

2006

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**GOVERNMENT RESPONSE
TO THE STANDING COMMITTEE ON LEGAL AFFAIRS
*REPORT ON THE TERRORISM (EXTRAORDINARY TEMPORARY
POWERS) BILL 2005 - EXPOSURE DRAFT***

TABLING STATEMENT

Circulated by the authority of
Jon Stanhope MLA
Attorney General

Mr Speaker, for the information of members I present the following paper:

Government Response to the Standing Committee on Legal Affairs *Report on the Terrorism (Extraordinary Temporary Powers) Bill 2005 - Exposure Draft*.

I seek leave to make a brief statement.

Mr Speaker, I would like to take this opportunity to thank the Standing Committee on Legal Affairs for its work on the inquiry into the exposure draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005.

Last month the committee produced a comprehensive report during a very short period of time, some of which was over the Christmas holiday period. In general, the committee regarded the measures in the exposure draft as both necessary and proportionate based on expert evidence on the threat to the ACT and the protections incorporated into the draft bill to ensure consistency with the Human Rights Act. In particular, it said that preventative detention for fourteen days was a proportionate response to the threat of terrorism in the ACT.

The report contained 36 recommendations, of these recommendation the government has agreed to ten, agreed in part to four agreed in-principle to two, not agreed to ten and noted ten.

The committee drew attention to the short period of the detention, the preconditions for making preventative detention orders, the central role of the Supreme Court, the information that must be given to detainees, the availability of compensation, and the entrenchment of international human rights standards in the safeguards contained in the draft bill.

In this way, the committee recognised the obligations arising out of the COAG Communiqué, and that it was possible to integrate human rights standards with counter-terrorism measures. It noted that many of the provisions in the draft bill had been modelled on the best parts of the legislation in other jurisdictions. It also

observed that the combination of those provisions and the additional human rights protections distinguished the ACT from the other States.

Mr Speaker, during the public hearings conducted by the committee on the exposure draft, some comment was made by contributors about inconsistencies between the ACT's Bill and that of the Commonwealth and other states. During my appearance before the committee I made two observations in response to those comments. I would like to repeat those observations today.

By and large, those inconsistencies are a consequence of the fact that the ACT has consciously sought to draft laws that comply with our human rights obligations and consistency with the rule of law. It is a mark of how far we as a nation seem to be straying from our democratic traditions and the rule of law that a government can be criticised for seeking to uphold basic fundamental rights and respect for the rule of law. Once upon a time governments were pilloried for seeking to undermine human rights and the rule of law.

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

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

In fact Mr Speaker, as I told the committee I suspect that the real reason for the lack of commentary on those other legislative packages probably has more to do with the

fact that there has been little opportunity or encouragement to comment. While there has been cursory inquiry and comment in the ordinary legislative scrutiny processes, there has been no formal parliamentary inquiry, for instance, in any the other States or the Northern Territory.

The ACT has actively sought the comments and opinions of not just the police but of a whole host of interested parties. We wanted community involvement; that is why, unlike the other jurisdictions, we went down the path of issuing an exposure draft and referring it to committee.

While the government has sought to draft the best law possible, we are, of course, open to consultation. I have said in this place before that the government is an inclusive government and takes its consultations very seriously because we are convinced that this will ultimately produce the best laws for the community we serve. Accordingly, having regard to the recommendations contained in the committee report I would like to outline a number of improvements on the exposure draft that have been incorporated into the Bill I am introducing today:

- the preamble has been expanded to provide a clearer explanation for why preventative detention is needed, specifically why persons suspected of being involved in terrorist activities need to have special legislation enacted to combat the threat that they pose.
- the provisions dealing with multiple preventative detention orders and time frames have been revised to improve clarity and readability.
- the ‘reasonable and necessary’ element in clauses throughout the exposure draft has been replaced with ‘reasonably necessary’.. I indicated in the committee hearings that I would request advice from the Department of Justice and Community Safety in relation to the formulation of the test. I was advised that there is little difference between the two formulations, because of this the government accepted the committee’s recommendation and included the ‘reasonably necessary’ test in the Bill so the test is more consistent with other jurisdictions’ legislation.
- the requirement for a senior police officer to set out in an application for a preventative detention order the particulars of all periods for which a person has

been detained under the ASIO Act has been clarified to provide that the senior police officer need not disclose information where to do so would constitute an offence under the ASIO Act.

