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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

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SYDNEY

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WITNESSES

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Friday, 30 April 2004

Members: Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Bishop, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Kirk, Knowles, Lees, Lightfoot, Mackay, McGauran, McLucas, Murphy, Nettle, Robert Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senator Bartlett for matters relating to the Immigration and Multicultural Affairs portfolio

Senators in attendance: Senators Bolkus, Greig, Kirk, Ludwig, Mason and Payne

Terms of reference for the inquiry:

Anti-terrorism Bill 2003.

Committee met at 1.33 p.m.

ANTICICH, Mr Nicholas, National Manager Counter Terrorism, Australian Federal Police

BATCH, Federal Agent David Allan, Senior Legislation Officer, Australian Federal Police

KEELTY, Mr Michael, Commissioner, Australian Federal Police

CHAIR—Good afternoon, ladies and gentlemen. This hearing forms part of the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Anti-Terrorism Bill 2004. The inquiry was referred to the committee by the Senate on 31 March 2004 for report by 11 May 2004. The Anti-Terrorism Bill 2004 proposes to improve Australia's counter-terrorism legal framework by making amendments to part 1C of the Crimes Act 1914, the Crimes (Foreign Incursions and Recruitment) Act 1978, the Criminal Code Act 1995 and the Proceeds of Crime Act 2002. The committee has received 27 submissions to this inquiry, all of which have been authorised for publication and are available on the committee's web site.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of those notes are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I welcome witnesses from the Australian Federal Police. The Australian Federal Police has lodged a submission with the committee which we have numbered 26. Do you wish to make any amendments or alterations to that submission?

Commissioner Keelty—No.

CHAIR—Before we begin I remind senators that, under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister.

Commissioner, welcome. It is very good to have you here. I invite you to make a short opening statement, at the conclusion of which I am sure there will be questions from members of the committee.

Commissioner Keelty—Thank you, Chair and senators, for the opportunity to give evidence in relation to the proposed provisions of the Anti-Terrorism Bill 2004. One of the key proposals under this bill is to allow judicial discretion for up to 20 hours extension time to an investigation period under part 1C of the Commonwealth Crimes Act 1914 for terrorism offences. Currently, the investigation period of a Commonwealth indictable offence is limited to four hours with possible extensions up to a maximum of 12 hours in total upon application to a judicial officer. The current provisions exclude certain dead time from the investigation period, such as the time taken to communicate with a legal practitioner or for the person being questioned to rest and recuperate.

The AFP considers that the existing investigation period provisions provided for under part 1C work well for the effective investigation of most Commonwealth indictable offences. However, the AFP's experience is that in complex matters such as the investigation of terrorism offences where it requires access to suspects, witnesses and information across multiple jurisdictions, both domestic and foreign, and in the event that a four-hour investigation period proves insufficient, it is then essential for the investigating official to have the flexibility to seek additional investigation time. The AFP considers that judicial oversight ensures an appropriate balance between the requirements of law enforcement and rights of the individuals.

It has been the AFP's experience while investigating terrorism offences that information from foreign jurisdictions in different time zones is commonly required, resulting in delays. This bill proposes to include a new dead time category in part 1C of the Crimes Act for the investigation of terrorism offences so that an investigation period can be suspended or delayed to allow investigating officials to obtain information outside Australia that is in a different time zone. This new dead time provision provides a built-in safeguard. A request for information from a different time zone must be reasonable in the first instance and any subsequent delays in the fulfilment of that request must also be reasonable.

The proposals to amend the Crimes Act 1914 will in no way affect a person's right to silence. A person is not compellable to provide answers, unlike other legislation. The duration of the investigation period is dependent upon a person's willingness to participate in questioning. If a person elects to exercise their right to silence, questioning will not continue,

requiring the investigating official to determine whether to proceed to charge or to release the suspect based on the evidence.

It is important to note that nothing in the bill undermines the existing initial investigation period for terrorism offences—four hours, or two hours for Aboriginal and Torres Strait Islanders. The standard part 1C safeguards will continue to apply for terrorism investigations. A reasonable investigation period with appropriate dead time categories is a minimum requirement if investigators are to appropriately analyse and present information to a suspect, to secure evidence before it can be destroyed to support a successful prosecution, to prevent further possible attacks and, importantly, to eliminate persons from further inquiries. Thank you.

CHAIR—Thank you very much, Commissioner. Some submissions argue that the amendments are not necessary because of the changes that were made some short time ago which gave ASIO, in particular, the capacity to interview people associated with possible terrorist acts for extended periods of time. Could you give the committee your response to that and why the AFP needs these extended investigative periods?

Commissioner Keelty—Yes. The amendments under this legislation are for police investigations as opposed to ASIO investigations. Under the ASIO Act, ASIO officers can question persons specifically in relation to terrorism, but the ASIO powers are directed at a very different outcome—that is, the prevention of a terrorist act. In other words, the ASIO powers can be exercised to collect intelligence so as to prevent a terrorist attack; they are not a legislative tool for collecting evidence, which is the difference between these provisions applying to the AFP and those applying to ASIO.

The investigative powers in the Crimes Act and this bill are directed at questioning suspects in the aftermath of a terrorist attack or attempted attack. They are crucial to enforcing the terrorism offences created under the law. If an investigating official questioning a suspect under part 1C forms the impression that a suspect may be able to assist in the collection of intelligence in relation to terrorist activities, ASIO can seek a warrant to question that person separately under their own act, and the two questioning regimes under the ASIO Act and the Crimes Act are complementary.

CHAIR—Thank you for clarifying that point. There is one other question I want to pursue with the AFP before handing over to my colleagues, and that is the potential for detaining children and Indigenous Australians for what could be, if you include all the dead time assessments, almost 40 hours. I am acutely aware of the recommendations of the Royal Commission into Aboriginal Deaths in Custody which resulted in changes to various pieces of criminal law to address those concerns, and I support those and always have. But I would be interested in your response to this particular concern—safeguards for Aboriginal Australians and children in particular.

Commissioner Keelty—Under the existing provisions of part 1C of the Crimes Act there are provisions that specifically address the issue of children and young persons, and also for Aboriginal and Torres Strait Islanders. Those provisions would not be affected by the proposed amendments. There are also guidelines that were established by the Australasian

Police Ministers Council. If the committee does not have a copy of those guidelines we can table a copy.

CHAIR—I am not sure that we do so that would be helpful. I do not have a Crimes Act to hand. Are you saying that the provisions in the Crimes Act which pertain to the arrest and questioning of Aboriginal Australians and children are not overridden by these amendments?

Commissioner Keelty—That is correct.

CHAIR—Thank you.

Senator BOLKUS—I refer to clause 15 of the proposed legislation. It is proposed that there be a new subsection (7)(a) which would allow a minister a regulation making power. There does not seem to be any criteria for implementing that regulation making power. Why is that?

Commissioner Keelty—Could I leave that for the department to respond to?

Senator BOLKUS—Yes. Going back to the question that Senator Payne asked, your answer was that under current legislation ASIO has the capacity to detain someone for intelligence gathering. What role operationally does the AFP play in that process now? To what extent are you involved in it and to what extent are you excluded from that process?

Commissioner Keelty—The role that we have in relation to the current ASIO powers is to be present during the questioning of a person under that act. The purpose of that is to determine whether there is evidence or the potential for evidence to be obtained, which would then have to be a separate process.

Senator BOLKUS—I am a bit intrigued. I am working on the premise that ASIO has a capacity to question someone and you are part of that process. Are there any categories of people who would not have intelligence but would be suspects? In other words, a person of interest because of their intelligence capacity would for me include anyone who would be suspected of the offence.

Commissioner Keelty—While I think through the proposition, I will say that one difference is that under the ASIO Act the witness is compelled to respond to the questions. We cannot then turn that around as admissible evidence. We have to then separately interview the person under the provisions of part 1C. I am just trying to think of a circumstance that might apply to your scenario.

Senator BOLKUS—You might want to take that on notice.

Commissioner Keelty—Yes.

Senator BOLKUS—The other question I have goes to guidelines for questioning. You refer in your submission to the guidelines for police custodial facilities adopted by the Australasian Police Ministers Council. Can we get a copy of those?

Commissioner Keelty—Yes, I can table a copy for you now.

Senator BOLKUS—I am wondering whether out of that or separate to that we should be looking at safeguards or protocols for the questioning regime. That was an issue with respect to ASIO legislation. There do not seem to be provisions in this legislation to accommodate

provisions for rest, recuperation and so on. Are you saying that the Crimes Act provisions apply?

Commissioner Keelty—Yes, the Crimes Act provisions apply—and that goes to the down time that I referred to in my opening statement.

Senator LUDWIG—Have you participated in any review of part 1C with the Attorney-General's Department or another department?

Commissioner Keelty—Could I take that on notice? I thought there was to be a review after a specific period, but my memory is—

Senator LUDWIG—That is why I was asking the question; I thought there was too. Has the AFP or any state police force that you are aware of made submissions to the government about the adequacy of the current provisions, which have generated the amendments that have been put forward and that are currently before the committee?

Commissioner Keelty—As I understand it, both Tasmania and Victoria—and I thought they might have made submissions to the committee—

CHAIR—Victoria has.

Commissioner Keelty—were looking at reasonable time rather than at the hours provision that we were supporting. I do not want to speak on behalf of Chief Commissioner Christine Nixon, but I have had discussions with all the commissioners. If the committee allows me to give it some background: there was a period of time when the Commonwealth led the way in this type of constraint, if you like, around the questioning of suspects by having a time limit and provisions about who should be offered to be present—whether it be a lawyer or a friend—and then as time went on tape recorded and videoed interviews were introduced. Once we introduced times at the Commonwealth level, some of the states that introduced subsequent legislation, in some cases many years later, went to reasonable time rather than to the time limit. It went through a sort of evolutionary process, where people were nervous at the start about how many hours might apply and then technology overcame some of the earlier concerns about the integrity of police interviews. Then some of the jurisdictions moved on and introduced reasonable time.

As I understand the basis of the argument put forward by Chief Commissioner Nixon—and, as I say, I say this with the reservation that I do not want to speak on Chief Commissioner Nixon's behalf—she asks why we can't have matching Commonwealth and state legislation, why we can't have reasonable time in both instances. Obviously, we have taken the view that capping it at a maximum level allows a limit. I think it is useful to point out that this will not be in very many cases and that, in any event, it will only be in cases where the person is cooperating with the interviewer. We cannot compel people to answer questions. Someone continuing to answer the questions, as I said in my opening address, has not given up their right to silence. This would be in a very small number of cases where the person is cooperating and is happy to be there doing what they are doing.

Senator LUDWIG—I am also interested in understanding whether or not the AFP have made any submissions or requests for the amendments that are currently before us to the

Attorney-General's Department—in other words, in a lead-up to this point, or has it come from elsewhere?

Commissioner Keelty—We have done it in consultation with the department.

Senator LUDWIG—When you say, 'in consultation with the department', do you mean that it was initiated by the AFP based on experience with the current legislation and then a submission has been brought forward to the Attorney-General or, alternatively, the Attorney-General has indicated this as an area that he wanted to explore because of other considerations—maybe the Victorian Police or some others—and has then consulted back with you about developing a proposal?

Commissioner Keelty—I will answer and, if I am wrong, I will come back to the committee as soon as I have determined that it is not correct. What happened was that all of the commissioners—including myself—met with the Prime Minister. The issue was raised regarding the point I just made about the lack of similarity in Commonwealth and state legislation and whether that would be a hindrance to the ability of the state police to investigate terrorism offences under the Commonwealth legislation. The Prime Minister took on board those comments from the commissioner and asked the Attorney-General to look at the issue and, as I understand it, that is how the process was initiated. It came back then to the department, and we, in consultation with the department, put forward this submission.

Senator LUDWIG—So there was no needs based approach from the AFP's perspective which generated this legislation. In other words, there was no deficiency in your current investigative regime or interviewing regime which highlighted a problem which needed to be addressed.

Commissioner Keelty—We were aware of the problem. We identified the problem through the investigations we had been doing in Bali and other places and that, had they happened in the Australian jurisdiction, we were going to have an issue. By raising it the way it was raised, it actually expedited the process.

Senator LUDWIG—What did you say the problem was, then?

Commissioner Keelty—There were a number of problems. One is that in the practicality of an investigation of the type that we were involved in, in Indonesia, there were issues about trying to get information from other jurisdictions, issues about trying to get forensic evidence to match other material that could then be put before a suspect. So there were lengthy delays in terms of the process that had to be gone through, and in the meantime a suspect could be, in every other respect, at large. So they were experiences that we learnt from the Bali bombings, and thinking about the application of the current powers in an Australian environment would be very limiting.

Senator LUDWIG—This is about suspects rather than non-suspects.

Commissioner Keelty—Yes, that is right.

