COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills

WEDNESDAY, 1 MAY 2002

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Wednesday, 1 May 2002

Members: Senator Payne *(Chair)*, Senator McKiernan (*Deputy Chair*) Senators Cooney, Greig, Mason and Scullion

Senators in attendance: Senators Bolkus, Ludwig, Mckiernan and Payne

Committee met at 9.34 a.m.

CHAIR—Good morning, ladies and gentlemen. Welcome to this public forum on the package of bills known as the security legislation amendment bills. I am going to read a brief opening statement, which has been made at the beginning of each of the public hearings so far, and then I will advise you of the planned procedure for this morning and ask Mr Cohen to address us.

On 20 March 2002 the Senate referred the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related bills to the Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. This is the fifth meeting of the committee on these bills. The committee has held public hearings in Sydney, Melbourne and Canberra, at which 54 individuals representing a variety of organisations have given evidence. The committee has also had the benefit of 421 submissions. In order to consult widely on the proposed legislation, the committee agreed that it would be useful to hold what we are calling a public forum, to allow members of the committee to hear short statements from organisations and individuals on the proposed legislation.

I note for the record that, in the preparation for these committee hearings and in the advertising of the inquiries, there has been considerable public concern about the time frame in which these matters are being handled. I emphasise both on behalf of the committee and for the record that the timetable under which the committee works is one that is set down by the Senate and that the committee was provided in the last sitting week of the Senate with a program of 10 bills to inquire into and report on by early May. The most significant of these in terms of number—and, some may say, in terms of interest—is the package of bills known as the security legislation amendment bills. I do understand that considerable concern has been expressed by members of the public and by various organisations about those time frames.

This committee has undertaken, as it always does, to inquire into and report on matters referred to it by the Senate in the most comprehensive and considered way possible within the guidelines that are provided to us by the Senate. As I indicated, this will be the fifth of our meetings on the bills and we will also be considering in great detail every submission that is made to the committee on this legislation. I hope that those assurances expressed by me as chair at this meeting and at previous hearings have allayed those concerns to some degree.

I understand that those who are intending to make a contribution to this morning's forum have been provided with witness and parliamentary privilege information. I remind you that these are proceedings of the parliament and, as such, are covered by parliamentary privilege. The proceedings will be recorded by reporting staff, and an official Hansard transcript of your evidence will be published. I also remind you that the giving of false or misleading evidence

to a committee may constitute a contempt of the Senate. I understand that those who are wishing to make a contribution today have registered as witnesses for Hansard purposes. If you have not done so, would you please do so now.

Senator McKIERNAN—Chair, could I at this time lodge apologies for both Senator Mason and Senator Cooney, who are engaged in other Senate committee deliberations.

CHAIR—Thank you very much, Senator McKiernan; I appreciate that. I remind witnesses that if your remarks could be kept to between five and eight minutes duration that will enable us to hear as many people as possible. We wish to have as many views put on the record as possible. Senators are here to listen to you.

COHEN, The Hon. Ian, MLA, New South Wales Greens, Parliament of New South Wales

CHAIR—We welcome our first contributor, the Hon. Ian Cohen MLC, from the New South Wales Greens. Please proceed.

Mr Cohen—Thank you, Madam Chair. I certainly appreciate the opportunity to appear before the inquiry and I will be as brief as I possibly can. I come to this inquiry both as a member of parliament and as a person who has been involved in a great deal of nonviolent direct action over the last 20 years. I have been called a terrorist many a time and I think that there is a very fine line here that needs to be protected in our democracy between people's legitimate right to protest and being tied up in something that could be extremely sinister. I have huge concerns about this legislation and about mirror legislation that is going through the New South Wales parliament.

The bills taken together propose a dramatic reversal of protections for accused persons—protections which have traditionally existed at common law and which are recognised in the International Covenant on Civil and Political Rights. They propose provisions for the proscription of political organisations under certain circumstances—which may or may not involve proof of involvement in acts of terrorism—and for the imposition of a penalty of life imprisonment for an extensive array of new offences in relation to direct or indirect involvement in acts of terrorism with proscribed organisations.

Regarding the definition of the act, a pivotal concept throughout all the bills is the definition of 'terrorist act'. This definition underlies most of the increased powers of security agencies and most of the new offences which are created. A chief concern is that the definition is so wide as to encompass a broad range of legitimate and largely nonviolent political activities which are currently part of the everyday practice of Australian democracy.

This definition is of great concern to me. It is wide enough to include nonviolent direct action, of which I have been a proponent for many, many years. The acts described in subsection (2) are wide enough to include any act or threat which involves serious damage to persons or property, or which creates a serious risk to public safety. Whilst no-one would argue that such activities should be lawful, that is not the point. Personal and property damage sometimes does occur as a part of legitimate public protest, even where the vast bulk of the participants are behaving in a nonviolent manner.

The effect of this section would be to create a situation where almost any form of nonviolent direct protest—such as those which many Australians have participated in and those which I have participated in at the Franklin Dam, the Daintree rainforest or the Jabiluka mine site—and the organisations supporting those protests could be covered, quite inappropriately, by antiterrorist measures. I have seen many an instance where there has been a fine line as to who has actually done the damage and who is at fault in situations where things get a little out of hand, people get emotional and the police get a bit hot-headed. This happens, and I think it is an extremely dangerous situation we are now looking at.

I believe that this legislation is also wide enough to cover computer hacking and even campaigns to jam email systems by mass public action such as mail-ins. That would certainly be of great concern to me, because I believe that to be a democratic right or nonviolent action.

Regarding removal of common law protections for suspects, the interrogation powers contained in the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 provide for extended periods of detention of suspects, initially up to 48 hours under

section 34F, but with powers to issue further warrants beyond 48 hours. The current maximum under domestic law in New South Wales is four hours, renewable to a total maximum of 12 hours. They also provide for removal of the common law right to silence by the creation of an offence of failure to answer a question, punishable by five years imprisonment under section 34G, and deny detainees access to legal representation during interrogation under section 34F.

CHAIR—Mr Cohen, that particular bill is not part of the package that this committee is currently considering, but your comments are on the record and we will draw those to the attention of the joint committee.

Mr Cohen—I appreciate that. Might I say that, in general, it is something that is of grave concern. If this bill does in any way impose upon those areas of human rights, I and very many others would have great concern. I understand that the extraordinary width of the definition of 'terrorist act' is compounded by the fact that a number of serious offences are created which impose life sentences on people who may only be remotely concerned with activities or organisations defined as 'terrorist'.

The provisions of the Security Legislation Amendment (Terrorism) Bill 2002 which give the Attorney-General powers to proscribe organisations do not even require proof that such organisations are involved in terrorist acts but require merely a reasonable belief to that effect on the part of the Attorney-General. That opens up a future possibility of manipulation of the powers to outlaw rival political organisations on spurious grounds. Once an organisation is proscribed, a further range of related offences is triggered into operation, under which members, directors or any person making funds available to such an organisation may be imprisoned for 25 years.

Regarding proscription of political parties, it is not unrealistic to posit a scenario under which an organisation like Greenpeace or a trade union like the MUA could be proscribed and all members or financial contributors could be liable to a 25-year prison term. We have a situation here, I believe, that is not dissimilar to the imprisonment of Nelson Mandela under apartheid laws in South Africa.

