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JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Reference: Inquiry into the terrorist organisation listing provisions of the Criminal Code Act 1995

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**JOINT COMMITTEE ON
INTELLIGENCE AND SECURITY**

Wednesday, 4 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 9.48 am**DONOVAN, Ms Helen, Policy Lawyer, Law Council of Australia****WEBB, Mr Peter, Secretary-General, Law Council of Australia***Witnesses were affirmed—*

CHAIR (Mr Jull)—I declare open this hearing of the committee's inquiry into the operation, effectiveness and implications of the proscription of terrorist organisations under the Commonwealth Criminal Code Act 1995. I welcome the representatives of the Law Council of Australia. Do you wish to make some introductory remarks before we proceed to questions?

Mr Webb—Yes.

CHAIR—Please proceed.

Mr Webb—I understand we have 45 minutes. Our introductory statement is a little bit lengthy, but I will try and get through it. The Law Council thanks the committee for the opportunity to address it today. An executive power to effectively outlaw an organisation and expose to criminal liability those associated with it has obvious human rights implications. Depending upon how the power is defined and exercised, rights expressly protected by the International Covenant on Civil and Political Rights, such as the rights to freedom of association, freedom of expression and equality before the law, are all vulnerable to infringements. But of course there are other rights protected by the covenant which the state may violate, not only through the actions of its own agents but by failing to act with due diligence to prevent the violent action of non-state actors or to bring perpetrators of violence to justice. This is a complex challenge posed for governments by the threat of terrorism.

The Law Council acknowledges that a degree of dynamic tension can exist between the state's many obligations. The Law Council also acknowledges that simple mantras in praise of human rights are unlikely to resolve those tensions. Nevertheless, the threat of terrorism does not render talk of human rights naive or irrelevant. International human rights law precisely anticipates the type of challenge posed by terrorism and provides a robust framework for balancing what may appear to be competing obligations imposed upon the state.

Many of the Law Council's submissions to the committee are remarkably similar to submissions made by the council when the legislation was first before the parliament. At that time the Law Council assessed the proposed legislation from a human rights perspective and found it wanting. Our assessment of the legislation in operation reveals the same. The Law Council's concerns about the proscription provisions, their necessity and the manner of their exercise, have not been allayed by the passage of time. They have in several respects been confirmed. The Law Council's position is that, because of the ad hoc and opaque manner in which the proscription regime has operated to date, it does not comply with the human rights framework outlined or Australia's obligations under the covenant.

Firstly, the Law Council believes that, because of the absence of criteria guiding the exercise of the proscription power and a lack of transparency in the proscription process, it has not been

clear what legitimate aim the proscription provisions are directed towards. It is easy to recite blithely that the provisions are directed towards preventing acts of terrorism, and clearly, putting aside questions of proportionality, that is a legitimate objective. However, the operation of the provisions to date casts doubt on the true objectives of them. There are no discernible criteria to explain why, of all the organisations that might fall within the broad definition of a terrorist organisation, 19 particular organisations only have been singled out for proscription. Certainly, there does not appear to be any obvious law enforcement rationale for their proscription arising from an established connection with Australia or Australian interests.

Blackstone's Guide to the Terrorism Act in the UK concludes that the proscription provisions in that country provide a means for expressing the revulsion of a Western liberal democracy towards groups which espouse or encourage terrorism but that the provisions do little else. The Law Council believes that, if the proscription provisions are intended to serve only as a vehicle for symbolic condemnations or as declarations of allegiance to Australia's allies in the war on terror then they are not directed at a legitimate aim sufficient to justify the curtailment of fundamental rights. The Law Council believes that if the legitimate aim of the proscription provisions is to prevent acts of terrorism then use of the proscription power should be confined to cases where it is demonstrated that proscription of a particular organisation under Australian law would assist law enforcement agencies to effectively respond to a threat posed by the organisation. Confinement of the proscription power in this way would require the promulgation of criteria for the listing of an organisation above and beyond evidence that the organisation satisfied the definition of a terrorist organisation.

For this reason the Law Council endorsed the recommendations of the Sheller committee that fixed and publicly available criteria for proscription be determined. The Law Council believes that these criteria should be included in the Criminal Code or the regulations and that any statement of reason in support of a listing decision should be required to specifically address those criteria. Apart from more specifically identifying the purpose of the proscription provisions—and thereby as required more precisely defining in law in what circumstances certain rights may be lawfully curtailed—fixed and transparent criteria are required to foster confidence in and respect for the law.

Clear parameters on the exercise of the proscription power are necessary to demonstrate to members of the community that rights of association and free speech are not placed under threat for improper or discriminatory purposes. The perception that the proscription provisions might be used as a rhetorical device by which the Australian government curries favour with foreign governments and talks tough on terrorism is inherently harmful. Faith in the rule of law is diminished by the promulgation of laws viewed as ad hoc, unnecessary and self-serving.

In addition to the grant of broad executive discretion, another problem with the proscription provisions foreshadowed at the time was that they did not afford affected parties the opportunity to be heard prior to an organisation being listed. Again, this concern has not been allayed over time; it has in fact been compounded. There is no transparency about which organisations are under assessment for listing and, thus, no opportunity for members of the community who might be affected by a proposed listing to make a case against the listing before it comes into effect. At the same time, ASIO has made it plain that it does not consider an assessment of the impact that a proposed listing might have on the members of the community as necessary or material to the decision-making process.

The Law Council believes that the failure to give notice and a right to be heard unnecessarily compounds the potential for the listing provisions to operate unjustly. We continue to believe that the most appropriate way to ensure that the proscription power is exercised in a transparent manner which conforms with principles of natural justice and safeguards against unnecessary rights infringements is to make the proscription process a judicial process. Since the creation of the proscription power, 27 people have been charged with offences relating to terrorist organisations. Of those, at least 22 were charged with offences relating to an unlisted terrorist organisation as a result of Operation Pandanus.

The Attorney-General's Department reported last year that all charges for offences relating to terrorist organisations to that date had concerned unlisted organisations. Therefore, in practice, courts are already being called upon to receive and assess evidence as to whether a particular organisation falls within the Criminal Code definition of a 'terrorist organisation'. While they do not perform this task for the purpose of declaring an organisation to be a proscribed terrorist organisation, the process of admitting and evaluating evidence from a range of disparate sources remains the same, as is the potential effect of the court's decision. According to the Commonwealth DPP, the courts would need to go through this process whether or not the organisation that a person is charged with membership of is a listed organisation.

The Law Council believes that the safeguards formally and informally incorporated in the current process are inadequate and cannot compensate for a judicial process. For example, consultation with state and territory leaders appears, in practice, to have been last-minute and of little substance. While this committee has been diligent in reviewing listings, robust in its questioning of relevant government officers and critical of some aspects of the current listing process, it has not succeeded in forcing the executive to commit to a fixed set of criteria for selecting organisations for listing and to address its reasons for listing to those criteria.

The Law Council believes that advocacy alone is an unjustified and unnecessary basis for proscription. We are aware that no organisation has been proscribed, to date, on the basis of advocacy alone. However, we reject any claim that this demonstrates that the power has been prudently exercised and will be in future. On the contrary, we believe this illustrates that the power to proscribe an organisation on the basis of advocacy is unnecessary. It is a power that cannot be prudently exercised because, as currently defined, it is inherently excessive.

The government has argued that the provision allowing advocacy as a basis for proscription is aimed at early intervention and prevention of terrorism. We believe that disproportionate restraints on freedom of association and speech will not achieve this aim and, in fact, are likely to prove counterproductive. The members of any organisation are rarely a homogeneous group who think and talk as one. On the contrary, although formed around a common interest or cause, organisations are often a battleground for opposing ideas and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members.

An Irish human rights group with experience of the proscription provisions in Northern Ireland made a similar submission to the UK Joint Committee on Human Rights when it argued that:

Proscribing organisations and prosecuting their members drives them underground and increases their allure for certain people.

To that end, the Law Council draws the committee's attention to the *Report of the Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism* presented to the UN General Assembly in December last year. The rapporteur set out three criteria for when incitement might legitimately be used as a basis for proscription and cited article 5 of the Council of Europe's Convention on the Prevention of Terrorism as a model of best practice.

I would like to make one further general observation in closing. At the federal level, Australia does not have any overarching human rights legislation against which the content and application of counterterrorism measures, such as the proscription power, can be judged. The absence of such an instrument places a heavy burden on parliament and committees such as this to be particularly vigilant in guarding against unjustified and disproportionate rights infringements.

One of the ways in which parliament attempts to discharge this burden and provide an alternative safeguard to a bill or act of rights is to include in controversial legislation mandatory reviews of certain provisions. This is to be encouraged. However, it goes without saying that it is a very superficial safeguard indeed if parliament, having mandated such a review, then ignores for the most part any recommendations which emerge from it. The Law Council, therefore, urges the committee to ensure that this does not become the fate of the Sheller report, which considered the views of a wide cross-section of stakeholders and recommended a number of balanced and proportionate reforms to the proscription process when it reported just over a year ago. Thank you.

CHAIR—Thank you, Mr Webb. Would it be fair to say that the Law Council has very great doubts as to whether or not the proscription power does anything much to counter terrorism at all—that there are other ways around it?

Mr Webb—We are not intrinsically opposed to some sort of proscription power. We think that this is not a role entirely for the executive, but is a matter that would be better supervised by the judiciary. Obviously, the executive would be best placed to bring matters to the attention of the judiciary to seek a proscription order, but we do not oppose the concept of proscription as such. We do feel as though the system that exists at the moment is so opaque as to create considerable doubts on the part of the objective observer that it is doing the job that it is said to be there to do.

CHAIR—Has the Law Council had any concerns about publicity that is supposed to be given regarding the listings? One of the criticisms that has come through to this committee is that quite often the decisions just do not get out into the communities themselves. Have you had a look at that aspect at all?

Mr Webb—No, we have not. So far as we are aware, all that appears to happen—but this is only so far as we are aware—is that the minister makes an announcement and there is the usual reporting of that in the media. Whether attempts are made by the department to further distribute that information to particular sections of the community or not I do not know, but certainly it would seem to be a very good thing.

Ms Donovan—We have seen through this committee's reports that the department has reported that they publish information in a number of languages—although not many pamphlets. Their ability to penetrate different communities is unknown to us.

CHAIR—The reason I was asking is that if we had any changes, that would seem to me to be one of the terribly important things that should be highlighted in any new system we might use—trying to get it up-front a bit more.

Ms Donovan—Certainly our recommendations with respect to the need for some degree of natural justice would have little utility if people are not even aware that the process is going on. Further, I think the Commonwealth DPP's comments about the utility of the proscription powers at present are based on an assumption that people who are likely to be charged will be unaware of the proscription, and therefore they will not be able to rely on that to meet that element of the offence. Clearly they do not, at present, think that information about proscription is penetrating into the community.

Senator FAULKNER—I would like to ask you about the statement that is made in both your opening statement and your submission in relation to 'the opaque and ad hoc manner in which the proscription power has been exercised'. You go on to speak about the transparency issue. I do not want to go to that; I probably share some of your concerns, but I also acknowledge that when we are dealing with these sorts of matters there is an inevitability about some lack of transparency. I always think that needs to be acknowledged. But I want to go to the other element of that—the 'ad hoc manner in which the proscription power is exercised'—and put to you that the charge of adhocery is quite a serious charge to make. Could you let the committee know, on the basis of the 19 listings that have been made, how you defend the charge of adhocery.

Mr Webb—I think we would say that the most instructive example of that is the approach taken to the listing of the PKK, which I know this committee has dealt with. We get the impression strongly from that example and from a failure to articulate particular reasons for proscription listings that the 19 organisations selected so far are very difficult to distinguish from other organisations that are undoubtedly said to engage in or be connected with terrorist activity of one kind or another around the world and which are not apparently dealt with by or in the sights of ASIO or other organisations that are presumably sponsoring the approach to listing.

Senator FAULKNER—So you are saying in part that it is ad hoc because there are certain terrorist organisations that have not been listed that should have been listed. Is that part of the argument?

Mr Webb—We do not know.

Senator FAULKNER—But if you do not know, how can you make the charge? That is what I do not understand.

Ms Donovan—We are looking at it from the outside in, I suppose. In the absence of criteria, it is very difficult for an external observer to understand any rationale as to why particular organisations are chosen over and above others. That is an observation from people who do not have the benefit of understanding the rationale of ASIO.

Senator ROBERT RAY—The same adhocery would exist under your judicial model because it would rely on the Attorney-General taking it to the court.

Mr Webb—Yes.

Senator ROBERT RAY—You did mention the PKK. Where is that ad hoc? What is the adhocery about that specific example you mentioned? You slid into the more general explanation that Senator Faulkner has taken up with you, but where is that with the PKK?

Mr Webb—We are relying on the evidence given by ASIO officers about that, which appears to us to betray an ad hoc attitude to selecting the PKK.

Senator ROBERT RAY—But the evidence is that any prior contemplation of proscribing them would have been blocked by the fact that they were involved in a peace process. Then they broke the truce, which made them eligible for proscription at that time.

Mr Webb—There may be many organisations which fall into that—

Senator ROBERT RAY—But I do not see why that is ad hoc. They were not proscribed when they were involved in the peace process. They have all the other characteristics that probably warrant proscribing. They then leave the peace process; I do not see where the government is acting in an ad hoc manner to then proscribe them.

Mr Webb—Well, we would say that there does not seem to be much connection with Australia, for example, about the listing of the PKK. It is certainly one of the criteria that one would think, and that we would recommend, should attend to a listing decision.

Senator ROBERT RAY—That is an amendment to the legislation, because currently there are six factors they may take into account, none of which are binding and not all of which have to be met. So it does not have to have a connection to Australia, but if any of them has a connection to Australia I think you have pointed to the worst possible example of the 19 so far.

Ms Donovan—That may be the case, Senator. My recollection may be incorrect, but I believe that the PKK was under consideration for listing before the peace process broke down, notwithstanding that the proscription followed the breakdown in the peace process. So that process then becomes unclear. But secondly: if just the peace process breaking down then becomes the impetus for listing then it is not clear that that is not an ad hoc process for deciding who is listed. Is it that you become eligible for listing because you have been a part of a failed peace process?

Senator ROBERT RAY—It is very wrong to say that it is the impetus. The better language—and I am not doubting your sincerity on this—is that it was the blocker. It does not actually provide the impetus to it. You know: they meet these criteria but they are involved in a genuine peace process; we are not going to do anything to interfere and make that situation worse. But when they leave the process the rest of the criteria come into play. So I do not think it is quite impetus; it is more the removal of the blocker. That is the better language here.

Senator FAULKNER—When the Law Council of Australia comes before us and says something as serious as what you have said in both your submission and your opening statement about ‘the opaque and ad hoc manner in which the proscription power has been exercised’, I have got to say to you I understand completely the case you have put about transparency or lack of transparency. So I put that aside; nevertheless I think it is proper at a committee hearing like this, when such a challenge or charge is made, that it be explored. And I am yet to understand the basis for the ‘ad hoc’ charge. I do not know whether you can help me with that at all. Are you saying that the only example that comes to mind is the PKK in the terms that you have outlined to the committee?

Ms Donovan—If the process is not ad hoc then there must be a clear rationale for selecting those organisations which have been selected thus far besides just fitting the definition, because clearly that would cover a much broader range of organisations. So there must be a clear rationale for selecting them, and presumably also for selecting them in the order that they have been chosen. Our position is that from the outside the rationale is not revealed, and therefore the conclusion is that it is ad hoc. I agree with Senator Ray that a judicial process without criteria would not solve that problem, because the court again would merely be looking at whether the organisation fell within the broad definition of a terrorist organisation.

Senator ROBERT RAY—You are putting the government in a position, which I quite like, where they cannot win. That is, if they do not proscribe a lot it is ad hoc, they are at fault, and they are missing a whole range of them; and if they go out and proscribe a whole range of them they will be criticised for a scattergun approach lacking precision. I think you have put them in a great position here, but unfortunately we have to approach these things objectively and not in a partisan way.

Ms Donovan—With respect, Senator, I do not think it is an unwinnable position. Promulgation of clear criteria which are directed towards the aim of the proscription power, which is presumably to prevent acts of terrorism, would meet the charge that it is not transparent and appears to the outsider to be ad hoc because then there would be a clear rationale for choosing those organisations in the order they have been chosen.

Senator ROBERT RAY—The difficulty we face here is that there is one area of government that is not totally transparent—that is, national security. It is a right and privilege which the Australian community and parliament cede to the executive and have trust that they do well. If that trust is ever betrayed, woe betide a government that does so. But we had a situation here, in the past but not now, where the main check and balance against, if you like, crude proscription was the right of the parliament to disallow. In putting that right of disallowance down, we insisted that open-source material had to be the basic reason, but we do not exclude secret material and we cannot make that available because basically it is secret. We are allowed to hear parts of it, and then you have to take us on trust. I know it is difficult—but the whole schema, if you like, the whole checks and balances, through no fault of the opposition and in some ways no fault of the government, has changed because you now have a government with the majority in both houses and traditionally they do not vote to disallow anything.

Senator FAULKNER—So that I am clear: in the view of the Law Council of Australia, are there any of the 19 listings that have been made that should not have been made?

Mr Webb—We have no view on that.

Senator FAULKNER—In the view of the Law Council of Australia, are there any organisations that ought to have been listed that have not been listed?

Mr Webb—We have no view on that.

Senator FERGUSON—You seem to have not an obsession with the PKK, but they figure quite prominently in your submission. You do say on one page:

To date no one has been charged with an offence under the Criminal Code relating to association with the PKK. This suggests that the listing was not motivated by any pressing need to curtail support from within Australia for the organisation's terrorist related activities.

To date no-one has been charged with an offence under the Criminal Code for any of the listings, so I do not know particularly why you chose to say this about the PKK. It is almost as though you think that the listing of the PKK is your chance to prove that the listings are done either on an ad hoc basis or in some ways without merit. I just cannot quite follow your rationale in only using the PKK as an example for your arguments against some of the operations and effectiveness of the provisions.

Mr Webb—We are not particularly picking on the PKK example; it is just that there seems to be more information available about that because it has been examined more thoroughly perhaps than others have by this committee and others.

Senator FERGUSON—I think we have examined them all pretty thoroughly, actually.

Mr Webb—In terms of what is on the public record, we feel as though there is more there for us to look at than there is in relation to other listings.

Senator ROBERT RAY—Having looked at that so thoroughly, I take you to paragraph 25 of your submission where you say:

Significant activity directed towards advancing the proscription of the PKK commenced from April 2005 ...

No doubt you would have looked at our report on this particular organisation where on page 8 we indicate that, in fact, ASIO sent its draft set of reasons for proscribing the PKK to DFAT in November 2004, a full six months before the Prime Minister visited Turkey in 2005. I think there is a lack of scholarship there somewhere.

Mr Webb—We will check that but we have sourced that statement that we made to your report in accordance with the footnote that appears there.

Senator ROBERT RAY—But there is not much point in reading one paragraph of the report without reading the others. I would have loved to have said that the listing of this organisation was associated with the Prime Minister's visit in April. If you do not think I would not have been into that in a big way, of course I would have, but we did ask specifically to find out where this process started. If ASIO sent its list of reasons to DFAT in November 2004, it would have started

work on this well before that. As you can tell, I never like conspiracy theories—not that you are actually peddling one but you are retailing one.

Mr CIOBO—At law school a remark was made to me that the law is less concerned with justice and more concerned with certainty. I must say that was brought back to me in reading through your submission because it would appear to me that the central thrust of your submission is that, whilst words of transparency and the like are bandied about, it really comes back to the issue—and I think this is perhaps part of what was fuelling the discussion that you had with the senators previously about adhocery—of your desire for there to be greater certainty. Am I right in reading that as being the central tenet of your submission?

Mr Webb—Yes, that is certainly a significant factor.

Mr CIOBO—My question, therefore, is: given you do not go into, for example, how under a judicial process classified material would be dealt with—I will invite some comments on that as well—how exactly do you see increased certainty, in terms of thresholds of qualifying criteria beyond the statement of reasons, being a superior model for government when it comes to proscribing or listing organisations, given that it may well be the case that exactly what we desire is greater flexibility, which the statement of reasons as provided by ASIO actually enables us to do, and that greater certainty would mean there would be less opportunity to proscribe organisations that may in fact need to be proscribed?

Mr Webb—You are obviously making those remarks in the context of some form of judicial proceeding.

Mr CIOBO—Absolutely, and in accordance with the thrust of your submission.

Mr Webb—Yes. Courts have long been used to dealing with highly confidential information, even prior to the passage of the anti-terrorism legislation which introduced a whole procedure for further protecting that sort of process.

Mr CIOBO—Are you talking about in-camera sessions? Is that what you are referring to?

Mr Webb—That could well be the case.

Mr CIOBO—How would in-camera sessions lead to greater transparency?

Mr Webb—It would lead to a more obviously objective outcome, in a sense.

Mr CIOBO—How is it obvious?

Mr Webb—Because one could essentially place more public trust in the decision of a judge than in the decision of the executive.

Mr CIOBO—That is a very big statement to make.

Mr Webb—Yes, it is.

Mr CIOBO—Is that the position of the Law Council—that judges are more trustworthy than ministers?

