



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

FINANCE AND PUBLIC ADMINISTRATION LEGISLATION
COMMITTEE

Reference: National Security Legislation Monitor Bill 2009

FRIDAY, 14 AUGUST 2009

CANBERRA

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SENATE FINANCE AND PUBLIC ADMINISTRATION

LEGISLATION COMMITTEE

Friday, 14 August 2009

Members: Senator Polley (*Chair*), Senator Bernardi (*Deputy Chair*), Senators Cameron, Jacinta Collins, Ryan and Siewert

Substitute members: Senator Ludlam to replace Senator Siewert for the committee's inquiry into the National Security Legislation Monitor Bill 2009

Participating members: Senators Abetz, Adams, Back, Barnett, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Hefernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Pratt, Ronaldson, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Bernardi, Jacinta Collins, Ludlum, Polley and Ryan

Terms of reference for the inquiry:

To inquire into and report on:

National Security Legislation Monitor Bill 2009

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Committee met at 9.31 am**EMERTON, Dr Patrick, Associate, Castan Centre for Human Rights Law****SCHOKMAN, Mr Ben, Senior Lawyer, Human Rights Law Resource Centre and Public Interest Law Clearing House, Victoria***Evidence was taken via teleconference—*

CHAIR—Welcome. The committee will now commence its inquiry into the National Security Legislation Monitor Bill 2009. The purpose of the bill is to appoint a monitor to review national security legislation. I welcome via teleconference representatives from the Castan Centre for Human Rights Law, the Public Interest Law Clearance House and the Human Rights Law Resource Centre. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your respective submissions. I now invite each of you to make a short opening presentation.

Dr Emerton—The main point that I want to make is that the need for oversight of the operation of Australia's antiterrorism laws is urgent. This is because the administration and application of those laws are—although this is a view not widely put—more or less in a state of disarray. They are in a state of disarray in two respects, which I want to say something briefly about.

Firstly, there are repeated issues of lawlessness and incompetence in the administration of Australia's antiterrorism laws. I will give as examples of that the treatment of Mr ul-Haque in Sydney, in relation to whom ASIO were found by a judge of the Supreme Court of New South Wales to have engaged in criminal acts of kidnapping and false imprisonment; the treatment of Dr Haneef, who was held, as it turns out, without sufficient grounds for 14 days without charge; and the case in Melbourne of Mr Thomas, who had convictions overturned on appeal on the grounds that the AFP had collected evidence in a lawless fashion. Mr Thomas was then subjected to a control order which had many notoriously ludicrous provisions, including forbidding him from telephoning Osama bin Laden. He was, in the end, acquitted of all charges at retrial after a very long and protracted trial. There is the case of three Tamil men on trial in Melbourne. Their trial continues, so I do not want to say too much about it, except that the main components of that trial drawing upon the Criminal Code have collapsed, and that was reported in the *Australian* earlier this year.

The Benbrika trials here in Melbourne, which are regarded as the feather in the cap for antiterrorism prosecution, involved four acquittals out of a number of accused at the end of perhaps one of the most expansive criminal trials in Australian history. There were a number of rulings by the presiding judge, Justice Bongiorno, during the course of that trial which made adverse findings about the conditions of custody in which those men were being held on remand. He made adverse findings about the practice of police and court authorities in providing security, which was prejudicing the jury. In the case of David Hicks, he was subjected to a control order. There were indications from the magistrate who issued that control order that, had Mr Hicks been prepared to contest the control order, it may well have been struck out on the basis that the grounds for issuing the control order were not made out. These are a number of episodes which show that there are lawlessness and maladministration in the administration of Australia's antiterrorism laws.

Just as importantly, and a second respect in which the administration of those laws is in a state of disarray, is the discriminatory application and undertaking of surveillance and policing under those laws. This has been denied on various occasions but those denials ring hollow, and we can see that through a collection of both affirmative evidence and negative evidence. On the affirmative side we have, for example, statements in the Sheller inquiry into the Security Legislation Review Committee which make it clear that it is Muslim Australians who are regarded as the source in Australia of a terrorist threat.

We have the submission from the Department of the Attorney-General in 2007 to the Parliamentary Joint Committee on Intelligence and Security's investigation into the procedures for listing organisations under the Criminal Code, in which the department indicated that it regarded Islamic Australians and Islamic groups as the main terrorist threat. This was while a number of Tamil men were under investigation, who, if they have a religious affiliation, are Hindus, not Muslims. It was also at the time when the most recently listed organisation was in fact the PKK, which is not a Muslim organisation. In the ASIO annual report for the period 2006-07, page ix of the introduction and page 3 of the report say that they regard Islamic sources as the most significant terrorist threat to Australia. There is the felt need by both the government and the press every time arrests happen to comment in general terms after each arrest on the special relationship between Muslims and terrorists. I notice that when, for example, white supremacists are arrested for engaging in acts of political

violence there is no felt need to say that most white Australians are not terrorists. The discriminatory urge does not apply in that case.

On the negative side, we can look at the way that white supremacists are treated in the administration of criminal justice and we can see that their activities are very rarely described as terrorist activities. The Western Australian firebombing in the early 1990s, which were quite notorious, are very rarely mentioned in this context. For example, the 2005-06 ASIO annual report very clearly distinguishes between what it classifies as terrorist violence, which is undertaken by Muslims, and other sorts of violence, which is undertaken by nationalists or racist extremists, such as the white supremacists in Western Australia. The only exception to this from the Australian authorities that I am aware of is that of the Assistant Commissioner, Ethical Standards in Victoria Police, Mr Luke Cornelius, a very remarkable policeman who has identified white supremacist activity in Australia as satisfying the notions of terrorism just as much as other sorts of activity, but that is an exceptional view.

On the whole, not only do we have lawlessness and maladministration but we also have manifestly discriminatory application of and public rhetoric about the laws. Everyone knows it; everyone understands it. I was speaking last night at Footscray Town Hall to a meeting of members of the Somalian and Lebanese communities. They know when terrorism is talked about in public by the government or by the press that they are the ones who are being talked about. There were a number of people there who had experiences such as having their houses raided and having themselves or their children turned out of bed in the middle of the night at gunpoint, although there is no suggestion that they are guilty or suspected of any violent crime. In the same circumstances white supremacists are not arrested and charged under terrorism laws. They are not treated in the same fashion. I will not be asked questions if a white supremacist is arrested simply because I am white. But we know that there are members of the Somali community—I spoke to them last night—who are interrogated and policed by ASIO simply because they are Somali.

CHAIR—Could you wrap-up your opening comments?

Dr Emerton—So we have people in Australia who have the lived experience of living in conditions of a security state, and that is why there is an urgent need for review. The details of how that review could be undertaken and how the bill could be improved in certain respects to facilitate that review, particularly emphasising independence from government and adequate criteria for review, are set out in our submission, so I do not need to elaborate on that. But the need is urgent.

CHAIR—Thank you very much.

Mr Schokman—Can I make a couple of very preliminary comments as well, bearing in mind that we have made a separate submission?

CHAIR—Yes, you can make a short opening statement.

Mr Schokman—And I will keep them very brief, I promise. First of all, thank you for the opportunity to make a submission. The Human Rights Law Resource Centre and PILCH both strongly support the appointment of a national security legislation monitor. You will have seen from our joint submission that we have made a number of comments about the bill, which are essentially aimed at looking at the current framework and function of that monitor position. The submissions we have made are essentially directed at the role of the monitor, the functions of the monitor and, in particular, powers to initiate reviews and ways in which reports should be written. I am very happy to expand on any of those points in our submission.

Senator LUDLAM—Thank you both very much for appearing by teleconference this morning. I will put these questions to either of you, and either or both of you can jump in, if you would. I think both of you raised some concerns in your submissions about the independence of the monitor, that the key role of the monitor was to provide independent oversight. In that specific regard, can you give us your thoughts on this bill, on whether that meets that need for that independence?

Dr Emerton—In section 1 of our submission we discuss this issue. We noted the contrast between the wording of section 3 of the independent reviewer bill, which passed the Senate last year, and the wording of section 3 of the current bill, and we contend that the wording of the earlier bill is to be preferred. In particular, the current bill identifies one of the roles of the security monitor is to ‘advise ministers’, whereas the earlier bill had as the principle object of the bill appointing an independent person. We think that second wording is to be preferred. As we explained in our submission, that is because it is likely to be the activities of executive agencies, be they government departments or, more probably, independent agencies such as ASIO or the AFP, that are under investigation. Unless that statutory independence is established and made unambiguous, there

would be an inevitable tension, both a legal tension and a practical operational tension, if the monitor were called upon to undertake a review of the activities of those departments or agencies. So we think there could be improvements in the wording of the bill to make that independence clear.

Mr Schokman—I would like to make two comments. The first one is in relation to the question of whether or not the appointment should be an individual monitor or a panel of say three. PILCH and the Human Rights Law Resource Centre do not have a strong preference either way, but the comment that we would make is that we consider any transparent and publicly accountable selection process would go to great lengths to avoid any perception of any lack of independence in that particular sense. We would certainly be in favour of a selection process that is clear and accountable, and we would also mention that it is in line with a lot of our submission—that is, if the actual roles and functions of the monitor are quite clearly stated or stated in greater definition than what they currently are, then we would consider that that would be important in maintaining the independence in both fact and perception of the role. The other comment I would like to make is that, as we outlined in our submission, we think that the standard of expertise of the person is also particularly important, and we consider that clause 11(3) should be retained in that sense.

Dr Emerton—I will also add on the point of independence, firstly, that we think that it is desirable that the bill should expressly confer upon the monitor the power to initiate a review of her or his own motion. Senator Wong's second reading speech suggests that that is intended to be the case, but the bill currently makes no express provision for that. A model for such an express provision can be found in clause 8(1)(c) of the earlier Independent Reviewer of Terrorism Laws Bill 2008 [No. 2] that passed the Senate. Also, on the issue of whether there should be one or a panel, my understanding of the logic behind a part-time appointment, which is the intended structure of the current bill, is that this would then make the position potentially attractive for an experienced barrister or senior lawyer, and that might be a desirable appointment from the point of view of maintaining independence. But, given the urgent need for extensive review of the sort that I canvassed in my opening remarks, there is also an issue about capacity and resourcing for the reviewer. If the intention is to make a part-time appointment so that the position can be made attractive to, for example, a barrister then that would suggest that it is desirable to have multiple appointments so that you could have sufficient energy, capacity and time on the part of these appointees to actually undertake the range of urgent review work that there is to undertake.

