CORRECTED TRANSCRIPT

REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

INQUIRY INTO NEW SOUTH WALES POLICE COUNTERTERRORISM AND OTHER POWERS

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At Sydney on Wednesday 14 June 2006

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The Committee met at 2.00 p.m.

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PRESENT

Mr P. G. Lynch (Chair)

Legislative Council
The Hon. J. C. Burnswoods
The Hon. D. Clarke

Legislative Assembly
Mr S. J. Chaytor
Mr G. Corrigan

PAULINE JENNIFER WRIGHT, Solicitor, Level 2, 91 Mann Street, Gosford, affirmed and examined:

CHAIR: Welcome to our Committee, Ms Wright. In what capacity are you appearing?

Ms WRIGHT: I am here as Chair of the New South Wales Law Society Criminal Law Committee.

CHAIR: As I am sure you are aware, the purpose of your being here today is to give evidence for our inquiry into the scrutiny of New South Wales police counterterrorism and other powers. Are there some things you would like to start off by saying to us?

Ms WRIGHT: Yes. The main concerns the Law Society has in relation to those powers are the detention without charge powers. They are probably of most concern to us. They are a fairly radical departure from what the law has been in the past. The other powers simply up existing powers, but those sorts of powers are quite new. The Law Society did not make a written submission to the inquiry but I have a document that I can table today responding to the questions sent to me.

CHAIR: We can take that as a tabled document. We will go through the questions so that other Committee members and interested parties know what we are talking about.

Ms WRIGHT: The first question was what we see as the main issues regarding New South Wales police counterterrorism powers. As I have just said, detention without charge is the main concern. The introduction of that, parallel with Federal legislation allowing the Supreme Court, on application by the police, to retain a person without charge or without prospect of trial for periods of up to 14 days at a time, is quite a novel law, quite an extraordinary power we say. No proof is required that there is going to be a terrorist attack. No proof is required that the detention might prevent a terrorist attack or preserve evidence in relation to a terrorist attack. All that is required is reasonable grounds for suspicion that the detention of the person might prevent such an attack or might preserve the evidence of an attack. Detained people can be not just terrorist suspects; they can also be people who are completely innocent but who might have information or know something, even innocently, about a terrorist attack.

The other concern about detention orders is that successive detention orders or rolling orders can be applied for, effectively enabling indefinite detention without charge and without the prospect of going to trial: upon release under one order a new order can be sought from the court for another fortnight's detention. During the period of detention innocent people, people who have not been charged with any crime let alone been convicted, can be held in gaol with convicted criminals, which is of concern. Another aspect of

concern is the secrecy of the hearings. The Supreme Court hearings of these applications are conducted in secret and revelation of the details of those hearings attracts a penalty of five years in gaol. The Act also allows the court in certain circumstances to keep the evidence in secret from detainees and their lawyers. That, of course, raises concerns about the ability of a detained person to challenge the detention order, because if you do not know the evidence upon which the order is based it is very difficult to challenge it in a higher court.

There are also restrictions on contact by a detained person: a detained person is only allowed to contact a very restricted group of people, including family and one person at their place of employment. It excludes, for instance, medical professionals and fiancées; it only includes spouses and members of the immediate family. The person is allowed to say only limited things about where they are. They are not allowed to say what it is about and why they are being detained. If the person who is informed releases information about that they are committing an offence. The gaol terms are quite severe: I think it is five years also for releasing that information.

The court may issue a prohibited contact order that prevents a detainee contacting even family members, co-workers or lawyers—particularly lawyers—in certain circumstances. Access to lawyers with security clearance is available but the detaining officer who is present during the period of detention has to be present, has to be able to hear the conversation and has to be able to understand the conversation—so it must be in the language of the attending police officer. The concern about that is that it makes it very difficult for a lawyer and their client to have a proper conversation without fear of being overheard and without fear of intimidation or later retribution by the odd bad apple who might appear. So the fear of being full and frank in giving instructions to one's lawyer in those circumstances is of concern.

As to concerns about detention without charge, particularly in circumstances where no proof is required that an actual offence is about to be committed or that the detention will prevent one— particularly where it also applies to the protection of evidence—this means that innocent people can be detained. An innocent person might be detained by mistake through carelessness on the part of the police officer. The police officer does have to swear their evidence, but all they have to say is, "Look, I've got a reasonable suspicion that this would prevent a terrorist attack or a reasonable suspicion that this will help preserve evidence of a terrorist attack." That is all that they really need to establish—which is not a high hurdle for such an onerous order to be placed on a person.

Obviously an innocent association with a person who later turns out to be a terrorist may result in detention because of the evidence provisions—if it is for protection of evidence. For instance, if you or I happen to be the next-door neighbour of a person of interest to the police who does in fact engage in a terrorist activity we might have particular knowledge of the comings and goings of that person without any knowledge that they were involved in

terrorism. We may have all sorts of information and it may be that we are detained as a completely innocent person. Remember that the powers apply not just to terrorist suspects but also to innocent witnesses. I suppose those are our main issues in relation to the powers that have been given to New South Wales police. The second question that was asked was in these terms:

> *Police now have access to a large body of powers to deal with terrorist incidents. Could the lack of uniformity of authorisation regimes to access these powers and various reporting requirements once these powers have been used lead to confusion or greater likelihood of misuse or abuse by police about the appropriate way to exercise these powers?*

Our brief response to that, I suppose, is that a potential problem is that police may start to see these powers, which are extraordinary by any standards, as being ordinary and able to be used in ordinary cases. I think the fact that some of the powers are contained in different pieces of legislation might increase that risk because they are not stated as being under the anti-terror law. They do not say, "This is an anti-terror law and should be applied only to anti-terror situations." Over time, when the reason for the powers' introduction—that is, the threat of terrorism—has been forgotten, that will increase the risk of those powers perhaps being misused by police, who think they are ordinary powers.

It should also be remembered that some of the new powers that were granted are not limited to use in terrorist cases. For instance, the power to search—the freeing up of the requirements on police before they can search a person—is an extension of an existing power, but it can be used across the board and is not restricted just to terrorism cases. I suppose, in summary, those would be some of our concerns. The next question raised was in the following terms:

> *The exercise of covert search warrants has been raised as a particular issue in some of the submissions to the Inquiry received by the Committee. Do you see the execution of covert search warrants as a problematic area? What kind of problems would you anticipate could arise? How could the execution of covert search warrants be more effectively oversighted?*

The Law Society is concerned about covert warrants. It is our view that those are open to abuse. The practice of giving people warning that their premises are about to be searched has grown up through a long historical process. The sanctity of a person's home and those sorts of things and the ability of a person in a democracy to go about their lawful business without interruption by the State are the foundation on which that is based. So when a warrant is about to be executed the person needs to be home and to be present while the police search their things. That has been a fairly fundamental right in New South Wales.

Covert warrants turn that upside down in that the person whose premises are being searched does not have to be notified of it until afterwards and they, therefore, are not necessarily present while the search takes place. That, of course, does give rise to abuse and it gives rise, perhaps more importantly, to the potential for abuse. The apparent fairness of the system is in question when covert warrants are used. It leaves the evidence that is found open to question—probably legitimate question—by defence lawyers if the person searched is ultimately charged. For that reason it also does not serve the interests of justice. Evidence can be planted. Historically, there have been cases of particular police officers planting evidence.