Mr Webb—I said there could be more public confidence placed in the decision of a judge rather than—

Senator ROBERT RAY—They are appointed by politicians.

Mr Webb—Yes, of course. So everyone who has been appointed by a politician is no longer objective?

Senator ROBERT RAY—No, I am not saying that.

Mr CIOBO—That is what we are asking you.

Senator ROBERT RAY—I am saying that if politicians can be objective in appointing judges, they can be objective in other areas; that is my point.

Mr Webb—They can.

Mr BYRNE—Do you reckon everyone has got confidence in decisions that have been made by the High Court? So your argument is that therefore everyone should be happy with every decision that was made by the High Court?

Mr Webb—If we do not have some sort of confidence in the decisions of the highest court in the land, even though you might want to disagree with them—

Mr CIOBO—Your statement went well beyond that. It was not a case of every decision that was taken. Your submission, like a number of others to this committee, has essentially sought to alleviate from the executive a decision-making power which I think rightly fits within the role of the executive. That is my point of view. What I am testing is the rationale as to why the executive is either unable to or perhaps not best suited to make those decisions. The Law Council has come forward with a submission saying that it is best handled by the judiciary.

Mr Webb—Yes.

Mr CIOBO—Your statement just now was to assert that the public could have greater confidence in a decision taken by a judge than it could in a decision taken by a minister, not in every decision but it was a blanket statement—

Mr Webb—In this context.

Mr CIOBO—that a judge's decision led to greater confidence than a decision taken by a minister. That is what I am testing.

Mr Webb—You do not have to test it. We assert it.

Senator NASH—So what you are saying is that transparency, and the need for transparency for public confidence, only applies when the process is in the realm of the executive. If it is within the judiciary then we do not need the same transparency because people will automatically have trust in the judiciary. So, when you talk about transparency, what you really mean is transparency only in the realm of the executive.

Mr Webb—The judicial process that we envisage would obviously entail some degree of openness. Not every piece of information that the sponsoring minister, presumably the Attorney-General, might want to bring before a judge about a matter would be necessarily classified. I would imagine that simply would not be the case. There may well be classified information which only the judge should see, for example. But in terms of announcing that a hearing is taking place about the proscription of a certain organisation and giving people the right to come forward and put their point of view about that in front of a judge, albeit who may have to consider classified information that perhaps cannot be seen by people who are not possessed of the appropriate classification and clearances, is still a superior process to the process that exists at the present time.

Senator NASH—In your view.

Mr BYRNE—Therefore, if a judge making a decision can only publish in a public statement of reasons but cannot publicise what is classified, you are saying that the public will still have a greater measure confidence in that decision. What if the public statement of reasons does not adequately define why the organisation has to be proscribed but you have made a decision based on the classified information? You are saying that the public will have trust in you because you are a judge but will not have trust in the members of the executive that made the decision, the elected representatives who are accountable elected representatives.

Mr Webb—These problems exist now in the criminal law in relation to terrorism offences. These matters are being dealt with by the courts. At some stage classified information will be brought into evidence which cannot be publicly revealed and which may only be given in evidence in closed court and so on. At the end of that process, if someone is convicted or even acquitted there will need to be statements by the court about that—

Mr BYRNE—But there are statements in the reports.

Mr Webb—and the court will have to handle the issue of what it is free to say publicly and what it is not free to say publicly in the same context.

Mr BYRNE—You still have not argued strongly enough to me why. You have been put in exactly the same position as an elected representative, as all of us here are, where we make a decision that is accountable to the public, effectively, in a public statement of reasons, but there are some reasons that we cannot go into because of the classified nature of the material we have received. Why would a judge be in any better position to make that decision than, say, members of this committee? You have just basically said that we have to operate under the same criteria.

Mr Webb—Because, presumably, that would not be the only input the judge would be getting.

Mr BYRNE—So you are saying that this committee, which might take submissions from groups of interest, say, after the regulations have been made and the organisation has been proscribed, do not take these things into account?

Mr Webb—But you are not the proscribing authority. The Attorney-General is the proscribing authority.

Mr BYRNE—But what I am saying to you is in terms of the decision. I understand what you are saying. You are talking about a front-end process and an after-the-end process.

Mr Webb—We are not suggesting that you be replaced. We are suggesting the Attorney-General's process be replaced.

Mr BYRNE—But we are arguing that, if you are making a decision about the proscription, you will still find yourself in a position where you will receive classified information that you will not be able to reveal to the public. So why would the public think that is any more transparent than the process that exists now?

Mr Webb—As we see it, the process would be as open as it possibly could be, whereas, at the moment, it is completely opaque to the public.

Mr KERR—I have two questions. The first issue about the process and who should adjudicate really depends on how you characterise what is being done. If you characterise a proscription akin to a judicial process that punishes an organisation, a judicial process, I think, could be argued to be appropriate. But, in large measure, what actually is happening in these proscription regimes is that the proscription is actually a declaration. Membership offences—people who carry on conduct and do not cease to adhere to the organisation or belong to it—are then subject to individual actions which are the subject of judicial process. Some of the discussion you are having is that this seems to many members to be an area where what is to be the law is much more usually determined by executive and parliamentary decision, and it is seen in that context rather than as an act of punishment of the organisation, because the punishment, if any flows, comes to people who adhere to the organisation afterwards. I am just wondering whether there is an issue of characterisation here that you need to address.

Ms Donovan—Perhaps one point, though, is that, to the extent that once an organisation is proscribed as a terrorist organisation, that element of the offence is then proven by the proscription. It goes beyond merely stating the law towards the role of punishing somebody for a particular act. So perhaps it falls in between there, to some extent, if the onus is then not on the prosecution in the court of law to demonstrate beyond reasonable doubt that the organisation, the subject of the charge, is a terrorist organisation.

Mr KERR—There are two points. We have to move on in a very short time, so I would appreciate in due course perhaps an additional note. One is that the government has proposed that the offence of membership of a terrorist organisation be a strict liability offence, and I would appreciate the Law Council's comments on that and the implications of it as opposed to how the law currently is constructed and what difference it would make in practice. I would genuinely be assisted by some assessment and analysis of what the consequence will be of that proposed change.

The second point is that Mr Webb, in his oral submission, touched on the issue of criteria in somewhat more detail than the written submission and went close, I think, to proposing what the Law Council would say would be a criterion we should examine to substitute for the very broad test. Much of the dilemma we face in this committee—and it has been commented on time and time again in our reports—is that the band of organisations that are potentially subject to proscription is much wider than the groups which are actually brought forward for proscription. That gives rise to your characterisation of that as ad hoc, and certainly it gives rise to a whole range of subsets of issues as to whether or not a more specific set of criteria would be appropriate and would better capture what is intended to be achieved.

I am wondering whether you could perhaps look at what Mr Webb said in his oral submission and perhaps come back with what you would regard as a framework, because we are all struggling with this issue. We have made recommendations and so too has the Sheller committee, but the government thus far has not followed those matters up. But if you are able to put forward what you would regard as a more suitable set of criteria so that, whether it be by a judicial process, an administrative process or whatever means, there is an opportunity to better test what is being proposed by way of proscription against a framework that achieves the objectives of protecting the society but not too broadly casting the net, I think that would be very helpful.

Ms Donovan—Certainly we could do that. I should say in passing, though, that Professor Patrick Emerton has proposed criteria to be considered by the committee before and he has revisited those in his submission to the committee on this occasion. The Law Council would endorse the approach of the professor.

Mr KERR—I am not asking for an endorsement of an approach. What I am actually asking for is your proposed draft. It may be the same as Professor Emerton's and, if it is, we will take it seriously. The Law Council speaks on behalf of the law societies right across the country. You could ask those in the societies who advise in this area whether you could put up something that would be workable and useful. Professor Emerton's submission may well be, in the end, what you advise, but I am more interested in taking it beyond that approach. I am convinced of the need to better refine the criteria but, thus far, the government has not been persuaded. We have suggested that it be refined but, thus far, we have not found language or an approach that satisfies the executive and the parliament more broadly than we have found an answer for this. So your assistance would be useful.

Mr Webb—We would be happy to provide it.

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

[10.36 am]

HOGG, Associate Professor Russell George, Private capacity

Witness was affirmed—

CHAIR—Welcome. Would you like to comment on the capacity in which you appear before the committee today?

Prof. Hogg—I teach law in the School of Law at the University of New England, but I am appearing in a private capacity.

CHAIR—I now invite you to make some introductory remarks before we proceed to questions.

Prof. Hogg—Thank you very much for the opportunity to speak to the committee. My views on the issues are of course stated in some detail in my written submission, but I want to focus on three broad issues that are of concern. Obviously, to some extent I will simply repeat some of the issues that have already arisen this morning and throughout the proceedings and work of this committee in its reports and so on. The first issue is the breadth of the listing criteria. I acknowledge that I do not have any rabbits to pull out of the hat in relation to this particular issue, but I think I must reiterate the concern expressed in a number of quarters that the breadth of the criteria permits the listing of organisations as terrorist organisations without reference to any link or activity in Australia, without reference to the history, context or cause of the political conflicts in which the groups may be engaged and without reference to the potential and desirability of alternative political solutions to these conflicts. In particular, I am thinking of the listing of the Palestinian organisation Hamas and the Lebanese organisation Hezbollah. I am not trying to deny that these organisations have engaged in some horrendous acts of political violence at various times, but they have little in common with al-Qaeda. Both organisations have essentially a national focus, both command a mass political following and both have participated in elections with considerable success. I am of the view that proscription in such cases has the effect of removing, or at least seeking to remove, the politics from what are intensely political situations laden with a great deal of historical freight.

My concern here about the problematic nature of this is not simply that it might intrude on important political and legal freedoms but also, just as importantly or perhaps more importantly, because I think there is room to doubt that it can provide any sort of viable solution to some of these entrenched conflicts which are the source of the political violence and may on occasions even constrict the search for constructive solutions to them. It is likely to inhibit, for example, the use of other policy instruments like diplomacy, peace initiatives, aid policy and the like.

I think the response of Western governments to the election of Hamas to the Palestinian Authority in January of last year is an example of this. Governments were ill-prepared for the eventuality of the Hamas victory. I think that perhaps one reason for that was that they could only view this situation through the prism of terrorism. They were also, I think, arguably

seriously hamstrung from making constructive interventions by the fact that they had previously listed Hamas as a terrorist organisation.

This, at least according to a recent report in the *Economist* magazine, has had some fairly dire economic and social consequences for or in the Palestinian territories. There was a 10 per cent decline in GDP per head in 2006 and an increase in the number of families living in poverty by 50 per cent. There were some fairly destructive consequences for the structure of the Palestinian economy, which was already dire. I think that those sorts of impacts obviously carry security implications as well, not only for Palestinians but also for Israel. I think that proscription was a key factor in inhibiting governments from responding in a different way to the situation.

I suppose also, by the bye, the implication in that situation is that a mass of the Palestinian population—those people who voted for Hamas—are to be regarded as terrorists almost by definition. This obscures many of the reasons why they did, which did not have a great deal to do, in my view, at least on the basis of my reading, with the fact that Hamas engages in political violence so much as the range of other political, social and economic activities that it is engaged in on behalf of fairly beleaguered populations.

Of course, that in no way alters the fact that acts of violence against civilians on both sides of conflicts of this kind should be roundly condemned. But to define the violence of one side only as terrorist serves to tacitly justify the violence of the other on too many occasions whilst obscuring the roots of the conflict and often hindering the search for effective political responses to it.

The second broad issue that I would like to draw attention to is the serious problem that flows from listing foreign organisations. It exposes residents of Australia with a connection to a listed organisation to prosecution on serious charges without the need to prove any element of terrorist intent or conduct. In some cases, it may even create something of a dragnet effect in relation to an entire ethno-religious community in Australia such as the Kurds or the Lebanese Shia or, if the Tamil Tigers were to be proscribed, the Tamil community in Australia. Again, this has serious implications for legal rights and freedoms.

Over time I think it could even have adverse impacts on Australia's security interests in the sense that using Australian criminal laws to persecute, as I think people on the receiving end would see it, otherwise law-abiding residents and citizens of Australia is likely to produce greater tension and conflict in the Australian context. In other words, where we are talking about organisations that operate in faraway places and that essentially have no focus on Australia or Australian security interests, the danger with these laws and with the offences that flow from listing is that you could transpose what is currently a distant conflict into the Australian setting. I am not saying that is going to happen overnight, but, depending on how the laws are administered and whether people are prosecuted and so on, it seems to me that that is a reasonable concern over the longer term.

The third point relates to this issue of enforcement. It seems to me that not much attention has been given to this, perhaps on the assumption that the laws have not been enforced in relation to listed organisations because there have been no prosecutions. The only point I want to make on this connection is that I think enforcement here cannot be equated simply with prosecution. For example, a stated rationale of the new counterterrorist laws is essentially to gather intelligence

and disrupt terrorist activity. If I could quote the former Director-General of ASIO on this from a speech in 2005, he said:

... it is essential there be a seamlessness in our intelligence and law enforcement counter-terrorism efforts.

... ..

When those known to be involved in terrorism are taken into custody, is the community best served by an immediate application of law enforcement processes, or is it best served through seeking to obtain, through lawful means, information concerning current plans and intentions, and the location of others involved in terrorism?

That question was rhetorical. The point is that the laws are not so much designed to guide citizen conduct; to a significant extent they are incapable of doing that with vague, undefined terms such as 'support' or 'membership', including informal membership. They are essentially designed to empower officials, often enabling the threat of prosecution to be used to compel cooperation that escapes legal scrutiny. I regard myself as something of a student of the Australian criminal justice system and policing, and anybody who has engaged in any research into law enforcement of any kind knows that when we are looking at enforcement we must look at the informal as well as the formal side of enforcement.

The other point about enforcement here is that listing an organisation may also trigger other powers—immigration powers, ASIO powers, issues in relation to extradition and so on—which can have very serious consequences for individuals, families and whole communities and which are often much more consequential than a criminal prosecution, for example. But in these areas, there are not the same safeguards and visibility as applies in relation to the criminal law. When we are looking at the issue of enforcement, we must look at it in that broader sense. I hasten to add that I am not suggesting that all that activity is somehow objectionable, malign or whatever. I am simply saying that it is likely that a lot of enforcement activity is going on out there that we know very little about and that is relatively invisible to us and thus not accountable, so we simply do not know the extent, nature and impact of that sort of enforcement activity. But it would be a mistake to assume that it is not occurring and occurring in the shadow of the proscription regime. That is an issue that I think by and large has been neglected and needs more attention. I will leave it at that point, and I am happy to answer questions to the best of my ability.

CHAIR—The first thing I would like to raise is that you are not a supporter of transferring the proscription power to the judiciary. There was a second option that was given by the Sheller committee for an independent advisory committee to be established. I would like to know what your thoughts are about that. There is another proposition that we could in fact establish a single authority—something after the style of an inspector-general—to oversee things. Could you give us a breakdown on what your thoughts might be on those propositions?

Prof. Hogg—I think there is something to be said—I am taking the second part of the question—on behalf of that proposal following the UK model. That is the sort of area perhaps in which more attention could be directed to the last issue I raised in relation to enforcement—just how the laws are actually operating in practice. I have my doubts about a proliferation of advisory committees. If you have looked at my submission you will know I am fairly critical of

the existing regime—its administration in particular. I feel often that I am simply reflecting views that I find in the reports of the committee, since that has been my principal source.

But I want to stress that there are some advantages to the existing process and the role of open-source material—I know there is obviously classified material as well—the role of this committee in reviewing each listing and the quality of the reviews that have been conducted to date. The Law Council perhaps indicated its reservations simply because there has not been a disallowance and the government has not responded to many of the criticisms and recommendations made by this committee. Perhaps that has to be assessed over a longer term against the influence on the policy climate, the quality of information and the quality of the understanding of the issues. It may be that there are broader positive consequences from the existing process that have not been acknowledged widely enough.

I also strongly support the two-year sunset clause on listings, which of course requires this committee to revisit the issues and also requires the government to revisit the issues on a regular basis. So I am not sure that that advisory committee would do anything as well as the current parliamentary committee. I would prefer to see this remain in the hands of the parliament.

Senator NASH—You say in your report exactly that—that, if it is going to stay, it should remain with the executive rather than a judicial body. You go on to say:

However, this should depend on the executive demonstrating that it can be trusted with the power ...

In your view, how should the executive demonstrate that it can be trusted with the power?

Prof. Hogg—Perhaps you might not agree with that precise formulation, but I think for anybody who has read the reports of this committee—and I have read all of them fairly carefully—it seems to me that there is a recurrent concern expressed by the committee in relation to a number of issues that are simply met with no response or a dismissive response by the government.

I tend to agree with the proposition put by the government that the task of listing is properly a task of the executive for the various reasons that it refers to: the breadth of consultation it can engage in, the global ramifications of listing and the problem of terrorism. But those justifications really depend upon whether it actually concurs with the very rationale that it offers for the executive administering the listing powers. That is an empirical question: how much evidence to the outsider is there that the government engages in a wide range of consultations and utilises a wide range of authoritative sources in relation to the listing process? I have found in several of your reports that you identify authoritative sources that say very different things to some of the things that are said by the government. It seems to me that that is a problem—a problem that is partially redressed by this committee. In a sense, that is what I am getting to, really. We do entrust enormous power to the executive in this context. We entrust it for some of those reasons it offers. We are entitled I think to criticise the executive when it does not live up to its own rationale for exercising the power.

Mr KERR—Isn't some of this a bit like when you talk about enforcement? There has not been a prosecution, but that does not mean that the proscription regime is not having an effect in terms of law enforcement. It may also be true that, whilst the government has not formally

adopted a number of the recommendations of this committee, the fact that this committee exists and the vigorous nature in which it pursues the agencies and tests and puts it on the public record has an effect. Whilst it may not be acknowledged and whilst there may not be an acceptance and formal recognition, the effect of what is occurring may be greater than would appear on the surface. I would hope that it is, but we ourselves do not know precisely.

Prof. Hogg—That is in keeping with I just said on how the performance of this committee and its effect must be assessed. I think it will be over a longer term. It will be in terms of the quality of policy debate, public debate and understanding around these issues. So, yes, I agree with that.

Senator FAULKNER—Professor Hogg, don't you come before us as an abolitionist as far as the proscription power is concerned? You asked the question in your submission—and it was a fair question to ask—'Abolish or Reform?' You did not answer it directly. This is not a criticism. I think it is a fair thing for me to say that you did not answer it directly, so let me ask you directly: are you an abolitionist or a reformer? In your view, should the proscription power be reformed or should it be removed from the statute books?

Prof. Hogg—I think it should be reformed. I think I am a bit of a realist. Other people might not think so. One recognises that there are a range of factors at work here. The committee itself has referred—on more than one occasion, I think—to the fact that a listing seems to be more symbolic than practical in its ramifications. There is a lot of inescapable symbolism. I do not think people who want to be realistic about a more effective effort to deal with terrorism whilst protecting democratic, political and legal freedoms and rights can afford to be unrealistic. At one level, I try to avoid that essential issue because I know that there is not going to be any dramatic change. I try to look for the areas in which it might be possible to bring about constructive change. In that sense, I am very much a reformer. I think the issue that is laboured by the committee around criteria is something that has to continue to be laboured and addressed. On the other hand, I think one of the deficiencies in the debate we have had about this is that it is about rights or liberty or security. If one takes ASIO's view as quoted by this committee seriously, that listing can have an adverse effect, we must recognise that proscription can have adverse security consequences, not just adverse consequences for liberty. They are some of the issues that I have been trying to grapple with in thinking about and thinking through these questions. They are essentially empirical ones: what is the actual effect of proscription as a regime in particular instances?

Mr KERR—Have you or anyone else in the academic world done any work on the effect of what you have characterised as the symbolism at play here? I understand the point you make that symbolic expression may have both positive and negative effects, but is there any work being done? It has not been referred to us thus far if it does exist. Do you know whether any work has occurred or is being undertaken in relation to that?

Prof. Hogg—No.

Mr KERR—That leaves us a bit in the dark. The point is understood, but the value of the point cannot take us very far without—

Prof. Hogg—It is true. There is some evidence from your own work that is relevant to this in terms of a sense of fear and disaffection within Australian Muslim communities.

Mr KERR—But we are not in a position to measure it.

Prof. Hogg—That is true.

Mr KERR—It is asserted to us and—

Prof. Hogg—Yes, that is the state of the evidence in the Australian context as far as I am aware of it.

Mr KERR—Take, for example, my reservations on the PKK. I expressed the view that there were probably a substantial number of people who adhered to a perception of the PKK as a national liberation movement that had had their support up until the time of its proscription. I was not certain of the degree to which they would continue to adhere to those views. There have been no prosecutions so maybe I was entirely wrong factually. But I do not think so. These seem to me to be research rich areas for us to pursue because, if the argument is that this drives people underground and makes for a more fertile bed for the actions of those who wish to disrupt our society, that is a material and factual consideration. Nobody seems to be doing that work outside of the security agencies and they do not address us on those matters.