Senator LUDLAM—All right. Thanks for that. I think we are going to start running a bit short of time, so can either of you briefly outline for us what you propose as acceptable minimum reporting standards for the monitor—to the ministers but particularly to the parliament?

Dr Emerton—We discussed this in section 6 of our submission. We think that there should be provision for the monitor to make reports to the parliament not only of their annual reports but also of other review work that they have undertaken. There was a clause to that effect, clause 11, in the earlier independent reviewer bill, but there is no corresponding clause in the current bill, and again we think it would be desirable to incorporate that sort of provision in the current bill.

There is the issue of whether the Prime Minister should have the degree of control over the monitor's reports that the current bill would give. Certainly we think that the bill should make it clear that the Prime Minister's capacity to set priorities and control the publication of reports should at most apply only in respect of those reports and reviews that the Prime Minister himself or herself has commissioned. So it should not be the case, for example, that the Prime Minister, by burdening the reviewer or monitor with very many reporting obligations, can therefore stymie or set priorities for the reviewer's own motion work. Our submission does not take a strong view on the question of whether the Prime Minister should be obliged to give to the parliament all reviews which the Prime Minister commissions, because there are competing considerations. Publicity and transparency are highly desirable but equally, given the current state of disarray surrounding the administration and operation of these laws, I think it would be highly desirable that the Prime Minister get better advice than currently seems to be being given, and to that extent there may be some advantage in having an independent person who can give confidential advice to the Prime Minister. So, on the issue of whether the Prime Minister's reports should have to be public or not, we do not take a strong view, but we do think it is very important that the prioritising and the work of those reports should not be permitted to swamp or stymie the other independent activities of the monitor or reviewer.

Mr Schokman—There are some very quick comments that I would make in terms of the actual nature of the reports that are to be presented by the monitor. The concern we have is that, as the reporting functions are currently defined in the bill, they are not sufficiently well defined. We would certainly advocate there being

some greater clarity—for example, by providing some minimum reporting requirements to which the monitor should have regard when preparing reports. In that sense, we note that there seem to be no reporting requirements provided for reviews by the monitor. At the end of our submission, at paragraph 58, we set out a number of what we would say are minimum reporting requirements. In other words, there is the potential for a non-exhaustive list to be included in the bill.

The other comment I would make, which I think Dr Emerton has already referred to, is in relation to the power of the monitor to initiate reviews. That is certainly a concern that we also share, in that there seems to be a disparity between what the explanatory memorandum states and what clause the bill provides for. We think that clause 6 should probably be more explicit in terms of its provision of that power.

Dr Emerton—In terms of the reporting functions, another point which is ambiguous in the current version of the bill and was unambiguous in the earlier independent reviewer bill is that the review in there for the reporting function needs to extend not only to the text of the law but also to the activities of the agencies who actually have the role of implementing and acting under those laws. In our submission, particularly in sections 3 and 4, we set out some discussion of how the bill could be improved in its drafting to make it unambiguous, rather than currently slightly opaque, that the review functions extend to the activities and operations of agencies under Australia's antiterrorism legislation.

Senator BERNARDI—Dr Emerton, I will address this question to you; it goes to your opening statement. Please tell me if I have misunderstood what you have said. You suggested that you thought—I do not want to put words in your mouth—the existing laws were unfairly targeting those of the Muslim faith.

Dr Emerton—Not the laws in their text, the laws in their application.

Senator BERNARDI—You gave an example of a bombing in Western Australia in 1995 and you referred to white supremacist organisations on a number of occasions.

Dr Emerton—Yes.

Senator BERNARDI—Can you give me some other examples of what you believe should be classed as terrorist acts that had not been?

Dr Emerton—They would be the principal ones. Obviously these laws were not in force in the 1990s when those bombings took place but, for example, the former Director-General of ASIO, Mr Robinson, said in an appearance, I would think in 1996, before the Parliamentary Joint Committee on Intelligence and Security that there had never been terrorist attacks in Australia other than perhaps the Hilton bombing. And that seemed to just completely discount those white supremacist attacks, although they would utterly fit under the statutory notion of 'terrorist act'. The thing to note in my view is that that is an occasion when bombs were actually placed and actually set off with actual intention; whereas, of the various antiterrorism trials that have run in Australia, none has involved a charge with an offence which actually has the commission of violence or even the immediate intention to undertake violence as a criminal element, and in that sense all the charges have related to ancillary or preparatory conduct. That is one particular case. As I say, Luke Cornelius, a police officer here in Victoria, is an exception but in many ways quite an interesting and remarkable exception.

Senator BERNARDI—I will interrupt you there for a moment. Your opening statement suggested to me that there was some sort of endemic racism in the application of these laws, and your justification for that is a line by someone that did not incorporate a bombing from 1995.

Dr Emerton—No; also in the ASIO annual report of 2005-06, which reports to activities undertaken by some of those involved in those bombings upon their release and their absconding upon breach of their bail, there is some discussion of that and their plans, upon having absconded from their bail, to undertake further bombings, racially targeted bombings. If one reads the relevant pages of the 2005-06 ASIO annual report, pages 22 through 24, I can very clearly see that under the heading of 'Terrorism' in the reference to the threat of terrorism we have a discussion of Islamic jihadi—as it is sometimes called—motivated violence. Under a discrete heading, with no reference being made to notions of terrorism or the threat of terrorism, we have a discussion of the plans by those who had absconded, in breach of their bail conditions, to undertake attacks which are not characterised as terrorist in that report, although they would undoubtedly fit within the statutory definition—more fire bombings of Chinese restaurants. So I contend there is an endemic element of discrimination here.

Again, just last night I was speaking in Footscray at a public meeting in what is now called the Maribyrnong Town Hall. There were Somali men there. There is not the least reason or shred of evidence to suggest that they are engaged in, or interested in any threat or participation in violent activity or connected to

any violent activity. They are routinely contacted, bullied and questioned by ASIO because ASIO is targeting them to find out information about the Somali community. The same degree of—

Senator BERNARDI—If there were people in my community that perhaps I had contact with or had information about, I would not regard it as racial vilification or racist for the police to ask me for information that might be of assistance.

Dr Emerton—ASIO are not the police, and that is already part of the problem. They have a practice of conducting themselves as if they enjoyed powers of question and arrest, which they do not, and that is well documented, for example, in the judicial finding by Justice Adams in the Ul-Haque case. So there are issues there in the contrast between ASIO and the Federal Police. There is a tendency for ASIO to disregard the lawful restrictions upon its operations. In particular, it does not enjoy powers of arrest and, except under certain special conditions, powers of questioning. That is an issue about which a number of complaints have been made to the Inspector-General of Intelligence and Security.

Senator BERNARDI—So you do not believe that ASIO should be able to question individuals that they think might be able to provide information regarding preparation or potential for terrorist activities?

Dr Emerton—I do not believe that ASIO should engage in bullying activities verging on some occasions, and in the case of Ul-Haque, in actually crossing over—

Senator BERNARDI—That was not my question. My question was: do you think ASIO should be able to investigate or should be able to question people? I never made a suggestion of bullying; I am just saying ‘question people’.

Dr Emerton—I do not know how much experience you have, Senator, with ASIO’s questioning practices.

Senator BERNARDI—I have not been in front of it myself.

Dr Emerton—I have got a reasonable knowledge through my involvement as a volunteer at the Western Suburbs Legal Service which, of the community legal services in Australia, probably has the largest national security practice. ASIO’s questioning practices are almost inevitably bullying, manipulative and exploitative. They have no regard for the conventional practices one associates, for example, with police questioning. For example, they never caution, although they record everything without indicating it. There are endemic problems in the way that ASIO uses its powers and these need to be investigated and reviewed.

Furthermore, manifestly it has an effect upon identifiable segments of the community who are already, in many respects, marginalised. There is a certain sense in which life can be miserable enough living in the public housing flats in Flemington or Carlton here in Melbourne. To be already living in those circumstances—if not as a refugee oneself then perhaps in a family of refugees—having come from situations of endemic and horrible violence in Somalia is bad enough. But to then have one’s life routinely interrupted, disturbed and distressed by disrespectful tactics and so on by inquiries from ASIO and other agencies, makes it even worse.

It is not a theoretical problem; it is not an imaginary problem; this is the lived experience of people living in conditions which I think many Australians do not fully appreciate. They do not know what is taking place and have not fully thought themselves into those circumstances. They have not thought about what it is like to live in a situation where one knows that because one is Somali one is under surveillance and subjected to questioning. One of the favourite lines that ASIO likes to trot out—or a variation of it—is, ‘We can do this the easy way or the hard way,’ and instances of that are well documented by Justice Adams in his judgement in the Ul-Haque case.

Senator BERNARDI—You are suggesting that racial profiling is responsible for unjust, offensive, intimidatory behaviour—

Dr Emerton—I am not just suggesting it; I am asserting it, yes.

Senator BERNARDI—I will ask you a question then. Of offences that are regarded as terrorist offences or offences that you believe should be regarded as terrorist offences that have not been documented as such, I wonder whether you have records of what proportion of offences are committed by particular ethnic or religious groups?

Dr Emerton—There are matters that again I think are currently sub judice, so I am limited in what I can say, but I understand that, for example, there is currently a matter under investigation in Melbourne of offences under the Radioactive Substances Act.

Senator BERNARDI—I am just asking about what percentage of offences that you believe comprise terrorism are committed by particular racial or ethnic groups.

Dr Emerton—I do not have detailed data to hand. I can give you a sense. For example—

Senator BERNARDI—You are making very serious allegations that people of a particular ethnic group or religious belief are being targeted unfairly and unjustly.

Dr Emerton—For example, I can say—

Senator BERNARDI—I am asking you—

CHAIR—I remind witnesses and members of the committee that the process works by questions being put to the witness and then we allow the witness to respond. The deputy chair was putting a question to the witness. We would appreciate it if he could finish his question and then you will have the opportunity to respond.

Dr Emerton—I am sorry. Of course.

CHAIR—I also want to draw people's attention to the time. Senator Bernardi has the call.