Covert warrants can also be used as fishing expeditions. In other words, covert warrants can be used under the terrorism laws as a pretext for looking for evidence of other crimes because any evidence that is found of a serious crime during a covert warrant search can be used in court—it is admissible in court. So there is a temptation for police officers to abuse those powers. The Law Society is not saying that the police routinely do abuse powers, but there have been cases historically where that has occurred and it is a matter of making sure that there are safeguards in place to prevent that, or at least to minimise the risk of that occurring. For that reason, we would recommend that covert searches be conducted in the presence of an overseeing officer, such as an officer from the PIC or the Ombudsman. We would have thought the Queensland Public Interest Monitor is a good model that could be considered and used in certain circumstances. We recommend that that be looked at.

That leads me to the next question, which states:

> *Are the safeguards built into the preventative detention powers adequate? For example, in Queensland the Public Interest Monitor must be present at every hearing of an application for a preventative detention order. Should there be a similar system in NSW? What other safeguards might be helpful?*

As I said, the Law Society considers the Queensland model to be a good one and it should be considered seriously here. The safeguards in place in New South Wales obviously include that the original application for a detention order must be made to a court. So there is oversight by a judicial officer. That is an important safeguard because the courts are independent in this State and that offers some protection. The application is made to the Supreme Court and the affected person and his or her lawyer are present. The evidence of the police officer seeking the order must be sworn, so it would be perjury to give false evidence. However, it must be remembered that the evidential burden is very light; the police officer must simply establish a reasonable suspicion.

The problem is that that applies only in ordinary circumstances. In emergency or urgent circumstances those safeguards are in fact omitted. Evidence can be given and an interim order can be made by telephone, which

allows a person to be immediately arrested and detained. As I said, an ordinary detention order lasts for 14 days and a rolling order can then be sought afterwards, so it can last indefinitely. Interim orders last only 48 hours, but, again, on the expiration of an interim order, an application for a further order can be made and it can keep rolling. Although it says it is limited to 48 hours, in fact it is not.

Another safeguard included is that a detainee is entitled to a copy of the detention order and normally is entitled to a copy of the grounds on which it was made. As I said, it is not allowed in circumstances where the information is deemed likely to prejudice national security. We have seen in the past circumstances in which the argument that something might prejudice national security is bandied about fairly lightly, or without much foundation. For instance, in freedom of information requests and different sorts of areas, questions of national security mean that an applicant gets a document most of which is blacked out, so it is a nonsense. Sometimes, because of the lack of transparency, it is open to question whether the national interest really does require the withholding of that information. As I said earlier, that means that a detainee may never know the grounds on which he or she has been detained and he or she really cannot challenge the legitimacy of the order having been made by a court. In other words, the courts really cannot help.

Another safeguard is that detainees can apply to the Ombudsman and the Police Integrity Commission [PIC] about their treatment during detention. We see that as a good thing and it should continue. They may also apply to the court to have an order revoked if they have any new evidence. However, it is very difficult to do that if they have not been given the grounds on which they have been detained. The Police Commissioner has to report annually on applications, and those reports have to include significant details about the nature and type of orders made, how many applied to young people, the number of complaints made, the results of those complaints and so on. The Ombudsman must report in 2007 and 2010 on the number and type of detentions and the orders that have been made under these laws. Those safeguards are all welcome, but they may not be sufficient.

I have had the opportunity to read the submission to this Committee prepared by the New South Wales Council for Civil Liberties, which contains a number of recommendations. The Law Society endorses those recommendations. I assume the Committee has a copy of that paper, which has the recommendations in the executive summary. Those recommendations contain greater and sensible safeguards that would be welcome in New South Wales.

The next question states:

Legislation amending the Controlled Operations Act to allow for retrospective approval of controlled operations was passed at the beginning of the year, but has not yet commenced. Do you see this as potentially impacting on NSW Police counter-terrorism activities? What

kind of difficulties could there be for the exercise of powers authorised retrospectively? What additional oversight mechanisms, if any, should be implemented for retrospective approval of controlled operations?

My response to that is in general terms. Retrospective laws of this nature will always be problematic. To enable an operation to become lawful at a later time, which at the time it was carried out otherwise would have been unlawful, is contrary to established principles of the rule of law. Authorities whose job it is to uphold the law should not be able to break the law and have their unlawful actions subsequently sanctioned. They should ensure that what they are doing is lawful before they do it. Obviously oversight cannot happen in relation to an operation that has already occurred. However, any application for retrospective approval should be overseen by the Ombudsman, and the Office of the Ombudsman should report on each application. Ongoing monitoring of outcomes of any such reports should be undertaken by the Office of the Ombudsman and an overall report should be made on a regular basis. We suggest certainly not less than annually as an added safeguard.

The next question is:

It seems likely that police counter-terror activities will involve taskforce arrangements, where a multi-jurisdictional team—for example, NSW Police, the AFP and ASIO—will undertake activities. Do arrangements of this kind pose particular challenges for effective oversight?

Clearly it is likely that that sort of joint effort will occur. Oversight in New South Wales by the PIC and/or the Ombudsman is fine, but the Australian Federal Police and Australian Security Intelligence Organisation are not subject to the New South Wales Ombudsman's or PIC's powers. Federal agencies would have to be involved as well to oversee those sorts of operations.

CHAIR: One of the other wonderful complications is what you then do with the Federal Bureau of Investigation agent stationed in Sydney who is presumably working conjointly with the New South Wales agency.

Ms WRIGHT: Indeed, it becomes quite complex. There are obvious problems with that. The kind of oversight that would be required in those circumstances becomes very complex and may require extra resources. One thing we must ensure is that the Office of the Ombudsman is appropriately resourced to enable sufficient staff to do the kind of monitoring that is required. The other issue arising in relation to oversight in general is that at present many complaints made to the Office of the Ombudsman are referred to the PIC and then to the local area command. That has given rise to concern among complainants that there is no investigation at arm's length. If the Office of the Ombudsman were more adequately resourced, that would not need to occur so frequently. There is dissatisfaction about the apparent or actual lack of arm's length investigation, and that is a legitimate concern.

The next question is:

Do you see the potential for the extraordinary powers in the anti-terrorism legislation to be used for more routine policing operations? What could be the dangers involved in this and how might misuse be prevented?

I referred to that obliquely earlier. I do see a problem with that. The danger is that the police may use the powers to investigate other crimes on the pretext that they are investigating potential terrorist activities.

And, of course, less overtly and subliminally the fact that the powers contained in various places may make their original purpose, that is, to fight the threat of terrorism, forgotten over time. Sufficient oversight by the Ombudsman would be one safeguard and collation of all laws in one place would be another.

The next question:

Are the current oversight mechanisms of agency reporting built into the Terrorism (Police Powers) Act, for example, annual reporting by the Attorney General to the Parliament on the operation of the Act, appropriate and sufficiently clear? If not, how could they be improved or supplemented?