Prof. Hogg—That is true. It is rich, as you say, but it is not easy research to be undertaking. Universities impose fairly demanding procedures in relation to—

Mr KERR—Terrorism is one of these very awkward things to define, also. It is a bit like what Shakespeare said of treason: ‘If treason doth succeed, none dare call it treason.’ You say it is a weapon of the weak. Where it actually succeeds—as it did, for example, in South Africa when the ANC became the government or in Israel when the actions of what were isolated terrorist groups ultimately coalesced into the Israeli state—they cease to be terrorists.

Prof. Hogg—It is a term that is rarely used in a politically disinterested way. That is one of the problematic features of it. It closes off discussion about what underlying issues might actually be at work here. I think that is one of the problems that I have with the way in which the terrorist discourse has come to dominate our debates and our political culture at the present time. Of course there is a problem—a massive problem. But, with very different and very complex issues, problems and conflicts from all over the world, drawing them together under the rubric of terrorism seems to me to carry grave risks in relation to security, not just in relation to issues of freedom and democracy.

Senator FAULKNER—Do you think the executive has abused the proscription power in any way?

Prof. Hogg—In the sense that as—

Senator FAULKNER—In any sense.

Prof. Hogg—The government has pointed to the statutory criteria which are applied in each proscription and it has not abused them. My view is that this is a power of considerable importance and risk and therefore it must be exercised with care and restraint. That should be able to be justified to this committee and the wider Australian community. When I read your reports I am less than satisfied that you people here are that confident that the power is being exercised with care and restraint.

Senator FERGUSON—If you read the end of the report you will find that, with one notable exception, there has been a uniform and unanimous view that all of those organisations that have been listed for proscription have been proscribed unanimously by this committee. Can I go on to one other issue. We need to remember that, if we are talking about listing organisations, the United Nations, that august body, lists a lot more than we do. So do many other countries. I am concerned about where you talk about proscription largely appearing as a form of Australian flag waving in the global war on terrorism. I am wondering whether you might like to define that. If that is the case, you should be in favour of abolishing the proscription regime.

Prof. Hogg—What I am suggesting is that it can be a form of flag waving in the war on terror.

Senator FERGUSON—But you did not say ‘can be’. You said it ‘largely appears to be’.

Prof. Hogg—I cannot off the top of my head reel off the organisations but I think the majority of the organisations that have been listed—I think it is fair to say the majority—have essentially been found by this committee not to have a link to Australia. Turning back to the current issue in relation to criteria, many of the—

Mr BYRNE—Did you say, ‘Had links to Australia’?

Senator FERGUSON—No.

Prof. Hogg—I think it is fair to say that the statement of reasons provided by the government in relation to many of the listings acknowledges that. Many of them operate in a fairly localised context, and there are probably a few cases where it is fair to say that they are not much more than a thuggish sort of criminal outfit. I come back to the question of the committee as to what function is served by proscribing those organisations in Australia. The response of the government on these issues has tended to be that we confront a global threat of terrorism. The committee itself has said, I think on more than one occasion, that that is ‘superficially logical’—to use your own words. But it is a very vague basis for listing a particular organisation in that it does not explain how the listing will actually address the problem in this instance. So, again, it really comes back to the symbolic issue: ‘We need to be seen to be listing certain organisations, to be doing our bit.’ That is the essence of it.

Senator FERGUSON—‘Links to Australia’ is something you have said two or three times. We also should take into account Australia’s interests overseas. For instance, I would have thought that the bombing of the embassy in Jakarta is an Australian interest overseas and that there is absolutely no reason why we should not list an organisation that may have been involved in that activity, or activity against any other Australian interest overseas.

Prof. Hogg—I do not have a problem with listing al-Qaeda or Jemaah Islamiah.

Mr KERR—I think he is referring to the Algerians as an example.

Senator FERGUSON—Yes.

Prof. Hogg—I think there is an organisation in the Philippines which your own committee report indicates from at least one authoritative source is moribund or collapsed, and it has just recently been relisted. I just have difficulty, given the gravity and complexity of the issues, with the rationale for those listings. That seems to me to be a problem that I share with the committee.

Senator FERGUSON—You talked at length about Hamas and Hezbollah. Neither Hamas nor Hezbollah as organisations are listed under our proscription power. We have been very specific in listing the military wing of Hamas and of Hezbollah, so I think that with respect to your arguments about the organisations in general, I know there is a difficulty sometimes in separating the military wing from the other, but to the best of my knowledge there is no intention to list either Hamas or Hezbollah. The United Nations does not either.

Prof. Hogg—With respect, I think it is fair to say that, in the context in which I was raising these issues in my opening statement, that distinction has not been drawn in the last 12 months since Hamas was elected to the Palestinian Authority. No distinction has been drawn in the context of boycotts and the response to that eventuality between—

Senator FERGUSON—But there is in our proscription.

Prof. Hogg—I know there is, but some of the ramifications of the proscription are what I am talking about here. No distinction has been drawn between Hamas and its military wing or between Hamas and the Palestinian Authority, for example. They could be regarded as separate.

Mr KERR—That is a bit beyond our reach, though. That is a matter for how Australia and other countries deal with their relationships with governments overseas.

Prof. Hogg—My point was simply that proscription does erect an obstacle to using a range of policy instruments.

Mr KERR—I would not have thought that it did. I have agreed with almost everything you have said, but in that area it does not seem to me to be logically correct. To say that, if you are a member of the military wing of Hamas in Australia and you therefore become subject to possible prosecution, that somehow would prevent us from having a diplomatically effective relationship with a Hamas government seems to me to be entirely wrong. Nor would the fact that it was not proscribed prevent us from refusing to have a relationship with a Hamas government. In a sense, I think they are quite distinguishable. I do not think either requires or prevents a particular resolution of our relationship between those governments and us.

Senator FAULKNER—I think, Professor Hogg, what you did not take into account in your opening statement, in relation to Hamas and Hezbollah, was actually the method. They were listed as a result of legislative action which I must admit was agreed in both houses of the Commonwealth parliament without dissent. In that sense, with the comments you made in your opening statement, that additional element needs to be taken account of given that you are speaking about them in the context of executive proscription. Admittedly, it ought to be said that

obviously legislation was generated by the executive but the mechanism, in fact, was quite different in relation to both those two organisations.

Mr BYRNE—Do you agree that these proscriptions might act as a deterrent for members of the community that might otherwise think of associating or joining with these organisations either here or abroad?

Prof. Hogg—They may well do. On the other hand, I would think, in relation to some of these organisations, you are talking about residents of Australia. These might be law-abiding residents and citizens of Australia, perhaps the Kurd community or the Lebanese Shiah community, whose life history and identity is bound up with that particular history, those relationships and so on. If that is the case, it is difficult to envisage that legislating offences in relation to membership, support, association and so on will have that effect for people in that situation.

Mr BYRNE—But if they have substantial penalties and you had a member of, say, one of those communities that wanted to join Jemaah Islamiah, are you saying that would not act as a deterrent?

Prof. Hogg—I am saying that it may well act as a deterrent. If people wish to join a terrorist organisation for the purposes of undertaking a suicide bombing or something similar, I do not think that the criminal law is a very effective deterrent. If they are determined terrorists, the evidence is fairly solid that the law does not work much as a deterrent. In relation to, if you like, the people who are associated with it, yes, it may. On the other hand, as I was trying to suggest, if you are talking about people whose identity is immersed in this community and these sorts of links then it may well be quite unfair for a start to impose laws that seek them to sever links with the community although they are law-abiding citizens and have no terrorist intents.

Senator ROBERT RAY—Isn't it just a little unfair to allow people to be a member of organisations that blow up and kill others? Other people have rights too. You said earlier on that these people are thousands of miles away. We are international citizens. Surely, we have to make a contribution internationally to fighting terrorism. The thing that terrorists survive off, above all else, is money—and money supplied by expats from around the world.

Mr KERR—Can I ask whether a research facility that is interested in this has any means of working with, say, security organisations to do some empirical work on the effect of some of these issues? You have raised, for example, the inutility or the symbolism of listing an organisation, say, in Algeria or in the Philippines that appears not to have any direct connection to Australia. I suppose from this committee's point of view—although I have experienced the same sense of, 'What are we about here and what are we doing?'—at the end of the day, if they are a terrorist organisation that are blowing up people, as Senator Ray says, and there are no Australians who are going to be directly affected, what is the evil to be prevented by permitting the proscription to stand? If there is an evil, if there is researchable information that says, 'This kind of symbolism may cause this effect,' if there is a counterargument, I would like to know about it. But at the moment all I can assume is that there is no harm being done. It might seem, on its face, to be no more than the symbolism and recognition, as Senator Ray says, that we are playing a part in an international campaign.

Prof. Hogg—I agree with you. I would say in response that, just as the precautionary principle in some senses applied in relation to the terrorism issue when suddenly on 9-11 all hands were on deck to deal with this problem that the United States and other countries in the world were ill-prepared for, part of dealing with the issue, the uncertainty of the threat, the uncertain character of the threat, actually involves thinking about these sorts of issues as well. That seems to me to simply be prudent from a security point of view.

Mr KERR—The security agencies say to us: ‘It’s prudent from a security point of view. There may not be anybody in Australia, but let’s wear some belts and braces, let’s proscribe these people who are blowing up things.’ All I am saying is that I would be assisted, and the committee would be assisted—and I do not think the security agencies would be averse to it—by knowing if it is having any adverse consequences. That would be a material contribution that scholarship and research could bring to bear, because at the moment we are just hearing hypothetical possibilities being addressed to us which, frankly, take us no further than acknowledging intellectually that it might be possible.

Prof. Hogg—Agreed.

Mr BYRNE—Can I ask something?

CHAIR—Very quickly; we are well over time.

Mr BYRNE—If you had a deeper, fuller, publicly available statement of reasons that took into account some of the concerns that you have raised, do you think that would ameliorate some of the concerns that you have expressed at this hearing today?

Prof. Hogg—This really goes back to an issue of community consultation and so on. I think that explaining the basis of a listing which effectively communicates to those affected in the community at large the rationale for the listing is desirable and essential. Again, I think the committee has drawn attention to this issue as well on a number of occasions.

CHAIR—Professor Hogg, thank you for your evidence. If the committee has any further questions they will be sent to you in writing by the secretariat. Thank you very much indeed for being with us today.

[11.19 am]

EMERTON, Dr Patrick, Private capacity

Witness was affirmed—

CHAIR—Dr Emerton, do you have any comment to make on the capacity in which you appear?

Dr Emerton—I am from the Faculty of Law at Monash University but I am appearing today in a personal capacity.

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

Dr Emerton—I do. I have been tinkering with them a bit as you have been asking questions of other witnesses to try to address some of the points that are being raised and to cut out some of what seems less relevant.

Senator FERGUSON—That is the danger of getting here early!

Dr Emerton—I have been making submissions to your listings reviews for over two years, and as you know I have been reasonably critical of the listing process in those submissions. So it is a great pleasure to be here today to actually talk to you and elaborate on them to some extent, and perhaps to defend and explain some of them further. In my opening remarks, I will just reiterate a couple of points.

I do not think that the operation of the listing provisions can be regarded as purely symbolic, because it clearly triggers some offences. I am thinking of 102.5, which triggers the quasi-reverse onus aspect there, and in 102.8 it triggers the association offence. It removes an immunity under section 6 of the Crimes (Foreign Incursions and Recruitment) Act 1978. It triggers the possibility of a control order under section 104.4 of the Criminal Code. A listing certainly has those concrete, more than symbolic, effects.

Also, arguably at least, a listing acts as a trigger for any of the organisational offences under division 102, although the DPP, due to their analysis of the way the fault elements work in the Criminal Code, seem to take a slightly different view of that. Obviously those criminal offences that are enlivened are all quite serious ones. I am particularly thinking of the training offence; 102.5(2) has a maximum penalty of 25 years, which is the most serious penalty in the Criminal Code outside of life imprisonment. So they are serious offences, and they also act as triggers for other criminal law investigatory processes like those of division 2 of the Crimes Act, which gives different regimes for habeas corpus in relation to these offences, and obviously the part 3, division 3 powers under the ASIO Act.

I would also say that I have not seen any public indication from ASIO as to whether or not it accepts the DPP's analysis of the operation of the fault elements under the Criminal Code. So it is not clear to what extent ASIO regards a listing of an organisation as enlivening the offences

under division 102 and therefore as enlivening its special powers. If it disputes the DPP's reading and reads the fault element differently then in fact ASIO might be construing its powers more broadly than the DPP construes its prosecutorial remit. So I think all these criminal law aspects of listing show that it is not purely symbolic.

As I have put in my submission and in earlier submissions, and as other witnesses have said this morning, under these offences someone can be convicted even though they have no criminal intent and no criminal purpose. On its own that is actually quite a significant criticism of a piece of criminal law: that it can lead to someone being convicted although they lack a criminal intent or a criminal purpose.

But I think the more telling objections to the listing regime are not the legal objections but the political ones. This really goes to the conversation that was had before with Professor Hogg. My view, which I have put in my submission, is that the process of listing organisations as terrorist organisations under the Criminal Code is at odds with and undermines Australia's traditions as a pluralist and liberal democracy. It vests the Attorney-General of the Commonwealth and the security agencies which advise him with the power to declare certain political associations and political activities illegitimate and unlawful on a highly discretionary basis. I hesitate to use this word, but it is a seemingly ad hoc basis, as the Law Council said. I argue in my submission, and am interested in defending this today if it is of interest to the committee, that it is a discriminatory basis. In these opening remarks I want to explain a little bit about why I see it as a discriminatory basis on which organisations are being listed.

The starting point is one that is commonplace in this area. Of the many hundreds or thousands of organisations worldwide which could be listed, only 19 have been listed. My reading of the committee's reports into the listing of those organisations is that no particularly coherent account has emerged—at least no coherent public account has emerged—of the basis on which those organisations were listed. It is not that there is no account for any given organisation; the statement of reasons is quite clear. But taken as a body of reasoning, where one compares the rationales for one with those of another, no coherent pattern emerges across the totality. I assert that the consequence of this is that certain sections of the Australian community, and I think in particular although not exclusively the Muslim community, are tarred with the brush of terrorism while other groups not listed have their political activities tacitly endorsed or at least tolerated although, from the point of view of the statutory requirements, there is no difference to be seen.

I think this failure to articulate a clear rationale for listing is demonstrated by the submission of the Attorney-General's Department to the current inquiry. On page 2 of that submission, reference is made to the security of Australia and to Australian interests. Page 8 of that submission explains the listing of organisations by reference to the main terrorist threat to Australian interests. Page 7 of that submission submits that direct relevance of an organisation to Australia does not matter because terrorism is a global problem. In my own submission I indicate that, of the 19 listed groups, in the material supporting their listing, 13 have no indicated connection to Australia or to Australians. No indication has been given by ASIO or the Attorney-General's Department as to how the listing of these organisations is contributing to the resolution of a global problem. In the meantime, Muslim Australians suffer from having their religion repeatedly associated in public speech with acts of extreme political violence.

I want to give another example to illustrate what I think to be the discriminatory consequence of the listing of organisations. On page 8 of its submission, the Attorney-General's Department indicates that ASIO assesses the main terrorist threat to Australian interests to come from Islamic extremists. Put to one side, then, the question of why the PKK is listed, and let us focus on terrorist violence in Australia. As I note in my submission, among the most natural candidates for characterisation as terrorist crimes in Australia are repeated attacks by white supremacists in Perth against Chinese restaurants and other Chinese community interests. But the only Australian public official whom I have heard describe these incidents using the language of terrorism is Assistant Commissioner Luke Cornelius, who is now the head of ethical standards in Victoria Police and an extremely interesting police officer.

No white supremacist group has been listed in Australia, even in response to their alleged involvement in the Cronulla riots. In its annual report for 2005-06, ASIO explicitly contrasts racist and nationalist violence with terrorism. So, in an attempt to muster the evidence that Mr Kerr was asking for earlier, I say that there is a clear rhetorical contrast which illustrates the discriminatory impact that these listings have.

It seems to me that when one looks at these examples, it becomes clear that ASIO, in deciding which groups to put forward for listing, is working with a conception of 'terrorism' and 'terrorist organisation' that is narrower than the statutory definition. The statutory definition, as we all know, encompasses virtually all politically, religiously or ideologically motivated violence—whether carried out by state actors or by non-state actors, whether supportive of or opposed to the so-called Western interests, whether or not it is part of an armed conflict and whether or not that violence is moral or immoral. The definition is extremely broad, but ASIO are clearly using something narrower.

This inference that ASIO are using something narrower is also supported by the fact that listed in the six factors that they take into account are engagement in terrorism and ideology. If those were just taken at face value, they would reiterate the statutory criteria and therefore be of no interest in helping narrow the focus. So, again, there is a strong implication that ASIO understand these in some particular or more narrow sense than the mere statutory meaning. But, at least in the public material, ASIO have not articulated what their understanding is. So which political violence and which ideologies do they judge to be terrorist and which not? Which ideologies do ASIO regard as illegitimate? My contention, which has been reiterated in my submission and in earlier submissions, is that it is inimical to democracy for a necessarily clandestine security agency to make judgements about which political outlooks and what sort of political adherence are legitimate and which are not, and then to enforce those judgements through the threat of criminal prosecution. I am here as an abolitionist, as I think you all know from my submission. I say that the simple solution to this inconsistency between the discriminatory impact and practice of listing and Australia's strong tradition of liberal democracy is to repeal the listing provisions.

I do have a fallback, and if you give me a couple of minutes I can articulate that. A number of submissions, and one of the earlier witnesses today, have referred to the Emerton criteria. I originally articulated those criteria not as statutory criteria for the basis of the listing but as review criteria to try to help the committee in its task of reviewing a listing. In my submission I have endeavoured to develop those criteria but not in the way Mr Kerr was asking for before—to set out some candidate statutory drafting. I have not done that and have not attempted to do that.

I have at least started the process by suggesting how one could begin to tighten up statutory criteria. I think that the statute could require that a listing be based on two sorts of evidence: firstly, evidence about the serious nature and extent of the political violence being engaged in, prepared for, planned by and assisted or fostered by the organisation and, likewise, how that is likely to go into the future and the reason for believing that proscription, rather than simply ordinary criminal processes, is needed to combat that violence. That is one set of matters on which evidence could be sought prior to a listing.

Secondly, evidence could be sought about the likely effect on the Australian community. That would be, for example: what degree of support does the organisation enjoy from Australians? What degree of opposition to it exists in Australia? How would the listing affect Australians? Is it likely to lead to political or communal tension within Australia? By listing the organisation, who in Australia would be made a criminal? Would some Australians experience the listing of the organisation as an affront to their civil and political liberties? With regard to the rationale for looking at those two bodies of evidence, it should then be ensured that the listing be made only when the contribution it makes to the protection of Australians will be clearly seen to outweigh the harm it does them by criminalising the hitherto lawful political and cultural activities.

The most natural way the Attorney-General's Department and ASIO would gather evidence about the effect a listing would have on the Australian community is to ask them about it and listen to the answer. For that reason, I regard the committee's earlier recommendations about consultation as extremely important, and I have reiterated that in my submission and in earlier submissions. I think it would be crucial that that consultation take place prior to a listing as a crucial part of an evidence-gathering role to get the evidence that would be essential to performing a balanced judgement: does the protection to be achieved by a listing outweigh the harm it has by affecting what have hitherto been the lawful activities of Australians?

I also think that consultation could play an important role subsequent to a listing and would have a different function at that point, because prior to a listing it would be essentially listening and evidence gathering. Subsequent to a listing I think consultation could play an important role of explanation and, in particular, explain in a genuine fashion to the community why an organisation has been listed and what the implications are for the community's activities of that listing. As my submission sets out, the Attorney-General and ASIO ought to be obliged to state clearly what they take to be the implications for Australia and Australians of a listing. Relevant information in such a statement could include, but not be limited to—and here I reiterate my submission: an indication of the sorts of training Australians have been providing to, or receiving from, the organisation; an indication of the amount and purpose of funds that they believe Australians have been remitting to, or receiving from, the organisation; the way in which the Attorney-General's Department and ASIO understand the concepts of 'membership', particularly 'informal membership', in the context of the organisation in question; and the extent to which ASIO intends to take advantage of the listing of an organisation to trigger its questioning and detention powers. I note in my submission that some of that might be regarded as not utterly fit for public consumption, but that could be mediated through this committee, which clearly has the role of representing the public's interest in dealing with the more clandestine aspects of national security.

They would be some of the matters that I think could be canvassed in a sincere and genuine way in post-listing consultation. Again, the ultimate purpose of that would be to enable

Australians to assess the consequences of the listing against their understanding of their civil and political rights, including the right to security of themselves and their families and, where necessary, change their behaviour to bring it into compliance with the law. More broadly, it would be part of a process of making it clear to the community that listing is a legitimate exercise of power within the framework of Australian democracy and not simply a discriminatory and anti-democratic interference with civil and political freedom. My view, to date, is that the burden of making out that explanation is not being discharged.

CHAIR—Thank you.

Senator ROBERT RAY—Before your confession of being an abolitionist—and I just want to move you back to that part of your evidence—

Dr Emerton—Yes.

Senator ROBERT RAY—you kept on talking at length about ASIO, ASIO, ASIO, which a lot of the witnesses do. Isn't the decision to proceed with proscription ultimately made by the Attorney-General of this country? ASIO is the servant; it is not the master of this decision-making process, but you gave a different impression. I am wondering why.

