counter-terrorism laws across Australia, or at least in NSW, the ACT and Australian Government jurisdictions, in case there was a terrorist attack in several jurisdictions, and to prevent weaknesses in legislative regimes being exploited.
- 2.20 The AFP said that some provisions, such as those pertaining to searches of persons, and the provision of interpreter services by telephone, should be as consistent as possible. Commissioner Mick Keelty said 'The ACT stands to be an island within the rest of Australia if its legislation is not consistent with the

¹⁸⁹ *Proof Transcript of Evidence*, 31 January 2006, pp29-30, 34–35

¹⁹⁰ See sub-s105.41 Disclosure offences with exceptions under s105.36, 105.37 and 105.39

¹⁹¹ ACT Attorney-General, Mr Jon Stanhope MLA, 'Exposure Draft of Anti-Terrorism Laws', Media Release, 539/05, 15 December 2005

¹⁹² COAG Communique, 27 September 2005, accessible at <http://www.COAG.gov.au/meetings/270905/>. Ms Leon, *Proof Transcript of Evidence*, 1 February 2006, p50

other jurisdictions that surround us'.¹⁹³

- 2.21 The ACT Attorney-General, Mr Stanhope MLA, responded to the 'need for consistency' argument by saying that the proposed ACT bill was different because it complied with the human rights standards of the ACT Human Rights Act, and that it draws on the best of the provisions in the various state Acts, which are each different from each other.¹⁹⁴ He described the suggestion that terrorists would do a comparative analysis of legislative differences as 'a bit preposterous'.¹⁹⁵
- 2.22 Others agree that human rights compliance justifies jurisdictional differences as it is better to have human rights compliant legislation rather than uniform legislation,¹⁹⁶ and that terrorists are unlikely to forum shop for the most lenient counter-terrorism legislation, particularly if the attack involves suicide bombers.¹⁹⁷ Some stakeholders focussing on the human rights safeguards in the proposed ACT bill suggested that it should be the model for uniform legislation across the country.¹⁹⁸
- 2.23 Others noted that since there is a range of available legislation under which terrorist acts can be prevented, and evidence preserved, consistency is unnecessary as the ACT does not have weaker legislation overall.¹⁹⁹ Differences in legislation are an inherent feature of federal systems.²⁰⁰
- 2.24 ANU criminal lawyers suggested that the issue of jurisdictional differences was less important than mutual recognition and an ability in the legislation to transfer detainees interstate if suitable facilities are not available in the

¹⁹³ AFP, *Proof Transcript of Evidence*, 31 January 2006, p42. See also Submission no 15; Australian Government Attorney-General's Department, *Proof Transcript of Evidence*, 31 January 2006, pp23, 28, 29, 34, 35

¹⁹⁴ *Proof Transcript of Evidence*, 1 February 2006, pp41, 44, 46

¹⁹⁵ *Proof Transcript of Evidence*, 1 February 2006, p42

¹⁹⁶ ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, pp14, 17; NTEU, *Proof Transcript of Evidence*, 1 February 2006, p10

¹⁹⁷ Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, p33; Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p5; ACT Human Rights Office, 31 January 2006, p14

¹⁹⁸ Prof Charlesworth, *Proof Transcript of Evidence*, 31 January 2006, p61

¹⁹⁹ Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, p55

²⁰⁰ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p21; Prof Bronitt *et al*, *Proof Transcript of Evidence*, 1 February 2006, pp31, 32

A.C.T..²⁰¹ The Australian Privacy Foundation also queried if detainees can be transferred interstate and said that if they can, their human rights should not be diminished thereby.²⁰²

Standard of proof and threshold tests

- 2.25 The Committee notes that interim orders concern preventive detention for reasons of public security. The standard of proof is relatively low, as are the threshold tests that needs to be satisfied before a preventative detention order can be issued. The Supreme Court need only be *satisfied on reasonable grounds* of a range of serious matters, including that the person intends and has the means to carry out a terrorist act, or possesses something connected with the preparation for or carrying out of a terrorist act or has done an act in preparation for or planning a terrorist act, *and that it is reasonable, and necessary and the least restrictive option* [emphasis added] to detain the person to prevent a terrorist act within the next 14 days.²⁰³
- 2.26 Similarly, sub-clause 19(4) of the proposed ACT bill requires the senior police officer applying for the order to be satisfied ‘on reasonable grounds’ of specified matters, whereas in NSW and at Commonwealth level, the police officer need only be ‘satisfied’ of the matters.²⁰⁴
- 2.27 The AFP and Australian Government Attorney-General’s Department said that it would be preferable if the ACT bill adopted the same tests as in other counter-terrorism legislation because the AFP may be need to make detentions simultaneously in each jurisdiction. The AFP advised the Committee that

As it is currently worded, the legislation may lead to a situation in which a member of a terrorist organisation is eligible for detention in NSW but co-conspirators in the ACT cannot be detained due to the higher

²⁰¹ Submission no 13, *Proof Transcript of Evidence*, 1 February 2006, p31

²⁰² Submission no 8

²⁰³ This is an issue for clauses 17, 19, 25 and 29 of the exposure draft bill

²⁰⁴ AFP, *Proof Transcript of Evidence*, 31 January 2006, p45. See s26F *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW); 105.4 *Anti-Terrorism Act 2005* (Cth) (as incorporated in Criminal Code Act)

threshold being applied to the same set of facts/intelligence by the Court.²⁰⁵

- 2.28 The Australian Government Attorney-General's Department said that one element of the test in NSW, Qld and the Commonwealth is 'reasonably necessary', and that there is a significant difference with the test in the ACT which is reasonable *and* necessary [emphasis added]. In 'reasonably necessary', the 'reasonably' applies to 'necessary' whereas 'reasonable and necessary' means the act of detention is reasonable, but is absolutely necessary.²⁰⁶ In response to this issue, the ACT Attorney-General, Mr Stanhope, said he would take advice on the issues arising from the language 'reasonable and necessary'.²⁰⁷

'Least restrictive' detention

- 2.29 For the AFP, the difference between sub-clause 17(3) of the exposure draft bill and section 105.4 of the Criminal Code is also of concern, particularly the ACT requirement that a senior police officer must be satisfied, on reasonable grounds, that detaining the person 'is the least restrictive way of preventing the terrorist act'. The AFP prefers the Commonwealth's use of 'reasonably necessary' and 'substantially assist', arguing that these tests are less subjective and easier to measure.²⁰⁸ The AFP also prefers the Australian and New South Wales governments' tests of 'being satisfied' rather than the A.C.T.'s 'being satisfied on reasonable grounds'.²⁰⁹
- 2.30 The incorporation of the 'least restrictive' element in the proposed legislation reflects human rights proportionality considerations, because one way of testing proportionality is to ask whether there is a less restrictive way of achieving the purpose aimed at.²¹⁰

²⁰⁵ AFP, Communication dated 13 February 2006 – response to additional questions following public hearing

²⁰⁶ Submission no 19; Australian Government Attorney-General's Department, *Proof Transcript of Evidence*, 31 January 2006, pp34–35

²⁰⁷ *Proof Transcript of Evidence*, 1 February 2006, p60

²⁰⁸ Submission no 15; AFP, *Proof Transcript of Evidence*, 31 January 2006, p44

²⁰⁹ Submission no 15

²¹⁰ R v Oakes noted above; Lex Lasry QC and Kate Eastman, Anti-Terrorism Bill 2005 (Cth) and the Human Rights Act (2004) ACT: Memorandum of Advice

- 2.31 The NSW Legislative Council's Legislation Review Committee suggested that a higher standard be included in the counterpart NSW preventative detention legislation and that the criminal standard of 'beyond reasonable doubt' should apply.²¹¹ This recommendation was not taken up in the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW) however,²¹² and it is not clear whether this type of legislation will be regarded as civil or criminal. The Australian and Victorian Governments regard their counterpart legislation as civil.²¹³ If the legislation is civil, some of the rights under the Human Rights Act, such as the presumption of innocence and other rights in criminal proceedings, are not relevant.²¹⁴
- 2.32 Several law associations criticised the relatively low standard of proof in the exposure draft bill during public hearings. Australian Lawyers for Human Rights argued that the standard in the proposed ACT bill could be 'beyond reasonable doubt', or at least 'a comfortable satisfaction on the balance of probabilities' applying the long-established 'Briginshaw test.'²¹⁵ The Australian Lawyers Alliance said that given the deprivation of liberty sanctioned under the proposed legislation, the civil 'reasonableness' or 'balance of probabilities' test is insufficient.²¹⁶ The ACT Law Society said detaining people on the basis of a reasonable suspicion 'cuts right across' current legal and political culture.²¹⁷ Other lawyers welcomed the proposed test of 'satisfied on reasonable grounds' as an important provision which was better than other

²¹¹ New South Wales Parliament, *Legislation Review Committee Digest No 15 of 2005*, pp24, 28 accessible at <http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/0/79A01AA5B58E8F0ACA2570C800135F54>

²¹² See s26D. Other provisions refer to belief based on reasonable grounds

²¹³ Australian Government Attorney-General's Department, Submission to Senate Legal and Constitutional Affairs Committee (No 290A) accessible at http://www.aph.gov.au/senate/Committee/legcon_ctte/terrorism/submissions/sublist.htm; Parliament of Victoria, Parliamentary Scrutiny of Acts and Regulations Committee Alert Digest No 1 of 2006, p45 (discussing cl13ZP)

²¹⁴ ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p22

²¹⁵ *Briginshaw v Briginshaw* (1938) 60 CLR 336; Submission no 5, p9; Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, pp42, 46. The Queensland Scrutiny of Legislation Committee described the Briginshaw test as the high end of the balance of probabilities: Queensland Parliament, *Scrutiny of Legislation Committee Alert Digest*, Issue No 14 of 2005, p5

²¹⁶ *Proof Transcript of Evidence*, 31 January 2006, pp2–3, 5

²¹⁷ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p24

- jurisdictions.²¹⁸
- 2.33 The Australian Muslim Civil Rights Advocacy Network urged that the criteria for issuing preventative detention orders, particularly to preserve evidence after a terrorist attack, be ‘as stringent as possible’ to prevent a recurrence of the detention of large numbers of Muslims, as occurred in the United States following the 9/11 terrorist attacks.²¹⁹
- 2.34 The ACT Human Rights Office welcomed the additional requirement in the proposed ACT legislation that detaining the person is ‘the least restrictive way of preventing a terrorist attack’ as this would require the applicant to show why seizure of items to be used in the terrorist attack is not sufficient to prevent the act occurring.²²⁰ On the seizure of items, the National Tertiary Education Union told the Committee that the legislation should not prevent academics and journalists from retaining their documents or sources collected or obtained for legitimate teaching and research purposes.²²¹
- 2.35 The Committee appreciates that the requirement that detention be the least restrictive option, highlights the need to balance the human rights of persons to liberty and freedom of movement, with the broader community’s right to life. But the Committee notes that in the A.C.T., the AFP may be able to detain people in their community policing capacity or in the exercise of their Commonwealth powers so these differences are less material for the first 48 hours of preventative detention.
- 2.36 The reference to ‘least restrictive’ is consistent with the minimum restriction element of the proportionality test in *R v Oakes*. The Committee notes the AFP’s comments that a police officer could rarely, if ever, be satisfied that detention is the least restrictive way of preventing a terrorist act. Other activities, such as decommissioning terrorists’ transport vehicles or weapons, or substantially increasing security measures at a place or event, peace-building, or withdrawing from Iraq, may all be less restrictive preventative measures, but if there is no evidence available that these options are not

²¹⁸ Submission no 16

²¹⁹ Submission no 6

²²⁰ Submission no 10

²²¹ NTEU, *Proof Transcript of Evidence*, 1 February 2006, p2

feasible, or if the evidence would take too long to prepare, the applicant may be unable to satisfy the test.

RECOMMENDATION 9

The Committee recommends that the ‘reasonable and necessary’ element in clauses 17, 19, 21, 25 and 29 of the proposed bill be replaced with ‘reasonably necessary’, so that the test is not so onerous and consistent with other jurisdictions’ legislation.

RECOMMENDATION 10

The Committee recommends that ‘is the least restrictive way of preventing the terrorist act’ in paragraphs 17(3)(b)(ii) and 19(4)(c) of the proposed legislation be replaced with ‘substantially assists in preventing the terrorist act’.

RECOMMENDATION 11

The Committee supports uniform best practice national security legislation and recommends that the ACT Government requests that the Standing Committee of Attorneys-General develops model legislation.

Detention of young people

- 2.37 Several submissions noted that the exposure draft bill does not define ‘child’.²²² This is unnecessary as the definition of ‘child’ in the *Legislation Act 2001* (A.C.T.) would apply to the Act. That Act defines a child as a person under the age of 18 years (unless descendency is relevant).
- 2.38 The Committee is of the view that a definition specific to the bill should be included as a ‘child’ should, for the purposes of the proposed legislation, be a person younger than 16 years of age.²²³ The ACT Government advised the Committee that while this proposed legislation does not apply to young people under 18 years of age, other legislation could be used to prevent

²²² Submission no 4, 15

²²³ See Dictionary notes 1 and 2 in the Terrorism (Extraordinary Temporary Powers) Bill 2005 (ACT)

terrorist activities by children.²²⁴

- 2.39 Several submissions welcomed the minimum age of 18 years in the proposed legislation.²²⁵ Others noted that children under 18 years of age can have criminal responsibility under the general law, and said that the minimum age in the exposure draft bill should be lowered to 16 years of age, with special protections for young people 16 to 18 years old.²²⁶
- 2.40 The UN Convention on the Rights of the Child defines 'child' as a person under 18 years of age unless granted majority earlier under domestic law.²²⁷ By virtue of the operation of the Human Rights Act, ACT legislation should conform to this international instrument, or a declaration of incompatibility should be issued when the legislation is debated in the ACT Legislation Assembly. When tabling the exposure draft legislation, the ACT Attorney-General said the right of children not to be detained except as a last resort can only be limited 'on the basis of clear and compelling evidence of a substantial threat from persons under the age of 18 that cannot be appropriately dealt with by a means other than preventative detention.' This position was confirmed in public hearings.²²⁸
- 2.41 In the ACT Government's view, the COAG agreement on strengthening counter-terrorism legislation refers to special rules for people between the ages of 16 and 18,²²⁹ and so contemplated the possibility of preventative detention for children between the ages of 16 and 18.²³⁰ Through its youth policy and programs for young people, the ACT Government, defines a young person as

²²⁴ Ms Leon, *Proof Transcript of Evidence*, 1 February 2006, p62

²²⁵ Submissions no 5, 10, 16, 18; *Proof Transcript of Evidence*, 31 January 2006, p58

²²⁶ Submissions no 15, 19; Attorney-General's Department, *Proof Transcript of Evidence*, 31 January 2006, p24; AFP, *Proof Transcript of Evidence*, 31 January 2006, pp42–44. The President of the ACT Law Society expressed a personal view that children under 16 should not be covered by the legislation: *Proof Transcript of Evidence*, 1 February 2006, p18

²²⁷ Article 1, *United Nations Convention on the Rights of the Child*, General Assembly resolution 44/25. 20 November 1989. Australia signed the CROC on 22 August 1990 and ratified it on 17 December 1990. It came into force on 16 January 1991. The Convention text is accessible at <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>

²²⁸ ACT Attorney-General, Mr Jon Stanhope MLA, 'Exposure Draft of Anti-Terrorism Laws', Media Release, 539/05, 15 December 2005; *Proof Transcript of Evidence*, 1 February 2006, pp62–64

²²⁹ Refer text at Appendix 4

²³⁰ Ms Leon, *Proof Transcript of Evidence*, 1 February 2006, p67

an individual between 12 and 25 years of age.²³¹

- 2.42 The Convention on the Rights of the Child also provides that children should be detained only as a last resort, and for the shortest appropriate period of time.²³² Other international soft law instruments also emphasise the need to keep young people out of the criminal justice system. For example, the Riyadh Guidelines and the Tokyo and Beijing Rules²³³ emphasise social supports, protecting the physical and mental health of young people, support for families and economic, social and cultural cooperation, and judicially-sanctioned detention as a last resort, and for the shortest time possible.²³⁴
- 2.43 The Committee has mixed views on whether children aged 16 to 18 years of age should be subject to the proposed legislation but notes that Commonwealth legislation can be applied, which covers 16 to 18 year olds. Ms MacDonald has additional and dissenting comments on this issue.

RECOMMENDATION 12

The Committee recommends that the proposed legislation be applied to persons 16 years of age or older, but that safeguards such as separation from adult detainees (such as in a juvenile detention facility) and special contact provisions for family members and oversight agencies be included in the legislation.

Preventative detention orders—applications for and making

²³¹ Refer to the *Office for Children, Youth and Family Support* website <http://www.dhcs.act.gov.au/ocyfs/young_people.htm#Ypeople> for details including the ACT Young People's Plan, ACT Government Commitment to Young People, and the Youth InterACT programme: D. Edirisuriya, Internship paper, ACT Legislative Assembly Committee Office, February 2006

²³² Article 37

²³³ The UN Guidelines for the Prevention of Juvenile Delinquency adopted by the UN General Assembly in 1990; the UN Rules for the Protection of Juveniles Deprived of their Liberty, and the UN Standard Minimum Rules for the Administration of Juvenile Justice adopted by the UN General Assembly in 1985, respectively, discussed in A. Nicholson, AO RFD QC, J. Tobin, D. Sandor, P. Grogan, C. Guerra, Submission to the Senate Legal and Constitutional Legislation Committee Anti-Terrorism Bill (No. 2) 2005, November 2005, accessible at <<http://www.dci-au.org/submission2.pdf>>, pp.20–21

²³⁴ International standards are discussed in more detail in Human Rights and Discrimination Commissioner ACT Human Rights Office, Human Rights Audit Of Quamby Youth Detention Centre, 30 June 2005 accessible at <<http://www.hro.act.gov.au/gems/Quamby%20Audit-final%2030%20June%202005.pdf>>

- 2.44 The exposure draft bill provides that a senior police officer may apply to the Supreme Court for a preventative detention order.
- 2.45 For an application for a preventative detention order to be made, aimed at preventing an imminent terrorist attack, there are various preconditions that must be met—
- the making of the application must have been approved in writing by the Chief Police Officer
 - the senior police officer must suspect, on reasonable grounds, that the person—
 - intends, *and* has the capacity, to carry out a terrorist act; *or*
 - possesses something connected with the preparation for, or carrying out of, a terrorist act; *or*
 - has done an act in preparation for, or planning, a terrorist act; *and*
 - the senior police officer must be satisfied, on reasonable grounds, that—
 - it is reasonable and necessary to detain the person to prevent a terrorist act some time within the next 14 days; *and*
 - detaining the person under the order is the least restrictive way of preventing that terrorist act; *and*
 - detaining the person for the period for which the person is to be detained under the order is reasonable and necessary to prevent the terrorist act.²³⁵ [emphasis added]
- 2.46 Several commentators have criticised the national legislative scheme for permitting interim detention orders to be issued without the prospective detainee being present at the hearing, which is *prima facie* a breach of the right to natural justice, equality under the law,²³⁶ and a fair trial.²³⁷ The NSW Legislative Council’s Legislation Committee has commented that the lack of a hearing process before a court authorising any form of preventative detention ‘significantly aggravates the trespass on the right to freedom from arbitrary detention and the right to a fair trial’. The NSW Committee suggested that preventative detention orders only be issuable by a court in the absence of the

²³⁵ sub-cl 17(3) and (5), emphasis added

²³⁶ *R v Heemi* (1998) 16 CRNZ 221 (CA)

²³⁷ Letter dated 20 October 2005 from Mr Richard Refshauge SC, ACT Director of Public Prosecutions, to Mr Jon Stanhope MLA, Chief Minister and Attorney-General, p3; Submission no 2. The right to a fair trial under s21 HRAct is not limited to criminal matters and extends to procedures to determine a person’s rights and obligations in a suit at law: 1984 Human Rights Committee General Comment No. 13 on ICCPR art 14

proposed detainee when the Supreme Court is satisfied that there are urgent circumstances warranting the granting of an interim order.²³⁸

- 2.47 The standard of ‘suspecting on reasonable grounds’ is lower than ‘belief based on reasonable grounds’ and ‘proof on the balance of probabilities’. The difference between these two standards was discussed in *George v Rockett and another*, where Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ said –

The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. ...