We have organisations which, as history unfolds, might be seen, on the one hand, as terrorist organisations and, on the other hand, as freedom fighters. The Free Papua Movement or OPM, the Bougainville Revolutionary Army, the Zapatistas, the ANC as it was at one period of history, or even Fretilin and Falantil in East Timor could attract penalties under this legislation. I feel it is absolutely vital that we do not see situations in Australia where there is proscription of political opponents.

We would not argue that there needs to be a review of our laws to fill any gaps which may exist in relation to real terrorist attacks, certainly of the kind that were witnessed last year in New York. But there is no demonstrated need to define terrorism so widely as to introduce laws which strike at the heart of democratic rights to protest, which remove common law rights and which infringe basic freedom of association.

Australia has a long history of legitimate domestic dissent and a tradition of the use of nonviolent direct protest as a means of highlighting public concerns. Social movements in Australia, such as the peace, disarmament and environment movements, have a long history of undertaking bold acts of defiance and dissent but within a strict framework of nonviolence and respect for the rule of law. There already exists abundant criminal law at both the state and Commonwealth level which specifically deals with protest rights, assault, public safety,

property damage, trespass, kidnapping, intimidation—and the list goes on. It is well covered, and I think it is extremely dangerous that we bring these laws into being.

The problems as I see them are the unnecessarily wide definition of terrorism; the extreme powers given to security officers and political officers in relation to suspect persons and organisations; the extraordinary powers given to the Attorney-General to proscribe organisations without the need to prove their association with terrorism; and the extremely wide reach of related offences which impose serious liability on members and financial contributors to organisations subjected to political proscription. There are virtually no safeguards against cynical political use of such powers by future regimes. These laws would make Australia indistinguishable from repressive regimes in other parts of the world and would seriously undermine our capacity to pressure other oppressive regimes to safeguard human rights in their own legal systems. I see this as a very serious, backward step. I really see this as a McCarthyist piece of legislation. I am shocked at the direction that this is taking and I just hope that the committee will take note of what I believe to be really deep public concerns about infringements on our civil liabilities.

In the paper today there is an article talking about the ability to strip-search 10-year-olds. Rights are being seriously eroded with this legislation, and I believe that it is important that we look back at the powers that are already in existence and recognise that the authorities have sufficient power to deal with situations. It is interesting that it is now 1 May and we are going to have demonstrations today; we are going to have a lot of young people across the road in Martin Place in the next few hours, fired up with their antiglobalisation message and many issues for a May Day rally. It might get a little out of hand. Are they terrorists? I think not. They are young people who come to these actions with little more investment than their ideals, and it is important that we protect those people: they are the fabric of our future. This law, as it is proposed, would cut down on the right to protest, the right to dissent, the right to a healthy way of expressing oneself in a democracy. I must say that I am extremely fearful of the direction of this legislation, and I am extremely fearful of a government—and this is happening at both the federal and the New South Wales level—where we have these laws of convenience somehow to placate fears within the population without really looking at the consequences of those laws.

Thank you very much for the opportunity to speak here today. I have based my report on a briefing paper by Aidan Ricketts, Associate Lecturer at the School of Law and Justice, Southern Cross University. For your information, I wonder if I could table that.

CHAIR—Yes, Mr Cohen.

Mr Cohen—Thank you very much.

CHAIR—Thank you, and thank you very much for your time.

[9.48 a.m.]

NAYLOR, Mr Andrew, Member, Human Rights Council of Australia

CHAIR—Welcome, Mr Naylor. Please proceed with your submission.

Mr Naylor—I thank the committee first of all for the opportunity to appear today. The committee will have received, I hope, a written submission from the council.

CHAIR—Yes, it has.

Mr Naylor—In the time available I hope only to highlight a couple of points in that submission. The council's objective is to promote compliance with international human rights conventions. The council is concerned that aspects of the anti-terrorism legislation will be in breach of parts of those international conventions. I want to refer the committee, if I might, to three aspects of the bill in particular. The first aspect is clause 80.1(4), and this was adverted to by the previous witness. That is the provision which would permit a person to be arrested or detained with or without charge for a reasonable time, pending a determination by the Attorney-General as to whether to provide written consent for the commencement of proceedings against the person for an offence against clause 81, which contains the treason offences.

Article 9 of the International Covenant on Civil and Political Rights provides that, where a person is arrested, the person is to be taken promptly before a justice. That reflects the common law in Australia. It is true that there are provisions in both state and Commonwealth acts which provide for persons to be arrested for the purposes of questioning prior to being taken before a justice. But in those cases there is an absolute limit set on the time that the person can be held in custody, and in both the state and federal legislation it is four hours, subject to extensions in certain circumstances by a justice. There are no equivalent protections under the provisions which are contemplated by the terrorism bill. It would appear to the council that, in the absence of those protections, the bill will be in breach of the obligation under article 9 of the ICCPR for the person to be taken promptly before a justice.

Because there is also a lack of definition of what is meant by 'reasonable', that could mean anything, depending upon the person who is holding the alleged offender in custody. There may also be a breach of subclause 9(1) of article 9, which provides that a person is not to be held in detention arbitrarily.

The other aspect of the detention after arrest provisions which concerns the council is that it is true that there are aspects of the rights under the ICCPR which can be derogated from in times of public emergency which threatens the life of a nation. The council's concern is that, accepting that the provisions which I have just referred to do in fact derogate from the rights provided for under the convention, is it the case that Australia is currently experiencing a public emergency that threatens the life of the nation, such as to justify that derogation?

The written submission of the council draws some analogies with the legislation that was enacted in the UK a couple of decades ago now, in response to the terrorism being experienced in Northern Ireland. In that case it certainly could have been said that there was a public emergency being experienced by the United Kingdom at the time. The council is very concerned that that is not the situation in Australia at the moment. True it is that the United States has certainly experienced terribly tragic events, but we question whether or not the time has come in Australia to say that we are entitled to abrogate those provisions of the ICCPR.

The written submission by the council also suggests that, if we are going to take this approach and invoke legislation that is in breach of the ICCPR, it would seem appropriate that that legislation be made the subject of a regular review. Certainly the prevention of terrorism legislation in the UK was the subject at least of an annual review, and the council would suggest that similar provisions apply in relation to this legislation, if enacted.

The second point I wish to make briefly is in relation to the terrorist offences which are proscribed under the legislation. The council's principal concern in that regard is that there is a lack of definition about what the elements of the offences are. For example, one of the offences is to make a document in connection with preparation for serious damage to property. The offence is not further defined. It seems to the council that it is not possible to say in the abstract whether or not the offence is constitutional. Whether or not it is constitutional will depend upon the circumstances.

The offence takes its complexion, though, from the circumstances. For example, the particular offence of making a document in connection with preparation for serious damage to property may be different if we are talking about an offence that occurs in a Commonwealth place, or may be different again if the context is action by a constitutional corporation. So the point simply is that there is a lack of definition about what the elements of each of the offences are. The definition depends to an extent upon the constitutional basis for the offence, and it seems to the council that that is offensive to fundamental principles of criminal responsibility.

