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DEPARTMENT OF THE PRIME MINISTER & CABINET

OFFICE OF THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

AUSTRALIAN NATIONAL UNIVERSITY
ACTON, AUSTRALIAN CAPITAL TERRITORY

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PUBLIC HEARINGS

9.45 AM FRIDAY, 19 MAY 2017

DR RENWICK: Ladies and gentlemen, welcome to this day of public hearings at the Australian National University. This hearing is being conducted pursuant to section 21 of the INSLM Act. The hearing is being recorded and a transcript will be posted to my website as soon as we can do that.

In attendance today assisting me is my principal adviser, Mr Mooney; counsel assisting, Ms Mitchelmore and Dr Katter; and Mr Anthony Hall of the Office of the Australian Government Solicitor. May I welcome everyone here today, particularly everyone who's made a submission. They are of a uniformly high standard and most helpful to me in completing my reports; so thank you.

Today is an opportunity to expand and highlight particular matters you'd like me to consider and, of course, for me to ask follow-up questions. I'm required by the statute which sets up my office to inquire into and make reports and recommendations concerning the following legislation and to do so by 7September this year.

First, there's the stop, search and seize powers under Division 3A of Part 1AA of the Crimes Act. Then there are the declared areas provisions under sections 119.2 and 119.3 of the Commonwealth Criminal Code. Then, finally, there are the control orders and preventative detention orders under Divisions 104 and 105 of the Commonwealth Criminal Code, including the interoperability of the control order regime and the High Risk Terrorist Offenders Act 2016.

May I set the scene for discussion today with two quotes, one from the Australian Prime Minister this year and the second from the United Kingdom a little while ago. When I was appointed Mr Turnbull said this:

> *The INSLM is an important and valued component of Australia's national security architecture, responsible for ensuring that national security and counterterrorism legislation is applied in accordance with the rule of law and in a manner consistent with our human rights obligations. In particular, as it becomes more important than ever for the government to continue modernising and strengthening our laws to address the growing and evolving terrorist and espionage threat at home and abroad, the relevance of the independent reviewer becomes, similarly, important. This will help ensure that our individual freedoms that underpin the Australian way of life are balanced against the need to fight terrorism and other threats with every tool at our disposal.*

In 2004 the United Kingdom Home Office Discussion Paper Counter-terrorism Powers Reconciling Security and Liberty in an Open Society began with this:

> *There is no greater challenge for a democracy than the response it makes to terrorism. The economic, social and political dislocation which sophisticated terrorist action can bring threatens the very democracy which protects our liberty. But that liberty may be exploited by those supporting, aiding or engaging in terrorism to avoid pre-emptive intervention by the forces of law and order. The challenge, therefore, is how to retain long-held and hard-won freedoms and protections from the arbitrary use of power or wrongful conviction whilst ensuring that democracy and the rule of law itself are not used as a cover by those who seek its overthrow.*

Those two quotes in many ways encapsulate the sometimes conflicting matters I'm required to consider.

The format for today, as I think everyone knows, is as follows: first, there will be brief opening statements from the Director-General of Security and two of the most senior officials from the Australian Federal Police and the Attorney-General's Department; and welcome to all of you. During that opening that will be televised and photos can be taken. We'll then pause to let the gentlemen remove their equipment and then we'll have a question and answer session.

After that opening session and a short break, being conscious that this is an area about which fair-minded people can legitimately disagree, we have two eminent experts to speak to relevant topics. They are Dr Rodger Shanahan and Mr John Lawler. Third and later on, I will receive submissions from key groups and I particularly acknowledge the helpful and detailed submissions from them. At the conclusion of today's hearings I'll proceed to finalise my reports with appropriate assistance from those assisting me.

May I particularly welcome Mr Duncan Lewis, the Director-General of Security, Mr Michael Phelan, the Deputy Commissioner for National Security from the AFP, and Ms Katherine Jones, the Deputy Secretary, National Security and Emergency Management from the Commonwealth Attorney-General's Department. Director-General, I think you're going first.

MR LEWIS: Dr Renwick, thank you very much for the opportunity to participate in your review of these components of Australia's

counterterrorism laws. ASIO value the work of your predecessors very much and we look forward to continuing this productive working relationship with you.

The Office of the Independent National Security Legislation Monitor is an important part of ASIO's accountability and oversight framework. The effective review of legislation and its impact increases the public confidence in the work of ASIO and it ensures that we are best placed to continue to counter threats to our national security.

ASIO appreciates the independence of your role and the assurance you and your office provide to the parliament, to ministers and to the community. My opening remarks focus on the global threat environment as they affect ASIO's work on politically motivated violence. It's important to note that ASIO faces other challenges that fall well outside the scope of this review. These challenges include ongoing threats in relation to counterespionage and interference, cyber intrusion, malicious insiders, border security and encryption.

Currently – and I want to make some remarks now about the current security environment – ASIO's work is set against a steadily worsening overall security and operational environment. There are a range of ongoing threats to Australia's national security and the sources of these threats anticipated out to 2026 will likely continue to be defined primarily by manifestations of Islamist extremism, hostile espionage and interference activities and malicious insiders.

Now, these threats will be framed by changing political and economic dynamics, technological change, including an evolving cyber environment, and more astute and determined adversaries. These threats will also transcend national borders. Australia is part of a globalised world. The events overseas have, and will continue to, shape the security challenges we face. The scale of the challenges posed has increased, further exacerbated by the evolution of technology and the way the subjects of security investigations operate and it will continue to make responding to them more difficult.

ASIO continues to devote significant attention to the challenge of predicting the shape of global security in the coming decade. Yet the trends we're seeing do not provide us confidence that the situation will improve. To confront these threats we need to ensure national security powers remain effective and practical into the future.

Some remarks, if I might, on politically motivated violence. The counter-terrorism challenge Australia faces is underscored by recent events. Since

the national alert level was raised in September 2014, there have been four onshore terrorist attacks in Australia and 12 disruption operations in response to imminent attack planning in Australia. All four attacks and 11 of the 12 disruptions involved individuals motivated by Islamic extremist ideology. The 12th disruption, I just note, involved an extreme right-wing individual and it was the first case in which a right-wing extremist has been charged under Commonwealth terrorism laws.

The attacks and disruptions in Australia in recent years highlight the enduring and the dynamic nature of the extremism challenge for this country with the conflicts in Syria and Iraq energising local extremists in unprecedented ways. Over the same timeframe we've seen the subjects of our counter-terrorism investigations greatly increase in number, reduce in average age and diversify in ethnicity and gender.

Like our international partners, Australia is challenged by a trend of individuals acting alone and utilising low-capability methods. Australia's four terrorist attacks since 2014 are characterised by single actors using unsophisticated methodology such as basic firearms and knives, but this does not mean that they are low impact. Although the efforts of intelligence and security services have averted several planned mass casualty attacks, the innocent victims of these four attackers are an enduring reminder that these unsophisticated attacks can still have a devastating impact.

Some remarks on foreign fighters. The conflict in Syria and Iraq has now energised Islamist extremists, including in Australia, at a level not seen before and these changes to the national and international security environment will have a generational impact. While we do not expect to see any major exodus of Australians from the conflict region, we anticipate seeing an ongoing trickle of returning foreign fighters and extremist group members.

Some will have greatly enhanced capabilities to undertake terrorist attacks. Any planning to do so may take many years to manifest. We're also likely to see returning Australian families and, in particular, children – and I have spoken about this publicly before – who have been exposed to Islamist extremist groups in Syria or Iraq and will be traumatised by their experiences.

Not only will many of these individuals experience difficulty reintegrating into Australian society, but also many will be vulnerable to Islamist extremist ideology. Regardless of actions taken, highly sophisticated Islamist extremist propaganda in English and, indeed, in a range of other languages, will continue to be accessible to potential extremists, including

here in Australia, to justify their actions for years to come.

The threat we face is self-sustaining easily drawing in vulnerable individuals who are swiftly radicalised and able to undertake simple but deadly attacks. Our ability to counter these individuals is further challenged by the operating environment, from the continuing spread and increased uptake of technologies, including encrypted internet communications and device security, as well as the shift from complex methodologies to simple but very difficult to detect and prevent low sophisticated attacks.

Now, all of these factors mean that intelligence and law enforcement agencies have to evolve their approaches to be more innovative, integrated and agile in order to identify and disrupt would-be attackers. A few words on the global environment. Globally, we're confronted with a greater range of Islamist extremist groups and more ungoverned spaces in Africa, the Middle East, South Asia and Southeast Asia than we've seen before.

The Islamic State of Iraq and the Levant, ISIL, has created and empowered affiliates and emboldened sympathisers who will outlive the organisation. Also of note, Al Qaeda and its affiliates are stronger than they have been in over a decade. They will continue to draw on local grievance to support their global agenda. Other new groups may also emerge inspired by an Islamist extremist ideology.

We expect Australians and Australian interests to continue to be potential targets for extremist violence, either directly through activities such as hostage-taking, or indirectly by being caught up in terrorist attacks in broader Western interests. The most likely venue for this will remain our immediate region of Southeast Asia where up to 1 million Australians visit Indonesia annually and where more Australians have fallen victim to terrorism there than anywhere else.

The return of seasoned fighters from Syria, Iraq or other jihadist theatres in future, even if few in number, could further increase the threat there and elsewhere. Dr Renwick, I'll close my remarks here and thank you, once again, for the opportunity to participate in this important review.

DR RENWICK: Thank you, Director-General.

MR PHELAN: Thank you, Dr Renwick. Thank you very much for the opportunity of allowing the AFP to appear today. The AFP strongly supports the role of the INSLM to examine the ongoing effectiveness of national counterterrorism legislative framework. It's these independent reviews that provide an opportunity to consider whether special CT

powers and offences remain appropriate and are adapted to the terrorist threat.

As the Director-General of Security said, on 12 September 2014 the national terrorist threat level was raised to probable. Since then, the number of terrorist-related investigations within the joint counterterrorism teams has more than tripled. There have been four onshore attacks and, of course, 12 major disruption operations. The terrorist threat continues to adapt and evolve.

In 2005, when specialist counter-terrorism powers were introduced the primary terrorism threat involved the long-term planning for large-scale mass casualty attacks. At the time Operation PENDENNIS was the longest running and largest CT investigation undertaken in Australia. The two groups were engaged in activities over a sustained period. This included ideological instruction, team building, training, fund raising, gathering supplies and planning an attack.

The decision to go to resolution was made to minimise the risk to the public. Even so, after much planning, the groups had not identified a specific target for the attack. The PENDENNIS style threat long-range planning for mass casualty attacks has not gone away. But we are seeing a major increase in the threat of smaller-scale opportunistic attacks by lone actors. The very short flash to bang, so to speak, time from radicalisation to violent action creates significant challenges for police and intelligence agencies.

Unfortunately, since mid-2014 rapid radicalisation and low-complexity plots have become the norm. The result is police have very little lead time or none at all to prevent spontaneous attack. The new threat environment means police have had to change the way in which we respond to disrupt terrorism. The place at which plots develop, coupled with the potentially catastrophic consequences of a terrorist attack, mean police need to act fast to disrupt terrorist activity.

Where possible, we disrupt terrorist plots using traditional criminal justice methods. Protection of human life is always the AFP and, indeed, state polices', paramount priority. But early overt action can mean insufficient evidence has been collected to support charging people with an offence. Since there is often strong intelligence to indicate the person poses a continuing terrorist threat, preventative measures may be necessary to manage that threat.

The fact control orders and preventative detention orders have rarely been used is not an indication at all of their lack of utility. Rather, it is

evidence that the AFP will only resort to the use of extraordinary powers where traditional justice methods cannot address the threat. Nevertheless, the AFP's growing experience with the regime has highlighted the need for reform to ensure it remains an effective preventative measure.

In the current threat environment we cannot assume that police will have sufficient warning of an impending attack to carefully plan and carry out disruption activity. Police need to act instantaneously to prevent loss of life or further loss of life. In this case stop, search and detain and seize powers and emergency entry powers may, in fact, be critical.

Finally in relation to declared areas offence, one of the many terrorism threats that we face today is the threat of returning foreign fighters, as alluded to by the Director-General of Security. These individuals have a demonstrated willingness to engage in violence and may have gained combat experience overseas and skills. The declared area offence forms a very important part of a suite of legislative measures designed to combat this threat.

The offence also recognises the people who enter or remain in a declared area put their own safety at risk. It also provides police with a tool to intervene and prevent persons attempting to travel to the conflict zone, which is equally as important. Thank you very much, Dr Renwick. I'm more than happy to answer any questions you may have.

DR RENWICK: Thank you, Deputy Commissioner. Ms Jones.

MS JONES: Thank you, Dr Renwick, and thank you for the opportunity to participate in this public hearing. If I could echo the comments of the Director-General and the Deputy Commissioner in the sense of the importance that the Attorney-General's Department places on the role of the monitor and your office and the place that reviews such as the ones that you're conducting today and others like it have in Australia's national security legal framework. It's vital for our agencies to have effective, appropriate legislation that enables them to perform their functions. However, this must also be balanced with appropriate oversight and protections for rights and freedoms.

The role of the Attorney-General's Department is to support the Attorney-General to develop and administer legislation applicable to our portfolio agencies and to ensure that they are able to operate flexibly and effectively to combat the evolving terrorism threat. As has already been outlined today, the threat environment we face is extremely complex and constantly changing. In ensuring our legislation is responsive to this evolving terrorism threat, the government has undertaken a

comprehensive program of legislative and other reforms, including eight tranches of national security legislation since 2014.

The current statutory review that you are conducting was built into the reform process to provide an opportunity to discuss and consider how these reforms are working in practice and whether they are fit for purpose and operating as intended. The department welcomes and appreciates the input of those in attendance today and those who have provided submissions for the statutory review.

It may be helpful if I briefly respond to several key issues that were expressed in the submissions around the control order regime. The first is the necessity of the control order regime. While the control order provisions have been used sparingly, this does not undermine their necessity. Where there is sufficient evidence to prosecute a person for a terrorism offence, including a preparatory offence, this will be the preferred option over seeking a control order.

Where there is insufficient evidence to support a prosecution, the control order regime provides an appropriate and useful tool to address the risk posed to the community by the person. The regime has been designed to be used only when specific thresholds and criteria have been met.

In relation to monitoring powers for control orders, it has been suggested that the threshold for using these powers should be raised to a reasonable suspicion the control order is not being complied with or that the individual is engaged in terrorist-related activity. However, consistent with the views of the Parliamentary Joint Committee on Intelligence and Security when the Committee was considering the legislation that introduced these powers, a higher threshold would substantially reduce the utility of the scheme. The purpose of these monitoring powers is to ensure that operational agencies do not have to wait past the point of safe intervention to act.

I also note that it has been suggested the threshold test for control orders should be raised to a criminal standard. However, introducing a criminal standard would undermine their effectiveness and purpose as a preventative tool. Likewise, B-party warrant provisions in the Telecommunications (Interception and Access) Act 1979 are an essential preventative measure in the maintaining of a control order. B-party warrants assist agencies to counter measures to evade telecommunications interception.

Consistent with the PJCIS's views on B-party warrants and the safeguard surrounding them, they are appropriate and proportionate in light of the

objectives and the rationale for the legislation. I might leave my comments at that.

DR RENWICK: Thanks very much. Can I perhaps just start with some questions about the scale of the problem just so that I've got that clear. As I understand it at the minute, we have about 21 people who are currently in prison following convictions for criminal offences. We have, I think, about 33 people currently before the courts charged with terrorism offences. I think I saw in the Attorney-General Department's submissions 12 people have been the subject of requests to the Attorney-General to approve foreign fighters charges. I think that's correct, that's the position.

MR COLES: Correct, Dr Renwick.

DR RENWICK: Mr Lewis said there's a trickle of returning foreign fighters expected but it may be expected that if people within that dozen return, there's a prospect that some or more of them might be charged. It will, no doubt, depend on many matters as to whether they are actually charged.

MR PHELAN: We actually have arrest warrants, Dr Renwick, for about between I think it's about 17 people that we believe are currently offshore.

DR RENWICK: Are you able to say, Deputy Commissioner, are they mainly for foreign fighter type offences or mainly for terrorist offences or a mixture?

MR PHELAN: It's a mixture, the whole gamut of CT offences. There are certainly some there for being a member of a terrorist organisation. There are some for terrorist acts. There are also a number for being in a declared zone. Arrest warrants are there for those people as well.

DR RENWICK: Thanks very much. Can I just begin? As you know, this is a question, I think, initially for you, Mr Lewis, just about the assumptions I should make about the nature of the threat. I'm just trying to summarise what I've heard from you and others. My brief, in summary, is to look at whether these laws remain fit for purpose in the sense that they are effective in deterring and responding to terrorism while properly respecting human rights. It's more complex than that, of course, but that's it in a nutshell.

I guess I need to understand in my reports the nature and scale of the current threats. The broad assumptions I'm making, I think, are these: the threat level hasn't changed since November 2015. It's remained at 'probable', but the complexity of the threats is evolving. There's an

increased risk of attacks conducted entirely by individuals. I think that follows from what you said, that there's been four lone actor attacks in Australia.

Those threats are the sorts of things we've seen recently overseas in places like Westminster and Nice,. Within that overall threat level of 'probable", there's still a wide range of scale of attacks. They could be the lone actor with a very simple implement such as a knife or a weapon or a car, or it, in theory, could be more complex. Finally – and I think all of you have said this, but particularly you and the Deputy Commissioner – increasingly they're carried out with minimal planning and in short timeframes.

That may be a reflection of the fact that people are radicalised quickly, perhaps online, in a very short time. I suppose, finally – and I'm not sure you dealt with this, but I think it's not controversial – that the perpetrators are becoming more careful with their communications. They may be using encryption to make your job more difficult. That's quite a few assumptions and I'm not suggesting they're comprehensive. But, in broad terms, is that where the threat sits, coupled with what you said in your opening remarks?