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.²³⁹

Preventative detention to preserve evidence

- 2.48 For an application to be made for a preventative detention order aimed at preserving evidence following a recent terrorist attack, there are various preconditions. The senior police officer must be satisfied, on reasonable grounds, that—

- a terrorist act has happened within the last 28 days; and
- it is reasonable and necessary to detain the person to preserve evidence in the ACT or elsewhere of, or relating to, the terrorist act; *and*
- detaining the person under the order is the only effective way of preserving that evidence; *and*
- detaining the person for the period for which the person is to be detained under the order is reasonable and necessary to preserve the evidence.²⁴⁰

- 2.49 The exposure draft bill details the content of proposed applications for

²³⁸ NSW Legislative Council, *Legislation Review Committee Digest No 15 of 2005*, pp27–28

²³⁹ (1990) 170 CLR 104 F.C. 90/026 para 14. See also *R v Rondo* [2001] NSWCCA 540 para 53

²⁴⁰ sub-cl 17(5), emphasis added

preventative detention orders, including the facts and other grounds on which the officer thinks an interim or preventative detention order should be made, the period for which the person should be detained and the facts and grounds justifying that period.²⁴¹

- 2.50 The Bill provides for preventative detention for up to 14 days to prevent an imminent terrorist act or to preserve evidence following a recent terrorist attack.
- 2.51 Applications must include information about the person's contact information, age, and dependent minors or persons of impaired decision-making capacity. If the person has impaired decision-making capacity, the application must state whether they should be restricted from being contacted by the Public Advocate.²⁴²
- 2.52 Applications must also include information about previous applications for preventative detention orders in the A.C.T., under Commonwealth legislation or interstate²⁴³, previous control orders, outcomes and particulars of all requests and applications made under the Commonwealth Criminal Code division 104 ('Harming Australians') and ASIO detention (relating to terrorism offences).²⁴⁴ Where a previous order has been issued, the additional information that has become available only after that order was made must also be specified.²⁴⁵
- 2.53 The Committee notes the Australian Government Attorney-General's Department's view that 18(k)(vi) of the exposure draft bill should be omitted because disclosure of information, without authorisation, about warrants issued and questioning done pursuant to the Australian Security Intelligence Organisation Act is an offence carrying a penalty of five years imprisonment while a warrant is in force.²⁴⁶ Questioning under the ASIO Act can also serve a different purpose to preventative detention.

²⁴¹ cl18

²⁴² sub-cl 18(2)

²⁴³ paras 18(1)(j) and (k)

²⁴⁴ para 18(1)(k)

²⁴⁵ sub-cl 18(3) and (4) referring to 12(2) and 12(6) restrictions on multiple preventative detention orders

²⁴⁶ s34VAA *Australian Security Intelligence Organisation Act 1979* (Cth)

- 2.54 Subject to the Supreme court's inherent jurisdiction to regulate its proceedings and a person's rights, the person is entitled to be present at the hearing of the application in person, or, if the Supreme Court directs, by videolink. The Supreme Court may hear the application without the person or their lawyer being present provided the court is satisfied that the person was properly notified of the hearing.
- 2.55 The proposed legislation provides that a person who is the subject of an application for a preventative detention order is entitled to be given a copy of the application and notice of the place, date and time the application is to be heard.²⁴⁷ The ACT Government justifies this provision on the basis of transparency. It is also consistent with *McGarry v The Queen*,²⁴⁸ where a majority of the High Court said that when responding to a request for an order for indefinite imprisonment in response to *predicted future behaviour*, the prosecution should place *all* available and relevant material before the court including full details of past conduct, including all of the evidence that related to it. However the proposed disclosure requirements have caused the Australian Government's Attorney-General's Departments some concern, as they may be inconsistent with the requirements of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) and the *Australian Security Intelligence Organisation Act 1979* (Cth).

RECOMMENDATION 13

The Committee recommends that the ACT Government consult further with the Australian Government Attorney-General's Department about the consistency of paragraph 18(k)(vi) with Australian Government legislation.

The Supreme Court orders

- 2.56 The Supreme Court may issue a preventative detention order if it is satisfied, on reasonable grounds, of a number of matters. These are that the person intends and has the capacity to carry out a terrorist act within the following 14

²⁴⁷ cl19

²⁴⁸ paras 29–31, per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ, [2001] HCA 62 (24 October 2001) accessible at <<http://www.austlii.edu.au/au/cases/cth/HCA/2001/62.html>>

days; or possesses something connected with the preparation for or carrying out of a terrorist act; or has done an act in preparation for or planning a terrorist act. The Court must also be satisfied that it is reasonable and that it is reasonable and necessary to detain the person for a specified period to prevent a terrorist act; and that this is the least restrictive way of preventing the terrorist act.²⁴⁹

- 2.57 Where a detention order has been sought to preserve evidence of a terrorist attack within the previous 28 days, the Court must be satisfied on reasonable grounds that it is reasonable and necessary to detain the person for the specified period to preserve evidence, and that detention is the only effective way of preserving evidence.²⁵⁰
- 2.58 The Supreme Court is required to consider additional matters where the person has impaired decision-making capacity.²⁵¹
- 2.59 The Supreme Court, when making a preventative detention order, has to give reasons for its decision and ensure that reasonable steps are taken to explain to the person the effect of the order, in a language the person can readily understand.²⁵²

Open or closed Supreme Court hearings

- 2.60 The exposure draft bill does not regulate the conduct of proceedings in the Supreme Court, preferring to leave this to the discretion of the court.²⁵³ The Australian Government Attorney-General's Department and the AFP told the Committee that protecting sensitive information was vitally important for national security, and the security of individuals or groups identifiable through the proceedings.²⁵⁴ They suggested that provisions for closing court hearings should be in the bill.²⁵⁵ In some other jurisdictions the counterpart legislation provides for closed court hearings and restrictions on the

²⁴⁹ cl19

²⁵⁰ sub-cl 19(6)

²⁵¹ sub-cl 19(7)

²⁵² sub-cl 19(8)

²⁵³ ACT Attorney-General, Mr Jon Stanhope MLA, 'Exposure Draft of Anti-Terrorism Laws', Media Release, 539/05, 15 December 2005

²⁵⁴ AFP, *Proof Transcript of Evidence*, 25 January 2006, p45–47

²⁵⁵ Submission no 15

publication of proceedings.²⁵⁶

- 2.61 Several non-government submissions and witnesses urged that the legislation maintain the open and public tradition of court hearings,²⁵⁷ but others cautioned that overseas persons detained on suspicion of terrorist activity tend to suffer retribution when released.²⁵⁸ UN human rights resolutions on terrorism also note the growing connection between terrorist groups and other criminal organisations involved in the illegal arms and drugs trade and other serious crimes, such as murder, extortion, kidnapping, assault, hostage-taking and robbery.
- 2.62 The Committee notes that the *Supreme Court Act 1933* (A.C.T.) provides that subject to any agreement of the parties to the contrary; and any other Territory law, evidence in any suit must be given orally in open court.²⁵⁹ The Registrar of the ACT Supreme Court, Ms Jill Circosta, advised the Committee that the court has an inherent power to close the court and restrict the publication of proceedings which presiding judges exercise according to ‘the interests of justice’. Evidence can be ordered to be sealed and securely stored. Ms Circosta’s view was that this was preferable to legislative direction because the system currently worked well.²⁶⁰ The Committee also notes that while in NSW hearings for preventative detention and prohibited contact orders must be heard in the absence of the public, the Supreme Court has a discretion whether or not to suppress all or part of the proceedings.²⁶¹

RECOMMENDATION 14

The Committee recommends that the legislation remain silent on the issue of whether proceedings in the Supreme Court should be open or closed, and whether restrictions should be placed on the publication of proceedings.

²⁵⁶ See for example s26P *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW)

²⁵⁷ Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, pp21–22; Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p2

²⁵⁸ *Proof Transcript of Evidence*, 1 February 2006, p34

²⁵⁹ s54 *Supreme Court Act 1933* (A.C.T.)

²⁶⁰ Personal communication, 8 February 2006

²⁶¹ S26P *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW)

Legal representation

- 2.63 A person is entitled to be represented at the hearing by a lawyer of the person's choice (unless the lawyer has been provided by the Legal Aid Commission).²⁶² The Legal Aid Commission is also required to appoint a person from the Public Interest Monitor Panel (PIM) to attend the hearing.
- 2.64 There is currently no requirement in the ACT that lawyers representing persons involved in terrorist-related legal matters have a security clearance, whereas parties involved in federal security law matters can be required to have a security clearance.²⁶³
- 2.65 Human rights law recognises the importance of legal representation and provides that in criminal cases a defendant's choice of lawyer should generally be respected. However, the UN Human Rights Committee, European Court of Human Rights, and courts in New Zealand have held that the right to legal assistance does not confer a right on an accused person to choose his or her representative.²⁶⁴ One submission suggested that the legislation should include a presumption against a hearing for a preventative detention order (not interim) proceeding if the prospective detainee is unrepresented. That submission also suggested that the Court should have the power to require Legal Aid to represent the prospective detainee.²⁶⁵

Availability of legal aid

- 2.66 The Director of Legal Aid in the ACT, Mr Staniforth, also expressed general support for the provisions of the exposure draft bill concerned with the

²⁶² cl14

²⁶³ ie. a party to the proceeding, a party's legal representative, and a person assisting a party's legal representative – see National Security Information Legislation Amendment Act 2005(Cth); National Security Information (Criminal And Civil Proceedings) Act 2004 (Cth)

²⁶⁴ *R v Heemi* (1998) 16 CRNZ 221 (CA). For a European position see *X v Germany* 6 DR 114 (1976), *X v United Kingdom* 15 DR 242

²⁶⁵ Submission no 16; Proof Transcript of Evidence, 31 January 2006, p58. The Victorian Parliament's scrutiny of counterpart legislation noted that consideration should be given to the State providing legal aid irrespective of a person's financial circumstances in circumstances where they were otherwise unrepresented: Parliament of Victoria, Parliamentary Scrutiny of Acts and Regulations Committee *Alert Digest No 1 of 2006*, p47

provision of legal representation,²⁶⁶ but expressed concern about sub-clause 49(5), which provides that the Legal Aid Commission must provide legal representation or arrange for it to be provided, 'if the persons asks'. Mr Staniforth said this sub-clause appeared to prevent the application of the 'entire mechanism for determining legal aid eligibility' under the *Legal Aid Act 1977* (A.C.T.) and that 'it seems socially iniquitous to promote the interests of persons in this position beyond the framework contained in the Legal Aid Act'.²⁶⁷ Mr Staniforth noted that some provisions of the Legal Aid Act could operate alongside the proposed legislation, but recommended 'that the sub-clause be amended to make the Commission's mandatory actions conditional upon the person being eligible for an appropriate legal service.' In particular, Mr Staniforth referred to section 28 of the Legal Aid Act, which requires that the person be unable to afford the cost of obtaining from private legal practitioners the legal services in respect of which legal assistance is sought and that it is reasonable in all the circumstances to provide the legal assistance.

- 2.67 The ACT Law Society shared the concerns expressed by the ACT Legal Aid Office about the apparent exclusion of a means test under the proposed legislation.²⁶⁸
- 2.68 Other submissions welcomed detainees' right to non-discretionary legal aid.²⁶⁹
- 2.69 The Committee notes that the human right to legal aid can justifiably be contingent on the means of the defendant and where the interests of justice require the provision of legal aid.²⁷⁰ Some witnesses did not object to the suggestion that legal aid not be provided to persons who would be ineligible on standard legal aid criteria.²⁷¹

²⁶⁶ eg cl49

²⁶⁷ Submission no. 1

²⁶⁸ Submission no 11; *Proof Transcript of Evidence*, 1 February 2006, pp14, 16

²⁶⁹ Submission no 10

²⁷⁰ including the complexity of the case, the capacity of the individual to represent himself and the severity of the potential sentence: *Quaranta v Switzerland* (1991) Series A/205; *Granger v United Kingdom* (1990) 12 EHRR 469; *Benham v United Kingdom* (1996) 22 EHRR 293 noted in Lord Lester of Herne Hill and David Pannick (eds), *Human Rights Law and Practice* 2nd ed, LexisNexis UK, 2004, p247. See also *Beet and others v. The United Kingdom*, accessible at <<http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0/6a3e720d6128beacc1256fb700551059?OpenDocument>> where the non-availability of legal aid to of tax defaulters who were imprisoned was a breach of the ECHR Art 5 rights

²⁷¹ Ms McKinnon, *Proof Transcript of Evidence*, 31 January 2006, p69

RECOMMENDATION 15

The Committee recommends that the proposed legislation be amended to ensure that the Legal Aid Office assists with finding legal representation for a person detained under the legislation, but that the provision of legal representation be consistent with the eligibility provisions of the *Legal Aid Act 1977* (A.C.T.).

Preventative detention orders—setting aside and amending

- 2.70 The exposure draft bill provides for the setting aside or amendment of preventative detention orders. The Supreme Court, if satisfied that the grounds on which the order was made do not exist or no longer exist, *must* set the order aside, and *may* do so if satisfied that it is appropriate to do so because of new facts or circumstances (as defined).²⁷²
- 2.71 The Supreme Court may also amend the preventative detention order if satisfied that that is appropriate because of new facts or circumstances that have arisen or facts and circumstances that were not before the court when the order was made, extended or last extended.²⁷³

Compensation

- 2.72 Under the proposed legislation, the Supreme Court may order compensation to be awarded if the court considers that because of facts and circumstances not before the court when a preventative detention order was made, extended or last extended, the order should not have been made, extended or last extended.²⁷⁴ Compensation can also be claimed for losses or expenses incurred because of the exercise, or purported exercise, of special powers by a police officer or a person assisting a police officer, if the court regards it as just and reasonable to make the order in the circumstances of the particular case (with regulations able to prescribe relevant and irrelevant matters).²⁷⁵ The AFP requested that an explanation for the policy underlying these compensation

²⁷² para 28(3)(b)

²⁷³ sub-cl 28(6)

²⁷⁴ sub-cl 28(5)

²⁷⁵ cl85

- provisions be included in the explanatory statement for the bill.²⁷⁶
- 2.73 These statutory compensation provisions are in addition to the compensation that may be pursued under the common law, although one stakeholder organisation requested that an additional sub-clause be added to the bill to make it clear that civil rights and remedies are not affected by the statutory compensation provisions.²⁷⁷ The Committee is of the view that an action in tort is not likely to be affected by these provisions, but notes that counterpart Queensland legislation has a general savings clause for remedies in relation to preventative detention orders.²⁷⁸
- 2.74 The AFP said that they were concerned about the compensation provisions being misinterpreted,²⁷⁹ and that compensation entitlements should be judged against the information that was available to the detaining officers at the time the order was applied for and the decisions made thereon, rather than whether there was information not before the court.²⁸⁰ The counterpart Victorian bill provides that compensation may be payable where the court is satisfied that the making of a police order was so unreasonable that no senior police officer acting reasonably could have made that order, which introduces a fault element.²⁸¹
- 2.75 The currently proposed compensation provisions appear to be human rights compliant. The *Human Rights Act 2004* (A.C.T.) recognises the human right for compensation to be payable if a person has been unlawfully arrested or detained.²⁸² This is based on the ICCPR provision that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.²⁸³
- 2.76 The Committee is concerned, however, that a court process is required for consideration of applications for compensation for losses or expenses arising

²⁷⁶ Submission no 15

²⁷⁷ Submission no 9; Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, pp2, 40

²⁷⁸ s75 *Terrorism (Preventative Detention) Act 2005 (Qld)*;

²⁷⁹ Submission no 15

²⁸⁰ *Proof Transcript of Evidence*, 31 January 2006, p52

²⁸¹ s13E(10) and (11) *Terrorism (Community Protection) (Amendment) Bill*

²⁸² sub-s 18(7)

²⁸³ art 9(5) considered in *W B E v The Netherlands* [1992] IIHRL 57 (23 October 1992)

from the exercise of special powers by police officers or persons assisting them. These proposed provisions might create unnecessary costs and an additional burden on the judicial system. The provisions are similar to those in the *Emergencies Act 2004* (A.C.T.) where compensation claims in relation to the performance of a function under the Act (other than the exercise of emergency powers) are to be taken to a court of competent jurisdiction.²⁸⁴

- 2.77 The Committee is aware that some compensation schemes, such as for victims of crime, also involve applications to the Magistrates Court, but that legislation is much more detailed than the current exposure draft bill in relation to procedural issues.²⁸⁵
- 2.78 The Committee notes that some compensation provisions enable claimants to lodge applications to non-judicial decision makers in the first instance.²⁸⁶ This is appropriate where the damage is minor, as seems to be envisaged in clause 84 of the exposure draft bill in relation to damage to premises. The *Emergencies Act*, for example, provides for claims arising out of the exercise of emergency powers to be assessed and responded by the Minister in the first instance, and enables a form to be prescribed for the purpose.²⁸⁷ If the Territory and the person to whom compensation is payable cannot agree on the amount of compensation, the claimant can seek to recover compensation from the Territory in a court of competent jurisdiction.²⁸⁸
- 2.79 The Assembly's Legal Affairs Committee (performing the duties of a scrutiny of bills and subordinate legislation Committee) has commented previously that it would be more cost effective for decisions by Ministers to be reviewable by the Administrative Appeals Tribunal (AAT).²⁸⁹
- 2.80 Several submissions referred to the risk to reputations, and that an employer may dismiss or discriminate against someone who has been held in

²⁸⁴ see s199

²⁸⁵ See for eg *Victims of Crime (Financial Assistance) Act 1983* (ACT)

²⁸⁶ eg *Workers Compensation Act 1951* (ACT), *Emergencies Act 2004* (ACT)

²⁸⁷ ss163, 169–171, 200 *Emergencies Act 2004* (ACT)

²⁸⁸ s172 *Emergencies Act 2004* (ACT)

²⁸⁹ ACT Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report 50*, 15 June 2004, pp.6–7, accessible at < <http://www.parliament.act.gov.au/Committees/reports/scrutiny50.pdf>>

preventative detention.²⁹⁰ This does not appear to fall within the current grounds of proscribed discrimination in the *Discrimination Act 1991* (A.C.T.). Several witnesses also noted that the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) exempts businesses with up to, and including, 100 employees from the operation of unfair dismissal laws, so terrorist suspects working in a small business may be unfairly dismissed and have no remedy.²⁹¹

RECOMMENDATION 16

The Committee recommends that the ACT Government consider amending the exposure draft bill to provide for an administrative process to determine minor compensation matters arising from the exercise of proposed Part 3 special powers, with review of the Minister's decision by the Administrative Appeals Tribunal.