Senator LUDWIG—In relation to the actual time zones themselves, what do you understand to be the maximum period that is proposed under this bill for you to detain? What I want to understand is the overseas time zone issue. Is there a cap on that, or can it be added up depending on which time zone you then have to inquire into? For argument's sake, if it

were a French, then American time zone inquiry because you needed to confer with different countries and then, secondly, if you look at the rest periods themselves, how long can the dead period, effectively, be? What I was trying to ascertain is the reasonable length of time that you would expect that amount of time to add up to.

Commissioner Keelty—The answer to your question is that it is reasonable. We say that the insertion of the dead time in part 1C for terrorism investigations is necessary because of the time zone differences between countries. Without the dead time mechanism, investigators may not have time to obtain the information from overseas. The only limit is that it be a reasonable time. The safeguard for that is, firstly, that any suspension or delay of questioning to receive information from an overseas location in a different time zone has to be reasonable. A suspension or delay would be unreasonable if, for example, the information could be obtained from an overseas location without delay regardless of any time zone differences or if the same information that is sought from overseas could be obtained from within Australia. A suspension or delay may also be unreasonable if the information to be obtained from overseas has little relevance to the questioning of the suspect. Secondly, the period for which the questioning is suspended or delayed must also be reasonable. The period is capped as reasonable so that the dead time cannot exceed the difference in time zones between places of investigation in Australia and relevant overseas locations. We have tried to put forward a bill that reflects the reality of the experience but is also subject to the test of reasonableness in the down time period.

Senator LUDWIG—What would be the total time? You keep using the word 'reasonable', but what I am trying to ascertain is what you envisage to be a reasonable time—in fact what the maximum time is. If, as you say, you can detain someone for a certain period proposed in this bill and then add on a dead time and overseas agencies, what could that extend to—36 hours, 24 hours, 23 hours?

Commissioner Keelty—It is the last point I made about it being capped. I do not know which country you might be talking about, but it is capped at the maximum time zone outside Australia with Australia. It is capped so that the dead time cannot exceed the difference in time zones between the place of investigation in Australia and the relevant overseas location where the inquiry is being made.

Senator LUDWIG—So shortly east of Greenwich. That is that period. How long is the rest period?

Commissioner Keelty—As long as they need—as long as the suspect needs—with, again, the test of reasonableness. Again I highlight that this would be in a circumstance where the person detained, the person being questioned under part 1C, is cooperating. Any sense that this could lack propriety—

Senator LUDWIG—So you are saying that the person could walk out?

Commissioner Keelty—If a person decided not to cooperate any further then the person interviewing would have to make a decision as to whether or not to arrest, as is the case with the current part 1C provision.

Senator LUDWIG—And they would have the legal adviser with them.

Commissioner Keelty—That is right—the opportunity to have a legal adviser.

Senator LUDWIG—I will leave that for the moment and come back to it if we have time.

CHAIR—I want to go back to the question of children and Indigenous Australians. I assume you are saying that the amendments are not applicable, and therefore the concerns expressed in some submissions do not arise, because the bill is not amending 23C(4) to say that the period might also be extended under section 23DA. That is how I read the bill and the head act. Have I got that right?

Commissioner Keelty—Yes, as I understand it that is right. It is the same; they continue on.

CHAIR—Thank you. That should put to rest some of those concerns, I hope.

Senator MASON—Commissioner, since September 11 you have appeared before this committee on numerous occasions, as have other agencies. Just to give a framework for our discussions, this committee in particular and the Senate and parliament in general have been asked to consider legislation that increases the power of Australian agencies to discover terrorist networks and to enhance their intelligence capacity. On the one hand, agencies have sought power from the parliament to increase their intelligence-generating capacity to fight terrorism. On the other hand, we have legislation—and this is part of it, as you said in your opening remarks—that has been directed towards what happens when we have caught someone and they are being questioned and then prosecuted. So on the one hand we have legislation that is directed towards the gathering of intelligence, and on the other hand we have legislation that is directed towards the prosecution of individuals.

In general—and I am speaking for myself here but, I suspect, for others—I have not had any problem with Australian intelligence-gathering agencies having increased powers to stop or inhibit terrorist offences. But when we get to the prosecution stage of individuals it is a slightly different equation, because either the terrorist offence has been committed—God forbid—or there has been an attempt. It strikes me that they are two quite different situations. I always wonder in general why agencies need more powers to prove that a particular individual is a terrorist just because they happen to be terrorists rather than simply criminals.

Do you understand my point? For example, I was flicking through the legislation with respect to amended section 102.5(2), which is about potentially strict liability and recklessness if a person has been providing training to or intentionally receiving training from an organisation. What has happened is that now the onus is on the accused to establish a reasonable possibility that they were not reckless. In a sense it is asking an accused person to go some way to establishing their innocence in the first case, to raising a reasonable prospect and then giving it back to the prosecution. Commissioner, why do you need that power? I ask you this in large distinction from increased powers to catch terrorists and gather intelligence. This is about prosecuting people. I am just wondering in general why you need more powers.

Commissioner Keelty—In essence, it is the difference between knowing about a thing and then being in a position to do something about it. On the one hand, whilst the enhanced powers to the intelligence legislation have enabled the potential for more information to be gathered and a picture to be developed, that is as far as it can go—that is, it is a hypothesis that is then developed out of a picture emerging from information and intelligence gathering.

On the other hand is the capacity to do something about it. For example, you could identify someone as a suspect terrorist under the ASIO legislation and apply that legislation to find out more details, but that only improves your knowledge about the issue. Someone then has to make a decision about whether it has reached the bar to be developed as a criminal prosecution, which is a quite separate process. The outcome of the application of the ASIO legislation is that we have knowledge. The outcome of the application of the laws that are the subject of this inquiry is that we have a prosecution that has to be proved beyond reasonable doubt that the person has committed a crime, whatever that crime might be. On the intelligence side, it may well end up simply being a hypothesis that it is more likely that a person has or has not done something or that a person is or is not involved in something, but it does not have to be proved to anybody.

Senator MASON—I accept all that you have said, Commissioner. My question is: why do you need to make it easier to successfully prosecute terrorists? We have been prosecuting criminals under the common law for a thousand years. I accept that the balance has changed hither and thither along the way. As I say, I have no problems with increasing the powers for intelligence gathering. But here we are changing again the common law principles to make it easier to prosecute a terrorist. I do not see the big distinction between a bloody terrorist and a mass murderer, for example. I just do not quite understand why we need to make it easier to prosecute successfully, otherwise we could use the same reason to justify capturing serial murderers and rapists et cetera. What makes terrorists so different?

Commissioner Keelty—In my view it is the seriousness of the crime. At its base it is mass murder. If I could just expand on that. There is an enormous impact from a terrorist attack that is not immediately apparent. Yes, there are the deaths that are caused, but there are serious ongoing impacts. For example, if a terrorist attack were to occur on an airline, it may well be that no-one decides to fly anymore. If a terrorist attack were to occur at a railway station, as it has in Madrid, how many people would decide not to catch the train and then the roads would be blocked up? It is the overall impact of this crime compared to other crimes. It is enormous. For example, the impact of the Bali bombings: not only were there the deaths of the people—and you would never, ever devalue the tragedy of the deaths of those people—but also it was the enormity of that crime scene, which I walked through so many times. It is the weight of this crime.

No crime in the statute is more serious than the crime of terrorism. So it does require separate considerations. It is much more complex. In the experience of the overseas agencies that I have been talking to about this crime, it is complex in the sense of how it is organised and how far the reach goes—that is why we talk about time zones and that sort of material. It is just a different crime and it requires different laws. I fully understand what you are saying.

Senator MASON—I would simply say, 'What about the conspiracies to commit treason and so forth during the Cold War when people were selling atomic secrets and everything else to the Soviet Union? Even during that extremely stressful period for the United States, the Americans kept to the rule of law. Sure it was tough, but the US Supreme Court kept to the rule of law, even in the most serious instances of alleged treason in the United States. I understand what you are saying, and I suspect most people would agree with you, but I am concerned whenever there is a diminution of the protection of the innocent. I might argue that

the more serious the crime, the more important the protections should be for the accused. Although I suspect it is a debate that I would not win, some people might argue that. Thank you.

Senator BOLKUS—Following on that point—and I think it is a good example of what you are concerned about, Senator Mason—we are talking about increasing the maximum penalty for reckless involvement to something like 25 years. That causes concern for me because recklessness could involve a degree of innocent motivation.

Commissioner Keelty—In part that goes to Senator Mason's comments. I am on the public record—I gave at speech at the University of Wollongong last year—that we need to have a balance between rushing out to get new powers and recognising what it is that we actually need to complete the task. It is important that we have that balance right. Therefore, it is important that the commissioner appears before this committee and that this committee carries out its work to scrutinise what is going on here. But the final arbiter in all this is the court itself. Whether an act is reckless or not will be determined by the court. The reason for the penalty is clear. It is to act as a deterrent for others who might get involved in the crime as well as to deal with the crime before the court at the time. The ultimate arbiter in everything we are discussing here today—whether it is reasonable, whether the police have acted appropriately or whether indeed the person has committed the crime of which they are accused—will be the court.

Senator BOLKUS—Sure. Having accepted all that, in the absence of any stated reason for the increase in the penalty, why would I not be excused for presuming that we have some very dangerous window-dressing here? What is the motivation for increasing the penalty from 15 years to 25 years?

Commissioner Keelty—From my perspective—and the department may well provide more information on this—the investigation into the Bali bombings opened up our eyes to how many people have been training, for example, as part of Jemaah Islamiah. We know that there are Australians who have trained with other organisations and there are matters before the court, which I will not touch upon. So there is an issue about dealing with people who train with these organisations for whatever reason. It may well be that they have a reason that is excusable. But the motivation for increasing the penalty is to allow the courts to determine whether it was a reckless act or it was an excusable act and if it was reckless or deliberate then the penalty fits the crime. We have a large number of people who potentially could act as terrorists, who have been given the training to make the bombs. We saw the technology of detonating bombs by mobile phone in the Bali bombings and we have now seen it in the Madrid bombings. The speed at which this new technology is passing through the hands of training camps is extraordinary. The speed at which the Jemaah Islamiah bombers learnt new technologies to avoid detection—and I am talking about the two outstanding suspects—has been incredible. So we have to have some major deterrent for people who are involved in the process of training these people but also for people who subject themselves to the training to potentially act as terrorists.

Senator GREIG—Commissioner, is there any such thing as a legislative deterrent to a suicide bomber? Is the law any response to more extreme terrorism?

Commissioner Keelty—To our way of thinking, we would think that they are acting irrationally. It is obviously a phenomenon that we have seen in the Middle East over a long period, but it is not something we saw in our immediate region until the Bali bombings. The law might be one thing, but to be honest with you it is a lot more than that. It is about education and re-education. It is about what acts on a person's mind; it is about what a person thinks they might achieve through that process and, sad as it is, the training, for example, that people had or the propaganda or the brainwashing—whatever you want to call it—in order to do that act is undertaken in the training schools, the training camps. I am trying to inform the committee that this is such a serious phenomenon, and I am an advocate for the rights of individuals. If you look at the media releases I put out about the two recent arrests, you will see that I said there should be no further discussion about these arrests and that the courts should be allowed the freedom to determine the facts of the matter. We are not seeking additional powers that, in my view, are beyond what we require and we would not do that.

Senator BOLKUS—My question indirectly touches on but is connected to the concept of reckless. Given current debate developments—and you mentioned the Bali bombings, fertiliser and telephone kick-starting of the bomb—under the legislation as it now stands, could you foresee a situation where someone, who does not take sufficient care in who they sell the relevant fertiliser to, could come under the definition of 'reckless'?

Commissioner Keelty—Ultimately, it is a matter to be determined by the court. It is like the situation where someone sells too much alcohol to a person who then has a fatal accident or is involved in a fatal accident: is the bar person then reckless for overservicing the alcohol? It has to be determined by the court.

CHAIR—Commissioner, Mr Anticich and Mr Batch, thank you very much for joining the committee this afternoon, for your submission and for your assistance. Senator Ludwig has just advised that there may be a small number of questions that will go on notice. The committee is required to report by 11 May, which is Tuesday week, so if we do need to do that there will be a very tight turnaround time.

Commissioner Keelty—We will oblige the committee.

CHAIR—Thank you.

[2.16 p.m.]

LEWIS, Mr Rodney, Board Member, Public Interest Advocacy Centre

PETTITT, Ms Annie, Policy Officer, Public Interest Advocacy Centre

CHAIR—I welcome witnesses from the Public Interest Advocacy Centre. PIAC has lodged a submission with the committee, which we have numbered 17. Do you need to make any amendments or alterations to that submission?

Ms Pettitt—No.

CHAIR—I invite you to make a brief opening statement. At the conclusion of that we will go to questions from members of the committee.

Mr Lewis—Thank you for the opportunity to address the committee. Firstly, we would like to place on record and repeat that what we submit here should not be taken as a derogation of the position that we originally took, which was opposition to the package of measures. I think we made submissions to this committee when those measures were before the Senate and the House. That of course is still our position—that is, opposition to the bills, now the law and of course in principle to any extension of that law.

