



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

**Reference: Inquiry into the Terrorist Organisation Listing Provisions of the
Criminal Code Act 1995**

TUESDAY, 3 APRIL 2007

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**JOINT STATUTORY COMMITTEE ON
INTELLIGENCE AND SECURITY**

Tuesday, 3 April 2007

Members: Mr Jull (*Chair*), Mr Byrne (*Deputy Chair*), Senators Faulkner, Ferguson, Nash and Robert Ray and Mr Ciobo, Mr Kerr and Mr McArthur

Members in attendance: Senators Faulkner, Ferguson, Nash and Robert Ray and Mr Byrne, Mr Ciobo, Mr Jull, Mr Kerr and Mr McArthur

Terms of reference for the inquiry:

Section 102.1A(2) of the *Criminal Code Act 1995* requires the Parliamentary Joint Committee on Intelligence and Security to review, as soon as possible after the third anniversary of the commencement of this section, the operation, effectiveness and implications of section 102.1(2), (2A), (4), (5), (6), (17) and (18) and report the Committee's comments to each House of Parliament and the Minister.

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Committee met at 2.01 pm

CHAIR (Mr Jull)—I declare open this public hearing of the Parliamentary Joint Committee on Intelligence and Security. This inquiry is conducted pursuant to subsection 102.1A(2) of the Criminal Code Act 1995, which requires this parliamentary committee to review the operation, effectiveness and implications of Australia's system of listing organisations as terrorist organisations under the Criminal Code. The committee is required to report its comments and recommendations to both houses of parliament and to the responsible minister.

This inquiry deals with an important aspect of Australia's new antiterrorism regime, introduced in 2002, in response to the threat of international terrorism. The proscription of terrorist organisations was the subject of review by the independent Security Legislation Review Committee under the chairmanship of the Hon. Simon Sheller AO, QC. The Security Legislation Review Committee reported to the minister and to the parliamentary committee on 21 April 2006, and the report of that inquiry was tabled by the Attorney-General in the Commonwealth parliament on 15 June 2006. The parliamentary committee must take account of the report of the Sheller inquiry but is not bound by its findings or recommendations.

This review was advertised generally on 18 November 2006 and posted on the Parliament House website. In November and December 2006, the committee wrote to relevant ministers, the premiers of each state and territory and a wide range of non-government organisations, academics and individuals with an interest in the subject matter. Twenty-eight submissions have been received. This is the first half-day of hearings, with a further all-day hearing to be held tomorrow in this room, commencing at 9 am. I should advise those present that the Prime Minister and all relevant ministers have agreed, in accordance with schedule 1, subclause 22, of the Intelligence Services Act 2001 that these proceedings should be conducted in public session.

[2.03 pm]

CARNELL, Mr Ian, Member, Security Legislation Review Committee; and Inspector-General of Intelligence and Security

SHELLER, The Hon. Charles Simon Camac, Chair, Security Legislation Review Committee

Witnesses were sworn—

CHAIR—Do you wish to make introductory remarks before we proceed to questions?

Mr Sheller—A short time ago we handed up an opening statement. On the last occasion we did that, and we thought it might be helpful to do that again. In that, we have set out a number of what we regard as cogent considerations in this review. We have also made reference to passages in our own report and to passages in other material we have had the chance to look at. It may be useful to take that as read, or the members of the committee may wish to look at it first.

CHAIR—We will certainly table it. Thank you.

Mr Sheller—Apart from that, there are at least five matters of considerable importance when one comes to consider the process for proscribing terrorist organisations: first, the notice of the proposed proscription to persons affected; second, the right of such persons to be heard; third, the transparency of the process; fourth, the onus of proof at the time of proscription; and fifth, adequate publication of the result of the proscription. A good deal of the concern of our committee in making our report was with what was seen, in many respects, as an absence of procedural fairness in the proscription process. Some of those matters have been taken up elsewhere, but we have sought in our report to set those out fully.

However, there is one that the committee did not direct itself to and no submissions were put about it but, on further reflection, it strikes us as we sit here—of course, we are not speaking strictly for the committee; we are just two members of the committee—that the process of proscription and the satisfaction of the minister or the Attorney-General is simply a reasonable satisfaction. If one went to the definition of a terrorist organisation and did not have the proscription process in paragraph (b) and a person was to be prosecuted for a derivative offence, such as membership of a terrorist organisation, in the ordinary criminal course in this country the prosecution would be bound amongst other things to establish beyond reasonable doubt that the organisation was a terrorist organisation. That rule of criminal law does not apply if the organisation is already proscribed as such. The regulation speaks for itself. There has been some reference in the act to the use of strict liability and so on but, so far as the committee was concerned, it seemed clear enough that a resolution of this sort proves itself at trial. That is a matter that was, in a sense, passed over. Nobody put a submission to that effect, but we consider that it is a matter of some concern in an administrative review type of situation.

However, I will deal now with the headlines of what we have written down in this opening statement. The purpose of proscription probably can accurately be said to, in part, make simpler

the burden of proving at a criminal trial; in part, be a deterrence to members of the public to join or raise funds for such an organisation; and, generally, to put members of the public on notice as to the status of the organisation in any dealings they have with it. I think it is important to bear in mind the seriousness of the derivative offences that follow from proscription. All of them involve imprisonment as a penalty: for some of them the imprisonment can be up to 25 years, and for others it can be up to 15 years. It is fair to say that most of them fall within either one of those categories. So it is a matter, obviously, of a greater seriousness if a person charged with any of those offences does not have the opportunity to properly defend themselves by, for example, attacking the allegation that the organisation is a terrorist organisation.

It seems clear enough from what we have seen that the proscribed organisations at this time are terrorist organisations, and no doubt advertise themselves as that. The problem will arise if an Australian organisation is thought to be engaging in terrorist activities and the view is taken that it should be proscribed. For example, the particular problem can be—and this was discussed in your earlier report—if that proscription is on the basis of advocacy, translated into praise, of a terrorist act. Again the concern is that somebody can be convicted of being a member, or whatever it may be, of a terrorist organisation and it may be that if the matter had been approached at the criminal level that person would have been found not guilty. That is a big burden indeed of this sort of legislation.

We refer to a report of 14 December 2006. We do not know whether members of the committee have the special rapporteur's report of 14 December 2006: *Australia: Study on human rights compliance while countering terrorism; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. That report only came into my hands in the last few days. We have set out at the bottom of page 2 an extract from that report which deals particularly with the advocacy section. At paragraph 28 of the report it says section 102.1(1A)(c):

... includes what might be described as the glorification of terrorism. The Special Rapporteur considers that this definition lacks sufficient precision and has the potential to cover statements which, in a very generalized or abstract way, somehow support, justify or condone terrorism.

And then this sentence follows:

Effective judicial guarantees should accompany any measures related to the designation of entities as "terrorist organizations".

We have had something to say here, again, about the legal burden of proof, and of course the consequences that can flow from a person charged with one of these serious offences having some burden of proof in order to be exonerated. That was discussed in the case of Sheldrake, which was discussed in the previous report of this committee, and we refer to that.

On page 4 of our opening submission we refer to the Attorney-General or the minister being satisfied on reasonable grounds of certain matters and we observe that there are no fixed statutory criteria for reaching the required satisfaction which can be reached on the civil rather than the criminal standard on the balance of probabilities. Then we again refer to the report of the special rapporteur and how it expressed the view in paragraph 23 that it is problematic that an organisation can be listed based 'upon an ordinary, rather than criminal, standard of proof,

with severe criminal penalties flowing from such a listing'. At the bottom page 4 and then going on to page 5, we have set out the problem of a person charged who is unable to meet a necessary burden of proof in respect of exoneration. We make the point, which I also made a moment ago, that:

This is a core criticism of the proscriptive legislation with the enhanced consequence that a person may be wrongly convicted and incarcerated for up to twenty-five years for the offence charged, even though the organisation is not a terrorist organisation other than by regulation.

We then refer to a number of the safeguards that have been described—some of which are mandatory, such as the referring of the matter to the Leader of the Opposition, but most of which are not. We refer, of course, to the power of this committee to review and to report to parliament. At the top of page 6, we quoted from a passage in a report of this committee in the relisting review which was published in February this year where this committee talked about criteria and what had been put to the government about trying to be more specific about those criteria. The committee said that the criteria still come back on these sorts of applications in the same form. At the end of the quotes from the committee, we drew from something that was quoted by our committee from the United Nations human rights committee that:

Laws should not be so vague as to permit too much discretion and unpredictability in their implementation.

It is submitted that, if there were a judicial process, which is one of the alternative recommendations made by the committee:

The validity and application of the ASIO criteria would have to be explained, justified and ruled upon as part of a judicial or quasi-judicial listing process.

Similarly, if the alternative recommendations put forward by our committee were taken up, one would expect that an advisory committee for the Attorney-General, as recommended in paragraph 9.32, would require such explanation and justification in the context of the proposed listing.

At the top of page 7, we shortly summarise at least some of the important aspects of the listing procedure, which I have already covered. Then we refer to chapter 9 where the committee set out what it regarded as essential reforms if the process of proscription is to continue. The listing process should, in one view, be a judicial process or, in another view, if it remains an executive process of the Attorney-General, a committee should be established to advise the Attorney-General, and we refer to the passages where we dealt with that in the report in some detail.

Finally in these opening remarks, we repeat what was stated by the committee in its report: it is believed that the amendments it had recommended to the proscription—advocacy, association and strict liability elements of part 5.3 of the Criminal Code—would contribute to a reduction in the fear and sense of alienation felt by at least some Muslim and Arab Australians. By doing so there would be an enhancement not a diminution of the antiterrorist efforts. The dynamics for the development of so-called home-grown terrorism must be reduced rather than provoked. That is the end of what I have to say in advance.

CHAIR—Thank you very much indeed. Can you see any advantage in the possible appointment of an individual reviewer rather than that committee? You have given a formula which is fairly broad. We have looked at a situation where there may be one expert who can do it. That obviously had little attraction to you.

Mr Sheller—My view is that a well-chosen committee, and the contribution of experience and learning in that, is more advantageous. But, of course, there may be somebody of such experience in this area and that, on its own, would carry great weight.

CHAIR—In your hearings what were the greatest objections given with regard to the difficulties with the present situation of executive listing?

Mr Sheller—I am not certain whether this is entirely directed to that question, and may I sidestep it for a moment. There was a great feeling of discrimination amongst representatives of people who came before us that this was directed to particular sections of the community and so on, and to an extent I think that was advanced about the organisations which had up to this time been proscribed. The particular numbers I do not remember, but I suspect that the vast majority were organisations which might be described as Muslim people.

CHAIR—The reason I asked was that that would probably be the most usual complaint this committee gets in its hearings as well.

Mr Sheller—In the association area, a lot of material was put before us about the way that Muslim people meet and so on and how that would be particularly affected by that legislation. Whether I can separate off at the moment the proscription part of the fears from that general fear, which would also embrace the proscription process, is the question. It was said by many that that process enabled something to be done by a minister without anybody who was going to be affected by it having an opportunity to oppose it or be heard on it.

Mr KERR—In relation to judicial review, so long as the definition of a terrorist organisation remains as it is in 101.1(2), the utility of a review seems to be rather limited. Most of the issues that we have concern about are not instances where there is much doubt that at some stage or other the organisation has used politically motivated violence. It is a question of whether, in the overall circumstances, it should be proscribed as an organisation and therefore membership and various other advocacy in relation to it made an illegal act for an Australian citizen, and how to distinguish that subset of organisations that we apply proscription to from the vast majority of organisations which at various times have used political violence and which are not listed.

As long as the definition remains as it is then any court would find itself in the same position as this committee when it raises these issues with the agency and the like, when we are told simply: 'Look, the criteria that we take into account are not part of the definitional framework. We take them into account but ultimately they are matters that go to judgements within the agency, the Attorney's judgement and certainly ours.' How would judicial review operate effectively in this framework where essentially the criteria are so broad as to what can be listed as an organisation? How would it assist in any way? It seems to me, on a very superficial basis, that if you are going to have a judicial review process you also have to look at the criteria.

Mr Sheller—I think we are conscious of the fact that to date, so far as I am aware, the listed organisations are what one might call ‘obviously listed organisations’ in the sense that I have no doubt that most of them would be proud of the fact that they were regarded as terrorist organisations. The concern is that this is not limited to those situations.

Say that in the future there is an organisation which is entirely an Australian organisation—say a social organisation which is for a particular group in the community—and it is discovered that somebody associated with that organisation has in fact supported, praised or perhaps helped in some terrorist act. That person’s association may be such as would give it a position where you could say, ‘The organisation has been engaged in that so it ought to be proscribed,’ and for a variety of reasons there could be pressure to have it proscribed. But on the other hand there may be many people associated with that whose activities have been entirely innocent, and they may want to say, ‘Look, those people who did that really were not representing the organisation at all and it was not a terrorist organisation; it just happened to have people with it who were terrorists.’

Mr KERR—Can I take you up on that, because with at least three of the organisations that we have proscribed I do not think it is true that they would be proud to articulate themselves as terrorist organisations. I think Hamas, Hezbollah and the PKK would, if they were asked to describe themselves, say that in a couple of instances they were the armed wing of a resistance movement engaged in a legitimate political struggle either for the independence of a subset of a national state or for the liberation of territory that they say was unlawfully seized by others.

There are many organisations which, wisely or unwisely, have used political violence as part of their approach to conflicts within countries. The Attorney-General quite rightly says—and is proud of the fact that we do not proscribe all of these—that we have to exercise judgement. But what interests me most is this: in any framework where you have an advisory group or a judicial review, upon what basis can they operate if the statutory criteria are such that essentially you have this inchoate and very broad framework with no hooks to hang judgements off other than ultimately that somewhere in the agency or within government a decision is taken that a particular organisation ought to be made the subject of prohibition, such that Australians who join it or advocate its aims are subject to these very great penalties that you have described?

Mr Sheller—But the criteria would presumably be initially those that go before the Attorney-General. The public material that goes before the Attorney-General would no doubt go before the court. In the scenario, if I can call it that, that you describe it is the position of the people who as a result of that proscription suddenly find themselves being charged with offences that can carry these huge penalties in some cases. It is those people having a say in defending their right not to be convicted if they are not guilty.

The procedure to be undertaken in the first part if there is no proscription of the terrorist organisation is a proof at trial of whatever is necessary to show that the organisation is a terrorist organisation. Indeed during the course of the material being put before us, and I think we refer to this in our report, the Commonwealth Director of Public Prosecutions put to us that in trials to date, even though there is a proscription, a process had to be gone through of proving that the person knew that the organisation was a terrorist organisation and that that in effect involves proving as much as you would have to prove if it had not been proscribed at all. We were told that you would have to show that the person knew that he or she was a member of a terrorist

organisation. That was something that we did not investigate further but it was something that was put before us.

The concern really is, and it is difficult and I entirely accept what you are saying, that in many of these cases it may be obvious but in others it may be very much a matter, perhaps, of discretion as to whether an organisation for one reason or another should be treated simply as an organisation that is striving to achieve some perfectly legitimate aim or whether it should be described as a terrorist organisation.

Mr Carnell—I would like to put a point of view. I certainly would not want you to have the impression that this committee I was a member of believes that all 19 organisations that are currently proscribed are correctly proscribed. I quite take your point that it is highly arguable in some instances. We were simply talking in general terms that there are others in there, such as al-Qaeda, who would bear the badge proudly, but we certainly do not seek to put to you that all 19 deserve to be proscribed.