The third point that I wish to make briefly—and this was also adverted to by the previous witness—is in respect of those provisions which would empower the Attorney-General to ban organisations. Those provisions seem to the council to be not altogether materially different from the provisions which were struck down by the High Court in the Communist Party case in 1951. The High Court said in that case that, if those sorts of provisions are to be valid at all, they have to lay down objective and justiciable criteria by which to assess whether or not an organisation meets the criteria to be proscribed. The council's concern is that the criteria as laid down by this legislation do not achieve that objective.

There are some other points made in the council's written submission in respect of clause 80.1 about the meaning of persons who assist in respect of those engaged in armed hostilities. The council's submission also makes some submissions about the fact that the legislation seeks to make the offences absolute and strict liability. The point briefly there is that the higher you go up the criminal register in terms of penalty the less willing the parliament should be to abrogate the need to prove the mental ingredient of offences. They are all the submissions I want to make at the moment. I am happy to answer any questions, though.

CHAIR—Thank you very much, Mr Naylor. In fact, we are just taking submissions this morning and trying to hear as many of those as possible. So we are very grateful to you for putting that information on the record, and also to the council for its written submission. Thank you.

Mr Naylor—Thank you.

[9.58 a.m.]

CORNISH, Ms Sandra Jayne, National Executive Officer, Australian Catholic Social Justice Council

CHAIR—Welcome, Ms Cornish. Please proceed with your submission.

Ms Cornish—The Australian Catholic Social Justice Council was set up by the Australian Catholic Bishops Conference in 1987 as a national justice and peace agency of the Catholic Church in Australia. The Catholic Bishops Conference mandates the ACSJC to promote research, education and advocacy and action on justice, peace and human rights, integrating them deeply into the life of the whole Catholic community in Australia and providing a credible Catholic voice on these matters in Australian society. The ACSJC is accountable to the ACBC through the Bishops Committee for Justice Development and Peace.

According to Catholic teaching, respect for the human person entails respect for the rights that flow from his or her dignity as a creature. These rights are prior to society and must be recognised by it. They are the basis of the moral legitimacy of every authority. By flouting them or refusing to recognise them in its positive legislation a society undermines its own moral legitimacy.

Thinking along similar lines, the preamble of the Universal Declaration of Human Rights also acknowledges that respect for human rights is the foundation of freedom, justice and peace in the world. While our concerns about these legislative measures come from our faith, we note also that other faith communities in Australia share the same concerns. I note a broad consensus amongst the submissions from the Jewish, Muslim and Christian communities in Australia.

As our chairman, Bishop William Morris, has said, while the government must ensure that Australia's national security arrangements are adequate especially in the light of last year's terrible terror attacks, it is essential that all such arrangements respect and protect human rights. It is the experience of the church that national security legislation in many countries in our region is often misused as a tool of oppression. While we do not believe this to be the intention of the Australian government's counter-terrorism legislative package, we do want to be sure that Australian national security legislation will not be open to such abuse. For example, the definition of terrorism needs to be precise and the right to freedom of association must be preserved. To fight terrorism effectively, we must ensure that our methods respect and protect human rights and do not fall into the logic of ends justifying means, as this is the logic of terrorism itself.

I thank the chair for her acknowledgment of the broad community concern about the limited time allowed for consultation about these very important matters. I would note that the limited time, nine working days either side of a major Christian feast, perhaps has led to us making a briefer written submission than we would have liked and perhaps the brevity of my comments today would also underrepresent the deep concern of the Catholic community about this legislation.

There is very little agreement internationally on how terrorism should be defined, and the consensus is in fact becoming smaller rather than larger. In the current climate the definition of terrorism is a highly politicised matter. It is of grave concern, then, that the definition of terrorism in these legislative measures is very imprecise. Many of the acts that are targeted by this legislation would be contrary to existing criminal law provisions. Along with other human rights groups, we are very concerned about the definition of terrorism being too broad

and therefore vulnerable in application. For brevity, I will simply note that we endorse the more detailed comments of Amnesty International, the Human Rights Council of Australia, Elizabeth Evatt and the New South Wales Bar Association. The freedom of association is a fundamental human right and should not be constrained except to protect against the most serious immediate and certain threats against the common good.

We are very concerned about the proposal to confer on the Attorney-General the power to proscribe organisations likely to endanger the security or integrity of the Commonwealth or another country and to make even very loose association with proscribed organisations an offence. The vagueness of the definition of the organisations that may be proscribed and the vesting of that power in a member of the executive are of deep concern to us. While the power is subject to review, such provisions can be invoked in fast moving circumstances that make judicial or administrative review a practical impossibility. If such a power is to be confirmed, it should not be capable of being delegated to a minister. The reasonableness of the proposed power to proscribe by declaration rather than by legislation should be considered by reference to the possible exercise of the power by a government which was antipathetic to human rights. There are also separation of powers concerns here.

In many countries around the world, including the Asia-Pacific region, the power to proscribe organisations is misused for political purposes, to suppress dissent and to suppress the legitimate rights of groups in society. This is the experience of many of our colleagues in countries in our region. While Australia does not have a history of national security legislation being misused for oppression, it is equally necessary to provide a positive example of the rule of law protecting human rights in this region.

We are also very concerned about the collective guilt implied by the way the legislation is currently drafted. The organisation could be proscribed on the basis of an act by an individual member of the organisation. The whole organisation is then held guilty. The vagueness about the level of association with the organisation that is required for certain of the offences that would be created is also of deep concern to us. Under the proposed legislation, it would also be an offence to know about planned terrorist activities and not to report them. This provision may be in tension with matters of religious liberty for Catholics. If preserving the secrecy of the confessional becomes an offence in relation to certain disclosures, Catholic priests fulfilling their religious duties may be obliged to disobey the law. Other professionals with privacy codes may also experience an ethical dilemma in this regard. The legislation needs to be much more precise in this area.

The reversal of the onus of proof for some offences is to us completely unacceptable. This is contrary to natural justice. Absolute liability for offences is also a matter of great concern to us. In the Catholic moral tradition there can be no moral culpability without, at the very least, knowledge. To apply penalties of 25 years imprisonment or life imprisonment for matters in which people did not even have significant information to understand the consequences of their action is absolutely unacceptable. Again, I would note the submission of the New South Wales Bar Association in relation to this.

This is only a very brief comment on a range of the most important of our concerns in this area, and I would again emphasise that we will be following this as the debate evolves.

CHAIR—Thank you very much, Ms Cornish.

[10.07 a.m.]

GREENOAK, Mr Gavin (Private capacity)

CHAIR—Mr Greenoak, we invite you to make your submission for between five and eight minutes.

Mr Greenoak—I believe the bills due to come before the Senate as anti-terrorist legislation are problematic to the highest possible degree. I assume that the Senate have been made aware of the public comments made by such as the Supreme Court Justice John Dowd, President of the International Commission of Jurists, Cameron Murphy, President of the New South Wales Council for Civil Liberties, and George Williams, Director of the Gilbert and Tobin Centre of Public Law at the University of New South Wales. All this public comment, and more, condemns these bills. Given the crisis of credibility which governments, not only in Australia, are suffering from in a healthy context of information sources of unprecedented number and scope, it is difficult to merely accept the drafting of these bills in good faith. This difficulty is not helped by an apparent rush to have them ratified, amid preoccupations with Easter and the budget, which is little short of astounding given the significance of the bills themselves.