We have an example of legislation creep, which is something that many warned of and of course many were aware of with the original package of measures. If I could be so bold, I think it is legislation creep in three dimensions, which is possible with this kind of legislation. Both vertically and horizontally we see here a demonstration of creep; that is, vertically we want more and more—we want more time for detention, for example. An example of horizontal creep is an extension of these notions, which has already been averted to recently, and that is: what about mass murderers, paedophiles and serious drug offenders? Perhaps we should have these powers to deal with them as well and address those terribly serious crimes.

We also wanted in the opening statement to make some generalised comments on three issues. The proceeds of crime amendments are intended to prevent a person profiting from the publicity surrounding their terrorist activities. Clearly this would include Messrs Mamdouh Habib and David Hicks. The point that we seek to make is that, if their detention or anything about their detention is shown to be illegal—say, before the US Supreme Court—the presence of the reference in this bill to the military commissions may be an embarrassment to the rule of law and perhaps even to the Australian parliament.

The other aspect of the proceeds of crime amendments is a question which we pose but we have no answer to immediately and that is: what if Xanana Gusmao were to write a book about his experiences? He was not charged with subversion when he was put on trial but he had some very serious offences on which he was found guilty. If he then wrote a book and sold it in Australia would the proceeds of that book be available under this law? Likewise for the Dalai Lama, just to give two of many examples.

On the issue of extension of time, we would want to draw attention to the very meagre rationale that has been put forward in the explanatory memorandum for the extension. The rational goes like this:

This Bill would adjust two of these safeguards so that authorities investigating the commission of terrorism offences are not overly constrained.

If that is the rationale and that is the best rationale that the drafter of this bill can come up with then I fear for the next time they come to the parliament because the same argument will apply without any elaboration or any attempt at elaboration. We think that is completely inadequate. In fact, we urge the committee to seek a well argued coherent detailed proposal which, perhaps, deals with concrete examples to show how such an extension is essential.

The second point that we would make about these extensions is that we should not just merely follow what has been done in the United Kingdom or in Canada where extensions of this kind or of this order are available.

Thirdly, to finish off with some kind of homily on this particular part of the measures, I had occasion to look at a case of ex parte Walsh which was decided at the outset of the Second World War. It is reported in the 1942 *Argus Law Reports* page 360. The Chief Justice of the High Court on that occasion talked about how:

... every intendment should be made in favour of the liberty of the subject.

He was of course construing a statute; you, senators, are actually involved in addressing its meaning. We would just urge that every amendment, every proposal and every review of this package of measures should be made, should be biased, in fact, in favour of the liberty of the subject.

Finally, some comments about the measures concerning training. So far as I can tell—and I only really started looking, I must confess to you, in the last 24 hours—there is no definition of the word 'training' in any of these measures. I cannot find it and I would be very grateful if someone could point it out. If there is not any definition, we are left with something of a vacuum where no vacuum of course should exist. I assume that a reference to training means military training but I am minded to think of a situation which comes up in another hobby I have with the International Commission of Jurists, and that is that we have been approached by a number of organisations over the years—the LTTE, the Liberation Tigers of Tamil Eelam, and the Bougainville Revolutionary Army, for example—who have sought to at least make communication and contact on issues of the rule of law.

Clearly we are not a revolutionary organisation but the point I seek to make is this: what does 'training' mean? Does it mean, for example, training for an organisation preparing perhaps for a transition to government? We have an example that goes back only to 1999 which is fairly close to our shores of an organisation which suddenly moves from outlaw to something else but in the meantime they need all sorts of legal advice on programs and policies. Even being a terrorist organisation they might seek advice on the Geneva conventions, the United Nations covenants and human rights instruments. Is this then to be a penalty of 25 years? So we would urge that the definition of training be actually manifest in the bills and perhaps some allowance be made. There is some detail in that that I would like to return to if time allows because there is a provision in the Crimes Act which perhaps is apposite. There can be concern about organisations like the OPM, the BRA and the LTTE, which are all separatist organisations, but they may in fact be seeking training which is not

military training. Clearly anyone who provides the training would obviously require the necessary intention, or lack the necessarily intention perhaps.

Finally, as a general observation of history, at one time the Americans and the Israelis were terrorists to the British, as were the Indonesians to the Dutch. We must be careful in our submission about how we deal with terrorism and terrorists because history is replete, in fact it is littered, with examples of how terrorists one day become governments the next. Thank you.

CHAIR—Thank you, Mr Lewis. Ms Pettitt, did you have anything to add?

Ms Pettitt—No.

CHAIR—Mr Lewis, in PIAC's submission concerns are raised about the time limits for questioning children and Aboriginal and Torres Strait Islander Australians. Have your concerns been allayed by the discussion with the previous witnesses on that point?

Mr Lewis—I will pass that question to Ms Pettitt.

Ms Pettitt—Can you please explain what was said by the commissioner before? I missed that.

CHAIR—I will have a small role reversal here. My understanding of the legislation as it is drafted—and we might all have to hang around until Mr McDonald gets to explain this to us completely—is that because there is no amendment to section 23C(4), that is, the section of part 1C that pertains to extending the questioning period for persons under 18 or Aboriginal and Torres Strait Islander persons, to include application of section 23DA—this extension section—then there is no amendment to that. That is, there is no change to the position for children and Aboriginal and Torres Strait Islanders as it currently stands under part 1C.

Ms Pettitt—That would be limited to two hours maximum.

CHAIR—Yes, as it currently stands.

Ms Pettitt—As it currently stands. If that is the case then our concerns would be allayed. However, if it is not the case our concerns would stand.

CHAIR—I understand that.

Senator LUDWIG—In your submission at page 5 you mention the military commissions of the US. Can you elaborate on what your specific concerns are in relation to using or mentioning the US military commissions?

Ms Pettitt—Our particular concern is that it is very unusual to specifically include an Australian legislation reference to an executive body of another nation state and, in addition to that, to specify one particular nation state. It seems very clear that this definition of 'foreign indictable offence' to include military commissions of the United States is clearly directed at Guantanamo Bay and the two Australian detainees currently there—Hicks and Habib.

Senator LUDWIG—When you say, 'executive arm of the US' are you referring to the actual legislation or the President of the United States? Who in fact would make the commission or the orders?

Ms Pettitt—As I understand, it is under the orders of the President of the United States that the detainees are being held in Guantanamo Bay.

Senator LUDWIG—Do you see any problems with including that provision within Australian law?

Mr Lewis—The problem is that it gives the Australian parliament's imprimatur to a system of dispensing justice which has been under great debate and attack. If indeed the opponents of the notion that a military commission can dispense justice properly, fairly and with due process prevail then we have embedded in Australian legislation something which, as I referred to earlier, could prove an embarrassment and would obviously have to be very quickly removed by government. It would be very embarrassing—taking it logically to its conclusion—if the Supreme Court were to find that all of the arguments about the military commission should be upheld. Of course, if the converse is true then there perhaps is not a problem—except that the arguments remain.

Senator LUDWIG—Do you see any problem constitutionally with including provisions such as that in Australian law?

Mr Lewis—Do you mean the appointment and establishment of military commissions?

Senator LUDWIG—I mean the use of that provision in Australian law as it stands—in other words in 337A. I was wondering whether you had had a look at it. If you have not had a look at it then you might not want to comment on it.

Mr Lewis—No, I did not.

Senator MASON—Mr Lewis, you raised the issue of recklessness in relation to section 102.5. In the shaded box at the foot of the last page of your submission, you say:

If the Bill is adopted, PIAC recommends that the amendment relating to training received by or provided to a 'terrorist organisation' be limited:

- to organisations whose primary activities involved the promotion and engagement in extreme acts of ideological violence; and
- to training that involved the promotion and engagement in extreme acts of violence.

Once again, we may have to wait for Mr McDonald to give his evidence, but I think—and correct me if I am wrong, but this is the way I read it—that section relates to, for example, someone providing training to people to fly aeroplanes. The question would be whether you are training people who might belong to an organisation with terrorist aims. For example, if you are a flight instructor and you train people, that is fine. But if you have any reason to believe that those people might be learning to fly for reasons involving terrorism, sabotage or running into the World Trade Centre then you might have a cause for concern. I think that section is a bit broader than the note you make at the foot of that section of your submission. That is the way I read it, anyway, and I mention it as a matter for clarification. I think that is right. Is that the way you read it?

Mr Lewis—Taking the example that you give, there is plenty of law to—

Senator MASON—There are plenty of examples.

Mr Lewis—tell us about recklessness and about what the High Court thinks about recklessness, wilful turning away from the truth and so on. If we said that it is limited:

- to organisations whose primary activities involved the promotion and engagement in extreme acts of ideological violence ...

that would omit recklessness. Is that what you are suggesting?

Senator MASON—It was more the second dot point I was getting at:

- to training that involved the promotion and engagement in ...

Mr Lewis—That requires an intention and a direct knowledge, and there can be no indirect knowledge in that.

Senator MASON—I suppose what I am saying is that the training you are giving with the organisation does not need to be in 'the promotion and engagement in extreme acts of ... violence'. It might be simply giving people knowledge and the capacity to engage in terrorist attacks, which may be violent at one level but might just involve flying a plane into a building.

Mr Lewis—We would not disagree with that.

Senator MASON—Okay.

CHAIR—Mr Lewis and Ms Pettitt, thank you very much for your submission and for assisting the committee this afternoon. We are working in a very tight time frame, but if there are issues the committee needs to follow up with you then we will be in touch. Thank you.

[2.34 p.m.]

EMERTON, Mr Patrick, Member, Castan Centre for Human Rights Law

CHAIR—Welcome. The Castan Centre for Human Rights Law has lodged a submission with the committee which we have numbered 18. Do you wish to make any amendments or alterations to that submission?

Mr Emerton—I would like to. The second paragraph under the heading 'Increase in permitted investigation period', which is from the bottom of the first page to the top of the second page of the submission, concludes 'from 12 to 24 hours'. Following that should be added, in parentheses, 'or in the case of children or Indigenous people 22 hours'.

CHAIR—Thank you. I invite you to make an opening statement, and then we will go to questions.

Mr Emerton—My submission is quite long, so I do not intend to try to summarise all of it. I just want to recapitulate a few key points. The first is that, on the whole, it is my view that these amendments have not been very strongly justified. The second is that, although the piece of legislation is called the Anti-Terrorism Bill, its provisions have the potential to affect a far wider range of people than those who would ordinarily be thought of as terrorists. For example, in the context of the amendments to the Crimes Act and the detention regime there, the justification that is offered refers to the complexity and international dimension of investigating terrorism offences. But if one looks at the definition of 'terrorism offence'—which is a technical term, not an ordinary term—one sees that it refers to any offence under part 5.3 of the Criminal Code. None of those offences have any requirement of an international element to commit the offence, so there is no a priori reason to suppose that those offences will involve international elements.

In many of them, the elements do not seem terribly complex. For example, the question of whether or not an individual possesses a thing connected to a terrorist act—and that is an offence under part 5.3—that does not, on the face of it, seem to be a particularly complex matter to investigate. So there is no a priori reason to suppose that these are particularly complex offences or offences with international elements when one looks at the actual legislation that is referred to. The nature of the justification seems to be quite weak and the potential spectrum of people who are caught very broad. It is not simply potential bombers or hijackers; a very wide class of people are potentially liable for terrorism offences under part 5.3 and would therefore be liable to the increased detention regime if the Crimes Act amendments went through.

Similar points are true of the proposed amendments to the Proceeds of Crime Act. These are not in fact limited to terrorism offences at all. Their implications are extremely broad, particularly in the light of their retrospectivity. As I have explained in my submission, they are retrospective in two ways. Once they are passed, it will be possible for any person who has offended overseas to retrospectively have their assets confiscated in Australia if, subsequent to the offence overseas, the law changes in any single Australian jurisdiction. In addition, the amendments are retrospective immediately in the sense that they would now enliven the

possibility of confiscation in respect of people whose offences were committed overseas in the past.

So in two respects those amendments are retrospective and they are in no sense limited to targeting terrorists or, in fact, even particularly to targeting criminals. The amendments to the definition of 'literary proceeds' would mean that any notoriety which arose even indirectly as a result of a criminal offence would generate liability to confiscation—even, for example, if the notoriety were notoriety for good works, say in prison reform, which resulted from someone's period of incarceration because they had earlier committed an offence and been incarcerated. So, again, the impact of those provisions is very broad.

The proposed amendments to the membership offence are, likewise, very broad in the range of people they would have the effect of criminalising. Imagine, for example, an organisation in the Gaza Strip which provides assistance to families of suicide bombers whose homes have been destroyed in retaliation for such bombings. That organisation could well be held as a result of that provision of welfare to those families to be indirectly fostering terrorist acts. That would mean that any organisation in Australia which sent money to that Gaza charity could now likewise be held to be indirectly fostering terrorist acts and, if the amendments to the membership provision went through, all the Australian members of that organisation would be criminals liable for 10 years imprisonment. You can think of other examples as well.