As I have said, the Law Society endorsed the recommendations of the New South Wales Council for Civil Liberties. If those recommendations were implemented they would supplement the existing safeguards built into the legislation and it would go some way towards at least providing better safeguards.

The next question:

Is the lack of overarching review legislation for counter terrorism powers, such as the United Kingdom Human Rights Act under the European Convention, a particular issue for New South Wales? If yes, please explain how.

Yes, would be answer. The raft of counter terrorism laws introduced in New South Wales and federally parallel can properly be described as Draconian. They undermine many of the fundamental values of an open and democratic society. Their impact is greater than in other jurisdictions because we do not have an equivalent to the United Kingdom Human Rights Act. The laws themselves cannot be challenged by measuring them against overarching legislation in the courts. They cannot be challenged on that basis. There is nothing to measure them against. They are laws that Parliament has power to make because there is no Bill of Rights to say it cannot make laws unless they do x, y and z to protect certain rights, so there is no law to compare them to.

CHAIR: On that point what is your view about whether it is more desirable to have a United States of America type Bill of Rights that are entrenched in the Constitution and where, if another law is inconsistent, it can be taken to court and have it declared invalid? Or, are you more inclined to favour the United Kingdom system where the law cannot actually be overturned but a finding from the court that it is inconsistent can be made and therefore it would be returned to Parliament for Parliament to resolve the issue?

Ms WRIGHT: The latter may be easier to achieve but the former would be preferable in that it actually has teeth.

The Hon. DAVID CLARKE: A Bill of Rights?

Ms WRIGHT: Yes, a Bill of Rights has teeth.

The Hon. DAVID CLARKE: Does the Law Society have a policy on that?

Ms WRIGHT: I believe it does, yes. I am getting a nod from the policy officer. Yes, it does. A constitutional Bill of Rights, we can see that there might be difficulties in attaining that because it would involve constitutional reform, but ultimately it would be a better safeguard of human rights in this country because it would have teeth. It could actually have the result of declaring legislation invalid if it contravened the constitutional Bill of Rights.

The Hon. DAVID CLARKE: For how long has the Law Society been advocating a Bill of Rights?

Ms WRIGHT: At least since the presidency of John North which is some years ago. I am sorry I cannot tell you. I can let you know that on notice if you would like an answer to that?

The Hon. DAVID CLARKE: Yes, thank you.

Ms WRIGHT: Of course, these laws can be criticised for breaching international conventions like the ICCPR to which Australia is a signatory, but the absence of a Human Rights Act or a Bill of Rights really means that there is no bar to these laws' legitimacy through our court system, and there is no review mechanism and ability to send it back to Parliament because it is inconsistent. So the Law Society believes that at the very least there should be an equivalent to the Human Rights Act if a Bill of Rights constitutionally cannot occur. The policy of the Law Society on that I think is that as a first step towards a constitutional Bill of Rights that a climate be created in which there is legislative requirements for measuring laws against a Human Rights Act would be a step in the right direction.

The next question:

Do you think the Ombudsman and the Police Integrity Commission have an adequate role in oversighting police exercising these powers? Are they the appropriate bodies for this role?

Again, as I have said, I endorse the recommendations of the Council for Civil Liberties to expand the oversight functions. I think that at the moment they are perhaps not quite as strong they could be. The recommendations of the Council for Civil Liberties appear to be quite sensible. As I said earlier, in most instances the Ombudsman would be preferred to ensure actual and apparent arm's length oversight in the exercise of the powers, and sufficient funding should be given to ensure sufficient staffing to enable them to carry out those activities.

The next question:

What other forms of oversight could be beneficial, for example, to what extent should judicial review be available?

The view of the Law Society is that judicial review should be available at every stage and that open and transparent oversight by the courts of the criminal justice system to ensure the proper operation of the rule of law is fundamental in a democracy and adequate judicial oversight is required. Our concern about judicial oversight is in relation to interim detention orders and the rolling of interim detention orders, and the inability of the courts to properly oversee something where a detainee really has no basis to challenge the order made because of the lack of information and evidence given to them.

Finally:

Are there any other matters you would like to raise?

I suppose just in general terms Article 3 of the Universal Declaration of Human Rights says everyone has the right to life, liberty and security of person. These laws are extraordinary in that they enable the State to take away the liberty of a person—even an innocent person—without charge and without the prospect of trial. At its conference in Berlin in 2004 the ICJ president said there is presently no part of the world that is immune from terrorism. The threats are real and call for a firm response from states. The response should, however, be proportional to the danger involved and carefully tailored to address it, bearing in mind that the danger includes not only the harm done by terrorism, but also the harm done to the fabric of our societies by disproportionate responses that undermine democracy itself.

The Law Society of New South Wales endorses that sentiment. There is concern that governments in Australia, including New South Wales, against the background of continuing fear of terrorism are seeking to bypass well-established human rights and rule of law principles. Perhaps not seeking to but, in fact, do by the passage of these laws.

The Hon. DAVID CLARKE: Do you say that government responses have been disproportionate to the danger of terrorism?

Ms WRIGHT: We believe that the ability to detain innocent people without charge and without prospect of trial is too much. Terrorism, of course, does put human rights and democracy in peril. That makes it all the more important for counter-terrorism measures to uphold human rights and the rule of law because they underpin the democracy we want so much to protect. If these laws are to exist and are not to be repealed then at the very least they must be subject to stringent oversight to ensure that they are not abused or misused. While there are safeguards contained in the legislation, the Law Society thinks they are not sufficient at the moment and the recommendations contained in the submission of the Council for Civil Liberties would go some way towards that, as well as some of the recommendations to which I have referred today.

The Hon. DAVID CLARKE: Is there already some judicial oversight?

Ms WRIGHT: Oh yes there is.

The Hon. DAVID CLARKE: Do you say that is insufficient?

Ms WRIGHT: Yes.

The Hon. DAVID CLARKE: Do you think the Ombudsman would do it better than the judicial oversight that is already provided?

Ms WRIGHT: No, the two must exist side by side. There should be oversight by the Ombudsman of certain things and oversight by the courts of other things. In other words, there must be a proper ability to challenge a decision in the courts. The court system should be transparent and the evidence on which orders are made should be given to the defendants and their lawyers to allow them to challenge it in the courts, otherwise the courts cannot do their job properly.

The Hon. DAVID CLARKE: Just for clarification, is it the case that the concerns you have raised today, particularly those raised at the beginning of your evidence, are all concerns that the Law Society has previously raised with the New South Wales Parliament regarding this legislation?

Ms WRIGHT: They are.

The Hon. DAVID CLARKE: You are basically just restating concerns that have been previously presented to the Government, and I think probably presented to the Opposition as well?

Ms WRIGHT: We are restating our concerns but, perhaps in the context of the oversighting powers, we are adding to that because we have been asked

specifically to comment on the oversight of the powers—which we have not been asked to do before.

The Hon. DAVID CLARKE: Keeping in mind that the legislation is in place, have there been any cases of exercise of these powers that have caused you great concern, where they have not been properly exercised?