Senator BERNARDI—I am just responding to the allegations that you are making that people are being targeted unfairly and unjustly because of their ethnic or religious orientation. I want to know what justification you have for it because, if you cannot tell me that white supremacists, which you have referred to on a number of occasions, should be targeted equally because they have an equal potential for offence or have been equally implicated, I feel that the position you are putting is not really a balanced one.

Dr Emerton—Taking full advantage of the fact that I enjoy privilege here and so am immune from being sued for defamation, I will give some examples. I also think I am immune from being sued for contempt of court. My understanding is that there is currently a matter—I do not know if it has been brought to prosecution yet or is at the preliminary stages—in Victoria in which—

CHAIR—Before you go any further, I remind you that you will not be covered by parliamentary privilege for any matter before the courts. I warn witnesses appearing before us today of the legal requirements for giving evidence.

Senator BERNARDI—Perhaps you could just give us the numbers; you do not have to give us the details.

Dr Emerton—There is a matter I am aware of in Victoria involving offences under the Radioactive Substances Act for, I understand, unlawful possession of radioactive material that is potentially connected to violent intentions. Again, I understand that there may also be nationalist extremist or white supremacist dimensions to that, although I am not certain if it has that aspect. It has not been charged under the antiterrorism laws. There was an issue recently—last year or the year before, I think—of the stockpiling of weapons in Queensland. Initially he was arrested, but the matter did not proceed to trial under the antiterrorism laws. There are issues of known endeavours recently—in 2004, I think—by white supremacists in Perth who had breached conditions of bail or parole to undertake further attacks. This was not investigated or charged under the terrorism laws and was classified differently under the ASIO annual reports. There is the issue of the strong consideration of incitement to racial violence surrounding the Cronulla riots and that a large amount of racialised violence took place there. That was not investigated or discussed in relation to the antiterrorism laws. That case is a case of people actually being hurt. The cases in Perth are cases of people known to have actually engaged in violent crime which hurt property and threatened people. These are not fantastic or imaginary cases; these are real and genuine cases.

Senator BERNARDI—So what is your definition of terrorism?

Dr Emerton—I am relying on the definition of 'terrorist act' in the Criminal Code, which refers to any act or threat of conduct with a political or religious ideological motivation intended to coerce either a government or a section of the public and which, if actually carried through to fruition—the act or the threat—would cause serious physical harm to people or damage to property. I would think that blowing up restaurants, preparing radioactive material for explosion, stockpiling weapons with various intentions and engaging in physical acts of politically motivated violence on a beach in Cronulla would all constitute that. We also have a range of ancillary offences that hang off that definition of terrorist act and incitement is one of them. I am relying on the statutory definitions—

Senator BERNARDI—How do you know, though, what the intention was with the stockpiling of weapons? If this is true—if someone has been stockpiling weapons for a terrorist activity—it beggars belief that they were let off.

Dr Emerton—They were not let off. It proceeded under firearms offences; it did not proceed under antiterrorism laws. From the point of view of an administering agency, there can be rational reasons for this. The legal complexity of our terrorism laws is tremendous, verging on the absurd, so the number of legal resources that need to be committed to any successful attempt to prosecute under those laws is also tremendous. I gather from questions answered on notice in the Senate that the Commonwealth expended \$75,000 on one subpoena in relation to the Tamil trials, so—

CHAIR—We should be bringing the discussion back to the actual bill before us. Can I also clarify that parliamentary privilege is applied to our witnesses, but we also have to be very mindful of any court cases and how they may be compromised. Could you summarise your answer? Senator Ludlam has a further question to ask, and we are running out of time.

Dr Emerton—In short, the complexity of running these matters is very great. Therefore, on any occasion where the authorities can proceed under a different charge, it may be more efficient or effective from their point of view to do so. My concern is that, in that decision of when we should proceed under these laws rather than proceeding under a more conventional and easier prosecution, the balance always seems to be struck the same way. I am not the only one who has noticed it; the people who are undergoing the surveillance and the policing notice it too. They live it, they experience it and it makes their lives miserable for, as well as one can tell, no particularly good reason.

Senator LUDLAM—Thanks, gentleman. The last question that I have relates to the difference between the reviewer deciding on his own motion to investigate a particular matter as opposed to having a matter referred to him by the Prime Minister's office. I wonder whether there are any concerns in your mind or any ways that the bill could be improved to make sure that the independent monitor does get to spend most of his time working on issues that he believes are important rather than those that perhaps the Prime Minister thinks are important. Do you think that is a live concern?

Mr Schokman—The only comment I would make on that has to do with the sort of independence that was asked. If we are looking at setting up a monitor here that seemed to be independent both in fact and perception then there may be some concerns if the monitor was only able to or required to act on referral by the Prime Minister. That would tend to politicise the process and therefore potentially to compromise the independence of the role.

Dr Emerton—I think the question raises a genuine but difficult issue. The easiest way to resolve the issue would be simply to strike out that part of the bill which permits the Prime Minister to make references, but that is not necessarily the best way to go because, as our submission indicates, it may be desirable for the Prime Minister to get advice on matters from an independent source.

An alternative way of doing it might be to look at the parts of the bill which allow the Prime Minister to set priorities for review. Firstly, one could quarantine that only to the matter that the Prime Minister has referred. Secondly, one could say, for example, that the Prime Minister can direct the reviewer as to how to spend no more than 50 per cent or 30 per cent of their time. One could put in an upper cap on how much time the Prime Minister could mandate that the reviewer spend and then the reviewer would have the discretion as to how much of their other time to spend on the Prime Minister's matters relative to the matters that the reviewer has initiated—their own motions.

Another alternative might be to give the Prime Minister the power to refer but leave the issue of priorities entirely in the hands of the reviewer. So there are a few options. I think that those who have more experience of the structuring operation of these statutory agencies at the ground level—in those sorts of terms—might be better placed to make the judgement as to the best of that particular range of options; the Castan Centre does not have a preferred view.

Senator LUDLAM—Okay. Thanks, Doctor.

CHAIR—I thank you both for appearing via teleconference this morning and for your submissions.

Dr Emerton—We are grateful for the chance to appear. Thank you very much.

[10.11 am]

HUNYOR, Mr Jonathon Neil, Director, Legal Section, Australian Human Rights Commission

Evidence was taken via teleconference—

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your submission. I now invite you to make a short opening presentation. At the conclusion of your remarks, I will invite members of the committee to put questions to you.

Mr Hunyor—Thank you. The Australian Human Rights Commission thanks the committee for the invitation to appear before it. Thank you also for allowing the commission to appear via telephone link. The commission supports the creation of a National Security Legislation Monitor and we regard establishing such a monitor as being consistent with the recommendations of the major Australian reviews of counterterrorism laws that have been conducted over the last number of years.

The explanatory memorandum to the bill states:

The main purpose of the Bill is to ensure the laws operate in an effective and accountable manner, are consistent with international human rights law and help to maintain public confidence in those laws.

The commission strongly supports that goal. The essence of our submission is that there are a number of ways in which the bill could and should be strengthened to ensure that those purposes are met. The two main areas that the commission has identified in its submission that could be improved are: ensuring the independence and perceived independence of the monitor, and strengthening the provisions relating to reporting to ensure that the monitor's reports are adequately considered and responded to by government.

We therefore make six recommendations, which I will briefly summarise for the committee. First, we recommend amending the bill to state expressly that its object is to appoint an independent national security legislation monitor. I note that clause 3 of the explanatory memorandum refers to the establishment of an independent reviewer of terrorism laws, so amending the bill to make this explicit and to make an explicit reference to the independence of the monitor will give effect to that intention expressed in the explanatory memorandum.

Second, we recommend giving the monitor the explicit power to report on any review he or she conducts, whether or not the review followed a reference from the Prime Minister. The monitor's powers in proposed section 6 do seem to include the ability to conduct a review of relevant legislation of the monitor's own motion, but the function of reporting under the proposed section 6(1)(c) is limited to references made by the Prime Minister. That is a matter of concern to the commission. In our view, the monitor's reporting function should apply to any review that the monitor conducts, and proposed section 6(1)(c) should therefore, in our view, be amended to provide that it is a function of the monitor to simply report on any review conducted by the monitor. I note that other submissions to the inquiry, such as that by the Gilbert and Tobin Centre of Public Law, recommend making explicit the function of the monitor to conduct reviews of his or her own motion. The commission would also support that clarification.

Third, we recommend that the monitor's functions should be expanded to explicitly include the making of recommendations in any report. In our view, the monitor should have the function of making recommendations to ensure the effective operation of Australia's counterterrorism laws and that the rights of individuals are adequately protected by those laws.

Fourth, we recommend that the bill should require all reports by the monitor to be tabled in parliament. Presently, only the annual report is required to be tabled, under the proposed section 29(5). It is unclear to us why tabling is not required of all reports. It would enhance transparency for that to be required.

Fifth, the commission recommends that the government should be required to respond in parliament to all reports and recommendations of the monitor. We note this was the feature of the Independent Reviewer of Terrorism Laws Bill 2008 and we would commend the same in this bill. Finally, we recommend amending clause 10(2) to include a specific reference to the monitor's ability to consult with the Australian Human Rights Commission. This was, again, a feature of the Independent Reviewer of Terrorism Laws Bill 2008 and our view should be included here.

Those are the matters set out in our submission. Before finishing, I would just like to note that a number of the other submissions received by the committee do identify a range of additional or alternative ways in which

the purposes of the bill could be better achieved and the monitor strengthened. Many of these are compelling. I will just note two that the commission particularly supports, having had the opportunity to read those submissions.

First, the commission supports recommendations to the effect that the monitor be able to receive references from the Parliamentary Joint Committee on Intelligence and Security in addition to references from the Prime Minister. This would enhance the effectiveness and independence of the monitor.

Second, the commission supports those recommendations that the monitor's functions should more explicitly require consideration of whether relevant laws comply with human rights obligations. So, while the monitor is currently required to have regard to Australia's international obligations, in our view it would enhance the role of the monitor for him or her to be required to specifically assess laws for their compliance with human rights. That concludes my opening statement.

CHAIR—Thank you very much. We will now go to Senator Ludlam.

Senator LUDLAM—Thank you very much for your submission and your presentation this morning. One of your recommendations which you just spoke on relates to the tabling of the monitor's report and a requirement for government to formally respond to the issues that might have been raised. Have you given any thought to what would be a reasonable time period for that?