- the provision of Legal Aid representation for a person who is the subject of a preventative detention order application will be subject to the Legal Aid Act. The provision of legal assistance will be subject to a means test as provided for in the Act and the Guidelines made by the Legal Aid Commission. Initial hearings will be covered by the 'duty lawyer services' provisions in that Act and subsequent hearings will be subject to an appropriate means test under the Guidelines.
- provisions relating to the exercise of police powers under the legislation have been improved, where appropriate, to ensure a police officer identifies him or herself before exercising any powers and gives reasons for the exercise of the powers.
- the exposure draft provided that a police officer detaining a person need not explain the effect of a preventative detention order to a detained person or tell a detained person that an order has been extended if it is impracticable to do so. The Bill includes an additional safeguard by requiring the detaining police officer to record details of the circumstances that made the conveying of information to the detainee impractical.
- the development of guidelines required by the exposure draft in relation to preventative detention now includes guidelines to assist in the implementation of the contact provisions.
- the penalties relating to the failure to provide name and address on request by a police officer have been reduced to bring them closer in line with comparable offences on the ACT statute book and state terrorism legislation.
- the annual reporting requirements have been improved.
- oversight agencies will be permitted 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.
- accessibility to the definition of 'torture' relied on by the legislation has been improved; and
- an explanatory note has been inserted referring to the possibility that overseas evidence may be derived from torture.

However, in making these changes the substance of the government's approach is not significantly altered. The government adopted those recommendation that made minor and procedural improvements, which we are always happy to do, but rejected those recommendations that proposed to change important aspects of the Bill. For example:

- the government rejected the recommendation that the preventative detention order regime be extended to young persons over the age of 16 years on the basis that it would reduce the human rights compatibility of the legislation without any demonstrably justifiable reason. The case for extending the legislation to minors has not been made;
- the government rejected the recommendation that the requirement that preventative detention orders be the 'least restrictive way' of achieving their objective be replaced with a requirement that they 'substantially assist' in doing so on the basis that it would reduce the human rights compatibility of the legislation without any demonstrably justifiable reason. The requirement that an order will 'substantially assist' an objective is not sufficiently rigorous; and finally
- the recommendation that the Ombudsman and Human Rights Commissioner perform the role of the Public Interest Monitor (PIM) in relation to hearings for preventative detention orders was also rejected. The Public Interest Monitor function must be preserved to avoid any potential conflict of interest and to ensure that expert legal representation is brought before the Supreme Court.

**GOVERNMENT RESPONSE TO THE
STANDING COMMITTEE ON LEGAL AFFAIRS
REPORT ON THE TERRORISM (EXTRAORDINARY
TEMPORARY POWERS) BILL 2005 -
EXPOSURE DRAFT**

30/3/06

Overview

On 26 July 2005, State Premiers wrote to the Prime Minister seeking a special meeting of the Council of Australian Governments (COAG) to address terrorism. The Premiers wanted to discuss, 'improvements to the existing national counter-terrorism arrangements and capabilities', 'community awareness [of terrorist threats and responses] in addition to their engagement in reporting suspicious behaviour' and 'a coordinated approach to preventing the spread of radical teachings advocating terrorism'.

On 4 August, the Prime Minister announced a special Premiers' Conference in late September 2005 to discuss proposed new laws. He indicated that they might cover 'counter terrorism legal frameworks; surface transport security; identity security; [and] advocacy of terrorism'.

COAG Communiqué

On 27 September 2005 COAG agreed that the Commonwealth and state and territory governments would enact legislation to strengthen existing counter-terrorism laws. At the meeting, COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there was a clear case for Australia's counter-terrorism laws to be strengthened.

COAG agreed that the Commonwealth Criminal Code would be amended to provide for control orders and preventative detention for up to 48 hours to restrict the movement of those who posed a terrorist threat to the community. COAG also agreed that states and territories would enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact. These measures included preventative detention for up to 14 days and special stop, question and search powers to operate in places of mass gathering.

The ACT Approach

The Chief Minister attended the COAG meeting with grave concerns about the need for the proposed laws. Before he agreed he sought assurances that the laws were necessary in the face of the risk confronting Australia. He received briefings from the Directors-General of the Australian Security Intelligence Organisation and the Office of National Assessments.

He has since publicly stated that he agreed to the pursuit of these new laws, on the basis of pledges from the Prime Minister that they would be proportionate, adhere to Australia's international human-rights obligations, and involve real judicial oversight and review.