MR LEWIS: Dr Renwick, yes, I wouldn't have any different view to the summary that you've just given of the position, I think we are advancing. The complexity of attack planning now – no, that's not the right way to explain it. It's not the complexity of the attack planning, it's the complexity of the ranges of possibilities that we face now. The attack planning is in many cases very simplistic.

If I was sitting here a decade ago we were talking about a far more sophisticated possibility. If you were building, for example, a large vehicle-borne explosive device, that takes a certain amount of time, it takes a certain amount of technology. It takes a certain amount of expertise. All of those things gave security – and I won't speak for law enforcement – but it certainly gave agencies such as my own lead time, which we now don't enjoy when it is possible for an extremist who wants to offer violence to the community to jump in a car and just drive through a crowd. Heaven knows it's not a terrorist incident obviously, but this morning in Times Square is another reminder of the ease with which an attack can be conceived and launched.

On the matter of encryption, it's probably worth considering the statistics around the levels of encryption that exists or are available to the community now that were not available in times gone by. When I assumed this role a little over two and a half years ago, the levels of encryption of telephonic and data transmissions here in Australia were

about 3 per cent. Currently it's just on 50 per cent and if I was here in a year or two's time it will be 100 per cent of transmission would be encrypted.

Now, I think I've mentioned to you before that creates a particular challenge for us. It's not that encryption can't be overcome, but it takes time and money; and we have neither of those particular resources available to us when you're confronted with a rapidly developing terrorist attack plan. That's the problem from the point of view of communication.

The other issue you mentioned was – you didn't use the word "self-radicalisation" but you were referring to radicalisation by individuals using online material. That is something that's quite new for us as a society, that an individual can sit in their bedroom and essentially self-radicalise by watching objectionable material of a certain type.

This issue of self-radicalisation by, as I say, watching and absorbing objectionable online material is something that has, again, shortened the timeframe in which agencies such as mine can do their work and identify these threats a little further out than as they're unfolding on the street.

DR RENWICK: Just picking up that last point, as I understand it, ISIL has been quite effective in its use of social media, perhaps more so than other terrorist organisations in the past. Does that create a further issue in relation to the speed of radicalisation?

MR LEWIS: Yes, I think organisations such as ISIL – but they're not alone, of course – I mean, most terrorist-based organisations have developed an increased capacity to produce relatively high quality material onto the internet to support their perverted sort of theology. Certainly when you have a look at some of the product that's coming out of ISIL it's very well-produced, it's a high-quality product and is having an effect on people that are watching it.

DR RENWICK: Deputy Commissioner or Ms Jones, did you want to add to any of those, I appreciate, not comprehensive assumptions?

MR PHELAN: No, thank you, Dr Renwick. Your summary was exactly the same as I would put forward as well.

DR RENWICK: Ms Jones, did you want to add anything?

MS JONES: The only point I would add to the Director-General's comments, whilst certainly in the last several years the social media impact driven specifically by ISIL has been incredibly significant here in

Australia in terms of influencing vulnerable individuals, I would emphasise that we are now seeing a growing sophistication of material from other organisations. I think the challenges in relation to social media being used as a medium to influence actors here in Australia will be an enduring challenge.

DR RENWICK: If you want to keep the microphone, my next question is to you, if I may, Ms Jones, unless you wanted to add anything, Mr Lewis?

MR LEWIS: Dr Renwick, may I just make one more observation?

DR RENWICK: Yes, of course.

MR LEWIS: We have been talking almost exclusively about lone actors and simple attacks and so forth. That is all true, but I wouldn't want you to think that there was not an enduring risk of more sophisticated operations with longer timeframes in what I described as the more traditional presentation that we've seen in the past. That is certainly true of organisations such as Al Qaeda which has a very different planning cycle. So we must not dismiss what I describe as the original threats.

I'm not suggesting for one moment – and I've made this plain previously in public – that there be the threat of a Paris-style attack here. That is not what I'm saying. But we must never discount the possibility of a more sophisticated and complicated and complex attack. That's particularly true, of course, for Australians travelling beyond this country.

DR RENWICK: I suppose, as far as I'm concerned, that means the laws need to be fit for purpose for the full range of reasonable possibilities.

MR LEWIS: Yes.

DR RENWICK: Ms Jones, can I ask you some questions about the control order regime? This has been dealt with in a number of submissions. Perhaps I can just summarise some of the points which have been put forward. Logically, I think we can see potential controlees as one of two cohorts. There are the 21 people who are currently incarcerated for terrorist offences and I'm right in thinking, I assume, that all of those there will be careful consideration given as to whether the high risk terrorist offenders application should be made. That's a fair assumption, isn't it?

MS JONES: Correct, yes.

DR RENWICK: They may or may not be granted, but they'll be

considered. That's a cohort and that's 21 people and that's perhaps one answer to the argument well, there's only been six control orders sought in the past. There will be at least consideration of that larger cohort in the relatively near future as their release dates come up.

MS JONES: Yes, that is a correct assumption.

DR RENWICK: Just dealing with the high risk terrorist offenders legislation, that's been vested in the State and Territory Supreme Courts following the serious sex offenders model to an extent, but there's a caveat there presently which says that the judge might decide not to grant an order continuing detention because a less intrusive remedy was available; and control orders are mentioned.

Now, what that means at the minute, as I understand it, is that the judge will say, "Well, I'm thinking about this," so you'd adjourn those proceedings, then you'd go off to the Federal Court or the Federal Circuit Court and you'd apply for a control order. One possibility which has been suggested – and I hate using this expression – is that there be a one-stop shop, there'll be a single court that one would go to.

That court, in relation to the high risk terrorist offenders, could release unconditionally, could detain or could release conditionally. For example, making an extended supervision order. That would mean a single court could grant all remedies. It would be, I suppose, a benefit for the respondent who wouldn't have to fight on two fronts. They could concentrate on a single set of court proceedings.

A number of submissions have raised that as a possibility and I think your own department's submissions suggest that's worthy of consideration, and certainly it's something I am considering. That rather longwinded beginning then leads to this question, I suppose, again dealing with the HRTO cohort: would one then adopt all of the serious sex offender range of remedies? And one which has been brought to attention is that for serious sex offenders a judge has a discretion of ordering detention for up to three years rather than the control orders of one year.

Do you have any view about any of those matters?

MS JONES: Thank you, Dr Renwick. In terms of the issue – similar to yourself, using the right phrase to talk about what is the most appropriate jurisdiction for these matters to be considered, I don't want to use the one-stop but I think that consolidation is perhaps another way to think about it.

DR RENWICK: Yes, consolidation, much better.

MS JONES: We think is potentially something worthy of consideration in terms of time, efficacy and costs associated with having to move from one jurisdiction to the other. In terms of enabling perhaps a consolidated consideration of those issues, we do think that's something worthy of closer consideration and we look forward to your views on that. We consider that there are some significant complexities that would need to be worked through in terms of whether or not we would actually need to establish a separate regime or whether any further order could be made under the existing control order regime, if reformed, and issues around the threshold in those circumstances.

I might invite my colleague, Mr Coles, to see if there's anything specific he might want to add to that answer.

DR RENWICK: Yes, certainly.

MR COLES: Thank you. I think happily Ms Jones provided an excellent summary. There's not too much I want to add other than, as Ms Jones said, it is something we're giving consideration to. It seems clear, as you've said, Dr Renwick, that there is an inefficiency in that jurisdictional discount between the way that high risk terrorist offenders legislation is currently famed and the kinds of considerations that the Supreme Court will need to go through in considering one of those orders and then, as you said, in the alternative, a control order.

We did, when developing the scheme, look at the state and territory schemes and, as you've indicated, several of those include extended supervision orders. So there may still be value in thinking about whether a slightly different model or a modified model may work better. But, as Ms Jones has said, that's still something we're thinking about and there's a range of considerations there, including whether it's a slightly different type of order and the types of thresholds that would apply.

DR RENWICK: Do I take it from that that you don't have a current view about extending the length of the potential order but you wouldn't rule out considering that possibility?

MR COLES: That's correct. Given the scheme hasn't yet been tested, I think it's fair to say that the length of the order is not something that has been at the forefront of our mind, but it's not something we'd rule out.

DR RENWICK: The thinking, I understand it, at the state level for serious sex offenders about a longer period is that it can take quite a long time just to run the case and prepare. You may be spending the best part

of half a year litigating it. So there may be some sense in it.

MR COLES: What I can say, Dr Renwick, is we have held a range of consultations with state and territory colleagues and I think a fairly uniform view that is held in relation to their own schemes is that particularly when you look at the process after a court issues an order under a state and territory scheme there's a review process. State and territory colleagues were saying that quite often we'll have binders, they're almost – because of the length of time and the time of the review process, in a sort of continual circular process of review, which may well be appropriate, but clearly has resource implications for a range of agencies.

DR RENWICK: While we're dealing with that cohort for a minute and picking up on Ms Jones' point about the additional monitoring powers – again, dealing with that cohort and looking at the additional monitoring powers, I suppose the one policy reason for having those – let me go back a step. At least one of the submissions has said, "Well, if you're going to have the serious sex offenders' legislation model," if I can call it that for this cohort, "You should, equally, not have such extensive monitoring regimes."

I take it your answer to that would be that the asymmetric effects of a terrorist act are such that parliament places a high premium in monitoring whether people are moving towards committing a terrorist act, that being one of the purposes of the control order, to prevent it. Is that broadly correct?

MS JONES: That was certainly a relevant issue that we took into account in terms of developing these provisions, based on advice that we received from law enforcement agencies, both the AFP and others. That was certainly a very strong factor in the development of that aspect of the provisions.

DR RENWICK: Can I move then from the HRTO cohort to what I can call the remnant cohort, that is to say, people who have never been and may never be charged with a terrorist offence but against whom a control order is sought. As you will have seen, there's quite a few submissions which say, "Well, these have been around since 2005 and despite the grounds on which a control order can be sought, having been expanded in 2014, currently there are none." I have heard what the Deputy Commissioner and yourself have said, that they remain important.

But is there anything further you want to say about a number of these submissions which say, "Goodness me, control orders for that remnant

group, there's been an opportunity to obtain them, they haven't been successfully obtained. Either they should be abolished or" and this is the other thing I would ask you and the Deputy Commissioner to comment on – "you should go back to the more limited grounds of obtaining a control order, the pre-2014 grounds, namely that it concerns conduct covered by various terrorism offences".

Did you want to add anything to your opening remarks about the retention of control orders generally or otherwise reducing the grounds in relation to this second cohort?

MS JONES: I would, but I might ask the Deputy Commissioner to speak first, then I'll follow up with some comments.

MR PHELAN: Thank you, Dr Renwick. As I alluded to earlier on in my opening submission, the tools that are available to law enforcement are wide and varied and every one of them is applied, depending upon the individual situation that is before law enforcement officers to mitigate the threat. The mere fact that we have not used a lot of control orders certainly does not mean that they are not required, because each of the individual investigations, when we plan for them, either instruction or whilst we're investigating them, control orders are taken into consideration as we go through that process.

But the reason we haven't used a lot of control orders is because the threat has been mitigated by other actions; either they've been arrested and charged because there's been sufficient evidence to do so, or there just hasn't been enough information to put forward a control order and they haven't met the thresholds that are required.

DR RENWICK: Or there's been some other disruptive strategy used perhaps.

MR PHELAN: That's right, normally arrest or you've taken other people out, arrested others and the plots have just dissipated and the threat no longer exists from those individuals. We are very discerning in whether or not we use them because we know it's a very intrusive power and we do use it when required. I can guarantee you that it's not something that's certainly off our radar. Of the 70-odd investigations that we've got currently on foot within the JCTTs, it is part of their planning for all of their investigations. But it may not be used.

It's at the top end of the spectrum because we do prefer to disrupt, charge, put people before the courts if we can first, but if there is an enduring threat from an individual, then we'll move to control orders and we won't

hesitate to make an application if the circumstances require it.

DR RENWICK: While you've got the microphone and before we go back to Ms Jones, on the one hand, the submission from the Law Council says the criminal standard of proof should be introduced for control orders. On the other hand, I think your submission suggests that you have hearsay, both at the interim stage and at the final stage. I suppose another part of the picture is that there have been quite recent amendments to the law, including special advocates, which hasn't yet been trialled.

MR PHELAN: That's right.

DR RENWICK: How am I to reconcile these different views? On the one hand, you want to make it easier. On the one hand, the Law Council want to make it harder. And on the other hand, I suppose, if there is another hand, the new system hasn't had a chance to work yet.

MR PHELAN: You're entirely right. For us, it would obviously be simpler if we could have the same standard of evidence throughout the process from interim through to confirmation. To us, that makes sense because you're trying to effectively – a court is trying to confirm an order based on some potential evidence that would be inadmissible in a full proceeding, particularly that means intelligence that we've used.

At the end of the day, we're about trying to mitigate the threat. If that threat is only based on intelligence, whilst very good intelligence, or based upon potentially admissible evidence but there's no way I'm going to lead that evidence because I may give up sources or I may give up capability, then that sort of information needs to make its way into an interim control order application to mitigate a threat. It makes no sense to me that I can't then confirm it based upon the same evidence that the original interim order was based upon.

DR RENWICK: I mean, now that we're about to have special advocates, that's the system whereby a security cleared lawyer for the potential controlee, who therefore is trusted, can see and test in a closed hearing that information. Now, one argument might be well, shouldn't I give that a chance to see how it works? It may make things much easier perhaps and maybe your complaint, on the one hand, and the Law Council's complaint, on the other, should await a chance to see how this new system works.

MR PHELAN: Yes, that's right, but a lot of it is about the information we put in, particularly about the intelligence that we put in the application. It's a difficult part for us because I don't want to get to a situation where I

may have to withdraw evidence based upon protecting sources and/or capability in particular, because, as the Director-General Security has alluded to before, whilst the plots are simple, they're complex to investigate.

The investigative tools that we require in particular are the capability we need to protect. At the end of the day, we're trying to protect lives here. We're happy with any external scrutiny and, indeed, the scrutiny by the courts. That's not the issue, as far as we're concerned. It's our ability to be able to put enough evidence, including exculpatory material, before those that are making the decisions.

DR RENWICK: Thanks, Deputy Commissioner. Ms Jones, did you want to add to any of that? And Mr Lewis, at any time if you want to add in, please do.

MS JONES: Thanks, Dr Renwick. Deputy Commissioner did cover quite a bit of what I was proposing to say anyway. I would though reiterate the point that I made in my opening statement. In a sense quite a lot of consideration of when these provisions were developed was on the basis that they would not be used perhaps frequently is the right word; they would be used sparingly. I think the fact that that has been the case over the life of those provisions was expected and, as Deputy Commissioner Phelan said, they're part of a range of approaches that are available for law enforcement.

I do note though that since 2014 there have been four. So it's not that they have not been used by law enforcement. Obviously I think where there is sufficient evidence to prosecute a person for a terrorism offence, then that is the preferred option. But in the absence of that adequate evidence, I think having the option available of considering control orders is appropriate in the current environment.

Dr Renwick, if I can just note one thing, just in relation to the earlier discussion about the cohort of 21. I did have it in the back of my mind. I think of that 20, one person has been sentenced in relation to offences that would not permit. I think it's 20 of the 21 where it would potentially be something to be considered.

DR RENWICK: Do I take it though, generally the Attorney-General would say that rather than permit the repeal of the remnant control order legislation next year, the relatively recent changes, including special advocates, should be given a chance to work because they may, in fact, make it a much more simple process?

MS JONES: Yes, we would support that position, obviously subject to any views you have to offer as a consequence of these reviews.

MR PHELAN: If I may, Dr Renwick.

DR RENWICK: Yes, of course. Please.

MR PHELAN: Sorry, I haven't been specific enough. If the control order legislation was repealed under the sunset clause, we are removing a very significant tool for law enforcement. The four that we've used we've used very specifically to thwart potential plots. The controls that are put on the individuals are done for that very specific purpose of disrupting those plots in terms of communications with individuals, in terms of who they can talk to, how they can communicate, where they can go.

Those are the sort of things that help us disrupt those plots. If that particular tool was removed from our toolbox, then it would really put one hand tied behind our back, if not two, if we needed to use it. Thank you.

DR RENWICK: Thank you. While you're there, Deputy Commissioner, can I move on to the PDOs, please? You will have seen in some of the submissions that it's suggested that Division 105 should be allowed to lapse next year for reasons which include there's broad powers already available to prevent a terrorist attack, including questioning powers under Part 1C of the Crimes Act for the pre-charge detention regime, the wide range of preparatory or other terrorism offences control orders, which we've just been discussing, or ASIO questioning warrants.

Importantly, it's been pointed out that analogous state laws are wider, go for longer and, at least in New South Wales, permit the questioning of the subject of the PDO where the Commonwealth ones do not. I've listed a number of matters there that, overall, what do you say about the utility of the Commonwealth PDO regime?

MR PHELAN: Certainly in relation to their correlation with control orders, they're for two totally separate purposes. Just because a control order regime does not mitigate not having a PDO regime. Whilst the Commonwealth PDO has, I suppose, been overtaken slightly by state PDOs and the equivalent thereof – and we have not used any in our JCTT investigations any of the Commonwealth PDOs, we have relied on the state ones for the very purposes that you articulated before, in some circumstances.

But we have also utilised our Part 1C in terms of questioning powers. We haven't even used the full 24 hours available to us is my understanding,

but I may have to take that on notice, within the available seven days. There are a number of tools that are available, but that does not mean that we won't use it if we have to use it at some particular stage in terms of a set of circumstances that may very well specifically require to use a Commonwealth PDO.

But the reality of the situation is that at the moment I'm unlikely to use one that's going to give me two days if I can use a state police one that's going to give me 14 days. It's hard to defend the indefensible.