Mr Hunyor—We have not sought to set a specific period. That may be an issue that the department might be better to provide a realistic time frame for. In other contexts, periods of three or six months have been set, and a period of six months would seem to be an appropriate one. But, as I say, it may be useful to hear from a departmental perspective what they think would be an appropriate time to formulate a response to what could be expected to be quite detailed reports. But, if we had to set a time limit, we would probably choose six months.

Senator LUDLAM—Is it your understanding that it is the intention of the drafters of the bill that the monitor would be able to initiate inquiries on his own motion? Are you just seeking to have that ambiguity clarified, or is it your reading that at the moment he or she would not be able to do that?

Mr Hunyor—That is right. You will see that proposed section 6(1) says:

The National Security Legislation Monitor has the following functions:

(a) to review the operation ...

And so on. So it would seem that that is a function of the National Security Legislation Monitor to conduct such reviews, but then there is no specific function for them to report on those reviews except in their annual report, where one assumes they would be able to report on those reviews. But, as I said, other submissions have suggested that what appears implicit in that should be made explicit; namely, that the monitor can conduct those reviews of his or her own initiative. We think that it possibly falls within section 6(1) as we read it, but we agree that that is something that could and should be clarified.

Senator LUDLAM—You have also noted in your submission that you are familiar with the disproportionate impact of counterterrorism—whether it be investigations or prosecutions—on the rights of members of particular communities. We had a bit of debate about that with our previous witnesses. Do you think the monitor can have a beneficial impact on those particular communities, with the way that these laws are enforced? Or do you think that perhaps we might be just entrenching things further?

Mr Hunyor—The commission's submission states that we are familiar with those concerns that counterterrorism legislation can have a disproportionate impact. Our submission is really that, by establishing an independent monitor, those sorts of concerns can be addressed and that will increase public faith in both the fair and efficient implementation of counterterrorism laws. So we see this as being an important accountability and transparency mechanism so that those sorts of concerns, which I know were expressed this morning by Dr Emerton and have also been expressed in the submission made by the Australian Muslim Civil Rights Advocacy Network to the inquiry, could be addressed by the monitor. That would be a useful thing in ensuring public confidence.

Senator LUDLAM—We will be hearing from them a little bit later in the morning. In your concluding remarks you note that you do support the passage of the bill although you have noted a couple of key recommendations. Is there anything in your mind as to this? If you had to pick one amendment or one improvement that the committee could recommend, what would that be?

Mr Hunyor—That is a difficult question. I think probably the main thing would be to ensure that the government responds to the reports, so there should be an explicit requirement in respect of the reports of the monitor, which, as I have said, we think should follow reviews even when they are not referred by the Prime Minister. In our view the key improvement would be to ensure that those reports are tabled in parliament and that those reports are responded to by government. We think that would improve the effective operation and also the integrity of the monitor in the system set up under the bill.

Senator LUDLAM—That is great. Thanks, Mr Hunyor. I might come back with some more questions later if we have time. I will pass you back to the chair.

CHAIR—We will go to Senator Ryan.

Senator RYAN—Thank you for your submission, Mr Hunyor. I have a few questions about a couple of things that you raised in your opening statement. You have referred specifically, both in the written submission and in what you have just said, to the requirement that there be public confidence in Australia's counterterrorism laws. I am wondering about your view as to whether there is public confidence in those laws at the moment.

Mr Hunyor—I am not in a position to express a view about that this morning. I do not have those instructions from the commission. But I guess the evidence of Dr Emerton before the committee this morning suggests that there are certainly people who lack that confidence. I really cannot say any more than that. I could take that question on notice, but as I have said I think the evidence in a sense speaks for itself and those concerns have been raised with the committee.

Senator RYAN—I would be interested in the commission's view on whether there is public confidence in those laws at the moment because that helps frame the report.

CHAIR—Mr Hunyor, if you could take that on notice.

Senator RYAN—Yes, that would be appreciated.

Mr Hunyor—I will, thank you, Senator.

Senator RYAN—In recommendation 5 you talk about the independence of the National Security Legislation Monitor. I have not noticed, and there has been some discussion of it earlier today, a definition of independence. It is a term that can have very different meanings. Do you have anything to add about how you or the commission would define independence?

Mr Hunyor—There are a number of ways by which our submission looks at the issue of independence. It is really about making sure that the monitor can operate effectively as he or she thinks is fit within the statutory remit that they are given and that there not be an appearance or a potential for their operations to be interfered with. That is why we think that the ability to report by the monitor's own motion is an important part of their independence and we note, similarly, the recommendation made by others that the monitor's ability to review matters by their own motion would be important. I think it is the submission made to the inquiry by the Gilbert + Tobin Centre of Public Law that also suggests that the bill might be improved by including provisions relating to the actual establishment of the office, its funding and its status as an independent agency. The commission would also support those sorts of improvements to ensure that the monitor is both independent and also seen to be independent because we think that is important to the credibility of the role.

Senator RYAN—Another one of the recommendations of the commission is to include a specific reference to the monitor's ability to consult with the commission. As I read it, that is currently able to be done under the existing draft. I am wondering why the commission's view is that there needs to be a specific reference to the AHRC. Was the desire for a specific reference only to remain optional or was it to be a compulsion on the monitor to consult with the Australian Human Rights Commission?

Mr Hunyor—The commission does not submit that the monitor should be required to consult with the commission. Consistent with our views as to the independence of the monitor, that should be a matter within the monitor's discretion. We think it is appropriate to list the commission to simply affirm the role of the commission in protecting human rights in Australia and to really bring to the forefront of the monitor's consideration, in exercising that discretion to consult, that it is appropriate that the the Human Rights Commission be considered. I note, for example, that the human rights commissioner was on the Sheller committee in 2005, so that sort of role has already been recognised. We just think it would be useful to make that explicit.

Senator RYAN—The last question I have is in respect of clarification, to make sure I am reading paragraph 27 of your submission correctly. It refers to international human rights obligations, as they are described. Your footnote includes various treaties that Australia has ratified. I want to clarify that you are of the view that the monitor should consider the obligations where the executive has ratified a treaty but they have not been incorporated in domestic law by parliament. So that is what that paragraph means?

Mr Hunyor—That is right.

Senator RYAN—So issues that have not been incorporated into domestic law?

Mr Hunyor—That is right. Those are still our international obligations. The wording of proposed section 8 says the monitor must have regard to Australia's obligations under international agreements. So those obligations do attach to international law whether or not they have been incorporated.

Senator RYAN—Thank you, Mr Hunyor.

Senator LUDLAM—Mr Hunyor, there is a counterterrorism white paper on its way. I do not think we have seen it yet, and it is rumoured to be in progress. There is also a quite substantial discussion paper, put out to the public by the Attorney-General this week, proposing quite significant law reform in this area. Do you have any concerns about the fact that these things are proceeding in the absence of a reviewer?

Mr Hunyor—I think the commission's position is that it would be ideal if there were a reviewer and the quicker we have one the better. But obviously we appreciate that the government has an important obligation to make sure that our counterterrorism laws are working well now. We would not want it to necessarily be held up, so I think we would not be suggesting that things should be put on hold until a monitor is in place. We would be urging that the monitor be put in place as soon as possible. I also note that the monitor's role does not include looking at proposed legislation. It only includes looking at legislation that has been passed. That is something that I think is also a part of some of the submissions. It is possibly in the submission of the Gilbert + Tobin Centre of Public Law but I would need to check on that. Submissions to the inquiry have suggested that the role of the independent monitor could include looking at proposed laws as well. But even if the monitor were in place that would not necessarily impact on things like the discussion paper. We simply note that that is one of the important roles that these committees have in allowing legislative scrutiny, and bodies like ours and others that you are hearing from can make submissions on these issues.

Senator LUDLAM—In terms of the physical demands on the monitor and his or her staff, do you have a view on whether or not one part-time monitor would be sufficient to undertake this kind of work? Should it be a full-time position or should it be as in earlier iterations of this bill such as the one passed by the Senate in 2008, which had one amendment that proposed a panel of three. Do you have a sense for the workload demands that are going to be placed on the monitor and whether the resourcing identified will be sufficient.

Mr Hunyor—The commission does not have a position on that. It is clear that it is going to be a big job, but the commission does not have a position on those matters of resourcing or on whether or not the monitor should be full-time or part-time.

CHAIR—Thank you for the commission's submission to the inquiry and for your appearance via teleconference this morning.

Proceedings suspended from 10.30 am to 11.00 am

LYNCH, Associate Professor Andrew, Centre Director, Gilbert + Tobin Centre of Public Law
McGARRITY, Ms Nicola, Director, Terrorism and Law Project, Gilbert + Tobin Centre of Public Law
BUDAVARI, Ms Rosemary, Director, Criminal Law and Human Rights Unit, Law Council of Australia

Evidence from Professor Lynch and Ms McGarrity was taken via teleconference—

CHAIR—I welcome the representative from the Law Council of Australia and, via teleconference, representatives from Gilbert + Tobin Centre of Public Law. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your respective submissions. I invite each of you to make a short opening presentation. At the conclusion of your remarks I will invite members of the committee to put questions to you.

Ms Budavari—We have agreed with the Gilbert + Tobin Centre that they will make the opening statement because of the fact that they are participating via teleconference. If that is okay with you we are happy for them to make the opening statement.

Ms McGarrity—Thank you for the invitation to give oral evidence to this committee's inquiry into the national security legislation monitor bill. National Security Legislation Monitor Bill 2009. We believe that this bill is a very positive step forward. We support the passage of legislation that would establish an office dedicated to the purpose of ongoing, holistic and independent review of Australia's counterterrorism laws. We do, however, believe that there are ways in which this bill could be usefully enhanced. Our suggestions are based on a consideration of the text of the bill as well as an examination of the way in which the office of independent reviewer of terrorism legislation has operated in the United Kingdom.

A key criticism that has been levelled against the independent reviewer in the United Kingdom is that he is an advocate for the government and the laws made by that government. That is, the office is not perceived to be sufficiently independent. We believe that the Office of National Security Legislation Monitor, as it is set out in this bill, could be susceptible to similar criticism. To guard against this we would recommend a couple of things: first, that the title of the office be amended to include the word 'independent'; second, that the bill clearly identify the staffing and resourcing arrangements to the office; third, that specific reference be made to the ability of the monitor to initiate inquiries; and possibly most importantly that changes be made to the reporting process.