Exposure Draft

On 15 December 2005, the Chief Minister tabled an Exposure Draft of the Terrorism (Extraordinary Temporary Powers) Bill 2005 in the ACT Legislative Assembly.

The Terrorism (Extraordinary Temporary Powers) Bill 2005 (the bill) gives effect in the Australian Capital Territory to the COAG Agreement of 27 September 2005 that States and Territories introduce legislation on preventative detention for up to 14 days and give special stop, search and seizure powers to police officers to prevent and investigate terrorist acts.

In line with the COAG agreement, the bill provides for preventative detention for up to 14 days to prevent an imminent terrorist act or to preserve evidence relating to the commission of such acts. The threat must be imminent. The danger to the community must be real. The detention must be reasonably necessary. And it must, in practice, be a measure of last resort.

The bill was developed in light of various legal opinions on human rights and constitutional issues in relation to the Commonwealth Act and the proposed ACT Bill. These include the opinion of the Solicitors-General, assisted by Mr Stephen Gageler SC, the advice of the Human Rights and Discrimination Commissioner, Dr Helen Watchirs, and Professors Hilary Charlesworth and Andrew Byrnes. They also include opinions from Mr Lex Lazry QC and Kate Eastman specifically in relation to the ACT *Human Rights Act 2004*.

The bill also takes into account recommendations made by the (Federal) Senate Legal and Constitutional Legislation Committee in relation to the laws proposed by the Commonwealth.

Additional safeguards, including some contained in the legislation of the other States that were considered the best in terms of human rights compatibility, constitutionality and adherence to established principles of justice, have also been incorporated to ensure that the ACT has the most effective, and human rights compliant, legislation possible.

Committee Reference and Report

The day the Exposure Draft was tabled, the Assembly referred it to the Standing Committee on Legal Affairs for inquiry and report by 28 February 2006. The Report of the Committee, *Report on the Terrorism (Extraordinary Temporary Powers) Bill 2005 - Exposure Draft*, was released publicly on 28 February 2006 and was tabled in the Assembly on 6 March 2006.

In general, the Committee regarded the measures as both necessary and proportionate based on expert evidence on the threat to the ACT and the protections incorporated into the draft bill to ensure consistency with the Human Rights Act. In particular, it said that preventative detention for 14 days was a proportionate response to the threat of terrorism in the ACT.

The Committee drew attention to the short period of the detention, the preconditions for making preventative detention orders, the central role of the Supreme Court, the information that must be given to detainees, the availability of compensation, and the entrenchment of international human rights standards in the safeguards contained in the draft bill.

In this way, the Committee recognised the obligations arising out of the COAG Communiqué, and that it was possible to integrate human rights standards with counter-terrorism measures. It noted that many of the provisions in the draft bill had been modelled on the best parts of the legislation in other jurisdictions. It also observed that the combination of those provisions and the additional human rights protections distinguished the ACT from the other States.

Compatibility Advice

On 15 December 2005, the Government asked Ms Kate Eastman, an expert human rights lawyer, whether the exposure draft was consistent with the *Human Rights Act 2004* (HRA).

In summary, Ms Eastman concluded that the exposure draft was compatible with the HRA.

In particular, the bill achieves consistency with regard to the following rights:

- Protection from torture, cruel, inhuman or degrading treatment (s 10(1) HRA);
- Protection of the family and children (s 11 HRA);
- Freedom of movement (s 13 HRA);
- Freedom of thought, conscience, religion and belief (s 14 HRA);
- Freedom of assembly and association (s 15 HRA);
- Humane treatment when deprived of liberty (s 19 HRA);
- Fair trial (s 21 HRA);
- Rights in criminal proceedings (s 22 HRA); and
- Rights of minorities (s 27 HRA).

Ms Eastman did note possible arbitrary interference with some human rights. First, she noted that detention under PDOs may be arbitrary (s 18 HRA), as a consequence of the duration of detention up to 14 days and the incommunicado nature of detention. Second, she suggested that interference with the right to privacy may be arbitrary (s 12 HRA), as a consequence of the way in which a person would be detained and held in custody under a PDO (Part 2, Division 2.7) and the special powers allowing preventative and investigative authorisations.