The view I would like to put is that, if one could envisage that if it were the subject of judicial review, in looking at the question of what are relevant and what are irrelevant considerations the court itself might effectively be in the position of having to develop criteria, and then having to gauge whether the evidence put to it means that relevant considerations were all adequately addressed and/or whether what in the court's view were irrelevant considerations were brought into consideration. To put it bluntly, there could be a risk here of effectively allowing the courts to have to develop those criteria when one would have thought it should be a matter for the parliament, on propositions put to it by the executive.

Mr KERR—We have been suggesting criteria.

Mr Carnell—Yes.

Mr KERR—The other point that strikes me is an issue of commonsense that you raised—that is, in the main there ought to be a process that enables people to put a view as to the wisdom or otherwise of a particular listing before criminal sanctions attach to membership of the organisation. I accept that there may be some case where urgency, particularly in relation to transfer of funds or the like, might emerge, but I think that can be done under other legislation where urgency might be important. But it seems to me—and I would appreciate your advice on this—that, currently, once a regulation is made, the organisation becomes illegal. There can be applications for delisting and the like. But, presumably, a person who puts their hand up and says, 'I'm a member of the PKK; I apply for its delisting,' essentially identifies themselves as a person to whom, prima facie, these criminal penalties apply. Presumably, that itself carries a set of complexities—particularly if the delisting application is refused—and very few people will want to self-identify themselves as a listed organisation to pursue what limited remedies there are potentially available.

I think this committee would be hesitant to build in too great a front-end, but what kind of front-end do you think we should build in to permit those who would be the subject of these criminal law penalties to make representations and to address them? Because after the act, after the regulation is actually made then presumably most of the relief that is notionally available will not be pursued for a whole range of practical reasons. The organisation, if it did exist, would

go underground, people would not speak of it. Exercising rights, when you put your hand up and say, 'I'm now volunteering for 15 years in jail,' is something that most punters will not do.

Mr Carnell—The SLRC would strongly agree with you on that. There may be unusual circumstances, but generally a better front-end, as you have described it, is essential. It is essential for reasons such as this—and this is a personal view, not something that we discussed in the committee because it has arisen since: when I read your committee's consideration of the listing of the PKK, from an administrative law point of view it seemed to me that you as a review committee were in the position of effectively gathering material that ought properly be a matter of primary decision making. But, even more importantly, you were hearing views from community and other groups, and it is important that they are voiced if we are not to heighten the sort of alienation that those groups may face. Frankly, even if ultimately the decision is to proscribe, it must be a better process of government and better for community relations if there has been that opportunity to put a case first. Certainly, the proposition that generally there ought to be an opportunity to put a case first before proscription occurs is something that all members of the SLRC strongly agree with.

Mr Sheller—In a sense, the judicial process is the simplest way to do that.

Mr KERR—I still find it very puzzling to ask a judge to, essentially, exercise a merits based decision about whether organisation A, which notionally meets the legal criteria, should or should not be listed as a terrorist organisation. I do not imagine that any organisation will come forward as a potential listing that does not in some way meet the legal criteria. The legal criteria are so broad that they cover a whole raft of organisations that we think no sensible government would ever include; we just keep our fingers crossed and hope that that be so. But how could a judge decide between those which meet the very broad criteria and should be listed and those which should not? It seems to me an inherently non-judicial task.

Mr Sheller—But a particular case would come before a judge on the application of the Attorney-General. A judge would not be asked to generally proscribe, to determine whether a whole string of cases—

Mr KERR—But unless there are criteria, the answer will always be yes.

Mr Sheller—There would have to be a criterion. One of the problems which I see as having arisen in your relisting reviews is that, so far, no criterion has really been established.

Mr KERR—The criteria have been established. They are in the act, but they are so broad—

Mr Sheller—Yes, they are in the act, but what does that mean? The point is that the Attorney-General has to decide whether or not action is to be taken and then it goes before a court. But then the question is: what should be put before the court? The material put before a court in a particular case would at the start be the material that is made public and given to the Attorney-General. What the judge is doing is that particular case. That is right up-front and ideally is it published, and people have an opportunity—without, as it were, criminalising themselves—to come forward and say, 'This should not happen.'

Mr KERR—I must say that I am much more attracted to your alternative proposition. I like the idea of merits based reviews, perhaps through the security committee of the AAT; that is an idea that has been advanced. That may have some advantage.

Mr Sheller—Yes.

Mr KERR—But giving it to a court is, I think, very difficult.

Mr Carnell—As you say, in our report we put forward at least two general propositions about how you might devise that front-end. There are even other possibilities; we thought it tended to come down to the two. But certainly the whole committee took the view that there must be a better front-end, as we have talked about, and it is a matter of careful deliberation on which model. There was not unanimity within the committee as to which model was preferable. Equally, we thought there were some good arguments for the different models and ultimately that is a fairly careful judgement that one needs to make.

Senator FERGUSON—You made an issue of the publicity of proscription in your committee report. I notice that you recommend the government develop a more comprehensive strategy to publicise the listing of terrorist organisations. In previous hearings on listings we have had requests that there should be some consultation and publicity prior to listing, whereas I think it is the view of many of our agencies that in fact the publicity should only occur after the listing. I think your committee is silent on the issue as to whether there should be publicity prior to listing.

Mr Carnell—The SLRC would say that generally there ought to be prior notice. Because one of the key purposes of listing is really deterrence, you can afford, as it were, to have a process of prior notice. If you have a plan or a plot going on, in the end you always have the personal offences in the Criminal Code. This is not our only shot at the problem. You could use the personal offences if there is something that is imminent and needs to be acted upon. Generally, it is amenable to prior notice, even in the form of the sort of unclassified statement that currently goes to the Attorney-General and is put into the public domain.

Mr BYRNE—If I were to present a hypothetical to you where I said that we could give you one of two outcomes in terms of your submission, but it was a choice—you must choose between the judicial authorisation or the independent advisory committee, or, following the proscription, a judicial review or a merit review—which of those would you choose in the real world?

Mr Sheller—I think we might each choose differently. There was a good deal of discussion, but the committee thought it was advisable to give them as alternatives. Various members had different views. I think on the whole we would say that it should be a procedure towards proscription rather than a procedure post proscription to look at it again as it were or whatever that may be. I think, in fairness, the majority of the committee were of the view that the executive process is preferable to the judicial process, but there was not agreement on that right across.

Mr BYRNE—This is the independent advisory committee that you are talking about?

Mr Sheller—Yes.

Mr BYRNE—Just taking that, if you were going for an independent advisory committee, who would you select? Which fields would these people come from?

Mr Carnell—I am happy to throw in some thoughts. Obviously, you would want the law represented. You could have a retired, eminent judge or you could have the chief general counsel. You would want someone—at least one person, probably more than one—well versed in security matters. There are a range of places you could look for that; they could be former senior officers of, say, the Office of National Assessments. You might look to have someone like the Commonwealth Ombudsman and/or the position I occupy, the Inspector-General. I think those are the sorts of skills that you would look for. There is no magic size to such a committee; I think you would want to keep it within reasonable bounds. It can be hard to get—as your committee no doubt experiences—nine people together. You would probably want to have—these are just personal views, these are not views of the SLRC—at least three people and possibly five.

Mr BYRNE—And would those people have access to classified material?

Mr Carnell—I suspect they would need to see it. Mind you—depending on the criteria that are actually settled on—with some of those criteria, there would not be any issue about classified material, I would not have thought. In some cases, there might be a certain sensitivity attaching to the material that could either be handled by the agencies being careful in how they present it or, if necessary, you could always security clear the members. I am not sure that that would really be necessary but if there were a sensitivity about such material going before the committee, give them a security clearance.

Mr BYRNE—In terms of informing the community after a proscription about the implications of the proscription, you would rather, if you had a choice, have something like an executive committee that would then assist the process of proscription.

Mr Carnell—I would see this committee putting up public notice of the intention to proscribe, taking submissions, if necessary having some hearings and writing advice to the Attorney-General. Under that scheme, the decision to bring forward the regulation would still remain with the Attorney.

Mr BYRNE—Do you see this as more of a public information exercise and the second part to my question is: isn't that what our committee does?

Mr Carnell—Yes, and I would have thought that, admirably as the committee does it, it is better done at the primary decision-making stage.

Mr BYRNE—Can I put a hypothetical that if we could not get an independent advisory committee up, basically as in the model which you proposed, there could be something like this committee coming into the proscription process prior to the regulation being announced. Is that an outcome that you have considered at all?

Mr Carnell—I think that is an option. The concept is one of a group of people bringing knowledge and experience to bear and able to engage with people who wish to make representations about a matter.

Mr BYRNE—Why do you think that no-one in this country has applied for delisting at this point, particularly given the recent listing of the PKK?

Mr Carnell—I really cannot speak for those people but I would have thought that the argument put by Mr Kerr is a pretty cogent one: why put your hand up?

Mr BYRNE—You can have a member outside the organisation who might not be a member of the PKK, an advocacy group, that might actually apply for that, but I have seen no application for a delisting, so can you explain why that might be?

Mr Carnell—I am simply not in a position to speak for the people who might be the people you are referring to. I do not wish to be unhelpful, but I really cannot speak for them.

Mr Sheller—Could I just take a step back to mention this. If a terrorist organisation is not listed but somebody is charged with being a member of an organisation that is a terrorist organisation then it is for the court or the jury to make that decision. So far as I know, nobody has suggested that that is too difficult for a court or a jury to do. With due respect, I do not agree with the idea that this task would be beyond a judge to undertake. Because I have been retired for some time I have not kept up with trials that are going on but it seems to me that it will not be long before there is a trial in which the jury will have to find whether or not the organisation was a terrorist organisation.

Mr KERR—There are the Melbourne accused at the moment, aren't there?

Mr Sheller—Yes. The details of that I do not know, so I cannot say, 'Look at this case—it is happening.' But it seems to me that the legislation accepts that as something that may happen.

Mr CIOBO—You will note that I am a member of the House of Representatives, not a senator. The consequences of that will bear out. My concern about essentially the thrust of your submission is really to do with the question of which part of this committee's role as an organ of the parliament you do not have confidence in with respect to our review of terrorist organisations such that the government would need to outsource that decision making to an expert committee or, indeed, to a judge.

Mr Sheller—This committee makes recommendations. The idea of either the executive process that is put forward or alternatively the judicial process is that it makes decisions. There is nothing particularly unusual that some people's decisions prevail over other people's decisions in these sorts of situations. It is not a slur on anybody—it is just a simple question of how best it is done.

Mr CIOBO—Except that in this case, if the process were a merits review, it would be effectively a second-guessing of a ministerial decision by a court or an expert panel. That is what you are proposing.

Mr Sheller—Yes. As I say, from my own point of view, that is a less-favoured approach. The judicial approach is simply an application by the Attorney-General. The executive approach is advice to the Attorney-General, who then makes the decision.

Mr CIOBO—However, fundamentally, the issue is, though, that the executive takes a decision ratified by the parliament to allow a minister to make a decision based on reasonable grounds on the evidence put before him or her to list an organisation. The submission you have put forward indicates, in my mind, that this decision is a lesser quality decision than one that is reviewed by a judge or, indeed, even if it were beforehand, one that an Attorney-General made application to a judge or an expert panel on, with all of the inherent difficulties that flow from open source and other source material that would need to be reviewed, which effectively is how it occurs now. It really is about quality of decision making at the end of the day and whether or not a minister as a member of the executive is best able to do that. It is a policy decision, is it not?

Mr Sheller—There are various factors about it—first of all, whether before the decision is made those affected have an opportunity to put their case; secondly, whether the process is a transparent process so that everybody knows exactly how the proceeding goes, like a hearing in open court; and, thirdly, whether there is a decision that is made before proscription as to whether there should be proscription—but bearing in mind that all of this has to be looked at against the penalty consequences to people affected by this. This is not simply a question of saying that an organisation is a terrorist organisation and that is it, and writing that down. I think the consequences to people would be as vigorous as probably any criminal law in Australia. There may be every reason for that. But in administrative law in an international situation one has to be very careful that those sorts of penalties are not imposed unless the person affected has every right to defend himself or herself. That is at the heart of this, really. It is certainly not suggesting that somebody's decision is better than another's. It is all to do with fairness.

Mr CIOBO—I am looking at the three criteria you have put forward—without overly entering into the debate because I am mindful of the time. The opportunity to put their case and the second element you outlined of transparency are, I believe, adequately covered off by this committee's review and recommendation. Of itself, I think a 'no' recommendation would invite significant public comment. The decision on proscription, which is your third notion, is one that I am ultimately very comfortable in having rest with the executive or the minister responsible. I want to put that on the record. I also want to raise with you the final statement that you made, Mr Sheller, in your opening statement when you said:

By doing so there would be an enhancement not a diminution of the antiterrorist efforts. The dynamics for the development of so-called home-grown terrorism must be reduced rather than provoked.

That is a fairly qualified statement. I believe that point needs to be made because, at the end of the day, that is not a statement of fact. The notion that terrorism is derived from alienation and from a sense of fear is open to a significant amount of conjecture at the moment.

Mr Sheller—Material to that effect was put to us. People may be right or wrong in their view about it, but it was not something that we drew out of the air.

Mr CIOBO—I just noticed that it was the comment you closed with after your opening statement. I just wanted to check—

Mr Sheller—I think it is important—

Mr CIOBO—I think it is important too that it is not taken as a given fact. I think it is important that statements like those are challenged. That has not necessarily been the cause of terrorism at all. I simply wanted to take this opportunity to revisit that statement.

Senator NASH—I have just a couple of quick questions on the report. HREOC and others say in your report that they are particularly concerned about the lack of any fixed criteria about specifying an organisation as a terrorist organisation. Did they come up with any alternative suggestions for you? Your report does not go on to say that. Did they make any firm suggestions about what they thought the criteria should be?

Mr Sheller—I think we said on page 80 that they said that some that have been put forward by ASIO were a start. That may be what you are looking at.

Senator NASH—Yes.

Mr Sheller—I think I am also right in saying that that was as far as it went. Is that right or not?

Mr Carnell—Yes. We did not have any submissions to us suggesting alternative criteria or even necessarily a refinement of these.

Senator NASH—So they do not want fixed criteria, but they do not have any alternatives?

Mr Carnell—Yes.

Senator NASH—On the next page of the report, page 81, it talks about how enhancing the transparency of the proscription process would increase public confidence. How did you measure the current level of public confidence to then be able to go on and say that the increased transparency would improve it?

Mr Sheller—I think it is hard to say. There is a good deal of debate about the way trials are now conducted, with some evidence now being taken behind closed doors. I am talking about something slightly different from what you have put to me, but there is a good deal of debate about whether that process should not be more transparent. I think people are very conscious of anything that affects criminal prosecutions or for that matter any other part of the law that is not done in a completely open way. That is my experience. There has been a good deal of discussion about the recent trial, or whatever occurred in the United States in the last few days, as to degrees of transparency and so on. I believe that thinking members of the public are concerned about that.

Senator NASH—Right. So it is more a perception of what would be an improvement in the public confidence rather than—

Mr Sheller—A perception from being involved in the law for a good many years.