A related matter that we would draw the committee's attention to is whether this office should consist of a single monitor or a panel. For the reasons set out in our written submission, we would recommend that there be a panel of three persons. This would assist in ensuring the independence of the office as the panel would bring a diversity of experience. It would also mean that the office could not be swamped by referred matters. It would have sufficient resources available to be able to initiate its own inquiries and determine its own priorities. We are happy to expand on any of these particular suggestions or to answer any questions about other suggested alterations to the bill as it presently stands.

Senator BERNARDI—Ms McGarrity, in your opening statement you mentioned that you thought that the staffing or resources available to the independent reviewer should be put into the legislation. Is that a correct interpretation of what you said?

Ms McGarrity—That is correct. We are not suggesting that there should be a specific number put into the legislation, or either people or budget being given to the monitor. All we are suggesting is that there should be a transparent process established, either in the legislation or in the regulation, to determine the staffing and resourcing arrangements, as we have some concerns that this office will be located within the Department of the Prime Minister and Cabinet and this could undermine public confidence in the independence of the office. A lot of this is to do with the public perception of independence, and this is obviously also the basis for our recommendation about changing the name of the office.

Senator BERNARDI—Let us go to the staffing and resources for a moment. I am not quite sure how it could work. The regulations would come before the parliament annually. If you cannot be prescriptive about what resources are going to be available, I wonder if you would offer a suggestion about how it could be incorporated or what sort of wording would be there.

Ms McGarrity—I probably cannot suggest on the spot any particular wording that could be used. We would just note recommendation 3 of the Senate Standing Committee on Legal and Constitutional Affairs. Amongst other things, it suggested that the bill, should include things like remuneration and resourcing. I am

happy to take that question on notice and see if I can find any other examples of legislation or regulations that do specify in more detail the staffing or resourcing arrangements of an office like this one.

Senator BERNARDI—Yes, I would be interested, if you do not mind. The other concern you expressed was about the location in the Department of PM&C. What alternatives are you advocating?

Ms McGarrity—I am not suggesting that the office should not be located within the Department of Prime Minister and Cabinet. Indeed, the Office of the Inspector-General of Intelligence and Security is also located within a government department and, indeed, that is necessary for administrative purposes. All I am suggesting is that that particular factor combined with other aspects of the legislation—things like the current reporting arrangements in sections 29 and 30—could have the effect of undermining public confidence in independence. If the office is going to be located within a government department, as it necessarily must be, then steps must be taken to ensure that it is balanced by clear indications of the independence of the office, for example, in the reporting requirements.

Senator BERNARDI—This takes me to page 11 of your submission. You advocate that the monitor should provide its report directly to the parliament. How would this improve the operation of this bill?

Prof. Lynch—The concern we have, and the reason that we supported reporting directly to parliament by the Senate Committee on Legal and Constitutional Affairs, was that it is very important for the office to be seen and not simply be an instrument of the executive of the day. Reporting directly to parliament is one way which that can be achieved. That seemed to be the motivation behind the earlier committee inquiry. Certainly, we would favour the ability of the monitor to report directly to the parliamentary Joint Standing Committee on Intelligence and Security when conducting inquiries at the request of that body.

Senator BERNARDI—The previous inquiry was built around a bill provided by Petro Georgiou and Senator Judith Troeth in the legal and constitutional committee. The government has tried to replicate it—I use that word even though it is not precise—in many areas, but it has overlooked some of the recommendations of the previous legal and constitutional committee. Are these the areas with which you are principally concerned, that some of the recommendations have not been adopted?

Prof. Lynch—The major recommendation from that committee which was not adopted and which we had supported was that the monitor needed to be constructed of a panel of part-time members. We have concerns over the amount of work that exists for a single individual to do on a part-time basis. The criticism of that is that it is much more unwieldy, but the idea of a panel is that there is diversity of views on the operation of these laws. Given their sometimes controversial nature, again, that stresses the independence and rigour of the scrutiny that is being applied if it is not simply coming from one office-bearer who may well hold office for a significant period of time. In the United Kingdom, Lord Alex Carlile has been the Independent Reviewer of Terrorism Legislation pretty much for the last decade. That seems an undesirable situation to replicate here.

Senator BERNARDI—So you are advocating for a panel and there being regular rotation of members on that panel?

Prof. Lynch—That is correct. The expression that has been used is ‘staggered membership’, so there is always sufficient expertise on the panel and the seats are not all changed at the same time. That would also enable the spread of work to be sufficiently addressed. One of the very positive features of this bill is the way in which it itemises the legislation that the monitor is to examine. It is quite a long list. It strikes us that, in terms of practically getting through the work and ensuring that there is more than an individual’s opinion on how the laws are operating, a panel is the best way to go, and that was the view of the Senate committee that inquired into the Georgiou bill.

Senator BERNARDI—In the opening statement there was some criticism of the UK independent reviewer being too close to the government, and you have referred to it again. Was that one of the criticisms?

Prof. Lynch—Yes, but I should stress that that is a criticism coming from some quarters. The office of Lord Carlile in the UK has attracted criticism from some sections of the community as being far too defensive of the government’s policies over there. That is something there are a variety of views on. Obviously, it is undesirable for an office such as this, whose very purpose is to be seen to be applying independent scrutiny of these laws, to be criticised on the basis that the relationship is too cosy with the government. We certainly would not say that that is the consensus view on how Lord Carlile has performed that job, but we are certainly aware of criticisms through the press and in parliament that have been made from some sections, who are concerned that he has taken on the role of advocating changes in government policy that have been quite controversial. The best example of that was the extension of precharge detention to 42 days.

Senator BERNARDI—Whether the criticism is appropriate or not is a subjective thing of course. Are the sections of the press and other groups that you talked about credible or fringe in your opinion? I should not ask you for your opinion, I guess, but are they credible and realistic criticisms?

Prof. Lynch—They are from credible sources and they are printed in mainstream analysis, both academic and journalistic. If you create a panel of three which produces a report into the operation of these laws and the membership of that multimember body changes and is refreshed on a far more regular basis than occurs in the United Kingdom—more often than, say, every 10 years, which has been the case with Carlile in the UK—then that kind of criticism becomes much harder to level.

Senator BERNARDI—But you are not advocating a different appointment process? Those three or however many appointments would still be made by the government?

Prof. Lynch—Absolutely; that is quite right.

Senator LUDLAM—Thank you for coming in and for your submission. Should there be a requirement on the government to respond to the reports of the monitor when they have been made public?

Ms Budavari—I will start, but I am sure that Gilbert + Tobin will have a comment on that as well. Certainly the Law Council's submission is that there should be an obligation on government to respond and it would be important to include such a provision in the bill. I think Gilbert + Tobin have suggested that there be a time frame attached. They may wish to comment on that.

Ms McGarrity—We would certainly endorse what the Law Council has said in relation to there being a mandatory requirement for the government to respond within a particular period of time. From memory, I believe that was part of the original independent reviewer bill that was considered by the Senate Legal and Constitutional Affairs Committee. We would endorse something like the provision that existed within that bill being included within this National Security Legislation Monitor Bill.

Senator LUDLAM—One of our previous witnesses put up the proposition that it would potentially be appropriate for the monitor to be able to review proposed legislation rather than what is already on the books. Does either the Law Council or Gilbert + Tobin have a view on that?

Ms Budavari—The Law Council certainly has a view. Again, it was put in our submission that that would be a useful addition to the functions of the National Security Legislation Monitor.

Prof. Lynch—Our view on that question is different. I can see that the input of the independent reviewer might be found to be useful, but I suppose it does have the risk that the body might become an approval mechanism, whereas really the parliament must decide whether those changes to the laws are to be passed. We see the reviewer as having very much a review rather than a preview role in reporting to the government and to the parliament how those laws, once made, are actually operating in effect. Again, that concern is borne out by the approach taken by Lord Carlile in the UK on some issues, which was to indicate his support for proposed changes. That, in particular, was the incident which led to some concerns being expressed that part of his job was to sell the government's policy on antiterrorism laws. So we think that the review function should be confined to exactly just that.

Senator LUDLAM—That is helpful. Is it your understanding of the current draft of the bill that, if the Prime Minister initiates or triggers a review by the monitor, that instruction would be made public?

Ms Budavari—I do not think that we have actually turned our mind to that and it is a very good point. A quick look at the clause would not seem to indicate that there is a requirement that it be made public. We would certainly support openness, transparency and accountability and therefore would support that requirement being inserted.

Ms McGarrity—I agree with what the Law Council has said, that it does not appear to me, on the face of section 7 of the bill, dealing with references, that a request to the monitor to consider a particular matter or conduct an inquiry into a particular matter would have to be made public. I am guessing that that may well be connected with the fact that section 30 of the bill also does not appear to require the Prime Minister, after receiving a report on a referred matter, either to table that report in parliament or to make that report public. It seems to us as though the referral process in this bill is really a process almost of the National Security Legislation Monitor providing advice to the Prime Minister. It is not a process of conducting a public inquiry; it is an advisory function.

Senator LUDLAM—I am already noticing a shift in the government's intention to move this into the PM&C portfolio. What are your views on the reporting obligations going directly to the Prime Minister? The

fact is that this committee is inquiring into this bill, rather than the Senate Standing Committee on Legal and Constitutional Affairs, which is in the A-G's portfolio. Do you foreshadow any complexities down the track in the relationship between the Attorney-General and the Prime Minister as far as this monitor is concerned?

Ms Budavari—In terms of a response from the Law Council, I guess it is always difficult to foresee what might occur down the track. I think our position is that we want this function established. We have been asking for this function to be established for a considerable period of time, arising out of many ad hoc inquiries, particularly into terrorism legislation. So we do not have a strong preference as to where the monitor would be located.

We do want to stress that, wherever the monitor is located, the monitor will require sufficient resources to be able to do this very important job. The Law Council was fortunate to meet with Lord Carlisle when he visited Australia earlier this year. He certainly indicated that he thought that at least three or four staff were necessary to fulfil his role. When you look at the budget allocation for this office, it appears that that allocation would be quite stretched to cover three or four staff as well as the part-time monitor. The Law Council is concerned about resourcing and we endorse the comments by Gilbert + Tobin about resourcing and also the Senate Legal and Constitutional Affairs Committee's comments that it needs to be dealt with somehow in the bill and not just left to the government processes in terms of budget allocations.