At the same time, prejudice need not apply but only history remembered as such bills must bear its weight in the best possible interests of people everywhere, and for the long term. I use the term 'everywhere' advisedly in both a literal sense, where legislation in any particular country will define its relations to others, and also in view of the much vaunted multiculturalism of Australia. It must be in the protection of these very culturally diverse people that these bills must be justified.

This leads to my particular concern which is that such unprecedented legislation will absolutely confirm the target status of Australians for terrorist acts and, perhaps even worse, conceal if not bury the absolute need of the Western Alliance to examine its undeniable role in the terrorist phenomenon. Given the means of modern warfare, we must surely see that only as we try to understand that which constitutes a violation of ourselves and others can we prevent the violence which follows. In the 21st century we must, I believe, consider with the utmost seriousness the need to sacrifice our vengeance if we are not to live under a growing threat of so easily escalating destruction.

Australia has been clever, I believe, and now it faces the absolute need to become wise. On three counts, any one of which would suffice, these bills must be rejected. Firstly, they are drafted in such a way that is open to abuse, which if not obvious now would, I suggest, become very much more so in a time of national crisis. Furthermore, it is difficult to see how such legislation might be drafted in a way that could not lead to the threat of terrorism becoming the threat of government. Secondly, these bills will not protect Australians from the threat or reality of terrorism but in fact will conform our target status and increase its likelihood. Lastly, they will seriously reduce, if not prevent, the absolutely needed critical self-examination in the international context of finite resources and shared interests, as this alone can lead to new and peaceful means of negotiating conflict—potentially on a massively destructive scale.

CHAIR—Thank you very much, Mr Greenoak.

Mr Greenoak—I have a transcript of what I have just said.

CHAIR—If you would table that, we would be very grateful. Thank you. It would assist the committee.

[10.12 a.m.]

ALEXANDER, Ms Isabella Jean, Solicitor, Oz Netlaw, Communications Law Centre

WILDING , Dr Derek, Director, Oz Netlaw, Communications Law Centre

CHAIR—Good morning. Thank you both very much for attending this morning. Please proceed.

Dr Wilding—I would like to thank the committee for the opportunity to appear this morning. Oz Netlaw is the Internet law practice of the Communications Law Centre at the University of New South Wales and Victoria University. Accordingly, our interest is in relation to legal and policy issues around the Internet. The object of Oz Netlaw is to encourage use of the Internet. So our comments this morning will be specific and limited to two of the bills under consideration. They are the Security Legislation Amendment (Terrorism) Bill 2002 and the Telecommunications Interception Legislation Amendment Bill 2002. Ms Alexander will present our points in relation to those two bills.

Ms Alexander—As Oz Netlaw has now had longer to examine the provisions of the various bills, we wish to expand on our submission in relation to the interception bill. Oz Netlaw shares the concerns expressed by Electronic Frontiers Australia, and other organisations concerned with cyber liberties, over the bill's ambiguity in relation to the status of stored communications under the bill. The Attorney-General's second reading speech and the explanatory memorandum suggest that a communication will be accessible by means of an interception warrant until such time as it is downloaded by the recipient onto equipment and can be accessed without using a line. However, a literal reading of the bill does not give this meaning. The definition of 'stored communication' makes no reference to the communication's receipt by its intended recipient. Therefore an email sitting on an ISP server which has not yet been accessed by the recipient may be considered a stored communication under the amendments. Consequently a law enforcement agency would be able to access the communication at the ISP's premises using an ordinary search warrant. It is not clear whether this is the intended meaning of the bill.

The confusion increases when one looks at the case of voice mail. A note to the bill specifically states that a voice mail message which can only be accessed by dialling a number is not a stored communication. However, although the intended recipient can only access the message by dialling a number, the service provider which stores the message can access the message without further use of a line. A literal reading of the bill in relation to voice mail messages would result in the situation that a voice mail message can be accessed using a search warrant at the premises of the service provider or using an interception warrant at the time the recipient phones in to collect his or her messages. It is our submission that the legislative situation in relation to service providers or email or telephone services ought to be clarified by this bill, not obscured.

In recent years, governments have been very concerned to encourage individuals, businesses and organisations to engage in the new economy offered by the Internet so that Australians can keep pace with the rest of the world. In our burgeoning e-economy, ISPs have the following basic needs. They need security: they need a secure environment for correspondence, data transfer and online commerce. They need customer confidence, and they need clarity. An ISP must know what it can and cannot do. It must know what rights and responsibilities it has with respect to the people, organisations and businesses that it hosts. It must know what types of warrants to respond to and how. For example, most ISPs keep data

relating to communications—that is, the header information of an email—for only a short period of time, depending on their storage requirements. Therefore it may be that by the time an ISP is approached by a law enforcement agency with a warrant it has destroyed the information sought. There are currently no laws and regulations in Australia relating to retention of the data by ISPs. The United Kingdom, however, has recently enacted the Anti-Terrorism, Crime and Security Act, and part 11 of this act sets up a structure within which the security of state can issue a code of practice relating to the retention of communications data by communication service providers.

Customers of ISPs have similar needs. They need to know that their correspondence and commerce is secure and private. A major barrier to getting people online is these types of fears. One main difference between an interception warrant and an ordinary search warrant is that the target of an interception warrant may never know its correspondence has been intercepted. A second difference is that an interception warrant may remain in force for up to 90 days. It is for this reason that a higher threshold applies to obtaining interception warrants. Due to an ISP's reliance on customer confidence in security and privacy, an ISP is unlikely to divulge to customers the frequency with which warrants are executed on their premises. This has the potential to foster a regime of secret surveillance, with which the current complaints based privacy regime is ill equipped to deal. It may also foster an atmosphere of mistrust of online activity.

The policy rationale behind differentiating between voice mail and email communication and between saved emails and emails currently in transit is difficult to understand in a society where many people consider email to be a non-verbal type of conversation. Because of the immediacy of emails, people are less likely to reflect on what they have written and whether it is the kind of thing they should actually be putting in writing. A major difference between a telephone conversation and a conversation by email is that records of the latter are far more difficult to erase than most people think. Also, records of email sent and received are usually automatically stored by the email program, so that not only will the privacy of the target of an investigation be infringed by the execution of a warrant but also that of anyone who has been corresponding with them. Reading someone's emails is just as intrusive as listening to a phone call, if not more so, given the breadth of information that can be accessed.

The final point that Oz Netlaw would like to make is in relation to the definition of terrorism. In our submission we commented on our dissatisfaction with the broadness of the definitions, and no doubt the committee has received any number of submissions on this topic. With respect to the interception bill, we would like to point out that there is no definition of terrorism in this bill. If we assume the definition will be carried from the Security Legislation Amendment (Terrorism) Bill, this is problematic for two reasons. First, it makes the interception amendment unnecessarily dependent on the passing of the terrorism amendment and creates an unnecessary need to import one statutory concept into another statute. Second, the bill makes terrorism a class 1 offence under the act, along with offences such as murder, kidnapping and narcotics offences. This is of concern because, although an act of terrorism has the potential to be as serious as those offences, under the definition currently in the terrorism bill it does not need to be. It could in fact be a comparatively minor offence occasioning minor damage to property but nevertheless fall within the terrorism definition. In relation to class 1 offences, a lower threshold is required for the issue of an interception warrant. The judge or AAT member issuing the warrant is not required to consider how much the privacy of the individual be interfered with.