Ms WRIGHT: I am aware that there has, of course, been some exercising of the powers. Because I was not a lawyer in the cases, I do not know what went on in them, because the proceedings are secret. I know that there have been at least five cases, but I do not at this stage know whether there have been proper or improper uses.

The Hon. DAVID CLARKE: Would it be true to say that you cannot come forward with any instance where you believe those powers have been improperly used?

Ms WRIGHT: That is right, and that is because of the secrecy provisions, so we are not allowed to know.

Mr STEVEN CHAYTOR: Would it be a correct summary of the evidence you have given that a lawyer's ability to provide representation to a detained person is limited, first, because of the presence during questioning of the detaining officer and, secondly, that the order detaining the particular person can have information limited because it is deemed to be in the national interest?

Ms WRIGHT: That is correct.

Mr STEVEN CHAYTOR: Are there any other scenarios that you can think of that would limit lawyers' representation of a person subject to a detained order?

Ms WRIGHT: The only other area of concern that comes to mind is that lawyers, in order to appear, have to have a certain security clearance. It is just another hurdle that a detained or affected person must surmount in order to get representation, to make sure the person of their choice has had security clearance.

Mr STEVEN CHAYTOR: Your understanding is that security clearance is authorised by which body?

Ms WRIGHT: I would have to take that question on notice. I am sorry. I do not recall.

Mr STEVEN CHAYTOR: On that line of questioning—it might be too hypothetical for you to answer and if that is the case I accept that—with regard to a lawyer going into an interview with a detained person, would it be prudent or advisable for that lawyer to mention to the person the nature of

these issues that we have discussed, in relation to not all information being available; and also that there is the presence of the detaining officer and what that might entail?

Ms WRIGHT: I think that a prudent lawyer would have to give that kind of advice to his or her client.

Mr STEVEN CHAYTOR: Do you think it is one of the first things a lawyer would mention?

Ms WRIGHT: Yes.

Mr STEVEN CHAYTOR: My next question is in relation to your comment, mentioned in passing but quite significant, that the counter-terrorism laws that we are discussing and their extraordinary powers are contrary to the International Covenant on Civil and Political Rights.

Ms WRIGHT: Yes.

Mr STEVEN CHAYTOR: In what way?

Ms WRIGHT: I will have to refer to some papers to tell you. Article 9—neither the person affected by the order nor their lawyer is given the full documentation. That would be contrary to article 9, which states that anyone arrested shall be informed at the time of arrest of the reasons for his arrest and promptly informed of any charges. Article 14 provides that everybody is entitled to a fair and public hearing, and that they have the right to be presumed innocent until proven guilty according to the law; that they should be informed promptly and in detail, in a language that they understand, of the nature and cause of the charge; and that they should be able to communicate with a lawyer of their own choosing; they should be tried while present and in a position to defend themselves, in person or through a lawyer of choice, and to examine witnesses against them. None of those measures to ensure due process and natural justice exist in these laws. Article 17 states that a citizen should not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. With regard to the *International Convention on the Rights of the Child 1989*, the preventative detention orders in respect of children between the ages of 16 and 18, where there is no criminal offence, breaches Article 3. So, those are some of the main concerns we have in relation to international conventions.

Mr STEVEN CHAYTOR: It has been a long time since I have studied international law, but Australia has ratified the international convention in the early 1980s, from memory.

Ms WRIGHT: It has.

Mr STEVEN CHAYTOR: Towards the end of your evidence you mentioned that it would be beneficial for additional oversight to take place by

way of judicial review. Does the Law Society have an opinion about the role of Parliament in using very clear and concise language in relation to a decision not being subject to judicial review, and the right of Parliament to enact a probative clause to that regard or extent?

Ms WRIGHT: I am not sure I understand your question, sorry.

Mr STEVEN CHAYTOR: Obviously, Parliament can insert a probative clause that uses clear and concise language to ensure that a particular decision is not subject to judicial review.

Ms WRIGHT: Yes.

Mr STEVEN CHAYTOR: That is a legal theory that I think is pretty well established, to the extent that it does not contravene section 75 (5) of the Constitution, which deals with certain writs of mandamus and the like.

Ms WRIGHT: Yes.

Mr STEVEN CHAYTOR: Does the Law Society have a particular view, though, because this particular legislation does contain a probative clause limiting judicial review about that the role of a probative clauses being enacted by Parliament on issues such as this, which are extraordinary powers and which you have suggested limit human rights?

Ms WRIGHT: Our view is that the judiciary should always have oversight of these types of laws, and they should not be limited. In a nutshell, that is our view. The judiciary is independent and should have that power.

The Hon. DAVID CLARKE: One question arising out of that. You also agree that there has to be weighed up on one side the rights of defenders, but also the protection of the public from acts of terrorism. You are saying that you do not believe that the Attorney General and the New South Wales Parliament got that balance right when it passed this legislation?

Ms WRIGHT: I think that the balance has not been struck properly on this occasion. I think that the ability to detain even children, without even suspicion that they have committed a crime, is quite extraordinary and, I think, goes too far.

The Hon. DAVID CLARKE: The view of the Law Society, when put to the Parliament, was rejected by the Parliament, was rejected by the Government and by the Opposition and this legislation was passed—if I am correct, Mr Chairman—almost unanimously.

CHAIR: Yes, with some interesting contributions to the second reading debate.

The Hon. DAVID CLARKE: At the end of the day the most interesting thing is the final vote. This legislation was passed, with the support of the Government and the Opposition, overwhelmingly in both Houses. The concerns of the Law Society, which you have restated today, were not accepted by the Parliament.

Ms WRIGHT: They were not accepted by the Parliament. Ultimately, I think they were accepted by the Federal Parliament Senate committee report. I think members of this Committee will find that many of the concerns we have expressed were endorsed by that Senate committee. Unfortunately in our view, the recommendations of that committee were not followed either in the Federal sphere or in New South Wales.

The Hon. DAVID CLARKE: So there was largely agreement between the Federal Parliament and the State Parliament on those matters?

Ms WRIGHT: There was. And we think they got it wrong on this occasion.

Mr STEVEN CHAYTOR: To what extent do you believe the Law Society's concerns would be reduced if the proof required for detention was not reasonable grounds of suspicion or balance of probabilities but a greater test, such as beyond reasonable doubt?

Ms WRIGHT: Of course, anything like that helps. But the fundamental problem would not be overcome by it. The fundamental problem here is that these laws do not require proof of a crime having been committed, or of a crime being planned, or anything of that nature. Under these laws, a person may be detained without any suspicion that they have committed or are about to commit a crime. While those sorts of measures would help, they do not assuage our concerns about those laws.

CHAIR: If there are no further questions, I thank you, Ms Wright, for your attendance.

(**The witness withdrew.**)

ROBERT STEPHEN TONER, Senior Counsel, and Treasurer, New South Wales Bar Association, affirmed and examined:

CHAIR: Mr Toner, in what capacity do you appear before the Committee?

Mr TONER: I am here to represent the New South Wales Bar Association. I happen to be Treasurer. But do not let that fool you: I still can't count!

CHAIR: There are a number of people round this table who notoriously can count! And are accused to doing it far too often!