Ms McGarrity—The Gilbert + Tobin Centre, as we state on page 7 of our submission, would favour the office of the National Security Legislation Monitor being contained within the Attorney-General's Department rather than within the Department of the Prime Minister and Cabinet; however, we do not have a particularly strong opinion on this point, and that is because we see the office of the monitor as being an independent statutory office that would be located within either of the departments merely for administrative purposes. We would not see either the Attorney-General or the Prime Minister being able to make general directions as to the way in which the monitor exercises his or her functions.

The other point I should make clear in relation to the independence issue is that we would certainly favour it being made more explicit in the legislation that the National Security Legislation Monitor is not merely intended to conduct inquiries on matters referred by the Prime Minister but has the function of conducting inquiries on his or her own initiative, which would once again serve to strengthen this perception of the independence of the office, as would changes to the reporting arrangements in proposed sections 29 and 30, particularly including a requirement that a report be directly tabled in parliament and also limiting the extent to which, if at all, the Prime Minister can request an interim report on referred matters by the monitor, which we do believe will undermine this public perception of independence.

Ms Budavari—The Law Council strongly endorses those comments as well.

Senator BERNARDI—Does the Law Council believe there should be a requirement for the independent reviewer or the people who participate on the panel to have a legal background?

Ms Budavari—Not necessarily. I think in the way the bill is drafted is that the person or persons who are selected, if there is an amendment to the bill, have to have suitable qualifications and experience. Obviously, a legal background would be an advantage in reviewing legislation and how it has been operating, but we would not necessarily see that that would be an absolute requirement. It would be up to the Prime Minister, in consultation with the Leader of the Opposition, to select a person or persons with suitable qualifications.

Senator BERNARDI—There has been some suggestion that it should be a civil rights lawyer or someone of that nature. You do not agree with that?

Ms Budavari—I would not go so far as to say that we would not agree with that, but we would certainly say that the criteria appear to be appropriate. 'Suitable qualifications and experience' is commonly used in legislation that deals with the selection of people. It needs to be fairly broad so that you get the best possible person for this role. One would assume that someone with a civil rights legal background would rate highly in terms of suitable qualifications and experience, but there have certainly been appointments to other positions where people have had different backgrounds and they have been able to perform the functions perfectly well.

Prof. Lynch—I suppose that is one of the concerns which may also drive a multimember panel rather than a single monitor. Our view is that because it is a reviewer of laws some legal qualifications and practice experience is important. Lord Carlisle is a very good example of the kind of person that you would have in mind. But the advantage of having a panel is that some other perspectives, either from security views or civil libertarian views, could also be represented and work with that person who is coming purely on the basis of

legal training. If the issue is how to narrow down what kind of monitor you want, the advantage of a panel is that you can really spread a bit of diversity.

Senator BERNARDI—I am not sure if you heard the earlier evidence given by witnesses—did you?

Prof. Lynch—No, sorry, I did not.

Senator BERNARDI—There were some suggestions that, basically, the administration impact of the existing laws is racist. Can you see that if you had a panel, and you said, ‘We need to have effective representation and things,’ that there would be demands for people of a particular ethnic or religious orientation? Or you could say, ‘We have to have a civil rights lawyer and we have to have someone who is not,’—those sorts of demands may creep into it over the course of time. Do you have a comment on that?

Prof. Lynch—I can see how that might occur, and I think the government would do very well to be resistant to seeing the panel as being bluntly representative of various camps. The issues involved in determining whether these laws operate in the way that the monitor is required to look at them—are they effective and are they necessary—are very complex, and do not really reduce down to single position perspectives. I would be aware of that concern, but I would not think that the government needs to be tokenistic in how it comprises the panel. I suppose I was just keen to respond to your idea that there are different perspectives on how these laws operate. If the purpose of the monitor—and really, this does seem to be the case—is to ensure public confidence in the laws and to dispel a lot of myths as to the effects that they may or may not have—and the fear which is often born out of a failure to understand them—as well as addressing actual problems that exist with them, then there would seem to be a case for a degree of diversity in the monitoring body.

Senator BERNARDI—I take your point, and I agree with you that we should encourage the government to reject any sort of tokenism, but I am also absolutely mindful of the pressure that can be brought through the public sphere by people who have an interest in this space. I am not quite sure how you resist that. Thank you for your contribution, I appreciate it.

Senator LUDLAM—Ms Budavari, you mentioned that you had the opportunity to meet with Lord Carlile, and you have obviously spent a bit of time thinking about how this is working in the UK. In the broadest terms that you like, can you describe for us any aspects of the model that is operating in the UK that we should adopt here, and are there any things we should stay away from?

Ms Budavari—In terms of aspects that we should adopt; we would reinforce the view about the importance of the independence of the role, and of all the mechanisms that we have outlined in our submission—also outlined in the Gilbert and Tobin submission—about how you reinforce that independence.

In our submission we have also specifically referred to the UK independent reviewer’s role in monitoring or providing input on control orders. While that process is different in the UK and in Australia, we think that there is some scope for some kind of role for the independent reviewer to certainly assess what has happened in terms of control orders. So we would support that from the UK. I think we are largely supportive of the UK model so I cannot, off the top of my head, think of anything that we would not support from that model.

Senator LUDLAM—To our friends at Gilbert and Tobin: you have noted that there is a bit of a need for the bill to comprehensively describe the role and function of the monitor, so you believe there is some ambiguity there that needs some tightening up. Can you outline what you think that role and function should actually be?

Ms McGarrity—We are actually very happy with the bill in terms of how it sets out the functions both in the objects clause and then in the role and functions section, section 6. However, what we would like to be included in this bill is simply some explicit recognition that the monitor’s role is not limited to conducting inquiries into referred matters but, as with the independent reviewer bill, the monitor has the capacity to conduct inquiries upon his or her own initiative and to determine the priorities. In terms of the criteria to be assessed by the National Security Legislation Monitor, we are very happy with the way in which the functions are set out. We believe that, necessarily, there needs to be some flexibility in those criteria as each national security monitor or each panel of national security monitors will necessarily take into account slightly different criteria and we do not see that as that being a bad thing.

Senator LUDLAM—Thank you very much.

CHAIR—As there are no further questions, I thank both organisations for your submissions and also for appearing before us in person and also via teleconference.

[11.32 am]

WOOD, Mr John, Board Member, Australian Muslim Advocacy Civil Rights Network

CHAIR—Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has before it your submission. I now invite you to make a short opening presentation and at the conclusion of your remarks I will invite members of the committee to put questions to you.

Mr Wood—Thank you very much for inviting us to present in person. I am here because the Australian Muslim Civil Rights Network generally supports the bill as framed. We also supported the Trood bill at the legal and constitutional inquiry in 2008. There are some particular concerns we have and I will speak to them in broad general terms and then go into the specifics. We would like to ensure that the community impact and the human rights aspects of the anti-terror legislation are explicitly included within the purview of the independent reviewer and, if possible, to have some specific law reform aspect incorporated as well, which we hope will occur, on executive excess. If there was a possibility of having something like an own motion type provision in the law reform mode, that may be useful.

While the antiterrorism laws are framed in neutral language, we observe, at present anyway, that our community is disproportionately affected and impacted by the operation of such legislation. We did a survey among our community sometime back—I think it was in 2005, but the sentiments seem to continue even to this day—and 75 per cent of our community who were interviewed were quite worried about the operation of such legislation. The conduct in the Izhar ul-Haque case of certain torturous actions by the security officers became quite well known in the community and does create some angst within the community.

In terms of specific comments, I would like to look at clause 3(c). When we talk about ‘Australia’s international obligations’, while we are specifically interested in ICCPR articles 9 and 18, we would like this to be reflected into domestic legislation so that it becomes operative within Australia so that we have an enforceable right against it. While the independent reviewer is to act consistently with international obligations, these obligations are not effective within our domestic legislation at the moment, so that is an aspect that we would like to raise.

In terms of 3(d), ‘contains appropriate safeguards for protecting the rights of individuals’, we would also like to talk about the impact on communities generally. Muslims are not a homogenous group. They do not belong to any particular race or language group. There is a lot of bycatch in the use of terms such as ‘Muslim’. I am not quite sure how we would frame it, but there is a community impact and we would like that to be considered.

We are also concerned about the issue of resourcing the office. There is a lot of legislation that can come in a rush when there are exigencies. It would be important that the reviewer have the resources to deal with these sudden extra demands on his or her available resources. If we look at 6(1)(a) in part 2, ‘to review the operation, effectiveness and implications’, we would again like to see some sort of perhaps non-exhaustive reference to human rights implications, community relations implications and international obligations, whether or not they are reflected in our domestic legislation.

One of the recommendations we made previously was that the independent reviewer be able to refer questions to the Federal Court if it were possible and if there were particular questions of law. As we read the clause 11, it does not appear to us that it is necessary for either the individual or the panel to have legal qualifications and we would strongly urge you to consider that the individual have legal qualifications, plus be quite experienced, even a chapter 3 judge, in acting as *persona designata*.

In clause 7 there is an issue of transparency which does not seem to come through in the current wording of the legislation. If whatever matter referred was acted upon, we would as a community, like to see at least parliament having turned its mind to the outcome of the action taken by the executive on an issue raised by the independent reviewer.

CHAIR—May I just ask you to summarise your statement so that we can perhaps drill down with some questions from the committee. Could you just summarise now your opening statement for us.

Mr Wood—Overall we are in support of the bill, but there are particular issues, as I raised, which we would like you to turn your mind to.

CHAIR—Thank you very much. I am sure that you will have an opportunity to expand on that with questions.

Senator RYAN—Thank you, Mr Wood. You have raised the issue of the impact of the antiterrorism laws upon the Muslim community and their perceptions, as a number of others have. I appreciate your comments that one should not view the Muslim community as a homogenous community. You have, however, quoted some numbers around survey data of interviews conducted in 2005. Was that survey also made up of the breadth of the Muslim community in terms of ethnicity, race—which you mentioned—gender and age, or was it representative of groups within the Muslim community?