RECOMMENDATION 17

The Committee recommends that the ACT Government consider amending the *Discrimination Act 1991* (A.C.T.) to proscribe discrimination on the ground that someone has been detained under ACT legislation.

Preventative detention orders—identification material

2.81 The exposure draft bill provides that a police officer above the rank of sergeant may take, or cause to be taken, 'identification material'²⁹² from a person who has consented in writing, or if the police officer believes, on reasonable grounds, that taking such material is necessary to confirm the person's identity as the person stated in the order,²⁹³ reasonable and necessary force may be used.²⁹⁴ Restrictions apply in relation to persons with impaired decision-making capacity.²⁹⁵

²⁹⁰ Submissions no 4, 18; *Proof Transcript of Evidence*, 25 January 2006, pp10, 13

²⁹¹ Submission no 18, Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p3; NTEU, *Proof Transcript of Evidence*, 1 February 2006, pp2, 6

²⁹² prints of the person's hands, recordings of the person's voice, samples of the person's handwriting or photographs (including video recordings) of the person

²⁹³ sub-cl 56(2). Use of the identification material for any other purpose will be an offence carrying a maximum penalty of 200 penalty units, imprisonment for 2 years or both: cl57

²⁹⁴ sub-cl 56(3)

²⁹⁵ if a person has impaired decision-making capacity only the prints of the person's hands, fingers, feet or toes may be taken unless the Supreme Court orders that other identification material be taken

- 2.82 Identification material must be destroyed after 13 months if a ‘relevant proceeding’ has not been initiated within that time, or, if a ‘relevant proceeding’ has been started within one year of the material being taken, one month after that proceeding or the last of the proceedings, is discontinued or finally decided.
- 2.83 The ACT Government has not explained why material does not have to be kept for the duration of the limitation period under the *Limitation Act 1985* (A.C.T.).

Preventative detention orders—carrying out

- 2.84 Division 2.7 of the exposure draft bill includes provisions specifying how members of the police force are to carry out preventative detention orders. These provisions concern issues of supervision,²⁹⁶ who may take a person into custody,²⁹⁷ what information must be provided to and by police officers,²⁹⁸ endorsement on the order of the date, time and location it is effected,²⁹⁹ access to premises,³⁰⁰ use of reasonable and necessary force,³⁰¹ searches and seizure of items,³⁰² release from detention,³⁰³ detention arrangements³⁰⁴ etc.

Detention facilities and arrangements

- 2.85 Under the proposed legislation, the Minister’s written approval will be required in relation to the arrangements under which persons can be held under preventative detention orders, and guidelines about the minimum conditions and standards of treatment that must apply.³⁰⁵ It will be an offence

and only in the presence of a parent or guardian or they are not acceptable to the person – another ‘appropriate person’ (as defined): sub-cl 56(4), (5)

²⁹⁶ cl33

²⁹⁷ cl32

²⁹⁸ cl35

²⁹⁹ cl34

³⁰⁰ cl36

³⁰¹ cl37

³⁰² cl38

³⁰³ cl39

³⁰⁴ cl40

³⁰⁵ sub-cl 40(1)

carrying a penalty of 100 penalty units or imprisonment of one year or both to contravene the prescribed or approved arrangements.³⁰⁶

- 2.86 The Chief Police Officer will be required to consult with the chief executive under the *Crimes (Sentence Administration Act) 2005*, the ACT Human Rights Commissioner, the ACT Ombudsman, and the ACT Public Advocate, about the arrangements, which have to be consistent with human rights.³⁰⁷ Detainees will have to be treated with humanity and respect, and not be subjected to cruel, inhuman or degrading treatment.³⁰⁸
- 2.87 The detention arrangements will have to address issues such as shared responsibilities between the Chief Police Officer and the chief executive, the location for detention,³⁰⁹ transfer arrangements, and advice to the ACT Ombudsman etc.³¹⁰ The guidelines to be developed under the legislation will be required to address issues such as segregation from convicted prisoners and remandees, humane and dignified treatment, detainees' cultural and religious needs, health care services, support for detainees with disabilities etc.³¹¹
- 2.88 The ACT Human Rights Office welcomed the requirement that appropriate guidelines and protocols be developed for humane treatment in detention.³¹² The Canberra Islamic Centre requested that persons in detention be allowed to practice their religion, which is already proposed as a matter for the detention guidelines.³¹³ Other submissions also welcomed the segregation of detainees from convicted persons as human rights compliant.³¹⁴ It was suggested that it would be preferable for police officers to be required to give a detainee information about the officer's name, place of work, identification number etc, rather than having this provided only in response to a detainee's questions.³¹⁵

³⁰⁶ sub-cl 40(10)

³⁰⁷ sub-cl 40(2), (3) The Ombudsman and human rights commissioner must be given a copy of the written arrangements and any amendments to those: sub-cl 40(6)

³⁰⁸ cl45

³⁰⁹ This has to be in the ACT and may be in a correctional centre: para 40(4)(b) and sub-cl 40(8)

³¹⁰ sub-cl 40(4)

³¹¹ sub-cl.40(5)

³¹² Submission no 10

³¹³ Submission no 12; para 40(5)(d)

³¹⁴ Submission no 16, *Proof Transcript of Evidence*, 31 January 2006, p58

³¹⁵ Submission no 16; *Proof Transcript of Evidence*, 31 January 2006, p59

The Committee was advised that other legislation requires this.³¹⁶ The Committee considers this suggestion to be reasonable. Another raised concerns about the ability of the ACT Government to transfer detainees interstate if appropriate facilities were not available in the A.C.T..³¹⁷

2.89 The AFP expressed concern that sub-clause 40(4) requires that the location of the facilities under which detainees will be held to be listed, and for oversight agencies to visit detainees. The arrangements are to be provided to the ACT Human Rights Commissioner and ACT Ombudsman, who (along with the Public Advocate) would need to know those locations to discharge their responsibilities under the legislation. Counterpart Australian Government legislation does not require the location of detention facilities to be disclosed.

2.90 The AFP is concerned that the ACT Ombudsman and Human Rights Commissioner will be made aware of the locations where detainees are to be detained under detention orders. The AFP advised the Committee –

Such a proposal could have serious security implications for the detainee, the police detaining the person and the community. The ability for the Human Rights Commissioner, the Ombudsman and the Public Advocate to visit detainees is provided for in section 40(4)(g). To comply with this existing provision, the AFP would need to take appropriate security measures as this would be occurring in the context of an imminent terrorist attack or in the aftermath of a terrorist attack. From the AFP perspective there is no additional protection for the detainee or the community to be gained from these office holders being informed of the actual locations of detention when orders are made. The AFP is subject to a range of legislative and administrative limitations on the exercise of its powers. The AFP remains subject to these core requirements in exercising its powers under this legislation. There is a need to ensure that there is sufficient flexibility to enable officers to protect the wider community whilst meeting the fundamental human rights of suspects/detainees in these circumstances. The AFP view is that this can be achieved through agreed guidelines/protocols detailing the appropriate standards for the care and protection of people detained under a preventative detention order.³¹⁸

2.91 The Committee appreciates the AFP's concerns and agrees that the list of

³¹⁶ See for example, Section 201 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)– Ms McKinnon, response dated 1 February 2006, to question taken on notice

³¹⁷ Submission no 13

³¹⁸ AFP, Communication dated 13 February 2006 – response to additional questions following public hearing

detention facilities should generally not be disclosed except to those with a need to know. The facilities used for detention are likely to vary depending on the needs and risks posed by each detainee.

RECOMMENDATION 18

The Committee recommends that the exposure draft bill be amended to require that the information referred to in sub-clause 32(2) and 35(3) and 75(3)(a) be provided by the police officer(s) without the need for a request from the person to whom the information is given.

Provision of information to detainees

- 2.92 The exposure draft bill also specifies what information has to be given and explained to a detained person as soon as possible after they have been detained, or when a preventative detention order has been extended, or further extended.³¹⁹ The NSW Legislative Council Committee scrutinising counterpart NSW legislation queried the absence in the NSW bill of notification obligations.³²⁰ The Australian Privacy Foundation said that the provision of information about rights is especially important because of the extraordinary nature of this legislation and the need for detainees to be aware of their rights to complain to the Ombudsman or to appeal to the Supreme Court to set aside the order.³²¹
- 2.93 The proposed ACT legislation provides that information need not be provided if the detainee's actions make this impracticable.³²² The Australian Privacy Foundation submitted that 'at a minimum' the proposed legislation should require the police officer detaining the person to record the reasons for such impracticability because if the detainee is in custody conveying information should not be difficult. The Committee regards this as a reasonable inclusion.
- 2.94 The Australian Privacy Foundation also said that contravention of the obligation to inform should affect the lawfulness of the person's detention.³²³

³¹⁹ Division 2.8

³²⁰ NSW Legislative Council, *Legislation Review Committee Digest No 15 of 2005*, p.26

³²¹ Submission no 8

³²² sub-cl 43(1)

³²³ Submission no 8

The Committee prefers that there be a penalty attached for failure to record the reasons for not informing detainees of their rights. The Committee regards this as a reasonable clause but Mr Stefaniak has additional dissenting comments.

RECOMMENDATION 19

The Committee recommends that clause 43 be amended to require the detaining police officer to record details of the circumstances that made the conveying of information to the detainee impractical. Failure to comply with this obligation should carry a penalty.

Preventative detention orders—contact provisions and prohibited contact orders

- 2.95 Under the exposure draft bill, persons detained under a preventative detention order may be prevented from making contact with other people,³²⁴ and can have some of their communications monitored. Relevant contact provisions are included in various divisions of the exposure draft bill. These provisions are more permissive than under federal legislation, but have been welcomed by some stakeholders as being more proportionate and justifiable in terms of limiting freedom of expression and protecting family life.³²⁵
- 2.96 Detainees who do not have impaired decision-making capacity will be entitled to contact—
- as soon as possible after they have been detained, a family member³²⁶ or person they live with, their parent(s) or guardian(s),³²⁷ their employer or a work colleague, a business partner or someone else (with the permission of the police officer), by phone, fax or email.³²⁸ Subsequent contact during visits or by phone fax or email may also be permitted under the order.³²⁹

³²⁴ cl52

³²⁵ Submissions no 5, 16, 18

³²⁶ ie a person's domestic partner, parent, step-parent or grandparent, child, stepchild, grandchild, brother, sister, stepbrother or stepsister, or guardian or carer: sub-cl 47(7)

³²⁷ sub-clause 47 permits contact with each parent or guardian if a person has 2 parents or 2 or more guardians

³²⁸ cl47

³²⁹ sub-cl 47 (5)

- the ACT Ombudsman³³⁰
 - privately and at any time (subject to a monitoring order),³³¹ a lawyer of the person's choice (with the help of the Legal Aid Commission if requested), to obtain advice about legal rights in relation to the preventative detention order or to arrange legal representation in relation to related specified matters. This contact may occur during a visit by the lawyer or by phone fax or email.³³²
- 2.97 Communications will be protected by legal professional privilege, meaning that they are generally inadmissible in evidence against the person in any court proceeding.³³³ Legal professional privilege does not, however, protect communications from compulsory disclosure where there is *prima facie* evidence that the communication was made in the furtherance of a fraud, crime or other improper purpose.³³⁴
- 2.98 It will also be an offence for a police officer to monitor contact between a detainee and the person's lawyer, otherwise than in accordance with a direction from a senior police officer in relation to the contact.³³⁵
- 2.99 Reasonable assistance to obtain interpreter services must be provided in relation to contact rights if the police officer detaining the persons suspects, or has grounds for suspecting that these may be necessary.³³⁶ Special contact rules are also proposed for persons with impaired decision-making capacity.³³⁷
- 2.100 The AFP submitted that the ACT bill's contact provisions, while similar to Victoria's, go further than provisions in New South Wales, South Australia and Western Australia in allowing contact with family and others for the duration of the detention unless prevented by a prohibited contact order. The AFP recognised that there was a need to balance obligations to provide

³³⁰ cl48

³³¹ cl53

³³² see cl49 generally

³³³ sub-cl 49(12).

³³⁴ *Clements, Dunne and Bell Pty Ltd v Commissioner of the Australian Federal Police* (2001) 188 ALR 515; 2002 ATC 4072, *Capar v Commissioner of Police* (1994) 34 NSWLR 715; (1994) 74 A Crim R 428, *R v Central Criminal Court; Ex parte Francis & Francis* [1989] AC 346; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; (1985) 61 ALR 55. See also ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p17

³³⁵ sub-cl 53(11) – maximum penalty 100 penalty units, imprisonment for 1 year, or both

³³⁶ sub-cl 49(10)

³³⁷ cl50, 51

humane detention with the need to prevent terrorist acts or to collect evidence after the commission of a terrorist act. The AFP is also concerned about security requirements and suggested that guidelines should be developed to clarify how the contact provisions will be implemented.³³⁸

- 2.101 The Committee notes that the proposed legislation currently permits contact ‘other persons’ at the discretion of the police, which could permit contact with religious leaders or social mentors. This seems to be consistent with the protection of freedom of religion in the ACT Human Rights Act. Young persons between 18 and 25 years of age may be more vulnerable than mature adults to being caught up in ‘causes’ and may benefit from discussions with a moderate person of religion or a social mentor while detained. If people involved with a terrorist cell or network can talk through their issues they may possibly be discouraged from becoming more alienated from the broader community. Communications with the ACT Commissioner for Children and Young People, or the Public Advocate, could also possibly be beneficial for a detainee. Such a ‘dialogue approach’ to mitigating fundamentalism has been applied successfully with Islamists in Yemen.³³⁹

RECOMMENDATION 20

The Committee recommends that the proposed legislation be amended to require the development of guidelines to assist in the implementation of its contact provisions.

Communications restrictions

- 2.102 Division 2.6 of the exposure draft bill proposes that persons detained under the legislation can have communication restrictions placed upon them. This may infringe freedom of expression if the restriction is not proportionate and justified in a free and democratic society.
- 2.103 The proposed legislation provides that a senior police officer can apply for a

³³⁸ Submission no 15

³³⁹ ‘The Judge and the Fanatic’, *SBS The Cutting Edge*, 3 January 2006, 08:30pm

prohibited contact order [for the reasons outlined below] and specifies the information that must be included in the application, including all relevant matters (whether favourable or adverse to the application).³⁴⁰ The information in the application must be sworn on oath.

2.104 The Supreme Court may make a prohibited contact order prohibiting the person for whom a preventative detention order has been made, from contacting, while the person is detained, the person or people stated in the prohibited contact order if the court is satisfied, on reasonable grounds, that the prohibited contact order is reasonable and necessary for one or more of the following purposes –

- to avoid jeopardising action that is being taken to prevent a terrorist act
- to prevent serious harm to a person
- to preserve evidence of, or relating to, a terrorist act
- to prevent interference with the gathering of information about a terrorist act; or the preparation for, or the planning of, a terrorist act
- to avoid jeopardising the arrest of a person who is suspected of having committed an offence against the *Commonwealth Criminal Code*, part 5.3 (Terrorism) or another serious offence; or the taking into custody of a person for whom a preventative detention order is in force or for whom a preventative detention order is likely to be made; or the service on a person of a control order under the *Commonwealth Criminal Code*, division 104.³⁴¹

2.105 The Supreme Court may refuse to make a requested prohibited contact order unless information is given in a way the court requires.³⁴² The exposure draft bill also specifies the circumstances in which prohibited contact orders can be set aside.³⁴³

2.106 Stakeholders have differing views on the provisions of the proposed legislation regarding detainees' communication rights–

- The AFP prefers the Commonwealth and NSW approach which has mandatory monitoring for contact between detained clients and lawyers.³⁴⁴

³⁴⁰ sub-cl 29(4) and (5)

³⁴¹ cl29

³⁴² cl30

³⁴³ cl31

³⁴⁴ *Proof Transcript of Evidence*, 31 January 2006, pp46–47

- The Australian Government Attorney-General's Department expressed concern about the risk of detainees being able to make disclosures leading to a terrorist attack under the proposed ACT legislation.³⁴⁵
- Several suggested that the provisions permitting detainees to notify specified people about their detention should be broadened, and to give police more discretion to permit additional contact.³⁴⁶ One witness suggested that there should be penalties for recipients of that information passing it on to others.³⁴⁷
- The Australian Privacy Foundation has suggested that to remove any doubt, the prohibition on recording of contact between lawyers and detainees in sub-clause 53(10) should include reference to taking notes as well as audio or video recording.³⁴⁸
- Several stakeholders were particularly concerned about communications between detainees and lawyers being monitored, as noted below.

2.107 In the Committee's view, the restrictions on freedom of communication in the proposed legislation are likely to be regarded by the Supreme Court as reasonable and proportionate under the *Human Rights Act 2004* (A.C.T.).

2.108 The Committee does not share the AFP's reservations about the scope for legal advice under sub-clause 49(9)³⁴⁹ as the detainee may be released and arrested on warrant for terrorism-related matters under other legislation, or may have legal matters pending when they are detained, such as contractual negotiations. This was a concern for the NSW Legislative Council's Legislation Committee in relation to the counterpart NSW Bill³⁵⁰ and for some commentators in relation to the Commonwealth's 2005 bill.³⁵¹ The Committee sees no need to restrict the issues that may be discussed between detainees and their lawyer, subject to legal aid eligibility considerations.