DR RENWICK: Do I also understand that PDOs would likely be used at the upper end of the more complex attacks? In other words, where law enforcement is under maximum pressure, there might be multiple attacks, what's actually happening is unclear at the time. Is that when you're more likely to use a PDO?

MR PHELAN: That's right. I suppose the best example is if you go back to September 2014 with Operation APPLEBY when a number of state PDOs were applied for. Given the circumstances of that particular operation where you've got multiple search warrants across multiple places with a number of people that you want to speak to and keeping them separate and so on, those are the sort of situations where you can envisage it would be used. A lot of the times it's going to be quick where we don't have a lot of notice.

DR RENWICK: If I can ask you, Mr Lewis. If there is a more complex attack, we know from your public annual reports and, I think, the Commonwealth public report in relation to the Martin Place Siege, the Commonwealth state report, that there are a significant number of people who you keep an eye on for terrorist-related matters at any one time. Are you able to say anything publicly about how a PDO might be useful, from your point of view, in the event of an emerging and complex attack?

MR LEWIS: The first point I'd make is a statistic. And I am on public record with this stat. We have over 400 high priority counterterrorism investigations underway right now across Australia. That gives you some idea of the caseload, if you like. Now, there are other lower priority investigations that would be additional to that, but 400 high priority investigations.

Those investigations are at any one time at various stages of maturity, if you like, and it does worry me that there is – and I have had this proposition put to me before – that the failure to use a particular provision that's given to my agency – and I only speak for my own, but I know it has application more widely. But the failure to use a provision in some

ways suggests that it shouldn't be available.

I do recall when these provisions were brought into being it was the view of those that were making the decision to introduce the provisions that they should be used sparingly. So I would like to claim that they are being used sparingly. It might draw a wry smile to say, "Well, so sparing that they're not used," but I come at this from a very different point of view.

I think the fact they've been used sparingly is actually a positive, but to have the facility and the ability to bring about what is essentially a critical disruption to a complicated and potentially several groups connected or several individuals connected, the ability to do that, I think, is important.

I'll make one other observation which goes to an earlier exchange that we had with regard to the difference between intelligence and evidence. From my own organisation, the last 10 or 15 years have been quite a challenge as we try to square the circle, if you like, around the difference between intelligence and evidence. And there is a very distinct difference between the two, of course.

But it has been a challenge to introduce intelligence in such a way that it can be introduced into proceedings but still giving the necessary protections to either the sources or the technologies that are being employed. The other thing that I would like to just have on the record is that, of course, it is not uncommon that intelligence is foreign sourced. It doesn't actually belong in its original form to Australian authorities. It is most common that that sort of intelligence comes to us with caveats with regard to how it can be used, because, quite obviously, the source country or the source agency is trying to protect its equities in this.

All of that adds to the complexity of bringing forward a proceeding. I've got nothing specifically further to add about PDOs because that is in a law enforcement domain. But I think the spirit of this does cut across all of our agencies. Thank you.

MS JONES: Dr Renwick, if I could just add one thing that was raised in some of the submissions in regard to the PDO regime. As you are aware, in 2014 we made some amendments to the regime that focused on the capability of a person to commit a terrorist act as opposed to the specific amount of time that was assessed that the act was likely to occur.

DR RENWICK: Yes.

MS JONES: One of the things we obviously talked very closely with the

law enforcement and intelligence agencies – and you'll have heard from the Director-General's introductory statement and Deputy Commissioner Phelan's statement just in terms of the evolving nature of how people are moving from developing capability and then an intent to act, which is in many instances now significantly faster.

The issue in relation to the PDOs and focusing on – I think there was a suggestion that perhaps we should go back to the previous approach, which was, was an attack likely to happen within the 14-day period? I think our thoughts on that are that the issue is that a person may be capable – law enforcement may have identified that the capability has manifested to be able to undertake a terrorism act. But whether or not they could specify that within that 14-day period it was absolutely likely to take place will always be very difficult, particularly when someone literally can move from the thought to action, what we've seen in recent years, in potentially days.

Our view is that the changes that were made in 2014 remain appropriate and we would consider that they should be retained in the same form.

DR RENWICK: Do I take it, given your department has the charge of the law reform side of the house, as it were, you'd agree that it's bad to try and develop policy in the immediate aftermath of a terrorist attack? It's much better in a calm way, as we're doing now, to think things through and think about all reasonable possibilities.

MS JONES: I certainly support that, noting, however, that we have had to respond relatively quickly to the changing environment. I think it is fair to say that we've had a more robust reform agenda in the counterterrorism space in the last several years than we have had over a very long period of time. I would emphasise that we have mechanisms where we work very closely with law enforcement and intelligence agencies so that we're informed of the evolving operational environment. We work closely with our state and territory counterparts through the Australian and New Zealand Counterterrorism Committee with both justice agencies and with law enforcement agencies so that we are constantly informed and in a position to refine our laws in light of the changing environment.

I should note those amendments, they were made in 2016, not 2014. It felt like 2014.

DR RENWICK: While you're there, Ms Jones, can I just move on to the stop, search and seize powers under Division 3A, Part 1AA? One suggestion which has been made, I think, by the Law Council is that if these provisions are to be retained, as you say they should be, then there

should be an annual reporting to the Minister if the powers are used. I think that's a relatively uncontroversial suggestion, isn't it?

MS JONES: Dr Renwick, we would be open to the recommendation in that regard. There is obviously oversight of the powers under Division 3A through the Commonwealth Ombudsman's current jurisdiction to investigate the use of these powers by the AFP. But we would be open to looking at any suggestions to increase transparency in that space. But I'll also refer to Deputy Commissioner.

DR RENWICK: I think the proposal is that in the event these emergency powers are used, there should be a proper report similar to other emergency powers.

MR PHELAN: That's right, Dr Renwick. I don't want to be flippant, but we report on everything else, so adding this to it won't really make much difference to us, so we're more than happy to – any transparency, that's fine, as far as we're concerned.

DR RENWICK: Good. I'll note that. Thank you very much. Can I turn then to declared areas? Now, these are laws, I think, which were brought in 2014 and we've already noted that they haven't yet been used, although there's the potential for them to be used depending upon who comes back from the two declared areas in Mosul and Raqqa. A couple of points here.

The first is, I suppose, that one practical safeguard to anyone who's concerned about the potential misuse of this provision by creating more declared areas is that it's a serious matter for Australia's diplomacy to publicly state about another country that, in effect, part of your country has been taken over by a terrorist organisation in a way which fits the division.

Do I take it there's broad agreement that's a safeguard? I see lots of nodding heads. I think I'd note that the three speakers all agree with that. Can I ask you first, Mr Lewis, just to say a little more, if you wish, about what might happen in the near future following the battle for Mosul? Presumably what's going to happen is that Iraq will retake real control of that part of its country and for the foreign fighters who survive, presumably they're going to go somewhere.

In what way will that affect us in broad terms? In what way will it affect Australia?

MR LEWIS: It's always dangerous to be speculative, obviously, about what is happening with an unfolding military operation and it becomes, I

know from my previous life, even more complicated as you get towards the back end of one of those operations. The demise of Mosul is something that's been on the cards for some time, as you know, and the seizure of that city by Iraqi forces is imminent, but it's been imminent for some time. I just want to make that point. So we need to be careful about timeframes.

What I can say, of course, is that within the declared area legislation there is contemplation of how you bring all of this to an end each time an area is declared. As you know, it's a three-year sunset clause on these declarations. But also there is provision in there for what are described as continuous monitoring and updating and re-evaluating as to whether there is still a justification for the declared area to exist.

I believe that we won't leap out of bed one morning and decide, "Right, it is now a different set of circumstances in Mosul." This will become apparent over a period of time. Eventually when we get to the point where it is decided that there is now no longer a requirement for that area to be a declared area, then I'm sure that we will be making the recommendation, at any rate, that it's no longer required.

There are, as you say, only two declared areas at this point and the process that we went through to declare those areas, I think, you're familiar with. But it does provide for us a very good set of controls, if you like. Rather than impeding the freedom of movement of Australians around the place, it is quite a precise and prescribed area into which you may go but only under very certain and special circumstances if you have overriding reasons – and they're quite prescriptive in the legislation – to be there, then, of course, you may.

But, otherwise, if you have no other particular reason to be there you may not be there for the period of the prescription. I think I'll leave it there, Dr Renwick. Happy to take other questions.

DR RENWICK: Certainly. Can I turn then, in relation to declared areas, to a couple of specific questions? Perhaps I should start with the Department first. As you will have seen, a number of the submissions suggest that, firstly, preparatory offences are sufficient to prevent someone travelling to these regions to engage in terrorist-related activities. Secondly, it's been pointed out that comparable legal systems like United Kingdom don't have a materially similar provision. For both those reasons some of the submissions to me suggest well, these powers, although they're relatively recent powers, of course, and there hasn't been any prosecution, should be allowed to lapse.

Ms Jones, did you want to say anything further about that?

MS JONES: Yes, thanks, Dr Renwick. Recognising that there has yet to be a successful prosecution, although Deputy Commissioner Phelan has indicated that obviously there has been some relevant investigations in relation to these provisions, but there are several aspects to the reasoning underpinning these provisions. First and foremost was to prevent people from travelling to the area to participate in the activities there and potentially be committing offences over there.

But it is also in relation to protecting people's personal safety and seeking to discourage them from travelling to areas that are of high, high risk for individuals. These provisions, when they were developed, there was very, very careful consideration of what would be legitimate reasons why people would be travelling to those areas. Our view and the view of the Parliament was that the balance was appropriately struck in terms of ensuring that a legitimate reason for being there would not be subject to people being prosecuted.

Our view is that these provisions perhaps have also had an effect of very strongly discouraging people who might otherwise have considered going into the area to not to go there, that they have had a powerful effect beyond just being utilised for prosecution. I think, as the Director-General noted, between ASIO and the Department, we regularly discuss and review the situation on the ground. Obviously we'll be guided by the advice of agencies.

But there is a robust review mechanism in place in relation to these provisions and we look very closely, we recognise that there are potentially legitimate reasons why people would be needing to go there, notwithstanding that it would be highly unsafe for anyone to enter those areas.

DR RENWICK: Just while you've got the microphone, can I just ask one question? I think one of the speakers referred to the fact that it's not just adults going there, it's adults taking sometimes their very small children. And we've seen examples of that in the press. From a policy point of view, this law is, no doubt, designed to protect the children as well, presumably, by discouraging their parents and guardians from taking them.

MS JONES: That was certainly one aspect that was considered in the time of the development of the legislation of the provisions. They were genuinely intended to be a powerful tool to dissuade people from going into those areas except in the most limited circumstances. We hope that

they have had some effect of ensuring that people are kept out of harm's way.

MR LEWIS: Sorry, Dr Renwick, could I just make one supplementary remark?

DR RENWICK: Yes, of course.

MR LEWIS: Following on from your question about children, it might be worth just registering our knowledge of the numbers who have been to these areas. We've had now just on 200 Australians in the Middle East with ISIL involved in the conflict. There are currently just on 100 of them left. Sixty-four we confirm have been killed. There is probably up to 70 or 72 may have been killed. And there are 70 children that we know of currently in the conflict zone.

DR RENWICK: On top of those numbers?

MR LEWIS: On top of those numbers, 70 children who have either been taken there or born there. Obviously that will be – there's quite an issue of determining whether somebody is a 17-and-a-half-year-old with an AK47 or a 17-month-old in wraps. I must say that the numbers going to the Middle East dropped off quite significantly at about the time of the introduction of this particular provision and some other factors. Obviously it wasn't the only thing.

There was an increase obviously in border protection, of border security around that time. Our own knowledge of the target group was improving significantly. So there were a number of ways in which we were able to disrupt. But I think those figures are quite instructive in terms of your consideration of whether this is worth it or not.

DR RENWICK: Thank you so much. Deputy Commissioner.

MR PHELAN: I have a little bit to say on this one. As I said earlier on in my opening submission, the declared area offences are extremely important to us and we actually have some matters potentially on foot in relation to those through arrest warrants being issued, but also a number of investigations. But some of the submissions that have been put forward, first of all, in terms of the preparatory offences are sufficient for someone going over and being a deterrent.

Of course, that would be fine if I had enough evidence to prove the preparatory offences and also, of course, they require an intent to do something. It's also been put at the other end of the spectrum that the

current regime in relation to foreign incursions offence would also be sufficient for someone who's been there.

DR RENWICK: Indeed.

MR PHELAN: Again, that's all well and good in a perfect world where I've got evidence in relation to the hostile activity, plus where they were, what they did, et cetera. But that can be a mixture of intelligence and evidence. So we may have, either from multiple sources, enough intelligence to suggest they were fighting and would meet the threshold for fighting incursions offences. But none of that is admissible potentially in an Australian court.

But I may have admissible evidence to suggest that they were in Raqqa or in Mosul, in which case we would charge them with those offences. I just don't think it's going to – well, I'm not always concerned with the court of public opinion, but having known what someone's done offshore and coming all the way back to Australia and not being able to prosecute them for a foreign incursions offence when I could have prosecuted them for an offence of being in a declared zone is something I'm not all that comfortable with.

DR RENWICK: Certainly. Thank you. Just while you've got the microphone, as you know, quite a few of the submissions have asked whether the exceptions can be expanded in some way for legitimate travel to the declared areas. One I wish to bring to your attention is whether the current exception of providing aid of a humanitarian nature is available to protect the activities of individuals say working for the International Committee of the Red Cross.

For example, it's been suggested that there should be an amendment, perhaps by regulation, to protect people engaged in delivery of training. For example, compliance training on the laws of armed conflict. Is that something on which you have a view or not?

MR PHELAN: My only view is this, Dr Renwick: that the parliament considered all of these things and we went through a number of hearings. I'd like to hark back to something that Ms Jones said. That is, it is about the safety of the individuals as well. I mean, Raqqa and Mosul are warzones. We don't want any Australians going there unless they're protected. It's the public safety as well as an evidentiary prosecution matter as well. This has to be a deterrent. We don't want people going to this part of the world.

DR RENWICK: You would adopt what Ms Jones said about the

protection of children?

MR PHELAN: Absolutely. That's one of a number of considerations as well.

DR RENWICK: Ms Jones, did you want to add anything to that?

MS JONES: Dr Renwick, just noting that in the development of these provisions – and I remember it very well, we looked at this very closely and considered the issue of people being able to provide humanitarian aid. Obviously the provision specifically notes that providing humanitarian aid is a legitimate purpose. In fact, that was the first of the ones that we put into the provision for that reason.

We would certainly think that the activities of the International Red Cross should be legitimately captured in that provision. In terms of the issue around capturing training, I think we want to look at that issue. The challenge would be about how you could appropriately define that. But, as you know, there is a mechanism for being able to add a particular type of conduct by regulation. That would be something you would have to consider.

DR RENWICK: Was there anything further any of the three speakers wish to add at this stage? Can I conclude this first part of the public hearings by, of course, thanking the three speakers and their respective agencies for attending? Can I just put on the public record that this is not the first time I have had a discussion with these three agencies. Quite recently I have had classified hearings where – this is one of the strengths of the monitor's office – I've been able to hear in a classified environment material underpinning some of the answers given today.

I should also place on the record that the agencies have assured me and it's been my experience to date that I only have to ask for particular information regardless of its classification and that will be provided. That is an important part of the strength of the monitor's job, that I can see, for example, what ministers see, but I'm independent and I can provide reports. Can I thank very much the three speakers and those accompanying you? We'll now pause till 11.30 when we've have the expert panel. Thank you very much.

ADJOURNED **[11.05 am]**

RESUMED **[11.27 am]**

DR RENWICK: Ladies and gentlemen, if you can take your seats, we'll now move to the second session, which is the expert panel. I'm delighted that Dr Rodger Shanahan and Mr John Lawler have taken the time, I think at some personal inconvenience to both of you gentlemen, to be here today. I particularly thank you for your attendance.

The thinking behind having each of you gentlemen here is that the task of the monitor in determining whether the laws are effective in deterring and preventing terrorist attacks while preserving human rights is not just a matter for lawyers. It is a matter for many other people with expertise in the field. I welcome Dr Rodger Shanahan, a Research Fellow at the Lowy Institute for International Policy, and Mr John Lawler, AM, former Deputy Commissioner of the AFP, former Chief Executive Officer of the Australian Crime Commission.

We will probably do this in two halves. We'll start with Dr Shanahan. Dr Shanahan, I would invite you to provide a brief CV and then to make some opening remarks. Thank you.

DR SHANAHAN: Thanks very much, Dr Renwick. I'm Dr Rodger Shanahan, currently a Research Fellow at the Lowy Institute. I was formerly an army officer and, pertinent to these issues, I had operational service in Lebanon, Syria and Afghanistan. I was also posted to the Australian Embassies in Saudi Arabia and the United Arab Emirates. Academically, I have a Master's Degree from ANU in Middle East and Central Asian Studies and a PhD in Arab and Islamic Studies from the University of Sydney.

I was previously an Associate Professor at the ANU where I convened courses on sectarian violence and malicious networks. I'm currently lecturing at the University of New South Wales on terrorism and politically motivated violence. In my role as a research fellow at the Lowy Institute, I'm in the West Asia Program, but part of our remit is to look at terrorism. Last year we released a paper on foreign fighters and consequences of the end of the conflict in Syria and Iraq. We're currently doing one on the nexus between humanitarian assistance and foreign fighters and terrorism. I've also appeared as an expert witness in a number of terrorism trials and during the Lindt Café Siege coronial inquiry.

DR RENWICK: I think, just interrupting you for a second, one of the matters in which you gave evidence was the matter of R v Alqudsi, which concerned whether Mr Alqudsi had been involved in foreign incursions in

Syria.

DR SHANAHAN: In recruitment of people for foreign incursions, that's correct.

DR RENWICK: Thank you.