Mr Wood—Thank you, Senator Ryan. That is a very good question and I had not actually thought about that until you just asked me the question. This survey was taken at the end of the fasting period when the community in Sydney gathered for the celebration of the Eid. It is open to everybody—it is a public event—but in particular, ethnic groups tend to congregate at this celebration. So I think that the short answer is: the diversity is not reflected—

Senator RYAN—Was it reflective of one particular group within the Muslim community more than others?

Mr Wood—It would be reflective of more than one group. There would be a large Arab contingent in those celebrations, subcontinental people, perhaps not as many of the Turkish community or the Malay and Indonesian speaking communities and not as many of the Australian convert community.

Senator RYAN—Would it be possible to get a copy of the results of the survey for the committee? Have the results been published or is it only the data that you had in here—the numbers that were questioned, where and when? Obviously survey data matters. If you are doing 50 people versus 500 people—

Mr Wood—I think that it was 175. Can I take that question on notice, please—

Senator RYAN—That would be much appreciated.

Mr Wood—because I am not sure where the results are and who has them.

Senator RYAN—I just want to go into this issue a little bit further. It strikes me, with the claims that you and other submitters have made regarding the perceptions within the Islamic community of the laws having a particular negative impact, that having a monitor is not necessarily going to change a wide number of perceptions, because they are not just driven by laws; they are driven by media coverage too, I would imagine. You mentioned the ICCPR, which I will go into in a second, but what specifically about this proposal do you think is going to address those perceptions?

Mr Wood—I do not think there is a magic bullet that would address all the community perceptions. We have in our community a huge range of people, and, no matter what you do, some people will still be paranoid.

Senator RYAN—It strikes me that the prime job of the law, apart from protecting Australia and Australians—

Mr Wood—Absolutely.

Senator RYAN—is to have support from across the entire community. You mentioned in your opening statement—I did not write down the exact quote—that the laws are drafted in a way that they apply to everyone equally. Do you consider them to be laws that do apply equally? Is this just a perception issue or do you actually think that there are problems with the laws in that they do impact on your community more than on others?

Mr Wood—I think that the laws are definitely drafted in neutral terms. At different times and in different circumstances, different groups will be affected. At present, the Muslim community is affected more, obviously because it is Muslims who are doing horrible things around the world—or people who act in the name of Islam. That is the reality of it. If they called themselves Martians, I guess people would be up in arms against Martians. There is a contributing factor there clearly, but I think the point I was trying to make was that it is a minority of people who do take the law into their own hands, but, because the newspapers and the media are not precise in their terminology and in their use of words, the generalisation tends to get a lot of people caught up in the whole thing. To answer your specific question, as I understand it: while an independent monitor will not completely eliminate all angst—and I do not think that anybody would expect that—I think it would go a long way towards mitigating these fears, because there is that review mechanism.

Senator RYAN—You did mention—and I just want to clarify this, because I think it is outside the remit of this particular inquiry—that your organisation was of the view that you would like the ICCPR incorporated into Australian domestic law. I just wanted to check that that is what you suggested in your opening statement.

Mr Wood—Perhaps that is what I did say.

Senator RYAN—I may have misheard it.

Mr Wood—I am not sure either. The issue was around—

Senator RYAN—It was clause 6.

Mr Wood—Yes. It was around the implications of international law and taking into account international law. As international law is not self-effecting in our system of law, there would be no legal obligation on the individual to take into account international law in its broadest sense. If it were part of our domestic law, the individual or the panel would be obliged to take it into account, like anything that is part of our domestic law.

Senator RYAN—Sure. You probably understand that is a contentious domestic issue also. Finally, you mention in your submission the potential for the monitor to make comments on proposed laws. That strikes me, just as your suggestion does about clause 6(2)(b) and individual complaints, that that could damage the perceived independence of the monitor. The monitor is a monitor of law rather than an Ombudsman to pursue individual complaints or a commission, as we heard from the Human Rights Commission, to make submissions on considered laws. If the monitor were involved in individual cases, which can be the subject of much public scrutiny, or involved in political debate about laws currently before the domestic political process—and one or both of them may be partisan in nature or be political without the political party partisan nature being dominant—wouldn't that potentially compromise their independence or perceived independence? They may then be seen by some as not being independent if they say that one law is bad and another law is good.

Mr Wood—I have spoken to Lord Carlile about the extension of the detention period in the UK. This was the submission that AMCRAN made, so I guess it stands as it is.

Senator LUDLAM—Some of the other sessions we have had—and I know you have listened to some of them—have been dominated by the disproportionate impact that people say the application of the terror laws, if not the drafting, has brought into certain communities. Can you describe for us in a bit of detail what that actually means for people's liberty experience?

Mr Wood—I think it is a particular issue for Muslim women who cover. I live in Canberra and there really have been no problems here. A lot of the problems we hear of, that are reported and come through to the community, are from Sydney. The vast majority of the population do not allow these things to impact on people. Young Muslim women who cover have had people in supermarkets come up to them and say: 'I think you're really brave. This is fantastic. Go for it.' I cannot quantify it. These are anecdotal reports that we hear.

At the other extreme you have particularly older women who have had their headscarves pulled off their heads. Every time there is something in the media and it is in the public consciousness these incidents seem to happen with greater frequency and then they die down. Those incidents seem to have a multiplier effect because they speak to their families and then their families talk to people in the broader community and it creates a sense of fear among people. Whether it is rational or not, it is difficult to say, but there is a feeling. Even in Canberra where we have had no reported incidents, people say they are a bit worried about going out. They will call each other and say, 'Can we go to the shops together?'

Senator LUDLAM—To what degree do you think the language barrier plays a role? There are a couple of separate issues there. Firstly, about access to legal advice and legal counsel for people who might have had some contact with officers from any one of the different intelligence agencies that work on terrorism issues. Is there a sense that people are not necessarily all that aware of their rights and their obligations under the laws as they exist at the moment?

Mr Wood—There are many in our community for whom English is not their first language and who do not have a great deal of familiarity with our legal systems or traditions. Through AMCRAN we have tried to put out information in Indonesian, Persian, Urdu, Arabic and, I think, Turkish. The problem is that though their first language may be something other than English their competence in that language is also sometimes a bit problematic. Trying to convey information with a legal content in a translated language is difficult. And when the people who are receiving this information find it difficult to even comprehend their first language, let alone the concepts that are being transferred across, fear seems to permeate a lot quicker than information. We have

these problems in our mosques, where you can have people speaking 20 different languages. How do you convey even religious information to them? It is a problem. We hope that in time the problem will ease.

Senator LUDLAM—One of your proposals was that the monitor should have a specific law reform role. Do you think the bill as it is drafted precludes the monitor from putting its views to government on law reform issues? Do you think that should be made explicit in the drafting of the bill?

Mr Wood—I think the way we have framed our submission is that we would like that law reform bill to have a supervisory or an advisory role. My personal view is that I would like to leave things to parliament. I think in our system we can leave it to you guys to debate things and if the laws as they are do not operate then we trust our judges to do the right thing, I guess. But as the AMCRAN submission is written, the answer would be yes to your question.

Senator LUDLAM—Thank you.

CHAIR—As there are no further questions, thank you very much for your organisation's submission Mr Wood and for taking the time out of your day to appear before us.

Mr Wood—Thank you very much for having me.

Proceedings suspended from 11.58 am to 12.02 pm

FLEMING, Mr Garry, Assistant Secretary, Border Protection and Law Enforcement Branch, Department of the Prime Minister and Cabinet

HUME, Ms Maree, Principal Legal Officer, Security Law Branch, Attorney-General's Department

McDONALD, Mr Geoffrey, First Assistant Secretary, National Security Law and Policy Division, Attorney-General's Department

CHAIR—I would like to welcome representatives of the Attorney-General's Department and the Department of the Prime Minister and Cabinet. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I remind witnesses that the Senate has resolved that an officer of the department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to senior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual question about when and how policies were adopted. I now invite you to make a short opening presentation and at the conclusion of your remarks we will invite members of the committee to put questions to you.

Mr Fleming—This opening statement is on behalf of us all. On 23 December 2008, the government announced its decision to establish the position of the National Security Legislation Monitor. This was in response to recommendations made in a number of reviews, including the Sheller committee in April 2006, the Parliamentary Joint Committee on Intelligence and Security in December 2006 and the Clarke inquiry into the case of Dr Mohamed Haneef in December 2008. The position of the monitor is to be within the Prime Minister's portfolio, similar to other oversight mechanisms like the ombudsman and the Inspector-General of Intelligence and Security. For that reason, PM&C and the Attorney General's Department have developed the bill for the government jointly.

I do not propose to walk through the bill, you have probably had enough of that. A lot of the public comment, and indeed submissions, to this inquiry refer to the UK model and Lord Carlile's role, and that is a useful touchstone to a point. But a key difference for us in developing this has been that we are bringing this into an already fairly mature public scrutiny system in Australia, which is quite different from the UK model. In particular, we already have the Inspector-General of intelligence and Security and the Ombudsman's role including in relation to law enforcement. There are a range of others including the Privacy Commissioner and the Human Rights and Equal Opportunity Commission. Of course, there is parliamentary oversight with the Parliamentary Joint Committee on Intelligence and Security and the foreshadowed parliamentary joint committee on law enforcement to replace the Parliamentary Joint Committee on the Australian Crime Commission.

Because it is coming into an already quite mature public scrutiny system is a lot of what sits behind why, for example, the functions of the monitor are described in the way that they are in the exclusion of dealing with individual complaints. It also goes to another issue that has been raised about it being a part-time position. It is in light of the fact that there are other mechanisms to take care of other aspects of public scrutiny of national security legislation and its use that it is set up that way.

CHAIR—Thank you for that opening statement. Mr McDonald, would you like to make some comments?

Mr McDonald—Only to say that the Attorney-General's Department administers a lot of the legislation that is listed in this bill and we are here to indicate our very full support not only for the bill itself but in terms of providing support to the monitor with briefing and the like. We just wanted to indicate that we will play a very enthusiastic role and the Attorney-General is very enthusiastic about giving the monitor every support that he needs.

CHAIR—Thank you for those comments.

Senator BERNARDI—Mr Fleming, you mentioned in your opening statement a number of inputs into how this bill came about. Did the department consider the recommendations of the Senate to the legal and constitutional committee's report into a similar bill?