³⁴⁵ *Proof Transcript of Evidence*, 31 January 2006, p24

³⁴⁶ Submissions no 4, 16; *Proof Transcript of Evidence*, Canberra, 25 January 2006, p5; *Proof Transcript of Evidence*, Canberra, 31 January 2006, p59; Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p3; ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p13; McKinnon, *Proof Transcript of Evidence*, 31 January 2006, p59; letter from Dr H. Wiles, to the Committee Chair, dated 7 February 2006, concerning detainees and communication provisions

³⁴⁷ ACT Legislative Assembly, Standing Committee on Legal Affairs (Reference: Exposure Draft Terrorism (Extraordinary Temporary Powers) Bill 2005), *Proof Transcript of Evidence*, Canberra, 25 January 2006, p5

³⁴⁸ Submission no 8

³⁴⁹ Submission no 15

³⁵⁰ NSW Legislative Council, *Legislation Review Committee Digest No 15 of 2005*, pp32–33

³⁵¹ Letter dated 20 October 2005 from Mr Richard Refshauge SC, ACT Director of Public Prosecutions, to Mr Jon Stanhope MLA, Chief Minister and Attorney-General, p3

Monitoring of client-lawyer communications

- 2.109 The provisions of the exposure draft preserve the confidentiality of lawyer-client communications in the first instance, contrasting with counterpart Commonwealth and state legislation, which provide for the monitoring of such communications. The ACT Attorney-General, Mr Stanhope, advised that the ACT provisions are modelled on provisions in comparable United Kingdom legislation, which creates a presumption of confidential legal communications except in limited circumstances. The United Kingdom experience is that these provisions have provided adequate protection of national security.³⁵²
- 2.110 Several submissions suggested that there should be no monitoring or use of communications between lawyers and clients, or that the standard of proof applicable to the Supreme Court hearing an application for a prohibited contact order be raised,³⁵³ which ought not to be applicable to communications with a lawyer.³⁵⁴ The Australian Government Attorney-General's Department noted the unpopularity of monitoring but said that the risks of disclosures had to be minimised.³⁵⁵ The AFP expressed concern that the test needing to be met before monitoring could be done was 'very stringent' in the context of preventing or responding to terrorist acts, given that the communications could compromise counter-terrorism operations or put the community at risk. The AFP preferred mandatory monitoring.³⁵⁶
- 2.111 Several submissions suggested alternate provisions –
- The ACT Human Rights Office suggested that clause 53 should be amended to limit its application to terrorism-related matters so that it is consistent with the right to privacy, a fair trial, and the proportionality test in section 28 of the Human Rights Act.³⁵⁷

³⁵² ACT Attorney-General, Mr Jon Stanhope MLA, 'Exposure Draft of Anti-Terrorism Laws', Media Release, 539/05, 15 December 2005

³⁵³ Submissions no 5, 6,9; Civil Liberties Australia, *Proof Transcript of Evidence*, 25 January 2006, pp24, 27–28; Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, p43; ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, pp11, 12

³⁵⁴ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p14

³⁵⁵ *Proof Transcript of Evidence*, 31 January 2006, p24

³⁵⁶ Submission no 15

³⁵⁷ Submission no 10

- One submission suggested that since the senior police officer considering the issue of a monitoring order is required to only consider, but not adopt, any submission from the PIM on the proposed monitoring order, greater powers for the PIM or provision of urgent recourse to a court should be provided for.³⁵⁸
- Another suggested that a decision to monitor contact with lawyers ought to be made by either a magistrate or a Supreme Court judge.³⁵⁹
- Another was that the police should not have access to any recordings of monitored contact; that records should be taped, sealed and presented to a Supreme Court judge to determine whether they are subject to legal professional privilege.³⁶⁰

2.112 The Committee recognises the fundamental importance of client-lawyer confidentiality subject to limited derogation in appropriate circumstances.³⁶¹ There is a public interest in encouraging full and frank disclosure between lawyers and clients.³⁶² In *Brennan v UK*³⁶³ a detainee's right to a fair trial was held to have been breached because of the presence of a police officer during a consultation session between the detainee and his solicitor. This ruling is consistent with at least one UN standard³⁶⁴ and a recommendation of an Australian Parliamentary Joint Committee report on ASIO's questioning powers.³⁶⁵

³⁵⁸ Submission no 6

³⁵⁹ Submission no 11; ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p14

³⁶⁰ Prof Bronitt *et al*, *Proof Transcript of Evidence*, 1 February 2006, p30

³⁶¹ See this principle discussed in a range of legal areas in *Three Rivers DC v Bank of England* (No 6) [2004] UKHL 48, *S v Switzerland* (1991) 14 EHRR 670, *Ocalan v Turkey* (2003) 37 EHRR 10 and *Campbell v UK* (1992) 15 EHRR 137, *Foxley v UK* (2001) 31 EHRR 25, *AM & S Europe Ltd v Commission of The European Communities* (Case 155/79) [1983] QB 878 at 949, cited in John Randall Qc, 'Ethical Issues at the Convergence of Civil and Criminal Litigation Background Paper – The Position of Lawyers in England & Wales concerning the Proceeds of Crime' accessible at <<http://www.ibanet.org/images/downloads/Lit05Miami%20-%20John%20Randall%20QC%20-%20Paper.pdf>>

³⁶² see *Grant v Downs* (1976) 135 CLR 674 at 685, *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49 at 64; *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543

³⁶³ (2002) 35 EHRR 27

³⁶⁴ Principle 8 *United Nations Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, UN Doc A/CONF.144/28/Rev.1(1990), accessible at <http://www.unhchr.ch/html/menu3/b/h_comp44.htm>

³⁶⁵ Parliament of the Commonwealth of Australia, *ASIO's Questioning and Detention Powers: Review of the Operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979*, Parliamentary Joint Committee on ASIO, ASIS and DSD, November 2005, p54 See also Submission 10

- 2.113 However the monitoring of a detainee's correspondence with his lawyer pending trial was held not to be a violation of his human rights in *Erdem v Germany*.³⁶⁶ The detainee in that case was a suspected terrorist and there were statutory safeguards attached to the monitoring of correspondence, which was permitted under statute. The Court also had regard to the margin of appreciation afforded to the state, and held that the interference was not disproportionate to the legitimate aims pursued (the interests of national security, public safety, the prevention of disorder or crime and for the protection of the rights and freedoms of others). Under the relevant statute the judge responsible for opening the correspondence must not have the conduct of the investigation and was required to keep the information confidential. The European Court held that the regulation of the detainee's correspondence did not violate his right to respect for his private and family life, his home and his correspondence under article 8 of the European Convention. The need to monitor correspondence to evaluate a terrorist threat was held not to be a disproportionate interference with the human right.³⁶⁷
- 2.114 The Committee notes the concern expressed by the ACT Director of Public Prosecutions in relation to the 2005 Commonwealth anti-terror bill that monitoring should be done by someone other than an investigating officer involved in the detainee's case so that the monitoring does not provide information which is consciously or unconsciously used in relation to the investigation.³⁶⁸ Mr Refshauge suggested that the person monitoring detainees' communications should be prohibited from communicating the content of any monitored conversations to the investigator.³⁶⁹
- 2.115 The Committee also notes that several law associations are critical of the proposed monitoring provisions. The Australian Lawyers Alliance, ACT Bar Association and the Law Council of Australia consider that communications between a person in detention and his or her legal adviser should be

³⁶⁶ (2002) 35 EHRR 15 and 38321/97 [2001] ECHR 434 (5 July 2001) accessible at <<http://www.worldlii.org/eu/cases/ECHR/2001/434.html>>

³⁶⁷ Noted in Steve Foster, *Human Rights and Civil Liberties* (Longman 2003) 'Supplement for Period December 2002–December 2005', typescript copy.

³⁶⁸ This would be contrary to the intent of cl55

³⁶⁹ Letter dated 20 October 2005 from Mr Richard Refshauge SC, ACT Director of Public Prosecutions, to Mr Jon Stanhope MLA, Chief Minister and Attorney-General, p3

‘completely privileged’, and that monitoring of communications by police should not be allowed.³⁷⁰ The Australian Lawyers Alliance suggested that there should be provision for review of a monitoring order by a court.³⁷¹ The ACT Law Society said that a Supreme Court order should be obtained to permit monitoring, or at the very least, the agreement of the PIM should be obtained.³⁷² The Law Society said that there are alternative legal mechanisms already available to deal with collusion or conspiracies involving lawyers and clients so sub-clause 53(2) may be unnecessary, although they were not opposed to it outright, provided the monitoring order was issued by a court.³⁷³

RECOMMENDATION 21

The Committee recommends that the exposure draft bill be amended to include a right of judicial review of a monitoring order.

RECOMMENDATION 22

The Committee recommends that a definition of ‘record’, which includes notes as well as video and audio recording, be included in the dictionary.

³⁷⁰ Submission no 2; Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p3

³⁷¹ Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p3

³⁷² Submission no 11

³⁷³ ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p17

3 SPECIAL POWERS AUTHORISATIONS— PREVENTATIVE AND INVESTIGATIVE AUTHORISATIONS

Preventative authorisations

- 3.1 Part 3 of the exposure draft bill deals with the authorisation by the Supreme Court or the Magistrates Court of special powers for police aimed at preventing or reducing the impact of a terrorist act. These and other powers in the proposed legislation would be in addition to any powers conferred on police in any other territory law.³⁷⁴
- 3.2 The exposure draft bill provides that the Chief Police Officer may, with the written approval of the Chief Minister, apply to the Supreme Court or the Magistrates Court for a preventative authorisation for special powers for all police officers³⁷⁵ if he or she believes, on reasonable grounds, that a terrorist act is happening or will happen some time within the next 14 days; and is satisfied, on reasonable grounds, that the authorisation would substantially assist in preventing the terrorist act, reducing its impact or both.³⁷⁶
- 3.3 Written applications for authorisations must specify a start and end time (which can be no longer than 7 days)³⁷⁷ and the general nature of the terrorist act for which the authorisation is sought; a name or description of the area (and a justification for why the powers in relation to that area are reasonable and necessary); the person or vehicle in relation to which the order is sought; and an explanation why the authorisation sought would substantially assist in preventing the terrorist act, reducing its impact or both.³⁷⁸
- 3.4 The Supreme Court or the Magistrates Court may authorise special powers in

³⁷⁴ cl91

³⁷⁵ para 65(1)(b)

³⁷⁶ cl61

³⁷⁷ sub-cl65(2) but successive preventative authorisations may be sought and issued in relation to the same terrorist act: sub-cl 67(2)

³⁷⁸ cl62

response to an application, with or without conditions or restrictions,³⁷⁹ if satisfied, on reasonable grounds, that a terrorist act is happening or will happen some time within the next 14 days; and that the authorisation would substantially assist in preventing the terrorist act, or reducing its impact or both. If the authorisation is for, or includes, an area, the court must be satisfied on reasonable grounds that it is reasonable and necessary to give the authorisation for that area.³⁸⁰ The court, may however, require further information, and that the further information be provided in a certain way (such as on oath or by affidavit).³⁸¹

- 3.5 Preventative authorisations may be amended or set aside by the court following consideration of an application by the Chief Police Officer or an interested person.³⁸²
- 3.6 This role for judicial officers is an important safeguard increasing the likelihood that the provisions may be interpreted as human rights compliant. The ACT Human Rights Office welcomed the need for judicial authorisation for strip searches in particular.³⁸³ The ACT Law Society would prefer that only the Supreme Court, and not the Magistrates Court, be able to authorise Part 3 Special Powers.³⁸⁴
- 3.7 These provisions raise constitutionality concerns, as discussed above. They also activate many rights under the Human Rights Act, such as the right to privacy and reputation, freedom of expression, to a fair trial, to equality before the law and non-discrimination in the exercise of human rights.³⁸⁵
- 3.8 Provisions under the *Terrorism Act 2000* (UK) authorising stop and search powers over all of a metropolitan police district in the Docklands in East London were regarded as human rights compliant in a 2004 UK case.³⁸⁶ The

³⁷⁹ sub-cl 65(3)

³⁸⁰ cl63

³⁸¹ cl64

³⁸² cl66

³⁸³ In Submission no 10 the ACT Human Rights Office noted that Canadian jurisprudence requires prior judicial authorisation before search and seizure powers can be exercised, citing *Hunter v Southam Inc* [1984] 2 SCR 145

³⁸⁴ Submission no 11

³⁸⁵ Submission no 10

³⁸⁶ *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2005] EWCA Civ 1067

UK Court of Appeal took into account the assessed risks to public safety and national security and the responsibility of government officials, and the experience and information sources available to them, to manage those risks. The Northern Ireland Human Rights Commission, having reviewed that case, nevertheless recommended that authorisations to exercise such powers should require judicial approval.³⁸⁷ Judicial approval is required under the proposed ACT legislation.

Investigative authorisations

- 3.9 The exposure draft bill also provides for the making of investigative authorisations in relation to a terrorist act that has happened within the last 28 days, is happening or will happen some time within the next 14 days. Such authorisations are intended to substantially assist in the apprehension of a person responsible for the terrorist act, investigation of the terrorist act (including preservation of evidence about it), and reducing the impact of the terrorist act. Authorisations can only be issued for an area the court considers is reasonable and necessary.³⁸⁸ The court may also require further information to be provided in a particular way (such as by oath or affidavit).³⁸⁹ Investigative authorisations cannot be extended but new authorisations may be issued to start immediately after the end of an earlier investigative authorisation or at a later time³⁹⁰.
- 3.10 The exposure draft bill specifies procedures that must be followed by police officers exercising authorised special powers. For example if asked by a person, they must tell the person the reason for exercising the power, and if the officer is not in uniform, show the person evidence that the officer is a police officer. If a person was searched, or a person's vehicle or premises were searched, in the exercise of authorised special powers, the person who was searched has one year after the day of the search, to ask the Chief Police Officer, in writing, for a written statement that the search was conducted in accordance with this Act. The Chief Police Officer will be required to give the

³⁸⁷ Northern Ireland Human Rights Commission, *Countering Terrorism and Protecting Human Rights*, Belfast, September 2004, accessible at
<http://www.nihrc.org/documents/landp/Terrorism_HR_Sept04.pdf>

person the written statement asked for; or tell the person, in writing, that the Chief Police Officer cannot give the written statement asked for and explain why.³⁹¹

3.11 If a special powers authorisation has been issued, police officers can require a person to provide, or prove the correctness of, personal details about themselves,³⁹² if those details are unknown to the officer and the officer suspects, on reasonable grounds, that the person —

- is a target person (i.e. is a person named or described in an authorisation); or
- is in the company of a target person in suspicious circumstances; or
- is about to enter, is in or on, or has recently left, a target vehicle (ie a vehicle³⁹³ named or described in an authorisation); or
- is about to enter, is in, or has recently left, a target area (i.e. an area named or described as a target area in an authorisation).³⁹⁴

3.12 If a person fails to provide or prove the correctness of the information they provide, and they do not have a reasonable excuse, they can be liable to a maximum penalty of 50 penalty units, imprisonment for 6 months or both.³⁹⁵ The Committee notes that penalties for failing to provide a name and address under other ACT legislation are much less than in the exposure draft bill: e.g. 5 penalty units under the *Major Events Security Act 2000* (A.C.T.), when the objectives of the legislation are similar, ie to protect public security.

Authorised special powers

3.13 Under the proposed legislation, a police officer may stop and search a person in accordance with prescribed requirements for personal searches,³⁹⁶ and anything in the person's possession or under the person's control, if the officer suspects, on reasonable grounds, that the person —

³⁸⁸ cl70

³⁸⁹ cl71

³⁹⁰ cl74

³⁹¹ cl75

³⁹² ie full name, date of birth, and temporary and permanent residential address : sub-cl 76(5)

³⁹³ defined as anything designed or used to transport a person or goods by road, rail, air or water: cl60

³⁹⁴ refer definitions in cl60

³⁹⁵ sub-cl 76(3),(4)

³⁹⁶ see Schedule 1

- is a target person; or
 - is in the company of a target person in suspicious circumstances; or
 - is about to enter, is in or on, or has recently left, a target vehicle; or
 - is about to enter, is in, or has recently left, a target area.³⁹⁷
- 3.14 If a person fails to comply with a search and they do not have a reasonable excuse, they can be liable to a maximum penalty of 50 penalty units, imprisonment for 6 months or both.³⁹⁸
- 3.15 Special powers can also be invoked to – search vehicles,³⁹⁹ move vehicles,⁴⁰⁰ enter and search premises and detain a person there if necessary for the search,⁴⁰¹ cordon off an area and the people and vehicles in or outside it,⁴⁰² seize things⁴⁰³ and use the force that is reasonable and necessary for exercising the power conferred under the authorisation.⁴⁰⁴
- 3.16 Several submissions expressed concern about the breadth of the powers conferrable under Part 3 of the bill. Dr Wheeler suggested there is uncertainty as to whether they fall within the *Kable* doctrine in that the Supreme Court is being empowered to authorise activities that may compromise its institutional integrity.⁴⁰⁵
- 3.17 Other submissions and witnesses made various suggestions for improving these provisions. These include–
- the insertion of a ‘reasonable and necessary’ test in the provision authorising access to premises⁴⁰⁶
 - reference to a presumption that the person from whom property was seized was the rightful owner rather than having it forfeited to the Territory⁴⁰⁷
 - a query whether the delegation provisions enabling some powers to be exercised by a senior police officer are appropriate.⁴⁰⁸

³⁹⁷ cl. 77; refer definitions in cl60

³⁹⁸ sub-cl 77(4), (5)

³⁹⁹ cl78

⁴⁰⁰ cl79

⁴⁰¹ cl80, sub-cl 80(3)

⁴⁰² cl81

⁴⁰³ cl 82 and see cl87 and 88 re return and disposal of seized property on application to court

⁴⁰⁴ cl83

⁴⁰⁵ Submission no 20

⁴⁰⁶ Submission no 12 re sub-cl 80(1)

⁴⁰⁷ Submission no 12 re sub-cl 88(2)(d)

- 3.18 Several submissions and witnesses welcomed the proposed regulation of personal searches.⁴⁰⁹ However the Australian Privacy Foundation said that a detaining police officer should not be permitted to avoid the requirements of Schedule 1 where circumstances make compliance 'impractical'. The Association prefers that the circumstances justifying non-compliance be specified. The Australian Lawyers Alliance suggested that an authorisation from a court should be necessary for strip searches.⁴¹⁰ The ACT Human Rights Office suggested that the bill should be amended to require police officers proposing to exercise special powers to provide information about their authority and reasons for their actions without a person having to ask for that information (as currently proposed).⁴¹¹
- 3.19 The Committee is of the view that the inclusion of a general justification for non-compliance is a reasonable drafting technique given that the range of circumstances justifying non-compliance is unforeseeable. The Committee notes the reference to return of seized goods in clause 87 to the owner or person who had lawful possession of it before it was seized. Powers of delegation are routinely included in legislation.
- 3.20 The requirement for persons to provide their name and address following a request from a police officer raises the human right to privacy and protection from unlawful and arbitrary interference with that right,⁴¹² and the right to silence and privilege against self-incrimination.⁴¹³ But it is also recognised that the police need to be able to conduct investigations where there are reasonable grounds to suspect that someone can assist the police in relation to their inquiries. In this instance the Committee's view is that the interference with the right satisfies s28 of the Human Rights Act, that the interference with the right is subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

⁴⁰⁸ Australian Lawyers Alliance, *Proof Transcript of Evidence*, 31 January 2006, p4; Canberra Islamic Centre, *Proof Transcript of Evidence*, 31 January 2006, p72

⁴⁰⁹ Submission no 7; *Proof Transcript of Evidence*, 31 January 2006, p4

⁴¹⁰ *Proof Transcript of Evidence*, 31 January 2006, p4

⁴¹¹ ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p13

⁴¹² *Human Rights Act 2004* s12 ICCPR art 17. See General Comment No. 16

⁴¹³ ACT Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report 6 of 1999*

- 3.21 The Committee notes the view expressed in submissions and by witnesses that given the significant penalties attaching to failure to provide personal information, a defence of reasonable excuse should be available, consistent with sub-clause 76(4).⁴¹⁴ Section 105.21 of the Criminal Code provides such a defence,⁴¹⁵ but the penalty under that provision is 20 penalty units for an individual and 5 penalty units for a police officer.