Mr TONER: Firstly, I thank the Committee very much for the opportunity given to the Bar to address you. We have not prepared a written paper, but we have been given a list of questions that indicate matters in which the Committee is interested. Rather than specifically deal with those questions question by question, there are a few things I would like to say on general topics, which hopefully will be relevant, hopefully will be of interest, and hopefully will be of assistance to the Committee.

In relation to the whole body of anti-terrorism legislation, both State and Federal, it is useful to have organisations such as the Police Integrity Commission or the Ombudsman having, in a broad sense, a supervisory function or the capacity to oversight the activities of the agencies of State. We are not here to refight battles that we have lost. Over the years, I have found that to be a relatively futile activity. Can I simply say that the Bar maintains its position to anti-terrorism legislation, both State and Federal.

I simply restate briefly that the Bar's position has always been that the proper approach to confronting criminal activity which has been badged as terrorist is to regard it as criminal activity, and that the proper way to investigate it and prosecute it are the conventional techniques we have employed over the years to investigate and prosecute crime. That is not to say that there ought not be enhanced methods of investigation or inquiry which come to light from time to time by technological advances, or where lacunae are revealed in such techniques which can be filled by appropriate legislative amendment to allow investigating authorities greater rein to properly investigate and prevent the commission of crime. But, again, can I stress and emphasise that the proper way of approaching this topic is as a criminal investigation and prosecution, rather than badging it, as it has been, with a specific category above and beyond what is simply criminal activity. We have always thought that if you discovered a plot to blow up the Opera House and kill a thousand people, you could probably have found something in the Crimes Act Prior to 2001 to deal with that proposition.

I am also aware of concerns-- and accept those concerns — in relation to the preparation for such crimes requiring additional legislative support to

allow police agencies to investigate those preparatory acts. We would have no problems with that either. Our concern is with not so much the State of New South Wales but with the Commonwealth vesting powers in agencies that are not equipped, nor should they be equipped, to investigate crime. I mean by that agencies such as ASIO. That having been said, and battles having been lost, let us confront what we have got now.

One concern that we have always had — and it subsists — is that there is a marked want of transparency in the operation of this legislation, both State and Federal, and the co-operative legislation, such as the preventative detention power. Of course, the principal preventative detention power from the point of view of New South Wales is under the New South Wales Act, because the Commonwealth power allows for detention of only 48 hours and the New South Wales power allows for extension of the detention period up to 14 days. And, of course, there is the capacity in the New South Wales legislation for rolling preventative detention orders. No doubt the Committee has been told about that ad nauseam.

I heard Pauline Wright a moment ago tell the Committee that it is very, very, very difficult for a lawyer to be able to effectively represent anybody who has been detained under the legislation because you cannot get hold of the information upon which the orders are based. As we have said previously, an order can be made based upon evidence that is convincing and powerful, but wrong — either wrong because there is a mistake in the interpretation of the material before the officer swearing the information, or because it is founded upon malice by an informer to an informant. But who is to know—because it is not transparent, it is not available to be investigated. We maintain that is a problem.

Can I add as a collateral matter – but an own important collateral matter—that, as a practical and principled concern, we are now getting to a stage, both in New South Wales and in Victoria, where people charged with very serious offences under the anti-terrorism legislation cannot be represented by their lawyer of choice. They cannot be represented by their lawyer of choice in circumstances where the persons charged do not have the capacity to fund their own representation because the Federal Government has passed a regulation to say that any lawyer who does not have a security clearance cannot represent that party, full stop.

Why this should be so has got us beaten, frankly. What is the reason for there to be security clearances for lawyers? After all, the jury will not be security cleared, the judge is not security cleared, the lawyers owe both a professional duty and a duty in honour to the courts—they take an oath or make an affirmation when they are admitted as a legal practitioner—and now we want only to have those who have the badge of the State able to represent those charged with very serious criminal offences. We find that obnoxious and, I must say, that it is difficult to see how it arises in the anti-terrorism legislation that you can have this collateral bar, so to speak, on lawyer of choice by those who are charged with very serious criminal offences.

Pauline Wright also made the point that there is an ICCPR covenant which states that a person is entitled to hear the evidence against him or her in a criminal charge. Under the anti-terrorism legislation, of course, the probability is that the accused will not hear that evidence. It is unlikely that a person accused of a terrorist offence is going to get a security clearance, so that the accused will be excluded. Even if the lawyer representing such an accused does have a security clearance and does hear the evidence that is being led, that lawyer will not be able to tell his or her client what that evidence is. We see that as a current difficulty in terms of the administration of this legislation and it is going to be an ongoing problem. Now how long the industrial action, so to speak, of the Victorian lawyers is going to be maintained or what its end will be, I do not know, but I imagine that there will be an interesting debate in the High Court based on Dietrich-type principles as to whether that sort of effective bar can be put on lawyers representing clients charged with very serious offences.

Can I turn now to some of the investigatory techniques that were raised by the set of questions that was circulated? In particular, can I turn to retrospective endorsement, so to speak, of controlled operations. The Bar has significant concerns in relation to that style of legislation, that style of endorsement. Our concerns are these: it has the smack of shoot first and ask questions later about it. In other words, to put metaphor on metaphor, the end is justifying the means. If the agency, the police, or whichever agency it might be, undertakes a so-called controlled operation and produces a fruitful result, there will be hurrahs in the street and holy water will be sprinkled upon this controlled operation ex post facto. And no doubt the politician, the Minister of whatever hue, will claim credit for such a triumph.

If it is a catastrophe, of course, I suspect that the cop is going to have to wear it. A good but tragic example of it is the police killing of the young Brazilian in the United Kingdom. Admittedly, that was not a controlled operation, but analogously it is a fair reference to what can happen when there is uncontrolled and far too zealous and perhaps nervy police officers acting without writ, so to speak, in anticipation of having their conduct subsequently blessed after the event. The pressures that will be applied to whoever it is that is going to anoint the operation after it has taken place to anoint it will be enormous. We have very significant fears about allowing a situation to develop where conduct which is not authorised can be done in the hope or expectation that it will subsequently be authorised, and no doubt those who are conducting the operation, in marginal cases will be in a position to put enormous pressure upon whichever authority it is to grant a blessing, so to speak, to justify their conduct after the event itself.

It is not like most retrospective legislation. From time to time there is mundane retrospective legislation which might relieve people of the obligations under easements across land, or whatever it might be, which are non-controversial in terms of subject matter. But the New South Wales Bar Association has, since Christ left Molong, as I understand it, opposed

retrospective legislation in any of its forms, whether it be a mundane application of it for the purposes of an easement across land, or whatever it might be, for the simple reason that a fundamental tenet of the rule of law must be that a person conducts his or her affairs knowing what the law is or being able to find out what the law is at the time of the conduct that the person is undertaking, rather than have it criminalised or impaired or impeded or sanctioned, for that matter, after the event. So we have concerns in relation to that aspect.