Senator NASH—I understand that. I am just trying to determine whether there was anything definitive that you had based that on. I take your point, but I just wanted to clarify that. When you considered the judicial process with the increased transparency on page 93, was there any

thought given to or concern about any relationship between increased transparency and greater risk to the public? I am not saying that there is a link, but was there any discussion or consideration given to any potential link between the increased transparency—

Mr Sheller—Not directly, but you are right—there has to be a balance. That is discussed and it is usually recognised by people. For example, HREOC's submissions put forward recognise that. It is a difficult balance. There is just one other thing that has to be borne in mind in all this, and that is that Australia does not have a charter which supports administrative fairness and so on. Many of the countries that have been discussed do have that. For example, a lot of the cases in the United Kingdom which have touched upon terrorist law have drawn heavily on human rights considerations. But that charter does not exist in Australia and that is a thing that has to be borne in mind when looking at these processes.

Senator NASH—Was consideration given to the timeliness of a judicial process and how that would work if that option were taken up? Would it be able to be effective quickly enough, as an alternative?

Mr Sheller—There is a procedure under the act. In a judicial process, an application can be made to a judge commonly in certain circumstances to, as it were, stop things, do something, make an order to maintain the status quo or, if somebody has to be restrained, to do that pending trial. The most obvious one is when people are arrested and bail is refused—things of that sort. But that is not a good example comparative to this. I think we expressed the view that those sorts of problems could be overcome by a judicial process.

Senator ROBERT RAY—I have a question regarding notice of proscription. I cannot understand this point at all. Of the 19 organisations that the government has proscribed and the parliament has not overturned, I do not think we have a name, address, telephone number or post office box, so it could only be a very general sort of notice that I would very much doubt anyone affected would ever read.

Mr Carnell—I agree it is essentially academic for those cases, but there has been speculation in the media that there might be other organisations proscribed where there are identifiable spokespersons or branches in Australia.

Senator ROBERT RAY—I do notice the words 'where practical' in your suggestion. So are you saying it is not practical so far but it may be practical in the future?

Mr Carnell—It could be, yes.

Senator ROBERT RAY—All the argument is about whether we should have this done by the executive or the judiciary, but isn't the real weakness now, through no fault at least of mine or John's, that the Senate has changed and you therefore have no real possibility—I am talking very pragmatic politics here—of disallowance? When the legislation was put together the disallowance power by the Senate—and never in the House of Representatives—was regarded as a powerful tool; now it no longer exists. I am not reflecting on colleagues; that is the reality. I do not think a disallowance motion has gone through since the Senate changed its numbers.

Mr KERR—You have just lost your capacity to persuade.

Senator ROBERT RAY—What I am saying is that the imbalance now is such that executive power will not be checked by disallowance as it once was. I think we all regard it as desirable to put check and balance in the system.

Senator FAULKNER—It was designed as both a sanction and a safeguard. If you are going to be fair about this, it was described by the government and the responsible minister of the day as a safeguard. The political realities are as Senator Ray describes them.

Mr Sheller—I cannot speak about anything more than the reading of the legislation, but there is the requirement, for example, that material be provided to the Leader of the Opposition. Thinking about it, that puts the Leader of the Opposition in a very difficult position in the political climate we are in because if the Leader of the Opposition says ‘yes’ or whatever the Leader of the Opposition is supposed to say, and something goes wrong then he is caught up with having said ‘yes’. If he says ‘no’, something could still go wrong. You wonder about a safeguard like that. That was something that occurred to me as I was looking at the papers.

CHAIR—I thank you both very much for your evidence. If the committee has any further questions they will be sent to you in writing by the secretariat.

[3.06 pm]

LYNCH, Dr Andrew Nicholas, Director, Terrorism and Law Project, Gilbert + Tobin Centre of Public Law

MacDONALD, Ms Edwina Catherine, Senior Research Director, Gilbert + Tobin Centre of Public Law

WILLIAMS, Professor George John, Anthony Mason Professor and Centre Director, Gilbert + Tobin Centre of Public Law

CHAIR—Welcome. Do you wish to make some introductory remarks before we proceed to questions?

Prof. Williams—Yes, we would each like to make a few introductory remarks but we will not speak for too long. I will focus on processing criteria, Andrew will look at review and offences and Edwina will finish with a direct comment on the issue of strict liability. In making the comments, I would like to start by saying that our submission and comments are consistent with the Sheller inquiry; we do not depart from them in any significant way. However, we have elaborated on some of the aspects they developed and have reached some more definitive conclusions.

The starting point in our submission is one of principle that is raised in many submissions—that is, as a threshold question, is it appropriate to have any form of proscription in Australian law? It is important to recognise that this is an extraordinary power and, bar legislation going back to the twenties and thirties, ordinarily you would not find a law of this kind. Our position is that it is justifiable to have this kind of law in the code. We recognise that there is a threat of terrorism to Australia and that we need laws targeted not just to individuals engaged in terrorism but also to organisations that foster terrorism and provide a platform for individuals to carry out their work. With that in mind, our submission is different, perhaps, from many of them, because the question for us is not whether we should have this regime but what form it should take and, ideally, how it should deal with the problem in the most effective way.

In dealing with the Sheller commission query of which option should be adopted—should it be executive or judicial proscription?—we adopt the first model; that is, executive proscription. Immediately I should acknowledge that this is a change of position, having thought about this issue now over a number of years, and I think it is important to reflect upon why I have taken the position I have. It is not simply that I have been outvoted by my centre colleagues; it is the fact that I think that where we are today justifies an executive model, though modified from what we currently have.

The first reason simply relates to the passage of time and the experience we can now draw upon for how this executive model has worked. I formed the view that the model has worked largely well. There are some problems—some things need to be improved—but nonetheless I think, for example, that the work of this committee demonstrates some of the strengths that can be achieved through an executive model.

I have also looked in detail at the models that have been applied overseas, particularly in the United Kingdom, the United States, Canada and New Zealand, and it is clear that a consensus has emerged amongst all comparable nations that an executive model is the way to go forward. It is hard to justify why we would be markedly different from what is occurring in those other nations. There may be differences in the law, but nonetheless on this question there is a level of consistency.

The third issue is that, ultimately, I have been convinced that the sort of model we need to achieve has to cover a number of proscriptions. In other nations it has often got to 40 or more proscriptions of organisations, and I simply cannot see a court model being workable and effective for the number of proscriptions we need to achieve. I do not think it is workable because of the time and the resources involved but, simply, that the criteria we believe need to be taken into the process are essentially not suitable for judicial determination with the speed and flexibility we think are required.

The only example we have on the books is section 30AA of the Crimes Act, which provides for a form of judicial proscription. We have also had the opportunity to go back and look at the operation of that. I think it is fair to say that it singularly failed as a model. It was designed to deal with communism. It was never applied to communism because it did not work. It is for those reasons that we think an executive model is the appropriate model with which to move forward. However, our position still is that we do not think the executive model that is currently in the legislation is the right model. We think it should be improved, and in particular we think that some outstanding problems need to be fixed and some further safeguards need to be added that reflect the extraordinary nature of this type of provision.

Firstly, we support the Sheller inquiry recommendation that there be an independent statutory advisory committee. We think this would improve the quality of decision making. Reading any number of the reports of this committee in which concerns have been expressed about the input of certain parties such as Foreign Affairs into the decision making, we think it is important to formalise that decision making to make sure there is an expert body available as a group to provide advice to the Attorney. Clearly, we think it should be advice only. We are not saying they should make the decision; it should ultimately be one for the Attorney to make. But we think it is time to formalise that role.

The second improvement we would like to see is better criteria. We have real concerns with the criteria as they exist. They are far too broad. They are vague. They are difficult to apply. What does something like 'indirectly fostering terrorism' mean, let alone some of the other combinations of words that you could have? It means that the criteria are far too broad, and it is very hard for people in the community wondering what gets you within those criteria to ascertain. What it means is that, for example, in this committee's work with the PKK and other organisations, it is clear that almost any organisation of this kind would fit within the criteria because they are so broad. We are lacking the more nuanced criteria that would help illustrate within that broad group which are the ones that should actually be proscribed and which should not.

We would agree that the ASIO criteria are the right starting point, and I think it is significant that almost all of the organisations making submissions regard that as an appropriate starting point. But, from my point of view, in particular what we are missing are criteria relating to the

actual link with Australia and the actual threat posed to Australia. The absence of those in the legislation I think is a problem. It also gives rise to some larger problems—that is, that there is the appearance of adhocery in the proscription decisions. That may be unfair because it may be that there are very good justifications for the other 19 organisations that have been chosen. But in the absence of clear criteria that the community can see being applied, it simply appears as if organisations are being chosen because of their relationship to the Islamic religion or other bases that again may be very unfair. That is the evidence that has gone before the Sheller inquiry and the legislation does not help in dispelling that perception.

The third change we would argue for is that we think at the front end there should be an improvement in terms of the ability of organisations to put material to the Attorney before an organisation is proscribed. We would regard natural justice as being a positive improvement, again, upon the quality of decision making. It would remove problems afterwards if it turns out people were going to put material that should have been known beforehand. It would also potentially help in improving public confidence and community acceptance. From our point of view, this is not simply about a legal problem; it is also dealing with larger problems of how to design effective legislation to combat terrorism. That simply does not mean proscribing organisations; it means that people in the community have faith in that legislation, and also that they do not feel further ostracised or become outcast by virtue of the process that has gone through.

The advantage also of having this type of natural justice criteria is that it would provide publicity before the decision is made. For example, if there was controversy or other media reporting, people would be alerted to the possibility. We recognise, as Senator Ray has put, that in many cases no-one would seek to put information. Our submission is that that may well be the case, but in other cases people would want to put evidence and the avenue should simply be there where that is appropriate. To this end, we point to the submissions of the Australian-Tamil Rights Advocacy Council that has made a submission to this committee. In a pre-emptive way, they have put a number of factors to this committee about why they think LTTE should not be proscribed, as well as evidence relating to links to the Australian community, positive works and other matters that they think should be included in the decision making. That is exactly the sort of material we think the Attorney should have before him in making a decision so that not only can he make the best decision but also there is public confidence that these matters have been taken into account before an organisation has been banned.

The final point I will make relating to criteria is that we think that part (c) of the definition of advocacy should be deleted, as does the Sheller committee. It is a very vague definition. Words such as 'praise' are not defined. It is very unclear how far it extends. It is also very imprecise. It is not clear who has to say the words for the organisations to be banned. Is a member saying them enough? A leader? A religious leader? It is very unclear as to the legal effect. It also, of course, has significant free speech implications.

I should not let this opportunity pass without saying that, in the absence of a charter, this type of provision is not checked in ways that comparable provisions are checked in the United Kingdom and elsewhere. Not only that, our provision can operate to the extent that a person can be jailed not for what they have said but for what somebody else has said who is part of the same organisation, even where the person jailed disagrees with the comment that has been made. That, to me, suggests a law that goes too far, and that is the reason that that should be deleted.

Dr Lynch—As George has said, we acknowledge the existing safeguards. But, in particular, we support the continued role of this committee in reviewing proscription decisions, including the discretion that the committee has to decide which listings to review. Other submissions have argued that this committee should engage in a review process as a matter of course. But, having observed the operation of the committee, we feel that this is not necessary, and that the committee should retain the power to determine when its concerns about a proscription warrant a full review. However, consistent with that position, we do feel that the scheme should provide a means by which persons potentially affected by a listing can initiate a merits review. At present, the delisting process appears to us inadequate, in that it simply involves a return to the original decision maker. As an improvement to this, we advocate a mechanism for merits review of the decision by the Security Appeals Division of the Administrative Appeals Tribunal.

We accept the difficulty of persons self-identifying as members of proscribed terrorist groups, as just raised by Mr Kerr, but there are ways around this. One thing we are imagining is that persons who have ceased to be a member of a listed terrorist group, in accordance with, say, section 102.3, subsection (2), upon a reasonable period of time elapsing, having then found out, would be able to lodge an application for review of the listing.

It might be thought that this recommendation would produce a worrying overlap with the role of this committee, but we do not think that this need be the case. As I have already said, the committee is under no requirement to review all listings. And, conversely, the committee may choose to exercise its power of review when the organisation in question or individuals who were members of it are not prepared to step forward to seek merits review through the AAT. In short, the two approaches complement each other by ensuring that there are sufficient avenues for review. To the extent that practical overlap might occur, this could be addressed through legislation or simply through the committee's use of its own discretion to review a listing.

We make this recommendation with some awareness of the distinctive processes and procedures employed by the Security Appeals Division of the AAT, and submit that implementation of this recommendation would require consideration of the appropriateness of those processes, and possibly some modification of them. And we are happy to try and assist the committee with this point further if it arises in questions today.

My last point is simply to connect proscription back to the offences for which it has significance. This has already occurred in the evidence given by the Sheller committee just before us. Much of the concern over the process and review of proscription stems from the consequences for individuals under the offences as they presently exist in division 102. Were those offences more carefully targeted, I suspect unease with the proscription process would be less pronounced.

So, once again, we would simply reiterate our support for the earlier recommendations of this committee and, before it, the Security Legislation Review Committee with regard to the amendment of the offences in division 102, including the repeal of section 102.8, in order to stress the interrelationship of all provisions in the division.

Ms MacDonald—In addition, we also wish to comment specifically on one of the recommendations in the joint submission from the Attorney-General's Department and other agencies. The submission recommends that, in the offences, strict liability should apply to the

fact that an organisation is a proscribed terrorist organisation. We oppose this recommendation, and support the previous recommendations of this committee and the Sheller committee—that is, that strict liability should not apply to the organisational offences.

The terrorist organisation offences are extraordinary in Australian law. They carry high penalties of imprisonment, but a core element of the offence—the requirement that the organisation is a terrorist one—is not provided for by the offence itself. A person can be guilty of an offence because they are in some way associated with an organisation, such as being a member or even an informal member of the organisation, or having conducted some sort of non-terrorism related training for the organisation; they do not need to have participated in any way in the terrorist organisations to promote terrorist activities. The defendant's knowledge of or recklessness towards the fact that the organisation is a terrorist one is central to the culpability in these offences.

Without the fault element, a person would be guilty of an offence for being connected with a terrorist organisation without participating in any terrorist activity or knowing that the organisation was a terrorist one. It is difficult to see what culpable conduct would be captured by such an offence. As such, we recommend that the fault element should be retained in these offences and that the offences should be amended as Dr Lynch has outlined.

CHAIR—Thank you very much. I am going to ask Senator Faulkner to lead the questions, but I just make an observation. I do not know if you have considered it but, in all the evidence that we have heard today in terms of the advisory committee, no mention has been made of any role for the states. Have you considered it?

Prof. Williams—No, it is not one we have considered directly. I suppose we took our lead from the Sheller committee on this. It would certainly be worth considering whether the states collectively might have a representative on the body, but even then I am a little bit dubious about that because I think the role of this committee is not to be representative; it is to provide high-level advice, and I would need to be convinced that the states had something to add. So unless a particularly strong case could be made that they have something to add in that regard then my view is: stick to the people who can assist the Attorney in making the decision and leave it at that.

Senator FAULKNER—I appreciate the point you make about the consistency of your views with the Sheller committee and also, with the exception of the change that you have outlined to us, a previous predisposition to support judicial proscription having evolved to executive proscription, which I think we understand. You have also presented a picture that is quite consistent with previous evidence that you have given to this committee and to a range of other parliamentary committees. Professor Williams, I gather from the broad thrust of your opening statement that you would accept a proposition that you do not believe these very significant powers of executive proscription have been abused since they have been in force. I think that is correct but I will check that with you.