DR SHANAHAN: I suppose I would just, with my opening remarks, give a brief overview of the nature of Islamic State, what it has done to establish areas that it controls in Syria and Iraq, a little bit about its aims and its strengths and why declared areas, I believe have a degree of utility, given the unique nature of the threat.

Some people may be aware that Islamic State emerged from the remnants of what was known in Al Qaeda in Iraq, which had been decimated by around 2006. It was slowly built up over a number of years. But by 2010 when the previous leader had been killed, the current leader of Islamic State, Abu Bakr al-Baghdadi, was put in place and they began operating largely in the western parts of Iraq, but also in Syria not too long after the uprising sometime in 2012. It was known by another name but it reported back to Islamic State in Iraq at that point. At this stage they were all ultimately loyal to Al Qaeda.

Raqqa in Syria fell to a coalition of Islamist and secular opposition groups and was taken away from control of the Syrian Government in March 2013. Control of that was seized by Islamic State in Iraq and Syria, as it was known then, later in 2013, around October. On the other side of the border in Iraq, Islamic State from 2010 conducted a well-planned series of operations, both to degrade Iraqi security forces and to free, in some instances, their key leaders from detention in Iraqi jails.

The end result of this was in June 2014 Islamic State was able to seize Mosul, the second-largest city in Iraq, and to essentially defeat three divisions of Iraqi military forces. It was an extremely powerful organisation at this time. Very shortly after taking Mosul, Abu Bakr al-Baghdadi declared its name now to be known as the Islamic State and that he declared himself the caliph or the successor to the prophet Muhammad and that the area that encompassed both Raqqa and Mosul would be known as the caliphate or the area controlled by the caliph, which has resonance in Islamic historiography.

Because of the degree of success and the empowerment that Islamic State had been able to do, both they and other groups, but particularly Islamic State derivatives, have always been very active in recruiting not only in the areas within which they operate but also actively seek to recruit

Muslims from overseas. That became particularly resonant after they defeated Iraqi security forces to declare a contiguous territory that was controlled by a caliph and was ruled in accordance with Islamic law.

In the case of Australia, that call to arms has been heard. To date, around 170 Australians have gone to fight as foreign fighters, the vast majority of whom are with Islamic State. Of those, about 70 have been killed. So there are currently about 100 foreign fighters still active in the area of operations.

Islamic State's short-term aim was to establish a contiguous territory, which it had done, and then establish it under the rule of Islamic law. Secondary aim and part of that primary aim as well was to fight people they declared to be unbelievers. Those unbelievers might also include other Muslims and they certainly included non-Muslims.

It also called for attacks against the countries that were attacking it. That included Australia. The spokesman for Islamic State, through social media, called for Muslims around the world to kill disbelieving Americans or Europeans or an Australian or a Canadian. That call was made in September 2014 and a similar exhortation to do the same was repeated in November 2015.

In terms of Islamic State, it is a unique organisation in this Islamist terrorist milieu for a variety of reasons: (1) its aspirations make it entirely different to anything that we have seen before. Al Qaeda have the same strategic aim to establish Islamic rule, but the speed with which Islamic State wanted to achieve that and who it was going to be under in terms of a single person who declared himself a caliph or the successor to the prophet Muhammad was something we hadn't really seen before.

That kind of message, for whatever reason, has had strong resonance with thousands of young Muslims outside of Syria and Iraq and they've been attracted to those places to fight. It's a very strong narrative that Islamic State has had, but probably more importantly, they've been very, very adept at the use of social media. One of the elements that we do understand is how professional that they are and given the number of people that they've attracted from a number of other countries, they're able to produce high-quality media products or recruiting tools created by people who are native speakers in a range of languages, including in English.

That's had a particular effect on Muslims outside of the areas of operations. Also, it's undertaken significant governance functions in the areas within which it controls. It rules in accordance of a system of law,

religiously based system of law, but it also does other functions, policing functions and, perhaps most importantly, or at least very importantly in this context, revenue raising activities such as taxation, kidnapping for ransom, amongst other issues.

Now, the $64,000 question is what happens once the caliphate is destroyed, which it's well on its way to being destroyed? All those foreign fighters – and I'll just concentrate on the issue of the foreign fighters at the moment – really have three choices: (1) they will die in place, increasingly so; (2) they will leave the area of operations and try and get to another area of operations and continue the jihad or the armed struggle in another theatre somewhere around the world; or they will return or seek to return to their country of origin.

Once in their country of origin, some of those will want to continue the jihad, whether that is physically by planning or conducting attacks, or whether it's in a more passive manner by facilitating the attacks of others, either in Australia or elsewhere. I think when we look at the issue of declared areas and how it pertains to Raqqa and Mosul I think the legislation that has been brought in is dealing with a unique set of circumstances.

We haven't really seen this phenomenon before of the terrorist group that is both aspirational, capable and has the ability to raise revenue and govern in a contiguous area overseas and within which conducts operational planning and facilitation for terrorist operations overseas. One then has to, therefore, ask yourself, for what reason would an Australian want to travel to one of those areas controlled by this prescribed terrorist group that actively conducts terrorist planning for operations overseas?

Another corollary to that is I mentioned the fact of the revenue raising capabilities of Islamic State. If an Australian citizen or somebody who is described under the legislation were to go to those areas there is a very high possibility that they would be detained by Islamic State and ransomed effectively.

Now, if a ransom was paid and these people would be released, then effectively you are, by omission or commission, funding a terrorist organisation through the use of that ransom money. If people are operating businesses inside those areas those businesses are taxed by Islamic State. So they're taxed by a prescribed terrorist organisation and, again, by guilt of omission or commission, you're effectively providing funding to a terrorist organisation that is plotting attacks against Western interests.

This notion of people going there to visit relatives, even if that were true, puts them at risk and it puts the Australian Government in an invidious position of having to try to negotiate them away and if they're able to get funding from whatever source, be it domestic or international, effectively your presence potentially has funded a terrorist organisation. I suppose I'll just finish on this issue by saying that I think everybody understands the concerns of prescribing a particular area and stopping people's freedom of movement effectively into that area.

But I think the set of circumstances are unique. I think the kind of entity that exists within those declared areas are such that the Australian Government is within its rights to stop people travelling there because their mere presence within that area might effectively lead to funding a prescribed terrorist organisation. Thank you.

DR RENWICK: Thank you, Dr Shanahan. Just a couple of follow-up questions. You talked about the likely fall of Mosul and what will happen next to people who don't die there. Mr Lewis this morning, Duncan Lewis, suggested that Australia is expecting what he described as a trickle of foreign fighters to return to Australia, but nevertheless, some of them. The Attorney-General's Department has indicated, as has the AFP, that there would be a real prospect of people being charged with these offences, if the evidence permitted, when they came back.

From the point of view of affecting the terrorist threat in Australia, do you have anything to add to the effect of those foreign fighters returning here?

DR SHANAHAN: I suppose from my experience to date as an expert witness in the trials that I've been a part of, the level of professionalism of the people who have been charged to date has not been particularly high. One of the concerns, given the intensity and duration of the fighting in Syria and Iraq and the exposure of people who have survived over an extended period of time, would indicate that they have good operational awareness. They may have good experience in operational planning.

They certainly have good experience in operational security. So the presence of even a few well-trained, highly-experienced people returning from these areas of operations can have a disproportionate impact, I would argue, on people in Australia and potential jihadists in Australia in raising their level of expertise.

The other issue I think we need to probably take into account with this kind of phenomenon is the kind of timeframe that people are looking at the people who have undertaken these kind of activities. If you're beholden to institute the rule of God and that you want to oppose the

unbelievers, then it's really difficult for people to convince you that your vision of God is wrong. So your timeframe, the timescale with which you look at your utility to the cause is probably much, much longer than say a nationalist terrorist where there might be a neat political solution to a conflict. In many of these cases there is no neat end point for the struggle.

DR RENWICK: I take it in addition to being someone with material capacity, including some capacity in soldiering, if I can put it that way, and an ability to pass on those skills to others in a way which would contravene counterterrorism laws, they may also become a rallying point, I suppose, for other would-be foreign fighters.

DR SHANAHAN: Certainly. There's probably two areas. And there's a potential difficulty, I would argue, that if people who are known to have gone to Syria and Iraq and to have fought as a mujahedeen and they return and there's not enough evidentiary proof to prosecute them, their mere presence may serve as a positive model to a select number of people if they can see a person who has returned from the battlefront, the Australian Government hasn't prosecuted them, they walk freely amongst the community, even if they don't actively try to slate anybody to impressionable young people, that might prove to be a type of role model.

I think the other issue is – and what we've seen from Afghanistan and particularly in Iraq in the early days in Iraq after 2003 – is the persistent nature of the networks of people who have fought in these conflicts. They're transnational networks. They meet foreign fighters from a variety of countries and those linkages may lay fallow for a period of time, but they are easily activated. It's not only the demonstrative effect of somebody coming back and not being prosecuted, there's also the skills transfer of people who do come back.

But I think the other third element is the fact that they are highly networked, given the number of years they've been there. If experience tells us anything, individuals in this terrorism space can be dangerous but it's more the networks that are dangerous because they allow people to operate in multiple countries. It also allows you to perhaps keep a lower profile by facilitating elements of the network without being a high profile individual yourself.

DR RENWICK: We do know, don't we, that ISIL has been particularly effective in producing a slick social media message and presumably some people have become adept at that while they've been over there.

DR SHANAHAN: Certainly that's one of the probably points of difference of Islamic State from organisations that have come before it.

Certainly there's a plethora of jihadist groups active in Syria and Iraq. Many of them put out their own social media product. But none of them really come close to the quality of the product that Islamic State produces.

DR RENWICK: Can I just focus then for a minute on what you had to say about the idea that someone can go, an Australian, for example, can go to one of these two areas for an innocent purpose in a way which would justify an expansion of the existing exceptions in the declared areas legislation. I just want to try and summarise what I think you've said. So let me see if I've got it right. I think the first point you make is it's extremely difficult to get into these declared areas without injury or losing one's life. And it's almost impossible to remain there undetected by ISIL. Is that proposition number 1?

DR SHANAHAN: That would be correct.

DR RENWICK: Then, secondly, I suppose logically, either one goes there overtly to help ISIL – that's one category of people and obviously a number of people have done that – or, secondly, it's possible that some people have gone there for an innocent purpose, for perhaps family reunion, for example. But if I understand you correctly, because they'll be detected by ISIL immediately or at some point they will, unless they sign up, as it were, ISIL will perhaps kidnap them and seek to extract a ransom.

I suppose it's possible that ISIL will seek to use them in some way to raise its own publicity or in some other way, for example, by paying a levy or a tax to ISIL they'll be economically supporting ISIL within its own territory. I suppose one can add to that that innocent children might be taken along by parents or guardians and they will be put at risk directly for their safety but also put at risk of later becoming radicalised and joining ISIL. Is that the gist of it?

DR SHANAHAN: Certainly. I'd probably emphasise more the credibility of somebody claiming to go and visit a family relative in a place that's widely known to be controlled by Islamic State (a) of even being allowed in such an area without knowing anybody, but (b) given there are other alternatives if your stated aim is to reunite with a family member, there's more freedom of movement of citizens of Raqqa and Mosul to travel outside of Raqqa and Mosul.

If you desperately needed to see a relative, perhaps you could get the relative to travel to that country, a different part of the country outside the declared zone and meet up with them. So I think there's more than one way to skin a cat. So you having to go to that I find bends the – I won't say it's incredulous but it's pushing the incredulity button.

But you're correct in the other aspects of your mere presence there. Islamic State has a track record of detaining and advertising the detention of Westerners and then seeking ransom for those Westerners. It's not only confined to Westerners but other non-Westerners and also in some cases nationals of those countries. It's one of the main revenue raising activities of a range of these groups but Islamic State in particular because of their strong social media presence. If they get a Westerner, then they can advertise that person's presence.

That's one of the real threats. As you pointed out, anybody who says that they are going to check on their business interests within these areas, by the definition of the functions of what Islamic State does within the territory that it holds, it raises revenue by taxing businesses. So if you have a business operating in there you are essentially providing – your business is providing funds to a prescribed terrorist organisation. Again, I would find it difficult to understand why you would have to go and check on your business (a) why your business would still be operating knowing that it's providing tax revenue for this organisation and then (b) why you would have to go and check on it.

DR RENWICK: My final question to you is this: I think you've described the situation in Raqqa and Mosul as somewhat unique; I think you've said that. Of course, it's possible that in the future there might be other declared areas over other parts of the world which have quite different characteristics. But I can't hypothesise about that because they're not in front of me.

Two final things. One point which the previous panel agreed with me on is that one safeguard to the Foreign Minister perhaps over-declaring areas is it's no small thing, as a matter of international diplomacy, for Australia to say to another country, "Part of your country is a declared area." That is an undiplomatic thing to say in that literal sense. That's a safeguard because it's not something Australia will likely do. Would you agree with that?

DR SHANAHAN: I'd agree with that to an extent. In the case of Iraq, yes, I would agree with that because we have maintained good relations with the Republic of Iraq, perhaps less of a consideration in the situation in Syria where so many countries say they don't recognise the government of President Bashar al-Assad. The diplomatic issue would probably be much less an issue in the Syria context but would be a live issue in the Iraqi context.

DR RENWICK: Final question from me. Appreciating that the situation

may change in Mosul at some point and if it does, no doubt – if Iraq retakes it, no doubt, the declaration will be revoked, but at present anyway, is there any relevant distinction I should be aware of, for my purposes, between Raqqa and Mosul, the two declared areas, or should I treat them as much of a muchness in relation to the way ISIL operates?

DR SHANAHAN: The latter, you should treat them as the same organisation. They're controlled by the same organisation. In the past they used to shift forces from one to the other as a matter of routine. That's really stopped now because the pressure is on Mosul. But I probably would say that while there are controversies about this notion of declared areas, which I acknowledge, but I think there are also peculiar circumstances which make it a valid safeguard.

At the same time, once government control has been re-established over a declared area such as Mosul, I think either as a safeguard or as a measure of confidence the speed with which a declared area could then be not made a declared area would probably give confidence to the rationale in doing this because there are probably – after an area that had been occupied is no longer occupied there's probably several legitimate reasons why people from Australia would want to go to those areas; to check on their businesses, to check on people.

I think it's behove on the government to then apply some speed to lifting the restrictions once the situation no longer warrants them.

DR RENWICK: Dr Shanahan, thank you so much. Mr Lawler.

DR SHANAHAN: My pleasure.

MR LAWLER: Thank you very much for the opportunity to appear before this review. I want to preface my comments on the review by placing the statements I intend to make into context. I've got some comments that may be outside the scope of the review, but I make them, nonetheless. I'll then draw your attention to some specific areas within the three pieces of legislation that I believe could warrant some further determination.

I retired from law enforcement in 2013 as the CEO of the then Australian Crime Commission, as you've outlined, and the former Deputy Commissioner of the Australian Federal Police. So my appearance here today is as an interested and concerned member of the community who strongly believes in the importance to Australia of the work that the security agencies perform in keeping Australia safe.

I do that from an operational and practical perspective that is grounded in nearly 35 years of high end law enforcement and criminal intelligence experience, a person who's had responsibility for the AFP's counterterrorism operations and as a trained counterterrorism hostage negotiator. It's not a purist legal perspective, nor anchored in academia by an in-depth analysis of terrorist extremism and its motivators. I will leave others and certainly Dr Rodger Shanahan are much better placed to do that.

Indeed, I note the legislation has been reviewed and has been the subject of much scrutiny through the parliament, through independent reviews like COAG and its committees and through the work of the previous Independent National Security Legislation Monitors. However, the operational terrain is dynamic and ever-changing. More can and should be done in preparing our legislative response to terrorism. When a major terrorist attack occurs it will be too late.

The review requirements already ask you, Dr Renwick, to examine the legislation in its broadest context, being "the operation, effectiveness and, most importantly, implications of Australia's counterterrorism and national security legislation". In understanding the implications we need to project forward and try and understand how that threat has changed to date and how it will likely present in the future. We need to be prepared.

Let me highlight some areas where a clear shift has already been seen. This has resulted in a dynamic and diverse attack methodology employed around the globe and, to a lesser extent, thankfully, in Australia. It has included the use of heavy vehicles as a weapon with or without explosives, the targeting of mass gatherings, the Nice experience, multiple well-planned and sustained coordinated attacks involving mass casualties – Paris and Mumbai – the targeting police and military – Curtis Cheng and the UK experience – the enduring interest in targeting the aviation sector.

Who will ever forget the image of the young child holding up the severed head of the so-called enemy fighter for all to see with the support of his father, an Australian citizen, a convicted terrorist, having served a prison sentence in Australia. The so-called lone wolf attacks, often opportunistic and random, the Lindt Café Siege, the warfare and terrorist skills of Australians citizens returning and still to return from conflict zones.

It is also important that we continue to remind ourselves that Australia's current threat level on a scale of 5 is rated at 3; probable, having been increased in 2014. That is credible intelligence assessed by our security agencies indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia.

Many professionals in the field, along with some of our political leaders, see the threat, rightly, as an enduring one that may be with us for generations. I would hope that most would agree that the terrorism threats we face now are as serious as any time in the history of our nation. We see the threat fuelled by fanatical Islamist ideology and enabled dynamically by the cyber environment and crystallised through impressionable or mentally unstable people in our community.

The nation's security agencies have performed remarkably well. since 2014 in Australia, there have been four attacks with 12 planned terrorist attacks disrupted, 62 people have been charged as a result of 27 counterterrorism operations in Australia, with a further 18 first-instance warrants in existence. Equally, others have been through prophylactic preventative intervention been warned off and as environments have been hardened, likely attacks have been thwarted.

The objective must be to prevent a terrorist attack. A realised terrorist attack is failure. Those agencies tasked with the difficult prevention task must be supported through resourcing, public and political support and with the most formidable array of legislative tools at their disposal. I commend the government's announcement of increased funding for the security agencies and their pronouncements of support that accompanied these announcements.