However, she concluded that these interferences are likely to be reasonable limits that can be demonstrably justified in a free and democratic society for the purposes of s 28 HRA:

- The obligation to respond to the threat of terrorism, including through legislative means, is an important and significant objective;
- The restrictions on rights are reasonable and necessary, taking into account the importance of achieving consistency within a national regime; and
- The bill incorporates extensive safeguards, which, in the context of a national regime, represent the least restrictive options available.

Recommendations and Government Response

The following discussion contains the government responses to the recommendations of the Legal Affairs Committee. Where relevant, references are included to the provisions of the bill that have been renumbered for introduction.

RECOMMENDATION 1

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

Noted.

The Government welcomes the Committee's in principle support for the proposed legislation.

RECOMMENDATION 2

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

Agreed.

The preamble will be amended to provide a clearer explanation for why preventative detention is needed, specifically why persons suspected of being involved in terrorist activities need to have special legislation enacted to combat the threat that they pose. The explanation will be based on information outlined in paragraphs 1.32 to 1.47 of the report.

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'.

Noted.

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*.

Noted.

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.

Agreed.

It is appropriate that the list of proscribed terrorist organisations address all relevant terrorist threats and that the list be under constant review. Decisions by the Commonwealth to list terrorist organisations should continue to be made in accordance with the consultative procedures under the Inter-Governmental Agreement on Counter-Terrorism Laws of 2004.

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.

Noted.

RECOMMENDATION 7

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

Agreed.

The provisions dealing with multiple preventative detention orders (clause 12) and time frames (clause 13) have been revised to improve clarity and readability. Time frames are now dealt with in the context of provisions governing the making of orders (clauses 22 and 30).

It is unclear whether there is any need to amend the provision dealing with hearing rights (old clause 14). While it is recommended, the Committee did not identify any lack of clarity.

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.

Agreed in part.

The bill will operate to allow detention in the ACT.

The bill does not facilitate detention in other jurisdictions. Given the time limits on detention and the hearing rights of the parties, it would be impracticable to detain a person

extraterritorially without compromising the role of the Supreme Court in supervising detention. There would also need to be specific legislative provisions regarding the transfer of detainees, the powers and duties of the AFP, the responsibilities of oversight agencies and the application of the *Human Rights Act 2004*.

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.

Agreed.

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'.

Not agreed.

The object of the legislation is to provide for preventative detention as a measure of last resort and the test reflects this. The test is appropriate for circumstances where a person is being detained, without charge, up to 14 days. The test reflects requirements that would be read into the text of the bill by the operation of the *Human Rights Act 2004*. It also reflects the COAG Agreement that the laws "must be necessary, effective against terrorism ... and be exercised in a way that is evidence-based, intelligence-led and proportionate".

However, it does not change the scope or efficacy of the law.

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.

Noted.

National security is dealt with by heads of government in COAG.

At its 10 February 2006 meeting, COAG received a report on the progress made on a number of counter-terrorism initiatives since its special counter-terrorism meeting on 27 September 2005. It agreed the details of the scope, form and process for the review of counter-terrorism legislation in 2010. The 'Details and Process for Council of Australian Governments' Review of Counter-Terrorism Legislation' can be found on the COAG website www.coag.gov.au. The review will evaluate the operation, effectiveness and implications of the relevant legislation and amendments in each jurisdiction.

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.

Not agreed.

The Convention on the Rights of the Child makes it clear that children should be detained only as a last resort. This is a fundamental human rights obligation that is antithetical to the detention without charge of a child under the proposed regime. A limitation on rights of this kind could only be justified 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. Such material has not yet been provided to the Government.

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.

Noted.

Government policy is that maximum period of detention (14 days) will take account of any periods of preventative detention under a corresponding Commonwealth or State law or detention for questioning under the *Australian Security Intelligence Organisation Act 1979*. For this purpose, an officer applying for an order will be required, for example, to identify any periods of detention and questioning under the ASIO Act (old paragraph 18(k)(vi)).

The ASIO Act prohibits the disclosure of the fact that a warrant has been issued for detention and questioning (s 34VAA). However, this prohibition only applies during the life of the warrant. It may also be waived by the Director-General of ASIO, the federal Attorney General or by the Regulations. It follows that the AFP will be, in most cases, free to provide particulars of previous periods of detention under the ASIO Act. But, the ACT Government will seek to discuss with the Commonwealth agreements to facilitate waiver.