Prof. Williams—Yes, that is correct. I am not aware of any instances.

Senator FAULKNER—Do you consider that you have been quite courageous in the evidence that you have provided to the committee, given that we have a situation where 19 organisations

have been proscribed? There have been no criminal prosecutions in Australia for terrorist organisation offences linked to a proscribed organisation, no applications for judicial review in any Australian court and no applications to delist an organisation. That is the environment that we find ourselves in. In other words, it is very early days. Are you being courageous in what you are saying to us?

Prof. Williams—Do you mean courageous in the sense of not going for a judicial model or courageous in a different sense?

Senator FAULKNER—First of all, courageous in moving away from what had been a position of your centre previously in relation to judicial review. I share the view that you have come to on balance and I have for a long time but—

CHAIR—Is there a question there?

Senator FAULKNER—You have identified a range of concerns that you have with the legislation as it stands and I think it is a reasonable thing. It is very early days to be making this sort of assessment.

Prof. Williams—It certainly is early days and, indeed, what lies behind my change of perspective—in a number of areas, I have to say—is that this is a field in which I think anyone who takes a fixed position tends to get it wrong. That is because prior to September 11 we had no national law on this topic. We have made a host of new laws—in fact 44 new laws have been passed by this parliament—dealing with terrorism in its various guises. We were also faced with the situation in which there were no good, comparable overseas models. The UK and other nations had not set down in any clear way how their models were going to work. It is only in the cold hard light of experience that we are now to start forming views some five years after some of the laws were first enacted as to what works and whether our initial judgements were correct. In light of that it is not too early to recast some of those judgements, as I have done.

For me it simply comes down to this: I think the evidence is there that executive proscription has not lived up to some of the dangers that were cast upon it. I also think that, in particular, the work of this committee has demonstrated something that I was sceptical about at that time—that is, the capacity of any parliamentary committee to play the scrutiny role this committee has. Clearly I was wrong in that assessment.

I think the experience of other nations is that courts simply are not up to the job, given the number of proscriptions. When we were first debating these issues some years ago, the idea was that there might be a few but that there would not be many, and that if that was the number we were talking about then a judicial model was much more feasible. But we now have 19 and the US have 44 or more, and when you are dealing with that number of proscriptions you have to be adaptable in the sort of model you are talking about.

Nonetheless, for me it comes down to the fact that if there is a change of position it is to say, ‘The executive can work but we are still not quite there yet.’ Building in merits review and some of the other safeguards is deliberately to build what would have been the advantages of a judicial model into the executive scheme and to provide the checks and balances that might otherwise have been there.

Senator FAULKNER—We have this vexed question of notification and right to be heard. One day you might find yourself completely conforming to the law and the next day you might find yourself liable to a very substantial sentence if the particular organisation you are associated with has been proscribed. I read in your submission the view of the centre on this issue but, given the complexities that we face in relation to some of these organisations—and Senator Ray asked the question a little earlier about how the hell you contact them and so on—do you have any substantive ideas about how government might address this? How might this committee recommend a course of action to try and deal with this real difficulty that many identify?

Prof. Williams—I think it is a real difficulty because, even though my view is that there has been no abuse and there are not any problems of that kind, there are perceptions in the community that there have been problems. I think that often they are not justified and that a lot of that comes down to the lack of adequate information getting to those people. I think the problem is magnified when we are dealing with organisations that have strong community bases in Australia, like potentially the PKK or Tamil Tigers.

I would like to see not simply a media release and something on a website but active engagement through the media networks of the community groups that might be affected by this. You could imagine that if a decision were going to be made banning the Tamil Tigers organisation then that would get a lot of press in those networks if it were communicated effectively, and it might well draw out some submissions and comments.

I think it is something we should be debating within those communities before the decision is made. It is the Attorney's decision, but I think the way we go about it at the moment is so low level that it is just not effective. It is not an effective media campaign, if nothing else, because people are simply unaware of what is happening.

Senator FAULKNER—But, given the nature of the regime we have at the moment, is debate within the communities prior to a decision realistic, in your view?

Prof. Williams—I think it would be. Senator Ray's point is a good one. Often there would not be because there are simply no links to the community here. It may be that there is no resonance whatsoever, in which case that is the way of it, but on other occasions there is. As you have seen from the submission from the Australian organisation involved with the Tamil people in Sri Lanka, that is an organisation that has a very great personal interest in these matters through its community radio networks, community newspapers and other bodies. There is the capacity to get information to those bodies in a way that is not happening now even after the decision, let alone before it. If at that point no submissions come in and no responses are received then, if nothing else, that means the government is able to say: 'You had the opportunity to have your say. There was a process that you could have gone through.' It is much harder to complain afterwards when that was not taken up.

Senator FAULKNER—I think the example of the PKK is possibly a better one than that of the LTTE, given that one is a proscribed organisation and one is not.

Prof. Williams—I raised the LTTE simply because it is proscribed in the equivalent regimes in other nations and, if you were going to pick an example of an organisation we have not yet proscribed, it would be very high on your list. That again is a source of concern in these

organisations—if they are proscribed under the equivalent regimes but not ours, will they have the chance to have their say here before that happens?

Senator FAULKNER—There is another issue I would ask you to comment on if you or any of your colleagues would care to—what about the broad issue of transparency in relation to these new elements of the Criminal Code and the way they have operated? Have you any views about that, which you might care to share with us?

Dr Lynch—This ties back to the offences and I know it is something that the committee is already familiar with. It seems that it is the combination of not just the fact that an organisation can be proscribed but that it is a criminal offence to somehow just be associated with it or an informal member. The last time we appeared before this committee, much of our time was spent discussing those. I think it is that combination of not only am I not really sure about what proscription is and how that might affect a group that I am a member of but there are these offences which are so broadly worded that, if the group that I am in is proscribed, then even if I am not actually a member, I might find myself in trouble. You really cannot look at one without the other. I think the two go hand in hand like that.

Mr CIOBO—I am sure you heard the testimony before and some of the questions that I asked the previous witnesses but effectively, as I see it, your submission calls for this expert committee to be established, firstly, to provide a recommendation to the Attorney-General and, secondly, for the Security Appeals Division of the AAT to provide a merits review. Is that correct?

Prof. Williams—That is correct.

Mr CIOBO—Can you explain to me why you believe it is better to have, for example, a retired judge and a number of other retired people from ASIO and the like advising the Attorney-General, and not this committee based on the evidence that this committee receives in putting a recommendation in? What is the benefit of having someone retired from various walks of life that gives superior quality advice to the A-G?

Prof. Williams—I think firstly that it is simply not the role of this committee. I think this committee has a scrutiny and accountability role and that it would actually be compromised if it were involved in the making of the decision at a very early stage.

Mr CIOBO—We are talking about a review though, aren't we?

Prof. Williams—No, we are talking about a committee that would advise the Attorney-General prior to the making of a decision. It is very important in my view that the role of this committee does not start until after that decision is made. It cannot be complicit or involved in that decision in any way.

Mr CIOBO—Why is that?

Prof. Williams—Because otherwise you are removing your accountability mechanism. You are removing the ability of this committee to be an independent reviewer of that decision because, in fact, you would be a part of making that decision at a prior stage. I think another reason is that it is simply inappropriate, given the political nature of these committees, that it

would be involved in advising the Attorney in that way. Again, it is just not consistent with the accountability provided by a committee made up of people of various political persuasions. I think this committee has a very important role but, in my view, it is clearly after the event. That is why, when we are talking at the front-end of what you build in, if it is not this committee, given the Attorney already receives advice from many different angles, our point, which comes out of this committee's reports, is often that is not as effective as it should be. Voices are not as loud as they should be; Foreign Affairs has been mentioned in some of the reports, and Russell Hogg's submission goes through this in very effective detail. We think it is important to formalise and improve that process.

We do not have strong views on the composition of the committee because from our point of view the most important thing is that you have the people who can provide the highest quality advice to the Attorney. Indeed, it may be appropriate to give the Attorney a great degree of leeway in choosing those people, subject perhaps to having a genuinely independent chair of the committee—a retired judge or someone else. They would have to be retired because of separation of powers issues but we would like to see someone there of stature, independence, who is retired but nonetheless the others should be there for what they can add in an operational capacity.

Mr CIOBO—But at the end of the day, what we are talking about is advice that currently flows from departments and agencies to the Attorney, and now inserting a committee perhaps in parallel to those groups to review this information. I fail to see how this enhances the decision-making process. Could you expand on that?

Dr Lynch—What we are drawing on there are the reports of this committee in highlighting deficiencies in the way in which that advice has been forwarded to the Attorney-General for him to make his decision. In particular, there has been dissatisfaction voiced by members of the committee regarding the amount of input from the department of foreign affairs. Having the independent advisory committee would really provide a means, I suppose, by which the Attorney-General is not proceeding to the decision-making stage until all that information has been adequately provided by ASIO and also the department of foreign affairs. The attraction of the idea to us is that it will formalise that process and put the departments on their game, really.

Prof. Williams—I will add two further points. One of the problems that is often identified is that it is a very political decision of this kind. This actually builds in a level of confidence in the community that experts have been consulted in a very public way that is not in the legislation at the moment, and it will hopefully build confidence over time.

Mr CIOBO—So you make the assumption that the community is comforted by experts being involved in the process.

Prof. Williams—I think the community is often comforted by the fact that they know that any Attorney has received advice from the leading experts.

Mr CIOBO—That could be a matter of some debate.

Prof. Williams—The other point I want to make is if the committee accept the submission we make about an opportunity to put in material then the appropriate way of doing that would be

into a committee of this kind, so they might receive community material and other work, analyse it and provide a report to the Attorney. He would then make his decision. At the moment he gets a document and makes his decision. This is simply formalising that, making sure you have the key people there and giving people an opportunity to be heard at an earlier stage.

Mr CIOBO—Can I touch on the merits review? As you mention in your submission, you:

... acknowledge that the proscription process already contains several safeguards, including judicial review, Parliament's power to disallow proscription regulations, the ability of the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman to conduct investigations into the administrative conduct of the executive, and the power of the Committee to review regulations proscribing terrorist organisations.

You have spoken about the fact that you believe this committee has functioned reasonably well, yet you also believe that there should be this additional review avenue available. I am again seeking to have you flesh out why with the current safeguards you need to have another one.

Dr Lynch—I suppose the attraction for it is similar to why a lot of people are arguing for the proscription process itself to be judicial, which obviously we are not. The reason people are drawn to that is to find something which is independent of the political realm, if you like.

Mr CIOBO—Why shouldn't these decisions be political?

Dr Lynch—The decision is still being made by a political operator, but it is being subject to—

Mr CIOBO—So why should it be second guessed by a so-called 'independent' body?

Dr Lynch—The reason I gave when I spoke earlier is it would provide a mechanism by which persons who are affected by the decision are able to seek some kind of review. They are not able to seek review from this body. You have the discretion as to whether you will examine a listing or not.

Mr CIOBO—It is facilitating a member of a terrorist organisation appealing the proscription of that terrorist organisation, whether they be a formal card-carrying member who has received their plastic card in the mail or one who is informally a member—is that your primary concern?

Prof. Williams—It is not only that. Certainly one concern is that there should be an avenue for independent review of the decision, but other concerns relate to, again, community confidence—

Mr CIOBO—But, again, why should a political decision be reviewed? The impression I am left with is that what you are saying is that there needs to be some distance put between politics and the decision that is made. I am asking: why is that?

Prof. Williams—It is for two reasons. One is that that is understood to be the normal course of things where important decisions are made by politicians which affect life and liberty. Indeed, you can look at the refugee context; you can look at any number of contexts where it is simply the normal order of events that when we are dealing with decisions of this magnitude there

should be review capability. The second reason, to get to your earlier question, is that some of the safeguards do not provide that and do not work.

Mr CIOBO—But hang on—there is a review capability already.

Prof. Williams—I was about to mention, for example, that the judicial review capability under the AD(JR) Act does not provide any form of merits review. In fact, that is a form of a review which does not go to the key aspects of the decision. It is a very limited procedural form of review. The disallowance mechanism, as Senator Ray has mentioned, is there in theory, but in operation it is not an effective check. So for those types of reasons we believe there ought to be this type of review, as you find in comparable contexts. We do not expect it will be commonly used. It will be very difficult to use. Indeed, there are all sorts of procedural problems, but nonetheless it is an avenue we believe should be open.

Mr BYRNE—Therefore if the balance of the Senate changed and there was the potential for disallowance, could you then say that that would be sufficient in terms of review?

Prof. Williams—No, we would not say that, partly because our view on the legislation is that it is not for any particular parliament. We need to get the legislation right for the next 10 or 20 years and we should assume that the political make-up of that chamber will change, but nonetheless all legislation needs to be drafted for whatever may be the possibility in that chamber without having to be amended after each election.

Mr BYRNE—Just as a matter of interest, why would the executive that would feed into the Attorney-General have greater knowledge about what would pose a terrorist threat to the country than, say, an intelligence agency, DFAT, Attorney-General's Department or a collection of intelligence agencies? What gives them remit over a group of agencies that currently provide advice to the Attorney-General as to whether or not an organisation should be listed?

Prof. Williams—It is a good question, and for exactly that reason it might be most appropriate that the committee be made up of representatives of those bodies, so they can meet together, coordinate their advice and do so in a way that does not appear to be working as well as it is at the moment.

Mr BYRNE—Some would argue that they already do so.

Prof. Williams—But according to this committee's reports, for example, there are real questions about whether the department of foreign affairs is adequately involved. Also, we think there is a distinct difference where you not only have those people involved but have an independent chair and have that body receive submissions from those who might be affected by the decision. For that, you need a deliberative process. You do not need to be simply told, 'Here's the advice from every department.' You need a deliberative process where the advice from each department can be looked at in the light of any submissions put in by members of the community.

Mr KERR—With respect to the idea of getting out of the silo, in our inquiries we have asked whether the community impact in the broader sense has been taken into account. We have been told by the assessment agency ASIO that it has not and that it is not part of the issues which they

take into account. Given the complexity that we face is usually the instance of why a particular organisation has been selected from amongst the whole plethora that might arguably come within the umbrella, these larger issues may best be examined by broadening the input that the government can receive. In the specific instance of the PKK, we were told those considerations had not been examined by the assessment agencies in their advice to the Attorney.

Dr Lynch—I think that is the appeal of an independent advisory committee. I agree with George in that it would be useful to have representatives of the various agencies on that committee, but effectively there is a mix and the point of having that mix is to ask those questions at the proscription stage. You have been asking them at the review stage, but really holding some kind of criteria up—again, we share concerns about the criteria—and advising the Attorney-General on the respective weightings amongst those criteria in making his decision based upon the information that has been forwarded by ASIO and endorsed by DFAT seems to us an inherently valuable thing to add.

Mr KERR—But if you bolt this front-end on, which takes into account some larger considerations or at least potentially opens them up, and allow people the opportunity to say, ‘Hang on, Tamil Tigers should not be listed for these reasons’—I do not suggest an endless process but a finite time within which people can address those issues—it seems to me that really we are talking belt and braces, and perhaps something else as well, when you have a merits review by the security panel of the AAT. I wonder whether that is almost a spurious safeguard in the sense that it would be very hard to imagine a circumstance that has gone through an advisory process with the best and brightest, considered by the Attorney, gone through this parliamentary review and then somebody pops up and says, ‘The best and preferable decision in the AAT is other than the consequence that has then emerged.’ One wonders what could be advanced to say that there is an opportunity to advance a different merits basis after that process, given the kinds of judgements that are involved.