Dr Emerton—I did not intend to give a contrary impression, but I did though intend to indicate that from reading the account of the process in this committee's reports one gets the sense—as ASIO is, if you like, the responsible bureaucracy—that the Attorney-General is to some extent relying on ASIO for advice as to which organisations should be listed rather than saying to ASIO, 'I think perhaps this organisation should be listed; is that correct?' One gets the sense that the process is initiated by ASIO. ASIO prepares a draft statement of reasons—

Senator ROBERT RAY—Yes, it is.

Dr Emerton—and sends that to the Attorney-General.

Senator ROBERT RAY—We think it should be. We do not think an Attorney-General should be suggesting that organisations should front up, because when he makes the final decision he is already biased.

Dr Emerton—And that is the sense in which I had focused on the fact that ASIO has articulated a list of factors that it says it takes account of in initiating that process. I was saying that they had listed among them 'engagement in terrorism' and 'ideology'. My point was that if those have purely the statutory meaning, those factors are of no interest because they purely reiterate the statutory criteria. But, as is the natural inference to be drawn, if they have a more narrow meaning, ASIO has not publicly articulated what it takes that meaning to be. My concern is about a clandestine agency in fact initiating a process of listing based on some narrow understanding of what is legitimate ideology and what is not. In a democracy, the scope of political legitimacy is a public matter and not a matter for the security agencies.

Senator ROBERT RAY—But it does not have an unlimited right of advice. ASIO has to then go and consult with DFAT. This committee pointed out in the early stages the inadequacy of that consultation; that has been rectified. You only have to look at the eight DFAT officers coming

here later today to know they have lifted their game. Then there also has to be consultation with the states, which is a process that I will concede has not been robust so far, but the potential exists for not only ASIO but also DFAT and the states to have their say before the Attorney-General sums up and makes the judgement.

Dr Emerton—That is true. I am in a slightly difficult position, because I have never been a public servant or a minister, so I look at this from the outside and do my best to give a considered opinion. But looking, for example, at the response of the first ministers at the COAG meeting in 2005 and the high degree of deference that was given to the confidential ASIO briefing given at the COAG meeting, one gets the sense that ASIO do play a significant role and they are driven by these factors they mention. If they suggest this organisation is a problem because of its engagement with terrorism or its ideology, that recommendation or advice is likely to be taken seriously, in part because one gets the impression that the responsible minister feels that it is hard to get reliable advice elsewhere. These things are by their nature clandestine and secret, and ASIO is the one doing the spying and collecting the intelligence.

My concern is that ASIO are using a certain concept of engagement in terrorism. What do they take terrorism to be? If you look at the statutory definition of terrorism—and this is meant to be completely trite—there is no doubt that the armed forces of most countries in the world are terrorist organisations under that definition because they are organisations engaged in fostering, preparing for or planning politically motivated violence. You made a reference earlier, Senator Ray, to bombings and killings. The armed forces of the world bomb and kill a lot of people, including civilians. So there is no doubt that under the statutory definition they are terrorist organisations. But it seems very clear that when ASIO talks about engagement in terrorism it is excluding from its thinking that sort of activity that falls under the statutory definition.

Likewise, there are all sorts of ideologies, including the revolutionary ideology of the Americans and the French which led them to overthrow their monarchies and establish modern forms of republican government. But when ASIO talks about ideology, I do not think it has that sort of ideology and that ideology's connection to political violence in mind; it has some other ideology in mind. But my concern is that, by not telling us and by having its operations and decisions cloaked in secrecy, it is taking out of the public realm into the realm of clandestine national security what in a democracy should be the most public of all matters—namely, the debate about politics, political values and political legitimacy.

This committee clearly plays a role after the event in bringing those public interests to bear on the listing. My concern is that to some extent one gets the impression that ASIO is prejudging some of these matters before a listing. I am answering at great length, for which I apologise. I will conclude there on a related point. In any reformed process I think it would be wonderful if the committee got to review matters before rather than subsequent to a listing. That would be terrific.

Senator ROBERT RAY—You heard the comment I made before: that was not necessary when the reality was these things were disallowable in the Senate; they are no longer. Your point about ASIO intimidating—by presence not by intention—state governments is well taken, but I do not think they have that effect on attorneys-general. If they do, we should get a new Attorney-General, but I am sure they do not.

Mr KERR—We are planning to do that, aren't we?

Senator ROBERT RAY—It is a plan but we are not betting on it. You have heard the debate already today. There are quite different views now on whether it should be executive or judicial. We had Professor George Williams come yesterday and recant. Having studied around the globe, he now favours executive rather than judicial. You still favour judicial. We do not come at this with clean hands, because we think we are better than the judiciary. The judiciary think they are better than us, and that is what makes for a very healthy society, I suspect. But always remember: we appoint judges. If we are objective enough to appoint judges, we should be objective enough to make other decisions. In many ways, from a practical point of view, if you have judicial proscription, a lot more organisations are going to be proscribed than currently.

Dr Emerton—My submission does not support judicial process, and I have never supported a judicial process.

Senator NASH—In your second set of criteria you say:

... a judicial process would perhaps provide a better forum for insuring that they were satisfied ...

That is, that those criteria were satisfied. Isn't that exactly what you are saying there?

Dr Emerton—No, I am putting forward some criteria. If my submission gives the implication that it supports judicial process, it is grossly miswritten, for which I apologise, because I have never in any submission intentionally set out to say that. I think my submission actually is officially agnostic. It canvasses the possibility of a judicial process. If the statutory criteria were to remain unchanged, the judicial process would be pointless.

Senator NASH—You do say that, and I take the point that you go on to talk about a parliamentary forum on the other hand, but you do specifically say:

... a judicial process would perhaps provide a better forum for insuring that they were satisfied ...

That is, this second lot of criteria. So what is it about the judicial process that would provide that better forum? Why would it be better than the executive to do it? What is there about that judicial process that you think would do it better?

Dr Emerton—In my submission I draw the connection to the natural justice point that had been made by the Sheller committee. When I talk about how the listing will affect Australians and so on, in a sense what I am doing is picking up on that. Natural justice is an administrative lawyer's concept, and I am not an administrative lawyer; I am just looking at it more in practical political and community terms—people would like to have their say. In some ways courts are structured to permit two parties and therefore people get a voice in court. A different sort of executive process, which, for example, involved empanelling an executive panel—perhaps one which the Attorney-General wants to chair—or even a sole member panel in which parties could appear, could perform exactly the same role.

I am thinking more of a forum in which people can talk. But if the statutory criteria were to remain unchanged, a judicial process is pointless, because I really regard it as beyond doubt that

the listed organisations and thousands of others in the world satisfy the statutory criteria. There is no doubt that these organisations from time to time foster, at least indirectly, the blowing up of things. There is a lot of talk in some submissions about merits review. At present it strikes me, just looking at this as a commonsense person, as irrelevant. If stricter criteria were to be put into place—and again I have not sketched the statute; I have only sketched a framework for thinking about what they could be—maybe a judicial process could be one forum, an executive panel might be another forum, and a parliamentary committee could be yet another forum.

I am thinking of forums in which widespread community consultation has taken place in other contexts. For example, the Constitutional Convention leading up to the referendum on a republic provided a forum for different voices. That was clearly an executive and parliamentary process, not a judicial process. So there can be a range of different mechanisms which can allow different voices to be heard. My concern is about having voices heard in a public way which is consistent with the traditions of public politics—which is what constitutes a democracy—rather than clandestine politics, which is my concern about the current process.

Senator ROBERT RAY—Today you have talked about public consultation. I have a bit of a problem with some of the listings, including al-Qaeda, Jemaah Islamiah, Abu Sayyaf, the Armed Islamic Group and Salafia Jhadia. You wouldn't happen to have their phone number or the post office box number where we can consult them? This is the problem. I can tell you that, if we said to the Islamic community in Sydney or Melbourne, 'We want to talk to you about Abu Sayyaf,' they would say: 'It's nothing to do with us. We have no links whatsoever.' And, of course, they do not. We would generate tremendous hostility by stereotyping people, the very thing that most of these submissions object to.

Dr Emerton—I take your point, and it is a sensible one. There is great difficulty with consultation. I am a lawyer and philosopher by trade, not a sociologist, so I am not competent to do, and have not done, the rigorous empirical work that Mr Kerr talked about earlier. I am a member of the anti-terrorism working group of the Federation of Community Legal Centres in Victoria, so I am involved in community programs in relation to these laws in the Victorian community—in relation to the Islamic community, the Kurdish community and the Tamil community. It is a difficult issue and there are a couple of things I would like to say in response to it. If no-one in Australia is interested and no-one in Australia is a member, the first of my two bundles of criteria would not be satisfied because no case could be made that listing necessarily achieves anything from the point of view of stopping violence. So the second bundle of criteria, the consultation criteria, ought not to be triggered because, having fallen at the first hurdle, there would be no need at all to go to the second hurdle to perform the balancing act.

My submission is based on the public material in relation to listings that organisations fall at that first hurdle, and they are set out in my submission. They are the ones for which, in my early submissions on listings, I urged the committee to recommend a disallowance because no case has been made. They are the 13 organisations that I have mentioned. There are two organisations that have been linked to Australia only through their connection to deterring Australia's presence as part of foreign forces in Iraq. That is a more difficult case because it has an impact on Australians—and the relevant Australians are the armed forces of Australia. I do not really support listing there—not so much because of its democratic consequences but because I think the Geneva conventions and the laws of armed conflict—and, in our context, division 268 of the

Criminal Code—provide a more considered framework for dealing with issues of terrorist violence in situations of armed conflict.

There are four groups which, from my reading of the materials and the committee's reports, do have links to Australia, whether through threatening interests, membership or both. They are al-Qaeda, Jemaah Islamiah, Egyptian Islamic Jihad and Lashkar-e-Taiba. It is with respect to these groups that your point—'When you go to consult, who will say anything or stand up for these groups?'—is most clearly taken. It is a difficult issue to respond to. I am not by any means an expert in the theory of consultation, but a lot of work is being done in consultation. I know other academics, in fields like public health and so on, who work on the theory of consultation, on how some of these issues can be overcome and on how consultation processes can be structured in a certain way. I do not have a definite solution, but I do speak to people who engage in community education and I have read the submissions that have come to this and other inquiries. One sees from the *Isma* report by HREOC that the Islamic community in Australia is getting tarred with the brush of terrorism. What is the pay-off, in terms of making Australia safer, which we could not just get from prosecuting people for conspiracy, attempted murder, incitement to murder, manufacturing explosives, acquiring materials with the intention of manufacturing explosives or all that banal part of the criminal law that has been with us forever?

Senator FAULKNER—Dr Emerton, what this committee hears all the time is that the consultation issue is not a theoretical problem but a practical problem, which was the thrust of what I think Senator Ray was saying to us.

Senator FERGUSON—It worries me when you talk about academics talking about the theory of consultation.

Senator FAULKNER—It is a serious, practical, real-life problem that is important.

Dr Emerton—Yes.

Senator FAULKNER—It is important to members of this committee but it is also obviously critically important, for some of the reasons that you outlined in your submission, to members of affected communities. I acknowledge that point you made. I am sure every member of this committee would. It is of critical importance but it is a very practical problem that we are trying to deal with.

Senator FERGUSON—I am not a lawyer or a philosopher, but in your opening remarks you talked about abolition and discrimination and raised the issue of white supremacists bombing Chinese restaurants.

Dr Emerton—Yes.

Senator FERGUSON—As I understand it, whoever committed that crime will meet the full force of Australian criminal law. There is a provision already to deal with that person or those people. As I understand it, if someone in Australia belongs to Jemaah Islamiah and decides that they will send funds so that someone can build a bomb to bomb the Australian embassy in Jakarta, without proscription I do not believe that there is any criminal law that they can be charged under. I may be wrong but without proscription it is not a crime to send money overseas.

Dr Emerton—Can we put to one side the Charter of the United Nations Act, because that will criminalise that particular conduct. We already have a piece of legislation that criminalises the financing issue, without picking up the issues of support and membership and what we might call some of the more political allegiance issues. That is not to say that the charter of the UN legislation is necessarily entirely without problems but I think it is more tightly focused on addressing a certain narrowly defined issue and responding to that more proportionately. Even if we put that to one side—

Senator FERGUSON—You should not be worried about the white supremacist because he will face the full force of the Australian law.

Dr Emerton—Someone who sends funds to Jemaah Islamiah, with the intention to be used to blow something up, is possibly guilty of conspiracy to murder. You would want more information but conspiracy to murder is there, and the offence of harming Australians abroad. So if we thought that it was the Australian embassy that might get blown up there could also be conspiracy to or an attempt at that offence. That is under one of the divisions of the Criminal Code—I cannot remember which one. If we change the facts a little bit, if it is an Australian who goes overseas intending to do that, there is the Crimes (Foreign Incursions and Recruitment) Act.

Senator FERGUSON—I am not talking about Australians going overseas.

Dr Emerton—But if we are talking about Australians financing, you have at least the conspiracy and the attempt aspects of the offences. You probably also have offences under Indonesian law, so they could be charged under Indonesian law and extradited to be dealt with under Indonesian law.

Senator FERGUSON—I think proscription is easier.

Dr Emerton—Yes and no. Perhaps it is easier for the authorities in Australia who want to see the person prosecuted. It is not clear that it is easier for Australian Indonesians with an Islamic background who want to carry out their legitimate political and cultural life here. The question is: for whose ease do we legislate in a democracy? I am prepared to concede there are pressures both ways. I am not prepared to concede all the pressures push only in favour of proscription

Mr KERR—The difference, of course, with the white supremacist organisation is that the individual who is the mad bomber goes to jail but the neo-Nazi party can continue effectively to participate lawfully in the democratic discourse of Australia.

Dr Emerton—Yes.

Mr KERR—And whilst we would expect that ASIO would be playing its normal and proper part in examining the conduct of people who were part of an extremist organisation within Australia, we have not reached a point where we proscribe such organisations.

Senator FERGUSON—But we may.

Dr Emerton—That would be one way to go. I think this goes back to a remark Senator Ray made to an earlier witness. One way to remove the apparent adhocery is to proscribe everyone.

But if the concern is about removing politics from the public sphere, that solution does not meet that concern because it criminalises even more politics. So my preferred solution is to proscribe no-one and just focus on investigating and prosecuting individual criminals in the way that Mr Kerr just explained has happened with the white supremacists.

Mr BYRNE—You have dedicated a number of pages in your submission to the role of ASIO. In the conclusion, when you are talking about the listing regime under division 102, you talk about ASIO being given excessive power. You say it is ‘a clandestine security agency’, and its powers are ‘to declare certain political views illegitimate and to act upon those views’ in the expression of its extraordinary powers. You then refer to another power in the question of detention. Are you arguing that any of these listings under the Criminal Code have been motivated or were listed by ASIO as a consequence of trying to declare certain political views illegitimate?

Dr Emerton—I have not said it is motivated; I have said that it has that impact. As I say in this submission and earlier submissions, I cannot know what motivates ASIO. In a sense it is proper that I cannot know what motivates ASIO, because it is a clandestine agency and I am an ordinary member of the public. My concern is it generates an institutional appearance, and in my view in a liberal democracy the best way to remove the generation of that appearance is to eliminate the proscription regime.

I am not in any sense casting aspersions on the integrity of the head of ASIO or individual ASIO officers; it is an institutional problem, not a motivation problem, giving these politically guided decision-making processes. The word ‘declare’ as it appears in the submission—in response to the comments Senator Ray made earlier—is probably the wrong word. The thing would be to ‘generate advice which can well lead to a declaration by the Attorney-General’. So the actual verb ‘declare’ may be not quite the right word. But my concern is about the institutional situation, not the motivations of individual members of ASIO. Nor is it about the motivation of the Attorney-General; my concerns are about the institutional structure and its inconsistency with liberal democracy.

Mr BYRNE—You mentioned also a number of organisations that are proscribed overseas; you said there are a hundred or so. Of those you have noted have been listed, for example in the UN, which ones would you suggest we proscribe here in Australia?

Dr Emerton—Again, I regard that as a slightly invidious question, because my preference is that nothing be proscribed. So if I answer hypothetically, I hope that the committee in its report will not suggest that I was actually saying these groups should be proscribed. But if, for example, one were to be consistent in pursuing proscription and if one did not share my concerns about the implications of proscription for democracy then one might ask, for example, ‘Why is the military wing of Hamas proscribed but not the military wing of Fatah, which also engages in suicide bombings aplenty?’ One might ask why, of the various terrorist groups operative in the Philippines, in which I would include at least elements of the Philippines army, only Abu Sayyaf is there and, I think, Jemaah Islamiah. But there are other groups that are working in the Philippines. Elements of the Philippines army are, notoriously, terrorist organisations. They kill many civilians; so why are they not proscribed?

If one looks at independence movements, why is the PKK proscribed? GAM was never proscribed. Admittedly, it was in a peace process, although there were frictions there and at one stage it did seem that the peace process had broken down and Indonesia reinvaded Aceh full force before the rabbit of peace was miraculously drawn from the hat. But GAM was never proscribed. OPM is not proscribed.

I am not saying I think any of these groups should be proscribed, because that would be inimical to my view about abolition. But I think these are the groups that have not been proscribed that do, in my view, give rise to an appearance of adhocery. Is that a satisfactory answer?

Mr BYRNE—Well, it's yours.

Dr Emerton—I mean, does that get to the matters the member wished addressed?

Mr KERR—We won't verbal you and say you support OPM's listing.

Mr CIOBO—I want to go back, Dr Emerton, to a large part of your submission which deals with the ideological concerns that you have about the ability of government or otherwise to make decisions about the ideological appropriateness of certain beliefs. What I basically put to you, given the very limited time frame, is: do you think that in a liberal democracy the belief in and pursuit of sharia law, for example, is consistent with liberal democracy?

Dr Emerton—Yes. Fred Nile is a member of a party which call itself the Christian Democratic Party although it has no connection to European Christian democracy. He sits as a member of the upper house in New South Wales and from time to time comments on laws and expresses views which would implement what I could call a type of biblical law. Sharia law is a different holy text. For these purposes it is of no significant difference.

Mr CIOBO—I understand. What about where that was accompanied with calls for it to be done through violent means?

Dr Emerton—My own view—and here I hope I do not discredit the rest of my testimony—is that, if someone is simply calling for violent overthrow, that is ultimately neither here nor there. When I was an undergraduate student at Melbourne University in the early 1990s I would go to meetings of various socialist groups and other political groups as well. I was interested in political things. There were many people there calling for the violent overthrow of capitalism. The suggestion that they pose any threat strikes me as absurd. The idea that anyone is going to establish a caliphate in Australia through any sort of violent overthrow strikes me as so far, if that is a genuine proposition—

Mr CIOBO—No, I am interested—

Dr Emerton—I am not suggesting this about you. Mere calls for violent overthrow on their own are a dime a dozen and of no interest to the security agencies.

Mr CIOBO—I guess the reason I put the question is that I cannot help but wonder whether you have been left behind in the debate to a certain extent. The debate that your submission

touches upon to a significant extent is the notion of what is and what is not acceptable ideology. I feel that the executive, and government in the executive sense of the word as well, have taken a decision about what we believe is appropriate ideology and what is inappropriate ideology and that the legislation reflects the decision that we have taken. I simply make the point that, whilst I understand what you are saying, I would question whether we have moved on a little bit since then. Proscription and the elements of proscription reflect a decision that has been taken, and I have the feeling that you are, as I said, one step back.

Dr Emerton—May I respond?

Mr CIOBO—Sure.

Dr Emerton—On the first point, that the government may have made some decisions and I am behind—that may be true, although I would regard it as regrettable if Australia had abandoned liberal democracy for another type of government, perhaps based on populist democracy. But, secondly, the legislation does not reflect that change, because the legislation does not specify any criteria. Here, for example, there is a clear contrast, and I think it is probably a deliberate drafting contrast, between this legislation and the Communist Party Dissolution Bill. If in fact the intent of proscription is to do what you are suggesting and exclude certain ideologies, we would get better rule of law values if the legislation incorporated, for example, ‘The prohibited ideologies are this,’ and gave us a list. White suprematism may not be on the list and a certain type of militant Islamism may be on the list. Then the people could take up that issue of the shape of Australian democracy at an election and so on in the normal way political debate takes place. At the moment we are precluded from having that debate because the statute is silent, but ASIO seems to have some thought in its mind, as best one can tell, which it is not telling us about, and it kind of cannot. As I say, I think the institutional solution is to get rid of proscription.

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

Dr Emerton—Thank you very much.

[12.05 pm]

BALASUBRAMANIAM, Mr Pratheepan, Committee Member and Spokesman, Australian-Tamil Rights Advocacy Council

Witness was affirmed—

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

Mr Balasubramaniam—I do. They have been shortened over the course of this morning. I will focus on some of the issues that came up: how this proscription regime can impact on a community and how we can practically engage in community consultation. I thank the senators and members for this opportunity to provide evidence in person. The Australian-Tamil Rights Advocacy Council was formed to address the collective anxiety of the Australian Tamil community, the approximately 30,000 Tamils of Sri Lankan heritage. I am not here to pre-empt proscription of the Liberation Tigers of Tamil Eelam, the LTTE, but to draw attention to this collective fear resonating within the Australian Tamil community—a fear that the proscription of the LTTE may attack a symbolic and practical connection to Sri Lanka. What we term ‘symbolic connection’ is an ingrained and diverse attachment to our history, territory and people. Our practical connection is our unconditional support of the Sri Lankan Tamil population through the devastating 30 years of war and a tsunami. Against the backdrop of these connections, it is the very nature of the proscription regime that creates this fear.