The bill will be amended to clarify that the applicant need not disclose information where that would constitute an offence under the ASIO Act (see new clause 17(6)).

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.

Agreed.

The Government welcomes the committee's agreement in relation to this issue.

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*.

Agreed in part.

In their submission, the ACT Legal Aid Office recommended that legal assistance be subject to the *Legal Aid Act 1977*, particularly section 28 of that Act which requires:

- that the person is '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'.

The Commission suggested that it was 'beyond argument' that the second condition would be satisfied in the circumstances envisaged by the bill. So, the key issue is the means test.

The relevant provision will be amended to ensure that a means test applies to the grant of legal assistance in relation to preventative detention order hearings (see subclause 52(5)).

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.

Not agreed.

Persons who have complaints in relation to exercise of the powers under Part 3 of the bill will have the ordinary rights of redress in relation to the exercise of powers by the AFP.

RECOMMENDATION 17

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

Agreed in principle.

The Government will consider including this issue as part of a broader review of the *Discrimination Act 1991*.

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.

Agreed in principle.

The Committee has not provided a detailed explanation for recommendation 18. However, the Government considers in the context of the Bill that as a matter of principle police officers should be required to identify themselves to persons when exercising legislative powers and give reasons as to why the powers are being exercised, particularly in circumstances where the officer is not in uniform. However, the obligatory details need only be sufficient to identify the officer in order to facilitate any future inquiries or complaint processes initiated by the suspect.

As identified by the committee, a police officer does not have to provide certain details to a person in exercising special powers unless the person asks. It may be argued that some people would not know they have the right to ask for this information, in these situations the right would have limited relevance. However, the Government also considers that in some circumstances it is not appropriate for a police officer to provide the information to all persons for reasons of operational practicability and to avoid unnecessary public alarm.

The Bill will be amended to address this matter in the context of each provision.

Taking a person into detention

Subclause 32 (2) relates to a police officer detaining or taking a person into custody under a preventative detention order. If asked, the officer must tell the person the officer's name, address of place of duty, ID number and, if the officer is not in uniform, the officer must show the person evidence that the officer is a police officer.

The Government considers that it would be sufficient for an officer to be obligated to identify him or herself by name and rank and if the officer is not in uniform, show the person evidence that he/she is a police officer. The Bill will be amended in these terms (see subclause 35(2)).

Seeking assistance

Subclause 35 (5) confers a power on police to require a person to give their name and address if the officer believes that the person may be able to assist the police officer in executing a preventative detention order. The officer must provide and record reasons for the request and, if asked, must tell the person the officer's name and address of place of duty and ID number. An offence applies to a person who fails to comply with a request by an officer.

The Bill will be amended on similar terms to clause 32 (2) to provide that a person does not commit an offence unless the police officer identified him or herself by name and rank and if the officer is not in uniform, has shown the person evidence that he or she is a police officer (see subclause 38(2)).

Special powers

Clause 75 applies to a police officer who exercises special powers under an authorisation. Before, when or as soon as possible after exercising a power, a police officer, if asked, must tell a person the reason for exercising the power.

In some exercises of power, for example, requiring persons to leave a cordoned off area, it may be impracticable for an officer to give reasons. This is because there may be hundreds of people if the area is a public place such as the city centre. In other circumstances telling persons the reason for requiring them to leave may cause public alarm.

The Bill will be amended to place an obligation on police officers to tell persons the reason for exercising a power in appropriate circumstances, including:

- where there is direct contact with the person (i.e. personal searches);
- where there is direct contact with a person's property and the person is present; and
- where a person is detained in order to conduct a search (see subclause 78).

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.

Agreed in part.

The Government agrees that the detaining police officer should record details of the circumstances that made the conveying of information to the detainee impractical. The Bill will be amended accordingly. However, failure to comply with this obligation should not carry a penalty. Criminal sanctions are only imposed on police officers in exceptional circumstances where fundamental principles are to be upheld, for instance, in relation to the detention of children (cl 11). In these circumstances the normal disciplinary proceedings will apply, it is not considered an appropriate obligation to impose criminal sanctions.

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.

Agreed.

RECOMMENDATION 21

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

Not agreed.

A decision to monitor contact between a detainee and their lawyer is made by a senior police officer in consultation with the public interest monitor (PIM). Human rights law requires that a detainee be allowed to consult a lawyer as soon as reasonably practicable, privately and at any time. There will be limited circumstances under which communication can be monitored.