Dr Lynch—Certainly, if the independent advisory committee aspect is added and it is also able to engage in consultation with affected groups then I would agree with you that the need for a merits review in the AAT is not as strong if there is wider consultation at that earlier stage. Taking our cue from the Sheller report, with the advisory committee, that was not necessarily something that they emphasised; hence, on the understanding that that is simply a panel of experts who will perhaps consider the potential effect in the community there is still that need to give persons affected some avenue whereby they can initiate a right to be heard. But it depends. The design of one will necessarily impact upon the design of or indeed the need for the other.

Mr KERR—But normally in the AAT, the decision, for example, substitutes for that of the minister. Excuse me if I am wrong, but I cannot imagine that legislation proceeding in the current climate would enable a single member of the AAT to, in effect, reverse a decision that has gone through that process. It might require a reconsideration but—

Dr Lynch—That is one of the things I raised in my opening remarks. The security appeals division operates in a different way. Presently, in relation to security assessments that are made by ASIO and are taken to the security appeals division, the normal standing of a tribunal decision does not apply to decisions made by the division in relation to those assessments. In effect, the impact of a decision is simply for the AAT to state its reasons when it disagrees with the determination that has been made by ASIO. One of the things we would say to you is that, if

you wanted to limit the impact of the merits review to something similar so that it simply issues a declaration, that may well be a way of constraining its power with regard to the ultimate decision so that it is not overturning the Attorney-General's decision. Certainly under the way in which the security appeals division works at the moment, the usual powers of the tribunal are circumscribed in that way and that may well be something, if we were to go to merits review at the AAT, that would be continued in the case of proscription hearings.

Mr CIOBO—Just to clarify, you are saying that the AAT would in effect second-guess ASIO's determination about the threat?

Dr Lynch—For a security assessment?

Mr CIOBO—Yes.

Dr Lynch—The current procedure is that they are able to make a determination about that.

Mr CIOBO—That is what I am saying. I was just confused about the point that Mr Kerr was making about whether or not that was the sole decision that would be made or whether or not it was the ministerial decision that would be reviewed.

Dr Lynch—Presently, it does not have the status—

Mr CIOBO—I am talking about under your proposal.

Dr Lynch—I know. It does not reverse the determination by ASIO regarding someone's security clearance, but it is able to issue a contrary result.

Mr CIOBO—So you would see a continuation of the same principle under your proposal?

Dr Lynch—We have not specified any detail. That was one of the things—

Mr CIOBO—That is what I am asking you.

Dr Lynch—That would certainly be an option that I can imagine would have particular appeal and I agree with Mr Kerr that it is highly unlikely that a sitting member of the AAT is going to overturn the decision by the Attorney-General, particularly if that has been made after advice from an independent committee which had consulted widely with the community.

Mr BYRNE—Do you think that the community in general, or some of the affected communities, broadly understand the existing system? The second question is: if they did, and they had some level of input prior to the proscription, would that ameliorate their concerns without having to have an executive and a review mechanism in the way in which you have described? Thirdly, do you think there has been enough explanation of the effects of proscriptions on the affected communities? And if there were, along with an explanation of the process of how we got there, do you think that would ameliorate some of the concerns of the communities that have been affected?

Prof. Williams—On the first question about communities understanding the system, I think the answer is clearly no. Then again, I think that the number of lawyers who understand the system can probably be counted on two hands. It is a very complicated system. There are a number of very difficult legal questions, meanings of words and all sorts of things. I think communities simply respond to the results, and the results are 19 organisations, 18 of which appear to have a direct Islamic link, and they draw their own conclusions from that. Whether fair or unfair, they do so without reference back to the scheme because, ultimately, people simply see the results. They do not see any decision-making process before that. That goes to the second point about the input. It could well make a difference. I think we have to be realistic about how difficult that will be and not overstate the case for dramatically affecting community opinion. Nonetheless, I think that raising these issues before the decision is made offers up the opportunity to create a climate of more acceptance and understanding of the processes. Thirdly, on whether that has been explained adequately enough, our view is that it clearly has not been. Having read the evidence to the Sheller committee, having received many calls, and having often consulted about these issues ourselves, I think that the extraordinary nature of the laws requires an equally extraordinary campaign to explain them, lest the broader goal of fostering social cohesion is lost and we end up dividing people because of undue fears about legislation that does not operate in a way that they can foresee.

Mr BYRNE—But if we could get something like that happening, do you think that the need for that sort of executive that would recommend to the Attorney-General and a merits review afterwards would become less?

Prof. Williams—I think you could largely deal with the problem if you got the front-end right. That is really the focus of our submission, because we believe that, once you go for an executive model, improving the quality of decision making and the transparency and involving public comment is the key to getting it right. Our comments on merits review are conditioned, if you like, by what the committee might go for at the front end. If it did not change anything then we would strongly argue for merits review, because we would not have the protections we would like. But as my colleague Dr Lynch has said, our arguments for merits review are far weaker, if indeed the protections we have talked about are built-in, because we also think they would deal with some of those community concerns quite directly.

Senator ROBERT RAY—Just one comment first of all in terms of the Department of Foreign Affairs and Trade. Since we put a bit of stick about, they have been extremely engaged and cooperative and are now taking it very seriously.

Prof. Williams—That is good to know.

Senator ROBERT RAY—I do not think we have reported on that, Chair, but certainly we have noticed it in our hearings. You have talked a lot about this advisory committee. Who would you put on it? Let's try to get down to taws here, so we can understand it. Here we have Professor Williams. The Attorney-General has rung up and said, 'I want you to put together a team, George.' Who would you put on it?

Prof. Williams—I would like to see as the chair of that committee someone of significant stature within the community, such as perhaps a retired High Court judge—someone who I think would come with a great degree of independence and be a good chair of the committee. I would

also like to see on that committee one or two persons who come from statutory agencies or other areas that have a broadly protective function in the community. That might be representatives of the Human Rights and Equal Opportunity Commission or the Privacy Commissioner. But I think the balance of the committee should be those who have the expertise to directly assist the Attorney in making the decision. Indeed, I would be quite happy for that decision to be largely left to the Attorney of the day.

Senator ROBERT RAY—If I have a criticism of the Sheller committee it was that it was extremely technically, legally constructed. They were all black-letter lawyers of one form or another on it. That came through in their report. I am just a bit worried about your advisory committee being the same.

Prof. Williams—As I said, I would perhaps have a judge as the chair. It would not have to be; it could be someone of equivalent stature. But from my point of view none of the others would need to be lawyers. Equally you might have a retired person from ASIO as the chair. Dennis Richardson would be a person who strikes me as an ideal chair for something like that, given the stature and recognition he has. You could pick your person in that position. But otherwise, as I say, it has very little to do with legal expertise. If you get the criteria right then I think you remove the need for the legal expertise. The problem at the moment is that the law is so vague and difficult you have got to have a host of lawyers just to understand how it should be applied.

Senator ROBERT RAY—If I could play the devil's advocate and pretend to be a bit cynical for once in my life—

Senator FAULKNER—As opposed to being cynical.

Senator ROBERT RAY—if I were in ASIO and Attorney-General's, I would love merits review at the AAT—I would love to flush out every potential terrorist and fellow traveller in the country. I remember years ago when the Tongan triplets came out—you know, the wrestlers. DIMIA got down there with their compliance branch and they picked up hundreds. Here, every time someone appeals or gets involved, they will be fully investigated. How do you protect them?

Prof. Williams—We are here to assist in the war on terror. Perhaps it can be put in that way. To answer your question properly, there are ways of constructing cases like this that will not give rise to the liability. But realistically it is very difficult. You might pick someone who wants to finance one of these organisations but says they will not do so until the status of the organisation is cleared, and there are a range of legal avenues whereby people can test decisions without themselves being complicit in being involved in a terrorist organisation. But we are absolutely frank about this. We recognise that merits review has its problems—it is difficult to challenge, it won't happen very often, and it is hard to get the decisions overturned—particularly if you did not get some of the front-end measures we are talking about. We do not think the system has the integrity at the moment it should and we put that as one of the things to be considered.

Senator ROBERT RAY—Governments naturally resent and do not endorse merits review, because it takes away from their own power, although what tends to happen is judicial review, when you have no merits review, becomes de facto merits review. I never know which way to dive, to be honest.

Prof. Williams—I accept your point. It is a legal minefield once you get into those sorts of areas. Clearly you would not want to get into those minefields here and that is why, if you did go for the merits review path, I think you would look very carefully at the existing model. You would not build in some of the other aspects of merits review you might find for other decisions which can complicate matters and also take them a far longer period to be resolved. We would argue for merits review limited to a quick, decisive hearing dealing with the core issues with a very limited range of remedies.

Dr Lynch—The issue you raise applies already in relation to the delisting process. As for anyone approaching the Attorney-General for a delisting, they would have to out themselves as effectively connected to the group. It is already a concern as to what you have on the books, as opposed to any suggestion that we might be bringing to you.

Senator ROBERT RAY—I think it is a step of degree. It did occur to me that delisting also had the same problem. I think the merit review tends to involve more, that is all. It is a point well taken.

Prof. Williams—The damage is done. Once the organisation is proscribed, it is very hard to do anything after that. That, again, is why we say the focus should be on getting the decision right in the first place.

Senator NASH—I want to go back to the public's confidence in the process. You made some comments earlier that if there was more of an open process about notification prior to a listing, the public would be more confident that they would have the opportunity to have some input, and that looking out the other side at the decision they would be more confident. Inherent problems have been raised with ensuring the integrity of notification. Where people technically have had input into the process and a decision is made, those who come out the other side of the process may feel that they did not really have the ability to have proper input and may be even more dissatisfied. Technically the process was in place, yet it did not work for them. Is that not still an inherent problem even if we go down that road, given the nature of the difficult issues to notify?

Dr Lynch—It is a difficulty but it is surely better than the existing situation where there is no opportunity for them to have input into it. As I understand your question, effectively it is pointing to people who may not have received notice of any earlier consultation about the group's status and felt that there was a process of which they were not probably alerted. I appreciate that. I agree that there may well be people who are disappointed by that as an outcome. But, again, I suppose that goes to honing that message and getting it out there. But it still seems to me not a reason for not changing the status quo where there is just no possibility for them to have an input into a decision like that.

Senator NASH—I take that point. I am just raising it as it seems to have been put forward as a panacea: this will solve this problem. I think we need to be cautious of an approach that says: if we are going to have this process of notification and more transparency then people will be happy with the outcome.

Prof. Williams—I agree with that. It will not solve the problem because it is a larger problem than simply changing any procedure; it goes to the publicity and all sorts of things. But our view

is that it would improve the situation. Ultimately, it could come down to the government making the decision and the quality of the information they provide to the community, how effectively they reach into community networks and all sorts of things. Our view simply is that in this case it is better to provide a measure of natural justice than none. The lack of natural justice itself we believe is a legitimate cause of complaint from those who would like to make a submission but are denied the opportunity to do so.

Senator NASH—Did you look at any inherent increased risk to the public with this greater transparency?

Prof. Williams—Yes, and that is a core part of the debate we had in putting together this submission. In the end, you have to judge these laws according to their effectiveness in protecting the Australian community. That is what they are directed at. If that purpose is not meant then that is clearly a problem with the laws. The view we formed in drafting the submission was that a natural justice criterion would not affect the community safety. If drafted appropriately with a limited time to put in a submission, we did not see it as undermining that in any way. In fact, we thought it might enhance protection because it would provide greater publicity and hopefully increase the chances that Australian citizens would not involve themselves with these organisations.

Mr BYRNE—In the UK, the Proscription of Organisations Appeals Commission provides a judicial merit review. Is that the sort of body that you are proposing?

Dr Lynch—Our understanding is that it only provides a form of judicial review and not merit review. We can look into that. I am aware of that commission's existence.

Mr BYRNE—I think it provides judicial merit review, because they do not have a separation of powers.

Dr Lynch—We could take that on notice and provide written advice.

Mr BYRNE—Can you report back as to its effectiveness. It was commissioned six years ago and I am not aware of them actually having overturned or had a submission that they have fully considered yet. I want to know if that was the model you were looking at and how many cases have been put to it, and what the outcomes are of those cases. I believe it was established in 2001.

Prof. Williams—Yes.

CHAIR—I understand you have done some work on comparisons of proscription in the UK, the US and Canada. Can we get a copy of that, either as a supplementary submission or independently?

Prof. Williams—Yes, we would be happy to provide further information on that as well.

CHAIR—Thank you for your evidence. If the committee has further questions, they will be sent to you in writing by the secretary.

[4.01 pm]

GIBSON, Mr John, President, Refugee Council of Australia

Witness was sworn—

CHAIR—Do you wish to make some introductory remarks before we proceed to questions?

Mr Gibson—If I could—and we are indebted for the opportunity to address the committee. I would like to make probably seven or so relatively short introductory points. I am confining this to the implications for the refugee determination process and the various processes that exist within the Migration Act.

First, there is in our view a tension of a practical and conceptual nature between the refugee convention, as incorporated into the Migration Act scheme and mechanisms, and the listing provisions under the Criminal Code. I suppose the first point we would make about that is that we would be concerned about the need to preserve the integrity of the refugee determination process and obviously to avoid any implications which could lead to refoulement, the return of people who genuinely are in need of protection.

The second point is that the refugee convention involves an inclusive process. I will just use an illustration—and this ties in very well in our submission with what appears within the listing provisions, where you have the use of certain terms like ‘informal membership association support’. In the refugee convention, a well-established principle is that of imputed or attributed political opinion. That can mean people in a range or a continuum from one extreme—for example, people of mistaken identity who are attributed as having the views of a particular organisation through association, familial relationships or membership, or people who are past participants and who have ceased to be members—to those who are actually active members. Every one of those people can come within the terms of the convention on the basis of imputed or attributed opinion. The point was made in an earlier exchange between Mr Kerr and I think it was Mr Sheller or someone about the history of self-determination movements and the fact that people who quite legitimately are opposing certain regimes can come within the convention.

There is one point that links to this, and that is—and possibly some further inquiry could be made of the material support provisions under the US legislation—that, if one takes forced assistance, forced recruitment, forced sexual slavery and forced labour, all of which are instances where someone would come within the convention, they equally, given the broad scope of the listing provisions, could well catch those individuals. There are examples—I read a report last year and I could bring it to the committee’s attention but I do not have it at hand—where, under the material support provisions, there are quite extreme cases where people have essentially been kept out of the refugee determination process or have been denied protection when they effectively have been the subject of forced slavery.

The third point—and I should probably freely confess that some of what we would say is not, obviously given the early days of this particular law, the subject of hard empirical data, although there are certain trends and I could go to those in a moment—is that we have consulted fairly

widely with the sector and what I do put to the committee essentially will be what we have been told.