It might be objected that some of the examples I give are perhaps a little unreal or fanciful. In particular, it might be objected that the DPP would be unlikely to prosecute in many of the cases that in my submission I suggest are more worrying. That may be true but it is no defence of bad criminal law that it is not enforced. This was recognised quite recently in the case of the Tasmanian anti-sodomy laws, which have not been enforced for a long period of time. Nevertheless, the Human Rights Committee of the United Nations regarded these as an affront to human rights and the Commonwealth parliament passed laws to intervene in that matter to render those Tasmanian laws invalid. So it is no defence of bad criminal law that it is not enforced. If there is no intention to make criminals of innocent people then laws should not be passed which make them guilty, particularly laws which expose them to up to 10 years imprisonment.

The discretion is really contrary to the rule of law. People's liability to prosecution or indeed their criminality through some of these provisions—for example, the proposed prescription regime under the Crimes (Foreign Incursions and Recruitment) Act—and criminal liability turning on so strong an executive discretion is entirely contrary to the rule of law. Criminal liability should turn on the consistency or otherwise of one's behaviour with legislatively prescribed constraints on that behaviour. So we have an existing trend in the antiterrorism field in Australian law of a great exposure of people's status of being guilty or innocent to executive discretion. These amendments would continue to push further in that direction.

It would be grossly contrary to the rule of law to introduce the reverse onus on the reckless training offence, particularly when one keeps in mind that the training itself need not be training for any criminal purpose. The training may be first aid training. The only question is the status of the organisation. 'Terrorist act' has a technical meaning, so 'terrorist

organisation' has a technical meaning. These need not be outrageous organisations which are liable to prescription under this regime. The argument that only outrageous organisations will be prescribed takes us back to the point of very serious criminal liability turning entirely on the question of favourable or unfavourable exercises of discretion by the government. To conclude, as is evident in my submission and in these comments, I really regard these proposals as entirely contrary to the rule of law.

CHAIR—Thank you very much. It gives us all something to think about.

Senator BOLKUS—I know we have A-G's here and we should trust them. Clause 15 proposes a prescription of organisations mechanism. I do not know if you have it in front of you.

Mr Emerton—I am familiar with the clause.

Senator BOLKUS—It says:

(7) For the purposes of subsections (5) and (6), prescribed organisation means:

(a) an organisation that is prescribed by the regulations for the purposes of this paragraph ...

In trying to assess the purposes of the paragraph, should we just look at (7)(a) or should we look at something broader? The first question is one of interpretation. What does that mean?

Mr Emerton—My own view is that it seems to be a power at large to proscribe foreign armed sources. There is nothing in the rest of the structure of the act which suggests implicitly any constraints on that regulatory power. If you look at clause 18 in the schedule and the proposed section 12 to issue regulations, it merely says:

The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed ...

So neither in the amended section 6 nor in the new section 12, if this were to go through, would any constraints, guidelines or grounds for prescription be set forth. These prescription powers are entirely contrary to the structure of the act.

The purpose of the act is clearly to outlaw private adventurers travelling from Australia to foreign countries and getting involved in military adventures in foreign countries. The entire structure of the act, therefore, is inconsistent with the idea of outlawing foreign armed forces. As my submission notes, the Attorney-General, who originally introduced this legislation, expressed in *Hansard* at the time that the intention under the act was that issues to do with armed forces would be regulated through the system of international law that governs the legitimacy or otherwise of the use of armed forces by states. So I cannot give a sensible answer to the senator's question, because I agree with his underlying premise that there is no basis implicit in the act on which this power would be regulated. It would be a power at large to proscribe foreign armed forces.

Senator BOLKUS—I accept that argument. I am also trying to work out the structure of that particular paragraph. There does not seem to be a purpose in that paragraph.

Mr Emerton—If you look at the explanatory memorandum, you will see it states that the purpose is to allow criminalisation at the discretion of the foreign policy of the government for reasons such as flexibility and the need to maintain good international relations. So if, for

example, one were to challenge regulations or seek a review of the regulations and reference was made to the EM to help interpret them by the reviewing body—be it the AAT or the court—it would seem that the grounds are to have the utmost flexibility to proscribe such armed forces as one wishes in order to enhance the operation of Australia's foreign policy and international relations.

Senator BOLKUS—My other question relates to literary proceeds orders. The provision anticipates that, in deciding whether to make an order, the court must take into account a number of things, including the social, cultural or educational value of the product or activity.

Mr Emerton—Is this section 154?

Senator BOLKUS—Yes. It does not include acknowledgment of political debate or discourse and to me that is a bit of a gap. By not including that, is it possible that the legislation could fall foul of constitutional protections of freedom of political discourse?

Mr Emerton—I am not an expert constitutional lawyer, but if I can still give what seems to me to be the correct answer my feeling would be no, because there is no prohibition on the discourse; it is merely confiscation of the assets generated from commercial exploitation of the discourse. Off the top of my head, my feeling would be no, at least if that prohibition were read narrowly, which seems to be the current tendency in the court after the Lange case.

Senator LUDWIG—Looking at the issue of what you called the 'reverse onus recklessness offence', can you expand on your view about that. Is it typical in legislation of this kind?

Mr Emerton—It is exceedingly untypical in legislation of this kind. The reason that I describe it as a 'reverse onus recklessness offence' is that my interpretation of the way the provision is structured is that there is no need for the accused, in order to be guilty of that offence, to have any state of mind as to the nature of the organisation with which the accused is training. They need have no state of mind. However, section 102.5—I think, clause 4—would allow it to be a defence to show that you were not reckless. Defences under the Commonwealth Criminal Code place an evidential burden on the accused to enliven the defence. If they discharge the evidential burden, the onus of rebutting the offence is shifted to the Crown and at that point it becomes a question of proof beyond reasonable doubt.

In practice, any accused under that provision who could discharge the evidential burden by showing a reasonable possibility that they were not reckless would then have transferred the onus to the Crown to prove that they had the relevant reckless state of mind. If they could discharge the evidential burden it would then in fact go on to be played out as a very standard crime where recklessness is the mental element. The reason I describe it as a 'reverse onus offence' is that the initial burden is placed on the accused to lead evidence that raises a reasonable possibility that they did not have a reckless state of mind. So if they cannot lead such evidence—and in my view, at least in matters which are likely to be charged under this provision, that may be quite difficult—

Senator LUDWIG—Could you just expand on why it would be difficult?

Mr Emerton—For example, currently in the United States a man colloquially known as the 20th hijacker, Mr Moussaoui, is under trial for conspiracy to participate in the September

11 hijackings and then bombings. He has wanted to call as witnesses in his defence certain individuals who are being detained in various foreign military holding camps by the government of the United States and he has been unable to do so because for national security reasons those witnesses are not being made available. Given the likely intended targets of these sorts of offences, it is likely at least in the immediate term going to be difficult for the individuals who are being accused of training probably overseas with probably Pakistani, Afghani or Middle Eastern based organisations—many of the individuals involved in those organisations have been detained by the Americans or are being pursued by the Americans or other foreign security services—to actually produce witnesses who can testify as to what they did and state that their state of mind was such that they were not being reckless. That seems in practice to be quite difficult.

I think it is a very disturbing provision. On any occasion it can be very difficult to lead evidence to prove that one lacked a certain state of mind. Particularly if these individuals are not keeping diaries—and many of them may not be keeping diaries of the sort that other people keep—then you would want to be calling witnesses, and in practice the witnesses may be very difficult to get hold of.

Senator LUDWIG—In respect of the retrospectivity that you highlighted with the proceeds of crime, I wonder if you could elaborate on the two instances where you say that they are retrospective in their operation.

Mr Emerton—It opens the door to retrospective confiscation in the future because the proposed new definition of foreign indictable offence, which would be introduced by new section 337A, would say that, if you have committed an offence abroad and that conduct was lawful in Australia at the time you committed the offence, you are nevertheless liable to confiscation if subsequently the law in Australia changes to make what you did overseas then an offence in Australian law now. So it opens the door for anyone who has ever been guilty of any offence overseas no matter at the time how absurd that offence might have seemed. Suppose, for example, in some jurisdictions overseas it is an offence for two men to sleep together. If you had been found liable of that offence and then returned to Australia and if—and one hopes this is not the case—some state in Australia reintroduced an offence of same-sex relations, at that point assets made from writing a book about the outrage of one's conviction in the backwards overseas country would be liable to confiscation because the time for testing whether you have committed a confiscable offence is the time the confiscation request is made, not the time when the alleged overseas wrong was done.

The second respect in which there will be retrospectivity is that they take that possibility and impose it backwards into the past. That is not in any of the schedules but in clause 4 of the bill, which makes it clear that a confiscation order can be issued now if an offence is criminal when the amendments are passed even if the criminal conduct overseas took place before the bill was passed. The scenario I have just described, which as it were opens the door to retrospectivity in the future, also applies now for people who are now in Australia who have prior to these amendments committed offences overseas. It both opens the door to retrospectivity in the future in virtue of the definition of foreign indictable offence and also imposes that retrospectivity here and now in virtue of clause 4 of the bill itself.

Senator MASON—Mr Emerton, I did not agree with your submission in its entirety but I thought was an excellent submission.

Mr Emerton—Thank you, Senator.

CHAIR—If there are no further questions, I thank you, Mr Emerton, and your colleagues at the Castan Centre for Human Rights Law for putting forward the submission and for assisting the committee.

Mr Emerton—Thank you.

[3.00 p.m.]

BECKETT, Mr Simeon, Spokesperson, Australian Lawyers for Human Rights

RICE, Mr Simon James, President, Australian Lawyers for Human Rights

CHAIR—Welcome, Mr Simon Rice and Mr Simeon Beckett from the Australian Lawyers for Human Rights. ALHR has lodged a submission with the committee which we have numbered 14. Are there any amendments or alterations you need to make to that submission?

Mr Rice—No.

CHAIR—I invite you to make an opening statement and will then seek questions from my colleagues.

Mr Rice—Thank you. I wish to open very briefly by introducing Mr Beckett, who, as well as being a spokesperson and member of ALHR, is the principal author of the submission. We make three principal points. In relation to the Crimes Act amendments, the point we want the committee to take note of is the paramount importance of ensuring judicial review of detention and the serious implications that the draft has for delaying for an extensive period the opportunity for that judicial review. We address the Criminal Code Act amendments and make the point that they are so broad and loose in their terminology that they are almost unworkable and, to the extent that they would work, there would perhaps be unaccountable conduct under the breadth of those amendments. The third point addresses what is perhaps uncomfortable for people—that is, a very direct freedom of speech argument—and the difficult question of how to balance access to information. I will ask Mr Beckett to speak to those in more detail.

CHAIR—That is in relation to the literary proceeds question?

Mr Rice—Yes.

Mr Beckett—I think that was the summary that I was about to give. In any event, I will try to develop that a little bit without delaying questions too much. The concern with the Crimes Act amendments is that there be judicial oversight of the questioning of suspects at an earlier rather than a later stage. We take issue particularly with the extension to the dead time, if I can call that, in section 23CA(8)(m), which effectively allows the investigating officers to extend the period of time depending on where they are getting their information from. The example I have used in the submission is the United States of America, where there is a time lag of 16 to 20 hours, depending on what time zone you are in in the United States. The objection is not that the extension could be provided by a judicial officer at a later stage on that basis but that effectively the decision is being made by an investigating officer to extend not the investigating time but the detention period. What we would say is that once you add all the dead time periods together it can be a substantial period of time before the person who has been arrested is taken before a judicial officer. We propose that that is something that should properly be taken into account by the judicial officer as part of the extension application and that the judicial officer then decide whether it is necessary to extend the investigating time by any additional period. That is the major objection we have to the amendments to the Crimes Act.

In terms of the Criminal Code Act amendments, I seem to recall that when the currently drafted section 102.5 was mooted ALHR had objections to that, so in many ways we are just reiterating our concerns about that particular section now—that is to say, it is far too wide. The issue seems to be to broaden the offence beyond what is provided in section 101.2, to make it an offence to either provide or receive training in relation to a terrorist organisation without the additional requirements that are provided in section 101.2—in other words, actual knowledge or recklessly failing to know that the training is connected with the preparation for an engagement of a person in or assisting with a terrorist act.

Once you use a very broad term such as 'training'—and we talked about this in the submission—you start to bring in a whole range of what would seem, at least ostensibly, to be non-criminal conduct. There is the issue of photocopying, for example—somebody providing training in respect of a photocopier. If what the legislature is trying to do is prevent something like the allegations against Mr ul-Haque, surely the definition of training should be defined in terms of some sort of violent act or training in relation to the use of firearms, explosives, sabotage and all of those sorts of things—blowing up public infrastructure. All of those sorts of things might make more sense but, when you use a term that is as broad-reaching as training, it starts to bring in around the edges of terrorism a whole lot of people who quite unwittingly might provide some form of service that they provide to the general community and they get caught up by proposed section 102.5.