The test and circumstances are based on provisions in comparable United Kingdom legislation, where the presumption, as in the ACT, is for confidential legal communications.

It is unnecessary to include an express right of review, as decisions will be reviewable under *Administrative Decisions (Judicial Review) Act 1989*. In addition, the detainee has the right to make a complaint to the Ombudsman.

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.

Not agreed.

The meaning of 'recorded' would take on its ordinary meaning and would include written notes, video or audio recording. A definition of this term is therefore unnecessary.

RECOMMENDATION 23

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

Not agreed.

The Government does not agree to the inclusion of a reasonable excuse defence for an offence against clause 35. Clause 35 confers a power on police to require a person to give their name and address if the officer believes that the person may be able to assist the police officer in executing a preventative detention order. Given the serious nature of this provision no reason for failing to comply with a request to give a person's name or address ought to be excused.

The general defences in the Criminal Code 2002 provide adequate defences for the offence. For instance, lawful authority (section 43) would apply to an undercover operative who does not give information or who provides false information to a police officer.

Clause 76 relates to special powers authorisations and would have a wider application. It could for example, apply to a person who is unknowingly in a target area (as opposed to a person who could assist in the apprehension of a terrorist suspect). Clause 76 also empowers a police officer to require a wider range of information (such as date of birth), and proof of correctness of detail. A reasonable excuse defence has been included due to the breadth of the provision and for example, to cover persons who have access to proof of detail but can only produce such detail at significant inconvenience or cost. In such circumstances, a court would be in a position to determine whether the excuse was reasonable.

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.

Agreed.

The penalty amounts in clauses 35 and 76 will be reduced to bring them in line with other jurisdictions. This will also reflect the seriousness of a breach in comparison to equivalent provisions in other ACT legislation (see subclauses 38 and 79).

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.

Not agreed.

The appropriateness of existing office holders performing the role of the Public Interest Monitor (PIM) has been considered and assessed.

There is no such office holder who could perform the functions without a significant degree of conflict of interest. The Ombudsman must hear complaints about conduct of AFP officers and the Human Rights Commissioner must have the capacity to independently review the effect of the bill on human rights.

This is complicated by the fact that the role of the PIM is to serve the public interest, not just the interest of the person who is the subject of the application.

The role of the public interest monitor is best served by a legal practitioner who can act, in effect, as counsel assisting the Supreme Court. There is no requirement for the Ombudsman or the Commissioner to be legally qualified.

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.

Not agreed.

Relevant information will be available through the annual reporting requirement (see below).

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.

Noted.

It would be unnecessary duplication to require other agencies to report annually on the "use and effectiveness" of the bill.

The agencies involved in implementation will be the AFP, Courts, the DPP, the Human Rights Office, the Public Advocate and ACT Corrective Services. The Chief Executive of the Department of Justice and Community Safety will report on behalf of all of these agencies and, taking into account subclause 98(2), will be able to obtain the production of all relevant information.

However, the bill will specify the matters to be reported on by the Chief Executive.

RECOMMENDATION 28

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

Agreed.

RECOMMENDATION 29

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

Noted.

The provisions dealing with hearing rights (clause 16) and contact rights (clause 51) serve different purposes and need to be retained. Notwithstanding their right to appear at the hearing (clause 16), the public advocate may still need to be notified of detention (subclause

51(2)), eg where they have not attended the hearing or where the place of detention is not disclosed (an order is not required to disclose this fact).

RECOMMENDATION 30

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

Not Agreed.

The *Legislation Act 2001* addresses this issue. Section 151A provides that if something must be done on a particular day or within a particular period of time; and the day, or the last day of the period, is not a working day, the thing must be done on the next day that is a working day. As such an amendment is not required. The effect of this Legislation Act provision will be brought to the attention of the Public Advocate.

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.

Agreed.

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.

Noted.

This recommendation draws on concerns expressed by the Ombudsman in its submission to the Committee. The Government understands that these concerns draw primarily on concerns relating to the need for cooperation between the Commonwealth and State Ombudsman when scrutinising administrative action under comparable Commonwealth and State legislation.

The issues will be less significant in the ACT given the dual role of the Commonwealth Ombudsman under the *Ombudsman Act 1989* (ACT) and *Ombudsman Act 1975* (Cwth).

More importantly, there should be limited need for cooperation between the local oversight agencies – the Ombudsman, Public Advocate and Human Rights Commissioner – given that their respective roles are focused on different issues and arise at different points.