We do not have particular concerns in relation to covert warrants, in other words, a warrant for people to sneak into premises and install listening devices, or whatever it might be—a useful investigative tool—and perhaps it is one of those areas where there was a lacuna in the law, particularly in difficult times of criminal investigation, where this is a powerful tool within the law enforcement armoury. Of course, the covert warrant will be obtained in the same way that any other warrant is obtained so that there is a proper scrutiny in relation to its grant. So we say there is no real difference between, say, a telephone intercept warrant and a covert warrant. It is not as if a human being gets told that their phone is being tapped. I suppose the difference is that there is an invasion of the house, so to speak, or something like that. But, in large part, that is a distinction without a difference, and one would imagine that a judicial officer, before granting such a warrant, will scrutinise the necessity for it with proper care. So we have no particular concerns in that regard.

Could I just revert for the moment to something I said earlier, and that is this question about the proper bodies to be investigating and prosecuting potential criminal activity which has been badged as terrorist activity is the police. One of our concerns in that regard is because secret agencies in this country have been notoriously both useless and unreliable. It is not so long ago that we had the Age tapes; it is not so long ago that we had Special Branch in New South Wales; it is not so long ago that ASIO was used to spy on the trade union movement for exclusive political purposes rather than any true business within their charter. And we are now asked to believe that there has been a peculiar Paulian moment for all these agencies so that they now come before us as changed citizens, proclaiming their virtue, and are now entirely reliable.

I would have thought that the best way to look at an agency is to look at its track record. Thankfully in New South Wales we got rid of Special Branch. I know there was sort of a rather quiet cachet on learning that you had in fact had a Special Branch file, and it was rather disappointing, as I understand it, in some parts of the political spectrum, when you found that you did not have one.

CHAIR: For that reason a number of people probably have not applied to find out.

Mr TONER: That is right. Nonetheless, what was remarkable about it was when those files were retained, the claptrap that was contained within those files. As I said earlier on, we are not to know the basis upon which warrants are obtained because we do not get the documentation that supports the information that underpins the warrant. There is no way of testing it, which brings me to this proposition and that is this: I appeared for the Australian Bar Association recently before the Sheller committee, which is looking into a raft of the early Commonwealth anti-terrorism legislation and what we proposed to that committee—and I note that Simon Sheller's report has not been tabled in Federal Parliament as yet; I suspect I know the reason why but it has not hit the table yet and I suspect that the Sheller committee will recommend this—is the creation of the office of a special advocate.

That goes a little bit further than the Queensland monitor. The role of special advocate will be to stand as an opponent to applications for warrants of all descriptions. This is very much a second-best position as far as the Bar Association is concerned, but if there is to be somebody to oppose these applications, because at the moment all that will happen is that there will be an application for a warrant put up to a judge. That information will be sworn—which is a significant advance in the New South Wales legislation—but in the end the judge must rely essentially on the information that is contained in the material that supports the warrant, whether it be an affidavit or whether it be the sworn information itself. There is no way of testing it.

An avenue of improvements may be to have an office of a special advocate who has the capacity to be the interlocutor to be the opposer to test the material that is being put up by the police or whichever agency it might be to determine whether it be rumour, hearsay, innuendo, malice, or whether it be matters of substance which found this information. Why should we have that in this case and not any other case where a warrant is obtained? Precisely because of the restrictions that surround the anti-terrorist legislation armoury; in other words, the capacity to obtain warrants of various descriptions, the capacity to detain people without trial and without charge. These things are alien to the broad run of the criminal law.

Again, we say this is very much a second-best position but the special advocate can be a person who has the highest security clearance and can have access to all the material that is the basis of this information so that there can be a proper independent scrutiny of that sort of material and it can be tested before the judge. We say that this is a fair middle step to our principal concerns about the want of transparency in the whole of this process.

I suspect that the Sheller committee will come down with a recommendation along these lines and I hope it is implemented by the Federal Government. We think it is probably a better solution to the Queensland monitor position. We think it is a better solution than simply having the activities of the police under the various aspects of the anti-terrorist battery of laws scrutinised by the PIC or the Ombudsman because we

would anticipate that the office of a special advocate would be specifically established for this purpose. Presumably, you could also extend it to ensure that this person is not unemployed and extend it to the scrutiny of perhaps other warrants within the system, but, nonetheless, we say a professional advocate charged exclusively with this task is better than mere scrutiny, albeit valuable scrutiny, by organisations such as the PIC and the Ombudsman, which have other valuable business to deal with in our community in any event.

I recognise also that there is some contradiction in putting that proposition to you against what I said to you earlier, namely, that we believe that all these things should be treated within the proper realm of the criminal law; again, a battle that we have lost. Let us move on to another proposition that will assist in assuaging the legitimate concerns of reasonable minds in this community that these things are done in secret and we are loath to have agencies of government operating secretly without any proper detailed scrutiny of their activities,

I was going to say that these laws are draconian. I must have said that about four billion times. Poor old Draco; he has been hard done by over the years, but in that context we say that there must be ways of tempering what we say is the imbalance. It is gone too far. It is a bit like tort law reform. I note that the New South Wales Government says that tort law reform should have the perfect balance. We can say things about that in another forum, but we say that this is gone too far as well. By way of example, prior to the London bombings there was no proposal before Federal and State authorities to change the law at all to make the law harsher, tougher, tighter and we had already had the Bali bombings, we had had 11 September, we had had the Madrid bombings. We had also, of course, had the long experience, without wanting to offend some sensibilities of the provisional IRA's campaign in London from 1968 onwards. We had had all of that and yet there was no need apparently to go beyond what had been put into law prior to the London bombings, then suddenly we need a whole new lot of laws after that, which included, of course, preventative detention after the London bombings. Why?

And it had been pronounced by politicians of all hues that the laws in place then represented a fair balance. If the laws then represented a fair balance, surely now they are in imbalance because what was done subsequent did not include anything which was countervailing the one-way traffic which the Anti-Terrorism Act 2005 represented. You have heard me just talking at you. Do you have any questions?

Mr GEOFF CORRIGAN: You mentioned assuaging reasonable concerns in the community. Do you think that the community at large shares your views?

Mr TONER: In part. It is very broad, the community, and not many of them pay particular regard to the constitutional issues that might be involved in legislation because it does not affect their day-to-day lives. People sensibly

go about their affairs without turning their attention, except perhaps during times of elections, to matters of high policy. The other aspect that concerns us greatly is that there is a very effective fear campaigns, either patently or indirectly, attached to this legislation. You can whip up vigorous public opinion in the short term by scaring people but what we are asking politicians to do is to stand back and take a breath and ask themselves what they are doing, why they are doing it and to what end. After all, we do live in a liberal democracy and we are trying to preserve a broad political discourse.

For instance, it would be a terrible day if somebody could not stand up in the streets of Sydney and say, "I oppose the American invasion of Iraq. I find it outrageous." This is not me saying this; I am just giving this by way of example. "I find it outrageous that the Americans invaded Iraq and have killed 50 or 60,000 Iraqis and there is a legitimate role for Iraqis to resist the American invasion of Iraq." Why can a person not stand up in this State and say that? But the laws of this country are turning to the point now where such talk is on the cusp of sedition. I find that very dangerous business.