In terms of the third part, we make no comments about the foreign incursions and recruitment act. But in terms of the Proceeds of Crime Act we take issue with the extension of literary proceeds orders to persons who are essentially providing an account to the Australian public of a foreign indictable offence and the surrounding issues to do with that offence—why they might have become involved in the offence and how they got roped into al-Qaeda, Lashkar-e-Taiba or whatever their organisation might have been. What we are essentially saying is that, notwithstanding the fact that they may be getting some financial gain, there is a very real freedom of speech issue in terms of providing the Australian public with that sort of information and that there are safeguards available in terms of incitement to do terrorist acts and so forth which would constrain a person in what they write in that sort of publication, be it a book or a television program. There are reasonable safeguards but, effectively, that restricts to some extent—not entirely but, we would say, to an impermissible extent—a freedom of speech issue about issues which are of extreme interest to the Australian population. I am speaking about the basis, for example, upon which somebody might want to become a member of a terrorist organisation or be involved in some form of terrorist act.

Mr Rice—I will give a brief example that might assist the committee in coming to grips with this difficult issue. As we say, none of us wants to see somebody profit in this way from crime but, at the same time, we have a freedom of speech issue and a public interest in, as Mr Beckett has said, people's motivations and reasoning. A book that describes the rigours of training in a terrorist camp, of rising at 4 a.m. and whatever else they are subjected to, is not in itself problematic in terms of what it may incite in Australia. A book that describes how to engage in terrorist acts would be. But there are laws in place that already prevent people writing books like that. Somebody cannot write a book which is treasonable, seditious or would otherwise describe how to carry out a terrorist act.

CHAIR—They can write it but—

Mr Rice—They can write it and they can be prosecuted. So there are legal safeguards in place for that kind of publication. You are left with a publication which would still be caught by this legislation, which is otherwise simply an account of somebody's personal experience, which is part of the public debate about what is attractive or not in different lifestyles, different religions, different political practices. To remove an account of that from the public debate, in our submission, would be to overstep a line that we have to live with in a society that allows free exchange of issues for debate.

CHAIR—Mr Rice, isn't it a point that they can write it but they cannot make money out of it?

Mr Rice—They can put it on the Internet.

CHAIR—It is on a freedom of speech issue to the extent that it is a censorship about being able to actually produce the document. It is about making money of it.

Mr Rice—It is about using—

CHAIR—I am actually being the devil's advocate to make sure that I understand what I think the provision says.

Mr Rice—We anticipated that. We did not put this in the paper but in our preparation for this we knew that this does not stop people publishing on the Internet. They can put their stories up—

CHAIR—It does not stop them publishing it and giving it away either.

Mr Rice—No; they can stand on the street corner with leaflets.

CHAIR—They do where I live. It is a very strange community. They give away plays—very interesting.

Mr Rice—But what it does do though is carve out of the forum for exchange of ideas a very significant part of that forum in Australia—that is, commercial news media and print publications. We are not approaching this on the basis that the amendments are an absolute bar, but they do preclude access to a very significant forum.

CHAIR—I go to the training question. Mr Beckett, you were saying that it might include all sorts of things, and I think my response to that is: isn't that the point? The example is the one we can use from the experience we have had—that is, teaching people how to make planes take off but not necessarily land. That is the training issue that has generated so much of the discussion in this area. It is not violent at all. It is not associated with a terrorist act at the time. It is not any other thing that you want it to be. However, it is the genesis of that event in so many ways. Again, being the devil's advocate here, that is the question we are compelled to discuss amongst ourselves.

Mr Beckett—The issue is in terms of the intention that the person committing an offence might have. Is it an entirely innocent—

CHAIR—The trainer, you mean?

Mr Beckett—In the example of a trainer.

CHAIR—Isn't that why recklessness is included? A person does not turn their mind to the fact that teaching somebody to enable a plane to take off but not teaching them how to land it might be a curious activity if you are a person who is in the business of training people to fly. But if there is no suspicious behaviour that would enable you to turn your mind to the fact that the photocopier was being used for terrorist related activity then you do not qualify under the section. Isn't that a reasonable interpretation of that section?

Mr Beckett—I think the issue is in terms of what sort of knowledge you expect the organisation to have. The example I used is Hamas. It might be of common knowledge to you or me and members of the committee and the media generally, but I am sure there are plenty of people out there who might not understand that an organisation like Lashkar-e-Taiba, for example, is a prescribed organisation. There might be knowledge of the name of the body but the person thinks this has got nothing to do with terrorism and, as far as he is concerned—

CHAIR—That is the recklessness question, isn't it? Doesn't that cater for that?

Mr Rice—In our submission that is what could be explicit and ought to be explicit in the legislation—the need for the mental element.

Senator MASON—There is nothing currently criminal about the particular act—

Mr Rice—That is right.

Senator MASON—whether it be photocopiers, training, firearms, or whatever. I think that is the point the chair was making—the distinction between those two things. I agree with you, Chair, for what it is worth.

Mr Rice—We make the point in paragraph 26 of our submission about what is missing. We have sympathy with what the legislation is designed to address but it is a question of balancing these competing rights. That is why we are here. We are concerned that there be an explicit connection where we know that the legislation—and there is a question of proof for the DPP—is intended to get to people who knowingly or intentionally engage in these acts. As drafted, the legislation picks up people who engage in these acts unwittingly—and reckless is not a sufficient safeguard for unwitting. If we had intent there would be no argument. You would establish the causal nexus—end of story.

Senator BOLKUS—At paragraph 11 of your submission you say that the extension of detention can be done without any application to a judicial officer but in your verbal submission you say that they would have to go to a judicial officer. Is there one definitive position?

Mr Beckett—I will have to check that particular provision.

Senator BOLKUS—Maybe we could move on to other questions while you have a look at that.

Senator LUDWIG—I would like to go back to the last issue dealing with the Proceeds of Crime Act and the proposed amendments. Is there anything in the current amendments that would prevent, say, the US *60 Minutes* paying for a story and that being syndicated in Australia or alternatively in Australia the third party setting up a trust to derive the proceeds from the literary work and then the writer being the beneficiary of the trust, for argument's sake? The amendment is designed to capture certain issues and it is designed to capture

literary proceeds but it seems to go only half way. In my short time I have thought up a couple of ways around it. I was just wondering whether they were valid or whether the legislation does capture them.

Mr Beckett—It is my understanding that the legislation does capture the trust arrangement, but I have not had a specific look at that issue.

Mr Rice—I think the trust arrangement certainly would be caught. I would have to look more closely at payments in the US. We are happy to do that and we can come back to you. There is an example that illustrates just how broad this is—the Nelson Mandela example. Nelson Mandela has published and profits from his book, which reflects on his time having been incarcerated for the very serious charge of sabotage. He might well be caught by this legislation for income earned on that book. We respect the moral position taken to stop people profiting from their crime but that illustration might highlight the need for real precision or, as we suggest, abandoning this provision and saying, 'We recognise we have other laws in place that stop people's writings going too far in terms of inciting crime but we accept that in society people can tell their stories.' Nobody likes it that Mrs Moran might tell the story of the Moran family in Melbourne and make money out of it, but if that is her life story that is her life story. That is the choice that this legislation raises for us.

Mr Beckett—I have an answer now to Senator Bolkus's question. There is no requirement in relation to the allocation of dead time. So a person may be arrested, brought to a police station and questioned. If there is a need to contact America, for example, to gain some additional information and America is effectively closed for another eight hours or so, under the amendments the investigational period would not run for that period of time and there would be no need for the investigating officer to go before a judicial officer to say, 'Can you extend it by eight hours so that we can contact the United States?' I am talking about the period before you need an extension of time. The four hours have not elapsed because you are taking into account a time zone somewhere else. The point I am trying to make is that where you are seeking a very substantial extension of time—and if it is the United States then the extension may be 16 to 20 hours—then that is really something that you should take before a judicial officer.

Mr Rice—Your four hours might take 20 hours to run—you still have not had to go to a judge in 20 hours.

Senator MASON—The previous witness was concerned about proposed section 102.5(2), which has been colloquially referred to today as reversing the onus of proof but is really about placing the evidential burden on the accused. I do not think you have mentioned that in your submission, or I have missed it. Does that exercise you?

Mr Beckett—It does. I do not think we need to develop that point. I have had a quick look at, for example, the Castan Centre submission. Is that what you are referring to?

Senator MASON—Yes.

Mr Beckett—The Castan Centre, I think—

Senator MASON—Covers the field?

Mr Beckett—I think so, yes.

Mr Rice—We have not endorsed other positions but our submission was written in the light of submissions that we were already aware of. Thank you for drawing that point to our attention. We would agree with what the Castan Centre says.

CHAIR—Thank you very much for appearing before the committee and for your submission and your assistance this afternoon. We appreciate it.

[3.22 p.m.]

WILLIAMS, Professor George John, (Private capacity)

CHAIR—Welcome. You have lodged a submission with the committee which we have numbered seven. Do you need to make any amendments or alterations to that submission?

Prof. Williams—No.

CHAIR—I cannot promise you any applause at the conclusion of your remarks today, not having Senator Bolkus in the chair, but I invite you to make an opening statement. At the conclusion of that we will go to questions.

Prof. Williams—I just want to talk about the two central issues raised in my submission. The first relates to the extended detention for questioning provisions and the second to the proceeds of crime provisions. Turning to the first of those, it has always seemed to me a very surprising omission that Australian law has not been amended to provide for an extended detention regime for suspects. The reason I have found that surprising is that that has been the first thing almost every other nation has done when they have looked to provide for new laws dealing with terrorism after September 11.

If you look at other nations you will see that the standard in the United Kingdom, for example, is seven days—of course with regular review at 12-hour periods and extensive judicial oversight—and Canada has three days. If you look at international guidelines you will see that the Council of Europe, for example, suggest that seven days is the absolute maximum that should be allowed for the detention of suspects for the purpose of questioning. Looking at it in that light, and particularly in the light of the existing ASIO questioning regime which provides for a week of detention for non-suspects, I think that the proposed regime fits well within the margins of what I might regard as reasonable.

However, I do have some specific concerns about the regime. They relate, firstly, to the idea of multiple applications for dead time with regard to queries to different time zones. You might get a 23-hour extension for one time zone and an eight-hour extension for a different time zone. That is at least a theoretical possibility under this provision. Also, when you have the possibility of extending the dead time in many other ways you end up with what might be a very lengthy period of detention. I do not think that that ought to be justified. Indeed, the legislation ought to be amended to put an absolute cap on the period of detention. Given that it is a 24-hour questioning period, and given the sorts of provisions for dead time at the moment, I would favour a 36-hour or, at most, a 48-hour maximum period of detention. Within that, the dead time would be made up as necessary.

Once you recognise that this is 24 hours of questioning with significant extra time added, I think other provisions ought to be considered—for example, a right for someone to sleep when necessary, a requirement that questioning be broken in different ways and the sorts of protocols you would expect to see for lengthy detention periods. These are the sorts of protocols that had to be drafted for the questioning regime in the ASIO Act. I think that this needs to be adapted to recognise the extensive nature of the detention that goes with it. It goes considerably beyond the 12 hours that we have at the moment.

The second issue relates to the proceeds of crime legislation. The first point is that it is retrospective. I do not think it should be retrospective. It is not a criminal offence, so it does not raise the most severe problems of retrospectivity. On the other hand, it means that conduct that was undertaken at a time when it was not an offence might have a consequence fixed upon it—in this case, relating to literary proceeds—that means you could not have anticipated that would have been the outcome. The parliament obviously very seriously looks at any retrospective provision, whether that be in tax or in other areas, and I think that that provision should be removed, if only to make it consistent with the explanatory memorandum, which states:

None of these amendments are intended to operate retrospectively.

It seems an obvious inconsistency to me, and it should be amended in favour of the explanatory memorandum.

The second thing in the proceeds of crime legislation is the recognition of the military tribunals. I have a number of concerns about that. One is a basic separation of powers concern. I do not think that Australian legislation should recognise something that is essentially an executive or non-judicial process. I think that it is appropriate to recognise judicial processes overseas, but I do not think we should ever give a judicial type investigation the same level of recognition as we do in this legislation. That is the first objection.

The second objection is that I have strong concerns about recognising the military tribunal process in the United States relating to the Guantanamo Bay detainees. It legitimises that process in our law, I think in a very unfortunate way. It is primarily a symbolic recognition, you might say, but I think that is inappropriate given the nature of that process, the lack of basic rule of law protections and the lack of access to civilian courts. That, of course, is something that is currently before the United States Supreme Court. I think it would be somewhat embarrassing to legitimise that process or recognise it in any way when indeed it may well be found to be unconstitutional by the court of that nation. We should find out about that in the next couple of months. Even if it is constitutional, I think the underlying arguments would suggest that it should not be recognised.