RECOMMENDATION 23

The Committee recommends that a defence of reasonable excuse for not providing required information be included in clause 35.

RECOMMENDATION 24

The Committee recommends that differences in offence and penalty provisions in the proposed legislation, and other similar legislation, concerning provision of personal information, be reviewed for proportionality and consistency.

⁴¹⁴ Submissions no 13, 16; ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p13

⁴¹⁵ Submission no 16

4 OVERSIGHT AGENCIES

A.C.T. Supreme Court

- 4.1 The role of the Supreme Court under the proposed legislation has been noted above.

Public Interest Monitor Panel

- 4.2 The proposed legislation provides for the establishment of a Public Interest Monitor Panel (PIM) to monitor the hearing of applications for preventative detention orders,⁴¹⁶ and contact between persons detained under the legislation and their lawyers.⁴¹⁷ Following the applicant's mandatory notification to the Legal Aid Commission that a preventative detention order is being sought, the Commission would appoint a person from the panel to attend the hearing. The panel member would be entitled to ask questions of anyone giving evidence to the court and to make any submissions to the court.⁴¹⁸ Lawyers with suitable qualifications and experience and an appropriate security clearance would be eligible to be appointed to the panel.⁴¹⁹ Such appointments would be subject to consultation with a Legislative Assembly Committee and would be disallowable.⁴²⁰
- 4.3 The proposed role for the PIM has a few similarities with that of the Public Interest Monitor under Queensland's *Terrorism (Preventative Detention) Act 2005* (Qld). That Act provides for attendance by the PIM at both initial Preventative Detention Order (PDO) applications and final PDO applications, and also at applications for remedies in the Supreme Court. However the Queensland Public Interest Monitor's role in relation to complaints against police is already held by the ACT Ombudsman.

⁴¹⁶ cl15

⁴¹⁷ cl53

⁴¹⁸ sub-cl 15(3)

⁴¹⁹ cl59

⁴²⁰ Legislation Act, div 19.3.3

- 4.4 Some submissions argued for a broader role for the proposed PIM,⁴²¹ including to undertake the proposed review of the operation of the legislation after 3 years,⁴²² and to report on the operation of the legislation periodically.⁴²³ The ACT Law Society supported the PIM but cautioned that local criminal law practitioners may be disqualified from being appointed to the panel and noted that the detainee should have a lawyer representing them anyway to look after their interests.⁴²⁴ The Canberra Islamic Centre suggested that the legislation should require the PIM to be given a copy of relevant documents concerned with an application and decisions made under the legislation.⁴²⁵
- 4.5 The Legal Aid Office CEO, Mr Staniforth, regarded the proposed panel as 'flexible and cost effective' but noted that the Legal Aid ACT would need to be amended to empower the Legal Aid Commission to pay the PIM given that this is a service clearly not falling within its current provisions.⁴²⁶
- 4.6 Others suggested that it would be more cost-effective to have the ACT Human Rights Commissioner and ACT Ombudsman perform the functions of the proposed PIM.⁴²⁷ The Human Rights Commissioner expressed a willingness to do so, provided resources were available.⁴²⁸ Although additional resources may be needed for both offices this should be more cost effective than constituting, resourcing, training, and keeping up to date a lawyers' panel, even though its services may rarely be called upon.⁴²⁹ Witnesses noted that the Queensland PIM is like a police ombudsman in any event.⁴³⁰

RECOMMENDATION 25

The Committee recommends that the proposed legislation be amended to remove the role of the proposed Public Interest Monitor Panel and that the ACT Human

⁴²¹ Submission no 9, 11; Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, p18, 22, 40

⁴²² cl98 – Submission no 4

⁴²³ Civil Liberties Australia (ACT) Inc, *Proof Transcript of Evidence*, 25 January 2006, p19

⁴²⁴ Submission no 11; ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p14, 16

⁴²⁵ Submission no 12

⁴²⁶ Submission no 1

⁴²⁷ Submission no 16; McKinnon, *Proof Transcript of Evidence*, 31 January 2006, p.60

⁴²⁸ ACT Human Rights Commissioner, *Proof Transcript of Evidence*, 31 January 2006, pp12, 19

⁴²⁹ Submission no 16; *Proof Transcript of Evidence*, 31 January 2006, p60

⁴³⁰ Australian Lawyers for Human Rights, *Proof Transcript of Evidence*, 25 January 2006, p57

Rights Commissioner and ACT Ombudsman be allocated that role.

A.C.T. Human Rights Commissioner

- 4.7 The Human Rights Commissioner has several functions under the proposed legislation. These include –
- to be consulted about proposed detention arrangements which may be put to the Minister for approval⁴³¹
 - to be told about each place a person is detained which the Commissioner must be able to be visit at reasonable times⁴³²
 - to be given a copy of detention arrangements, and arrangements as amended⁴³³
- 4.8 Under the *Human Rights Act 2004* (A.C.T.) the Human Rights Commissioner can review ACT laws, including the common law, and report to the ACT Attorney-General on the results of the review. This report must be tabled in the Legislative Assembly, subject to any amendments that are necessary to protect an individual's privacy or the public interest. The Commissioner has the power to seek leave from courts and tribunals to intervene in appropriate human rights cases.

Public scrutiny and ACT Legislative Assembly

Annual reports

- 4.9 The exposure draft bill provides that each annual report prepared under the *Annual Reports (Government Agencies) Act 2004* for a financial year must include a report about the use and effectiveness of this Act during the year.⁴³⁴ This is a welcome provision but the information would be far more accessible for stakeholders if each agency involved in the operation of the legislation were to contribute to one inter-agency annual report on the operation of the Act, such as the AFP, Supreme Court, ACT Human Rights Commissioner, ACT Ombudsman, PIM, Legal Aid Commission, Public Advocate, ACT Police etc. This could be in the form of a summary report with hyper-text links to annual

⁴³¹ sub-cl 40(2)

⁴³² paras 40(4)(g)

⁴³³ cl40(6)

⁴³⁴ cl 95

reports prepared by agencies under the *Annual Reports (Government Agencies) Act 2004*.

4.10 To maintain an appropriate level of Assembly oversight of the legislation and annual reports, the annual report on the legislation should be referred, under the Act, on tabling, to the Assembly's Legal Affairs Committee, as is standard practice for annual reports.

4.11 In NSW, annual reports by the Commissioner for Police in relation to the *Terrorism (Police Powers) Preventative Detention Act 2005 (NSW)* are required to address prescribed issues, including –

- the number of applications for preventative detention orders (including interim orders) and the number of any such orders made, and the number of occasions on which such an order (other than an interim order) was not made following a hearing,
- the number of any such applications and orders in relation to adults and the number in relation to juveniles,
- the duration of each such order made,
- a statement as to whether each such order was made to prevent a terrorist act or to preserve evidence,
- a statement as to whether a person was taken into custody under each such order and, if so, the period for which the person was detained,
- a statement as to whether the person detained under such an order was principally detained in a correctional centre, juvenile correctional centre, juvenile detention centre, police facility or other place,
- the number of applications for prohibited contact orders and the number of any such orders made, the duration of each such order and the number of any such orders made in relation to adults and in relation to juveniles,
- the number of applications for revocation of an order and the number of revocations granted,
- particulars of any complaints in relation to the detention of a person under a preventative detention order made or referred during the year to the Ombudsman or Police Integrity Commission and the outcome of any complaint so made,
- a statement confirming the destruction of identification material required to be destroyed under the Act.⁴³⁵

⁴³⁵ Section 26ZN *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005*

- 4.12 The Australian Privacy Foundation suggested similarly that the annual report should be required to include information on prescribed matters.⁴³⁶
- 4.13 In the Committee's view there is merit in this prescribed list being reportable on annually, but as appropriate for the ACT legislation. Consideration should be given to including a similar provision in the proposed ACT legislation for reporting by the Chief Police Officer and other agencies involved in the implementation of the legislation.
- 4.14 The Committee notes that the ACT Bar Association and the Law Council of Australia recommended similarly that the Commonwealth Attorney-General prepare an annual report on the operation of the Commonwealth legislation and table it in the Australian Parliament.⁴³⁷
- 4.15 The ACT Ombudsman's view is that there is 'a need for systemic review by the Ombudsman or the Human Rights Commissioner to satisfy public and legislature concerns about the exercise of intrusive powers'.⁴³⁸
- 4.16 In the Committee's view however, as both of those offices exercise powers and functions under the proposed legislation, it would be inappropriate for systemic reviews to be undertaken by those offices. The exposure draft bill does provide for a review of the Act after 3 years of operation. In the Committee's view, and that of several stakeholders, this should be an independent review.⁴³⁹

RECOMMENDATION 26

The Committee recommends that the ACT Government consider amending clause 95 so that the Legislative Assembly's Standing Committee on Legal Affairs is provided with a report annually that includes the prescribed annual report information from each agency involved in the implementation of the proposed legislation.

⁴³⁶ Submission no 8

⁴³⁷ Submission no 2

⁴³⁸ Submission no 3

⁴³⁹ Submission no 4

RECOMMENDATION 27

The Committee recommends that consideration be given to prescribing in the proposed ACT legislation the matters to be reported on by the Chief Police Officer and other agencies involved in the implementation of the legislation.

RECOMMENDATION 28

The Committee recommends that ‘at any reasonable time’ be omitted from paragraph 40(4)(g).

Public Advocate

- 4.17 The proposed legislation provides for the Public Advocate appointed under the *Public Advocate Act 2005* (following its commencement),⁴⁴⁰ to be present at each Part 2 application⁴⁴¹ for an interim preventative detention order when the application concerns a person of impaired decision-making ability.⁴⁴² The Public Advocate is entitled to ask questions of anyone giving evidence to the court and to make any submissions to the court. The Public Advocate must be given a copy of the application; and written notice of the place, date and time the application is to be heard.⁴⁴³ This is a role that the Community Advocate and Deputy Community Advocate already perform under other legislation and which the Advocate welcomes.⁴⁴⁴
- 4.18 The legislation also provides that an interim or preventative detention order may include a restriction requiring that the Public Advocate contact the person subject to a detention order *only* after 24 hours of the person’s detention,⁴⁴⁵ or after the expiry of an interim order.⁴⁴⁶ Such a restriction can only be imposed to significantly reduce the risk of a terrorist act happening or to avoid a

⁴⁴⁰ and before then the Community Advocate: cl97

⁴⁴¹ cl16. Part 2 applications include both interim and preventative detention orders – cl9 (definitions of ‘part 2 application’ and ‘preventative detention order’, and cl21

⁴⁴² cl16. The proposed dictionary defines impaired decision making ability by cross-reference to s6 of the *Guardianship and Management of Property Act 1991 (ACT)*, which provides that a person can have impaired decision making if they have a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness

⁴⁴³ cl16

⁴⁴⁴ Submission no 14; ACT Community Advocate, *Proof Transcript of Evidence*, 25 January 2006, p62

⁴⁴⁵ sub-cl 22(7), (8)

⁴⁴⁶ sub-cl 22(8)

preventative detention order being seriously undermined.⁴⁴⁷ Although the Committee cannot envisage when such circumstances may arise and doubts the need for these provisions, the Committee notes that the ACT Community Advocate, Ms Anita Phillips, conceded that there is 'probably' a need for such provisions.⁴⁴⁸

- 4.19 The ACT Community Advocate (OCA) also advised the Committee that she finds the provisions within the Act in relation to persons who have an impaired decision-making ability consistent with the OCA's functions and responsibilities, and that the office will be pleased to undertake the monitoring role proposed in the bill. Ms Phillips did request however, that as the OCA only operates on a Monday – Friday office hours opening, the provision of advice and/or contact to the Public Advocate 'within 24 hours' needs to become 'one working day' or 'as soon as possible'.⁴⁴⁹ The Committee is concerned however, where preventative detention orders are sought between Friday and Monday mornings, or on public holidays, that particularly vulnerable detainees may not have their interests protected, even though the current Community Advocate may do her best to contact a detainee promptly.⁴⁵⁰
- 4.20 The Committee is of the view that 'within 24 hours or as soon as reasonably practicable' may be preferable and sufficient to accommodate the Community Advocate's request.
- 4.21 The exposure draft bill provides further, that within 24 hours of being detained under a preventative detention order the police officer detaining the person must tell the Public Advocate about the person's detention as soon as possible after the order is made.⁴⁵¹ Sub-clause 51(2) does not seem to be consistent with clause 16 because the Public Advocate should already have been notified of the proposed application for a preventative detention order.

⁴⁴⁷ sub-cl 22(9)

⁴⁴⁸ ACT Community Advocate, *Proof Transcript of Evidence*, 25 January 2006, p64

⁴⁴⁹ Letter dated 10 January 2006 from the ACT Community Advocate to the inquiry secretary concerning the Exposure Draft: Terrorism (Extraordinary Temporary Powers) Bill 2005; ACT Community Advocate, *Proof Transcript of Evidence*, 25 January 2006, pp63, 66

⁴⁵⁰ ACT Community Advocate, *Proof Transcript of Evidence*, 25 January 2006, p67

⁴⁵¹ sub-cl 51(2)

RECOMMENDATION 29

The Committee recommends that the consistency of clause 16 with sub-clause 51(2) be reviewed and any appropriate amendments made.

RECOMMENDATION 30

The Committee recommends that each reference to '24 hours' be amended to '24 hours or as soon as reasonably practicable'.

A.C.T. Ombudsman

4.22 In addition to a detainee's right to contact the ACT Ombudsman noted above, the exposure draft bill includes a number of provisions enabling the Ombudsman to address issues arising in detention situations:

- the ACT Ombudsman may make representations to the nominated senior police officer responsible for supervising the exercise of functions in relation to the preventative detention order⁴⁵²
- the ACT Ombudsman is to be consulted about proposed detention arrangements which may be put to the Minister for approval⁴⁵³
- the detention arrangements must provide for the ACT Ombudsman to be told about each place a person is detained which must be able to be visited at a reasonable time by specified officials including the Ombudsman⁴⁵⁴
- the ACT Ombudsman is to be given a copy of detention arrangements, and arrangements as amended⁴⁵⁵
- a detainee must be informed of his or her rights, including the right to complain to the ACT Ombudsman about the application for a preventative detention order having been made, the detainee's treatment by anyone exercising authority under the order, and the person's detention⁴⁵⁶
- indicates that unlike contact with other persons, the right to contact with the ACT Ombudsman is not subject to a prohibited contact order under cl29⁴⁵⁷

⁴⁵² para 33(4)(c)

⁴⁵³ sub-cl 40(2)

⁴⁵⁴ paras 40(4)(f) and (g)

⁴⁵⁵ cl40(6)

⁴⁵⁶ cl41(2)(g)

⁴⁵⁷ cl54

- a person may contact a lawyer in relation to making a complaint to the ACT Ombudsman⁴⁵⁸
- 4.23 The ACT Ombudsman, Professor John MacMillan, has suggested to the Committee that the exposure draft bill should be amended to clarify that the Ombudsman is permitted to question a detainee who has made a complaint to his office, or whom the ACT Ombudsman is visiting in detention. Currently a detainee cannot be questioned except in relation to matters concerning identity, wellbeing and ‘allowing the person to comply with a requirement of ...[Part 2] in relation to the detained person’s detention under the order’.⁴⁵⁹ As detainees’ rights to complain to the ACT Ombudsman are at the detainee’s discretion under Part 2 and a complaint is not a ‘requirement’, the Committee sees some merit in the Ombudsman’s suggestion.
- 4.24 The ACT Ombudsman also suggested that the exposure draft bill could be amended to authorise consultation and the exchange of limited information between the Ombudsman, the Public Advocate and engaged members of the PIM so that cooperation between oversight agencies was enhanced and duplication and the risk of possible exposure of sensitive information was lessened. The Ombudsman suggested that oversight agencies could cooperatively produce a standard form of advice about complaint rights and oversight and processes relating to the proposed legislation.⁴⁶⁰ The Committee agrees that this could be cost-effective and beneficial.

RECOMMENDATION 31

The Committee recommends that consideration be given to amending clause 55 to permit oversight agencies to question a detainee in relation to concerns the detainee has about a detention order, or a matter related to the application for a detention order, or the conditions of detention.

⁴⁵⁸ cl49

⁴⁵⁹ para 55(1)(c)

⁴⁶⁰ Submission no 3, p3

RECOMMENDATION 32

The Committee recommends that consideration be given to amending the exposure draft bill to authorise cooperation amongst oversight agencies in the public interest or the interest of detainees. This could extend to the production of cross-agency information packages for example.

5 MISCELLANEOUS

Chains of command and incident management

- 5.1 Part 3 of the proposed legislation confers broad and special powers on the AFP. For example, under clause 86, the ACT Chief Police Officer can give directions in relation to the exercise of functions of an ACT department or Territory entity, to facilitate the exercise of a power under Part 3.⁴⁶¹ The responsible chief executive is authorised and required to comply with this direction.
- 5.2 The powers in Part 3 that can be facilitated in this way include the power to require personal details of a person, search people, search vehicles, move vehicles, enter and search premises, cordon target areas, seize things, and use reasonable force⁴⁶² to break into premises or vehicles or anything on a person.
- 5.3 Part 3 raises issues under the *Kable* doctrine, which has been discussed above. The Committee also queries whether some of the Part 3 powers should be included in this proposed legislation when the *Emergencies Act 2004* (A.C.T.) should be the primary Act for managing emergencies in the A.C.T., including a terrorist act.
- 5.4 The entities which can be placed under AFP direction are numerous and significant –
- They include ‘departments’, which are defined the *Financial Management Act 1996* (A.C.T.) as —
 - an administrative unit⁴⁶³ (excluding prescribed parts)
 - a part of an administrative unit

⁴⁶¹ cl86

⁴⁶² The use of reasonable force under Part 3 special powers, is managed internally within the AFP (AFP) by Commissioner’s Order 3, which prescribes appropriate competency standards, the accreditation of trainers, the qualification and re-qualification of AFP employees in the use of force, appropriate reporting mechanisms and management structures for training and monitoring use of force in the AFP. This is not a public document

⁴⁶³ Under the Legislation Act dictionary ‘administrative unit’ means an administrative unit for the time being established under the *Public Sector Management Act 1994* (A.C.T.), section 13 (1) ie established in writing in a disallowable instrument by the Chief Minister, and in relation to which Ministers can be allocated responsibility – s14 Public Sector Management Act 1994. These ‘administrative arrangements’ also prescribe the Acts for which Ministers are allocated responsibility

- a group of 2 or more administrative units as prescribed.