We submit that the failure of the bill to define terrorism or act of terrorism raises questions about how widely the bill may be applied, and as currently drafted it fails to provide adequate assurances regarding privacy and civil liberties of individuals.

CHAIR—Thank you very much Ms Alexander and Dr Wilding. I might just note for the record, Ms Alexander, that in evidence given to the committee in Canberra on 19 April there was some considerable discussion of aspects of the TI bill in addition to that presented by Ms Graham in Melbourne the preceding day. I do not know whether Oz Netlaw has had an opportunity to have a look at that, but if you have not and you would be interested in doing so the committee would be interested in any additional comments you matter wish to make.

[10.20 a.m.]

WATERS, Mr Nigel, Convenor, Australian Privacy Charter Council

CHAIR—Mr Waters, would you please proceed.

Mr Waters—In the limited time available to consider this package of bills, we have focused on the Telecommunications (Interception) Legislation Amendment Bill 2000, but that does not mean we do not have concerns about some of the other bills, and we endorse the comments that have been made by other parties about some of the privacy implications of the other bills. But I will focus today on the telecommunications interception amendments and, furthermore, I think the submissions from organisations like Oz Netlaw and Electronic Frontiers Australia need to be put alongside ours because I do not think any of us have had time to comprehensively address all the privacy issues. Hopefully the committee by receiving all of those submissions will be able to take an overview of the privacy implications.

In our view, the proposed amendments to section 6 concerning delayed access message services would drastically reduce the privacy of communications of all Australians. Communications have traditionally been regarded, rightly, as particularly privileged in terms of privacy and confidentiality. Whether by post or by telephone, access to content by the authorities has been strictly limited, requiring specific warrants—in the past, judicial warrants, although that particular safeguard has been weakened in recent years—limiting the ability to get those warrants to only certain agencies and for certain specified serious offences. All of those safeguards have to some extent been weakened recently, but the regime remains one that is of a particularly high standard and particularly strict. This amendment, in our view, would arbitrarily remove that level of protection from a whole range of modern communications, not only emails but also message bank, pager and other forms of stored communications.

Ms Graham from Electronic Frontiers Australia gave you the useful analogy of the Australia Post situation where, translated into that environment, in effect what these amendments would mean is that only while the postie was actually carrying the letter would it be protected. While it was lying in the delivery sorting office or when it was lying in your mailbox it would not be protected. I think that is a useful analogy that brings home to people the effect of these amendments. If communications deserve special protection at all then, in our view, it must be from end to end. It must be from the point that you knowingly commit the communication to a carrier to the point at which the recipient knowingly receives it from the carrier. There is no logic to making any distinction for parts of the communications passage as opposed to others just on the basis of whether it is stored or not.

One of the key points which we think has been overlooked in this debate is that it is not just a question of telecommunications interception warrants versus other warrants. The government has tried to suggest that safeguards would remain in the sense that other warrants would be required. That is not the case. By removing this form of communication from the telecommunications interception act, you potentially open up the content of emails and other forms of stored communication to access by a whole range of other administrative devices including things like tax office notices and law enforcement agencies' requests to agencies without any form of warrant or oversight at all. There is some degree of confusion, I think, as to the extent to which some of those other administrative measures would give access but certainly there are some, such as tax office notices, which would clearly be permitted by this exclusion or excision from the interception act regime. In that respect I would remind the committee of evidence that emerged a couple of years ago in Senate proceedings of the level

of access to telecommunications records by law enforcement agencies. We are talking about hundreds of thousands of requests a year for traffic records. In our view, this would open up the content of emails to the same sort of potential volume and frequency of access.

Freedom of communications with a reasonable presumption of confidentiality in our view underpins a whole raft of our freedoms and it is fundamental to our liberal democratic society. If these amendments are passed, you will never know, when using email and other forms of stored communication, whether some government agency is intercepting those messages. In our view, it would be likely to lead to such interception becoming widespread and pervasive with a very deleterious, chilling effect on society. Ideally in our view the law should be amended to clarify and reinforce the Telecommunications Act regime but at the very least these particular changes should be resisted and rejected. In our view, the amendments are an opportunistic bid by the authorities to gain a technological dividend from the move to a new type of communication. They have no logic or rationale in terms of the regime that exists for interception of communications, and should be resisted. Thank you.

CHAIR—Thank you very much, Mr Waters.

[10.27 a.m.]

CAMPBELL, Mr James, Education Research Officer, Students Representative Council, University of Sydney

KURIACOU, Mr Daniel Kuriacou, President, Students Representative Council, University of Sydney

CHAIR—Thank you for coming this morning. Would you please proceed?

Mr Kuriacou—We are going to split our submission in two ways. James is going to talk to the written submission we have already given to this inquiry and then I am going to talk more broadly about the effects of this bill on university students.

CHAIR—Bear in mind the committee does have your written submission, so if you perhaps highlight the most important points and then Mr Kuriacou you can make your contribution.

Mr Campbell—I will be brief. Our submission holds that the set of bills is an inappropriate response to the threat of terrorism and in fact is counterproductive, and I am sure you have heard arguments along those lines earlier. Again, along the lines of earlier speakers, we have got considerable concerns about the ambiguity of the definitions around terrorism and, indeed, great concerns about the scope of people who could be caught up through being associated with a proscribed organisation. We feel very strongly that it is important the parliament protect the right to associate and that these bills are a threat to that.

We also believe that they are not consistent with the traditions of Australian democracy. As evidence to that, we would point to the referendum held in 1951 where the Australian public was given a choice about voting 'yes' or 'no' in terms of banning of the Communist Party and, although it a fairly narrow margin, certainly chose the route of saying that such a bill was opposed at that time. That bill is similar to this one and it was rejected.

The other point we would like to highlight is that there seems to us to be very little protection in the bill, notwithstanding comments of the Attorney-General. Unlike other countries, there is no bill of rights in Australia. There is review by the ADJR, but although I am not a lawyer I understand that it is a very limited role that or that that review body would have in terms of the merits of proscribing an organisation.

The minister—the Attorney-General or any other minister that is nominated by the Attorney-General—would take on the role of proscribing an organisation as a terrorist organisation, not the parliament. It is not a reviewable decision of the parliament. The Attorney-General recently said in relation to the debates around whether he should be involved in defending the High Court in the recent controversy about Justice Kirby, 'I'm a political officer. I'm not an independent person in that sense. I am a member of the parliament. I am a member of a political party.' We would hope that he would make good judgments but we cannot rely on him making apolitical decisions. That is the extent of my comments.

Mr Kuriacou—From my perspective of the president of the student organisation: a large number of students involved in club and societies which would come under our banner and funding by our organisation are currently protesting in Martin Place and out the front of ACM. Like last year, there is the possibility that those protests could get violent. These are students who in no way would fit any justification I think you could come up with as terrorists, but are actually expressing their deep concerns over positions that governments

have taken in this country. In the same way, students who are members of clubs and societies of our council were at the recent Woomera protest which involved the escape of prisoners and certainly illegal acts. But our question is whether those illegal acts were anything more than students breaking the law rather than students acting in a way that was terrorist. I would say that in no way would those students fit any fair definition of a terrorist, but they were students I suppose expressing, and maybe expressing illegally, their anger against political decisions made by this parliament.