The fourth point is the question of the potential effect of the proscription provisions flowing or feeding into aspects of the refugee determination process. The first, of course, is onshore/offshore refugee determination. The second is the use of the exclusion provisions under article 1F—in other words, where there is serious reason for considering that someone has committed a serious non-political crime, a war crime, a crime against humanity or a crime against the principles of the United Nations. The third, which is probably one of the most significant and could well be the subject of further inquiry, is the use of material information in ASIO security assessments. Every protection visa or humanitarian visa applicant has to satisfy condition 4002. Condition 4002 states, as you are probably well aware, that someone is not directly or indirectly a risk to security. That in turn engages political motivation and violence and in turn engages division 102.

The fifth point is that we can definitely say there are trends in relation to quite significant delays—of anything up to 12 months, 15 months or 17 months in one instance, which I could cite—of security assessments in the case of people who essentially have been found to be in need of protection. I suppose there are a number of lines of inquiry and statistical information that could be provided by DIAC in a number of these areas which essentially could provide some substance to what we have been talking about.

The sixth point is, of course, the question about how you challenge these adverse security assessments. There is no question of the almost inability of anybody to use judicial review to challenge them and there are issues of transparency in relation to that.

The question which has been cited and referred to in a number of submissions, but I think we have touched on it very briefly, is again the question of the reliability of intelligence coming from particular sources. Lastly—and I think Professor Hogg referred to this in his submission—is this issue of whether individuals who legitimately could claim the protection of the convention would be effectively prevented or inhibited from doing so by these provisions. They are essentially the points we would like to make, but I certainly could expand on any of those.

CHAIR—In terms of the 19 organisations that have been proscribed, do you have any evidence yet of any refugee applicant being affected directly by that proscription?

Mr Gibson—If I could make two points. One is that the most obvious case of an organisation where these problems, as we see them, would arise would be the PKK, and that has been the case since December 2005—and that is now 17 months. I could cite two occasions where, fed into the refugee determination process, one could probably say that a tribunal member has been affected by the implications of association with terrorist organisations—PKK or people in Turkey who support the Kurdish cause but essentially are not members of the PKK but there is a tendency to characterise them that way.

In terms of hard data, that would be a very useful line of inquiry. In fact, there would be five particular types of information which we would ask the committee to look into with DIAC, and they may well be able to produce the sort of information that is otherwise lacking. I do not want to produce impressionistic hypothetical examples, but it is possible for DIAC to produce

information about delays in security clearances and the reasons for them. At an NGO consultation, DIAC made it clear that they have no control over the process but that they would certainly be able to produce the information.

Secondly, it would be information about adverse security assessments after a positive finding that someone is in need of protection, and we have no data about that. Thirdly, it would be where there are sentences of character cancellations on these grounds linked to the listing provisions. Fourthly, it would be the application of exclusion provision. Fifthly, it would be whether effectively there has been a rejection of people who, for example, may be from Turkey and have imputed PKK connections, where those claims have been made and they have gone back to Turkey—in other words, whether the process has been influenced. One could probably ask ASIO about the quality and reliability of intelligence and the benchmarks they use when they are dealing with people who come within this category of, for example, being imputed PKK people. That is a very long way of saying that I do not have the data, but it could well be available and it would certainly clarify the issue, as far as we are concerned.

CHAIR—How effective is the publicity that goes with these listings? In your position, is there general knowledge within the various branches of your organisation of what is going on? Does it go beyond that to applicants?

Mr Gibson—Again this would have to be impressionistic, but I would say it would be relatively little. The most significant fact of knowledge was December 2005, the listing of the PKK after the departure of the Prime Minister of Turkey, about which various submissions were made or various things were said at the time. That clearly affected a particular group of people. As far as the great range of refugee applicants or people applying for protection visas is concerned, they do not come within this, simply because the organisations they may be imputed with are not yet designated.

Then there is the question of the LTTE—I was here and I heard what was said by the previous participants—and the issues that would be raised by any possible proscription of the LTTE, given the very significant number of Tamil refugees in this country who are here on the basis of imputed LTTE opinion fearing persecution. If it were ever considered by the Attorney that that particular organisation were to be proscribed, that would really be the test, and I assume there would be widespread knowledge, which would affect a significant number of people.

Mr KERR—Take the PKK as a starting point. In the past I assume it would have been a routine basis for applying for refugee status that a person was a member of the PKK or was believed by the Turkish authorities to be a member of the PKK or was associated with and through familial links or something of that kind and therefore at risk of persecution.

Mr Gibson—I agree.

Mr KERR—One of the issues we had to reflect on was whether there would be a subset of people who might be affected already in Australia by the listing. But take the issue as to the application of these proceedings now and the impact of the listing as such. People already in Australia have the option of dissociating themselves. The act does permit people to dissociate themselves from the organisation and therefore not be subject to the criminal law.

Mr Gibson—Yes.

Mr KERR—But, assuming that somebody now seeks asylum in Australia because of imputed belonging to the PKK or the like, how would that be dealt with under the current legal regime? The refugee convention says that you do not give asylum protection for serious non-political crime. Actual participation in terrorism is now regarded as serious non-political crime. So, if their conduct were asserted to be actual acts of terrorism, they would not, if I am correct, come within the refugee convention.

Mr Gibson—If they came within the article 1F exclusions, that is correct.

Mr KERR—So they would not be subject to protection. However, if they were subject to protection—absent their obligation if they are permitted to stay here that they would be subject to the criminal law if they did not renounce a pre-existing linkage to the PKK; other than that—how would it affect them?

Mr Gibson—There would be a range of possibilities. If someone was, let us say, not a member of the armed wing but was essentially involved in, as I said, the question of imputed association, but even someone who was a member or supporter or was involved in relief work in relation to helping the Kurds or generally a supporter of the Kurdish cause—in other words, not caught by the article 1F exclusion—they could find themselves faced with probably three different possibilities. One would be the extent to which their claims were believed, and that may well be influenced by the refugee determination process. The second, which I referred to before, would be the need to satisfy condition 4002. That directly would engage division 102. It is quite possible that, on that basis, there would be an adverse security assessment, notwithstanding that they had satisfied the convention test. So it could be one of those two possibilities where clearly there have been serious reasons for believing that they had committed a serious non-political crime.

Mr KERR—But I am just trying to distinguish between the sort of problem that every Australian citizen faces as opposed that faced by people who are refugee claimants. I am just trying to test this as best I can to try to work out the degree to which it is a problem that we have to address or is outside our remit. Let us assume that somebody is found to be not within 1F—that is, they have not be an active participant in terrorism but have been a supporter of the PKK, have actively supported its political objectives and have done all the sorts of things that make them fear persecution if they return, but they do not fall within the 1F exception—and then a security assessment is made. That security assessment could determine that, having fled to Australia, they no longer are going to take up that political struggle and will cease to be an active adherent to it. Like every Australian who is already here, they have to decide or to potentially face these very serious criminal offences. If the judgement were that they would fail to do that, what would happen then? Obviously, if somebody says: ‘That was what I did there. I’m leaving that country behind. I’m making a new life in Australia. The politics of my homeland are questions for my homeland and not for me anymore,’ that seems to answer part A. However, if they said, ‘No, we still support the objectives of the PKK but we obviously understand that that is a criminal act in Australia,’ what then happens?

Mr Gibson—If that is the assessment that ASIO has made—and the linkage is fairly strong in the sense that what I read out before does directly engage division 102. If they come within those

terms, essentially there is in practical terms an unreviewable adverse decision which, while theoretically challenged by judicial review, just like a refusal is obviously challengeable and reviewable to the RRT—

Mr KERR—Is that by the security division of the AAT?

Mr Gibson—I am sorry, yes. If that is the case—if you fail there—then depending on the extent to which material is available to indicate the existence of jurisdictional error in the AAT's determination the practical outcome of your posited scenario, in my view, is that someone would not satisfy the criteria for the grant of the visa and would be returned. The determination is highly problematic because, as you are all probably aware, the Migration Act has a whole range of different provisions which mandate nondisclosure, except in very limited circumstances, of particular material that has national security implications.

Mr KERR—Then what happens? Are they returned, even though they have been assessed as in need of protection?

Mr Gibson—They would then be returned, because one of the requirements for the grant of a protection visa is that they satisfy condition 4002, like the health criteria, which also are part of the requirements.

Mr KERR—So we return people who fail the health criteria or the security assessment to places where they have demonstrated—

Mr Gibson—Subject to—

Mr KERR—I am just asking a question. I honestly do not know the answer.

Mr Gibson—Subject to the ability of the applicant to seek to engage ministerial discretion under section 417 or section 351, which would obviously involve a non-compellable, non-reviewable discretion, as I think the committee is aware. But, short of that—even though we are told by DIAC that they do a post-removal assessment of the risk of return—there is no formal process such as some sort of post-determination assessment of risk, as there is or was for a long time in Canada. We do not have that in any formal sense.

Mr KERR—But we have already made the determination that they are in need of protection.

Mr Gibson—But essentially the outcome is that they do not satisfy the criteria for the grant of a protection visa.

Mr KERR—Then what about the convention against torture; how does that kick in?

Mr Gibson—As a possibility. As you would remember, there was that instance a number of years ago where a man from Somalia had failed at each of the stages of a protection visa claim, and at the last instance a petition was made to the committee against torture. The person in question came from a Somali subclan that country information suggested was at risk. The minister at the time stayed his removal and I think the person in question, after a quite a long time, was granted status. The name escapes me at the moment, I am sorry to say, but there is

certainly that theoretical possibility. But, as I understand it, ministers of immigration in the past have not considered themselves bound to stay removal on the grounds of an application being made to the committee against torture.

Mr KERR—Just as a matter of application of the refugee convention—again I do not know the answer to this—would Australia be in breach of its obligations under the convention if it returned somebody who did not meet the visa categorisation but had been found to be in need of protection? In other words, if the security assessment kicks in—presumably what you are saying is that it might kick in now because they have an imputed membership of an organisation which hitherto would have been regarded as the basis for their admission as a refugee—and they are returned, would that be in breach of our convention obligations?

Mr Gibson—Yes it would be, because the refugee convention as a whole provides within its terms the article 1F exclusions, which obviously deal with more serious instances which warrant exclusion from the protection that the convention confers. That is serious non-political crime—in our instance, section 91T of the Migration Act taking up section 5 of the extradition act—war crimes and crimes against humanity. It has its own scheme within the convention. So in terms of the convention we would be in breach of article 33 of the non-reformable provisions.

Senator FERGUSON—Mr Gibson, I apologise for not being here for the start of your presentation; if you have answered this question let me know. You make four recommendations at the end of your submission. The third recommendation says:

That refugees and asylum seekers be given procedural rights to challenge adverse security assessments.

I am just wondering what that has to do with the legislation that we are looking into.

Mr Gibson—I am sorry?

Senator FERGUSON—I am just wondering what that has to do with our inquiry into the implications of terrorist listings. I cannot quite see what that recommendation has to do with it.

Mr Gibson—It is in terms of the interface regarding the protection which the convention and our act confer. It is also as per the discussion prior to your coming back, about the question of the application of condition 4002. That essentially engages division 102, in terms of a decision by ASIO as to whether someone is a direct or indirect risk to national security, which brings in those provisions. On that basis—and this has been the subject of an exchange with Mr Kerr—someone who might otherwise satisfy the convention but would fall short at the point of the ASIO assessment effectively has no practical way, save for the AAT security merits review, of challenging that.

Senator FERGUSON—But under this legislation they would have to have an association with the organisation that has been listed. If you are only talking about an adverse security assessment, unless the person is a member of a proscribed organisation I cannot see what the connection is.

Mr Gibson—But that goes back to my initial comments in relation to the tension between our act and the protection that the convention confers on people who may not even be active

participants in, and who certainly do not belong to the armed wing of, a proscribed organisation, but who can be, as I gave instances of, the victims of forced labour, forced recruitment, forced sexual slavery—a whole range of matters, as well as people who are simply associated with, or have familiar relationships with, members. Our view of the reach of the proscription provisions—and the same view would seem to be held by others—is that people in that category can easily be brought within the terms of an adverse security assessment, but would generally have been found to be refugees within the terms of the convention. That is our concern.

In terms of the recommendations, what we would be urging is point 2. I set out, before you returned, a number of inquiries that could be made to give some substance to what we are talking about, the sort of information and statistics which could be available to flesh out whether some of the concerns that we have indicated are in fact borne out.

It is early days. In the case of PKK it is now 17 months, as we said, but certain reporting requirements and investigations could be made to provide some substance and to quantify, as we say, the extent to which refugees and asylum seekers have been affected by the proscription powers.

Senator FERGUSON—So your first recommendation is that research be carried out to establish the extent to which they have already been affected?

Mr Gibson—Yes.

Senator FERGUSON—Have you, as a refugee council, done any of your own research? Or have you had any direct representations to your council that people have already been affected by the regulation?

Mr Gibson—I hesitate to essentially say that there is a strict causal nexus, because in this area it is very hard to establish causal links. What is clear from our various interlocutors in relation to the ASIO security assessment process is that there have been significant delays—delays of anything up to 12 or 15 months. One instance was given—and I appreciate that the organisation is not proscribed at this point—of somebody from an LTTE controlled area of Sri Lanka who had to wait for 17 months.

Senator FERGUSON—They are not a proscribed organisation.

Mr Gibson—I know that; I appreciate that. I am just saying—

Senator ROBERT RAY—In actual fact, there has never been a case that we know of—certainly not that I know of—of a refugee applicant who has been knocked back because they have been a member of a proscribed organisation, has there? Has there been any to your knowledge? You obviously often assist people in this position. Surely the first thing you say to them is: ‘Are you a member of any of these 19 organisations? If so, resign now.’ It does not apply retrospectively.

Mr Gibson—We do not represent individual cases. We are effectively the peak body or the umbrella body that essentially represents organisations that either represent individuals or deal with the policy aspects of the offshore humanitarian program and onshore protection. People

who have concerns are not necessarily people who are card holding members of, for example, the PKK but those who are within the process and who are treated as having an imputed association. That is obviously where our concern would lie. But I agree with you: I do not have anything. Has a member of the PKK been denied refugee status? I cannot answer that in the affirmative; I do not have that material.

Senator ROBERT RAY—The whole issue of ASIO doing security appraisals may be worth consideration by this committee and in our review of the annual activities of ASIO we may well go to that. But it seems to me to be a stalking horse here, because it does not apply and it is almost never going to apply to proscription. That is what we are inquiring into today.

Mr Gibson—But you are inquiring into the effects of proscription, aren't you?

Senator ROBERT RAY—Yes.

Mr Gibson—And if the effects of proscription flow into—

Senator ROBERT RAY—If someone who is a member of a proscribed organisation applied for refugee status they would not get much sympathy at this committee. You do not give advice to applicants, but your constituency does, and I would have thought that they would try to make sure that people are not members of a proscribed organisation at the point that they are applying for permanent protection in this country, because it cannot be applied retrospectively. Once you have resigned from it, the proscription laws do not apply.

Mr Gibson—But it all depends on how the scope of the proscription provisions and these concepts of informal membership, association et cetera are applied when it comes to the security assessment, doesn't it?

Mr KERR—To take Senator Ray's point, Senator Ray has a practical response to what you are saying rather than a theoretical one, which is this: you may well be a card-carrying member of the PKK and if you have taken part in political violence directly you would be excluded under 1F, so you cannot be a refugee. There would be no reform—

Mr Gibson—If it is serious non-political—

Mr KERR—If that person were returned, it would be a tragedy from their point of view but it would not breach the convention. If somebody comes here who is a card-carrying member or who has imputed membership of the PKK and approaches their asylum in this country by saying, 'I'm leaving behind that level of political activism,' then—subject to a wrong assessment by ASIO—this issue does not arise.