5.5 Under the *Auditor-General Act 1996* (A.C.T.) 'responsible chief executive' means

- the responsible chief executive in relation to a department under the Financial Management Act
- the chief executive officer in relation to a Territory authority under the Financial Management Act
- the person responsible for managing the affairs of a public sector company
- the responsible chief executive of the department or Territory entity that is responsible for matters most closely related to a joint venture or trust in which the Territory or a Territory entity has a controlling interest.⁴⁶⁴

5.6 Under that Act 'territory entity' means a Territory authority or a public sector company.⁴⁶⁵

5.7 As the ACT Emergency Services Authority is an administrative unit⁴⁶⁶ its CEO, the Emergency Services Commissioner, can be directed in relation to the exercise of his or her powers by the ACT Chief Police Officer in relation to his or her Part 3 powers under the proposed legislation. This is a power that can be exercised even if the Chief Police Officer has not been appointed a Territory Controller under the Emergencies Act.⁴⁶⁷ Thus there is a potential for conflict to arise with the Territory Controller in relation to directions given to the heads of departments under the Emergencies Act.⁴⁶⁸

5.8 The functions of the Territory Controller are specified in s 160 of the Emergencies Act in relation to declared emergencies. The Territory Controller will differ according to the type of emergency and could be the Emergency Services Commissioner, the Chief Police Officer or the Chief Health Officer for example. The functions of the Territory Controller are to:

⁴⁶⁴ See dictionary, *Auditor-General Act 1996* (ACT)

⁴⁶⁵ dictionary

⁴⁶⁶ *Administrative Arrangements 2005 (No 4)* (ACT), NI2005-438, p36

⁴⁶⁷ s159, Implementing a recommendation of the McLeod report – R. McLeod AM, *Inquiry into the Operational Response to the January 2003 Bushfires in the ACT*, Australian Capital Territory, Canberra, 2003, pp.222, accepted by the ACT Government: Legislative Assembly, *Government Response: Report of the Inquiry into the Operational Response to the January 2003 Bushfires in the ACT*, August 2003, p.28

⁴⁶⁸ s162

- manage the response to, and the recovery from, the emergency by ensuring that entities dealing with the emergency are appropriately deployed
- coordinate the disposition of other resources to manage the emergency
- advise the Minister and the Chief Minister about the emergency
- advise the community on anything relating to the state of emergency that the Territory Controller considers appropriate; and
- any other function given to the Territory Controller under this Act or another territory law.

However, the Chief Minister may direct, in writing that the Territory Controller is not to have a function (or part of a function) mentioned in subsection (1); or (b) that the Territory Controller has another stated function.

- 5.9 The Australian Government Attorney-General's Department noted in their submission 'it is unusual that coercive powers that can be exercised by law enforcement officials are not clearly and unambiguously conferred in the primary legislation, and not subject to extension by an executive order'.⁴⁶⁹
- 5.10 The Department also suggested that the legislation should include a requirement to notify persons in the 'target area' of the creation of a 'target area'. 'Prescribed security zones' declared under Australian Government legislation must be notified by television or radio broadcast, be published in the Commonwealth Gazette and on the Internet.⁴⁷⁰ In the ACT such communications would be made pursuant to the *Emergencies Act 2004* (A.C.T.).
- 5.11 The Committee queries the need for clause 86 and some other powers in Part 3 in view of the provisions of the Emergencies Act, which was enacted in response to the recommendations of the McLeod report on the operational response to the January 2003 bushfires. The McLeod report had criticised as an impediment to the most effective management of those bushfires, the ability of both the ACT Chief Police Officer and the Director of the ACT Bushfire and Emergency Services to exercise their prescribed powers concurrently.⁴⁷¹
- 5.12 Responding to these concerns, the Emergencies Act consolidated various Acts dealing with bushfires and other emergencies, and it provides for different

⁴⁶⁹ Submission no 19

levels of special powers, with the capacity for those to be escalated as needed for the management of emergencies in the A.C.T..

- 5.13 In the Committee's view, if some or all of the additional powers in Part 3 are necessary, a better vehicle for them would be the Emergencies Act so that its aim of consolidating emergencies legislation is not compromised, and because of its superior executive authority and accountability provisions.
- 5.14 There are some accountability provisions in the exposure draft bill. The ACT Chief Police Officer is required to make and keep (for 7 years) records about the exercise of special powers under the legislation. This obligation can be elaborated in a regulation made under the legislation.⁴⁷² The Chief Police Officer is also required to report to the Minister⁴⁷³ as soon as possible after a special powers authorisation ends. That report must include and address specified matters and be presented to the Legislative Assembly (with acknowledged editing as permitted) not later than 6 sitting days after the day the Minister receives the report.⁴⁷⁴ These are welcome provisions and demonstrate a stronger commitment to accountability under this legislation than in other jurisdictions, which only require annual reporting to parliaments on the conferring and exercise of special powers under their counterpart legislation.⁴⁷⁵
- 5.15 However, it is the Committee's view that the Emergencies Act has other superior provisions, which better preserve ministerial responsibilities and accountability. These deal with directions from the Chief Minister, the Territory Controller reporting to the Chief Minister and Ministers, and the Minister keeping the public informed during a state of alert and state of emergency in accordance with a community and information plan.⁴⁷⁶ These provisions could apply following a terrorist attack if a state of emergency has been declared.

⁴⁷⁰ Submission no 19

⁴⁷¹ pp216–218

⁴⁷² cl89

⁴⁷³ cl92

⁴⁷⁴ cl92; provisions which are similar to those in the Human Rights Act 2004 (ACT) re editing of reports

⁴⁷⁵ eg cl21M of the Victorian Terrorism Community Protection) (Amendment) Bill 2005 provides for annual reporting by the Premier to the Parliament

⁴⁷⁶ see for eg ss149, 153, 154, 158, 165, 166 *Emergencies ACT 2004* (ACT)

- 5.16 However, if a state of emergency has not been declared, those provisions would not apply and the ACT Chief Police Officer could exercise his or her powers under the proposed legislation, without the Emergency Act safeguards concerning Ministerial accountability. The McLeod Report emphasised the importance of retaining ultimate power and authority for the executive government during a state of emergency, whilst not impeding effective management of the emergency situation through normal bureaucratic controls.⁴⁷⁷
- 5.17 The Committee considers that clause 86 derogates from the principle of ministerial accountability and responsibility and should be relocated to the Emergencies Act, or if retained in this proposed bill, additional safeguards preserving executive authority should be included.

RECOMMENDATION 33

The Committee recommends that the ACT government review the need for clause 86 in the proposed legislation, and consider amending the *Emergencies Act 2004* (A.C.T.) to include this clause if necessary.

Torture

- 2.6 The application for a preventative detention order must state that the officer applying does not suspect that any of the facts and other grounds relied on in making the application are based on information obtained, directly or indirectly, from torture.⁴⁷⁸
- 2.6 Clause 93 of the exposure draft bill also provides that evidence obtained, directly or indirectly, from torture, whether carried out inside or outside the

⁴⁷⁷ McLeod AM, *Inquiry into the Operational Response to the January 2003 Bushfires*, p221

⁴⁷⁸ para 18(1)(f). See also para 29(4)(d). In cl.93 torture is as defined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 1, paragraph 1 ie 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

ACT (including outside Australia) is inadmissible in a proceeding under the legislation. This prohibition, whilst narrower than anti-terrorism legislation in the United Kingdom,⁴⁷⁹ is consistent with the ruling in a recent United Kingdom House of Lords decision, which held that evidence obtained by torture anywhere was not admissible against a party to proceedings in a British court in accordance with common law principles and international law.⁴⁸⁰ The proposed ACT provision is also stronger than a provision in the *Evidence Act 1995* (Cth), which confers both general and specific discretions on courts to exclude such evidence.⁴⁸¹

- 2.6 The Committee notes the concerns expressed by the AFP that torturing suspects is not how they do business, and that current legislative provisions are adequate. The AFP advised that acts constituting torture and other cruel, inhuman or degrading treatment or punishment are a criminal offence and/or civil wrong in all Australian jurisdictions.⁴⁸² The Committee appreciates international concern about interrogations in countries with poor human rights records.⁴⁸³ Evidence obtained from such interrogations could be shared directly or indirectly with Australian law enforcement authorities, and although unlikely to be regarded as reliable, it should nevertheless be prohibited from use.⁴⁸⁴ The case of the Australian, Mamdouh Habib, who was detained in

⁴⁷⁹ s76 of the *Terrorism Act 2000* (UK) provides that a court can exclude evidence and restart a trial if the prosecution gives or proposes to give a statement made by the accused in evidence and prima facie evidence is adduced that the accused was subjected to torture, inhuman or degrading treatment, violence or the threat of violence in order to induce him to make the statement, and the prosecution does not satisfy the court that the statement was not obtained that way—Ms McKinnon, response to question taken on notice, 1 February 2006

⁴⁸⁰ *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004); *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* [2005] UKHL 71 accessible at <<http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm>>

⁴⁸¹ ss90, 135, 138 – *Evidence Act 1995* (Cth). The *Evidence Act 1971* (ACT) confers a broad discretion on ACT courts to exclude evidence in a criminal proceeding if the court is satisfied that it would be unfair to the person charged to admit that evidence. It is as yet unclear whether preventative detention is a civil or criminal proceeding

⁴⁸² Submission no 15; *Proof Transcript of Evidence*, 31 January 2006, p54

⁴⁸³ The European Parliament's Committee on Legal Affairs and Human Rights is currently inquiring into an alleged United States' policy of outsourcing torture under its prisoner rendition program: Matthew Schofield, 'EU inquiry points to 'outsourcing' of torture: Investigator says governments in Europe probably knew about CIA's rendition flights', 24 January, 2006, accessible at <<http://www.chron.com/cs/CDA/printstory.mpl/world/3610164>>

⁴⁸⁴ Ms Leon, *Proof Transcript of Evidence*, 1 February 2006, p50

Pakistan, Egypt and Camp X-ray, involves allegations of torture overseas.⁴⁸⁵

- 2.6 Several submissions welcomed the proposed clause.⁴⁸⁶ Two noted that it would be desirable to extend the prohibition on receipt of evidence obtained through torture, to evidence obtained through cruel, inhumane and degrading treatment.⁴⁸⁷
- 2.6 The Committee also welcomes the proposed clause but would prefer to see a definition given at the first reference to torture in the exposure draft bill. The Committee notes that the first reference to torture does not include an explanatory note and that the dictionary refers to 'section 93' for the definition of torture.

RECOMMENDATION 34

The Committee recommends that a definition for 'torture' be included or referenced at the first use of the term 'torture' in the proposed legislation, and that the definition be specified instead of being a cross-reference to an international instrument appended to an Australian Government Act. The definition should also be extended to cover evidence obtained through cruel, inhumane and degrading treatment.

RECOMMENDATION 35

The Committee recommends that an explanatory note be inserted in the proposed legislation referring to the possibility that overseas evidence may be derived from torture.

Sunset clause

- 5.1 While COAG agreed that the new laws would be reviewed after five years and would expire after 10 years, the ACT bill proposes that the Act be reviewed after three years of operation and the sunset clause in the Bill refers to five

⁴⁸⁵ ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p15

⁴⁸⁶ Submissions no 7, 10

⁴⁸⁷ Submission no 16; ACT Human Rights Office, *Proof Transcript of Evidence*, 31 January 2006, p11; Ms McKinnon and Prof Charlesworth, *Proof Transcript of Evidence*, 31 January 2006, pp58, 66–67

years.⁴⁸⁸

- 5.2 This five-year sunset clause is consistent with the recommendations of the Senate Committee report on proposed Commonwealth legislation⁴⁸⁹ but differs from other jurisdictions' legislation.⁴⁹⁰
- 5.3 The Australian Lawyers for Human Rights submitted that the sunset clause should be one year rather than five.⁴⁹¹ The ACT Law Society welcomed the 5-year sunset clause.⁴⁹²

RECOMMENDATION 36

The Committee recommends that the five-year sunset clause be retained.

Mr Bill Stefaniak MLA
Chair
24 February 2006

⁴⁸⁸ Cls 98, 99

⁴⁸⁹ Australian Parliament, Senate, Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, November 2005, p.56. The Senate Committee also recommended an independent review of the preventative detention regime after 5 years

⁴⁹⁰ eg in Vic cl11 – 10 years Terrorism (Community Protection)(Amendment) Bill 2005;

⁴⁹¹ *Proof Transcript of Evidence*, 25 January 2006, pp44, 57

⁴⁹² ACT Law Society, *Proof Transcript of Evidence*, 1 February 2006, p15

6 ADDITIONAL AND DISSENTING COMMENTS

Bill Stefaniak MLA

- 6.1 Firstly, let me make these additional comments. I would like to acknowledge my appreciation to all the people who put in submissions. I would especially like to acknowledge the hard work of both the committee and the committee secretary, Hanna Jaireth.
- 6.2 As a result of the COAG briefing, the ACT Chief Minister accepted the need for anti-terrorist legislation and complementary legislation to what is being enacted by the Commonwealth and states. While I agree that this type of legislation is rare in Australia and we have not really seen the like of it before (although people have been detained in times of war), I accept, as does the Chief Minister, that there is a need for this legislation. Although I am obviously not privy to what happened at COAG, when we have diverse people from the Prime Minister to the Chief Minister, accepting the need for it, we have to give credence to it.
- 6.3 If we are to have such legislation it is important that it is as standard as possible across Australia. Terrorism, like other major crime, knows no boundaries. I think it is particularly important for the ACT to have legislation that is, if not identical, at least very similar to that of the states and the Commonwealth. There is a real need for the standard of proof required to be consistent across jurisdictions.
- 6.4 A number of people gave evidence before the committee. I accept the rationale and the evidence given by Mick Keelty, the Australian Federal Police Commissioner. He is a world-renowned expert on policing and matters pertaining to terrorism. In this regard, he was the most experienced person to appear before the inquiry and I give due weight to his evidence. Mr Kelty indicated to the committee on 31 January 2006 that—

The ACT is of particular importance to the Australian Federal Police because it not only houses the seat of government, some 90 different

missions and some 1000 staff attached to those missions across the Australian Capital Territory but is policed by the AFP in a community policing role, complementing the role the AFP plays nationally and internationally. In responding to terrorism, we are focusing on minimizing the risk to the community ... we are trying to narrow the space when we can intervene to prevent an attack occurring and the opportunity for terrorists to launch such an attack. These are powers we will use judiciously and cautiously to protect the community.⁴⁹³

6.5 The Commissioner went on to say that the AFP had had the Commonwealth legislation powers for over a month and ASIO also had had detention powers for over 12 months and there had been little or no outcry from anyone in the community about the abuse of power.

6.6 The Commissioner and his AFP colleagues did have fears about whether the ACT's proposed bill was sufficient. He stated in his submission that the police had concerns about provisions in the bill that may impede the inter-operability of the ACT policing element of the AFP with the rest of the AFP and other jurisdictions in conducting counter-terrorism operations.⁴⁹⁴

6.7 In terms of powers sought, the Commissioner stated;

The proposed extended powers are necessary to extend the AFP's power to prevent terrorist attacks and respond effectively to attacks in a way that is consistent with police in all jurisdictions in Australia. The AFP believes that this bill does not enable us to do that.⁴⁹⁵

6.8 The Commissioner and his colleagues went on to indicate that they had particular concerns in relation to different standards of proof being required for the AFP to establish a case for preventative detention order before the ACT Supreme Court. The standards of proof required are much higher than those anywhere else in Australia.

6.9 The Commissioner indicated that in a number of areas the NSW legislation

⁴⁹³ *Proof Transcript of Evidence*, 31 January 2006, p4

⁴⁹⁴ *Proof Transcript of Evidence*, 31 January 2006, p5

⁴⁹⁵ *Proof Transcript of Evidence*, 31 January 2006, p5

was a much more suitable model than the ACT legislation.⁴⁹⁶ On 31 January 2006, the Commissioner was asked by me, “from what you say, from the AFP point of view, would it be simpler if, say, the ACT simply adopted the NSW legislation and introduced that?” In answer, the Commissioner replied;

It would be. That would be a way forward. I understand why there might be a difference on certain issues. But I think in this bill we do need to have consistency. If ever I have seen people with the intent and motivation and ability to do something catastrophic, it is the terrorists. Let us not forget, Chair, - I mean this in a respectful way – the ACT has been the target of a planned terrorist attack. There is a person in Western Australia who pleaded guilty to the planned bombing against the Israeli Embassy here in Canberra just prior to the Sydney 2000 Olympics. The fact that this person pleaded guilty is something this committee ought to take note of. Canberra is a target.⁴⁹⁷

6.10 In an answer to Mr Gentleman, Commissioner Keelty stated—

The reason for terrorist attacks are many and various and there is nothing that can make us immune from them. This is a really important point about why we need consistency in the legislation across Australian jurisdictions, particularly for the ACT, that we don’t by default cause ourselves to be the subject of a terrorist attack because the police don’t have the right powers.⁴⁹⁸

6.11 The Commissioner was concerned that terrorists, like international criminals, do take note of jurisdictional impediments to their activities and, if our bill were to be weaker than other jurisdictions, this could well be a factor. I note this view was not accepted by anyone else, but again, I refer to the Commissioner’s qualifications as an expert in this field, something that, with the greatest respect, no other person to appear before the committee could demonstrate.