The other example is that in the late sixties and early seventies, one of the few things on earth that I have done to my credit was I stood up, with many others, and in a very minor way I opposed the regime in South Africa. It was apparently a legitimately constituted regime. What is more, I vigorously supported the African National Congress [ANC] which at that stage was engaged in an armed struggle to overthrow that regime. Under the laws that exist today, that is a criminal offence. If I stand up today and support the violent overthrow of the Government of North Korea, that is potentially a criminal offence. If I stand up and advocate the violent overthrow of the Government of Iran, that is potentially a criminal offence. The difference is that it is only a question of political taste as to who is prosecuted. That is what the law says.

We find these laws difficult because they infringe fundamental ideas about free speech and do it secretly. It does it in circumstances where it restricts severely the capacity of people to be represented by lawyers of choice and at the public expense where that person is indigent. Can I just pick up on that particular theme whether the Bar Association supports a Bill of Rights or a charter of rights. The answer is yes. If you had asked us that question 10 years ago, the answer would have been no, but the answer now is yes, with a capital Y. Why? Because Australia is one of the few democracies that does not have it.

If we did have such a Bill of Rights or a charter of rights, we would not have the legislation that we have in this country now. They would not pass the Anti-Terrorism Act 2005 in the United States. Why? A Bill of Rights. I think we ought to have one. Let us underpin now what our philosophy is, namely, we are a democratic country. We believe in the right of free speech. We believe in the right people to be represented by a lawyer of choice. We believe in the presumption of innocence and we believe in due process. These things

are being stomped on continuously by the anti-terrorism legislation both in this State and Federally.

Mr STEVEN CHAYTOR: I wish to draw out a few of your comments that you made in relation to the Office of the Special Advocate. You referred in that instance to the office standing as some sort of opponent for applications for warrants. Would you also extend that office to stand as some sort of opponent in relation to preventive detention orders?

Mr TONER: Yes.

Mr STEVEN CHAYTOR: So it would be both?

Mr TONER: Quite. As I say, it is the middle ground, but it would go to meet in some ways the criticism that we have had, namely, that these orders are untested. We know that in New South Wales the regime that was put in place under the New South Wales legislation is significantly better than the Commonwealth Act, but nonetheless it still suffers from the same flaw, namely, there is not a capacity to test the information which founds the information.

Mr STEVEN CHAYTOR: You also mentioned the Special Advocate. Would that be a person with the highest security clearance?

Mr TONER: Yes, unlike politicians and judges.

Mr STEVEN CHAYTOR: So you would suggest, therefore, that that person should have full access to the person who is subject to an order.

Mr TONER: Full, complete and unfettered, and one would expect an Australian eyes only [AUSTEO] type of clearance.

Mr STEVEN CHAYTOR: Would you expect that the detaining officer would be present during those discussions with the person who is subject to an order?

Mr TONER: Well, no, but that is the fight we lost. We have problems with all that. We say that if you are going to have legal representation, it ought to be legal representation. You should not have your aunty sitting at your knee listening to it all. You should have free, unfettered access to legal representation, otherwise it is not legal representation.

CHAIR: Are there further questions? If there are no further questions, I thank you, Mr Toner, for your attendance and for the evidence you have given.

(The witness withdrew)

RICHARD MARTIN BIBBY, Assistant Secretary, New South Wales Council for Civil Liberties, 5 Mangiri Road, Beecroft, affirmed and examined:

CHAIR: Dr Bibby, what is your occupation and in what capacity do you appear before the Committee?

Dr BIBBY: I am a retired academic and appear as the Assistant Secretary of the New South Wales Council for Civil Liberties.

CHAIR: The Committee has received a submission from you. Do you wish that your submission be made public and be included as part of your sworn evidence?

Dr BIBBY: Yes.

CHAIR: Are you happy for the Committee to authorise the disclosure of your submission?

Dr BIBBY: Yes.

CHAIR: Would you like to make an opening statement?

Dr BIBBY: Briefly. I stress the seriousness of the powers that have been given to police. They are very serious indeed, because have very serious threats attached to them. I remind you that there are worse things that can happen to a country than a terrorist attack. It is true that Australian democracy is strong, but it is strong because of a great many threads that support it; it is strong because there has been a rejection of things such as detention without trial and because there is recognition of the importance of due process in the rule of law. There are limits that we set to investigative authorities, which are necessary in order to protect freedoms.

What has been happening in recent years, especially by the Federal Parliament, has been a gradual knocking away of those threads. The strength, I argue, comes from the whole and not from the individual bits. Every time we produce a new power for police we need to make sure that something goes in place, as much as possible goes in place, to be a substitute thread.

We argued against the detention without charge powers when they were put through. We argued that with the Federal Parliament, and sent a submission to State members of the Legislative Assembly and the Legislative Council. But because of the pressure of time—these things were rushed through pretty fast—we were able to get that submission in only the day before the lower House was due to consider the bill. So there was not much time to consider our submission.

I want to stress how serious the matter is and how readily it could be abused. It is likely to be abused in the way that the relevant powers have been

abused in Ireland and England. In Ireland, the use of detention without trial was counterproductive, as has been very widely recognised by all major political parties, at least in England. It led to so much anger that it fed into the Irish Republican Army and its supporters. The things are actually dangerous even just being used in their normal use.

In our original submission on that bill, and I think in this one also we referred to the de Menezes case. A couple of days ago there was another case in Britain, about a raid on a house in which a person was wounded and could have been killed, because the police made a mistake. I do not mean they made a mistake in the sense that they were careless, or what have you. Just that a mistake was made, they got misinformation. Powers can be abused by mistake and that is the likeliest thing.

What happened in the de Menezes case? There was an immediate attempt to cover up, which is not surprising. They invented all the stuff about him wearing clothes suitable for winter when it was summer, and so on, which all turned out to be false.

Unfortunately, in Australia we have a history of a certain amount of police misuse of their powers. I know enormous efforts have been made in New South Wales to clean up the police, but we have to recognise that there will always be the temptation to make use of the powers that are there, or the law, to short-circuit the processes. So we have expressed concerns about how these powers can be misused.

The most serious, perhaps the least likely, worry is the use of the powers to subvert the democratic processes. I am not talking about tyranny; though that would certainly be worse than terrorism. I am talking about something that has to be taken seriously, because there has been a history of attempts to subvert democracy within Australia. I remind you of the Menzies anti-communist bill and the subsequent referendum; the attempt by the Labor Party in 1974 or thereabouts to put through a permanent gerrymander; the Queensland gerrymander, which was supported by at least two or possibly three major parties, I forget; and so on. They were efforts to try to twist the system so that only one party can win. You can see the outcome of that in countries like Singapore and Malaysia, where precisely the sorts of fears about terrorism and public safety have been used to push through Acts that they use to make those democracies shams.

There is a risk here, though a lesser one, that those powers can be misused. I think it needs to be taken seriously. It is not as though it can all happen overnight. The time to deal with such things is when the first moves are made and that is why it is crucial that the actions of police in using those emergency powers are given special supervision. We have attempted to put forward some suggestions as to how the present supervision arrangements might be changed.