To elaborate on two of our concerns, it seems that a decision to list is open to be made without a real assessment of the actual harm to Australian citizens, and also the decision-making process, which we have discussed, is severely lacking in community consultation. Although the LTTE is not listed, these factors contribute to a real and growing uneasiness that the operation of the listing regime will attack or affect our everyday actions, opinions, connections and involvement in Sri Lanka. Such a listing could be imminent and, if it occurs, it will in effect ambush our community. This is because prior to a decision to list there is no avenue for the community to find out or predict that a listing might be imminent. The community is not consulted as part of the decision-making process and the decision takes effect as soon as the regulation is passed, which is basically overnight.

Given that the LTTE controls from one-half to two-thirds of the north and east of Sri Lanka, our attachment is, in a very complex way, intermingled with their presence, administration and broader state-building aspirations. It is these that I wanted to draw on briefly. In order to understand the symbolic and practical connections, I need to briefly explain the broader state-building aspirations of the LTTE, that territory it administers and its peace initiatives, and how the Australian Tamil community is, in a very complicated way, intermingled with all of this. In 2001, a ceasefire agreement was brokered between the Sri Lankan government and the LTTE. The agreement represented the LTTE as the representative of the Sri Lankan Tamil people. The peace agreement has broad international recognition and support. At the time of signing the agreement, the LTTE controlled or administered nearly two-thirds of the north and east of Sri Lanka. Checkpoints or defence lines divide the territory administered by the LTTE and the Sri Lankan government, and a visa entry system is implemented.

This is the critical point: during the nearly four to five years of post-conflict development, the LTTE consolidated much of its civil, administrative and social planning objectives. It has a police force, a legal system, a judiciary, a customs and tax system, and its own banking institutions. With the support of local and international NGOs, it has rebuilt roads, schools, medical centres, children's homes and other necessary infrastructure damaged during the war. Its planning and development secretariat administers and coordinates the work of all NGOs—they have to be coordinated by the LTTE—and its peace secretariat, which falls under its political division, engages the Sri Lankan government in peace talks.

It is the general view of the mainstream expatriate Tamil community—and I am not here to debate whether it is right or not—that government sponsored violence in the 1970s and 1980s saw the collapse of the rule of law and the exodus of over a million Tamils from Sri Lanka. Sri Lankan Tamils migrated to Australia—as well as to many other parts of the world—during the seventies, eighties and nineties. As a community, we are well integrated and value the right to education and employment as a way of contributing to our greater Australian society. We see ourselves as Australians and as Tamils. As Tamils, we generally support and see the need for the LTTE's broader aspirations of state building as a vehicle for the self-determination of Sri Lankan Tamils.

Since migrating to Australia we have maintained a symbolic and practical attachment. To elaborate, the symbolic connections are the attachment to the territory demarcated by the LTTE, the attachment to the people of the north and east and the attachment to the historical struggle for Tamil self-determination. Most do view the LTTE as a national liberation movement which formed out of necessity. Examples of the practical connections are that Australian Tamils regularly donate computers, books, stationery, vocational training equipment and other educational material for the development of schools and training centres in these areas.

Another example is that, after the tsunami, Australian charitable organisations funded rehabilitation projects amounting to over \$1 million. These projects are managed by local Sri Lankan charities within these territories. Australian Tamils regularly visit LTTE administered territories and see their relatives and family homes. In the last five years, hundreds of Australian high school and university students have visited these regions to establish links with what they view as their cultural and historical heritage. Many spend their time teaching English at schools and children's homes.

A large proportion of the Australian Tamil community remain connected to the north and east of Sri Lanka. This connection is unavoidably intermingled with the existence of the LTTE. It is with the backdrop of these symbolic and practical connections that the very nature of the proscription regime creates a fear that these connections might be attacked. One of the reasons why I am here is that, in fact, the listing regime might ambush our community overnight.

There should be no doubt that the application of our security laws must be proportionate and this should be explicitly provided for in the legislation. The need to protect our national security by legislation should be weighed up against the impact that legislation has on the community. In circumstances where an organisation poses no discernible threat to Australia, Australian citizens or Australian interests overseas and the listing of that organisation would produce actual harm to a community, it should be explicitly stated that an organisation should not be listed.

We have discussed the decision-making process appearing to be arbitrary, so I will leave that. One of the things raised was how practically you could engage a community prior to a decision. I think there are many ways that you could engage the Tamil community prior to a decision, if you were going that way, which would be helpful for any other decisions that are made in the proscription regime. You could approach the relevant community organisations. You can go through the Department of Immigration and Citizenship. You could place advertisements in national papers and community newspapers. I am pretty sure, coming from a Tamil community perspective, that there would be lots of people who would be willing to engage in a consultation process prior to a decision. That is basically one of our recommendations.

In conclusion, I would just like to draw those points again. The community is not able to find out or predict whether a listing is imminent and is not told that a listing could be imminent. There is no consultation process to find out that we can contribute to such a decision. It seems that a decision to list is open to be made without a real assessment of actual harm to Australian citizens.

It is unclear how ASIO applies its own criteria when determining whether to recommend a particular organisation for listing. I just want to touch on that a bit. We have talked about ASIO's criteria, but one of the things that is relevant to the Australian Tamil community is that there is no clear distinction between an organisation engaged in terrorism and one that is engaged in armed conflict. There is significant opinion which suggests that the LTTE in Sri Lanka is engaged in an armed conflict and not in terrorism or internal disturbance. The LTTE is also a recognised party to an internationally recognised ceasefire agreement. It has previously engaged in numerous peace initiatives.

Related to this point is that on some occasions the listing of organisations can be counterproductive to the peaceful resolution of those conflicts. It criminalises particular organisations and also disengages the diaspora community from engaging those organisations in peaceful ventures. In that regard, it can actually be counterproductive to reducing the politically motivated violence in another country. On that note I close my comments.

CHAIR—The committee has not been notified of any proposal to list the LTTE at this stage. Can you tell us whether there is some scuttlebutt or rumour going around the community at the moment that it is about to be listed?

Mr Balasubramaniam—We are in a very difficult situation where we believe that the Sri Lankan government or representatives or groups of the government might be engaging foreign countries to list the LTTE. There are particular groups in Australia that represent the government which might be lobbying the government to list the LTTE. We are concerned that the regime is open to list them without necessarily understanding the effects on the Australian community and the effects in Sri Lanka as well.

CHAIR—If the decision was made to list it, what effect would that have on the local community?

Mr Balasubramaniam—Because of these concerns that we already have, what happens is that people start distancing themselves from the country, basically. You cannot engage in Sri Lanka without somehow being connected to the LTTE. When I went there two years ago I had to

go through the Sri Lankan checkpoint to get into LTTE-administered territory. I had to engage with them, and get stamps, to visit my family home. That is a natural part of our lives. We contribute lots of equipment, money for rebuilding and things like that. For instance, we give money for the support of orphanages. For schools we give computers. For hospitals we give medical equipment. These are everyday things that happen where we engage with our community back in Sri Lanka. So the answer to that question is that it would impact gravely on our everyday connections with Sri Lanka.

CHAIR—Is there much dialogue between the two sides within the Sri Lankan community in Australia?

Mr Balasubramaniam—From the point of view of the younger generation there is lots of dialogue that goes on, and we are good friends; but when it comes to issues like the conflict there are amicable differences that are just left aside. From the point of view of the older generation there is not much dialogue.

Mr CIOBO—You made reference to unconditional support for the Tamils as a separate state. Does that unconditional support extend to, for example, UNICEF observations about recruitment of child soldiers? Amnesty International has been reported as saying that there is a culture of fear that dominates Tamil society in Sri Lanka. Does it extend also to not enforcing requirements that rules of armed conflict such as not targeting civilians, protecting hospitals and schools and so on are all abided by?

Mr Balasubramaniam—In answer to your question, I did not actually say there is unconditional support for a separate state for the Tamils—I was talking about unconditional support for the Tamils in the context of the war, not necessarily for a separate state.

Mr CIOBO—In that context I repeat my question.

Mr Balasubramaniam—I would rather not get drawn into things that are going on in Sri Lanka.

Mr CIOBO—But these issues have direct relevance to exactly what we are talking about. I do not think it is possible for you to delineate between the two.

Mr Balasubramaniam—From the proscription regime's point of view, those issues are probably of no concern in terms of harm to Australian interests, harm to Australia or harm to Australian people.

Mr CIOBO—Why not? Many Australians travel.

Mr Balasubramaniam—They do, and there is that risk of attacks on tourists that came out in the PKK report.

Mr CIOBO—So that is a direct threat to Australian interests.

Mr Balasubramaniam—In terms of the question in relation to child soldiers and civilians being targeted, that is a risk, and I probably cannot take that away. The threat may be there, but with respect to the risk of it eventuating, I am probably not in a position to assess that.

Mr KERR—You would say that the risk for an Australian travelling in a zone of civil war anywhere in the world is large. That does not therefore mean that you criminalise the participants on one side in the civil war.

Mr Balasubramaniam—The point was made that by criminalising one side you basically open up the other side to go about and continue what has been happening for over 30 years.

Senator ROBERT RAY—But isn't the real dilemma in this case not just to do with issues that are directly concerning you but delineating between forces of national liberation and terrorist acts? So the various Tamil troops up in Elephant Pass clearly meet the criterion of national liberation. There is no question about that. But when a bomb goes off in Colombo in a bus queue, that hardly qualifies as national liberation. That is the dilemma that governments, this committee and others have.

Mr Balasubramaniam—So it is a question of degree, I guess, of how much of a national liberation movement they are as opposed to how much of a terrorist group they are.

Senator ROBERT RAY—Do you have a percentage formula that would help me?

Mr Balasubramaniam—No.

Mr CIOBO—This is the point I was trying to make; it is exactly the same issue of characterisation. I suspect you particularly used the words 'unconditional support'—

Mr Balasubramaniam—Of the Tamil population.

Mr CIOBO—That is why I asked you directly about that because your statement seemed very deliberate to me.

Mr Balasubramaniam—Unconditional support of the Tamil population is what I said, but I said that we also support the broad aspirations of the LTTE's state building, which are basically civil administrative functions, police force, judiciary, children's homes and schools.

Mr CIOBO—To pick up on Mr Kerr's point, I put it to you that this is not about taking sides; it is about drawing a line about activities that are characterised in the main as terrorist activities and not activities of a liberation army. Therefore, to the extent that a liberation army engages in terrorist activities, I submit, rightly perhaps, that it should be a proscribed organisation. That is not saying on which side we want to find ourselves; I put it to you that I would be just as open if the other side engaged in those same activities to seek the same outcome.

Mr BYRNE—It does.

Mr CIOBO—That may be the case.

Mr Balasubramaniam—Can we get that on record.

Mr BYRNE—I am wondering about the effects of proscription. I understand that the LTTE is proscribed in the United Kingdom, Europe and the United States, and I am not quite sure about Canada. What has been the experience of the UK Tamil community as a consequence of proscription?

Mr Balasubramaniam—I am not sure of the effects on the community in the UK. I do not have close links there. It is the proscription of the LTTE in those countries that is drawing out the fear in Australia.

Mr BYRNE—Of those large Tamil diaspora populations, Australia seems to be the only country where the LTTE is not proscribed at the present time.

Mr Balasubramaniam—That is correct. I believe Canada has also proscribed the LTTE.

Mr BYRNE—Canada has proscribed them—and I know there are hundreds of thousands of people with a Tamil background in Canada—and the UK, Europe and the United States have proscribed them. They have all determined that the LTTE in their view is a terrorist organisation. Why wouldn't Australia do the same, given that those countries have, particularly those with large Tamil populations such as Canada and the United Kingdom?

Mr Balasubramaniam—I would hope that Australia would make an independent decision, independent of those countries, and I would hope Australia would look at the genuine on-the-ground situation in Sri Lanka, which shows evidence to support the fact that there might actually be a shadow state operating in certain parts of the north and the east which might take them closer to an armed group and away from a terrorist group. Again, I probably cannot sit here and argue that question about degree. I do not have the intellectual ability to do that. I would hope that Australia would make an independent decision, independent of those countries' listings.

Mr BYRNE—How many people of Tamil background would you say provide material support to the LTTE?

Mr Balasubramaniam—Again, it is a question I probably cannot answer. I am here to draw out the collective—

Mr BYRNE—No, that is not quite right because you represent the Tamil community and you would deal with the Tamil community. What percentage would you estimate would provide support to the LTTE?

Mr Balasubramaniam—I cannot answer that question. I have no idea. I am here to represent the Tamil community in regard to the negative impact proscription would have on them in terms of their historical, cultural and symbolic connections to Sri Lanka.

Mr BYRNE—You would have to know. How many of the charitable organisations that you are aware of that operate in Australia—and you mentioned them—provide support to the LTTE?

Mr Balasubramaniam—As far as I know, the charitable organisations that I know of provide no support to the LTTE.

Mr BYRNE—None?

Mr Balasubramaniam—None.

Mr BYRNE—Are you aware of how many Australians of Tamil background would be providing support, material or otherwise, to the LTTE?

Mr Balasubramaniam—No.

Mr BYRNE—Therefore, if the organisation was proscribed, as they have been in these other countries, you are not aware of the impact of that on the Tamil communities, from what you have said in your evidence. So how then can you make a judgement about how it would affect the Tamil community here in Australia?

Mr Balasubramaniam—I make the judgement based on the lived experience of how, even in the context of a proscription possibly occurring, the Tamil community has started distancing itself from its connections to Sri Lanka—not just material support, but everyday connections. If a listing were to occur—and they would know of it, because it would be big news for them—they would distance themselves much further from their connections to Sri Lanka and much division would take place in the community.

Mr BYRNE—Would you say that the LTTE is broadly supported by most of the Tamil community in Australia?

Mr Balasubramaniam—Not everything that the LTTE does is broadly supported by the Tamil community in Australia. But I will go back to what I said previously: there is a complicated history behind Sri Lanka and the LTTE is viewed to have been formed out of necessity as a national liberation movement.

Mr BYRNE—How would you respond to comments that have been made to me by leaders of the Tamil community that in fact they deplore the terrorist acts that have been conducted by the LTTE in Sri Lanka? They agree with their broad aims, but do not support the terrorist acts.

Mr Balasubramaniam—No comment. It is a democracy. We all have different views.

Mr BYRNE—What I am saying to you is that you have members of the Tamil community who are saying that the LTTE commits terrorist acts. These are community leaders who are telling me this, not just one or two people.

Mr Balasubramaniam—I cannot answer that question. A lot of people tell me that the LTTE is not a terrorist organisation. They would also be community leaders and they say that the LTTE are a national armed group.

Senator ROBERT RAY—I did hear you say that this was not a pre-emptive strike against proscription, but I must congratulate you on getting very close to it. There is one part of your

submission that I strongly disagree with, and I want your response to this. Right at the end of your submission you say that you would like the proscription regime axed. I understand that. Quite properly, you then say, 'If it's not, we'd like X.' But you say:

That a listing may only be made if it can be shown that an organisation to be listed poses a real threat to Australia and Australians ...

I wonder where that leaves us as an international citizen. I do not think that you have thought this through because that basically implies that it is okay for us to send money overseas and have other people blown up as long as they are not Australians. That is a very narrow view, dictated by your perspective on trying to defend a position vis-a-vis Sri Lanka. You have not thought the principles right through.

Mr Balasubramaniam—The view comes from trying to apply the proportionality principle of threat to Australia versus harm to Australian citizens. In a context where there is going to be severe harm to Australian Tamil citizens then we need to look at this threat to Australia, Australian interests and Australian people more so than the general threat out there.

Senator ROBERT RAY—But how would we feel if citizens overseas were repatriating funds to blow up Australians in Australia—that it did not affect Peruvians or Mexicans but the money was coming from those countries? This is what I do not understand about this part of the submission. It is a very lucid submission, but this stands out. We are international citizens, are we not? We have a responsibility to look after the interests of everyone around the globe, not just Australians.

Mr Balasubramaniam—If we stand by that then we would have to go back to that debate about two sides arguably committing human rights violations against people and take a neutral stance and not criminalise one and encourage the other to continue in the same way that the LTTE might be accused of doing.

Senator ROBERT RAY—I find that answer totally confusing. I suggest that you go away and discuss that aspect of your conclusion with your association, because I do not think that you have fully thought that through. You have thought of a way of trying to resolve a Sri Lankan problem, not realising that you are really endorsing a bigger problem world wide by taking that narrow view.

Mr Balasubramaniam—This is about addressing the concerns of the Australian Tamil community. I will go back and take that on board and discuss it, but this comes about because we are connected to the struggle in Sri Lanka.

Mr KERR—Can I take the point that Senator Ray has raised and put it in a slightly different context? We have had members of disputing communities in Australia for a long time. You only need to look at people who come from former Yugoslavia, people who came from Serbian and Croatian backgrounds and the like. Whilst there have been conflicts in those countries, they have not spilled over in Australia. Equally and I think largely there has not been a spillover between the two groups from Sri Lankan backgrounds in Australia, but I take Senator Ray's point that when you come to this country, the country has a legitimate point to say, 'You can continue to advocate independence.' Proscription would prevent that to some extent because the governing

authority of the semiautonomous part is the LTTE, effectively. Once you come to Australia, you can advocate politically all you like that Australia's foreign affairs position should change, but is it not legitimate for us to say that we will criminalise the sending of money overseas to assist either side in an armed conflict of this kind?

Mr Balasubramaniam—I think that is legitimate but I think, in assessing the legitimacy, you have to also consider the impact on the other connections that we have as well that might be severed by proscription.

Mr KERR—That is a different point. Proscription says that you cannot advocate, support or belong to a group. Although you are not giving us a clear answer to Anthony Byrne's question, I infer from what you say that there are members of the Tamil community who would support the Tamil Tigers in the sense that they would see them as a liberation movement. They would happily go to functions and if there were not a law preventing it, they would send money back to assist. In that context, what I am saying is that, in a robust democracy, you can allow the expression of opinion but we have laws that stop Australians from going over and fighting for groups such as the Tamil Tigers. We have said basically that once you come within the protection of Australia then you have to, in a sense, play a part in a global community where we are not going to export violence.

I am wondering where you see the boundary line should be because some restrictions on Tamils' capacity to engage directly in support of even a liberation movement are already in the law. The membership of the Tamil Tigers is not proscribed, but you could not as an Australian, I think under existing laws, send money to the Tamil Tigers and you are certainly prohibited from going as an Australian and fighting for the Tamil Tigers. It would be an offence under our foreign incursion laws. Where do you see that it is legitimate to draw this line, as members of the Australian community? That is the point I think Senator Ray is making—that there has to be some sort of recognition that, once you come within Australia and become a citizen or a member of the Australian community, to a certain degree you have to leave behind some of the conflicts that might have otherwise motivated you in the past. We have kept changing those lines; we have made them tighter. It used to be about Australians going overseas to fight in the Spanish Civil War—that would now be prohibited on both sides.

Senator ROBERT RAY—In Mr Kerr's verbalisation of my position, he has moved it a fair bit!

Mr KERR—Only to try to improve it!

Mr Balasubramaniam—Can I take that on notice?

Mr KERR—Yes.

Senator ROBERT RAY—Would you like to get back to me, if you are happy to take things on notice, on whether proscription powers should only be applied to organisations that are a threat to Australia or whether a threat to other citizens around the globe should be taken into account. Would you like to respond to us in writing? I would appreciate it.

Mr Balasubramaniam—Yes.

CHAIR—Thank you for your evidence. If the committee has any further questions, we will send them to you in writing.

Proceedings suspended from 12.35 pm to 1.31 pm

SIMMONS, Ms Frances, Associate to the President, Human Rights and Equal Opportunity Commission**VON DOUSSA, Mr John, President, Human Rights and Equal Opportunity Commission**

Witnesses were affirmed—

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

Mr von Doussa—Thank you for inviting the Human Rights and Equal Opportunity Commission to appear to give evidence today. HREOC recognises the proscription of terrorist organisations is an important tool in the legislative armoury to address terrorism. Organisations that advocate and commit violent acts against civilians in an attempt to achieve their political or ideological goals are to be abhorred. Governments clearly have an obligation to do all that they can to deny legitimacy to such groups and prevent such acts.

However, the methods by which the government seeks to prevent terrorism must not disproportionately curtail the human rights of those who may be caught up in the exercise of the laws. Laws which deliver an unfettered or very broad discretion to the executive may lead to arbitrary and disproportionate decision making in breach of human rights law. The existing proscription process is an executive process under which the Attorney-General has an extremely broad discretion in determining whether to list or delist an organisation as a terrorist organisation. No merits review of the Attorney-General's decision is available. Review is limited to judicial review, and in the context of the proscriptive process that is not a realistic protection.