CHAIR—Thank you for that very helpful summary. I was going to go to the question: what if the Supreme Court of the United States does find it constitutional? Would you still find it repugnant?

Prof. Williams—I would. The primary underlying policy basis has nothing to do with the military tribunal in the United States. I do not think we should recognise an executive trial process in any nation. We would not do so in this country. If we started to recognise a process like that here, except in a very limited military context, we would be very concerned about it. I do not think the proceeds of crime legislation should extend to that. More than that, it is about the specifics of the US process itself. Irrespective of its constitutionality, there are policy reasons for not recognising it.

Senator MASON—Do you think US military tribunals might perhaps be fairer in some contexts than non-executive trials elsewhere in the world at times?

Prof. Williams—That is certainly possible, and it means that in some cases the parliament should be very vigilant about recognising a judicial process in a country where there is not an independent judiciary, for example. I agree with you that you may well have an even worse process. That is why I go to the underlying separation of powers values. Unless you get into that ad hoc process, which perhaps sometimes needs to be done, I think in general executive processes should not be recognised.

CHAIR—As it stands in the bill, proposed section 23CA(8)(m) does not currently require application to a judicial officer to utilise the so-called dead time. Do you think your concerns would be allayed if there were a requirement to apply to a judicial officer to utilise the dead time period?

Prof. Williams—They would be allayed somewhat, but I think the primary concern is just how long it could be extended for and that is why I favour an absolute cap. It may well be a generous cap in the sense of saying there needs to be a reasonable amount of dead time recognised. The act describes the people who actually give the extension in other circumstances as judicial officers, but they are not. It could be a justice of the peace, for example.

CHAIR—I was just using the terminology from the act.

Prof. Williams—And I agree, but I think one of the underlying problems is that it is not a process like the ASIO legislation, where you genuinely have a judicial officer or a retired judicial officer in all circumstances. That means that I would not give the same level of credence or weight to the ability of having that check in this case.

CHAIR—Mind you, it took us a long time to get to that point in the ASIO legislation!

Prof. Williams—It did.

CHAIR—I feel a sense of deja vu.

Senator BOLKUS—Professor, I have one question on the literary rights aspect of this. I am persuaded by the argument that says it does have retrospective application. But in that context, presuming that one of the targets of this is the Hicks family, would it be a fair presumption to make—and I do not know whether this has been the case—that, if Terry Hicks had been offered some assistance over recent months to travel or whatever by a media outlet and had received some benefit, this legislation would attach itself to that?

Prof. Williams—It is difficult to see. Would you seek to attach it there through the word 'indirectly'? Is that what you are referring to?

Senator BOLKUS—Yes. I cannot see what other interpretation you can give that word.

Prof. Williams—It is certainly an awkward word in that context. I think the addition of it leads to uncertainty rather than to further certainty. I would think that is likely to be a long bow to draw, but I would have to also say that I am not quite sure what it is directed at either. When you are dealing with someone who has committed an offence, you can usually tell whether someone has actually identified or made money out of that through literary writings. When it comes to the word 'indirectly', the second reading speech does not help very much at all. I would probably favour removing the word because I am not sure what it means.

Theoretically it might extend there but I would be surprised if any court would recognise that extension, given the injustice of doing so.

Senator BOLKUS—You talk of 'the features of a bill of attainder'. Would you like to elaborate on that for us?

Prof. Williams—By 'bill of attainder' I am referring to a piece of legislation that directly or indirectly targets someone in a way that ultimately affixes a consequence upon them. It is not a law of general application, in other words. I was careful in the language I used in my submission in that I did not say, 'This is a bill of attainder,' and I do not think it is because it does not affix any form of criminal guilt. My concern is that, because it applies only in terms of a particular extension to two Australians who are being held in Guantanamo Bay, it has the appearance of something that is directed at them and I think that is very unfortunate. One way of dealing with that would be to seek to enact a more general regime, if appropriate, dealing with military tribunals—though I think that should be resisted for the reasons I have given. It is just so specific in its targeting that it suggests itself as a law that ought not be passed because of the way it is directed at two individuals as opposed to dealing with the general problem.

Senator BOLKUS—You also mention in this context the possibility of 'free speech interests'. Could you elaborate on that?

Prof. Williams—They are free speech interests. Of course, they are modified in the sense that you can still publish the book, but you would have to recognise that there is often a link between a desire to write a book and a desire to make some monetary gain out of it. I link that into the retrospectivity and other issues to say that we are not dealing with administrative or other concerns here; we are dealing with the balancing up of some fairly fundamental rights. That to me means there must be an almost compelling justification to argue that we should remove the capacity for people to earn money out of their writings. Personally, I think that can be justified in many circumstances where you are dealing with serious crimes, but I do not think it can be justified in a case like this where you have what amounts to a very inappropriate and unfortunate trial process in the United States for two people where it is not clear what offence they would ever have committed under our law. I cannot see why in those circumstances their free speech rights should be overridden.

Senator BOLKUS—Thanks.

Senator LUDWIG—Do you see that the legislation proposed in respect of the overseas inquiries, which is part of the dead time that is being proposed, goes to only one period or on your reading of it could it be combined if there were an inquiry into France or into America at different times during the investigation? Could it be extended by each individual instance or do you say it is the total instance?

Prof. Williams—I think there is a genuine ambiguity in the provision at the moment. It does not say one particular period of dead time for one country; it simply refers to a reasonable period in which you allow the investigating official to obtain information from a place outside of Australia, but ultimately that could be a number of places. It is possible it could be a single extension of dead time; it could be multiple. My argument is it should be clarified. If it is going to be multiple time zones—which it may reasonably be; for a particular

person you may need information from three or four places—that could be met by having an absolute cap on the time and giving the people the capacity to get what information they need reasonably within that time, but not enabling this to be extended over what might be a number of days if indeed it could be read in the multiple application way, which I think it could potentially be.

Senator LUDWIG—Have you envisaged what the cap might be?

Prof. Williams—We have a 24-hour questioning regime. I would favour 36 or 48 hours. Forty-eight hours is probably more reasonable given the amount of questioning we are looking at, but I think it is not reasonable to extend it much beyond that because otherwise it looks like a regime where somebody is being held for long periods with questioning that is not in kilter of that. I recognise the ASIO legislation has 24-hours questioning with seven days detention, but that always struck me as completely out of kilter. I think that should have been 24 hours over three days. I think this equally might be 24 hours over two or at most three days.

Senator LUDWIG—And the cap you refer to is only in relation to the dead time then? In total all of those provisions that might add up—

Prof. Williams—That is correct.

Senator LUDWIG—Does that include rest?

Prof. Williams—That is correct. I would have it include all reasonable periods of time. That would mean that someone could potentially be held for two full days. When you compare that to the current 12-hour period maximum—and this is a very significant extension beyond that—that has dead time options as well. Unless the parliament wishes to go greatly beyond what already is provided then I think it should be limited by a reasonable position. The same issues do not arise in the same way for the existing provisions because you do not have this time zone issue. I think that adds quite a new dimension to this.

CHAIR—Professor, at the bottom of page 1 of your submission because we are talking about an extended period of detention you refer to the necessity for protocols and other protections with regard to detention—adequate provision of food, rest time and so on. The Australian Federal Police have told us in their submission that there are existing safeguards in part IC of the Crimes Act, which in some cases there are, and that they regard the additional safeguards set out in the Australasian Police Ministers Council Standard Guidelines for Police Custodial Facilities to be adequate protection in this regard. Do you have a view of that proposition?

Prof. Williams—I did not have the benefit of their submission when I put my submission in. I am aware of the provisions in the act but not the additional document you referred to. I have to say I am not an expert in this area. My concern is that we are dealing with quite a different type of detention than what is already in the legislation and I think it needs to be adapted to recognise that someone could be sleeping over a couple of days. Whether or not it complies with that I would have to defer to other people, but I would certainly want it to be carefully scrutinised to determine if it does recognise the different nature of this law.

CHAIR—We have not had time to read it in any detail either. It was kindly provided by the commissioner when he appeared this afternoon. It says that it is not intended to be law or treated as absolute. They are for guidance. It is intended to portray in broad principle optimal standards and it seeks only to set out what is generally accepted as being good principle and practice. So there are issues with that. With your concurrence the committee will provide you with a copy of these guidelines and get your view on that, if you do not mind.

Prof. Williams—I am happy to look at those. The only other thing I would say about those is that to the extent that the guidelines are important I would like to see them given more recognition in the act. That was recognised in the ASIO legislation. If they are good guidelines they ought to be there, even if it is through an appropriate instrument that can be updated over time, so that they get scrutiny within parliament. Some external guidelines are not strong enough in terms of providing protection.

CHAIR—When you are extending the powers as far as this bill envisages—

Prof. Williams—When you are looking at a few days of detention potentially as opposed to 24 hours, extended by potentially a few hours. They may be good guidelines, it is just that they need to be built into the act appropriately.

CHAIR—I understand that. There being no further questions, thank you very much both for your submission, which is very to the point, and for your attendance here this afternoon.

[3.40 p.m.]

HESS, Mr Marc Daniel, Senior Legal Officer, Security Law and Justice Branch, Attorney-General's Department

McDONALD, Mr Geoffrey, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

CHAIR—Welcome. Before we commence I remind senators that, under the Senate's procedures for the protection of witnesses, department representatives should not be asked for opinions on matters of policy and, if necessary, they must be given the opportunity to refer those matters to the appropriate minister. Mr McDonald, do you have an opening statement?

Mr McDonald—I will keep it very short, because I think that the opening statements by other people have covered many things that I would cover. Just starting with part IC, I think the history of part IC needs to be remembered. The reason it was enacted was to provide some guidance to police in an area where there was a lot of uncertainty about how long a person could be held. In fact, in the case of Williams, a High Court case, it was pointed out that there were a lot of misconceptions in this area. The Commonwealth was a leader in legislating in this area and you have seen from the Federal Police that it has worked very well over the last 13 years. Essentially, the amendments here build on and retain many of the safeguards that are in part IC under the current law.

Historically, the attitude of Australian lawyers is that if something is from the UK, Canada or America it is automatically better than anything that we have here. In fact, I would say that our system here is considerably more sophisticated. We recognise in statute that the ASIO powers are for an entirely different purpose from the questioning powers. It was just heartening to see the way in which the police commissioner recognises that too, that the object of part IC is about getting reliable evidence and presenting that before the court and everything is determined by the reasonableness of what is happening in that context.

I would be extraordinarily surprised if the dead time, for example, in relation to the time zones would get anything like the sorts of time periods that were being suggested by Professor Williams. I have spoken to the Victorians about cases in Victoria concerning reasonable time and what the court has considered to be reasonable time, and the court has considered periods like 16 hours to be reasonable. So in terms of the time zone issue, if a country was many hours different in time but it was during business hours, then the argument for saying that the time zone difference was a reasonable consideration would be diminished enormously.

We must remember that all this is judicially supervised. The scariest way in which it is judicially supervised, from the police perspective, is that if they do try to use the time zone, dead time argument in an inappropriate manner, in a way that is not reasonable, then we have got a chance that the evidence will be inadmissible and they will lose a terrorism case. They will not want to lose in a case like that. That is why they have got those guidelines and that is why the protocols really do work. All the police in Australia, and the Police Ministers Council, have endorsed those guidelines because they do not want to lose cases. The

suggestion that we start mimicking the UK or some of these other countries does not really show an appreciation of how good our legislation is.

The upper limit of the 24-hour provision is not something that we would see being used that often. As the commissioner said, the four-hour with the eight-hour extension has been used for 13 years at the Commonwealth level in relation to drug-trafficking offences, fraud offences—a whole range of offences. So this is really to deal with some of the most complicated of cases.

There have been some comments about mass murders and the like. When have we had a mass murder in the conventional sense of 3,000 people, or 200 people as in the case of Bali? When have we had criminal activity, as we have seen in some countries in the last few years, that has been synchronised in different locations all over the place? The potential in this area and the sophistication is such that it is conceivable in the worst case that this would be a very difficult investigation to conduct, and for that reason it is conceived that there will be circumstances where extension of the overall time might be up to 24 hours.

There was some mention of the fact that you can have multiple extensions. That is actually to make it more reasonable and more finetuned. For example, officers are coming towards the end of their four hours and say, 'I think we can justify another two hours.' They go to the magistrate and get an extension of two hours. As they get into it, they find that they needed another three hours. The system is not one based on the starting point of: 'We're going to get 24 hours.' It seems in some of those other countries the starting point is 48 hours or something like that. Our system is designed to get good evidence. It has an eye on the fact that this is about investigating for the purposes of prosecuting someone for a very serious offence.

I turn now to the other amendments—as you can see, I was going to have a very big introduction. The original foreign incursions act was enacted in 1978. Again a history lesson: in 1978 the concern was about Biggles going off and being involved in rebellions against existing governments. A lot of the concern was about people from this country being involved in international violence. Nowadays, with situations such as those we have seen in Somalia, Afghanistan and the like, you can see how there will be situations where Biggles will be able to do the same sort of thing, cooperating with a government of that nature or, in some cases, where there is now no certainty that it is even a government. That is just a sheer reflection of historic change and recognition of the needs. Sure, we have been learning some of this from what has happened in the last few years.