In the same way, our student organisation has taken very vocal and in some ways very active roles in things like condemning the government's position in the Iraqi conflict of the 1990s and of condemning the government's position over a long period in its relation to East Timor and certainly organised fundraisers for organisations inside East Timor, of which some were linked with terrorist activities or what could have been defined as terrorist activities under this bill but what would now probably be called and quite proudly by both houses of parliament as freedom fighters who were fighting the good fight. The fact is that student organisations do not always have the same opinion of international conflicts that are going on as the government may have. In fact, governments are more likely to choose sides with what might be the ruling government in other countries where student organisations might be more likely to support groups which are fighting against those governments. There are numerous examples internationally that you can think of right now where you would probably find that student organisations across the country would have very strong views and in some ways may be helping with either fundraisers to support groups in those countries. One obvious one would be the Israeli-Palestinian conflict.

So there is that side, the very political side which organisations take which often conflicts with the government. These students are not in any way engaging in terrorist activities but are students who are expressing their political opinions. University students are prone to be rather ideological. University students are prone to be rather well informed and very active around political issues. For those reasons, students tend to form quite vocal positions and those positions often conflict with the current government, no matter which political party it is. Those students in no way, whether they are part of organisations which this government or any government may decide are linked with terrorism, are terrorist students. They are just students expressing their democratic rights.

The other situation I wanted to express, which is of great concern, is that this bill would in involve the government in numerous conflicts in choosing sides. There are going to be numerous occasions—and there are numerous international conflicts around the world—where if the government was to proscribe organisations then effectively it is choosing a side in that conflict. It would be highly unlikely, for example, that this government would proscribe governments as terrorist organisations. In the Indonesian East Timor situation this government had numerous treaties with the Indonesian government. One would assume in that situation it would be highly unlikely to proscribe the acts of the Indonesian government. It would be more likely to proscribe the acts of the East Timorese freedom fighters. Given that that is the case—that other governments around the world are unlikely to fit any definition you will have of terrorist organisations and only organisations working inside those countries which have links to Australian organisations will be proscribed—I find that this bill is unnecessary.

If students or organisations act illegally, then the current legislation exists that will have them arrested for breaking the law. There is no need to bring in any of these bills, I would argue. In fact, this student organisation is calling on the Senate to actually reject these bills as a whole. For example, if numerous Palestinian cultural groups at the University of Sydney

decide to have a fundraiser for Palestinian groups which may have both a human rights and an activism role in the current Palestinian-Israeli conflict, would those groups be proscribed? If this government is going to choose to proscribe those groups then you are taking away the democratic rights but also the cultural links of those students who exist at the University of Sydney and quite often form themselves into cultural groups.

It would be highly unlikely that the government would ever choose a side that was not that of a government. In most cases, our federal government has that tradition of being quite slow to react when it comes to looking at international conflicts. It is far more likely to support the numerous regimes which many groups might consider as having massive human rights conflicts. We can even look at the Pinochet example. This government was quite slow. It seems to be very quick to condemn after the events have occurred but very slow to condemn while they are occurring. When that is the case, this legislation has threatens to stop the free rights of students both to protest about events that are going on in Australia and also to have a very vocal political voice about events that are going on internationally.

CHAIR—Thank you, Mr Kuriacou and Mr Campbell.

[10.37 a.m.]

EVATT, Ms Elizabeth Andreas (Private capacity)

CHAIR—Judge, would you please proceed.

Ms Evatt—Thank you. I am here in a personal capacity. I would like to thank the committee for giving me this opportunity to speak today. I have put in a written submission. I do not want to repeat today the detail of that submission. I would like to raise some more general points first of all. I would like to speak a little about terrorism.

Terrorism as defined in this bill includes action to promote a political cause by acts which cause harm to persons or property. Now, I deplore terrorism. I condemn it utterly, and we do not want terrorism in Australia. Yet I do remember in the 1960s listening very intently to Nelson Mandela when he spoke most eloquently of the reasons why his organisation was going to resort to violence, not against persons but against property, because they had been forced out of the political scene; they had nowhere to go. I felt very uncertain about that at the time, as I still do, because one does not know where acts of violence of that sort can lead. So, as I said, I condemn terrorism. Yet we also need to think that terrorism itself causes fear. The fear that we have of terrorism brought to the surface by the acts of last September is a very powerful emotion. We all experienced it at that time. Fear is tremendously powerful. It can cause us to feel paralysis or it can cause us to panic. The collective fear of the community can lead to hatred. As we know, the acts of September 11 resulted in the murder of a Sikh in New York within a few days. It led to attacks on mosques in Australia. This fear of terrorism can cause hatred but it can also cause acts of injustice. Remember that in wartime, in our country and the United Kingdom, thousands of quite innocent people were interned in wartime. Even in the United States, their own citizens were interned because they were of Japanese descent.

So thinking about fear and the fact that it gives rise to hatred and injustice, what are the lessons for Australia? I think we need to take great care not to be railroaded by fear or by the desire to be seen to be doing something about terrorism. This Security Legislation Amendment (Terrorism) Bill looks to me like an ambit claim drawn up by the security agencies in Australia—their ambit claim before those with experience and wisdom about the application of law have got to work on it to remove its excesses. It looks as if it has been written by the security agencies themselves and not by those whose job it is to defend the liberties of Australian citizens.

First, the need for this law has not been established, by which I mean that it has not been shown that there is an immediate threat to Australia that requires such draconian laws. The Attorney-General on his own web site says there is no immediate threat to this country. I looked it up just the other day. The need is not there. The need is not urgent. There is time. We do not have to have these laws in force today. We do not need them ever—but we certainly do not need to have them this week or next week. There is no urgency. We need to have time. You have heard this morning, and I am sure in many other places, the concerns that have been widely expressed by many, many people about this legislation. What is missing is the time to sit down and go through it with a fine-tooth comb and weed out what should not be there. There might not be much left if you do that! But it does need to be done. So I say that the need is not urgent. I ask that the committee consider whether there isn't a need to defer the enactment of these laws, or at the very least—and I do not really support this—their implementation. My fall-back position is to have a sunset clause. I urge all those issues to be considered, but my primary submission is to examine these laws closely, and not to pass them at all until they have satisfied the test of civil liberties of Australian citizens.

This bill, as I see it, is the sort of law you would expect to see in the old South Africa. It is the kind of law you would expect to see in old Russia. It is the kind of law, if they have law at all, that the Chinese would use to suppress the Falun Gong and other organisations of dissent that they do not like. It is a law that puts the burden of proof on the person accused of an offence. This is a reversal of our normal standard of protection of the citizen in common law. As we know even our laws, our common law criminal laws with all the safeguards they have of presumption of innocence and so on, have not prevented wrongful convictions in Australia—Tim Anderson for example—or in the UK. They have not prevented wrongful convictions brought about largely by the desire to satisfy the community that something has been done about terror.