The proscription of a terrorist organisation triggers the application of criminal offences set out in division 102 of the Criminal Code. However, there is no way for defendants in criminal proceedings to test a central element of the prosecution case—namely, that an organisation is in fact a terrorist organisation.

The serious consequences that flow from proscription underscore HREOC's concern that the current process creates the potential for arbitrary and disproportionate decision making. In HREOC's view the existing process has three fundamental problems: firstly, the absence of any criteria for the exercise of the Attorney-General's discretion to proscribe or delist an organisation; secondly, the lack of opportunities for interested parties to oppose the proposed proscription of an organisation; and, thirdly, the absence of a merits review of the Attorney-General's decision to proscribe a terrorist organisation.

The lack of transparency of the process undermines public confidence that the proscription power will be exercised in a non-discriminatory way. In HREOC's view the current mechanisms for parliamentary control of the listing process are insufficient to remedy those problems. Concerns about the proscription process have already been ventilated in the Sheller inquiry review of security legislation. In addition, concerns about the scope and application of the derivative offences and the broad definitions of 'terrorist act' and 'advocate' have been addressed by the recommendations of this committee in its recent review of the security and

counterterrorism legislation. The Sheller committee report provides practical options to improve the fairness and transparency of the proscription process. HREOC strongly endorses the Sheller committee's unanimous conclusions that, firstly, criteria for proscription be determined and stated; secondly, in all but exceptional circumstances, proposals to proscribe an organisation be made public and, if practicable, affected parties be given the opportunity to be heard; and, thirdly, that proscription decisions be widely publicised.

Ideally, HREOC believes the proscription process should be a judicial process rather than an executive process. Under a judicial process, questions about how an application can be fairly heard, the assessment of evidence and the management of security-sensitive information would be resolved by an independent and unbiased judge. In a climate where there is misunderstanding and fearfulness among Australia's Muslim community about the operation of counterterrorism laws, the old adage that justice must not only be done but must be seen to be done is more relevant than ever. Judicial oversight will avoid any perception that listing decisions are politically motivated and it will help ensure that the process does not operate in a discriminatory or arbitrary manner.

In the event that proscription continues to be an executive process, HREOC supports the Sheller committee's recommendation to reform that process to create a method providing affected parties with the right to be heard in opposition. In addition, HREOC believes merits review should be available to challenge the factual basis of the Attorney-General's decision. Since its introduction the proscription process has attracted considerable criticism. HREOC urges the committee to recommend the reform of the proscription process and endorse the creation of a judicial proscription process.

I will, if I may, tease out one paragraph of our written submission before the committee—that is, paragraph 48 of the submission filed in February this year. In that paragraph, HREOC supported without qualification the implementation of the Sheller committee recommendation for changes to the executive process if the proscription by judicial process is not adopted. The Sheller report proposal included the addition of an independent statutory advisory committee to advise the Attorney-General. The precise role of this committee is not clear to us but HREOC is prepared to support the introduction of an advisory committee if its function is to be the body which calls for and receives responses from interested parties who oppose the making of the proscription regulation. The committee would then have the function of assessing that material, along with material received from ASIO and the Chief General Counsel of the Australian Government Solicitor. However, presumably the advice of the committee would not bind the Attorney-General. The Attorney-General would presumably retain the power to make a decision that did not follow the advice. To make the role of the advisory committee meaningful in these circumstances, the legislation should require that the Attorney-General must take into account the advice of the committee—though not necessarily follow it. As the Attorney-General could depart from the advice, HREOC's proposal that there be a judicial merits review remains important.

CHAIR—Thank you. Have you had any evidence that any of the present laws and arrangements that are in place have proven to be discriminatory?

Mr von Doussa—We do not have hard proof of that, but there is certainly a perception amongst the Muslim community that they have been discriminated against. I am not saying that is right, but there is the perception there, and that seems to us to be a difficulty.

CHAIR—Do you personally think that proscription is the best way that we can possibly counter terrorism, or is there another way?

Mr von Doussa—I think it is one amongst many things that one would need to do to counter terrorism, but I think it is important. I think it has the benefit which has been discussed here of identifying an organisation which people should avoid associating with.

CHAIR—The third thing I would like to ask is: do you agree with the United Nations report on the Australian definition of terrorism being too broad?

Mr von Doussa—Yes. It is broad in the sense that it does not have criteria that must be taken into account by the Attorney-General or anyone else that has to review the decision.

Mr BYRNE—I have a couple of quick questions about judicial authorisation. If you are basically asking that the Attorney-General submit an application to you, what would be your threshold if you were the judge of evidence that you would require to proscribe an organisation?

Mr von Doussa—I would envisage that, as you say, there would be an application made in the ordinary way to a court, notification of that would be given to those that might be affected by it and the opportunity to respond would then be available, which is one of the things that seems to be generally required by administrative law or some similar process. I imagine the legislation would address this question of proof and I would envisage that the court would be authorised to take into account a report from ASIO so that that basic information would be before the judicial body, the same as it would be before the Attorney-General, without having to call evidence from people. Then the judge would have the power under the National Security Information (Criminal and Civil Proceedings) Act to receive evidence but to impose confidentiality as necessary to protect security and at the end of the day would make a decision based on all the information that was before the court.

Mr BYRNE—You said that you would be asking people that may be affected by the proscription to appear before you and present the case as to why they should not be proscribed. If you received classified information from an organisation like ASIO, how would you give them the capacity to respond to it?

Mr von Doussa—I am not the court and I am not a judge at the moment.

Mr BYRNE—No, but you put a model up and I am just exploring the model with you.

Mr von Doussa—The courts have that function anyway. They are dealing with similar issues under control orders, or will do so. The judge has to use common sense. You can sometimes indicate to a respondent in proceedings that there is a particular issue that they ought to address without identifying the source of the information that gives rise to the issue.

Mr BYRNE—To explore this a bit further, if there was information that you could not divulge in the interests of national security to the respondents and therefore you had to make a decision basically primarily based on the undeclared evidence that you received from ASIO, how would you go about doing that?

Mr von Doussa—That is not a novel situation either in courts. You simply do not disclose it. You would say to the respondent: ‘There is other security information which I’ve taken into account. Because of the nature of it, it’s not possible to put it into the public domain.’ That sort of thing happens in criminal trials now, where the police say that they have confidential information from an informant they do not wish to reveal. Those sorts of things arise.

Mr BYRNE—When the respondent asked you when you were making a decision and you decided to proscribe on the basis of information that you could not provide to the people in front of you, do you think they would say that was a transparent process?

Mr von Doussa—They would perhaps be unhappy that they did not get it all, but I think they are likely to treat it as a transparent process and certainly an objective process. The same issue will arise if there is some sort of merits review, too, and, to some extent, even on judicial review, because one of the issues on judicial review would be whether there were reasonable grounds upon which the Attorney-General could form his opinion. So the reasonable grounds would at least have to be identified, if not the source of the information.

Mr BYRNE—Could you see a situation where you had a group where you said, ‘I’m sorry; the decision is made on this basis,’ and then they say, ‘But we want to know why we’ve been proscribed,’ and you say, ‘I can’t tell you.’

Mr von Doussa—I think you would tell them. You would tell them that you were satisfied that there is a security risk that warrants the proscription, but you would not give them more detail.

Mr BYRNE—Would you therefore then argue that that is a comparable situation to what this committee does when it reviews the proscription regime?

Mr von Doussa—I agree that there is a similarity in the result, yes.

Mr BYRNE—I will leave it at that, then.

Mr von Doussa—But there are a number of practical considerations which aggregate together to cause us to continue to support the judicial model.

Mr BYRNE—But would you argue that in the scenario I have taken you through it is not entirely dissimilar to a process we currently undertake?

Mr von Doussa—I agree with that. I am not trying to advance the argument that the public have a different view of judges than politicians.

Mr BYRNE—No. I was just teasing out the model.

Senator ROBERT RAY—I am bemused by this judicial decision making, where people can come and approach it and argue against it—and merit review. Frankly, I do not really see the local reps of al-Qaeda, the Islamic Army of Aden or the Islamic Movement of Uzbekistan coming into court and arguing their case, because they would be setting off a big light and a siren for ASIO to be on the lookout for them for the rest of their lives. I do not see that happening as a practical thing.

Mr von Doussa—One of the difficulties in this is that there are a lot of derivative criminal offences that carry very serious jail terms. At some point, presumably, people are likely to be charged and, if they are charged on the basis of a proscribed organisation, how do they go about challenging that, if they wish? That is more relevant to the merits review, which is something that would occur after the event, rather than it being a front-end decision. But, unless you have some sort of merits review, that is a completely unchallengeable issue, whereas normally in a criminal case people are entitled to test all the ingredients of the offence. Here a substantial ingredient of defence is decided conclusively against the respondent by proscription.

Senator ROBERT RAY—One of the reasons we are in a complete unknown is that no-one has been charged. I have always assumed that if you did not know you were a member of an organisation the court would take that into account in assessing the case. But we do not know because this law has been in place for some time and no-one has been charged under it, which leads people to say, 'It's unnecessary law because no-one has been charged,' or others could say, 'It's working perfectly as a deterrent because we haven't had to charge anyone.' I am not sure which is the case here. But what we have not tested and what we cannot test yet is how a judge would react to a charge and where they would put the weight—whether they would think, 'Membership of the organisation means an automatic jail term,' or 'They didn't know they were a member of the organisation; there was very little publicity given to the proscription,' et cetera. I do not know whether you have any views on that but I do not know.

Mr von Doussa—Ignorance of the law is not usually seen as a defence; that is one of the difficulties.

Senator ROBERT RAY—It is sometimes influential in sentencing, though, I would have thought.

Mr von Doussa—It is.

Senator FAULKNER—Can I ask you about the matter you raise in paragraph 34 of your submission, which goes to the issue that has been in the front of the minds of many of our witnesses during this hearing, which is the question of the criteria that apply and the recommendation that HREOC brings forward to bring an additional criterion to bear considering whether proscription is proportionate in all the circumstances.

Perhaps I am wrong in describing that as an additional criterion, because I do see in your footnote about how, in fact, you would see it would need to adopt provisions similar to section 104.4 of the Criminal Code. Could you perhaps explain to the committee how you would see this working in practice and the benefit of it in the circumstances?

Mr von Doussa—It is one of the requirements of international law that if you are going to impinge upon the rights of assembly and expression and so on that the impingement or the derogation from that right be proportionate and necessary in the circumstances. That is the genesis of this.

The way in which it has been approached in international law is to see whether you can achieve what you want to achieve by some lesser means. That probably is going to get us back to the criteria. Again there was discussion today about connection with Australia. In some circumstances, you could say, 'Well, the fact that there is no immediate connection with Australia doesn't matter because you are protecting an overseas interest.' But there may be other circumstances where there does not appear to be any need to proscribe a particular organisation, because it appears to be fairly innocuous in what it is promoting or whatever the reason might be. So it is really inviting the Attorney-General to ask the question: 'Do I really need to go this far?'

Senator FAULKNER—What force in law do you see the criteria that have actually been adopted—by the former Director-General of ASIO, I think—as having? They are well known publicly and this committee of course has canvassed the need to make public the criteria. What force in law do those criteria have? What is your understanding?

Mr von Doussa—At the moment my understanding is that they have none at all because they are not part of the law. What the criteria ought to be is really a matter for experts in the security industry to work out. We are not experts in the field.

Senator FAULKNER—No, I appreciate that.

Mr von Doussa—They could identify a number of factors which they think are important. The Attorney would be required to have regard to those, so it becomes a checklist. It also gives substance to the law, which is necessary when there is an application for judicial review—what are the issues that are seen to be relevant; what should have been taken into account?

Senator FAULKNER—I completely accept the point you make about HREOC not being a security agency. I think it is reasonable for me to ask you then not in relation to what criteria are chosen—you say that this is really not a matter for HREOC; I accept that completely—but can you say to us whether you believe the criteria should have statutory force?

Mr von Doussa—Yes. In our submission we do express the view that there is some international authority to suggest that where you give a very broad discretion to somebody that does not meet the requirement of the ICCPR to prescribe by law the grounds for derogation from a right. If you put some specific substance to the law such as a list of criteria it is getting closer to meeting the international test.

Senator FAULKNER—But in relation to the criteria that exists at the moment, the status of which we have just been canvassing, HREOC has no view as to whether that list should be expanded? In other words, you do not see your recommendation to consider the requirement for a consideration whether proscription is proportionate in all the circumstances as an additional criteria; you see it as being a separate provision in the Criminal Code? I want to be clear on this.

Mr von Doussa—It is as an overriding qualification to the exercise of the power.

Senator FAULKNER—Yes, and not a criterion?

Mr von Doussa—No, not as such. There would be a list of things to be taken into account. Presumably it would be expressed in terms of matters to be taken into account; not every matter has to be fulfilled. There seems no reason not to start with the list of six that have been identified by ASIO, but there may be others that become relevant as experience unfolds.

Senator FAULKNER—I am not sure whether they were originally identified by ASIO. They may not have been.

Mr von Doussa—Or whatever ASIO thought was appropriate.

Senator FAULKNER—I think it would be fair to say ‘adopted by ASIO’. That would be accurate.

Mr von Doussa—Yes.

Senator FERGUSON—You said there was a perception amongst the Muslim community of discrimination. Do you base that information on the fact that people in the Muslim community have complained to you at HREOC about this discrimination?

Mr von Doussa—That was a report that came out of the various consultations we did for the *Isma* report. My understanding is that it has been repeated in a more recent program that HREOC has conducted with the police and Muslim youth in Melbourne. It is mentioned in one of the submissions to this committee by one of the Islamic groups that they have that perception. I think the Attorney-General himself has mentioned it in speeches. There seems to be a body of opinion all going one way on that.

Senator FERGUSON—If it is a perception and not a fact, how do you allay the fears of the community?

Mr von Doussa—That is a difficult thing. We embarked upon various awareness programs to try to get people to understand the law, the system and what these proscriptions actually mean and that they are not necessarily targeting their religion. But one of the things we think would help is to have some body independent of the executive that actually made the decision—just one step further removed—in the hope that that would help alleviate the perception.

Senator NASH—Why would that help? I know that seems a very basic question, but why would it help? Are you saying that having the decision with the executive is looked at in negative terms and moving it away from the executive would be helpful?

Senator FERGUSON—It is because they are listed and not who lists them that I think is the problem.

Mr von Doussa—The perception seems to be also that the government—‘the government’—is targeting religion. The government gets blamed for all sorts of things—rightly or wrongly.

Senator FERGUSON—We had noticed.

Senator NASH—If somebody else or some other body did the listings then it would not be seen as discrimination? Is it being seen as discrimination because it is the executive that does it?

Mr von Doussa—It is less likely to be. If the body is set up, particularly with criteria and so on, so that it has the appearance of being an exercise that is objective and independent of government, there is less likely to be the perception that somebody has another agenda which is targeting a particular religious faith or whatever it might be.

Senator NASH—But if the criteria are the same for both, it really should not matter who works to the criteria.

Mr von Doussa—But our whole legal system is premised on the idea that you separate the exercise of powers. The judiciary and the court system are separate from government to try and break down perceptions that might otherwise follow. If you had the government deciding all tax appeals, there would be a quite plain perception that there was a conflict of interest. It is to try and break that perception.

Senator ROBERT RAY—But it all comes back, of course, to the bona fides of appointing the panel to advise. Traditionally, in this country, there is a whole range of positions—including judicial ones—where governments appoint on merit and not on bias. I can only think of one bad exception with this government, which a couple of my colleagues know about. But generally, when they are appointing an ombudsman or an inspector-general, these people are quite neutral. But you would have to have that apply to your case, wouldn't you?

Mr von Doussa—Yes, certainly.

Senator ROBERT RAY—Someone did suggest the possibility of a panel consisting of A-G's, ASIO, Foreign Affairs et cetera. I would not regard that as terribly independent.

Mr von Doussa—I agree with that.

CHAIR—Would there be any chance of us receiving a copy of that updated report you mentioned?

Mr von Doussa—The *Isma* report?

CHAIR—Yes.

Mr von Doussa—Yes, certainly. It is readily available. I will check—I think there is a public report on the outcome of the program we have done with police and Muslim youth. It may not be a very long one, but there is a report on it.

CHAIR—In your submission you talk about a judicial merits review if the judicial situation does not go through. What is that?

Mr von Doussa—It is a merits review conducted by a judge. I would not draw a hard and fast distinction between that and a merits review by the security section of the AAT.

Mr BYRNE—There is a comparable situation in the UK with a merits review judge. Have you seen how the system in the UK has worked?

Mr von Doussa—I think we need to take that on notice.

Mr BYRNE—Could you get back to us with the number of cases that have proceeded to merits review following proscription?

Mr von Doussa—Yes, certainly.

Mr BYRNE—Failing any substantive changes in the way in which you have put them forward, how would you feel if there were, for example, a more fulsome statement of reasons provided that might address some of those criteria without impinging on security matters? Do you think that might assuage some of the concerns in the community about transparency of process?

Mr von Doussa—The better the reasons the less likely wrong perceptions are, whatever the context.

Mr BYRNE—If we were to tweak the system, if there were some sort of adjustment to it—as I said, without impinging on any security issues—would that address some of the issues of concern in some of the communities that are affected?

Mr von Doussa—It may go some way towards doing it, but I do not think it would cure the problem.

Mr BYRNE—We do not live in a perfect world, though.

Mr von Doussa—No.

Senator ROBERT RAY—It is difficult when 18 of the 19 proscribed organisations have an Islamic bent. With those statistics it is pretty hard to do anything to alter the perception, even if it is not the reality.

Mr von Doussa—We have made some suggestions which we hope will help.

CHAIR—Thank you for your evidence today. If the committee has any further questions, the secretariat will send them to you in writing.

Proceedings suspended from 2.02 pm to 2.27 pm

HIGGINS, Mr Karl Mark, Director, National Security and Counter Terrorism Section, Department of Immigration and Citizenship

McMAHON, Mr Vincent, First Assistant Secretary, Border Security Division, Department of Immigration and Citizenship

Witnesses were sworn or affirmed—

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

Mr Higgins—No.

Mr McMahon—No.

CHAIR—I was amazed to read that you have 550,000 people of concern on an alert list. That seems to be an incredible number. In your activities with terrorist suspects, roughly how many visas would have been rejected in recent years?

Mr McMahon—On the basis of terrorism alone?

CHAIR—Yes.

Mr McMahon—The numbers are quite small. I think they are published in the ASIO annual report but, essentially, they are of the order of maybe 10 or fewer a year.

CHAIR—How would that compare to the people with criminal records that you are after?

Mr McMahon—Some of that data is quite hard for us to pull out simply because of the way our own systems report. That is actually a number that I have been chasing for a while. I do not have it, but it would probably be in the 50s or something like that. Can I just comment on the structure and nature of the movement alert list?

CHAIR—Yes, please do.

Mr McMahon—I can flow back from that a little more articulately. We have about three million records in all, and most of them are records that relate to documents such as lost or stolen passports et cetera. As you say, we have around half a million records that cover a range of interests such as police, national security and immigration. Roughly 60 per cent of the records are personal records, national security records. In that sense we act as a simple agency for ASIO. We then have a range of other records that relate to immigration concerns such as previous overstayers, health issues and character issues. We have about a quarter of a million referrals each year from the primary line to the secondary line, and by far the largest proportion of those is around documentation and possible matches to the movement alert list. The matches often relate to health undertakings and to previous stays within Australia. So there is absolutely no question that, when you really get down to it, the numbers involved around national security, the

ones that actually end up with an adverse assessment—and an adverse assessment would normally lead to a visa refusal or visa cancellation—are very small.

CHAIR—But you are in fact almost first line, aren't you, because those refusals would have come from overseas offices?

Mr McMahan—Correct. The whole strategy of the movement alert list, the name checking and profile checking that we do, the checking against the national security handbook, is about trying to identify people before they come to the country.

Senator ROBERT RAY—When you knock someone back for a visa, do you fully disclose the reasons why you have knocked them back in terms of one lot is health and one lot is this, but this lot is national security?

Mr McMahan—Correct. We basically say under which provision they were knocked back. There is no disclosure of reasons. To get the reasons around the decision, because we are only acting as an agent in this case, they would need to go through a legal process. When I say that we are an agent, I mean that we do not make the national security assessment. Once the national security assessment is made we then make decisions under the Migration Act, and the Migration Act is quite specific about how we must treat an adverse assessment. In some cases it virtually operates as a matter of law and the person is refused because there is an adverse assessment. For example, in some cases where the person is a permanent resident it is not automatic, and the minister must consider the case in terms of the character provisions.

Mr KERR—Can you help us through the way in which this would operate in relation to applicants for refugee status? We have had submissions from the Refugee Council of Australia, and I would be assisted by some clarification. This is a hypothetical example only: assume somebody comes to Australia claiming refugee status on the basis that they are subject to possible persecution in Turkey because of their membership of, or association with, the PKK. That is a listed organisation. They are not excluded because of a convention-related reason—in other words, they have never themselves been responsible for an act of terroristic violence so they do not fall outside. They are assessed as being in need of protection. How then does that process operate? Does the fact that they have had a prior membership of what is now a proscribed organisation give any automaticity to a refusal? I think that is the concern: how would the assessment proceed in a context where there is this proscription regime? I am trying to get a fix on exactly what happens.