The terrorist training offence is, as has been pointed out, not a new idea either. The types of changes that have been suggested here were mooted a couple of years ago. I guess the government's view is that more has happened since then and that it is time for the parliament to consider this issue again. The idea of using strict liability in relation to one element of the offence—that is not the whole offence—in this context and of having, as was pointed out by some of the witnesses, the evidential burden applying in relation to the element of whether the person was aware that it was a terrorist organisation is not unprecedented for serious offences. It has always been the case for drug offences. If you have a certain quantity of drugs, the presumption is that you are a trafficker. You have to show that, yes, you consume a lot of it. The maximum penalty for drug-trafficking offences is comparable.

Senator MASON—I am not quite sure I like your analogy, but it is your opening statement!

Mr McDonald—I suppose what I am driving at is that it is not unprecedented and we are dealing with something here that is definitely quite difficult to prove. Strict liability is used where it is felt that the accused may be in a position to point to evidence more easily than the prosecution. Some have said that the person would have to produce evidence. In fact, the evidential burden talks about pointing to evidence of a reasonable possibility. So as soon as they point to a witness who can assist them in that case, in the example that was used, then it is for the prosecution to prove beyond reasonable doubt that there is no substance to that particular point. The evidential burden is quite an important aspect. Legally, it is not requiring the accused to prove anything; it is requiring them to point to evidence and the burden of proof still lies with the prosecution.

The main thing I need to emphasise with respect to the amendments to the Proceeds of Crime Act is that this is about dealing with some loopholes that we identified when reviewing the legislation. There have been two major criticisms. One that we have mentioned relates to the US military commission and the suggestion that consequently the legislation is aimed at only two people. I think it would lack credibility for us to say that the experience of that case might have inspired us to think about these issues, but the US military commission is a reality. It belongs to a country that has great resources and a great capacity to apprehend terrorists and there is absolutely no doubt, in my mind at least, that the potential for them to apprehend terrorists in the future is still there. There may be a situation where they manage to get the person before we do. It seems unreasonable for the literary proceeds to be confiscable if we happen to get the people and deal with them under our law but if Joe Bloggs gets caught by the Americans and dealt with under the military commission, he gets off and does not have the proceeds taken. It is about dealing with the future crime and it does extend to other crimes as well.

The second point on proceeds is this issue of retrospectivity. It is not retrospective, because it does not apply until this legislation is enacted. If someone decides, after the date it is enacted, that they are going to sell their story then they know when they sell that story that this law exists. That is what we mean when we say that it is not retrospective. I appreciate the points that are being made in relation to the fact that, if something is an offence in another country and then subsequently becomes an offence here, this law would come into play. However, if that occurs after this law is in place then the person knows that if they commit offences in other countries, there is a chance that the literary proceeds can be taken. The message in it is: don't commit offences in other countries.

CHAIR—I am not necessarily confident that you have gone to the point, Mr McDonald, but we will get back to that. Do you have much more to go on with?

Mr McDonald—That is it.

CHAIR—Thank you. I wish to go back to the beginning of your brief statement. I refer to the example you gave of your discussions with the Victorians as to what the court considers to be reasonable time. That was in reference to the extension of investigation time and to the dead time question. It is not particularly illustrative to discuss with the Victorians what the

court considers reasonable time when there is no involvement of a judicial officer in the dead time process.

Mr McDonald—The dead time process is supervised by the court in terms of the admissibility.

CHAIR—It is a bit late for that though.

Mr McDonald—Some would say that is really significant amendment. I am not just saying that; some say that is really significant.

CHAIR—It is significant for the police but I am not sure it is significant for the detained person. It is significant if a court tells the police, on an admissibility question, that the evidence is not admissible because the amount of time spent on dead time was not reasonable. That is significant for the police but that is not significant for the detained person who may find themselves in that position for up to that time. You may say that the examples are extreme, but this is a discussion of extremes and of people who may find themselves in a position of being, in a combination of dead time and extended investigation time, detained for 40 hours.

Mr McDonald—I cannot say that you would not get a situation whereby someone might regard that as reasonable, but I would consider it pretty extraordinary. The whole tenor of the legislation is such that that would be a pretty extraordinary outcome.

CHAIR—We are giving extraordinary powers. That is why that is important to discuss.

Mr McDonald—At the moment we have dead time in relation to rest, medical and a whole heap of other issues, such as getting a lawyer—and that can take a while sometimes. During the last 13 years we have had this legislation operating with dead time and I do not expect that this aspect will operate much differently from how it is now. There was a review which I think we implemented with that measures bill—this is taking the opportunity to answer an earlier question—and there were not a lot of problems in this area.

CHAIR—You refer to 13 years of experience but what you are referring as having 13 years experience of is the current operation of part IC and a relatively short detention and questioning time of a person under arrest, not the revised part IC with the extra section 23DA of up to 20 hours more.

Mr McDonald—However, there have not been limits on the dead time. I refer to the medical problem we were talking about. Someone said you could still be working within your four hours but in fact it would be quite a lot longer period because of the dead time. That can happen now. Let us say there is a medical crisis. You are halfway through the interview and the person has a panic attack or something really major. The person could be taken away for five hours while they are assisted to recover from the particular problem and then they could come back and then finish off the final hour—sorry, let us say it is 10 hours. You could go over the period.

Senator MASON—We understand.

Mr McDonald—In fact, I actually expect with this legislation that in reality the periods of the extensions will not be up around the full 24-hour limit. I expect that they will be within that period and that in fact the dead time will in many cases still come within that limit.

However, with a terrorism investigation—and this is the argument which I think has been put pretty persuasively by the police—in a worst-case scenario we can conceive there will be situations where it will be reasonable for it to go within these sorts of time limits. A terrorist attack could be something as simple as one bomb going off in a limited location with a limited number of victims or it could be something quite horrific and complex.

CHAIR—I do not disagree. I am concerned with determining in my own mind at least whether it would be unworkable to interpose some requirement for a judicial officer, as defined, for the extensions in the dead time concept as well.

Mr McDonald—I do not think it would be unworkable. Clearly we go to a judicial officer to get the extensions for the overall time.

CHAIR—Yes, that is right.

Mr McDonald—So it would be ridiculous for me to say that it would be unworkable.

CHAIR—The reason that I have some concerns—and you used the Victorian example—is that we had the Victorian Chief Commissioner of Police telling us that we should not have any limits at all on this; we should just have whatever they happen to think might be reasonable time. I understand there is some oversight of that. We have a relatively subdued submission from the Australian Federal Police but a most enthusiastic one from the Victorian chief commissioner in this regard. The committee has to look at where the ground is on this, and that is why I ask these questions. Do you have any comment on that?

Mr McDonald—I think Victoria, Tasmania and the Northern Territory favour this sort of unlimited reasonable time. I think the sad thing for them is that they have not had the good experience that the AFP obviously has had with having clear guidelines in the legislation and a clear understanding of the limits. The whole problem with this unlimited reasonable time concept is whether the police constable and the court are going to have the same idea about what is reasonable. You risk the whole case being thrown out. That is why the AFP and people like the commissioner like this: because they can have some certainty their people will know what the limits are.

Senator MASON—You know where you stand.

Mr McDonald—As he said, when you start talking about longer periods of time, it is about having the person's cooperation in many cases. He is going to put in rest breaks, make sure the person is fed properly and stuff like that so that he knows he is going to get good evidence. It is all about getting good evidence. There is such an incentive to get this right that they have developed their own guidelines.

CHAIR—I wanted to come to that question—I only have one more question in this particular area before I go to my colleagues, and then I have a number of others—of the protocol and guidelines to protect the position of those people detained under these extended investigation periods. The police have advanced the APMC Standard Guidelines for Police Custodial Facilities, which we have received—and I have had a chance to look at them quickly—but they are not in law; they are not incorporated in the legislation. Professor Williams adverts in his submission to the process that the parliament undertook in relation to the Australian Security Intelligence Organisation in regard to the detention of non-suspects,

the protections and protocols there and incorporating that in legislation. Is it conceivable that we might be able to do the same thing in relation to these extensions, Mr McDonald?

Mr McDonald—That would be something I would probably want to discuss with the police. Clearly it has been done in other legislation.

CHAIR—I do not have the benefit of having that piece of legislation with me, but the committee might turn its mind to that. If you have anything to add on that point, would you come back to us?

Mr McDonald—Yes.

CHAIR—Thank you.

Senator BOLKUS—I have heaps of questions but I would like to start off by asking about the prescribed organisation provisions in clause 15 subclause (7). What are we are expected to understand the words 'for the purposes of this paragraph' entail?

Mr McDonald—Mr Hess from the security law area can answer that.

Mr Hess—The words 'for the purposes of this paragraph' in (7) refer to subsections (5) and (6). What (7) does is merely define, if you will, what a prescribed organisation for the purposes of clauses 15(5) and 15(6) will be. Clauses 15(5) and 15(6) will remove the defence in section 6(4)(a) of the foreign incursions act.

Senator BOLKUS—When we say 'for the purposes of this paragraph' we mean for the purposes of paragraphs (5) and (6)?

Mr Hess—That is correct. It is worded a bit oddly.

Senator BOLKUS—Yes.

Senator LUDWIG—How do you discern that it means (5) and (6)? Why wouldn't it mean (4), (3) or (2)?

Mr Hess—It says:

(7) For the purposes of subsections (5) and (6), ***prescribed organisation*** means:

(a) an organisation that is prescribed by the regulations for the purposes of this paragraph—

The purposes of paragraph (7) are to define what is the prescribed organisation and it defines it for the purposes of subsections (5) and (6).

Senator BOLKUS—When (5) or (6) say an organisation is a prescribed organisation 'at the time of entry' there is a historical dislocation there, isn't there?

Mr Hess—I am sorry, Senator, I do not understand.

Senator BOLKUS—You are giving the minister a blank cheque to prescribe an organisation under 7(a) but you are saying that that organisation has had to have been prescribed at the time of entry.

Mr Hess—For the entry offence that is correct.

Senator BOLKUS—Why is there a need for this? What is wrong with the existing prescription powers?

Mr Hess—There are no existing prescription powers in the foreign incursions act.

Senator BOLKUS—If we were to adopt powers that apply in processes under similar legislation, and criteria, would you have problems with that? This provision is pretty open, isn't it?

Mr Hess—In terms of the power to prescribe in 7(a) you are correct, it is a broad power to prescribe. In terms of 7(b), that refers to organisations that are listed for the purposes of the Criminal Code, so for the purposes of listing for 7(b) the Attorney or minister will need to be satisfied that the organisation is involved somehow with a terrorist act. I suppose that 7(a) is much broader because, unlike the listing of an organisation for the purposes of the Criminal Code, being merely a member of an organisation listed under 7(a) is not an offence under the foreign incursions act; you have to engage in a hostile activity with an organisation that has been listed. The extra protections or criteria for listing for the purposes of the Criminal Code were not felt to be necessary for the purposes of listing organisations for the purposes of 7(a) here.

Senator BOLKUS—The whole premise of that provision is that you need to be involved with a terrorist organisation?

Mr Hess—No, under the prescription powers we can list terrorist organisations through the Criminal Code, but we can also list organisations under 7(a) that are not terrorist organisations.

Senator BOLKUS—Such as?

Mr Hess—They may be paramilitary forces; for example, the Bosnian Serb forces during the conflict in Bosnia could be listed. Even the armed forces, for example, of the Taliban at the time could have been listed.

Senator BOLKUS—Fretilin?

Mr Hess—Yes. It could be any organisation, Senator.

Senator BOLKUS—The Country Women's Association? Why wouldn't you?

Mr Hess—You could but unless the Country Women's Association is going to engage in hostile activities such as an armed conflict or an offence under—

Senator BOLKUS—The point is that there are no criteria, are there?

Mr Hess—That is correct—for 7(a) there are not.

Senator BOLKUS—You could list them.

Mr Hess—You could if you so chose but the mere listing will not create an offence. It is having the listing and then you as an individual engaging in a hostile activity with a listed organisation. You could list the Boy Scouts but it would not be an offence unless the Boy Scouts went out and invaded Columbia, for example.

Senator BOLKUS—You do not think the parliament would be adverse to listing benign organisations?

Mr Hess—They may well be, but those regulations can always be disallowed.

Senator BOLKUS—We have had experiences when governments put up a group and you cannot knock off the Boy Scouts unless you knock off Jemaah Islamiah, for instance. Isn't

that a problem that maybe you should have anticipated? I find it amazing that you can list such benign organisations, and we will have to have a look at that. Why not impose some criteria? Did you look at criteria?