But these laws will open the floodgates wide to many people who have done nothing at all contrary to the interests of this country being put in fear of prosecution. It will lead to many organisations and individuals not knowing whether they have committed an offence. I am here to speak for the rule of law in a just society and part of that rule of law is that people should know with certainty whether their acts are likely or not likely to be criminal. I defy anybody to know, if this bill were enacted, whether certain actions would be or would not be seen by the security forces or the Attorney-General as contrary to law. It will never be known whether they are contrary to law until it has been through the courts. It is very risky stuff, this.

I do not want to take up too much of your time. You have my written submission. I press the point that the offences that this bill creates are too vague and imprecise to defend people. The power to proscribe organisations is wider and more dangerous than the anticommunist legislation of 50 years ago. It gives the Attorney-General a weapon that he can use against organisations of dissent. He can threaten them with the use of this law even when no offence has been established. If an organisation is proscribed, individuals that have very tenuous links with it can be at risk of being charged with an offence and the burden shifts to them. Thank you very much for giving me your time. I do hope that these laws will never enter the statute book.

CHAIR—Thank you.

[10.47 a.m.]

DOHERTY, Mr Denis, National Coordinator, Australia Anti-Bases Campaign Coalition

CHAIR—Mr Doherty, please proceed with your remarks.

Mr Doherty—I hope you have my submission.

CHAIR—We do, Mr Doherty, thank you.

Mr Doherty—Thank you. The Anti-Bases Campaign Coalition has been going since 1987. We have been organising demonstrations connected with US bases in Australia and US war fighting around the world, and we have been doing that for quite a few years. Our main thrust is that we are concerned with two aspects of this legislation. The first is the haste in which it has been put together. We think this is undue haste, it is unnecessary haste, and lots of mistakes are going to be made if you continue down this road. Our second concern goes to the fact that what is already in place is adequate, more than adequate and, on some occasions, even fairly oppressive.

Our group is very definitely an antigovernment group, and we organise campaigns against government policy—namely, US bases in Australia. So we expect that there will be, and there has been, some monitoring of us. Whenever our buses leave for Pine Gap, shadowy figures behind various pillars take videotapes of us. We suspect that our telephone is bugged. We expect some of this, and we suppose that a certain amount of monitoring is already in place. But the general run of the Australian population do not see that they are being spied on and do not understand that it is happening.

Several years ago I received a phone call from an Australian journalist. He said, ‘The name of your group is going to appear on the front page of the *Australian* tomorrow; I just thought I might warn you.’ The next day, sure enough, there were headlines in the Australian of ‘US spied on Australian peace groups’. That article referred to this book I have in my hand here. It is called *America’s Space Sentinels: DSP Satellites and National Security* and was written by Jeffrey Richelson from the University of Kansas. It refers to a document he discovered that was written in 1989-91. In that, there was a threat assessment done on the antibases group in Australia. We immediately contacted ASIO and discovered that a citizen of Australia can complain if he has been unjustly spied on.

So, on behalf of the group, we approached William Blick, Director-General of Intelligence and Security. We said, ‘We have been unjustly spied on. It is not right or just that a foreign spy organisation can come into Australia and spy on an Australian protest group.’ His reply was, ‘If it was in the national interest for you to be spied on, you will not be told that you were spied on, but we will listen to your complaint.’ We then had to supply him with the *Australian* article, a photocopy of the book and a photocopy of the index of the book. Several months later we received a reply which went something like: we have discovered that no organisation in Australia cooperated with this particular spy agency from the United States. I then asked, ‘Did you look at the document that was quoted in this book?’ They said, ‘No, we just looked at our own records, and our own records show that we did not have anything to do with them.’ So I do not know how a foreign agency can spy on an Australian group and not have the cooperation of the Australian secret service. The point I am making is that there is already enough power in Australia to protect it from so-called terrorist acts. I would just like to quote to you from the threat assessment of the antibases group. It states:

In 1989 the Air Force Office of Special Investigations (OSI) had prepared a study, classified CONFIDENTIAL NOFORN (Not Releasable to Foreign Nationals), entitled “Australian Anti-base

Groups." A 1991 Air Force Space Command threat assessment noted that "in peacetime, the primary unconventional warfare threat would include terrorism, vandals, dissidents, and protest groups ... Activity at this level would most likely be intended to harass or cause inconvenience, as opposed to destroying the facility or halting operations."

It then goes on:

The Space Command study … noted that "the Australian government has shown the resolve to meet the security needs of the site."

They are talking about the then Nurrungar US base. It continues:

When it became apparent during previous demonstrations that security personnel were undermanned for the size and aggressiveness of the demonstration, increased security measures were taken to provide more personnel and equipment.

This particular statement is relevant for us today in that it says that US bases are an object against which terrorist acts might be taken, and so the government's foreign affairs policy is encouraging terrorism. By having those bases here, you are encouraging terrorist acts—but your response is to put the blame on the ordinary citizen and restrict our democratic rights. We think this whole area, this whole subject, needs to be looked at far more thoroughly. The government should look at itself and take measures in its own foreign policy to downgrade any terrorist acts taken against Australian territory, instead of putting the blame on Australian citizens, legitimate protests and antigovernment policy groups.

I call on the government to rethink this whole area. This is far too hasty, far too amateurish and has been done in an almost slavish response to what is happening in the United States and in the United Kingdom. We are in a different country, under a different set of circumstances, and we do not need this legislation. Thank you.

CHAIR—Thank you, Mr Doherty.

[10.56 a.m.]

RANALD, Dr Patricia, Principal Policy Officer, Public Interest Advocacy Centre

CHAIR—Dr Ranald, please proceed with your remarks.

Dr Ranald—The Public Interest Advocacy Centre is an independent and nonprofit legal and policy centre. Its work goes beyond the interests and rights of individuals; we seek to undertake strategic legal and policy interventions in public interest matters, in order to foster a fair, just and democratic society.

We have two major concerns about the proposed anti-terrorism legislation. The first is the extremely short time frame allowed for submissions and the fact that, as other commentators have noted, this means it leaves a lot of room for shortcomings in the bill and for those shortcomings not to be properly addressed.

Our second set of concerns, as expressed in our submission, really goes to the principles behind the bill. Because of the very short time frame, we have not commented in detail about the bills, but we are concerned that some of the measures in the legislation, if implemented, may contravene internationally recognised human rights standards—including the rights to liberty, a fair trial and freedom of association—and also facilitate the violation of an individual's human rights. We believe that it is the obligation of government to ensure the protection of human rights of all peoples in their jurisdiction.

I just want to comment on three aspects in regard to those principles. First of all, the definition of terrorism is too broad and it does not meet its proposed aim or stated intention to exclude lawful advocacy protest or dissent or industrial action. We believe that it is too broad to meet that aim and it could include those areas. Secondly, in relation to the power to list organisations as proscribed groups, which would be given to the Attorney-General, the burden of proof is to be on the organisation concerned to prove that it should not be proscribed. This process renders the group and all of its members illegal and liable to prosecution and it can apply penalties to anyone who supports or assists those groups in any way. A number of other commentators have also made our point that such provisions would or could have been used to proscribe Australian groups which supported the African National Congress under apartheid or the East Timor independence movement. In our view, the expansion of executive power, which was tested in the 1951 cases, appears to be contrary to the principles of the Constitution and to the doctrine of the separation of powers.