Obviously it is going to be unsatisfactory for police to be investigating police, or for police to be supervising police, if the worry is that police may be starting to misuse their powers—even if they are starting to treat as mundane or ordinary what are supposed to be extraordinary powers. That needs to be drawn to the attention of the public and the Parliament as soon as it starts.

Obviously it is not going to be satisfactory to have police supervising police in that respect. We have suggested the Ombudsman for some powers, we have suggested the Police Integrity Commission for others. There has been a suggestion, as I heard today from the Bar Association, that a special advocate be appointed. We do not have strong views on how it is to be done, but we do have strong views on the need for it to be done.

The Hon. DAVID CLARKE: Is there not already judicial oversight?

Dr BIBBY: That is useful, but we need as much oversight as we can manage.

The Hon. DAVID CLARKE: Do we not have that with judicial oversight at the moment?

Dr BIBBY: It is better than the Federal position, but I do not think it is enough. The judicial oversight is going to involve the requirement of people to seek a warrant from a court. The police are going to have to present their case to a judge. There is no capacity for the court to go into a place of detention and find out what is going on, or at least as far as I know, or to question detainees or question those who are detaining them to find out from day to day whether abuses have occurred. The abuses are likely to occur if you have a position where people are terrified of a terrorist attack and we are detaining people without trial. Remember, under the International Covenant on Civil and Political Rights, those sorts of powers are supposed to be used only in a national emergency, not just when there is a terrorist threat. If we suppose that kind of danger, the risks of abuse are enormous.

The Hon. DAVID CLARKE: You do not believe that a suspected terrorist attack is a national emergency?

Dr BIBBY: Not necessarily. Under the covenant it was not thought to be. The powers that agreed it should be done only under a national emergency were the powers that were used to having terrorist attacks. The United Nations Human Rights Committee has argued that. Indeed, it is only when there is something more than a risk of a terrorist attack. I do not want to downgrade the possibility of a terrorist attack or the worries about it. Every time I go into the Opera House to perform or to attend I am aware of the possibility that a plane that is flying overhead might be going to smash into it.

The Hon. DAVID CLARKE: You said there are worse things that can happen than a terrorist attack?

Dr BIBBY: Indeed.

The Hon. DAVID CLARKE: I am sure that the families of the 2,000 people or more who were killed in the World Trade Center would probably disagree with you on that. There are not too many things that are worse than a terrorist attack of that nature.

Dr BIBBY: Tyranny and civil war come to mind.

CHAIR: I refer to the Queensland public interest monitor. Tell us a bit more about how that operates and how is it structured?

Dr BIBBY: I got your questions at 1.50 p.m. when I came in today, so I have not been able to look into the detail of that. Last year's Federal anti-terrorist legislation enables the public interest monitor to attend a hearing of a relevant authority and effectively to take on the role of defending the interest not only of the public but also of the detainee. The way we would envisage it is that this person would have access to material that had been kept secret from the potential detainee and the lawyer.

That is not to say we accept it is appropriate to do that, of course. On a recent occasion a lawyer who was given substantial security clearance nevertheless was denied permission to see the evidence against his client in the Federal Court. The Attorney General prevented him from getting it. It was on the grounds not that he was likely deliberately to breach the requirements of confidentiality but that he might let a few things out to this person, to that client or to another client and, when they were all put together, out of that would come a revelation of one of the matters that was supposed to be kept confidential. So even with a security clearance the lawyer can be overridden and prevented from hearing the evidence. We would want somebody there whose role was to be an advocate for the detainee or potential detainee.

CHAIR: Do you know for how long the Queensland public interest monitor has existed?

Dr BIBBY: I will take that question on notice. I would have to look it up.

CHAIR: Some of us are interested in learning a bit more about that. If you could send us something later about that it would be helpful.

The Hon. DAVID CLARKE: Dr Bibby, you would be aware that during the Second World War 1,400 people were detained in Britain without charge or trial. Would you be aware of that?

Dr BIBBY: Yes.

The Hon. DAVID CLARKE: Do you agree with that?

Dr BIBBY: You are asking me whether the Council agrees with it? I do not know.

The Hon. DAVID CLARKE: Had you been there at that time would you have opposed those 1,400 people being held without charge?

The Hon. JAN BURNSWOODS: Are you referring to so-called enemy aliens or criminals? To whom are you referring?

Dr BIBBY: Lord Moseley? Moseley was detained during the war and then Churchill argued for his release after the war.

The Hon. DAVID CLARKE: Some 1,400 people in that category were detained. They were considered a threat to the security of the nation.

The Hon. JAN BURNSWOODS: Are you talking about the United Kingdom or Australia?

The Hon. DAVID CLARKE: The United Kingdom, but it also occurred in Australia.

Dr BIBBY: I will answer this question because I think it matters. What matters is the difference between being at war and being under threat of terrorism. It is easy to say that there are differences. The question is whether the differences are morally relevant. One of the major differences is that clearly there is an end to a war. There is no end to terrorism. People talk about having victory over terrorism. There might be a victory over a particular kind of terrorism in that we might persuade radical, violent Islamists that they should give it all up. There will not be an end to terrorism. So we are talking about something that is there not for the temporary period of a war but that was probably removed afterwards.

The Hon. DAVID CLARKE: We are talking about a continuing danger?

Dr BIBBY: We are talking about a continuing danger. What is possibly appropriate for the massive danger of an existing war is different from what is appropriate for the danger and continuing risks of terrorism. So I reject that parallel.

Mr STEVEN CHAYTOR: This Committee is particularly concerned with the oversight procedures that can be implemented in relation to counterterrorism laws. In that regard we have heard—and you were in the room—from the Law Society and the Bar Association, which very much supported an increased oversight in relation to hearings that take place for covert warrants and preventive detention orders. Would it be fair to summarise it by saying that the Council for Civil Liberties agrees with that, but probably takes the step further in that your submission clearly highlights that there should be oversight at the time the covert warrant is taking place and at the time there is a collection of material?

Dr BIBBY: Yes.

Mr STEVEN CHAYTOR: It also goes to the practice and procedure that take place in relation to how a person is detained?

Dr BIBBY: That would be right.

CHAIR: You refer in your submission to some concerns about part 8A of the Police Act. Are you in a position to talk about that today?

Dr BIBBY: I can make a couple of comments, but I would like to take that question on notice. I did not bring that Act with me and I would need to check.

CHAIR: Perhaps you could take it on notice. I suspect that you might have misinterpreted what happens in that legislation and your submission goes a bit further than what is the case. I would be interested in you having a proper look at that and getting back to us.

Dr BIBBY: I could make a comment now. Your question supposes that the Commissioner of Police should still be investigating. It is not that the Ombudsman may disagree with the Commissioner of Police. The commissioner must cause the complaint to be investigated. We want the Ombudsman to be able to go on investigating. I will check it and take that question on notice.

CHAIR: That would be useful.

Dr BIBBY: It is important that the Ombudsman, or whoever, is able to go on investigating without interference.

CHAIR: Are there any further questions?

Dr BIBBY: Do you not want to follow up on question No. 2?

CHAIR: I did not see the need to ask that. If no-one else does, thank you for your attendance and assistance.

(**The witness withdrew**)

(**The Committee adjourned at 3.55 p.m.**)