Mr Hess—We could do that. For example, one of the criteria that could be listed already exists in another section of the foreign incursions act, which, I believe, is 9(2). Section 9(2), in effect, gives the minister the power to declare an organisation to be an organisation which, in effect, an Australian could take part in hostilities with, and that would be a lawful undertaking of hostilities. The criteria in that section, were the minister to declare an organisation, are that it be in the interests of the defence or international relations of the Commonwealth. So you are correct; we could look at restricting the prescription power.

Mr McDonald—However, that is a policy issue.

Senator BOLKUS—It is a policy issue, sure, but we need to develop some policy issues here.

CHAIR—We might not ask the officers to do that.

Senator BOLKUS—I mentioned the situation of Terry Hicks. Let us do something really radical for a moment and presume that David Hicks gets off. Under this legislation he could still have no right to sell his story.

Mr McDonald—No. This legislation still relates back to the person being convicted.

Senator BOLKUS—No, it does not. It does not say 'convicted', does it? That answer is totally wrong.

Mr McDonald—It is committing an offence. If the person got off, it would be unlikely in the extreme that this legislation would apply.

CHAIR—The Law Council suggests that it should be based on a conviction, but in fact your bill says there are reasonable grounds to suspect that a person has 'committed an indictable offence or a foreign indictable offence'. It says nothing about having committed the offence—

Mr McDonald—The situation with that is that, clearly, if the person gets off, they get off for a reason and, in looking at this, our prosecutors would take that into account when trying to determine whether there is any basis for his reasonably—

Senator BOLKUS—Why don't you just have conviction?

Mr McDonald—I think it relates a lot to the scheme we already have there. In fact, the issue of literary proceeds was before the parliament less than two years ago. I have here for your convenience—I know Senator Ludwig likes me to try to use innovative things that help the committee; I think with this provision this is actually quite helpful and you might find it useful later—a document with the amendments transcribed into the head bill. The rest of it is pretty easy to understand but this one is more difficult. You will see there that the concept in this has been approved in relation to other criminals, so issues about whether or not it is a good thing have already been considered by the parliament fairly recently. It has a lot to do with the fact that the new Proceeds of Crime Act is not conviction based. It is simply consistent with the rest of the Proceeds of Crime Act. The old Proceeds of Crime Act 1987

was conviction based. So we are just being consistent there. However, if he gets off he will get off for a reason, and that is something that the prosecutors would consider very carefully before they embarked on it. I do not want really want to comment too much.

Senator BOLKUS—What do we read into 'indirectly'?

Mr McDonald—The word 'indirectly' was in recognition of the fact that there might be an argument that the notoriety came about not just because of the conviction but because of where they were detained or something like that.

Senator BOLKUS—Would it cover the old man?

Mr McDonald—No, it certainly does not get—

Senator BOLKUS—Anyone else?

Mr McDonald—It does not get any other person. It is only talking about—

CHAIR—Just the individual.

Mr McDonald—Yes, that is right. I will answer a lot of the questions that were raised in writing. The legislation talks about deriving the benefit in Australia or having the money transferred back to Australia. It is limited to what we can do jurisdictionally.

Senator BOLKUS—Why then did you try to delete the words 'in Australia' in the legislation?

Mr McDonald—The legislation recognises that you could have a situation where the benefit could be obtained overseas and then transferred back to Australia.

CHAIR—So it is derivation.

Senator BOLKUS—By deleting the words 'in Australia' I do not think you do that. You purport to have an extra jurisdictional effect of the legislation, don't you?

Mr McDonald—If we have a situation where the benefit never goes anywhere near Australia, then obviously we have limits on what we can do.

CHAIR—That is, in fact, 153(3A), which says:

... benefit is not treated as literary proceeds unless the benefit is derived in Australia or transferred to Australia.

Is that correct?

Mr McDonald—Yes, that is what I am pointing out.

CHAIR—I think that answers Senator Bolkus's questions.

Senator GREIG—I want to clarify a question which I think Senator Bolkus just asked—I was not certain of his question. In relation to profiting from publication, in the case of Mr Hicks, would it be the case that his father, Terry, or his lawyer, Mr Stephen Kenny, could publish a book about the ordeal of David Hicks at Guantanamo Bay and that book could contain intimate discussions with David?

Mr McDonald—It would be really inappropriate for me to comment on a specific case. I think I have been pretty free-flowing in my discussion of the issues, but that is probably making it a bit too difficult for me.

Senator GREIG—Let me ask it another way, because I am genuinely still not clear on this. Let us say there is an international case where somebody is convicted of a crime or suspected of a crime overseas, it is a notorious case and an Australian relative wants to write a book about that. Can that relative profit from that?

Mr McDonald—This legislation focuses on the person who has committed the offence profiting from it.

CHAIR—Which I think, Senator Greig, means yes. But we stand to be corrected in these matters.

Senator GREIG—If I understand you, you are confirming what I am saying. You are saying, 'Yes, that is likely to be the case.'

Mr McDonald—The legislation focuses on ensuring the person who has committed the offence does not derive a benefit from it.

Senator GREIG—I understand that, but it seems to me that it could be sidestepped so easily. What if, for example, a lawyer or a relative were to write a book, make some money out of that and buy a nice, new, big house and the person to whom the law was targeted was released from jail or not convicted in the first place and had the benefit of the luxury of living in big, new house from the profits of the book?

Mr McDonald—The government has decided what is reasonable and what is not.

Senator LUDWIG—There is no definition of 'training' proposed.

Mr McDonald—Yes, this goes back again to the original legislation. I think Senator Mason touched on the point. The ways in which you could assist a terrorist organisation are just amazing. We have talked about aircraft and we are thinking about financing. There could be all sorts of amazing ways.

Senator LUDWIG—So it is foreseeable for just a driving instructor—

Mr McDonald—Yes. I think it is because the poor Victorian lawyers have not had the benefit of a good criminal code. Recklessness, in our Criminal Code, is quite specific. It requires an awareness of the substantial risk. The Criminal Code has quite a strong test of recklessness, which I think I have mentioned before. Consequently there would not be any issue of someone who was unwittingly dealing with an organisation being caught by this.

Senator LUDWIG—So it could include driving instructors, bus driving instructors and the like?

Mr McDonald—I guess you can have bad law, which relies too much on prosecutorial discretion but, equally, you can have bad law if your offences can be driven through easily by people that are going to harm other people. This is one of those areas where, to deal with the problem, it has been very difficult to take a different approach—although, I might add, this aspect was considered by the parliament previously. I cannot generally see anything that has happened which has changed things since the parliament last considered it, except that people are probably more conscious of this training issue in view of the many instances around the world since 2002.

Senator LUDWIG—Is this an instance of the department re-running the issue or the Attorney-General re-running the issue? Or is it being driven by the AFP or other policing agencies?

Mr McDonald—The Attorney-General, Mr Ruddock, said when he became Attorney-General that he wanted us to be proactive and to make sure not only that we react to things after they have happened but that we try to discover and to anticipate issues and to ensure that the law is appropriate. Consequently we have worked with the AFP officers in response to that over quite a period, not directly with the commissioner but with many of the people who have been involved in the investigations. There has been a truly constructive approach. Quite clearly the department—which, of course, designed part 1C—is very keen to meet as many as possible of the policy objectives of part 1C and the Criminal Code itself, while at the same time dealing with the very real practical difficulties when you have an extraterritorial offence, overseas evidence and the like. We never really had many investigations, say 10 years ago, which involved a lot of overseas evidence.

Senator LUDWIG—So it is fair to say that these amendments have been departmentally driven?

Mr McDonald—No, I am not saying that.

Senator LUDWIG—I am sorry; I thought you were.

Mr McDonald—No. The call for us to investigate whether amendments were necessary was a call not just to the department but to the police. The police have been raising them in this line in relation to Bali and how difficult that was. The police have been saying to us ever since Bali occurred that, if it had happened in a situation where we had to put it before an Australian court, some of our investigative procedures would have been stretched. I suppose what I am trying to say is that our portfolio, certainly in my experience, is one where we try to work together on these things.

Senator LUDWIG—Why didn't you define an 'offence against a law of a foreign country' under the Proceeds of Crime Act?

Mr McDonald—I am sorry?

Senator LUDWIG—You have mentioned an 'offence against a law of a foreign country'. Do you say that that is defined? You define 'foreign indictable offence' but you do not define an 'offence against a law of a foreign country'.

Mr McDonald—We have defined it there. Obviously, an offence—

Senator LUDWIG—Includes—

Mr McDonald—Yes. 'Foreign indictable offence' is a reference to criminal offences. The reason we have mentioned the US military commission is that we can conceive of an argument that it is not a criminal offence in the normal sense. So to make it clear that that is intended to be covered, we had to define that.

Senator LUDWIG—Why wouldn't you have included it in the original act? Is the only reason the US military reference?

Mr McDonald—That is the only reason we have got that. It says:

... ***offence against a law of a foreign country*** includes an offence triable by a military commission ...

Senator LUDWIG—Where could I find offences triable by the US military commission? Where would I be able to ascertain what those offences are?

Mr McDonald—It is very specific to the legislation. It says:

... Military Order of 13 November 2001 made by the President of the United States of America and entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".

So it is extremely—

Senator LUDWIG—Have you read that?

Mr McDonald—Yes.

Senator LUDWIG—Where can I read the offences triable?

Mr McDonald—We can get that.

Mr Hess—If I may, it is actually a military commission instruction No. 2.

Senator LUDWIG—Yes, but it is not in the US—

Mr Hess—No, it is not in that military order—

Senator LUDWIG—No. It cannot be there.

Mr Hess—but military commissions have jurisdiction, it says, over the laws of wars or other laws found triable, I believe. I do not have a copy of the order with me, I am sorry.

Mr McDonald—We can take that on notice.

Senator LUDWIG—The difficulty I have is that you say it is the President's executive order of 13 November 2001 but you cannot find the triable offences in that document.

Mr Hess—No. The offences are not set out in the document.

Senator LUDWIG—You cannot, can you?

Mr Hess—No. They are not set out in the document that the military commission is established under. So they are offences that are triable by the commissions which are established under it.

Senator LUDWIG—So you have got in with a clause 3B, which then says that commissions established hereunder shall have jurisdiction over violations of the law of war or all other offences triable by military commission.

Mr Hess—That is correct.

Senator LUDWIG—But that is not enough either, because clause 7 of the order then delegates responsibility for finding these offences to the general council of the US Department of Defense. So what I am trying to find out is where I find the actual triable offences. It is reasonable to know what law you have offended and are supposed to be tried under, isn't it? The precept of our democracy is that you are supposed to know. The law is supposed to be ascertainable, surely.

Mr McDonald—Can we take that one on notice? I think we will be able to assist you with that.

CHAIR—And if it is open ended or not.

Senator LUDWIG—You can trace it through. I do not want to do him any injustice but at the moment you actually have to go to a guy by the name of William J. Haynes II, the General Counsel for the US Department of Defense. He, and nobody else at this point in time, seems to have the power to establish what US triable offences are. So it is not a presidential order and it is not the President's executive arm of the US government; it is William J. Haynes II or his successor who will determine it, depending on whatever is in his head at a particular time of day. Is that really acceptable to Australian jurisdiction to give power to William J. Haynes II to make triable offences?

Mr McDonald—That is a policy question. I think we would like to take that question—

Senator LUDWIG—He is a Pentagon lawyer, in truth.

Mr McDonald—on notice, because I think it is a good question.

Senator LUDWIG—While you are doing that, I want to deal with why the Australian parliament should recognise a Pentagon lawyer as a source of US criminal legislation. That is the nub of the issue. Why should we? I am having a lot of difficulty understanding why, but I am open to your answer on notice. I wonder whether you could make it a bit more specific. In answering the question, could you look at the issue and say that William Haynes II may not be the appropriate choice for us to use, as a Pentagon lawyer, but identify the instruction of the military commission themselves as a better way of determining it rather than giving the Pentagon lawyer an open book, so to speak?

Mr McDonald—You may have noticed that I do not have nearly the same confidence as I did about the Australian Criminal Code, but I would like to try to give a really comprehensive and proper answer on it.

CHAIR—That is what we are after.

Senator LUDWIG—If there is anything else, I will put it on notice.

CHAIR—Time has caught up with us, Mr McDonald, but there are a number of questions we will ask on notice in relation to the Crimes (Foreign Incursions and Recruitment) Act and amendments thereto and also in relation to a couple more aspects of the proceeds of crime issue, including the separation of powers question. We would be interested in what advice you can give the committee about that, because I have some concerns and Professor Williams has also brought some before the committee. There may be one or two other things. We are required by the Senate to report on 11 May, which is Tuesday week. We will get those questions to you on Monday without difficulty and we would be very grateful for a speedy response. I understand that some of the questions require some detail, but we will need your assistance to turn this around.

Mr McDonald—This is a top priority for us.

CHAIR—Thank you. I thank all of the witnesses who have given evidence to the committee today. It has been a long day, given that this is our second hearing today, but it is also a difficult bill and a number of important issues have been raised.

Committee adjourned at 4.33 p.m.