⁴⁹⁶ *Proof Transcript of Evidence*, 31 January 2006, p9

⁴⁹⁷ *Proof Transcript of Evidence*, 31 January 2006, p10

⁴⁹⁸ *Proof Transcript of Evidence*, 31 January 2006, p18

- 6.12 That being said, I WOULD RECOMMEND THAT THE ACT GOVERNMENT SHOULD ADOPT THE NSW LEGISLATION. I make that recommendation for the above reasons along with the Commissioner's comments but also because even the ACT Human Rights' Office indicated that the NSW Act was the next best Act in terms of human rights and other considerations. So, it seems, if that is the case, it would be a good template model.
- 6.13 Failing the ACT Government accepting that, I WOULD RECOMMEND THAT THE STANDARD OF PROOF REQUIRED FOR THE AFP TO PROVE MATTERS BEFORE THE SUPREME COURT OR ANY OTHER TRIBUNAL, SHOULD BE THE SAME AS FOR NSW AND OTHER JURISDICTIONS. I note the Committee's recommendations 9–11 address this issue.
- 6.14 In no way should our standards of proof be more severe and restricting on police than those of other jurisdictions. It is crucially important to have as much uniformity as possible across jurisdictions on something as serious as this. We are dealing with the potential for hundreds if not thousands of lives to be put at risk if the legislation is not consistent across Australian jurisdictions. Some inconvenience and some laws that restrict human rights are necessary to protect the fundamental right of all Australians, and that is the right to live. I think, on balance, that the laws enacted elsewhere do strike a reasonable balance and I commend these recommendations to the ACT Government.
- 6.15 Apart from these general comments above, I make some further recommendations on specific parts of this bill that were not taken up by my colleagues.
- 6.16 First of all, for the sake of conformity with other states and the Commonwealth, I BELIEVE THAT THE SUNSET CLAUSE SHOULD BE TEN YEARS AND THAT THE REVIEW PERIOD SHOULD BE AFTER FIVE YEARS. The arguments used above, I again use for the justification of this conformity.
- 6.17 In relation to other matters within the bill, there is the constitutional issue as to whether in fact the Supreme Court should be the issuing authority. Obviously, this issue would be overcome if we adopted NSW legislation. However, were the ACT Government not to do so, it should err on the side of caution and I would make the following recommendation. I WOULD RECOMMEND THAT

THE PROPOSED LEGISLATION RETAIN A ROLE FOR THE SUPREME COURT IN RELATION TO PREVENTATIVE DETENTION ORDERS BUT THAT SENIOR POLICE OFFICERS IN THE ACT BE GIVEN THE POWER TO ISSUE A 24 HOUR POLICE ORDER IN URGENT CIRCUMSTANCES WITH INTERIM ORDERS OF 24 TO 48 HOURS BEING REQUIRED TO BE HEARD IN THE PRESENCE OF THE PARTY IN THE SUPREME COURT. This, at least, would overcome any possible constitutional problems. The ACT Government, if it did not want to adopt the NSW legislation, could adopt the Victorian legislation, which does what I recommend. It could also mirror Commonwealth legislation with the same effect, that is, a senior AFP officer could make a 24 hour order and a retired judge, serving judge, federal magistrate or senior AFP member could make an order for the next 24 hours to extend it to 48 hours.

- 6.18 I MAKE A FURTHER RECOMMENDATION THAT SUBCLAUSE 14(2), 15(2), 16(2) and 19(2) OF THE EXPOSURE DRAFT BILL BE AMENDED TO REQUIRE THAT INFORMATION THAT IS LIKELY TO PREJUDICE NATIONAL SECURITY WITHIN THE MEANING OF THE NATIONAL SECURITY INFORMATION (CRIMINAL AND CIVIL PROCEEDINGS) ACT 2004 COMMONWEALTH, BE EXCLUDED FROM THE INFORMATION WHICH BE GIVEN TO THE PROSCRIBED PERSON ABOUT A PREVENTATIVE DETENTION ORDER. At any rate, I feel the national legislation would override our legislation. While my other two colleagues wanted this recommendation deleted from our draft, which has been done, I believe it should be a recommendation and make it accordingly.
- 6.19 While I have no problem with the recommendations in relation to torture – indeed, I was keen to see an explanatory note inserted referring to overseas evidence that may be derived from torture. I note the concerns of the AFP that references to torture might imply or be read as if the AFP sometimes resorts to this. The footnote has been put in to refer specifically to overseas torture. I want to put on the record that the AFP is a most honourable organisation and conducts itself with great competence, honesty and professionalism in the Australian legal context. The Australian Federal Police in Canberra, from my perspective as a former prosecutor, and defence lawyer, is a body of men and women who uphold the law and conduct themselves in an exemplary fashion.

For anyone to imply that members of the AFP resort to torture is an abomination and an outrageous slur on a most honourable police force.

- 6.20 In relation to whether proceedings in the Supreme Court should be open or closed and whether restrictions should be placed on the publication of proceedings, I note the situation in other jurisdictions and especially section 26P of the NSW Act – and I understand Victoria has a similar provision – I RECOMMEND THAT LEGISLATION INCLUDE A PROVISION FOR CLOSED COURT HEARINGS, RESTRICTIONS ON THE PUBLICATION OF PROCEEDINGS AND AN OFFENCE FOR DISCLOSURE IN BREACH OF THE SUPPRESSION PROVISIONS. I believe if we are to be fair dinkum about combating terrorism, it is essential to have a provision available for proceedings to be held in a closed court and to have an open court would largely defeat a lot of this legislation.
- 6.21 As to whether lawyers should have a security provision, I note that there is some provision that the Legal Aid lawyers will have this. I think because of the nature of this legislation, it is desirable that lawyers and assisting lawyers, acting in matters under the Act, should have security clearance and I would RECOMMEND this.
- 6.22 I DO NOT AGREE WITH THE RECOMMENDATION THAT THE ATTORNEY GENERAL SHOULD CONSIDER AMENDING THE DISCRIMINATION ACT 1999 TO PRESCRIBE DISCRIMINATION ON THE GROUNDS THAT SOMEONE HAS BEEN DETAINED UNDER ACT LEGISLATION. I THINK THE ACT SHOULD REMAIN SILENT ON THIS ISSUE. I think there are good reasons why someone should not be given a job because they have been detained under this legislation and I think there is a strong case to be made out why it would be fair and proper for someone to discriminate against someone who had been detained. I think this would apply to many employment situations and I dissent from the rest of the committee on this point.
- 6.23 I also do not agree that clauses 32, 35 and 75(3) be amended to require the information in sub-clause 32(2), 35(3) and 75(3)(a) be provided by police without the need for a request from the person to whom the information is given, and I recommend that the clauses remain as they are. In relation to

paragraph 40(4)(b), I feel that should be amended to refer to standards of facilities rather than their location and that paragraph 40(4)(f) and (g) be omitted from the proposed legislation. I would prefer a requirement that oversight agencies be able to see and communicate with detainees by video link or other technologies.

- 6.24 I do not agree with the recommendation that Clause 43 be amended to require that detaining police officers be required to record details of the circumstances that made the conveying of information to the detainee impractical. I certainly do not agree that failure to do this should carry a penalty. I RECOMMEND THAT THE CURRENT CLAUSE 43 (1) IS FINE AS IT IS AND SHOULD REMAIN. I agree that our legislation should provide that information need not be provided if the detainee's actions make this impracticable.
- 6.25 I commend my additional and dissenting comments to the Government for their deliberations and I reiterate the fact that all governments accept the need for this kind of legislation and we must ensure it is workable. It is essential that police are able to operate under the same set of rules in all Australian jurisdictions and I urge the Government to ensure our legislation is consistent in all respects with other Australian legislation.
- 6.26 It is also my fervent hope we will not have to use this legislation or any other over the next ten years. That would be a great victory in itself, not only for our legal system but in the fight against international terrorism.

Mr Bill Stefaniak MLA
Chair

24 February 2006

Additional and dissenting comments

Ms Karin MacDonald MLA – Dissent from Recommendation 12

- 6.27 I dissent from the majority of the Committee on this recommendation – that the proposed legislation be applied to persons of 16 years or older. My reasons for dissenting are as follows–
- 6.28 The age of majority in Australia is 18 years. The argument has been made, by some, that children under the age of 18 years can have criminal responsibility under the general law and should therefore be covered by the proposed legislation from 16–18 years, with special protections.
- 6.29 While it is certainly true that criminal law can be applied for persons under the age of 18, the current view in this country is that until a person reaches 18, they are treated as a child. This is certainly reflected generally in legislation.
- 6.30 It was also argued that there have been instances of people under 18 committing terrorist attacks, such as suicide bombings.
- 6.31 My response to this is that there have been children younger than 16 who have committed such acts of atrocity, but we have to draw a line at some point.
- 6.32 While I do not believe that there is a remarkable transformation in maturity on a person's eighteenth birthday, the current view remains that this is when a person becomes an adult, and society holds the view that a child's reasoning and responsibilities are less than an adult.
- 6.33 As we currently view that a person is not old enough to vote until 18, and therefore does not have political representation, it would be most egregious to lock someone up who did not even have recourse at the ballot box.
- 6.34 If there is a reasonable suspicion of a person under the age of 18 being involved with a potential or committed terrorist act, it is my firm belief that this can be dealt with by other legislation.

Ms Karin MacDonald MLA
24 February 2006

Additional and dissenting comments

Dr Deb Foskey MLA

Introduction

- 6.35 While I have fully participated in the deliberations on, and generally endorse, the Legal Affairs Committee's report on the exposure draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005, I wish to record the additional comments below.
- 6.36 Since the first announcement by COAG that the Australian Government and state and territory governments would introduce laws specifically targeted at preventing terrorist acts, the Australian and ACT Greens have asserted that such laws are not necessary, as existing legislation already gives police and other security forces sufficient powers. No new evidence has come to light to change my opinion.
- 6.37 Witnesses before the Committee during this inquiry expressed many of the reasons and views that underlie my opposition to the laws, and they have further convinced me that it would be irresponsible of me to support these laws.⁴⁹⁹ One submission asserted that the removal of the presumption of innocence under preventative detention orders is the greatest change to the rule of law since the Magna Carta.⁵⁰⁰ Whether or not this is the case, and I note that British and European history provide many examples of disregard for human rights and the law, it indicates the magnitude and the seriousness of the legislation in its various forms in the states, territories and Commonwealth.
- 6.38 Many of our submitters considered the laws to be of such grave importance that they gave up their summer break to write submissions and to appear before the committee. A majority of the non-government submitters come from the field of law, and many of them represent the highest echelons of

⁴⁹⁹ See submissions 2,4,5,6,7,8,9,11,12,13,16,17,18,20

⁵⁰⁰ See submission no 5

academic and private practice. Although lawyers, like politicians, are often the butt of jokes about selfishness and lack of social responsibility, this is an instance where their concern for human rights and the just application of law has been very welcome. I thank them for their commitment to community service and hope that the committee report and the additional comments and the subsequent legislation go some way towards vindicating their efforts.

The 'war on terror' in context

- 6.39 It should be noted that the US Pentagon has published a report indicating that the impacts of climate change may pose a greater threat to global stability – and the US and presumably Australia – than terrorism. The Greens would like the Australian and ACT Governments to give as much attention to this issue as they have given to an as yet unsubstantiated terrorist threat.⁵⁰¹
- 6.40 I believe that COAG should have considered a broad suite of strategies for reducing the likelihood that Australia and Australians would be the target of terrorist attacks. Some of these are outlined below.
- I believe that a federal government determined to reduce the threat of terrorism in Australia and for Australian citizens in other countries would reconsider its foreign policy priorities. Broadly, terrorist acts are most likely to be directed against citizens of countries perceived to be 'enemies' of Islamist regimes. Terrorists, and internal security and intelligence services, are often unwittingly serving the political agendas of governments and individuals while believing that they are responding to a higher calling. Thus, Australia is entrenching and exacerbating its status as a terrorist target because it is militarily engaged in Iraq and because it is seen as supporting US objectives in other countries as well.

The withdrawal of our troops from Iraq would be a first and necessary step in reducing risk.

Professor Clive Williams, referring to the Federal Government's decision to retain 550 troops in Iraq, said, 'the Government has missed a golden opportunity to draw down our forces in Iraq. A dangerous downside of a

⁵⁰¹ P. Schwartz and D. Randall, *An Abrupt Climate Change Scenario and Its Implications for United States National Security*, October 2003 accessible at http://www.climate.org/PDF/clim_change_scenario.pdf

continued high-profile Australian presence is that it increases the terrorism threat within Australia from Muslims who see our activities in Iraq as participation in the perpetuation of Western domination and exploitation. It also increases the terrorism threat to Australians overseas'.⁵⁰²

- Law is only one mechanism that governments have at their disposal to increase the security of citizens, and coercive laws like these are only one part of that mechanism. Setting in place policies, and committing resources to enhancing community inclusion for people of all ethnic backgrounds and ages would reduce the risk of so-called 'home grown terrorism'.
 - o There is a tendency to focus on ethnicity as a predisposing cause of terrorist intent. If this is the case – and I believe that this focus overlooks the threat to our social fabric posed by other groups such as white supremacist groups – then we need to ensure that our stated commitment to multiculturalism is strengthened and extended.
 - o I think we should take multiculturalism to the next step on the path it was meant to take us down: community connectedness. '[Not] to take this step would be to 'sleepwalk into segregation' as different communities became further entrenched and increasingly isolated from each other'.⁵⁰³
 - o While we are in danger of marginalizing people of Muslim beliefs and Arab ethnicity, a situation I believe that the COAG laws will exacerbate, we are also in danger of ignoring the potential for this alienation to be felt most strongly by young people in those and other communities. The best way to fight 'home-grown' terrorism – will be to consult meaningfully with young people of all ethnicities (this includes English speaking background youth as well – we often forget that British ness, Irish ness and so on are also ethnicities) to come up with and implement strategies which will increase their sense of being part of one 'Australian' community, while recognising and respecting the diversity among the many groups of which it is composed. I hope that the Federal Government will commit funds to this

⁵⁰² *The Canberra Times*, 23 February 2006

⁵⁰³ Chris Flynn, 'A policy now outworn' in *The Sydney Morning Herald*, 24 December 2005

community development exercise and the ACT Government will also include such processes in its new multicultural strategy.

The human rights context

- 6.41 My major objective throughout the Committee's deliberations on the exposure draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005 has been to increase the likelihood that these laws will comply with the ICCPR, and protect the security and rights of all ACT citizens.
- 6.42 The Greens have supported the Human Rights Act in the ACT, and would like to see it strengthened. We appreciate the effort that the ACT Government has taken to make these laws human rights compliant but believe that this can never be achieved while preventative detention orders are central to the legislation. Nonetheless, I believe that these laws offer some real protections for ACT citizens who come under suspicion from the AFP or other federal bodies.
- 6.43 During the committee process I asked the AFP whether they could take a detainee out of the ACT under a Federal preventative detention order. I also asked if they had the power to hand a detainee over to another jurisdiction's police force for detention under that other jurisdiction's laws. The AFP's response to both my questions was that they saw no impediment to doing exactly that. These responses strengthen my fear that the Australian Government may be planning to further misuse their new so-called anti-terror laws. This fear was a critical factor in my decision to recommend that these laws cover young people between the ages of 16 and 18.
- 6.44 I note that the Attorney General and Chief Minister, Mr Stanhope, believed that he secured agreement during the COAG meeting of September 27, 2005, 'that the most contentious proposals, to introduce control orders and a preventative detention regime, will only be used in exceptional circumstances and will meet all the human rights standards set by the ACT'⁵⁰⁴. This has not come to pass, and even the best efforts of the Bill's drafters and others consulted, have not been able to overcome the human rights derogations

⁵⁰⁴ Letter from Mr Jon Stanhope MLA, to Dr Deb Foskey MLA, dated 26 October 2005

inherent in this preventative detention regime. While the Committee's report focuses on the issue of proportionality to justify and ameliorate police responses, and the judges of the Supreme Court are given a role by the legislation, by its very nature this legislation departs from the ICCPR.

- 6.45 The Chief Justice of the ACT Supreme Court, Terry Higgins indicated a similar concern when he wrote:

The tragic story of Jean Charles de Menezes, the Brazilian man who was shot down in a London train station, illustrates the potentially disastrous consequences of intentionally subverting human rights to so-called 'practical concerns'. If we don't ask the hard, politically unpopular questions, how will we guard against administrative oversight and prevent similar future tragedies? ...

There will *always* be innocent people in the wrong place at the wrong time.
...

It is important to guard against the violation of civil liberties regardless of whether the challenger is a radical terrorist, or an unduly prescriptive piece of legislation. ...

We must be wary of laws that undermine the very democratic freedoms we are seeking to protect from terrorism; terrorism laws must serve to protect all Australians, they must not bow to the pressures of collective fear.⁵⁰⁵

- 6.46 I have worked in the Legal Affairs Committee to make the legislation more compatible with the ACT Human Rights Act. Despite the best efforts of members of the Committee, I do not see how the Attorney General will be able to issue a statement of compatibility when the final legislation is tabled in the Assembly. While the defence of 'proportionality' may be invoked, we have still not been shown evidence of the real and immediate threat that might justify these laws, or the legal advice which the Federal Attorney-General's Department assured us declares the Commonwealth legislation to be human rights compliant. Legislation already exists giving police and ASIO officers powers that, in some cases, may lead to unacceptable restrictions on civil liberties. Consequently, it is my opinion that the legislation is not:
- necessary, or
 - human rights compliant.

⁵⁰⁵ *The Canberra Times*, 14 October 2005

Detaining young people 16–17 under the ACT legislation

- 6.47 At first sight, including young people of 16-17 in the legislation seems to be inconsistent with a strong respect for human rights conventions, including the Convention on the Rights of the Child. In fact it is out of a desire to enhance their rights that I supported the recommendation that the proposed legislation apply to young people 16 years of age and above, along with one other Committee member, although my reasons are different.
- 6.48 This is because I believe that if 16–18 year olds were to be excluded from the ACT Legislation, they are likely to be dealt with under the Commonwealth legislation, thus lacking the oversight and protection that is built into the ACT legislation. So paradoxically, this is one case where the human rights of young people may be better protected by being treated as adults under ACT legislation than by being regarded as children under the Commonwealth legislation.
- 6.49 If the AFP detained a young person under Commonwealth preventative detention powers, they may hand them over to an interstate police force for further detention and they could also do this under the ACT legislation as it currently stands. This would not only remove the young person from being close to their family and loved ones, it would also expose them to the vagaries of other states' detention laws, all of which are less human rights compliant than the ACT's draft Bill. In this way, the ACT's laws may actually serve as a shield for young people against the harsher laws of other jurisdictions.

Specific comments on the report

- 6.50 First, I want to thank the Inquiry Secretary, Dr Hanna Jaireth, for the time and effort she put into this report, which is a scholarly compilation of the submissions and evidence presented to the Committee.
- 6.51 Second, I wish to commend my fellow committee members on the cordial way in which they conducted discussion as we deliberated on the report, despite the variations in our views.

Additional recommendations

6.52 I wish to make the following additional recommendations –

- That the ‘reasonable and necessary’ element in clauses 17, 19, 21, 25 and 29 be retained in the proposed bill as jurisdictional differences are an inherent feature of federal systems and a higher threshold test better complies with human rights standards which require preventative detention to be proportionate and least restrictive.
- That clauses 25 and 27 be amended to require the applicant for an extension of a preventative detention order, which has been issued for the purpose of preserving evidence (sub-clause 19(6)), to satisfy the Supreme Court that investigations have been conducted with due diligence before an extension of the order can be granted.
- That an express provision should be inserted into the Act stating that a detainee **must** be released from detention when a Preventative Detention Order lapses.

6.53 It may be the case that these last two recommendations are not necessary, because these provisions are implied in the existing provisions. However, when considering legislation such as this, where fundamental human rights and legal principles are at stake, an abundance of caution is preferable to a presumption of completeness or benevolence.