The next immediate step is continued attention to and refinement of the legislative framework. Notwithstanding the charges I've outlined above, often criminal prosecution is not the most efficient and effective response to the threat. That is why preventative legislative responses such as control orders and preventative detention orders are so necessary to have available on the statue books.

Further, the argument that the legislation has not been used should not be the basis to call for the legislation to be repealed. I use the analogy of robust national security legislation being like house insurance. You may never need it, but if you are the victim of a bushfire or flood or some other catastrophe, you'll be hoping that your insurance has no loopholes, is the most comprehensive available and delivers you the best possible outcome from a tragic situation.

Some areas worthy of more discussion include a legal mechanism that links changes in the National Terrorism Threat Advisory System to adjustments in the powers available to our police and security agencies. For example, when the threat level reaches certain, all the powers the police and security agencies could possibly need to respond to a threat are

enlivened.

Equally, when the level is at not expected, certain legislation may not be available. There will not be the time to try and enact new or rectify deficient legislation and, indeed, the Operation PENDENNIS experience taught us this. In a prevention context, there is a real tension between the use of intelligence and evidence and its application within our adversarial legal system.

Some place less emphasis on intelligence versus evidence. But on occasion some intelligence can be more, if not equally, as compelling as evidence in establishing a fact or discovering the truth of a matter. Difficulties with the sensitive nature of national security intelligence sources and prohibitions normally placed upon it have sought to be overcome through the NSI Act. But how these Acts work together needs to be further explored and enhanced.

The use of special cleared forums, appropriately cleared personnel have been utilised, but more is required. There should be much greater use of intelligence as a legitimate legal base in the prevention of terrorism. There should be no gaps between Commonwealth and state legislation, particularly as it relates to counterterrorism. It should never be the case of the lowest common denominator. The best legislation should apply and be consistently applied in each of the jurisdictions.

To the specific legislation the subject of this review, I have a few non-exhaustive comments in relation to each of them. I must say at the outset, however, that despite limitations in the three legislative areas under review, they will, in my view, act as a deterrent to some and should be retained on that basis alone.

To the stop, search and detain powers under Division 3A, Part 1AA, in the main, the stop, search and detain powers in this division can only be applied in Commonwealth places and consideration needs to be given to a widening of powers as has been done in section 3UEA to allow their use in both Commonwealth and state locations.

The 3UEA section is the emergency entry power available in all Commonwealth and state locations, but on the basis that the power can only be used where there is an imminent threat to a person's life, health or safety. Emergency powers must be used conditionally, as would appear to be the case to date as I believe they have not been used since the legislation was enacted.

However, there may be circumstances where this power needs to be used

to prevent the loss of intelligence or evidence in relation to a terrorist investigation. For example, a suspected terrorist enters a premises just after being tipped off to the involved police and security agencies in relation to their terrorist planning. One would think the police would need to go in there very quickly to retain computer evidence and other things that would be potentially able to be destroyed.

Indeed, this concept is envisaged in Division 105, the preventative detention orders, where those orders can be used to preserve evidence of a recent terrorist attack. Further safeguards could be put in place if the powers were used. For example, if utilised, the proportionality could be assessed and reported upon by yourself.

In relation to the declared areas division – and we've heard Dr Shanahan speak about those – but I understand there have been no prosecutions in relation to this legislation to date. I understand further that this is based on the difficulty in obtaining evidence from foreign jurisdictions, particularly warzones. There have been some attempts to improve the processes around the gathering of the evidence. But how successful that has been is questionable.

There have been calls on that basis for the legislation to be repealed as one that's not been used and the risk that innocent people may find themselves within declared areas but outside the exception provisions. For example, visiting a friend rather than family was one cited reason. I must say, Dr Renwick, I think the legitimate reasons for people going to these declared areas are absolutely overstated and I think Dr Shanahan has supported that position in his material he's presented before you.

Of the two declared areas to date, both warzones, one questions why anybody working outside of an official capacity would wish to place themselves in such danger in going to such an area. One clear reason is to support or fight for the terrorist cause. One way of tackling this, I believe, may be an authorisation regime linked to the legislation, and that may be worthy of further consideration.

It will overcome the difficulties raised by some around the claim that the exemptions are problematic and infringe on human rights. Official organisations like the Red Cross or the United Nations could be authorised under the legislation to have personnel in declared areas. Other individuals could also be authorised to enter declared areas without fear of prosecution if they outline to Australian authorities before their travel the reasons why they need to enter the area.

This would have multiple benefits. It would give the authorities the

opportunity to establish the bona fide nature of the travel and, indeed, warn those individuals of the risks involved and further establish a coherent list of those Australians lawfully in the declared area.

In relation to the control order Division 104, I'm of the view that the control order regime should be retained. Notwithstanding some of the legislative and operational shortcomings, it is a mechanism that has utility in some circumstances. It could be more focused to lower risk individuals who may be dabbling with material on the internet or being radicalised and need effectively to be warned off or constrained.

The process of applying for interim control orders was seen to be more flexible and fit for purpose than the confirmation process. I understand there have been long delays in this confirmation process and the reason for these delays need to be understood and, I believe, rectified. There have also been difficulties in easily making adjustments to confirm control orders.

The same standards of information relied upon should be open to be utilised in both the interim and at confirm stages of the order. As indicated above in my earlier comments, mechanisms need to be found whereby intelligence can be utilised but where sources, associated methodologies and sharing arrangements are appropriately protected.

Further, there seems to be an inconsistency between Division 104 and Division 105 whereby the former requires the written consent of the Attorney-General and the latter does not. There may be good reason for that but it's not immediately apparent to me.

Section 104.53 outlines the restrictions that can be sought to be linked to the order. I can envisage amongst those restrictions circumstances where the 12-hour restriction in any 24-hour period may be difficult to manage. Further, the conditions do not seem to allow the obtaining of a DNA sample. They allow, I think, for fingerprints to be taken but not DNA.

If this is so, then I believe this is a serious weakness and the section needs to be modernised. This modernisation may allow for the matching against data of other outstanding offences that have been committed. For example, the theft of guns or explosives, there may very well be DNA evidence at a crime scene that may be usefully matched.

It may also in an ancillary way serve as a mechanism for solving of the crime, but also providing the opportunity to have a person taken into custody whilst the other charges are heard. Control orders under this legislation will cease on 7 September 2018, if I understood the legislation

properly, in about 16 months' time. But given the enduring nature of terrorism, I wonder whether there is relevance in the sunset clauses in this and other pieces of the terrorism legislation.

In relation to preventative detention, Division 105, there seems to be a level of inconsistency in the ages that apply to different circumstances within Divisions 104 and 105 of the Code. The ages of 14, 16 and under 18 are referred to. Where possible, this should be made consistent, noting the recent amendments made lowering the age in some provisions to 14.

Amendments made to Division 105 under the HRTO Act do not apply, as I understand it, while a person is in prison. The orders, I believe, should be able to apply to persons in prison and it would be one way to restrict contact with certain individuals. We know within law enforcement, despite the best efforts of the prison authorities and despite the best efforts of the prison authorities and despite the best efforts of their incarceration and the conditions around their incarceration that prisoners within prisons do communicate outside. It may very well be that the authorities outside of the prison authorities would be best placed to detect that on occasions.

Of course, if that were breached, it would lead potentially to further incarceration. It's also noted that the New South Wales investigative detention regime was supported by the majority of COAG members as a way to strengthen pre-charge detention. Over 12 months later there seems to be no nationally consistent model in place, despite the position of COAG and the request in October 2016 of your predecessor in a report on this area to say that it needed to be kept under active consideration.

This scenario is an example of what I was referring to earlier about the inconsistency between states and territories and the Commonwealth and having the most robust laws available. Finally, there is currently a restriction on the interviewing of individuals during a preventative detention order. This, in my view, should be removed and the same rules of evidence and/or conditions that apply to other police and security interviews should apply in this circumstance.

Dr Renwick, they were the key areas I wished to raise. I apologise for taking probably a little longer than you may have wished. But happy to answer any questions, if I can.

DR RENWICK: Thank you very much, Mr Lawler. I have one particular question and one more general question for you. If I can start with the particular one. Do you agree with Dr Shanahan's general proposition to summarise that it's somewhat unreal to imagine a legitimate business trip to either Raqqa or Mosul that doesn't, sooner or later, benefit ISIL and,

therefore, can't be regarded as legitimate? What do you say about his proposition there?

MR LAWLER: Yes, I do agree with it, unequivocally.

DR RENWICK: The more general question which I would invite you to spend a couple of minutes expanding on is this, based on your significant police experience: we've had thwarted complex attacks in Australia such as the PENDENNIS conspiracies. But in more recent times we've had the four lone actor or small numbers of people. We haven't had a large integrated or coordinated attack – thank goodness – carried out.

One of the things when I'm considering whether the laws are fit for purpose in deterring and responding to terrorist attacks while appropriately protecting human rights – I'm just interested in you perhaps explaining for a minute or two some of the difficult decisions that have to be made by police when you have an emerging situation. You have an incident in place A, perhaps in another city you have another incident at the same time. As the Director-General of Security said today, he's got about 400 high risk terrorist groups or activities under investigation.

No doubt, there's a concern by police and intelligence that the police will be, understandably, focused on the emerging attacks and that that might be a good time for them to act at the same time. Are you able just to speak to those possibilities and what laws one might need to respond to them?

MR LAWLER: Yes, I am. The question had multiple facets to it.

DR RENWICK: Indeed.

MR LAWLER: If I miss a facet, please feel free to repechage and we'll try again. But the scenario you paint is a scenario, quite frankly, that I would not wish to contemplate. If a multifaceted terrorist attack on a large scale occurs in Australia, the authorities responding will be under the most extreme pressure that one could possibly imagine. We know from even lone actor attacks, the Lindt Café Siege, the huge number of police and security and other agencies involved into the many, many hundreds, as I understand it.

That will dwarf into insignificance if there is a multifaceted attack of the nature you talk about. Issues of coordination and decision-making will be extraordinarily difficult. I dare say there will be mistakes made. It will be very fluid and often in these situations, certainly in the initial stages, very chaotic, because, of course, the authorities, despite all the very best intentions, will not have a cohesive picture often of who's involved.

We've seen examples of that in other parts of the world. In those situations the authorities' first objective will be to try and contain the crime scenes that they have, try as best they can to take those responsible into custody, if there's sufficient evidence to do so, and to understand very early if in actual fact other threats are likely to manifest themselves in the coming timeframe, whether that be hours, days or weeks, and to try, as best they can, to prevent such further events occurring.

As I said in my earlier opening remarks, if a terrorist event is realised, that is at one level a failure of the system and the authorities in its harshest sense, if I can say that. You have large numbers of police under extraordinary pressure, a government and its wardens are working on many, many fronts – from the national government through to state governments through councils and through others, through the whole spectrum – will be impacted and responding to the events as they've unfolded.

Just what those events look like, what the specific circumstances are, will mean that the actual response can and will often be different and that stands to reason. But amongst all of that is to go back to your point about Duncan Lewis' 400 investigations that are active here and now. Without a catastrophic event placed on top of that – and I can tell you from past experience that with events that weren't as serious as what you outlined in a hypothetical context – all of the surveillance resources of the state police and the security agencies and the federal police were utilised.

There was no more capacity, despite there being very extensive capacity. It's not hard to envisage that resources will be under very, very acute strain and there may need to be, which is why areas such as control orders and preventative detention orders that can be activated very quickly – to say that some of those 400 at least we need to just make sure you don't pose a threat while we're actually trying to deal with another event here that's placed a strain and is in harm's way.

I think that's, in my view, a very legitimate use of those preventative measures. Where we have such large scale, if it were ever to happen – hopefully not – then these are some of the things that would need to be able to be put in place very, very quickly, because if they can't be put in place quickly, then, of course, the risks are amplified, in my view. I hope that covers most of it. If it doesn't, we can go again.

DR RENWICK: Did you want to add anything, Dr Shanahan?

DR SHANAHAN: No.

DR RENWICK: I suppose the final matter on which you might like to comment is that in almost every case, I imagine, the state police forces will be the first responders. That's something I need to keep in mind, I think, when I look at these laws. That a terrorist act, many of them, are over very quickly. I suppose the Westminster Bridge example is a recent tragic example of something which was over in 60 seconds or two minutes.

But in Australia, unlike the United Kingdom, for example, it's the state police forces who typically will be there first. Do you agree with that?

MR LAWLER: I think it's the same in the UK. Indeed, you might have the Leicester police or the Surry police responding to a particular incident, the metropolitan police. I understand the UK has the national counterterrorism responsibility law, but they're the local police for the municipality of London. That's certainly true. In most instances outside of a Commonwealth place or, indeed, the ACT where the AFP and the Commonwealth law enforcement agency that work, the state police will respond.

Depending on the nature of the incident, it might be that in very short order the Joint Counterterrorism Teams respond. So that's a joint security agency, state police, federal police and others involved in the response. But more likely I would have thought – and I agree with your proposition – that it may very well be a uniform patrol car or patrol cars, a uniform response in the first instance.

That's certainly true. That in itself, with the nature of responding to an incident of the like that you've sort of envisaged, creates its own challenges for those officers responding.

DR RENWICK: Gentlemen, thank you very much. That was a most informative session from you both. As I say, I'm conscious that you're both here in circumstances of some personal inconvenience. On behalf of my office, I thank you very much. We will pause there for a minute while the Human Rights Commission come forward. Thank you.

I welcome the Human Rights Commissioner, Mr Edward Santow, and his colleagues, Mr John Howell and Ms Sophie Farthing to the next session of these public hearings. May I firstly acknowledge the extraordinarily detailed and helpful submission which your office and you have prepared, Mr Santow; thank you for that. Did you have any opening remarks before I had some questions?

MR SANTOW: Yes, if we may. I might just make four relatively brief points in opening. The first is that the Australian Human Rights Commission approaches this issue as it does every issue within our remit, that is, by considering how domestic and international human rights law and principle apply in this context. Taking that as the starting point, we would start by making, I think, an important acknowledgement, which is that the dichotomy that is sometimes posited between liberty and security, in our view, is a false one. That there are a number of very important human rights issues at play.

Some of them suggest very strongly that it is important to have clear, strong legislative and other protections against terrorism. Similarly, it's important that those protections be carefully calibrated to meet that terrorism threat because, of course, there's always the very strong risk that uncalibrated measures will impinge too greatly on fundamental human rights affairs.

The means to ensure that calibration can occur most effectively is well-known to international human rights lawyers, that is, the sorts of principles you'd be well aware of: that the counterterrorism measures must be prescribed by law, they must meet the necessity requirement. They must also meet the proportionality requirement.

The second point I want to make is that there is clearly an important interrelationship and, indeed, interdependency between the quite extensive array of counterterrorism laws that we have in Australia. As former Chief Justice Gleeson has made this point in a different context, it is dangerous and misleading to look at a multifaceted problem only from one facet. While it's quite proper for you to be undertaking this analysis of certain elements of the counterterrorism regime, it is really important in undertaking that limited analysis also to take into account the other elements of the counterterrorism regime because they bear on how these specific elements operate.

The third point I wanted to make was that the role of the monitor is unique, as I'm sure you well know. We see it as uniquely placed to assess counterterrorism laws and the broader context in which they operate, including because the monitor's access to classified information and other information that is just simply not in the public domain. Organisations like the Australian Human Rights Commission, we see ourselves as hopefully providing a supportive role to you as the acting monitor.

But we do all rely on your ability to obtain that important factual information that perhaps is only in your care. The other observation is perhaps a more practical one, and that is, that frequently when

counterterrorism measures are proposed at first instance, as it were, it's done in a context of claimed urgency. That can make it very difficult to subject those proposed measures to careful consideration.

They're also, by necessity, proposed in a sense in the abstract, whereas your role allows you often to consider the operation of those laws. That is quite different. So that heightens the importance of the role you play, not intending to put any pressure on you. Then turning to our submission, a very brief summary of our position. In relation to stop, search and seize powers, on their face we see that there's a very real risk that they fail particularly the proportionality test.

It is difficult, for example, to make an argument that they serve a useful and important deterrence function because they are police powers. By contrast, that deterrence argument might well be able to be made in respect of some offences. But a power is in quite a different category. Clearly more information is needed about the use of these powers, which goes to my point before about your role.

In relation to declared areas, we note, as others have, that these are highly unusual provisions that criminalise conduct that is not inherently nefarious or wrongful. The protections that do exist, for example, ministerial or prosecutorial protection, we acknowledge and we make no negative comment about the officer holders. However, those protections don't give full weight to the more stringent requirements of the rule of law because they rely on, I guess, individual discretion.

There are key factual questions that need to be answered regarding the operation of those provisions. We've summarised those at paragraph 44 of our submission. Depending on the answers to those questions, we recommend that the provisions hereafter be repealed or amended to calibrate better with the nature and scope of the terrorism threat they need to address.

Turning to preventative detention orders and control orders, broadly speaking, we recommend these regimes should be amended to comply with international human rights law requirements or, if that proves unachievable, to repeal it.

Finally, in relation to the interrelationship between control orders and the High Risk Terrorist Offenders Act, there are, first, practical problems that I think have been quite properly acknowledged by the Attorney-General's Department late last year, especially perhaps most acutely and unusually, the absence now of an effective tool to assess the risk of terrorist recidivism is deeply concerning to the ability – for this regime to function

effectively and could have a whole series of unintended consequences either by overreach but also perhaps by under-reach because a court might well feel that in the absence of reliable evidentiary material it is unable to make an order in respect of someone who genuinely does pose a risk to national security.

Our views is that having two separate regimes, that is, the control order regime and the regime under the High Risk Terrorist Offenders Act, is inefficient and, indeed, potentially dangerous for similar reasons, because it may well cause delays that could, in the context of a continuing terrorist threat, may give rise to terrorist activity but also from a human rights perspective it could easily involve an order being made that is more restrictive and therefore impinges more on the human rights of the person that is the subject of the order than is absolutely necessary.