Mr Gibson—I accept that.

Mr KERR—Senator Ray's point is absolutely right: a repudiation of active participation in an organisation that we have made illegal in this country would seem to be a sensible and straightforward approach in a claim for refugee status. A failure to do that is an act of stupidity. There may be some stupid people. Then we get into these areas of complexity where you raise that we would be in breach of the convention. There are these issues, but I suppose in a practical

sense we have superimposed on the convention an obligation not to do anything that might be regarded as dangerous to our national security. I suppose how that is being applied is something that we ought to look at in a different forum. But surely the practical response is, if you bring disputes from overseas into Australia—and whilst perhaps strictly as a matter of convention entitlement you are not in breach of the convention—you would be pretty dopey to do that.

Mr Gibson—I agree with all that you have said on that scenario.

Mr BYRNE—Just in regard to those two examples of the PKK where you tried to tie it into the legislation with imputed association—

Mr Gibson—Yes.

Mr BYRNE—were they advised—unless they were members of the PKK or associated with them—to renounce any association? That is the first question. The second question is in terms of what Senator Ray was saying. Is it not really merely a matter of the length of time that it takes to get security clearances? That is the major issue.

Mr Gibson—Yes.

Mr BYRNE—With those two people, was there an imputed association with the PKK?

Mr Gibson—The two cases that I was citing were essentially pro-Kurdish groups. One was the armed wing of the communist party, and the other was someone who had an indirect association—not with the PKK, but they could be seen as having an imputed PKK association in the Turkish context. It would appear from the various claims that are made and the country information that often people who may be involved in Kurdish causes are nonetheless imputed with a pro-PKK opinion. Those people are both subject to review applications at the moment. That, of course, will only affect whether there has been some legal error in the assessment.

As for the trend in security assessments, I do not have specific numbers for how many successful Kurdish applicants have suffered long delays. Certainly in terms of the general context, various people who report to us say that in the last year or so there have definitely been longer periods. That could well be put down to the war on terror and a whole range of other factors that could contribute to that. I do not want to mislead the committee and say that it is because of the proscription of these organisations, in particular the PKK, that there has been a delay. As a trend, that has certainly been the case.

Mr BYRNE—Do you agglomerate that information with your organisation? You were talking about people who have fed into your organisation.

Mr Gibson—What our research and policy director has done is to speak with a number of principal interlocutors who deal with these cases at the first instance.

Mr BYRNE—Could you take that on notice and get back to us on your understanding of the numbers of people who are involved?

Mr Gibson—Sure. Certainly.

Mr BYRNE—Thanks.

Mr KERR—There is a paragraph under point 3, ‘The situation of refugees and asylum seekers.’

Mr Gibson—Of our submission?

Mr KERR—Yes. Under point 3, ‘The situation of refugees and asylum seekers,’ you say:

It is a cruel irony that the same act which may result in a refugee being recognised as deserving international protection could also criminalise her or him as a member of a listed terrorist organisation.

Mr Gibson—Yes.

Mr KERR—I appreciate it might be an irony, but if we were to comply with our convention obligations and not refole, and a person persists with their membership of an organisation which, under Australian law, is unlawful—and every other Australian is subject to it, rightly or wrongly—it is not really an irony, is it?

Mr Gibson—No.

Mr KERR—All that would be the case is that their conduct becomes criminal, just as it would for anyone else who is a member of the Australian community.

Mr Gibson—I could not resist that conclusion.

CHAIR—I thank you very much for your evidence today. If the committee has any further questions, we will send them to you in writing.

[4.40 pm]

CHONG, Ms Agnes Hoi-Shan, Co-convenor, Australian Muslim Civil Rights Advocacy Network

KADOUS, Dr Mohamed Waleed, Co-convenor, Australian Muslim Civil Rights Advocacy Network

Witnesses were affirmed—

CHAIR—Do you wish to make any introductory remarks before we proceed to questions?

Dr Kadous—I would, if Your Honour would allow. We extend our thanks to the committee for inviting us to appear today. The proscription regime has been one of the most problematic aspects of the antiterror laws for Muslims whom we have spoken to about it. Firstly, the proscription process itself is opaque. The committee has in the past done much diligent work to raise some of the issues that the Muslim community is most concerned about. How is it that ASIO decides that an organisation is to be proscribed? What are the criteria that ASIO examines, and on what basis does the Attorney-General accede to such a request? Why is it that some organisations appear to meet these criteria but ASIO chooses not to seek their listing? How does politics, whether it is foreign governments applying pressure or state politicians demanding action, affect the process?

This issue is particularly sensitive in the Muslim community because of the 19 organisations listed 18 identify themselves as Muslim groups. We are often asked by the Muslim community why other groups meeting the same criteria are not listed. In previous submissions we have also pointed out that in comparison to international standards there is a predominance of Muslim terrorist groups in Australia that is not the same as other nations. This creates a sense in the Muslim community that Muslims are being specifically targeted because of their beliefs. At the same time, white supremacist groups are not proscribed even though they have perpetrated acts within Australia that would fall under the definition of terrorist acts.

Another problem with proscription is that several of the proscribed organisations are seen within the Muslim community as part of independence movements and not as terrorist groups. The current laws are so broad as to include armed conflict, and no distinction is made between organisations proscribed because of their involvement in armed conflict and those who are not.

We are also deeply concerned by the advocacy criterion for proscription. We have raised this in our submission, and that the perception in the Muslim community is that this was designed as a way of silencing Muslim groups. Proscription or the threat of proscription is seen as a resort to legal means to restrict freedom of speech rather than reasoned argument. The definition of advocacy is also so broad that many activities far removed from acts of terrorism could be covered. For example, the statement that all people have the right to resist occupation by foreign forces through whatever means necessary could be seen as advocating terrorism.

This must be understood not just in the context of the proscription process but also of the existing laws on sedition and unlawful association. The impact of proscription on an organisation is very severe, including long prison sentences for members of an illicit organisation and even those associating with members of the organisation. The practical impact of proscription should be taken into account when an organisation is proscribed, as well as a plan for how to implement the proscription. This is especially difficult in some parts of the Muslim community.

When these elements are combined, they make the Muslim community fearful and lead to forms of self-limiting behaviours. People who tell us that they have been contacted informally by ASIO are almost in a state of panic. This is not an attitude that is conducive to good intelligence gathering and cooperation. Members of any community should not fear ASIO to such an extent that they worry about their rights. But the level of fear is so high that this is difficult at the current time, in part because of the prima facie bias in the proscription process. I should make it clear that I do not believe that there is a real bias in the implementation of the laws, but that there is a very strong perception of it.

Another manifestation of the fear is that Muslim parents advise their children not to go to protests or to be involved in any kind of political activism. We had formally advised people that attending protests was perfectly acceptable behaviour in Australia, but we are concerned by the reports in the investigation into the PKK's listing that four small protests referred to by ASIO could be considered as one reason, even if it is a small one, for the listing of the PKK.

These are the most pressing issues facing the Muslim community with respect to the proscription regime. We also commend IISCA's submission to the inquiry. It is our view that major revisions are required to the process of proscription. As we pointed out in our Security Legislation Review Committee submission, one of the most important of these is the removal of advocacy as grounds for proscription. We are supported in that by recommendations from the SLRC itself, HREOC and the Gilbert + Tobin Centre of Public Law.

Secondly, the process of proscription must be made more transparent. It is our view that the SLRC's report suggestion of the Attorney-General applying to the Federal Court before the proscription goes through and the opportunity given to affected parties to appear before the court would be the best way to approach this. In addition, more detailed criteria for proscription must be clarified and enshrined in the legislation. This is something that we have heard the committee itself recommend. As this committee has done, we would like to advocate Dr Emerton's suggestions for the criteria, as well as possibly considering parts of ASIO's set of recommendations.

Thirdly, the issue of distinction between legitimate resistance movements and terrorist organisations must be clarified. This has been one of the areas of inconsistency, and the question that always arises within the Muslim community is why some groups involved largely in internal conflicts are classed as terrorist organisations and some are not.

CHAIR—Thank you. Dr Kadous, I think in a personal sense you have probably answered this already, but does anyone within the Muslim community not agree with regard to any of the groups that have been listed as proscribed organisations in Australia?

Dr Kadous—Within those 18, there are some that some people would question, particularly if we take into account this confusion between groups involved in armed conflict and groups involved in what you might term as terrorist attacks on civilian targets. In the view of many within the Muslim community, they view the listing of organisations like Hamas Izz al-Din al-Qassam Brigades and the Hezbollah External Security Organisation as problematic. I would not say that they are necessarily opposed to it, but they would see it as one-sided. And they ask the question quite legitimately why Jewish terrorist groups such as **Kahane Chai, which is listed in the United States, is not listed in Australia even though it is involved in exactly the same conflict and in much the same way.**

Senator ROBERT RAY—Isn't that a problem not just limited to Australia? Mr Kerr and I have both been at the Sixth Committee of the UN and spent interminable hours listening to them trying to define terrorism. After seven or eight years, they have yet to come up with an acceptable definition.

Dr Kadous—Yes, defining terrorism is a very difficult issue. It is not one that there is a simple answer to. But to say that because it is difficult no effort should be applied in terms of distinguishing between armed conflict and terrorist attacks on innocent civilians is simply to give up, and I do not think that that is appropriate.

CHAIR—Just going back to what we were talking about before with Hamas and, I suppose, Hezbollah in some respect, is the reason that their listing might be queried simply that there are a number of wings of that organisation that might be involved in various social welfare activities and education activities as well as wings that are definitely political and that could well be involved in terrorist groups?

Dr Kadous—That is partially a reason. When we try to explain to members of the Muslim community that Hamas is legal and that it is not a crime, for example, to associate with members of Hamas, only with members of the Hamas Izz al-Din al-Qassam Brigades, they sometimes have issues with distinguishing between those two roles. They say, 'But Hamas does a lot of good work in the Palestinian territories in supporting people after natural disasters, after Israeli attacks and so on.' So that is part of it.

I should also mention another organisation that is problematic. Some people also have the view that Lashkar-e-Taiba, because it is fighting for independence in Kashmir—or that is their view—should not be listed. I know that there are issues with that in terms of Lashkar-e-Taiba's connections with other terrorist groups, but many within the community are doubtful about that and they still see Lashkar-e-Taiba as an independence movement.

CHAIR—We have spoken about the need for notification and education about what is going on in this regard. Do you think it is fair to say that it has been a bit of a failure so far?

Dr Kadous—I would not go quite so far as that. I think that the Muslim community would have some idea of which organisations are on the proscribed list, especially the well-known ones like al-Qaeda and so on. However, the issue is not just one of notification, it is also one of policy in the sense that because the process itself is not open, it is opaque; people do not really trust it. They do not know that the proscription process is fair or see that the proscription is justified in some cases. So it is not just a question of getting the message out but also of getting the

justification of the proscription out. While the press releases issued by the Attorney-General go part way to doing that, I do not think that they go all the way in not just explaining that this organisation is proscribed but explaining why it is proscribed.

CHAIR—May I ask whether those press releases get a run in the ethnic press?

Dr Kadous—I can take that question on notice. I only read Arabic; I do not read other community languages.

CHAIR—Take the Arabic press, for example. Is it fair to say that the A-G's press releases or press releases pertaining to this sort of thing do get coverage?

Dr Kadous—I know that these issues do get discussed. I am not sure about the A-G's press releases in particular. I could take that question on notice and investigate but I really do not know.

Senator FAULKNER—You have given evidence before, when you appeared previously before this committee, about efforts that your own network has undertaken to try and assist in ensuring that members of your community are aware of decisions that have been made about the listing of certain organisations. Can you confirm that for us?

Dr Kadous—Yes, that is correct. We have a bulletin that we send out via email approximately monthly. We also have *Anti-Terrorism Laws: ASIO, the Police and You*, a new booklet, which includes a complete list. We are currently finalising the third edition and have made sure that it includes, for example, PKK as a listed organisation because there are some Kurds within the Muslim community.

Senator FAULKNER—You are obviously still actively involved in that activity, which is positive. Given that it has been some months now since you appeared before the committee, are you able to make an assessment, for the benefit of the committee, of the effectiveness of that communication strategy and, more broadly, how this message is getting through to the communities that you are associated with?

Dr Kadous—We continue our efforts through the newsletters, although our resources are very limited. I think that we have succeeded in communicating to the Muslim community what their rights are, what the proscribed organisations are and how to interact with ASIO while ensuring that their rights are protected. That work continues. In terms of success and in terms of communicating things like the PKK, not many of our members are really interested in that, but we continue to be active in that regard. Assessment is still a difficult issue for us. All we can go on is inquiries that we receive, and there have been a few more inquiries, but it seems that not much has really changed from the last time we appeared before the committee.

Senator ROBERT RAY—A consistent theme through your submission is that, because 18 of the 19 organisations have an Islamic flavour, this is perceived to be discrimination. But last time you said that this had been exacerbated by talkback radio people, and you gave some substantial evidence on that. That must have been well over a year ago. Have you found an easing of that situation—that it is less likely now than it was a year ago?

Dr Kadous—There have been several instances since then. I cannot remember exactly when our appearance was, but certainly the case of Morris Iemma, the Premier of New South Wales, requesting that Hizb ut-Tahrir be listed was not conducive, and that was also picked up by radio personalities and given another run. That caused quite a lot of friction within the community. So there have been several instances since. I am not sure whether it was before our last appearance. There continues to be both political and media pressure.

Senator FAULKNER—That of course is not a listed organisation at this stage. You have mentioned concerns; you identified a handful of the currently 19 listed organisations and that some members of your community have concerns about the listing or do not understand the reason they have been listed. Are you aware of any attempts at all from within the community, or has there been any consideration that you have any knowledge of, to perhaps consider a formal approach to challenge the listing of an organisation?

Dr Kadous—I think the level of fear within the community of the repercussions of them being involved in such an activity would be such that that would be very difficult to do. Many within the Muslim community have a keep-your-head-down approach, which makes that—I would not say ‘untenable’—at least unlikely, especially given the perceptions in the media if it were to come out, for example, that they were seriously suggesting that Hezbollah or Hamas should be removed from the list of terrorist organisations. So I think that such a challenge is unlikely, and I am not aware of any, although it would be an interesting exercise to go through.

Senator FAULKNER—I suppose this would reinforce those attitudes, which does not surprise me. I had expected you to respond in that way—that it does reinforce the importance of getting it right in the first instance.

Dr Kadous—Yes—and to explain the justification as to why it was so in the first place, and to make the process as transparent as possible. Part of the consideration is that the process is not very well defined, and that introduces greater difficulty. As I understand it, the process to seek that an organisation be delisted involves an undisclosed submission of documents to the Attorney-General, who may consider the submission. It is not clear what format they should be in. It is not clear what issues the Attorney-General will consider other than those that have been discussed in the legislation. It is not clear what the time lines are like. It is not clear what would happen if the Attorney-General were to respond in the negative, aside from ADJR appeals, which would only examine the process of making the rule instead of the judgement itself. It is not clear what the prospects of such an activity would be. Further, there is a bit of a difficulty when the Attorney-General is the person who makes the decision in the first place. He is also the same person who reviews his own decision. It is not good policy, and I do not think it leads to the perception of transparency.