Mr McMahan—I can sort of divide the process neatly in the beginning. I will then try and develop it a little bit more. Clearly, there are a number of areas where other ministers or other authorities make decisions which then have implications for the way in which we go about decision making within the Department of Immigration and Citizenship. It could be the Minister for Foreign Affairs who makes a judgement that a person is a threat to international affairs or whatever. In the case of an adverse assessment, we then have to work through the category of the application to see what the effect of an adverse assessment is. For an application for temporary protection, it is a refusal if an adverse assessment has been made. But visa cancellation is not automatic. If you have a visa, it requires a considered process and a decision in terms of the character provisions of the act. Depending on the category and where the person is, the impact on the act is different.

I think you are going to a slightly different point. In respect of the way the identification of a person being with a proscribed organisation works, as I understand, ASIO's processes are very similar to the processes we go through. The existence of a person on a movement alert list is in itself in a sense inconsequential. It simply provides a basis for a decision maker to have information before them so that they can make a decision. We could put someone of serious concern on the list, but when it comes down to it the decision maker must make the decision on the merits of the case. I would expect that a similar provision exists in respect of ASIO such that the proscribed organisation provision brings to its attention someone of potential national security concern. I cannot comment on how its processes go from there.

Mr BYRNE—Say for example that the PKK is listed and then you start having applications from people of Kurdish background from Turkey. What happens?

Mr McMahan—Essentially, there are two ways in which we would make a referral to ASIO. The first is if ASIO has placed on a movement alert list that person's name. We would simply refer that to ASIO and we would cease processing at that point in time. Before a decision maker can make a decision, they need to have all the information before them. That is an established referral process within government. Similarly, we have the security checking handbook, which provides the department with a list of other people who need to be referred to ASIO. It then needs to make an assessment as to whether or not that person is a direct or indirect threat to national security. That then comes back into our sphere for the decision-making process to take place. That depends on the type of application, where the person is et cetera.

Mr BYRNE—What about a short stay visitor visa, for example, where it is someone of Kurdish background who is not on the list of people of interest or on a movement alert list or whatever, and that person applies? What happens? They are not on a movement alert list; you have not been notified about them. When they come to this country, are you required to notify any security agency and ask for a security check to be undertaken before they are given clearance to come into the country?

Mr McMahan—Without going to the particular circumstances, we have guidance about who we need to refer. That is contained in the security checking handbook. That is our basis for referral if it is not a name match. In some cases, there will be overlap—it will be both a name match and a requirement for us to refer. Parts of the security checking handbook ask us to make a judgement about whether we think this person may be of a national security concern. That may come through the application process, the interview process or whatever. We would make that referral. There could also be information provided by the public in respect of a person who might raise with us a concern. In other words, the national security checking handbook requires us to make referrals where issues of national security are raised.

Mr BYRNE—Is there a profile therefore that you would have in terms of when an organisation is listed that you are looking at?

Mr McMahan—There are listed countries, so the confidential part of the security checking handbook is the list of countries. In addition to that it may well be, for example, that we have a person who is not themselves falling within the detail of the handbook. If we saw they had made a number of trips to Afghanistan and then to Iraq or something like that, it may be sufficient for us to then register a concern and pass it on to ASIO for its view as to whether or not they have an

interest in the person. They may come back quite quickly and say they may not have a concern but they can also come back with what we call a 'stopper' which actually stops us from making any further decisions around the case.

Mr BYRNE—Have you had any instances of people coming into the country that subsequently have become persons of concern after you have granted them a visa?

Mr McMahon—Yes, we have.

Mr BYRNE—Do you have the details of how many?

Mr McMahon—No, we would not have details of how many—not here.

Mr BYRNE—Can you take it on notice?

Mr McMahon—We can.

Mr BYRNE—Thanks. The other thing you referred to was with respect to the hotline. How much information are you getting from the National Security Hotline that is providing some benefit to you in assessing whether or not people are a security risk in entering the country?

Mr McMahon—I cannot comment on how many we get through the hotline. Within the confidential part of the submission there are numbers there about the number of referrals we make through our own sources. Many of those are from members of communities or from the public.

Mr BYRNE—But you will get back to me in terms of that question on notice about the number of people that have come through that have subsequently become persons of concern?

Mr McMahon—Yes. Can I just comment on that. I will certainly go back and look at numbers. It does vary over a period of time but there are a number of reasons why it can happen. It goes to some very significant system and process changes that we are having in place. When a person makes an application offshore, it is checked against the movement alert list, and while the movement alert list does not change between onshore, offshore and between systems, the capacity of the systems—in other words, the algorithms and the sophistication of the systems—does change. So we do have instances where an application is made, checked against the movement alert list, and bearing in mind it is not a simple name-to-name matching. We have what we call 'notifications' and we have four million notifications in central office alone at the time of the visa load. The visa load comes in, it is loaded into the mainframe and it says, 'Here are the people who have been given visas.' At that point in time a much more sophisticated check has taken place. It is probably as sophisticated as any system in the world at that time. We then find ourselves in situations where people who have not been able to be identified through the other simpler checks and the sound-alike names and all those sorts of stuff come into it, it may be pulled up. The other thing is that we do have instances where people have entered the country—and Willie Brigitte would be an example of this—where they are added after entry and the system automatically then goes back and says, 'Okay, here's the person, does that person have a visa?' Often they will be in the country by that stage. Occasionally they will be country.

So there are a number of circumstances where people may enter the country and for various reasons they became a concern at that time.

Mr BYRNE—For some of those people who have come in and have become persons of interest after they have been granted a visa, the question would be: were those people's visas then revoked? The second question is: how long did it take for your department to become aware? Just those two questions, if they can be answered.

Mr McMahon—We often become aware relatively quickly. Very few visas are revoked on national security grounds on entry. I cannot recall, in the last one to two years, any person whose visa has been revoked as a result of arrival and an adverse assessment having subsequently been made on arrival. But we do have examples of where people arrived for one reason or another and became persons for whom a referral was required. In fact, I cannot remember any example where a visa was subsequently revoked. There certainly have been people who have been associated with organisations but on examination it was not a sufficient enough association to result in an adverse assessment taking place.

Mr BYRNE—So we are saying that a number of people have come through who have become persons of interest. You will take that on notice and get back to me. You will get back to me in terms of the time taken for those persons of interest to be identified. Could you also take on notice what action was taken? You are basically saying their visas have not been revoked but what other course of action was taken with those persons?

Mr McMahon—With respect to the final component, there is really no further immigration action required for those people. Once we have been advised that no adverse assessment is going to take place, for the purpose of the act we would expect them to abide by their visa conditions and we would not take further action. Whether or not security organisations themselves take further action, they would not tell us.

Mr BYRNE—All right, but if you could take those two questions on notice I would appreciate it.

Mr McMahon—I will.

Senator FERGUSON—I want to ask a question in relation to controversial visitors. Are there many occasions when visas are refused because a person is deemed to be a controversial visitor? I presume you are talking about the David Irvings of the world—is that the type of person?

Mr McMahon—That is correct. The most recent decision that was reported in the paper today was Sheikh Bilal Philips.

Senator FERGUSON—One of the considerations is that the application is considered against public interest criteria. What are those criteria that are against public interest? I can understand the national security criteria and the foreign policy interests but I am just not sure about public interest criteria.

Mr McMahon—Normally character, security and health would be the broad areas of public interest criteria. For controversial visitors, I think we had in our submission some of the factors

that would result in that assessment. For example, it could be where they have been regarded as disruptive to the Australian community or where they would cause conflict on arrival et cetera.

Senator FERGUSON—It says because of their activities, reputation and known record in your submission. Lots of people are considered controversial who probably still get in the door.

Mr McMahan—I have now turned to the page that you are looking at. The public interest criteria are the three that follow: character, national security and foreign policy interest.

Senator FERGUSON—What page is that?

Mr McMahan—That is the second page of the submission. It has the heading ‘Controversial visitors’.

Senator FERGUSON—Yes, I’ve got that.

Senator NASH—They are separate, aren’t they?

Mr McMahan—They are but they are the public interest criteria.

Senator FERGUSON—National security and foreign policy is that what you are talking about?

Mr McMahan—Yes.

Mr CIOBO—What bearing, if any, does it have on someone who is seeking a visa if they are a member of an organisation that is proscribed? Does that mean that they automatically go on to the people alert list? How do you go about harvesting that information? Do you do it or does it come through other agencies?

Mr McMahan—Overwhelmingly, national security organisations will place people on the national security classification for the 01s, as we call them. The organisations will put them into the system. Sometimes something may come to us and we may put them on the system, but essentially that component of the movement alert list is maintained by the national security organisations.

Mr CIOBO—So that would come through with the application when they get security clearance or otherwise?

Mr McMahan—In effect. They will put the name on. We are responsible for checking the visa applications against that movement alert list and then alerting ASIO. When the score is very high we refer it regardless of whether or not we think it is a match. A number of the other ones will come to our attention. For example, quite clearly we do not have access to all the criminal records in every country. We do ask during the visa process for character checks to be made, and the reliability of those checks between countries can vary reasonably significantly. But often migration officers will put a person on to the list when the person has expressed an interest in Australia—the person says, ‘Yes, I would like to visit Australia one day.’ The person’s name will probably go on the list because there is a possible association between that person, that criminal

record or whatever and Australia. When we remove people they go on the list. When we deport people they go on the list. People have come to our notice, for example, who have made multiple attempts to gain entry between posts. We put them on the list. So there is a range of reasons why a person might come to our attention.

Mr CIOBO—To clarify, if someone had previously received a protection visa or permanent residency and they were a member of an organisation that subsequently became a proscribed organisation, would that mean that there would be a likelihood of their status being revoked?

Mr McMahan—You are focusing on the protection area, are you? Or more broadly?

Mr CIOBO—On refugees. It is basically the conflict that was outlined earlier by Mr Byrne about someone who sought refugee status and sought a protection visa on the basis of being a member of a group which was being persecuted and then that group subsequently being proscribed.

Mr McMahan—If a person had a protection visa, whether temporary or permanent, in Australia and they became the subject of concern by ASIO to the point that they made an adverse assessment, the minister for immigration would be required to consider the possibility of visa cancellation.

Mr CIOBO—Does that flow automatically from the listing?

Mr McMahan—No, it does not. The listing, in a sense, is almost irrelevant to us other than in respect of the potential for that listing to be a referral. It flows from the adverse assessment.

Mr CIOBO—So I really need to direct that question to ASIO?

Mr McMahan—Correct. The way it goes about relating a listed organisation and how it then makes a decision about a national security concern is up to it. What we deal with under the Migration Act is the consequence of that action, and the consequence is an adverse assessment.

Senator ROBERT RAY—Reading all these submissions and knowing the regime, it is almost passing strange that you, DIAC, are allowed to do all of these things without much parliamentary scrutiny. ASIO and all the other agencies have IGIS; they have this committee. But you can make decisions in these sorts of related areas with no real parliamentary scrutiny. You are in heaven, are you not?

Mr McMahan—Actually, we have considerable scrutiny around the migration side of the decisions because the visa cancellation decisions et cetera are all subject to judicial and review processes. In a sense, we have to look at the consequence of the action of ASIO. If ASIO says there is an adverse assessment, we then need to look at what is actually before us at that moment in respect of that visa status. Some parts of the act will result in automatic refusal and some parts of the act will require us to have a visa cancellation consideration. If a visa is cancelled then it is subject to normal merits and judicial processes.

Mr BYRNE—I guess I am seeking an opinion from you. Do you think the minister should have the power to revoke citizenship if a person—

Senator ROBERT RAY—You cannot ask that.

Mr BYRNE—I will take that question back then.

Mr McMahon—Thank you.

Senator ROBERT RAY—But we will get it asked at estimates of the minister at the table.

Mr BYRNE—Okay—the big end of town again! I will defer to it.

CHAIR—There being no further questions, thank you very much for your evidence today. If the committee has any further questions they will send them to you in writing through the secretariat.

[2.59 pm]

KOBUS, Ms Kirsten, Principal Legal Officer, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

McDONALD, Mr Geoffrey Angus, Assistant Secretary, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

DEPUTY DIRECTOR-GENERAL, Australian Security Intelligence Organisation

DUNCAN, Ms Alison, Executive Officer, Counter-Terrorism Policy Section, Department of Foreign Affairs and Trade

HEAD, Mr Perry, Assistant Secretary, Counter-Terrorism Branch, Department of Foreign Affairs and Trade

WHYATT, Mr Justin, Executive Officer, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade

Witnesses were sworn or affirmed—

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

Mr McDonald—I will make some short remarks. I think the main thing that we would like to stress is that this legislation has been in place for several years now, and there are really no examples that I am aware of where this particular legislation has caused problems. A lot of the discussion and the criticism of the legislation which occurred in the context of the Sheller review was in my view generally hypothetical rather than based on actual problems with the proscription process. I would like to stress that the proscription process that we have in Australia compares very well with other countries that have proscribed terrorist organisations. In particular, the oversight of this committee in relation to each and every one of those listings and the re-listings every two years provides a level of scrutiny which compares very favourably with those other countries. In other respects I will rely on our submission.

CHAIR—Does anybody else wish to make any comments before we start? Just on that point, did the statement from the United Nations regarding our definition of terrorism being too broad cause many ripples in the department? What was your attitude to that?

Mr McDonald—It is really hard to understand why they consider it to be too broad. The definition that we have certainly is tight when compared to, say, the British definition. And, of course, at the international level there has been considerable difficulty in coming up with an agreed definition. So I guess our response to that is that we do not agree that it is too broad. In fact, the definition is quite an involved definition which, when it comes to prosecuting an offence beyond reasonable doubt, presents challenges.

Senator ROBERT RAY—One could ask a nasty question, I suppose, of the rapporteur of the sixth committee—that is: how does our definition of terrorism compare with the fact that they have never been able to come up with one?

Mr McDonald—Yes. I was not going to put it quite as bluntly as that.

Senator ROBERT RAY—But you were alluding to that, were you?

Mr McDonald—Yes, I think I was.

Senator FAULKNER—Deputy Director-General, I am interested in the six established criteria on which ASIO evaluates an organisation for listing. Could you explain to the committee, in terms of your organisation, what status those criteria have?

Deputy Director-General—We need a common understanding of what you mean by ‘listing’, because there are clearly two steps. There is the step of listing, which is meeting the legislative test in the legislation and preparing the statement of reasons. Before that there is simply a bureaucratic step which needs to determine how you manage the process and how you arrive at whatever priority. In any walk of life we all need tools to sort out our priorities, and that is where the criteria emerge from. We are asked to do a certain job within government—because our role is not within the legislation. Against the very large number of potential groups that may meet the legislative test, we have to work out where we start from. So the criteria simply have the status internally of a tool—an accountable tool rather than just a haphazard approach—as to where we start and, as we go through, what comes up next as the more likely ones that will meet the test.

Senator FAULKNER—As a measure or a tool; you use that terminology. It is a bureaucratic measure or a tool, which is basically what I would understand it to be. So it has no statutory force at all, does it?

Deputy Director-General—No; it is not in the legislation.

Senator FAULKNER—Absolutely not. Does the Director-General require officers who are undertaking this work to use these particular criteria as a measure? How procedurally or bureaucratically does it work within ASIO?

Deputy Director-General—It is simply the policy framework within the organisation that those are the things which need to be used at that sifting stage, the monitoring stage, before we arrive at which groups are going to receive a more intensive look because it is intensive to go through the actual development of a statement of reasons. That is how they arose.

Senator FAULKNER—I appreciate that. Can you say to the committee how effectively the criteria are working?

Deputy Director-General—I think they are working reasonably well. Obviously, they are partly derived from the legislation, because some of the criteria go to the legislative test. Other criteria relate to issues around intent and the levels of threat that organisations might pose to us. Regardless of the actual words that are there—and I know that some submissions have raised the

question of ideology et cetera—the criteria were drawn up not in any legal way but as an administrative tool.

Senator FAULKNER—I might come back to that, because I am interested in that issue. But, just so that I am clear on this, would Mr Head or Mr McDonald care to comment on the applicability of those criteria or their relevance to any work undertaken in DFAT or A-G's?

Mr McDonald—The criteria are used by the organisation, and, of course, that is where the criteria were first mentioned—by the organisation. From a legal perspective, of course, it is not binding. Certainly from the department's perspective we look at whether what is being proposed fits within the legislation rather than focusing on the criteria. I think this committee has recommended in the past that the criteria be given a more formal endorsement by the government. That has not occurred. It has been left really as an internal tool for the organisation, as was mentioned.

Senator FAULKNER—I think just for the purposes of the record you should say whether you are using 'organisation' with an upper case 'O' or a lower case 'o'. I think I know, but this ought to be clear.

Mr McDonald—I meant ASIO

Senator FAULKNER—I assumed that.

Mr McDonald—Yes, I thought about the implication.

Senator FAULKNER—It is insiders lingo. I do not know if there is anything you can add to that, Mr Head?

Mr Head—I would not add anything substantive. We would use it as a guide in the tasking of our posts and reporting as a useful way of clarifying the information we would be seeking as part of that process.

Senator FAULKNER—I am not sure who to direct this question to among the officials at the table. I want to come back to the issue that you raised, Deputy Director-General, about the concerns that have been raised before this committee by submitters in relation to the particular criterion 'ideology and links to other terrorist groups/networks'. The first thing that is not clear to me—and I would like to understand—is whether 'ideology' is separate to 'links to other terrorist groups/networks' or whether it is all the one criterion. Could you tell me that first of all, just to assist me with my understanding of it? What does the conjunction mean? It is actually of critical importance. So you tell me.

Deputy Director-General—I think it can be looked at as either two separate ones or, if there is an ideological link, then it becomes part of the global networks. I think that is the issue. When we look at it, it is the global networks and what links the global networks.

Senator FAULKNER—I would have thought—and, as I say, I am not sure which official necessarily to direct these questions to—that 'links to other terrorist groups/networks' is uncontroversial, but I know 'ideology' to be controversial. We know that from the submissions

that we have received at this committee and evidence in fact that we have heard before this committee today. So that is why I think that the link between the two is of concern. I do not know if you can assist me with this at all, Mr McDonald?

Mr McDonald—I can properly assist as to why ‘ideology’ is there, and that is because ‘ideology’ is of course part of the definition of ‘terrorist act’. If you look at the definition of ‘terrorist act’ the action is done or the threat is made—that is, a violent threat—with the intention of advancing a political, religious or ideological cause. So the ideology, of course, has to be read in the context of the legislation that we are working within. Of course it is relevant where the threat is connected to that ideology.

Senator FAULKNER—Your saying that might put some minds at rest. Perhaps others who are reading it are not making such a sophisticated leap of faith, because it does not say that, does it; it actually uses the word ‘ideology’?

Mr McDonald—It is a simple outline of the criteria. But of course the criteria, as we said at the beginning, is but a sketch tool. At the end of the day, what is important is working within the framework of the act. The act provides what a ‘terrorist act’ is, and the terrorist act aspect of it is quite important in this. But, as you say, it could be expressed more elegantly.

Senator FAULKNER—Surely it is fair to say that the terminology that is used has caused a great deal of concern and, dare I say, paranoia among certain community groups. It might not be fair, but it has certainly caused concern. We know that; it has been registered with us.. Isn’t there a case, given what you have just said, Mr McDonald, for us to make this particular criterion of ideology a great deal more clear than it currently is? That is the evidence you have just given to us.

Mr McDonald—Yes. I am happy to say that we could do more to make that clearer. It is certainly in the context of that definition of a terrorist act and, of course, from a legislative point of view, the definitions have to fit in there. The criterion is one which this committee has looked at before and thought was a reasonable sketch of the sorts of factors that should be looked into. It has only ever been seen in that way and, if it is causing concern, it could be improved.

Senator FAULKNER—This is the value of review, which is what is being undertaken at the moment. Perhaps you might care to comment on this also, Deputy Director-General?

Deputy Director-General—Thank you. It depends where we go with this. If there are improvements, that is fine. To appreciate our situation, when we were given this task the only guidance was the legislation. If there is additional guidance which we can get either from within government or from review then we are happy to take that on board.

Senator FAULKNER—But surely the critical thing here is that this is the guidance that is going to your officers who are using this—to use their terminology—bureaucratic measure. The criterion, which is public, is obviously also causing a range of concerns. It may be that a range of those concerns—certainly some that have been expressed at this committee—could be allayed if tighter, better and clearer language was used. I would suggest that it might even be better to break this into two separate criteria. That may be the way to go. I do not know if either of you would care to comment on that.

Deputy Director-General—I take your point completely. We welcome any further guidance anybody wishes to give us.

Mr McDonald—I would agree with that suggestion.

Mr BYRNE—Mr McDonald, I have a question for you. Some of the evidence that we have heard is that, after an organisation has been proscribed, people do not understand the full implications of it. Can you tell this committee what you do, who you go and see and what you actually tell these people after, for example, the PKK has been proscribed? Can you tell me which groups you went to see and how you described why they were proscribed and what the reaction was to that?