We recommend that a court be empowered to adopt essentially the least restrictive means necessary to address a properly assessed risk of terrorist activity.

DR RENWICK: Mr Santow, just before I ask a couple of questions about your submission, can I first acknowledge that under section 8 of my Act I must have regard to Australia's human rights obligations, among other matters, and naturally I will do so. Secondly, I may and have and I intend to continue to consult with you and your colleagues. Hence, my gratitude for such a detailed submission.

Can I perhaps deal with the recommendations in reverse order and start with the control orders? Perhaps if you look at recommendations 8 and 9 on pages 5 and 6 of your submission. I don't think you were here for the first session, but the proposition I put to the agencies was this: there are really two distinct cohorts of potential controlees, conceptually. There are some 20 people who've been convicted of terrorist offences by a jury and they form the high risk terrorist offenders cohort.

Then there is, if I can call it, the remnant cohort of people who, at least for the time being, haven't been charged with any such offences and perhaps have no criminal record at all. If you just deal with the first group first, there is great force – and I think the agencies acknowledge this – in a single court being able to continue detention, release unconditionally or release on conditions using the serious sex offender legislation model which is constitutionally valid, so the High Court tells us in cases like Fardon and, of course, we have a body of jurisprudence which has been built up in that regard.

Speaking at a higher level of generality, I think that is consistent with

what you're saying, isn't it, in relation to that cohort?

MR SANTOW: In principle, yes. The practical difficulties of this arise at some point, particularly in the absence of being able to have a mechanism that reliably predicts future terrorist behaviour.

DR RENWICK: I take your point that it's both inefficient and, indeed, I would add is a burden on a respondent who's got to perhaps fight on two fronts, both in the Federal Court for control orders and in a State or Territory Supreme Court for the HRTO. Putting it all in one court would be an advantage. Dealing with your last point though, that is a criticism which was put at a constitutional level inFardon, it has been put in other cases in relation to serious sex offenders.

Again, just speaking conceptually, is there any reason why, if you use the serious sex offenders' model, you're not in an equally good position, difficult as it may be if you're a Supreme Court judge, in trying to predict future behaviour about terrorist activities as you would be trying to predict how a serious sex offender might behave in future?

MR SANTOW: Again, in theory, that's correct, but the problem then – I don't know if there's been a change in the last couple of months. But the acknowledgment, as I understand it, that the Attorney-General's Department made as recently as December was that, unlike in the sex offences context, there literally does not exist a tool that reliably predicts risk of terrorist recidivism.

If such a tool existed, then perhaps there would be a different calculus made. But the kind of theoretical agreement that I can make I feel has to be caveated by that practical problem that in the absence of a reliable mechanism we run the risk of a whole series of unintended consequences.

DR RENWICK: That's, again, at a sort of high level of generality. That's the cohort, that's the HRTO cohort. But what I take from what you said is that there is support from your agency of having a single court being able to deal with the full range of possibilities. Of course, the rules of evidence apply and you've got a state or territory judiciary which has dealt with analogous, broadly analogous, type legislation.

MR SANTOW: Yes, that's right. I mean, the starting point for us is that any of those courts that is granted jurisdiction should be empowered to make the least restrictive order necessary in order to address any genuine threat of terrorism.

DR RENWICK: But just to underpin the point, the present state Supreme

Court judge is expressly exhorted to consider that. Control orders are given as an example. That judge can't do that. The judge would have to adjourn those proceedings. Proceedings would have to come on in a federal court and so on. I think you're agreeing with me on that's how undesirable that is.

MR SANTOW: I am, yes.

DR RENWICK: That's that cohort. I take it in relation to the remnant cohort or what remains, in other words, as people who have never been convicted of a terrorist offence, you take a very different approach, namely that – is this right – step 1 is that those laws should be allowed to lapse when they come up for renewal at the end of next year. But if that's not the course taken by the government, and noting – just pausing there, of course, quite significant changes were made in recent years to allow the use of special advocates and the like and we have not yet had an opportunity to see how that might work.

Is that right? Just to understand your position, is step 1 should be allowed to lapse. Step 2 if, however, it remains in place, what then?

MR SANTOW: I think in relation to control orders more generally, the observation that we've made is that in the last several years a number of legislative measures have been introduced that help at that relatively lower level to address the threat of terrorism. There's a vast array now of inchoate type offence provisions. There are also additional powers given to the police and like bodies, including B-party warrants.

The consideration of the necessity of control orders per se should be considered in that context. With, admittedly, the limited information we have before us, our view is that there's a strong argument that control orders may no longer be necessary, taking into account the other provisions that exist. Our argument in the alternative is that the control order regime itself could be amended, again taking into account the other provisions that exist, taking into account also information that is largely not within our grasp, namely the way in which details – the control order regime is currently being applied.

So that the control order regime itself has the capacity to be less restrictive while still serving the counterterrorism objective.

DR RENWICK: Thank you. Moving then to the stop, search and seize powers – and that's I think your recommendations 1 and 2 – I'd be interested in your submission on this. The strength of the monitor's office, it seems to me, is being able to look in great detail how a law has

been used. Mr Walker, for example, indicates that control orders – went in great detail through the files and found out why they were used or not used and so on. How should I approach it, in your view, when you're dealing say with the 3UEA exceptional powers – the agencies would call them true emergency powers – where they haven't yet had an occasion to use them and because state police forces are likely to be the first responders might never?

But if the time comes it is a genuine emergency, how should I approach looking at the necessity for keeping laws like that?

MR SANTOW: I realise that it's not an easy task. Clearly when a particular law has been applied, then consideration can be made of that application. The Australian Law Reform Commission in 2005 undertook an inquiry into a number of relatively new counterterrorism laws, focussing on sedition. Those laws in their new form or, indeed, in their older form had only been applied very sparingly over many decades in Australia.

My understanding, having worked at the ALRC at the time, was that the ALRC undertook consultation, sometimes confidential consultation, with the various police and like bodies to ask quite nuanced questions about the considerations they take into account in determining which powers to rely on and, indeed, which powers they choose not to rely on, similarly, which offence provisions to – in terms of prosecuting authorities, which offence provisions to go with and which not to go with.

That, I think, elicited some very, very useful information about both powers and offences as to how necessary and useful they were again, also how calibrated they were to a particular threat. Obviously the only way that you can get information is through that kind of qualitative interview process because it's really about absence of information when a particular power has been only rarely, if ever, exercised.

DR RENWICK: May I then turn to the declared areas - - -

MR SANTOW: Sorry, there was one other point that I neglected to mention in that respect. I think it would be also interesting to solicit the views of groups within the community who may feel particularly at risk of the application of these provisions to ask them, I guess, whether this is having any positive/negative effect on their behaviour, particularly any kind of chilling effect in terms of the enjoyment of their rights to freedom of association and so on.

DR RENWICK: Thank you very much. May I then turn, finally, to

declared areas provisions? I think you came in just at the end of the previous session. If I can try and summarise what Rodger Shanahan and Mr Lawler said about the two declared areas. Again, all I have to work on is the fact that there's these areas in Raqqa and Mosul and their evidence to me in the last little while was, "Look, these are unique areas in the world. They're wholly controlled by ISIL." If I can just summarise it for a minute or two.

It's extremely hard to get into these areas safely, if at all, and if you remain there you will not remain undetected by ISIL. Logically, there are two groups of people who go. We're talking about Australians who go to these declared areas. There are either people who go overtly to help ISIL; that's one category. Or there are people who go for an innocent purpose; family reunion, business and the like. When I say "innocent", of course, some of those are prescribed, some of those are not.

What they say is that firstly – this is an important point – of course, some adults take the children of whom they're guardians or parents to these very dangerous places. One purpose of these laws is to protect the children. That's one thing I'd be interested in your views on. Another is that because they will be discovered by ISIL, one way or another, they will be put to ISIL's purpose. For example, they will be kidnapped and ransomed.

They will be exhorted to do something which will help ISIL or otherwise – and this particularly deals with people who might want to go for a business purpose to Raqqa or Mosul – they will be levied or taxed or in some way will support ISIL. Their bottom line is who knows what other declared areas might be declared in the future. But I think in summary they said the reasons given for people wanting to go for business purposes or to visit a friend and the like are either theoretical or misguided.

In relation to the family reunion example, they said because it was so dangerous their answer would be well, the relative could be invited to meet them outside the declared area. That might be a different situation. But would you like to say something about the rights of children in this regard and how that should be weighed up, and secondly, if I can call it, the economic business angle, which a number of people who've put in submissions have said there should be effectively an exception allowing you to go there for a legitimate business purpose. Just assuming for a minute I accept that evidence factually from Dr Shanahan that that's how it actually works.

MR SANTOW: In relation to the first of those issues, the children's rights issue, we hadn't – the three of us – considered that issue properly

and we need to take that on notice. If we have a body of work that we can draw on, then, of course, we'll get back to you about that.

DR RENWICK: Thank you.

MR SANTOW: In relation to the second question, I guess a starting point, I hope, is a pragmatic and practical one. We don't want to be in any sense naïve about the dangers that apply in relation to the sorts of places that you're talking about. I think part of that practical and pragmatic approach means that we need also to realise that, as in many parts of the world, you can have an area of enormous danger, located very closely to an area of much less danger.

Fundamentally, for us, as our submission makes clear, the key criterion should be about the activity that the relevant person is proposing to undertake or is undertaking in the declared area. In other words, a regime that is premised on there existing a relatively small and finite set of legitimate purposes for someone to be able to travel to a particular place is more likely to fail the proportionality test.

Far better if this provision were to be retained – and you'll note that that's kind of our position in the alternative – far better that the offence provision be directed more specifically to someone undertaking, I guess, nefarious activity rather than having some kind of evidential burden that they're actually undertaking a legitimate activity.

To summarise that more briefly, if the provision is to be retained we would want it to ideally be focused on whether or not the accused is proposing to undertake nefarious activity.

DR RENWICK: I suppose I would simply add as a footnote that I'm aware, of course, and I think a number of submissions point out, that there are no comparable countries which have such a provision.

MR SANTOW: Yes.

DR RENWICK: Notably, the United Kingdom, which is not shy in enacting provisions, doesn't regard this as a necessary matter. No doubt you would say that's something I would throw into the mix when considering whether this is a proportionate response.

MR SANTOW: Absolutely. That's a point that we've made in our submission. There is clearly some discussion about this at the international level. I had the good fortune of speaking recently with Dr Sandra Krähenmann at the Geneva Academy who's a world expert on

this issue and I understand that she and some of her colleagues are undertaking analysis of how various jurisdictions are looking at this issue.

It might be useful to look at the publications they're putting out and, indeed, perhaps speaking with them informally about their most recent analysis.

DR RENWICK: My final observation for any comments you wish to make is this: the agencies this morning and the experts also all agreed that it's literally undiplomatic to make a declaration. That is a safeguard against any suggestion that the Foreign Minister may unnecessarily declare these areas. In other words, it's a very pointed thing to say to another country – now, Syria, it's pointed out, might be in a different category given Australia's views about Mr al-Assad.

But in relation to Iraq, it's a very different matter. We support them in various ways and it's not something we do lightly to make a declaration that, in effect, part of their country has been taken over by ISIL and shouldn't safely be gone to by any Australians. In principle, would you agree that that is a practical break on the Foreign Minister unnecessarily declaring – it may not be sufficient, but it's a break, isn't it?

MR SANTOW: Quite probably, in the same way that I have nothing negative to say about the current holder of the Foreign Minister position, I acknowledge in a practical way that may be true. The problem, I guess, is one that I adverted to in a different context a little bit earlier in terms of having prosecutorial discretion or ministerial discretion be a safeguard. It may well be a practical safeguard, but it's not one that the rule of law ascribes an enormous amount of weight to because it is just that; it is a discretion as distinct from a firm legal protection.

We would say it's far better to make sure that the legal protections are precise and appropriately weighted and then be very glad that, in addition to having those legal protections, we live in a country that has, on the whole, highly competent people of high integrity who occupy the relevant offices. That provides an additional protection.

DR RENWICK: Just one final thing, if I can just go briefly back to control orders. Dr McGarrity and her colleagues in their submission suggested that with control orders we should go back to the original situation where there's a much more limited basis for obtaining control orders. There's now, as you know, in more recent times additional grounds. Is that something you dealt with in your submissions or wish to comment on?

MR SANTOW: We haven't looked at that question specifically. I think I would just repeat our general point about if a control order regime was to be obtained, it would be necessary for government to demonstrate that there was a compelling need for it and that the existence of the regime with respect to each category of conduct that applies to is necessary and proportionate to the aim of the regime.

DR RENWICK: Thank you. If there's nothing further, may I, on my own behalf and on behalf of my office, thank you all very, very much, firstly, again, for your very detailed and helpful submission, and secondly, for taking the time to appear here today. I hope you will be regular attendees at such events in the future. Thank you.

MR SANTOW: Thank you and we wish you well.

DR RENWICK: We will resume again at 2.00.

ADJOURNED [1.02 pm]

RESUMED [1.54 pm]

DR RENWICK: Ladies and gentlemen, welcome to the final session of today's public hearings. May I particularly welcome representatives of the Law Council of Australia: Tim Game of Senior Counsel, Co-Chair of the National Criminal Law Committee of the Law Council of Australia and of the Sydney Bar; Dr David Neal of Senior Counsel, a member of same committee of the Melbourne Bar; and Dr Natasha Molt, Senior Legal Adviser.

May I place on record my gratitude for the very detailed submission from the Law Council and, of course, Dr Neal, your additional memorandum relating to your experience acting for Mr Causevic in control order confirmation proceedings. It may be convenient just at the outset for me to indicate a couple of the matters which have emerged this morning and then invite you to go to particular matters.

In relation to declared areas, the evidence from Dr Rodger Shanahan, which is relevant for me in considering the likelihood that some of the exceptions or exemptions might be used in relation to the existing declared areas, was effectively this. And he noted, of course, it may be different for different declared areas in the future.

That first it's very hard to get to either place safely or at all and when you get there it's impossible to remain undetected by ISIL. Logically, people either go there to help ISIL or they go for an innocent purpose but inevitably, in his evidence, they will be caught up with ISIL in some way or another. They will be captured and ransomed. They will be levied by some tax or other to support ISIL if they try and conduct businesses or they will somehow support ISIL.

He made the additional point about the risk to children of adults travelling to the area with young children. That was the gravamen of his evidence. Then the other general matter I think I should just note for your benefit is this: it has emerged from a number of submissions and from discussion this morning that when dealing with control orders logically there are two cohorts. There are the 20 or so people who have been convicted of terrorist offences who are the subject or who are capable of being the subject of high risk terrorist offenders' applications.

In relation to those, there seemed to be a measure of support for the idea that a State or Territory Supreme Court using the serious sex offender legislation should be able to order continued detention, permit release unconditionally or have some sort of extended supervision order. The details, of course, of that are another matter. But that's one cohort but a distinct cohort is what remains and for that amendment that we, of course, are dealing with people who haven't been convicted and perhaps not even charged with a terrorism offence.

In relation to that group, the additional point was made that there had been some amendments to the control order provisions since Mr Walker and Mr Gyles looked at it. That is, notably, the special advocate concept. I think there is some force in the idea that they are logically different cohorts and they may, therefore, attract different legislative regimes, assuming the control order concept is to continue when the expiry comes around next year.

With those general matters in mind, Dr Neal, would you care to expand on, with those matters in mind, what you said in your memorandum about control orders and the difficulties you see with them on either model, if I can put it that the remnant model as much as the one you used in Causevic, the other model would be the serious sex offender model where a single court can deal with all remedies.

DR NEAL: Yes. Perhaps going to the post-sentence cohort, if I can use that as the category, the real difficulty now, I think, is that there are a range of different legislative provisions that apply to that phase of the process. They're different, they have different courts which can invoke

them and the criteria are different. So that there does seem to us to be a need to rationalise that in firstly, the way that you've suggested, the idea that the State Supreme Courts, in addition to the Federal Court, has the power to issue these orders.

That seems to be a rational 'one-stop' type of solution to us and that's what we've said in the submission. We've said that in the context of control orders, but it applies more generally. In relation to control orders, what we've said is that we thought that the level of seriousness of the control order warranted a superior court determination and that's why we said it should be the Federal Court rather than the Federal Magistrates Court that orders them.

There was a point raised by the Attorney-General's Department then about the ability to deal with cases quickly and geographically. We would say that allowing State Supreme Courts to make those orders deals with that problem at least as well, if not better. Certainly during the *Causevic* case we were very conscious of the fact that the Federal Magistrates Court has extraordinarily heavy caseloads.

Now, we were not impaired by that in that case, that they made considerable attempts to make sure they could accommodate us as readily as possible. But it would seem to us that having the State Supreme Courts and the Federal Court should deal with those matters because of their seriousness and then any practical difficulties in terms of access would be overcome in that way as well.

DR RENWICK: Pausing there. Dealing with the, as you call it, post-sentence cohort, is there any reason why I shouldn't recommend that the serious sex offender regime apply? For example, as you may know, a judge has the discretion under that regime, after quite a lengthy hearing and with all the difficulties of predicting future conduct which you've referred, to grant an extended supervision order of up to three years as opposed to one year under the control orders.

Just dealing with that cohort for a minute, is there some reason of principle why, for example, that shouldn't be an available option for a judge?

DR NEAL: Two things to say about the extension of the power in relation to control orders. We would certainly strongly oppose the extension of control orders to three years in relation to the pre-charge situation. I should explain there's a basis for that in the *Causevic* example. In the affidavits that were in *Causevic* they were saying in affidavits sworn around about July of last year that if the order were not imposed that the

test for unacceptable risk that he would commit a terrorist act would take place.