In any event, many such issues are likely to be addressed by existing disclosure powers:

- Generally, the Ombudsman may disclose information if, in its opinion, the disclosure is in the public interest or the interest of detainees (*Ombudsman Act 1989*, s 34).
- Similarly, it may disclose information about complaints if, in its opinion, the disclosure is in the public interest (*Complaints (Australian Federal Police) Act 1981* (Cwth), s 41A).
- The Human Rights Commissioner may disclose information with a person's consent or in relation to the exercise of a function (*Human Rights Commission Act 2005*, s 99). Those functions are stated very broadly and do not include investigation of complaints.
- The Public Advocate has the power to disclose information if satisfied that the disclosure is necessary and reasonable in the public interest (*Public Advocate Act 2005*, s 17).

The Government will liaise with the Ombudsman in relation to developments on this issue.

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* to include this clause if necessary.

Not agreed.

Clause 86 of the bill enables the Chief Police Officer to provide directions to another Chief Executive of a department or entity. This power applies following the Chief Police Officer obtaining a preventative authorisation order or an investigative authorisation order. To obtain either order the Chief Police Officer must obtain the written approval of the Chief Minister and an order of the Supreme Court. In making an order the Supreme Court must be satisfied that such an order is necessary to prevent, reduce the impact of or investigate criminal activity (a terrorist act).

The objects of *Emergencies Act 2004* are to preserve life, property and the environment, and to provide effective emergency management. The *Emergencies Act* deals with consequence management, not law enforcement. The functions of a Territory Controller in relation to a declared state of emergency do not include law enforcement or investigation of criminal activity.

The purpose of the draft bill is to prevent and investigate criminal activity (a terrorist act). The draft bill deals with law enforcement, not consequence management. The police have the responsibility of law enforcement and investigating criminal activity in the ACT.

The National Counter Terrorism Plan, which has been endorsed by the Council of Australian Governments, provides that police have operational responsibility for preventing and responding to terrorism and for investigating terrorist activity, threats and incidents. Clause 86, and Part 3 of the bill provides the police with appropriate special powers to fulfil their law enforcement responsibilities.

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.

Agreed in part.

The Government will include a reference for the definition of torture at the first use of the term. However, it will not create a separate definition of torture for ACT law.

It is appropriate to cross-reference to the definition of torture in the Convention Against Torture, as the term has an accepted meaning in international human rights law.

But, it is inappropriate to extend the definition to cruel, inhuman and degrading treatment.

Clause 93 creates a blanket prohibition on the admissibility of evidence obtained directly or indirectly from torture, regardless of where or on whom the torture was carried out.

Contrary to the Committee's report, this is not narrower than anti-terrorism in the UK, which the report suggests extends the definition to cruel, inhuman and degrading treatment. No similar explicit prohibition exists in UK anti-terrorism legislation.

Section 76 of the *Terrorism Act 2000* (UK), which the report refers to, relates to the admission of confessions by accused persons in Northern Ireland. The provision ceased to have effect in 2003 because it allowed for the admissibility of confessions on wider grounds than is permitted under ordinary rules of evidence. (Section 76 was introduced in 1973, when it was proving difficult to use confession evidence in the Northern Ireland courts. A standard was therefore set that allowed confession evidence to be admitted unless there was evidence that the confession was elicited under specified forms of duress. The section was passed down through various Northern Ireland (Emergency Provisions) Acts into the *Terrorism Act 2000*.)

The prohibition on the use of evidence obtained either directly or indirectly by torture is consistent with international human rights law, which prohibits torture absolutely.

It is unnecessary to extend the definition to 'cruel, inhuman or degrading treatment'. Such considerations will be appropriately dealt with through the ordinary rules for admissibility of evidence. The ACT has the added protection of decisions being made by courts, applying those rules.

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.

Noted.

Clause 96 clearly states that evidence may not be used if it is obtained directly or indirectly from torture (subclause (1)) including torture that was carried out overseas (subclause (2)). The purpose of subclause (2) is to clarify that the provision applies to 'overseas evidence'.

It is therefore redundant to include any explanatory note to that effect.

RECOMMENDATION 36

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

Agreed.

The sunset clause is in line with the Senate Committee's recommendation of five years. This provision is necessary to ensure that the ACT has the best and most human rights compatible legislation.