Senator FAULKNER—Around this table we might argue that we have a role in review ourselves. But let us just take it back a step. You talk about the understandable community response—that, to use your terminology, people would like to keep their head down. Wouldn't that also be likely to be the case in notification of affected people in advance of any proposal for the listing of an organisation? That notification issue is one that has been a matter of controversy. It has certainly been canvassed before this committee again today, as has the issue of the right to be heard. It seems to me that there may well be a similar response in advance of a listing to the one you are reflecting on after a listing has been made. Is that a concern?

Dr Kadous—That is true to some extent. However, given that the organisation is not yet proscribed, the exposure for someone who is not already considered to be possibly associated with members of a terrorist organisation is somewhat minimised. There is also the possibility—and I am sure that the committee would consider in camera submissions to such an inquiry; you need them for ASIO anyway, so ASIO could present their evidence at such an inquiry—that if there were guarantees of confidentiality available or the possibility that intermediate organisations could communicate to the committee through organisations like ourselves, it would ameliorate the effect of that. It is different when you come at a question when it has been considered at the beginning and when you are already on the wrong side of the decision, trying to move it back. It would still be a concern but it would be at a much lower level than if the organisation were already proscribed and if you were fearful that, simply by advocating for the removal or delisting of an organisation, you might then be followed by ASIO to see if you were associated with members of that organisation.

Senator FAULKNER—I think the committee is aware of the role that your network has played for some time now in communicating to the community the changes that have occurred in the law, the responsibilities that members of the community have and the risks to members of the community in relation to how serious the offences are. Beyond the role that you are currently playing with the newsletter and so forth, do you have any other suggestions to make to the committee on how that publicity, that dissemination of the information about listing decisions, can be improved?

Dr Kadous—I think that, to some extent, the Department of Immigration and Citizenship has also been looking at this issue. As I mentioned earlier, it is not an issue of communicating the list. It only has 19 organisations on it. It is available on the national security website, on our website, in our booklets and on numerous other websites. That is not the issue. The issue is why they are proscribed, and that is important for justification purposes within our own community. So it is not just a case of saying, ‘This organisation is banned,’ or, ‘This organisation is proscribed.’ It is an important part of that for it to be understood why this organisation is proscribed. I know it sounds a bit round-about, but I really think that the best way to improve the communication is to provide the justification or to provide an open process for how that organisation came to be proscribed. Then perhaps even the people who are participating in the process will act as communicators of that message through the community.

Senator ROBERT RAY—One of the problems we have is that the national security area is the one area in which there is not full transparency of government. So that then leads us as a community to entrust the government to look after these areas and act ethically. That is one of the reasons we have a degree of, if you like, scrutiny from this committee and the Inspector-General of Intelligence and Security. So, whilst normally I am quite responsive to the transparency argument, having full transparency is unfortunately not the case. But, at least in this case, all open-source material has to be adduced and has to be convincing by itself, even though it can be supplemented by secret material. I think I am right in saying that we include all that open-source material in our reports, so you can go through our reports and read the open-source material, bearing in mind that we may have been given some closed material that we cannot disclose. So there is a bit of a problem with transparency in this one area of government.

Dr Kadous—AMCRAN is fully aware of that and we understand the need on occasion for PJCIS to sit in secret. That is not the issue here. The problem is that in that process sometimes

members of the community do not get a chance to hear the evidence against them. You want affected parties to at least get a chance to respond to those criteria. I am not sure that PJCIS would be the recommended place for that to happen, even though it does an excellent job and, having read your reports—for example, on the listing of the PKK—I can see how much work goes into each of these decisions and I appreciate that.

Senator ROBERT RAY—I accept what you are saying, but we cannot be fully responsible for disclosing everything and satisfying the community. I do not think anyone can when it comes to national security because you can have transparency up to a certain point and not beyond it.

Dr Kadous—Yes, but there are also other issues such as the right for people affected to have a means of expressing their points of view. They could put in a submission for the listing of the organisation but the problem is that by then they have already been listed and they have already been criminalised. I would even be in favour of it if PJCIS was part of the proscription process before the organisation gets proscribed. That would improve transparency. It does not put PJCIS in the situation—

Senator ROBERT RAY—Sorry. We were just having a legal discussion here and you have been proved to be right. Please, go on.

Senator FERGUSON—I just want to follow up with one question.

Dr Kadous—If I may just finish my point, Senator Ferguson.

Senator FERGUSON—Yes, sorry.

Dr Kadous—I do not mean to be rude. It is almost like a presumption of innocence problem. By the time it gets to PJCIS to review, it is already assumed that the organisation is worthy of proscription and it already has been proscribed. That is the problem. If it happened earlier as part of the discussion or process, that in itself would be an improvement.

Senator FERGUSON—In the conclusion to your submission you describe the proscription regime as ‘arbitrary and subject to political influence’.

Dr Kadous—Yes.

Senator FERGUSON—Could you expand on that a little?

Dr Kadous—Sure. I should make it clear that I am not talking about PJCIS’s review of the proscription but the initial proscription as initiated by ASIO. What I mean by that is, if you look at any set of criteria, for example, those defined in the legislation—and this is something that has also been referred to in the parliamentary research note that I am sure you are all aware of—many organisations, in fact the parliamentary research note mentions seven or eight, meet the same criteria but are not listed. So it is not clear to us what exactly the criteria are. Why isn’t LTTE listed but PKK is? Why is it that Hamas Izz al-Din al-Qassam Brigades is listed but Kach—Kahane Chai—is not?

Senator ROBERT RAY—The answer on LTTE has traditionally been because there is a section that says that if they are genuinely involved in a peace process they will not be proscribed. Of course, in the last eight months, maybe it has moved into another column, but there was an actual reason for not proscribing it.

Dr Kadous—But, as I understand it, PKK was also involved in peace proceedings between 2004 and early 2005. Those may have been suspended but the question is: what happens if peace proceedings—

Senator FERGUSON—They were not proscribed at that stage.

Dr Kadous—They were proscribed after that—

Senator ROBERT RAY—After they broke the treaty.

Dr Kadous—After the truce was broken rather than after they broke the truce.

Senator FERGUSON—That is semantics.

Dr Kadous—Yes, it is all semantics.

Senator ROBERT RAY—It may not be.

Dr Kadous—Nonetheless, there were efforts on the part of PKK to be involved in peace processes. So is LTTE going to be listed soon?

Senator ROBERT RAY—We do not know.

Senator FERGUSON—We do not make those decisions.

Dr Kadous—Exactly.

Senator FAULKNER—You made the point that we are not involved beforehand, so we do not know the answer to that question.

Dr Kadous—I was not suggesting that.

Senator FAULKNER—There was a strong argument that was presented extremely well by a previous witness, Professor Williams, about the good sense in having this committee limiting itself to a scrutiny and oversight role, which I personally happen to believe is a more appropriate role for a committee like this. Anyway, the fact is that this committee is not involved in advance of the listing. That decision is made by the executive; it is not made by this committee.

Dr Kadous—I should clarify that I meant the question as a rhetorical question, not as a question to be posed to the senators, members and officers. In response to that, there are other ways. It does not have to involve the PJCIS, as you say. But the other suggestions put forward by the SLRC—for example, having the Attorney-General apply to the Federal Court or perhaps an

agency similar to the SLRC itself being part of the process—are other options. It is not restricted; it is not the only option that is worthy of consideration. The SLRC report itself recommended several different alternatives. We would express opposition to the advisory group. One of the alternatives suggested in the SLRC report is that an advisory group be set up. That does not really improve transparency at all. That was the only option that we thought was not worthy of consideration.

Senator FERGUSON—I just want to follow this up; I have one final question. When you talk about it being subject to political influence, I not sure whether you are talking about political influence from within Australia or whether you are talking about the influence of other countries, which has been suggested, in determining whether or not an organisation is listed. I am not quite sure what you mean by political influence.

Dr Kadous—As an example, I consider Jim McGinty and Morris Iemma calling for HT to be banned to be political pressure within Australia. There are also media personalities who apply their own pressure. In addition, there is the possibility of foreign influence. I know that this committee found that the Turkish government had not influenced the process at all, but the fact remains that there is the perception that this was the case given that open sources of information have also indicated that the Turkish government has been seeking the proscription of the PKK. I am not suggesting that that has actually happened.

Senator FERGUSON—We knew they had been seeking it.

Dr Kadous—Exactly. I am not saying that they did influence the process, but there was at least a pressure applied on their part to have it listed. That is pretty much what you just confirmed. It was perhaps not through the mechanism that the Attorney-General chose, but definitely through ambassadorial and international relationships.

Mr KERR—I was just concerned about your dismissal of the advisory panel as not contributing to transparency. Take, for example, should ever it be considered, Hizb ut-Tahrir. Why would it not be useful in a circumstance of that kind to enable people who say that the group should not be proscribed to go to an expert group and make those submissions? The fact that it is merely advisory still does not exclude all the benefits that you have talked about before in allowing people to at least make the case and present the rationale and the reasons why it should not be the subject of a proscription. You could make certain there is prepublicity, that the community has an opportunity, and put forward at least the prima facie basis as to why it should be proscribed. Allowing people to do that before the proscription actually comes into effect lets them come forward and say: ‘I am a member of this group and I do not think it should be proscribed. I think it is perfectly legitimate. It is an advocacy group in the interests of some religious nature’—something of this kind; frankly, I do not know what the organisation advocates or does, so I am a bit in the dark here. I think that has a great deal of advantage as opposed to finding out at midnight that the organisation has been proscribed and then turning up afterwards—or not turning up because you are hiding in your basement and being scared to identify yourself as a member of that group any more.

Dr Kadous—I guess it depends what you mean by an advisory group. If it is open to public submissions then it would definitely have something to contribute. I thought it was an advisory group that would not really do that much. But if it were to actually talk to the community and

give groups who are affected an opportunity to be heard, that would be an improvement. However, the question remains of whether it will be binding on the Attorney-General.

Mr KERR—No.

Dr Kadous—And then we are back to square one. Yes, it would improve things, and, in the absence of providing one of the other alternatives such as going to a court or being subject to other measures, it would be better than the existing system. It is not binding on the Attorney-General, and, to some extent, that has been an issue with the PJCIS. Some of the recommendations from the PJCIS, which have been very good, have not been taken up. That is what I would be concerned about. So the fact is that it still gives the upper hand to the Attorney-General and he can choose whether or not to accept the judgement. That would be my main problem with an advisory group. It is not binding in any way.

Mr KERR—I understand that but, for example, let's get crude about this: ultimately the Attorney-General comes from the party that at present controls a majority in both houses of the parliament. There is no process that will ultimately be binding on the Attorney. The Attorney can sweep it aside, come into this parliament and propose legislation as has occurred with the two listings of Hezbollah and Hamas which were passed simply through the parliament and through no process. What we are trying to do is to actually build in safeguards—not to give you or anyone an assurance, no-one can give that assurance—so that the executive control of this process would not ultimately prevail.

Dr Kadous—I very much respect your legal experience. Let's say, for example, that it went to a court and a court ruled that Hizb ut-Tahrir was not liable for listing—clearly hypothetically. It would at least be seen as bad form for the Attorney-General, after a court has already issued its decision, to introduce legislation that contradicted that. I agree that it may be legal, although I do understand that there are specific rules about bills of attainder, but nonetheless it would at least look bad. It is not much of a defence, but it would be a defence.

Mr KERR—That is what you would have if you had an expert advisory group. The Attorney says, 'Look, I've been given a prima facie reason by ASIO that there should be a proscription of this group and I am satisfied that this should be examined now.' From some of the submissions that we have received it would then go to a group that will permit some examination of some submissions. If the Attorney were given advice by that expert group that he should not then proceed, again it is only a pressure point, but a government that is prepared to ignore that kind of expert advice could just as easily ignore any other step along the way. We cannot give you an absolute assurance. This committee cannot give you an absolute assurance. No matter how we construct our law, it can be unconstructed later by a government that controls both houses.

Dr Kadous—I understand that, but as you said it is all about the pressure points. I will give one example: the Security Legislation Review Committee recommended the removal of advocacy as grounds for proscription of an organisation. That recommendation as I understand it came out in June 2006. That has not necessarily been taken up by the Attorney-General. With due respect, the recommendations, from even a committee headed by someone as honourable as Mr Sheller, are not always implemented. But as you said, it is all about pressure points. I am not going to argue that.

Mr CIOBO—But ultimately we get back to a situation—I think this is what Mr Kerr was referring to as well—where the top of the pyramid will be the executive arm of government. Whilst I understand the point you make about application to a Federal Court judge, fundamentally my starting point would be that I would rather have the definitive decision made by someone elected and accountable than someone who is not.

Dr Kadous—The question is whether terrorism has a special status as distinct from other criminal activities. For many other criminal activities, it is certainly not acceptable for the Attorney-General to intervene in those cases except in very specific circumstances. The question is whether terrorism is such a radically different offence from other criminal offences that we permit it in this case. We give the courts much independence to handle matters that are criminal in nature.

Mr CIOBO—I am not sure you are comparing apples with apples. I think we are delving into a separate issue. This parliament and state parliaments can bring people before them and try them—if I think back to my basic knowledge of law—but we choose not to in certain instances and in the majority of instances.

Mr KERR—We can't.

Mr CIOBO—We can't? I thought state governments could. We are just having a quick little legal debate here. But moving right along, the point that I was making is that this is not to do with decisions about whether someone is a terrorist; it is to do with proscription of a terrorist organisation. The points you were referring to would still be tested in a court.

Dr Kadous—When you proscribe a terrorist organisation it has implications for many different citizens—

Mr CIOBO—Sure, but whether someone—

Dr Kadous—who will then be subject to criminal offences.

Mr CIOBO—Exactly.

Dr Kadous—I admit it is a fuzzy issue. It is not something that is clear-cut. There are arguments on both sides. What I am saying is that, yes, the Attorney-General is empowered to make new laws, but once the laws are made and the criteria are defined we usually hand it off to a court of law to handle. So the preferred mechanism is the one that is discussed under the normal mechanism. I will mention that, of the 15 people charged, none of them have been charged with proscription related offences. So we trust the normal mechanism in at least 15 out of 15 cases, which is that a court of law will look at this question.

Given that the court of law has to look at the question anyway, it is not clear to me that this should exclusively be the domain of the Attorney-General and not the domain of the courts. I acknowledge that ultimately it is the executive arm of government that has the role in making the laws, but I would argue that one of the key concepts of the separation of powers—and I am not a lawyer, so I do apologise if I am getting this wrong—is the separation between making laws and deciding who meets those laws and who does not meet those laws.

Mr CIOBO—Okay. Thanks.

CHAIR—I thank you very much indeed for your evidence. If the committee has any further questions, these will be sent to you in writing by the secretariat.

Dr Kadous—Thank you very much.

CHAIR—Do we wish to receive officially the United Nations document, *Australia: Study on human rights compliance while countering terrorism; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Mr. Martin Scheinin)*?

Senator FAULKNER—I so move.

CHAIR—There being no objection, it is so ordered.

Resolved (on motion by **Mr McArthur**):

That this committee authorises publication, including proof transcripts on the internet, of the evidence given before it at the public hearing today as part of the records of the committee's review of Australia's security terrorism laws.

CHAIR—I declare this public hearing closed.

Committee adjourned at 5.22 pm