Now, that was notwithstanding that he'd been in goal for five months, he'd been charged with offences, he'd been released and he'd been on the control order for then nearly eight months, nine months, and there was no blemish in relation to any of that. The reports from the psychologist and the imam whom he was required to see under the order were all positive.

We had, in fact, tried to settle the case in relation to getting the tracking device removed, but they said no and if that were done that would expose the risk.

DR RENWICK: Just interrupting you, just noting for the transcript, I think the judgment says that a very large complaint he had about the tracking device was that he was a builder's labourer and it was observable during his daily work and a source of considerable practical embarrassment for him.

DR NEAL: It was crippling for him, really. The psychologist made the same point. I think that, again, in a lot of the discussions which the Law Council and I have been involved in up until the control order regime, we were talking about abstract situations where we didn't have much experience of what this looked like with a lived experience of someone. But one of the arguments that was put to the court about the device was that, really, the community was going to be a lot better off if this young man got reintegrated into society and into work and that the counselling could proceed without the inhibitions that the tracking device had on him.

Effectively, he became fairly reclusive and was sitting around at home with not much to do. That seemed to us to be a very bad thing and the court accepted that it was. The point I was going to make though in relation to the position maintained by the AFP up until that point was that he remained a serious risk and they would not settle the case.

In the end, that was removed. The order remained in place, though you will have seen in the memorandum I think the basis for that could have been challenged, but he had enough of it. It then expired automatically in September that same year, two or three months later.

DR RENWICK: And was not renewed.

DR NEAL: There was no application to renew it. If you allow a sort of default provision of three years that's going to have a bad net-widening effect and one might expect that the responsibility for not maintaining the

order might be something that would be embarrassing but the traditional common law prejudices in favour of the liberty of the individual really mean that these extraordinary measures are tightly surrounded by controls.

If there's one year available and it's renewable, then there's a control but in an appropriate circumstance the AFP or whoever else wants to can apply to extend it. We'd be strongly opposed to that.

DR RENWICK: For both cohorts? -

DR NEAL: I was just coming to that one. I hadn't thought of it in the other context. But really I think our response in relation to the other context is there needs to be a rationalisation of the suite of orders, that having this range of things with different tests and so on, that doesn't seem to make sense. It might be that if you are thinking of it in the context of a continuing detention order you would say, "Well, look, some post-sentence extension other than detention should be considered through a regime of some sort."

You've given the example of sex offenders. There are the extended supervision orders and there's control orders. It seems to us that there should be some single system which considered each of those things and comes up with one system that deals with each option.

DR RENWICK: When you talk about one system, do you mean a single court or do you mean more than that?

DR NEAL: A rationalisation of the legislation to deal with extension of sentences, if I can put it in that broad context, which might envisage (a) detention, (b) some forms of supervision and then what else is really needed. I think there are two things there, that need to be considered. (1) are you going to engage in post-sentence detention? That legislation, with the criticisms you've mentioned, is in place.

Then the other consideration is well, what do you do with people who need some form of supervision but not detention? That extends, indeed, to the state parole systems, so that there are three pieces of legislation potentially available; control order, the continuing detention order, the extended supervision order and parole. Actually, it's four, I can't count. That's why I became a lawyer.

That's, to use a very technical legal term, a bit 'higgledy-piggledy' I think you'd have to say. That, plus the fact that there are different tests and then there are different options, that whole area of policy needs to be rationalised into a suite of policies exercisable by the Federal Court or the

State Supreme Courts.

MR GAME: Just very briefly, can I just make a couple of comments about that? In a practical sense, with the introduction of a new High Risk Terrorist Offenders Continuing Detention Orders the focus of the whole thing was shifted to those orders, including Control Orders and supervision orders, so that, that will become the critical curial context. That's happened in State courts, not Federal courts. You need to have the whole thing happening in the one court, whether it be federal or state.

DR RENWICK: Just pausing there though, Mr Game. I mean, the state courts are the specialist criminal courts in the country and when you're dealing with predictions of future conduct in the criminal context it's the state courts with experience. Do I take it from that..

MR GAME: Yes, I'm quite happy with the state courts. There's no constitutional problem obviously with that. But the constitutional context is possibly a little bit different because*Fardon*, which is kind of the template, is kind of *Kable* derived and this is more directly federal. So there needs to be a tighter nexus with the crime that was committed and we think, whether for constitutional reasons or otherwise, an unacceptable risk is potentially stating the thing a little bit too low.

The reason is this. I mean, you ask somebody what an 'unacceptable risk' is and they're not a lawyer they might say almost anything is an unacceptable risk and they don't quite necessarily appreciate the difficult balancing exercise a court has got to do. In the context of people who've committed terrorist offences that is a big ticket item, that's a big issue. So those are the comments we make about that.

We do think that if one is going to do this, then there need to be alternative and lesser – as Dr Neal has said, there needs to be the prospect of extended supervision orders and potentially things of the kind of control orders but bearing in mind that the legal test for a Control Order is different, again, and has been extended since *Thomas vMowbray*. So that's changed a little bit as well so those things, they're not all uniform and they would need to be made to work.

DR RENWICK: Which is the standard that you would propound of the available ones?

MR GAME: In terms of the standard of proof, what we would propose is this. Did you mean to say the standard or the criteria?

DR RENWICK: The criterion is more accurate.

MR GAME: It's hard for me to answer because currently the criteria are all different and we kind of worked out different answers for different bits of it. I'll come back to this question about the standard because I think - - -

DR RENWICK: The standard of proof?

MR GAME: Standard of proof. I can mention that now so I don't forget. There is a test of a high degree of satisfaction in one of the tests, which is not either *Briginshaw* or *'beyond a reasonable doubt'*, but a high degree of satisfaction of the necessity for the making of the order. That would seem to be a reasonable idea to flow through all of these provisions. It's actually saying, "Right, you really need to do this. I'm not going to do anything more than is absolutely necessary in the circumstances."

DR RENWICK: But it's not the criminal test.

MR GAME: Well, we've proposed the criminal test, but I think we're pushing against a big wave in that respect. I say this is our fall-back position, but it is a kind of sensible and uniform way of dealing with it. As for the actual test to be applied of things that may – we see, for example, the use of the word "*something could happen*" in the legislation. The word "*likely*" is a word – and these are all just words – that's used in various senses. But likely in the sense of real and not remote chance of things occurring is actually not a bad kind of underlying idea of prospect of things occurring.

It's not more probable than not, it's just there's a real – this is a real kind of – because if you just say "could" people just take that to mean possibly. Then you're kind of back in dubious territory of the words aren't really helping you at that point. Do you want to comment further on that?

DR NEAL: The only other suggestion that we've taken up was the one that's in section 105A.7 of the High Risk Terrorist Offenders legislation. It's the provision that comes into effect in July this year. So it's the high risk terrorist offenders' legislation. The test proposed there is – and this is based on the sex offender type legislation in the states –

> *The court is satisfied to a high degree of probability on the basis of permissible evidence that the offender poses an unacceptable risk.*

That's the sort of test that we would say at least lifts the present bar of evidence for Control Orders – certainly for control orders we'd certainly

say that should be done. But it is important that there be a test that's uniform through these various considerations so that the court is not faced with a nightmarish situation of saying, "Well, for the purposes of this type of order, we might make it this basis, but on the other hand, if we think" – there's a different one and so forth.

DR RENWICK: Looked at its most simple. If you have that as the standard, by reference to that standard, the court is saying you remain incarcerated, you're released unconditionally or you're released on conditions. You might call the conditions different things. They might be parole conditions or extended supervision orders or control orders. But in terms of restrictions on liberty, you can list them and say, "Here are the potential restrictions and here's the test." That's really what you're saying.

DR NEAL: Yes. When I said earlier in a general way this needs to be rationalised, that is obviously central, questioning that sort of rationalisation. Then the suite of orders – when we ask are the conditions for a Control Order different from the conditions of an Extended Supervision Order, we say conceptually it's the same sort of issue. What are the issues that might be needed in order to meet a circumstance of continuing detention or of release on certain conditions? But they are the same sort of conditions and the same sorts of limitations.

Then we would say it's possible to do this number of things in relation to these people and no more than that, rather than having different things flowing from four different types of legislation.

DR RENWICK: While we're dealing with that test and the words "*admissible evidence*", you will have seen the AFP has suggested, in relation to Control Orders, that it hearsay evidence be permitted. It'd effectively be the interlocutory standard throughout. Is there a constitutional problem lurking there, apart from any policy issues?

MR GAME: I think so, because– this is an exercise of Federal judicial power and it has to satisfy the criteria for such an exercise. One is thinking of *Nicholas* and that line of territory. You would actually end up with a different kind of a hearing because you'd have somebody say that somebody else says something and we're not going to tell you who that somebody else is. So you've got testing problems and then you've got the court being brought in.

That's where the exercise of Federal judicial power comes in because you've got the court being asked to rule about a person's future detention on the basis of a report from some person of what some other person says.

For an interim control order it's okay and necessity may require it, but not otherwise, we would say. Bearing in mind also that it's a very serious issue, whether it be detention or control, it's a very serious issue.

I would have thought unlikely to pass muster when you think of *Permanent Trustee v Bass* and all that whole kind of world of activity, which would not be brought in by analogy, it will be brought in by direct application in these circumstances. Apart from that, anyway, I think there's something undesirable about the nature of the process that would fall out if you went down that track, which I think it's really important to sort of hang onto.

DR RENWICK: Now there's going to be *special advocates*, then, there isn't a problem about producing the source, perhaps in closed hearing, because the special advocate will be able to see them and hear them and put questions to them.

MR GAME: It's an uncomfortable solution but it is a solution that can be made to work. It's not going to satisfy necessarily the individuals concerned. But if you look at the thing in its total, then it's something that can be sort of lived with.

DR RENWICK: Then just to complete the post-sentence cohort, if I can call it that again, do you have anything you want to say about the monitoring regime, the really quite extensive powers which are available to monitor now? I think the answer which would be – or the proposition which would be put to you is that because of the asymmetric effects of a terrorist act, in other words, an act by an individual, for example, can affect many people – and that's why terrorist acts are dealt with separately – that justifies the more serious monitoring powers for this cohort. We'll come in a minute to the people who haven't been convicted of terrorist offences.

DR NEAL: Yes. I'm puzzled a bit about this in light of the practical experience, though this is the pre-trial and no sentence. As you know, Causevic was charged but the charges were dropped because the DPP thought there wasn't sufficient evidence. The conditions for his control order are attached to the judgment. To my observation, they were already very extensive. He was only allowed to use a certain phone. He was only allowed to use a certain computer. He had to live at home.

He had curfew between 11.00 and some other period. And he's wearing a tracking device. I'd imagine that there was a significant degree of monitoring already going on about him by the police through this period. They'd already been doing physical surveillance. They now had the

tracking device. There were counselling conditions. So that the extent of the surveillance on him directly – I think really what the claim for these monitoring devices must be about – but I'm not sure that this is the case – must be about something that is monitoring communications of third parties who deal with him.

That is, to look through the phones or the records of the place of schooling or the workplace or the mosque, monitoring other friends of his. I wonder where this all stops. I don't know that in particular now that you're intruding on the privacy of third parties that that's an additional and significant and a serious step. But also it's going to make, for someone like him or for someone who's coming out of the system – the people who will want to deal with someone in that situation are going to be markedly reduced.

That was the major problem for Causevic in finding work. He wanted to work in construction and the monitoring device itself – he said, "Look, I just think that I can't go to an employer and ask for a job without telling them about this. The automatic answer is going to be no." Similarly, the person in the post-release situation, I mean, how do you integrate that person back into the community at that stage if the people who are likely to be his cohort or his employer or his schooling or his church group, whatever it is, themselves knowing that they are liable to pulled into this web?

The reason that we're trying to reintegrate them – and I think that purpose can't be forgotten – is that we're hoping that this person has now reached a point where (a) they've seen the error of their ways, (b) there's already an extensive surveillance suite of mechanisms available, but (d) we're going to do things which make him reintegrating that much more difficult.

The other thing with Causevic too is that because he knew he was being watched he felt anxious about that. He felt anxious. For instance, he was not supposed to go near the RSL at Dandenong or the Shine of Remembrance in Melbourne. He was nervous he was only a new driver – if he got into the prohibited zone that he would breach the condition and that he would be going back (to goal).

I think there is certainly an important balance that needs to be drawn between the need of the community to ensure that people who are breaching conditions – may have breached conditions, if there's a reasonable suspicion of the breach of a condition, that that can be investigated. But the community's needs are not going to be well served if the conditions are made such that reintegration becomes far more difficult, if not, impossible.

That's one of these delicate balancing exercises. I would have said even in the post-sentence situation and from my observation of what happened in relation to the monitoring of Causevic that going those extra steps without, for instance, a suspicion at least that there is a breach of a condition that would be going too far.

MR GAME: One thing, I noticed, and this is not right on track, but coming back to the nature of the hearing, I noticed in Dr Neal's submission an issue about *Jones v Dunkel*. It's not going to apply – it's not going to be kind of dragged out in the continuing detention thing because that kind of principle won't apply at all. But there are problems with that kind of processing respective control orders as well.

There's a sort of a reverse *McMahon v Gould* problem, here is if you have a civil proceeding after you haven't done a criminal proceeding and then you're going to require the person to say something, then there's a problem if you're going to do something adverse against them if they don't say anything when they're going to be exposing themselves to a liability which currently is not being pursued.

Again, that kind of points up the need for a single unified system in respect of all of these things and one set of principles, that runs through them. The example, that Dr Neal had of the notice to admit facts and then bad things were going to happen if you didn't respond to them in a particular period, that is quite problematic when you're talking about really – you can call those civil proceedings, but they're quasi-criminal in nature and that's really how they should be treated.

DR RENWICK: Just while we're on the test, I think, Mr Game, you said that unacceptable risk might be a problem as a test. But do I understand though that the Law Council's view is that the compendious test in 105A.7(1)(b), if it applied to the whole process – release, don't release, release conditionally – with that compendious expression, which includes unacceptable risk, it is a workable definition?

MR GAME: That goes a long way, but we do still worry about the words "*unacceptable risk*" when, as I say, it doesn't quite trap the idea of, shall I say, the significant prospect or chance that something may happen. If there's a tiny risk – this is the whole problem. So we do still see a problem. By setting out criteria you do go a long way to deal with the problem, but you still have, I think, probably if you asked many people if any risk was unacceptable they'd probably say it was. And lawyers will respond in a different way to that problem.

DR RENWICK: Indeed. I mean, it's not how the serious sex offenders' legislation works in practice.

MR GAME: That's right.

DR RENWICK: So judges are cautious about it.

MR GAME: I think you've really got to build up principles around it that make it – whatever the compendious word is

DR RENWICK: Perhaps I can just take you forward to 105A.8. This, in a sense, unpicks the matters in (1)(b).

MR GAME: I'm a more conservative fellow than Dr Neal and I think he probably might – what do you think?

DR NEAL: The Law Council's position in relation to the whole of that legislation was to oppose it on the basis of the problems, in particular in terrorism offences around the notion of risk about the proposal that there would be some form of expertise to design testing instruments which would be able to assist in the determination of risk and have experts who could do it.

We said in the submissions in relation to that that the psychologists who are working in the area do not claim presently to have a fully satisfactory test for these things, testing instrument, let alone one that's been validated in the way that they would normally do by testing their test against empirical circumstances over a number of years.

Obviously the Parliament didn't accept that submission and it's gone ahead in any event. Our position really in relation to this is we have the same objections and there are some of those that my learned friend, Mr Game, has already said to you. But pragmatically, we would be saying, "Look, in the event that our submission" – our primary submission here is the control order shouldn't be there and that the preparatory offences are now sufficiently wide to deal with the necessary problems.

In the event that that's not accepted, then we would say the following things. In relation to this particular issue that we're dealing with now, in the event that the, can I call it, the '*one-stop shop'* approach is developed, then the legislation needs to be rationalised and we need to come up with a test that suits the range of circumstances. If it's not beyond reasonable doubt, it shouldn't be on balance of probabilities.

So that in a sense the continuing detention order test is getting somewhere

towards medium. In particular, high degree of probability and on admissible evidence. It's then the following words about risk which I think the point where we haven't got a resolved position on.

MR GAME: We see the difficulty of trying to articulate it. Having regard to what Dr Neal was saying just then and the cascading thing, the way it would work is if you had a cascading set of possibilities, then you would apply this test so that you would go for the most extreme if either that was the only way in which you could answer these criteria and then you would go to the next one if that was the only way in which you could – and that would kind of wrap the thing up to a degree.

I'm sorry for my comment a moment ago, but I just – we don't like the test '*unacceptable risk*'. But coming up with a different formulation is no easy matter.

DR RENWICK: And you can see constitutionally after *Fardon* why this test has been chosen.

MR GAME: Yes. We would say build around it as many criteria as possible, but also build around it in the propositions that you'll only – what I just said to you, that you'll only go to the most extreme if no other possibility is available. You'd have to say, "Can I achieve this by making a very restrictive supervision order or can I achieve this by" – and if the answer is yes, then you don't do the more extreme one is the way in which we would put it.

DR RENWICK: Proposition 1 is repeal. Proposition 2, I think, is that if that's not accepted, you're more comfortable with the post-sentence regime. You're very uncomfortable with the situation which faced Mr Causevic.

DR NEAL: Yes.

DR RENWICK: But if, again, Parliament chooses to continue, then it's as set out in your submission.

MR GAME: There's one point I'll just mention again about legal representation. These cases are really hard cases and they require sending people who are experienced advocates to do them. In the one that Dr Neal did, the Solicitor-General for the Commonwealth turned up with a team.

DR RENWICK: He is now the Solicitor-General.

MR GAME: But he didn't turn up as the Solicitor-General – but you

can't have people not getting paid turning up on the other side doing the thing on the smell of an oily rag, having to respond to serious legal issues. Once they are in the case they can't walk away from it. The government has got to kind of set up a system – if they're going to do this, they've got to actually set up a system where those who are responding to it are properly represented. That's not just one line saying that they get legal aid.