Mr McDonald—We take up opportunities to explain how the terrorism laws operate, but we have not gone out to talk about a specific group. For example, soon after the PKK listing occurred, I was speaking in a migrant settlement meeting in Melbourne which was put on by the Northern Migrant Resource Centre. At that discussion I was able to go through the listing process and, in particular, the main areas of vulnerability for new migrants.

The main one I identified—so that you are all aware of what I was saying—was that you could have someone coming from a country where giving funding to an organisation known to be a terrorist organisation was not a crime, and then they move to this country and continue to give donations to it. So it is important that we get out and talk to these groups, and I have a list here of various meetings that we have been to. We have also put together some pamphlets, which we are updating to put greater emphasis on the listing aspects. We are currently getting printing quotes and the like for those. We have them in many different languages. We make sure that we have all the main languages covered: French, German, Chinese, Arabic and Indonesian.

Mr BYRNE—In total, with all 19 organisations you have proscribed, how many meetings have you had with relevant stakeholders to describe the effects of the proscriptions?

Mr McDonald—I have on this list before me seven meetings through 2006—various discussions and the like. Going back before that, to 2005, I think there would be fewer, but I can check the figures for that. I have done some this year, too. I think I have done at least one this year.

Mr BYRNE—It might assist you to take it on notice.

Mr McDonald—Yes.

Mr BYRNE—I ask that you take on notice this question regarding the proscriptions: how many meetings, in total, have you had with relevant stakeholders subsequent to the proscription?

Mr McDonald—I would say that I have not had a meeting with a specific group subject to a proscription. We have had meetings with general groups—

Mr BYRNE—Yes, representatives.

Mr McDonald—For example, with the PKK, I have not been out speaking specifically to Kurdish groups, but since we listed the PKK I have spoken to mixed groups about listing.

Mr BYRNE—There has also been a fairly steady stream of evidence about the lack of transparency, because people who may be affected by the proscription cannot actually provide evidence as to why they should not be proscribed prior to the proscription. Do you have a response to that?

Mr McDonald—It is not long after the proscription that there is publication of the proceedings you have here, and that is before the disallowance period expires. We have had situations where groups have made submissions about the listings of particular groups.

Mr KERR—But if a person puts their hand up and says, ‘I’m coming along; I’m a member of the PKK; I’d like you to disallow this regulation,’ that may be the subject of an action that may put them in jail for 15 years. We may disallow that but I would not hold my breath and turn blue on that prospect. I cannot think of a reason why a proscription regime would have to take place immediately on its promulgation, but let us assume that it is capable of thinking as such. In the normal course, what would be the problem at least of, say, delaying it coming into effect until such time as a disallowance period expires?

Mr McDonald—I think the rationale for the current system is to enable them to be listed quickly and to take away the ability of groups to restructure what they are doing as a response in advance of the listing.

Mr KERR—Why can’t they restructure anyway?

Mr McDonald—Obviously, as we have indicated in the submissions, where the groups are involved in terrorist activity as an organisation, they can of course be prosecuted in any case whether they are listed or not. In the example that you gave, it is possible that person could have been prosecuted in any case.

Mr KERR—Not for being a member of the PKK.

Mr McDonald—Yes, they could. If the prosecution can prove, as required in the first part of the definition, that the organisation:

... is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); ...

All of the organisation offences that have been prosecuted to date have been in relation to non-listed terrorist organisations.

Mr KERR—Let me rearticulate this question. Regarding the 19 organisations that have thus far been proscribed, I leave it to you to address whether in any of those circumstances there would have been any reason why national security interests would have been prejudiced if the coming into effect of that proscription regime did not take place until such time as the expiry of the disallowance period. I separate out from that that we already have a provision that

criminalises the transmission of money to most of those organisations; that issue does not seem to me to be material.

Mr McDonald—On the money front, there are more serious offences in this part of the Criminal Code than the ones that relate to the freezing of assets legislation. It is the nature of the penalties here that come into play on that. I would like to take your question on notice so that I can consider it properly.

Mr KERR—I am happy for you to take it on notice, but I just mention 103.1 Financing terrorism. The penalty is imprisonment for life. It does seem to me that it is hard to imagine saying that that is a less serious provision.

Mr McDonald—No, what I was referring to there was—

Mr KERR—I understand—the UN promulgation provisions.

Mr McDonald—That is right. Of course, the offence in 103 is where you do have to prove the link to the terrorist act. That is more difficult.

Mr KERR—Just for completeness, Mr Ciobo asked—and I would also be interested—whether the organisation has anything to add that might illuminate us in terms of our reflection about our advice to government on this issue. Many people have been suggesting there should be some kind of front end to enable there to be at least an opportunity for people who think that a proposed proscription should not proceed to advance those arguments absent, in a sense, everybody's ego, commitments on the line, there being criminal offences already and the like. No-one is suggesting that this be an endless process, but there has been consistent advocacy throughout that the process would be improved by having some mechanism either put on as a front end before our review or alternatively deferring the operation of the proscription until the parliamentary examination processes are completed.

Deputy Director-General—In general I think a bit of time for reflection would be useful. But clearly you could posit circumstances which may occur only extremely rarely where there might be a conjunction of activity and there could be an issue.

Mr KERR—So, if we had an exceptional cases circumstance, the Attorney could bring about an immediate proscription and the ordinary process that we currently encounter would proceed, but where there was no such exceptional circumstance a more open or less criticised process could be evolved. Would that be difficult?

Deputy Director-General—That is more a policy question than an agency question.

Mr KERR—From the agency's point of view, we are asking whether there would be any national security implications as opposed to policy implications.

Deputy Director-General—I would need to give it a bit more thought and work with my colleague in terms of a considered response.

Mr KERR—Of course.

Mr McDonald—I wanted to mention on the financing front that 102.6 is the funding a terrorist organisation offence. We mentioned the 103 offence—there is also 102.6. It is easier to prove than 103 and it carries 25 years.

Mr KERR—So these are not light penalties and they already exist.

Mr McDonald—No, and that is why we are careful about the listings.

Senator ROBERT RAY—But what you are saying to Mr Kerr is, ‘No; we’re not going to consider submissions up front, but we’ll rear-end them because this committee can hear the views or there can be a delisting process.’ The problem with that is that Mr al-Qaeda Australia is hardly likely to go to the delisting process or come to this committee and let you know who he is. Even though you cannot use evidence given to this committee because of parliamentary privilege, there is a fair bit of derivative use here where you get to know who the person is. It is just running up a flag and saying, ‘Look at me; I’m getting ASIO to track me for the rest of my life by coming to this committee and saying no to the proscription.’

Mr McDonald—My answer to that is that we could get that person anyway under the first part of the definition—

Senator ROBERT RAY—If you can track them you can get them. If you do not know who they are, they are hardly likely to come along here and say, ‘Look at me.’

Senator FAULKNER—I would like to ask this both of the Deputy Director-General and of A-G’s. It may be a matter that you would prefer to take on notice, and if you do I understand. I want to refer to paragraph 34 of the HREOC submission, where HREOC is making a suggestion to this committee that there should be a new provision similar to 104.4 of the Criminal Code requiring the Attorney-General ‘to consider whether proscription is proportionate in all the circumstances’. I was interested in getting a view from both ASIO and Attorney-General’s. I appreciate that you may prefer to take that on notice. I am happy with that if you would prefer to do so. As I say, this is from the HREOC submission, paragraph 34, and it is assisted by a clarifying footnote. You may care to take that on notice or respond.

Mr McDonald—The definition of ‘terrorist organisation’ is one that is pretty tough. It is an organisation that is directly or indirectly engaged in preparing, planning, assisting or fostering a terrorist act. Of course, the definition of ‘terrorist act’ is one that is draped in violence, whether it is a threat or an actual act. My response to that is that I think that, once that definition is satisfied, it is always going to be proportionate to respond with a listing. It is something that we can give further consideration to but I think that is the essence of it. The definition of a terrorist organisation is such that, if that is met, a listing would be a proportionate response.

CHAIR—You do not object to taking ideology and religion out with any amendment that might come?

Mr McDonald—The definition of ‘terrorist act’ specifically refers to religion and ideology but it marries it with violence. If the activity is politically, religiously or ideologically driven then it is the act of violence that defines terrorism. It needs that element to distinguish it from other violent crime.

Senator FAULKNER—My highlighting of the HREOC recommendation goes to concerns about the criteria for listing, that is the direct relationship. I think it probably does warrant being reflected on from that perspective.

Mr McDonald—I am sorry, I got confused there. I thought you were talking about changing the definition. What you are talking about is the ASIO criteria. I am sure ASIO would always give consideration as to whether it was proportionate in relation to a particular organisation.

Senator FAULKNER—I would certainly hope so too but the issue here is the view of agencies about actually inserting such a provision in the Criminal Code. I hear the goodwill and I accept that which you express, Mr McDonald, and I would expect ASIO also to reflect that, but the issue here is a considered response as to whether such a provision could be included in the Criminal Code.

Mr McDonald—Okay.

Senator FAULKNER—If both ASIO and A-G's could take that on notice and provide us with a response, we would appreciate that.

Mr McDonald—Thank you, yes.

Senator FERGUSON—Part of the agreement is that we should consult with the states, although I must say in the past four or five years the states have not really had any input of any significance and have generally declined to comment—once or twice because they did not have a lot of time, I think.

Mr McDonald—To be fair to them, there are occasions when their officers have asked for clarification and we have been able to satisfy them.

Senator FERGUSON—The Commonwealth has interpreted the intergovernmental agreement as not to apply to relistings. The ACT says that is not consistent with the agreement. Who is right and who is wrong? What is your interpretation of it?

Mr McDonald—We are right.

Senator FERGUSON—I thought you might say that.

Senator ROBERT RAY—Now we are worried!

Senator FERGUSON—On what basis does the ACT say that it is not consistent with the agreement?

Mr McDonald—It is not the first time that this point has been raised by a jurisdiction. I think it was raised a year or two ago—

Senator FERGUSON—About relistings.

Mr McDonald—Yes, but we think the language of it enables it to be done in that way. There is consultation, that is the main thing.

Mr BYRNE—Prior to the listing, do you have informal consultation with the states?

Mr McDonald—There is certainly nothing to prevent us from doing that. I think there probably have been instances where that might have happened but generally speaking the consultation occurs at the time that we have the whole of the case.

Mr BYRNE—But are you saying that there are instances when you have consulted informally with the states prior to proscription?

Mr McDonald—There may be examples of that. I would not want to rule it out. That is something I might—

Mr BYRNE—Can you take that on notice?

Mr McDonald—Yes.

Mr BYRNE—Can you also take on notice whether or not there has been any recent consultation with the states about any potential future listing?

Mr McDonald—Yes, okay. I will take that on notice.

Mr KERR—I am just trying to get the facts about how the system works in an area which has been asserted to us as having potential overlap with the immigration area. We heard from the Refugee Council of Australia and then from the Department of Immigration and Citizenship about the way in which refugee claims are assessed. I think the concern of the Refugee Council is essentially that the existence of a proscription regime is effectively in conflict with our refugee obligations under the refugee convention. I want to tease out how these things work. Take a situation where a person comes to Australia from Turkey and claims protection because of either membership or imputed membership of the PKK. They are assessed as having engaged our protection obligations and then their case comes under consideration under visa public interest criterion 4002. It would not if they had been active in an act of political violence because that would be excluded as it would now be regarded as a non-political crime. So we are assuming that they are somebody whose membership or association has not involved them directly in the undertaking of an act of political violence.

I am not singling that group out; I am just saying that that is a listed organisation now. This could extend to other circumstances hypothetically—for example, were the Tamil Tigers to be proscribed in the future. There are endless situations. As I understand it—and correct me if I am wrong—ASIO then makes a security assessment as to whether that person is a direct or indirect threat to national security. If my understanding is right, the mere fact that they had been a member or imputed member of an organisation overseas would not of itself automatically mean that they would be refused a positive security assessment. Obviously if they were granted permission to remain in Australia and continued to associate with or be a member of that group they would expose themselves to a criminal penalty under our law, but if their mere membership or imputed membership—because remember there was very extended counselling and

advocating—automatically takes them out, then it takes out a big chunk of people who would ordinarily be the subject of such protection obligations.

I am just wondering, from the organisation's point of view, whether you do an individual assessment which, in a sense, allows the prospect that if they live in Australia their previous membership of that organisation is a factor that will be taken into account in an overall assessment of any security risk but will not be decisive. If the listing operates automatically to preclude that, there does seem to be a very large potential area of conflict for our obligations under the convention, which may be much broader if the proscription device is used more frequently in a disputed national environment, but would be less important if you are doing individual assessments. I am just wondering exactly how this is done. What actually happens? One answer will reassure me and one answer will worry me, so I would just like to know what is happening.

Deputy Director-General—Obviously it is case by case, you understand, because you are dealing with individuals; you are not dealing with groups. There is no connection between the Migration Act requirements, which guide us when we are doing anything to do with any visa—whether it is a temporary visa, whether it is a permanent visa or whether it is a protection visa—and the proscription provisions. So when we are doing a visa application it is what the Migration Act says. Whether the group is proscribed here or not, it is still a matter of the individual and the extent to which that person might have engaged in, or is likely to engage in in Australia, activities prejudicial to security. It is not automatic.

Mr KERR—No. All right.

Deputy Director-General—So if a group is proscribed there is no automaticity to say that that knocks anybody out. It goes back to the individual assessment.

Mr KERR—I appreciate that answer and I think that it is really important that it is on the record. This was obviously a subject of very grave concern to the Refugee Council but it has also come through in a number of other submissions. Certainly, making that portion of the transcript available, but also making the organisation available to talk to the Refugee Council about that, would be extraordinarily valuable in at least removing one issue which has been advanced as a real concern by some people in this area.

Deputy Director-General—I understand that and, as I think our DIAC colleague said, if you are talking about cases of that sort here in Australia then there are appeal mechanisms to the assessment.

Senator NASH—I want briefly to go back to the issue of informing the community of listings because it has come up a number of times through the submissions. I appreciate what you told the committee before, but what is the process for a particular listing? What steps are taken to inform the community of that listing?

Mr McDonald—The first thing that occurs, apart from the regulation process—and, as you know, regulations are publicly circulated and gazetted—is that we put the listing on our website. That contains, as do the statements that go with the regulations, the actual statement which is the basis for the listing—the statement prepared by ASIO with the reasons for it. They are the two

main ways in which they can find out about it. The Attorney-General also issues a press release announcing the listing, which is taken up in the media.

Senator NASH—Do you track those releases in local community media to see whether they are run? With the other two methods, people very much have to come to them to find the information, as opposed to you taking the information out to the community.

Mr McDonald—They are the traditional methods for any legislation. This problem of communicating what the law is to the community is right across the board with legislation. As you would know as well as anyone, there are hundreds and hundreds of regulations being made that can impact on people, and I do not think too many of us believe that everyone is out there checking the *Gazette* notices.

Senator NASH—But this does have a significant level of importance. Given the amount of evidence that the community could be better informed coming back to the committee, can you see any ways in which that community information could be improved, over and above what is being done at the moment?

Mr McDonald—The new pamphlets that we are designing, which we are going to be circulating through—

Senator NASH—They are about the general information, are they not?

Mr McDonald—No, they are going to be more focused on the listing and will have the list of organisations in them. We think those pamphlets are an improvement on the previous ones. We distributed those to areas where there might be vulnerability. The migrant settlers organisation down in Victoria is an example of that. It is a very difficult area. I think it is something that we can always improve on. The difficulty is that it needs to be done carefully; otherwise, a community can feel put upon if you are bombarding them with information about this. It is an area where we continue to review the way we are doing it. I thought your point about tracking whether those press releases are taken up in community newspapers was a good one. I am not sure of the extent of that. That is something where we might get you some more information. Clearly the community newspapers are pretty important in this situation.

Senator NASH—Maybe there is a way of having a more direct approach with the communities rather than relying on the community newspaper to pick up the release.

Senator ROBERT RAY—I have a question for Mr Head. Before the luncheon break, Mr Balasubramaniam raised the question of the Sri Lankan government lobbying other governments to proscribe the LTTE. We know from previous discussions that there was contact between the Turkish government and the Australian government prior to the proscription of PKK. We again discussed this morning that the process was well underway before that discussion occurred. To what extent is the Australian government being lobbied by overseas governments to proscribe organisations, and do we point out to them that there is no provision within the act to receive such submissions and nor should it influence our policy? How do we handle those matters?

Mr Head—Speaking in general terms, I am not aware of our missions being heavily lobbied for proscription. It is not an issue that is constantly on my radar. I am not aware of that as a

pressing matter. In respect of proscription processes, we have had instances where governments have certainly sought detailed information—which is publicly available—on our proscription processes and on which organisations we have listed. As a general rule, we are very circumspect in what we say about future listings, as we are domestically. It is not DFAT's role to assess which organisations should or should not be listed. We contribute information to that process and that is basically our role. To answer your question, we are not subject to heavy lobbying at present on issues relating to proscription.

Mr McDonald—We are. We have had quite a deal of ministerial correspondence in relation to the example that you mentioned, both for and against. There is not so much a government level contact, although I can think of one example where there might have been correspondence. At the organisational level, some organisations and individuals are in favour of listing that organisation and others are not in favour it, so we have been getting quite a deal of correspondence for a couple of years but in the last year particularly. That has been a bit of a debate with that community for quite a while.

Senator ROBERT RAY—I would have expected you would have and I would have expected on occasions a foreign government to approach our government to list an organisation because we know they do it around the globe. I was more interested in how we respond given the fact that basically the legislation does not allow us to respond in a favourable way.

Mr McDonald—It is totally a security issue.

Senator ROBERT RAY—Yes.

Mr McDonald—That is what the decision making is based on and I know that ASIO monitors this issue carefully. The response to that correspondence points out that we are always monitoring all organisations and thinking about whether listing would be in the public interest.

Deputy Director-General—As you can see, the foreign governments' views are not part of our criteria.

Senator ROBERT RAY—And you have never been approached by a fraternal organisation of the same nature as yours to take action on any of these issues?

Deputy Director-General—I am not sure that I could say we have never been. People do express views but not views that we take into account. It flows down from the legislation we are dealing with here and then from the ASIO Act, under which we operate, and that is where we get our guidance from.

Senator ROBERT RAY—Let's say you were in midstream and you had an approach. Would you include that by matter of notification to the Attorney-General—just a note in your submission to the Attorney-General on such an issue that it has had no influence at all but you have had an approach?

Deputy Director-General—It would not be relevant to the paperwork for these submissions on proscriptions. It is just not relevant. It might be recorded somewhere in our files, but that is where it would sit.

Mr Head—I will add to that answer. Firstly, in terms of specific cases such as the one that you mentioned, to be accurate, I would need to have checked back with our geographic area. I am sure the issue is raised in the context of general discussions between governments from time to time. But, to answer specifically the question, ‘Are we being pressured on the issue?’ my answer stands as no. In terms of the issue that you just raised about how that is incorporated in the process, in the DFAT contribution to submissions for proscription we would include, where we would perceive it to be relevant, the political context of the situation in any overseas country. Where we saw that as relevant, we would draw that to the attention of ASIO and others, but that, as has been described, is not necessarily a determinant in their decision making or their views on this. But certainly we can think of instances where the context of a peace process or other relevant developments have been included by way of information that a decision is to be made from.

Mr KERR—I have a question about strict liability. It mentions the DPP’s advice in relation to the proving of that offence. I must say on my initial reading it does not seem that that proposition that the DPP has advanced to the Security Legislation Review Committee is well founded. Did you interrogate that advice? Could we be provided with it? On its face it seems odd that the expression ‘knowingly’ has been constructed in such a way as to apply to actually knowing that the organisation has been listed. It seems not a reading that is natural.

Mr McDonald—It is the way the code works. It really values the knowledge element very strongly, and in fact it is not the first time that we have had to provide clarification and make sure that sort of interpretation is not taken. So the DPP’s point is a valid one, and the best way to fix it would be to draft it carefully but put in strict liability in relation to knowledge about the listing.

I think that, at the time the legislation was drafted, people were very anxious about the listing process and the sorts of things that have been raised by Senator Nash—that it be proved by the prosecution that people know it is listed. But it is quite a big bar for the prosecution to prove that. The DPP, even if an organisation were listed, would probably find it easier simply to prove that it is a terrorist organisation than to prove that the person knew it was listed.

So strict liability carefully drafted is really the way to deal with that, provided people understand what we are trying to do. But, even without taking that into account, of course listing has a much broader importance than being able to prosecute specifically using that leg. It is the transparency and the educative value of it, which is, of course, the source of the criminal law.

Mr KERR—You are independently satisfied that the DPP’s reading of the statute is a correct one?

Mr McDonald—Yes, we think it is correct.

Mr KERR—To assist the committee in reflecting on what is a very broad submission, maybe there could be a little more detail about why the problem is said to exist and what could be—

Mr McDonald—It is all to do with the old proposition that you are taken to know the law, but under the code, which is very strict in its application of fault elements, if you put the fault

element in there and it gives it a context where you are supposed to know it is listed then you do have to prove that.

Mr KERR—I would just appreciate it being set out, so I understand it better.

CHAIR—As there are no further questions, I thank you for your evidence. If the committee has any further questions these will be sent to you in writing by the secretariat.

Resolved (on motion by **Senator Nash**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 4.03 pm