Dr Deb Foskey MLA
24 February 2006

Appendix 1: List of Submissions

- No 1 — Mr Chris Staniforth for Legal Aid Office (A.C.T.)
- No 2 — Mr FJ Purnell SC for the ACT Bar Association
- No 3 — Prof John McMillan, ACT Ombudsman
- No. 4 — Dr Helen Wiles
- No. 5 — Ms Amy Kilpatrick and Ms Simeon Beckett for Australian Lawyers for Human Rights
- No 6 — Dr Waleed Kadous for Australian Muslim Civil Rights Advocacy Network
- No 7 — Ms Belinda Barnard for the Women's Legal Centre (ACT & Region)
- No 8 — Ms Lindy Smith for Australian Privacy Foundation
- No 9 — Mr Bill Rowlings for Civil Liberties Australia (A.C.T.) Inc
- No 10 — Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner
- No 11 — Mr Greg Walker, President, Law Society of the ACT
- No 12 — Mr Ahmed Youssef and Mr Asmi Wood for the Canberra Islamic Centre
- No 13 — Prof Simon Bronitt, Dr Mark Nolan, Ms Miriam Gani and Ms Prita Jobling for the ANU College of Law
- No 14 — Ms Anita Phillips, Office of the Community Advocate
- No 15 — Mr Peter Whowell, Australian Federal Police
- No 16 — Prof Andrew Byrnes, University of New South Wales, Prof Hilary Charlesworth, Australian National University, Ms Gabrielle McKinnon, Australian National University, Dr Gabriele Porretto, College of Law, Australian National University
- No 17 — Mr Patrick McCarthy for the Australian Lawyers Alliance
- No 18 — Dr Carolyn Allport for the National Tertiary Education Union
- No 19 — Mr Geoff McDonald for the Commonwealth Attorney-General's Department
- No 20 — Dr Fiona Wheeler, ANU College of Law

Appendix 2: List of Witnesses

Public hearing of 25 January 2006

- Dr Helen Wiles, private individual
- Mr Bill Rowlings, President, Civil Liberties Australia (A.C.T.) Inc
- Mr Anthony Williamson, Director, Civil Liberties Australia (A.C.T.) Inc
- Ms Susan Harris-Rimmer, Australian Lawyers for Human Rights
- Ms Amy Kilpatrick, Australian Lawyers for Human Rights
- Ms Anita Phillips, ACT Community Advocate
- Mr Brian McLeod, Deputy Community Advocate

Public hearing of 31 January 2006

- Mr Richard Faulks, National President, Australian Lawyers Alliance
- Mr Mark Blumer, ACT President, Australian Lawyers Alliance
- Dr Helen Watchirs, ACT Human Rights Commissioner
- Dr Rowena Daw, ACT Human Rights Office
- Mr Geoff McDonald, Assistant Secretary, Security Law Branch, Australian Government Attorney-General's Department
- Ms Karen Bishop, Senior Legal Officer, Security Law Branch, Australian Government Attorney-General's Department
- Commissioner Mick Keelty, AFP
- Commander Stephen Lancaster, Acting Chief Police Officer for the ACT, AFP
- Mr Peter Whowell, Manager Legislation Program, AFP
- Mr Paul Robottom, Acting National Manager Intelligence, AFP
- Federal Agent Kylie Weldon, Acting Team Leader Joint Counter Terrorism Team Canberra, AFP
- Prof Hilary Charlesworth, Regulatory Institutions Network, Australian National University
- Ms Gabrielle McKinnon, Regulatory Institutions Network, Australian National University
- Dr Gabriele Porretto, College of Law, ANU
- Mr Ahmed Youssef, Canberra Islamic Centre
- Mr Asmi Wood, College of Law, ANU

Public hearing of 1 February 2006

Dr Carolyn Allport, President, National Tertiary Education Union

- Mr Greg Walker, President, ACT Law Society
- Prof Simon Bronniti, College of Law, ANU & Director, National Europe Centre
- Dr Mark Nolan, Lecturer, College of Law, ANU
- Ms Miriam Gani, Senior Lecturer, College of Law, ANU
- Ms Prita Jobling, Research Assistant, College of Law, ANU
- Chief Minister & Attorney-General, Mr Jon Stanhope MLA
- Ms Renée Leon, CEO, Department of Justice and Community Safety (JACS)
- Mr Brett Phillips, Deputy CEO, JACS
- Mr Peter Garrisson, Chief Solicitor, JACS

Appendix 3 – Anti-Terrorism Legislation Comparative Provisions

The following comparison of ACT, Commonwealth and NSW legislation provided to the Committee by the ACT Department of Justice and Community Services

	PROVISION	ACT	COMMONWEALTH	NSW
	Preventative Detention Orders (PDO)			
1	Judicial review and oversight:			
	Who can make a PDO?	All PDOs (interim and final) may only be made by the Supreme Court. This will ensure judicial review and oversight throughout the entire process and help to minimise the risk of the legislation being declared unconstitutional. It also ensures that matters are decided at a hearing at which the subject and his or her lawyer are entitled to call witnesses, produce materials and make submissions.	Initial PDOs may be made by senior AFP member (24 hours). Continued PDOs may be made by a retired judge or a serving judge, Federal Magistrate or AAT member acting in their personal capacity (<i>persona designata</i>).	All PDOs (interim and final) may only be made by the Supreme Court.
	Notice	Yes, except in relation to interim orders where a person is first taken into custody.	No	Yes, except in relation to interim orders where a person is first taken into custody.
	Scope of oversight	Ombudsman, Human Rights Commissioner, Public Interest Monitor.	Ombudsman.	Ombudsman, Police Integrity Commissioner, Independent Commission Against Corruption.

	PROVISION	ACT	COMMONWEALTH	NSW
	Access to legal representation	Yes	Right to representation, no additional provisions.	Right to representation, no additional provisions.
	Access to relevant information (application)	Yes.	Restricted access to all relevant documents and to the material on which an order has been sought.	Yes.
	Statement of reasons	Yes.	No. Restricted to summary of the grounds on which the order was made.	No. Restricted to summary of the grounds on which the order was made.
	Publication of proceedings	Silent. Decisions relating to the conduct of proceedings should rest with the courts and that existing powers of the Supreme Court are adequate to determine appropriate publication of its proceedings.	No requirement for courts to publish reasons. Proceedings must be heard in the absence of the public and the court may make orders to suppress publication of the whole or any part of the proceedings or of the evidence given in the proceedings.	No requirement for courts to publish reasons. Proceedings must be heard in the absence of the public and the court may make orders to suppress publication of the whole or any part of the proceedings or of the evidence given in the proceedings.
2	Test for making a PDO	‘satisfied on reasonable grounds’ The test that has been adopted conforms to the formulation recommended by the Solicitors-General. No material difference between ‘satisfied on reasonable grounds’ and ‘satisfied’.	‘satisfied’	‘satisfied’

	PROVISION	ACT	COMMONWEALTH	NSW
3	Basis for making a PDO	The Supreme Court may only make a PDO on the basis that it is ‘reasonable and necessary’ and: - the least restrictive means to prevent a terrorist act; or - the only effective way to preserve evidence.	The issuing authority may make a PDO on the basis that it ‘reasonably necessary’ and: - would substantially assist in preventing a terrorist act; or - is necessary to preserve evidence.	The Supreme Court may make a PDO on the basis that it is ‘reasonably necessary’ and : - would substantially assist in preventing a terrorist act; or - is necessary to preserve evidence.
4	Express prohibition on the admissibility of evidence obtained by torture	Yes	No	No
5	Additional safeguards for children and persons with impaired decision-making ability who are in the care of the person subject to a detention application.	Yes	No	No.
6	Restriction on rolling warrants/multiple PDOs	Yes, except where multiple PDOs are based on new threats or are intended to address different purposes, provided they are based on new information (preventing a terrorist act or preserving evidence).	Yes, except where multiple PDOs are based on new threats or are intended to address different purposes (preventing a terrorist act or preserving evidence).	Yes, except where multiple PDOs are based on new threats or are intended to address different purposes (preventing a terrorist act or preserving evidence).

	PROVISION	ACT	COMMONWEALTH	NSW
7	Public Interest Monitor	Yes. The Public Interest Monitor will represent the public interest at a hearing for a PDO or prohibited contact order. This will protect a person's right to a fair trial to the extent possible.	No. Only requirement is to notify the Commonwealth Ombudsman when a PDO or a prohibited contact order is made.	No.
8	Privacy of contact with lawyer	Yes. Monitoring of legal communications will only be permissible in limited circumstances (similar to comparable UK legislation.) and the PIM must be consulted.	No. All legal communications monitored, without exception.	No. All legal communications monitored, without exception.
9	Compensation for wrongful detention	Yes	Yes	Yes.
10	Questioning of detainees	No Also no facilitation of the questioning of detainees – a PDO will lapse once a person is 'released' for any form of questioning.	No But a PDO does not lapse if a person is 'released' for questioning, ie the person can be returned into detention if the PDO is still in force.	No But a PDO does not lapse if a person is 'released' for questioning, ie the person can be returned into detention if the PDO is still in force.
11	Requirement for legal representation to be provided by Legal Aid	Yes	Silent	Silent
12	Detention of children	No. PDOs not applicable to anyone under 18 years	Yes. PDOs applicable to children between the age of 16 and 18 years.	Yes. PDOs applicable to children between the age of 16 and 18 years.

	PROVISION	ACT	COMMONWEALTH	NSW
13	Conditions of Detention			
	Detainees must be separated from people who are on remand or who are convicted	Yes	Silent	Silent
	Appropriate support for persons with special needs, including psychiatric disabilities	Yes	Silent	Silent
	Detention arrangements to accommodate cultural or religious needs, and age and gender considerations	Yes	Silent	Silent
	Requirement to develop protocols on the humane treatment of detainees.	Yes	No	No.
	Detainee able to inform family of the fact and place of detention	Yes	No. Detainee only able to inform family that he/she is 'safe' but 'not able to be contacted for the time being'	Detainee only able to inform family that he/she is 'safe and is being detained', that a PDO has been made and the period of detention.
14	Disclosure offences	No	Yes (max 5 years imprisonment)	No.
15	Annual report	Yes	Yes.	Yes

	PROVISION	ACT	COMMONWEALTH	NSW
17	Sunset clause	5 years	10 years	10 years
	SPECIAL POLICE POWERS TO STOP, SEARCH AND SEIZE			
18	Special powers may be exercised by police	Yes - while a special powers authorisation is in force.	Yes – if a Commonwealth place is a ‘prescribed security zone’.	Yes - while a special powers authorisation is in force.
19	Judicial oversight	Yes - Chief Police Officer may apply to the Supreme Court or the Magistrates Court for a special powers authorisation.	No - A police officer (defined to mean a member, or special member of the AFP or a member of a police force of a state or territory) may apply to the Minister for a declaration that a Commonwealth place be declared as a prescribed security zone.	No - An authorisation may be given by the Commissioner of Police or Deputy Commissioner of Police (with concurrence of the Police Minister – except in urgent circumstances, up to 48 hours, when the Minister is unavailable)
20	Test and Basis for authorising powers	An authorisation may be made if a terrorist act is happening or will happen within the next 14 days; or that a terrorist act has happened within the last 28 days <u>and</u> the court is ‘satisfied on reasonable grounds’ that the authorisation would substantially assist in apprehending a person responsible for a terrorist act or in investigating the terrorist act or reducing the impact of the terrorist act.	A declaration may be made if issuing member ‘considers’ that it would assist in preventing a terrorist act from occurring or in responding to a terrorist act that has occurred (no timeframes).	An authorisation may be given if the police officer is ‘satisfied that there are reasonable grounds for believing’ that there is a threat of a terrorist act occulting in the near future or has been committed and is ‘satisfied’ that the exercise of those powers will substantially assist in preventing the terrorist act or apprehending the persons responsible for committing the terrorist act.

	PROVISION	ACT	COMMONWEALTH	NSW
21	Period of authorisation of powers	An authorisation that is made in relation to a terrorist act that is happening or will happen (a preventative authorisation) cannot exceed 7 days. An authorisation that is made in relation to a terrorist act that has happened (an investigative authorisation) cannot exceed 24 hours. There are no extension provisions and also no restrictions on multiple authorisations.	A declaration ceases to have effect 28 days after it is made (or sooner is revoked by the Minister).	An authorisation that is made in relation to a terrorist act that is happening or will happen cannot exceed 7 days, and can be extended to a maximum of 14 days. An authorisation that is made in relation to a terrorist act that has happened cannot exceed 24 hours but can be extended to 48 hours.
22	Powers:	Police powers under a special powers authorisation include the power to: ▪ require person details (eg name and address) ▪ power to stop and search people (strip searches only if a person is the identified target of a special powers authorisation) ▪ power to stop and search vehicles ▪ power to move vehicles ▪ power to enter and search premises ▪ power to cordon off an area ▪ power to seize things ▪ power to use force that is reasonable and necessary.	Comparable powers. May be exercised by any police officer (ie AFP or state or territory police officer).	Comparable powers.

	PROVISION	ACT	COMMONWEALTH	NSW
23	Power of Chief Police Officer to give directions to chief executive of departments	Yes	No comparable power.	Yes (Commissioner of police)

Additional Information – Issuing Authorities:

	Interim PDO	Final PDO	Interim special powers authorisation	Interim special powers authorisation
ACT	Supreme Court	Supreme Court	N/a	- Supreme Court - Magistrates Court
Cth	Senior AFP member (24 hours)	Minister appointed: - Supreme Court Judge - Judge - Federal Magistrate - retired superior court judge - AAT member	N/a	Minister
NSW	Supreme Court	Supreme Court	- Commissioner of Police - Deputy Commissioner of Police 48 hours only without concurrence of Police Minister.	- Commissioner of Police - Deputy Commissioner of Police with concurrence of Police Minister
VIC	Senior police officer (24 hours)	Supreme Court	Chief Commission with written approval of the Premier (24 hours)	Supreme Court

	Interim PDO	Final PDO	Interim special powers authorisation	Interim special powers authorisation
SA	senior police officer (24 hours)	Minister appointed judge	▪ Commissioner of Police, or if unavailable ▪ Deputy Commissioner of Police, or if unavailable ▪ Assistant Commissioner of Police, or if unavailable ▪ senior police officer in urgent circumstances without written approval of Police Minister and judge of the Supreme Court or District Court – but must seek written approval asap.	▪ Commissioner of Police, or if unavailable ▪ Deputy Commissioner of Police, or if unavailable ▪ Assistant Commissioner of Police, or if unavailable ▪ senior police officer with written approval of Police Minister and judge of the Supreme Court or District Court.
WA	Governor appointed: ▪ judge ▪ retired judge (interim order must be review asap by Supreme Court)	Supreme Court	Commissioner in urgent circumstances without prior approval of a judge (24 hours only).	Commissioner with prior approval of a judge.
Qld	▪ Senior police officer (24 hours)	▪ judge ▪ retired judge	N/a	N/a
Tas	▪ Senior police officer (24 hours) ▪ Supreme Court (48 hours)	Supreme Court	Commissioner of Police with written approval of Premier (24 hours only)	Supreme Court

Appendix 4 – Council of Australian Governments' Special Meeting on Counter-Terrorism 27 September 2005 – Extract⁵⁰⁶

Strengthening Counter-Terrorism Laws

COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.

COAG agreed to the Commonwealth Criminal Code being amended to enable Australia better to deter and prevent potential acts of terrorism and prosecute where these occur. This includes amendments to provide for control orders and preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community. The Commonwealth's ability to proscribe terrorist organisations will be expanded to include organisations that advocate terrorism. Other improvements will be made, including to the financing of terrorism offence.

COAG noted that in 2002 when Leaders agreed to new national investigative powers, Queensland's use of a Public Interest Monitor was recognised. COAG also noted that Queensland would continue to use the Public Interest Monitor for control orders and preventative detention.

State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings. COAG noted that most States and Territories already had or had announced stop, question and search powers.

The NCTC will settle the amendments to the Commonwealth Criminal Code by the end October 2005 and consider options for harmonising State and Territory legislative provisions. Details on the operation of, and safeguards for, control orders and prevention detention are attached.

Leaders also noted that the Commonwealth will consult States and Territories on:

⁵⁰⁶ The 27 September 2005 agreement is accessible at <<http://www.COAG.gov.au/meetings/270905/>>

- proposed amendments to Part IIIAAA of the Defence Act 1903 to enhance and clarify the arrangements for calling-out the Australian Defence Force to assist civilian authorities; and
- the possible enactment of laws to prevent the use of non-profit or charitable organisations for the financing of terrorism.

Attachment

Control Orders

In relation to control orders COAG noted:

- the AFP (AFP) must have reasonable grounds that issuing the control order would substantially assist in preventing a terrorist act or that a person has trained with a listed terrorist organisation before applying for a control order;
- the Attorney-General must consent to the application being made;
- if the Attorney-General consents, the AFP may apply to a court for the issue of a control order;
- the court must be satisfied on the balance of probabilities that issuing the control order would substantially assist in preventing a terrorist act or that a person has trained with a listed terrorist organisation;
- the court must also be satisfied on the balance of probabilities that each of the controls in the order is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act;
- there is no provision for a person to be given advance notice of a control order in case a person tips off associates who are involved in terrorism. This would potentially undermine the purpose of the orders;
- however, once a court has issued a control order it must be given to a person immediately by the AFP officer who requested the order. The officer must ensure that the person understands the order;
- the control order does not come into effect until the person, the subject of the order, is notified;
- once notified, the person can immediately apply for revocation of the order. The person's lawyer is also able to obtain a copy of the order. The same court that issued the control order can revoke it;
- in addition normal judicial review processes would apply to decisions to issue or revoke control orders;
- control orders would not apply to people under 16 and would apply in a modified way to people between 16 and 18; and
- each year, the Attorney-General would report to Parliament on the operation control orders.

Preventative Detention

In relation to preventative detention orders COAG noted:

- the AFP must have reasonable grounds that making the order would substantially assist in preventing a terrorist attack or, where a terrorist act has occurred, preserve evidence;
- an AFP officer could issue an order for an initial 24 hours; that period could be extended by an issuing authority for a further 24 hours only; the total detention period allowable would be a maximum of 48 hours; an issuing authority would be a Magistrate or Judge who agrees to act as an issuing authority in their personal capacity;
- a person detained could not be questioned except to confirm their identity;
- any preventative detention order, as well as the treatment of the person detained, would be subject to judicial review;
- any preventative detention order, as well as the treatment of the person detained, could be subject to investigation by the Commonwealth Ombudsman;
- a person detained would be given an opportunity to contact a lawyer for these purposes as well as being entitled to contact a family member and employer solely for the purpose of letting them know they are safe but are not able to be contacted for the time being;
- in some circumstances, the right to contact a lawyer or other person could be limited - for example, if there are facts or grounds to suggest that the lawyer or other person is linked to the terrorist act; the contact with a lawyer or other person would be monitored to ensure that the communication relates solely to the purposes permitted under the legislation;
- where the person is unable to contact their nominated lawyer for security reasons, access to a security cleared lawyer would be offered to them;
- preventative detention would not apply to people under 16; special rules would apply for people between the ages of 16 and 18 and people incapable of managing their own affairs;
- consistent with Australia's international human rights obligations, any person being preventatively detained must be treated with humanity and respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment. Any official who fails to treat a detained person in accordance with these obligations is subject to an offence punishable by two years' imprisonment; and
- each year, the Attorney-General would report to Parliament on the operation of preventative detention orders.