It's got to be a process whereby there's proper representation. The same goes for the special advocates.

DR RENWICK: Just dealing with the special advocates now that we've come to them, I should put on the record that while I'm flattered that the Law Council thinks I should be selecting the special advocates, I'm a little uncomfortable with that. I would have thought that what should happen – and I'd be grateful for your assistance on this – is that we've already got legal aid bodies around the country. They should set up a panel. It could be a national panel, I suppose, because there aren't going to be many of these cases.

A precondition for getting on the panel is that someone has the requisite security clearances. And I know people don't like that, but that would be step 1. That's the only government involvement though in the selection of the special advocate. Thereafter, it's a matter for Legal Aid to say yes, they're otherwise competent and appropriate. The key thing really is not having a very small list. You've got a sufficient number of people.

Then, of course, it's the controlee, the person who's the subject of the proposed orders, who gets to choose. Then, really, the government's involvement is only setting the standard.

MR GAME: We do agree to that or something similar.

DR RENWICK: What you would say, I think, just following on from your last comment, Mr Game, is, in effect, to have a equality of arms, they should be paid at AGS rates, as the applicants' counsel would.

MR GAME: Yes, well, they need to have, whatever it is, they need to have serious lawyers doing a proper case properly funded.

DR NEAL: As I'd understood it, there was a fund set up within the Attorney-General's Department for funding the defence in these cases. I didn't deal directly, but my instructors did. It was denied on the basis that no novel point of law arose in this case. I was a little surprised about that, but I was also more surprised we didn't get funded it seems that for the

AFP this necessitates someone with the technical purview of Dr Donoghue. I don't know what the basis of that fund is or how it's implemented or what the criteria are.

But then, having dealt with Legal Aid for 12 months in order to finally get some degree of payment, the unusual nature of these cases means that their scales don't match anything in them and, in any event, the amount of work, for instance, to respond to the 50-page notice to admit, which took an enormous amount of time (a) to be sufficiently aware of –across the material to be able to then confer with the client to find out what these responses should be, but with, at the other end of it, if you got that stuff wrong he still had a charge that could have been re-enlivened.

You just simply could not responsibly do that in a way that was anything short of fulsome. I think they didn't allow anything for that work. That's really not acceptable. I did that case because I thought he should be represented and so I put that to one side. But systemically, it can't be expected that people who are depending on making a living out of being lawyers will do these things without being paid at the relevant rates or be expected to give up other cases where they would be paid at a significantly higher rate or to appear against counsel for the other side who are being paid double or more.

DR RENWICK: In the United Kingdom I think the solicitors – there's a special office within the Treasury solicitor who instructs the special advocate. The difficulty here may be there are far fewer cases

DR NEAL: It's a good difficulty to have.

DR RENWICK: And that. But here, if you put *Hicks* and *Thomas* to one side as in a sense a bit anomalous, then you've only got four and it's a relatively small number.

MR GAME: If there were enough you'd have an office of representation. That would be the way to go.

DR RENWICK: I was going to turn, unless there's anything further on control orders, to declared areas. One of the things I'm conscious of is that the provisions we're dealing with in section 119.2 and 119.3 are provisions which don't exist in comparable jurisdictions. The United Kingdom, for example, doesn't have them. Now, I gave you a brief summary of what Dr Shanahan had said earlier.

But before we get to the detail of that, Mr Game, would you, just for the benefit of the transcript, just take us through 119.2? If you're advising on

a declared area prosecution or opposing it, for that matter, what are the difficulties with it?

MR GAME: This provision is – you have something that's called a declared area and if you go in there you commit an offence. Raqqa and Mosul I think are the only two declared areas at the moment. If you raise an evidentiary onus, which means you bring forward material capable of acceptance

DR RENWICK: Just pausing you there, and I'm sorry I keep interrupting. What might happen for an accused who is not going to go into evidence is they might point to something -

MR GAME: That's right, it does not. - - -

DR NEAL: It has to be particularly high.

DR RENWICK: All I was going to say is, for example, they might point to what they've said in a record of interview and that would be enough, wouldn't it?

MR GAME: Yes, "I went to visit my family," is the one that is the standout, presumably, of these. Then the onus shifts to the Crown to – tis a bit like duress, the onus then shifts to the Crown to exclude it beyond – there's a definition of "evidentiary onus". Then these things – what lies behind this is an idea and the idea is that you're going to this place, shall I say, for a nefarious purpose. But they've had difficulty stating what the nefarious purpose is. So what they've done is they've created a list.

That list kind of works as a negative element because once the thing has been identified, then the prosecution has to exclude it, which actually, from a prosecutor's point of view, is no easy task. But there are some other complications in here. The prosecutor would then have to exclude the prospect that it was for a bona fide family visit.

But the word "solely" is in there for a particular reason. The word "solely" is problematic in terms of culpability. But it means – so say if you looked at (f). It sounds like a silly example. But if a journalist went there to do a news report but was also writing a book, then it wouldn't be solely. But the reason that they've said solely is so that you can't escape if you're going to visit your family and engage in nefarious activity.

It's very unsatisfactory to define a crime in this way by reference to a list because there'll be plenty of non-inculpatory things that are not in the list. It's a bit like an exception in relation to prior sexual conduct where you

have a list of exceptions and then as soon as you have one that's outside it, then you can't bring to the trial the other material.

But if I was a prosecutor and somebody brought a case to me about this, I would not be attracted to prosecuting an offence of this kind trying to prove what – notwithstanding the use of the word "solely", it would be establishing what, to me, ultimately would be establishing a negative element. So that I didn't go there to work for Médicins Sans Frontiére would be (a) and so forth.

That's quite hard, actually, which may be part of the reason why there's only been one prosecution. From a civil liberties prospect, it's an unsatisfactory provision. But actually from an enforcement perspective, I wouldn't be attracted to a provision like this. I don't know whether I've explained that.

DR RENWICK: Thank you.

MR GAME: It's much better, if you can, to say I'm going to a declared area for a particular purpose, but that's still tough to prove. But you've identified what the purpose is. Once you've established that purpose, it doesn't matter whether you've got some other purpose or some innocent other purpose or you want to visit your family or do some other thing. That all falls to one side in the determination whether or not you've gone there for that purpose, so to take up arms or to engage in military activity or whatever it is.

If you can define the thing in positive terms, not negative terms, then that's far better and you don't have to worry about any of this other stuff. That becomes, shall I say, the defence case but not an element of the crime. That's the critical difference. If somebody brought me a brief with this stuff about this I'd say this is not an attractive prospect and I'd need some really strong evidence that actually showed that the person went there for a nefarious purpose.

You'd actually be proving the positive in order to establish the negative. That's how the case would fall out. You may have intercepts of the person saying, "I'm going to Raqqa to do such and such." That will be your case. Well, why not make that the thing that you have to establish, which is the nefarious purpose, and try and find a descriptor for it? That's how I would put it.

DR RENWICK: To finish the idea, you would say that's already in 119.

MR GAME: That's already in 119 and if they want to extend it to

something else, then pick up another extended concept. Don't kind of create this really ultimately – I think a provision like that is close to unworkable from an enforcement perspective. Somebody, I understand, gave evidence this morning that there was some connection between people not going and this legislation. Well, that may be so, but we can't really comment on the deterrent aspect of it, but we can comment on what sits inside this provision.

DR RENWICK: Thank you, that's very helpful.

DR NEAL: Could I add to that, Mr Chairman, the theme of the Criminal Code Act – and I was a member of the committee that, in particular, was involved with the elements of criminal responsibility phase of that work – was that the fault elements of criminal offences consonant with the general common law principles is that the key elements of the offence would be stated and proved by the prosecution.

Now, really the key element of this offence in its policy is to punish people who have gone overseas to commit terrorist acts as defined in Part 3 and partly defined in the continuing detention. What are the acts that are comprehended? We would say that the better way, if you're going to have this at all, would be to draft it with "for the purpose of committing a terrorist act" as the key fault element, which, in reality, is what it is aiming to do.

You would then get to the same sort of position as Mr Game just outlined, except it would be part of the prosecution case in the first place rather than effectively reversing the onus of proof on the key element.

DR RENWICK: Do you also say that what you could do in 119.2(3) is you make the list non-exclusive, which means the jury then has a discretion of determining the travel was for a genuine purpose?

DR NEAL: It certainly should be non-exclusive and it may be that some of those guidelines that your colleague pointed out in relation to subsection (8) the continuing detention order perspective – these are some of the criteria that should be taking place may be another way to do it. But as long as you've got lists there's going to be the ones that miss and some hapless soul walks in and says, "Look, I was there, I was walking in the mountain and someone declared this. I came back here and I refused a record of interview because my lawyer told me not to give a record of interview." Then what have I got?

That is a real, in practice, problem. Again, in Causevic that notice to admit was, as I've said in the memorandum, a way of effectively putting

the defence explanations for the allegations that were put against him in a way that minimised the risk that he might get charged with a criminal offence if he misspoke when he gave evidence.

MR GAME: If you look at 119.2, maybe it's unrealistic to think that somebody wouldn't know why they were going to Raqqa or Mosul. But the only conduct that's prohibited with a mental element of intention is enters. Then it's recklessness on (b) and, as I say, the example is not a very good one of those places because you'd think people would be well and truly more than reckless about it.

But then you've got "does not apply" introduces the idea of negative elements and you've now got – and that's when the problem – that's when the whole problem sort of comes to light. You've created a crime with very minimum things and then the life of it sits in this exception. We did want to say a few things about the stop, search and seize powers.

DR RENWICK: Yes, we'll come to those. Just one final thing on declared areas. I don't know whether you had a difficulty with the declaration process by the Foreign Affairs Minister or not particularly. I think some other people did.

MR GAME: I mean, if only two places have been declared, it's obviously not being abused. There are dangers in creating crimes by executive act. That's the reason why there is so much caution about this, because that's what you're do in this situation.

DR RENWICK: Stop, search and seize, one point which has been put to the contrary of what you're putting is that these are truly emergency powers. You'll be pleased to hear though that I think it's true that the agencies all accept your recommendation in 5.2, namely that there should be annual reporting in the event these provisions are ever used, which, of course, they haven't been yet. So you'll be pleased to hear that.

What do I do, Mr Game? Here's one of my dilemmas. Some provisions like control orders have been around for a while, been around since 2005, they've been used. Mr Walker, for example, he was able to look in some detail at what was done and why it was done. But where a power is never used, for example, because there hasn't been the requisite emergency – assume that's the conclusion I come to – what am I to do with that?

Isn't a large step for me to take to say, "Well, I don't think there's ever going to be an emergency like that." This is dealing with the emergency power for a minute, the 3UEA power. "Therefore, it should be repealed,"

or do I say, "Well, providing there's enough safeguards, it is true emergency power and we all hope it's never used but it should remain"?

MR GAME: This is not a direct answer to your question. But if you look at the language – I'm going to make a suggestion about 3UEA and I appreciate it hasn't been used. But if one thinks for a moment of the language of provisions like LEPRA or the common law power of arrest, so you have to tell a person as soon as reasonably practical the reasons for exercise of a power. And there are a whole series of them.

Well, if at a later point it's reasonably practical to tell them, there's no point in just ignoring that completely and saying, "Well, the time has passed and who cares?" What you could do with this provision is this. Normally to get a warrant, normally to search you need to get a warrant and you need to file the information in support of a warrant. If this necessity arose – and the necessity would have to be a necessity – that is to say, it's necessary to exercise the power – this is how I would read it – without the authority in the sense that there is insufficient time to obtain one.

So it wouldn't be a valid exercise of this power if there was sufficient time to obtain a warrant. I'll also bring to mind some other provisions like in the Crime Commission model legislation or NCA which is now the Australian –(Australian Crime & Intelligence Commission) that model legislation has exercise of powers and then it has reporting conditions, not 12 months later, but to the management committee or to a particular committee within a relatively short period of time.

But what I would suggest is that you make the exercise of the power, the legality of the exercise of the power conditional on the, as it were, subsequent compliance with the provisions as to what the basis of the exercise of the power was and why it was necessary to exercise it. This is like a provision that says it's not reasonably practicable to do things before we do that. But then you should feed into it the protections that say yes, but afterwards you do have to do those things.

Then you've actually bookended the thing in a formal way. I don't mean a year later, I mean as soon as reasonable – it would be a similar document to the information in support of a search warrant but it would be retrospective. "This is why we did it and this is why we had to do it at short notice and these are the beliefs we had." That would be – in answer to the question this has never happened, what I'm suggesting to you is quite a standard kind of way of – except it's got a bite at the end of it, which is that the exercise of the power is conditional on this satisfaction.

If you ignore it, you do this and then you ignore it, then the power wasn't illegally exercised at the time but then your failure to do it at that later point of time will render that exercise of power unlawful. It's just a temporal thing, but it can be made to work. That's what I'd say about that one.

DR RENWICK: Just on that, you're using as what are normally the preconditions to the power the examples you've given, but you can't point me to an example where there's this post facto - - -

MR GAME: The LEPRA regime was a little bit unsatisfactory because it says you have to do it as soon as reasonably practicable. There's a case called *McCarthy* which implies that the exercise of the power is not unlawful if you've failed. I'm saying you actually legislate to the contrary. I'm saying it's got to have teeth and that's how you make it have teeth. There's nothing wrong with it because the power wasn't unlawfully exercised at the time if you don't do it later.

But if you don't do it later, then at that later time it will become unlawful. So that's got consequences because it means that the person is not doing anything unlawful when they do it, but they've got to go and do these things afterwards. In respect of prescribed security zones , Commonwealth places a quite – similar ideas apply to prescribed security zones because you can go up and search anybody in a prescribed security zone.

DR RENWICK: E.g. an airport.

MR GAME: Yes, an airport or a post office or part of Jervis Bay. So it's not a whole lot of places, but it is – so it's going to have limited operation. But, again, you would want to build into that the protection of why was the power exercised? Why was it prescribed and why was the power exercised? It's going to be different because this is the Minister making the declaration. But some form of retrospective justification for the exercise – for the declaration.

But you probably also want to have some system that – I mean, there are a range of things that you could do. Are you going to search every single person in the airport? That would be permitted by this. That's the thing that you want to kind of – that's the thing you want to latch on to is why was – I mean, there may be a ready answer to it. But all I'm saying is to make these things work you need to have something that sits at the other end of them that makes the person who did the thing explain why they did the thing, not with any necessary adverse consequences.

But all that means is that when people exercise these powers they're mindful of the fact that at a later time they're going to have to justify it. So that's what I would suggest about those things.

DR RENWICK: Mr Game, do I take it that you've built on orally some of the submissions which have been put in, 14 to 23?

MR GAME: Yes.

DR RENWICK: It would be very helpful if I could just have a single page with those supplementary – that would be most helpful.

MR GAME: Sure.

DR RENWICK: Any other matters the Law Council would like to raise?

MR GAME: Yes. You'd probably like to hear this. We welcome very much the opportunity that we've been given to speak to you today. We consider your position an extremely important one. At every stage we've sought to engage with the Monitor. The past reports and the work that's been done by the Monitors has been outstanding.

We do have a concern that there is not a mechanism that requires government to respond to your reports and we think there should be something in the legislation that requires within a particular time a meaningful – not "thank you for your letter", but "this is our response to your proposals", a proper – we say we think there should be actually a legislative prescription that requires government to respond within say three months or whatever. I don't know what the time period might be, but within two or three months. The last Monitor, Roger Gyles AO QC, did a report on questioning in detention and that hasn't yet been responded to. Again, that's a current one that - - -

DR RENWICK: Thanks, Mr Game. I think in your supplementary note if you wanted to put in half a page about that. I'm aware from my UK counterpart, Max Hill, QC now, there is a provision, although being England it might be a practice rather than a provision, whereby the UK government does have to respond within a certain time. Sometimes, of course, in the UK they just say, "Noted," which is not what you've suggested. But it would be useful to have the Law Council's view of that on the record.

While you are dealing with such submissions you might like to express an opinion about a complaint by both of my predecessors and myself, which is that for own motion inquiries the view the my predecessors have taken

and which I take is that I can only include own motion reports in my annual report.

Mr Walker said that was most unsatisfactory; and I agree. It cannot be a problem that if I have the authority to inquire into things in my own motion, then I should be able to do a stand-alone report and there should be an obligation on the Prime Minister to table it in Parliament within 15 days, subject to any declassification issues, of course. If you care to express an opinion on that in the supplementary note, I would be interested.

MR GAME: I think the tabling period might need to be shortened as well.

DR RENWICK: I think at the minute it's15 sitting days – if I get a prime ministerial reference, it's got to be tabled within 15 days, which is perfectly fine. But I think there have been some problems in the past and the Law Council's support on that would be welcome.

MR GAME: Thank you.

DR RENWICK: Nothing further. Can I just reiterate the fact that I do intend to continue to engage with the Law Council. I'm extremely grateful for your detailed responses, both in writing and orally today. They've certainly given us food for thought.

MR GAME: Can I just say this? People in Dr Neal and my position, we don't do the work. It's done by the research people and the secretariat, particularly Dr Molt. If that research and submission providing body didn't exist, then there really wouldn't be one in Australia that actually responds on an ongoing basis to these legislative changes.

DR RENWICK: Noted. Thank you very much. Ladies and gentlemen, that concludes the evidence from the Law Council, for which I express my gratitude again. That also concludes the public hearings as Dr McGarrity is no longer able to be here. I hope those of you who've attended have found it of interest and use. My reports will be made available publicly in September because they'll be delivered by then and they need to be tabled by then.

But until then, I don't intend to make any public statements on the likely result of the inquiries. I, again, thank all that have taken part and attended and good afternoon.

ADJOURNED INDEFINITELY [3.05 pm]