The last aspect I want to comment on is the issue of detention. The system of detention proposed with the legislation will establish an informal criminal justice system without the safeguards of the formal system. Anyone deemed to be a threat to national security could be imprisoned initially for 48 hours, but then that period can be extended and extended. This is done on the basis of information inadmissible as evidence in a trial and on a significantly lower standard of proof, and those detained would not have the right to legal representation or the right to refuse to answer questions.

CHAIR—Dr Ranald, the committee does not have before it the ASIO legislation in this package of bills to which I believe you are referring, but we will draw your remarks to the attention of the joint committee.

Dr Ranald—I would appreciate that. I understand that the ASIO hearing is being held in Sydney at the same time as this one, and so it has been impossible to attend both.

In conclusion, I want to say that the government has a duty to ensure national security, but this must not be achieved through the violation of international human rights standards—those very standards which it is trying to defend. Those who commit serious crimes and grave human rights abuses must be brought to justice. However, as the UN Commission on Human Rights has affirmed, all measures to counter terrorism must be in strict conformity with international law, including international human rights standards.

CHAIR—Thank you very much, Dr Ranald, for your contribution this morning.

[11.02 a.m.]

BOULTEN, Mr Phillip, Convenor, Criminal Defence Lawyers Association

CHAIR—Mr Boulten, please proceed with your contribution.

Mr Boulten—The New South Wales Criminal Defence Lawyers Association comprises approximately 200 solicitors and barristers in this state who day by day defend people in the criminal courts. We will be the ones in this state who will be defending people charged with the criminal charges that are proposed in these bills.

In large measure, our association supports in just about every respect the submission of the Law Council of Australia. I commend its advice and recommendations to the committee. Generally, our association accepts that, in a democratic society, it is an appropriate response to terrorism for the parliament to pass laws specifically criminalising acts of terrorism. The society though is very apprehensive about the definitions of the offences which are created by this package of bills.

The definition of 'terrorist act' in the Security Legislation Amendment (Terrorism) Bill 2002 needs some real rethinking. The definition involves the word 'involve', which is an unknown concept in the criminal law. It is so general as to rope in many noncriminal acts which could criminalise the lawful activities of many decent, ordinary citizens. What is more, the attempt by the government to create absolute liability offences is a real departure from the ordinary criminal law. Any response to terrorism—world terrorism or local terrorism—needs to have as its hallmark proportionality. The response needs to deal proportionately with the threat. You should not, in my submission, create such a departure from the ordinary law as absolute liability offences do, unless the threat is only capable of being dealt with by such offences.

It is the submission of our association that the definition should be amended so as to create offences with specific intents. If it were a crime carrying life imprisonment to do any act with the intention of seriously harming somebody, killing somebody or creating very substantial property damage such as to threaten people's lives with a political intention, a religious motivation or an ideological motivation, that would be a proportionate response to the events that have led to this bill being put before the parliament.

In one of the bills currently before the parliament, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, there is created an offence by section 72.3(2) criminalising the setting of bombs that does have a specific intent. That section makes it an offence to set a bomb with a specific intention. So there is this conflict between one of the bills and the head bill. The terrorist bombing bill is the parliament's response to an international covenant and could be seen as a better model for the head bill for the criminal offences. As it is, if they go up together in the forms they are in at the moment, there is this tension where there are two different sections in different acts which could criminalise the same activity but where the tests are quite different.

There is also concern in our association about that part of the definition of 'terrorist act' which criminalises the destruction of property. The destruction of property for political purposes is part and parcel of ordinary garden variety protest and dissension. What could properly be regarded as a minor criminal offence this legislation escalates to one carrying life imprisonment. The association recommends tightening up the definition of the property aspect so as to cause it to be 'destruction of property that threatens life or serious injury'. This is the

sort of definition that the Model Criminal Code Officers Committee has recommended as part of its recommendations for offences like this.

Some other countries have created legislation post-September 11 creating criminal terrorist offences without in any way including destruction of property in the definition of the crime. As it currently stands, the inclusion of destruction of property per se could include major damage to fences surrounding detention centres and the like. You have no doubt heard plenty of examples from the submissions that you have received in the process thus far.

The proscription of organisations by the Attorney-General with very limited review judicially is opposed simpliciter by the association. The association is of the view that individuals commit crimes. If the individual commits a crime which can properly be characterised by any of the offences, then it is proper to prosecute the person. It is not a safe process to proscribe organisations. What is more, the association has doubts about the constitutional validity of the current proposal allowing the Attorney-General to proscribe organisations and then to criminalise membership, even informal membership, of such organisations.

The association urges the government to delete that part of the bill which proscribes organisations. Alternatively, if there is to be proscription of organisations against the traditions of our community then it should be by judicial process. Just as, currently, Australian based organisations may be proscribed only after a hearing on the merits in a court by a judge with full right to appeal, so too it should be with these organisations that are sought to be proscribed by this legislation. There should not be a two-tiered level of proscription.

The final submission that I make is that this committee has recently considered the proceeds of crime amendments, and it is likely that the parliament will broaden the scope of the government to confiscate assets. One of the bases on which people's assets might be confiscated is because they have been charged with some of these offences which are now currently being considered by parliament in these bills. If the parliament chooses to broaden the scope of the confiscation legislation so as to enable the confiscation of assets without conviction but merely on reasonable suspicion or on the balance of probabilities that the person has be involved in a terrorism offence, then the prospect looms of people who have not been convicted of any criminal offence, even the very broadly defined ones which are currently the subject of these bills, having their assets confiscated despite the fact that they have not been charged or, if they have been charged, they have been acquitted in a criminal court.

I urge the committee to keep in mind that this legislation will be legislation for the foreseeable future. It is intended to apply at all times in all circumstances. Times will come when there is not the same focus on terrorism as there is now, one hopes. A time will come when people will not be so fearful or worried as they were in the weeks and months after September 11. These laws must be applicable and proportionate for those circumstances as well as for worrying times. We have seen in recent history the most terrible travesties of justice occur in Britain in the context of people falsely convicted of terrorist crimes. The most celebrated travesties of justice in recent times relate to IRA bombings in Guildford and Birmingham where people have been convicted because of blinkered justice. These provisions are capable of blinkering justice, and you are urged by practising lawyers to rethink the bills to create a more balanced response to the environment in which we are living.

CHAIR—Mr Boulten, thank you very much for your remarks this morning. The committee is very grateful for your submissions. That brings us to the end of our recorded list

of those intending to make submissions. There are other members of the public here now. Does anybody else present in the room wish to make any submissions on the legislation at this time? There being no further public submissions, I thank all those members of the public who have attended the committee hearing this morning and made their submissions. As I said at the beginning of this process at 9.30, the committee has been aware of the concerns at the time frame in which these matters are being considered and organised this forum this morning to try in some small way to address those concerns as they had been expressed to us. We are very grateful to all of the witnesses who have participated for their contributions, and to those who had also made written submissions. I declare this public meeting of the Legal and Constitutional Legislation Committee on this legislation closed.

Committee adjourned at 11.17 a.m.