Mr Fleming—That would have been referred to in the development of the bill, I am sure.

Mr McDonald—It was.

Senator BERNARDI—The evidence that we have heard has supported a number of recommendations that were in the legal and constitutional committee report which are not included in this bill. I will name one,

which is that there should be a panel of three independent reviewers. I am seeking your comment as to why that is not the case.

Mr Fleming—Sorry for my slightly equivocal answer before but ultimately the bill we were developing was in response to the decision of government in December last year and part of that decision was that it was a single position rather a panel.

Senator BERNARDI—I am not trying to pointscore here. I am merely trying to establish that there were a number of recommendations which have been supported by the evidence that has been provided today that are not included in the government's bill. I want to know why that is.

Mr Fleming—That was the policy decision made by government, that it be an individual.

Senator BERNARDI—Particularly that it be an individual monitor?

Mr Fleming—A monitor position, rather than a panel.

Senator BERNARDI—Could you comment on the suggestion that the reviewer report to the parliament?

Mr Fleming—That would certainly be one option. Reporting to parliament through a responsible minister is not an uncommon construct. The other issue in this particular area is that you might be dealing with cases that can drag on for years, and it is very easy to prejudice some of those cases through public comment. Whatever model is used, they would just need to make sure there was that safeguard against accidentally prejudicing an ongoing case.

Senator BERNARDI—So you actually think reporting directly to parliament might be used?

Mr Fleming—Not necessarily, I am just saying that with whatever method is used there would need to be some safeguard to make sure that there was not a prejudice to an ongoing operation.

Senator BERNARDI—There has been some criticism of ongoing operations levelled by some of the witnesses that are here. The independent reviewer, of course, is designed to allay some of those fears. Mr McDonald, do you want to make a comment?

Mr McDonald—When the government made its decision—and the ministers in the government were certainly aware that the panel idea, or reporting directly to parliament, were possibilities—it was felt that, given the complexity of the security environment, it was probably best to have the monitor report through the Prime Minister.

Just to give a bit of granularity to that, when it came to the Clarke inquiry, for example, we experienced huge difficulties in that often the information does not come from this country. Often it comes from other countries and we have to be very careful about sensitivities in relation to the information that is sourced from other countries. Quite often it is not apparent, on the face of it, what the sensitivity is, so this mechanism and the sort of model we have got here enable us to explore those matters. You would probably appreciate that much of the safety of Australians in the context of terrorism and acts of foreign interference and so on does depend on intelligence security cooperation with other countries. If you do not respect those other countries' sensitivities then you might find yourself not getting sufficient information.

Senator BERNARDI—Based on those comments, would the independent reviewer require a specific level of security clearance?

Mr McDonald—Certainly. That would be something that would be part and parcel of the—

Senator BERNARDI—What level would that be? I am not that familiar with many security clearances, actually.

Mr McDonald—I have not personally looked at that and I do not know. I expect it would be at a very high level.

Mr Fleming—I imagine they would probably need to go through a top secret security clearance.

Mr McDonald—That is what I think it would probably need to be.

Senator BERNARDI—Is that the highest? I am showing my ignorance!

Mr McDonald—I thought it was a cruel question! That is the level of security that is required for this type of function—the highest level for this type of function. That is the best way I can answer that question.

Senator BERNARDI—I will let you off with that one—discretion in that matter!

Mr Fleming—If I could make one point—you talked about the criticism of ongoing operations. I just refer back to the fact that the monitor's role is not about investigating the individual complaints; there are mechanisms through the ombudsman and the IGIS.

Senator BERNARDI—But a feature of the information, the evidence, that has been provided to us today by a number of concerned organisations is that particular racial groups, Somalis or Muslims, have been targeted unfairly, it has been unwarranted and—

Mr McDonald—Let us use that as an example. Let us say the allegation was that Islamic people were being targeted unfairly. If the allegation was that they were being targeted unfairly because of procedures in the legislation—as a result of the way the legislation is drafted—then that would be a legitimate matter for the legislation monitor to consider. If, on the other hand, it was felt they were being targeted unfairly because there was some horrible policeman who was racist, or something like that, then that would be more appropriately dealt with by the Ombudsman and Inspector-General of Intelligence and Security functions. That is the sort of delineation. Those accountability mechanisms have been operating for some time and have worked very well. I am probably more familiar with the Inspector-General of Intelligence and Security, and I can tell you you could not get a more fearless and thorough investigator of conduct than the inspector-general.

Senator BERNARDI—Just following that up, we heard that the Islamic community were targeted under the terrorism laws, whereas non-Muslims involved in comparable offences—and there were allegations of arms caching or stockpiling, and a couple of others—were not being charged under terrorist laws. What would be the monitor's responsibility in that regard?

Mr McDonald—The interesting thing about that is that it would come down to whether, for some reason or other, the terrorism laws gave the police or ASIO some sort of provision which made it more likely that they were going to target these people than other people. But I think that, at the end of the day, you start getting into the area of police resources—what sorts of resources they are putting into particular matters—and that of course is getting away from monitoring the legislation. So, in a really simplistic example, it would be the case that the police would give greater priority to a terrorism investigation than, say, someone who has stolen property from someone's shop or their house or something like that, because terrorism is a higher policing priority in police case management.

So you have to look at the facts of the particular situation or allegation to determine where the issue is best raised. If, for example, there were a complaint of racism, it would be appropriate to go to the IGIS if it was about ASIO or to the Ombudsman if it was about the Federal Police. But sometimes, because you are focusing on a certain type of crime that is particularly damaging to society, people think you are being discriminatory on the basis of race when in fact the real focus is the type of crime.

Senator BERNARDI—So, if you are investigating a potential terrorist cell which happens to have links to a particular community, whether it be a Muslim community or another community, it is only reasonable to question people who are part of that community; is that what you are telling me?

Mr McDonald—It is totally non-discriminatory as to what community it is. It is a question of whether they are involved in terrorism. If people are involved in terrorism, it does not matter who they are. There is a very high priority in dealing with terrorism because it can destroy the whole confidence of a society, both psychologically and economically.

Senator BERNARDI—But this monitor will not be assessing whether discrimination or bias exists in the implementation of the legislation, will they? They will only be assessing whether the legislation is appropriate.

Mr McDonald—Yes.

Senator BERNARDI—And whether it needs to be reviewed or modified over time. So a lot of the evidence we have heard today is not appropriate.

Mr McDonald—For example, you could have a situation where the monitor might see some behaviour of this nature and say, 'It would be ameliorated if you put a certain provision in your legislation,' but the focus is the legislation. It might be—there is nothing worse than making up examples on the spot!—and this is highly hypothetical, that doing raids at a certain time of night is difficult for a particular culture. It might be so difficult that it causes a whole pile of problems from a security point of view and other points of view. The monitor might say: 'We think we should have something in the legislation that says you can only raid between certain hours,' and that would have other problems, 'because we think that conducting raids during those hours creates a lot of problems.'

Senator BERNARDI—Do you have a view that you would like to share with us about the suggestion that the monitor should be a lawyer or have legal training, including the suggestion that they should be a former judge or a civil rights lawyer? I am not sure that we have any civil rights lawyers we can spare right now—I do not want you to comment on that last bit.

Mr McDonald—As a lawyer I would say that we are all civil rights lawyers, including the people in government. I have worked in criminal law and security, and I think most of my work has focused on safeguards in legislation. You will not get a bigger civil rights lawyer than me in that respect.

Senator BERNARDI—Is that a job application?

Mr McDonald—No, I do not think they would have me. I think I have drafted too much of the legislation! Firstly, obviously, legal qualifications would be taken into account, but I think it is important that there be some flexibility in choosing the person. It is the character and the experience of the person that are very important, not just the qualifications. Secondly, there is consultation with the Leader of the Opposition. It is a high-profile job, so I would expect any ‘stupid’ appointment would be very publicly exposed. Sometimes with legislation of this nature it is important to give some flexibility.

Mr Fleming—I think that, clearly, relevant parts of the legal profession are going to be an obvious picking ground. A legal background will help. My only concern would be that, if you locked in that they had to have legal qualifications, you would potentially rule out someone who might be very well qualified to do it. You might not get the best candidate, just because they do not have legal qualifications.

Senator BERNARDI—Is there a risk, given that it is a part-time role, that it might compromise other people’s external activities or that their external activities might compromise their role? Would there be a limit on what they are able to participate in?

Mr Fleming—There would be, and there is explicit provision about them not being able to undertake activity that would put them in a conflict of interest.

Senator BERNARDI—If they declared a conflict of interest, they would not be able to participate?

Mr Fleming—Well, you would not appoint them. And under clause 15 of the bill, the monitor:

... must not engage in any paid employment that conflicts or may conflict with the proper performance of his or her duties without the Prime Minister’s written consent.

Senator BERNARDI—I am sorry, I had not seen that. That is fine.

Senator LUDLAM—I have a couple of questions. A bit of confusion has been expressed by some of the earlier witnesses today as to whether the monitor can initiate his or her own reviews. It certainly suggests so in the second reading speech and in the EM, but then clause 7 suggests that referrals would have to be approved by the Prime Minister’s office. Can you clarify for us what the intention is.

Mr Fleming—Certainly. Within the core functions of the monitor, as expressed in clause 6 of the bill—reviewing the ‘operation, effectiveness and implications’ of the specific legislation and any other relevant law, and to ‘consider’ that legislation—under subclause (3) the monitor ‘has the power to do all things necessary or convenient’ for discharging that role. So, within that core role, he or she will not need a referral and can investigate anything on his or her own motion. The ‘References’ bit means that it is if there is some national security related stuff that is outside that core role that a decision is made we will also get the monitor to look at that.

Senator LUDLAM—All right. I suspect the committee may decide ultimately to recommend that the drafting be clarified because it has created a degree of ambiguity. Can we go back to some of the questions Senator Bernardi was raising about when reports of the monitor would or would not be presented directly to parliament, either via the Prime Minister’s office or directly to the parliament. Can you clarify that. My understanding was, and I think you have confirmed, that the monitor is not necessarily going to be spending a lot of his or her time investigating specific cases but that this is more a policy and legislation review function. That is why I was a bit surprised to hear Mr McDonald talking about whether operational matters might be compromised by tabling these documents directly in parliament. My understanding was always that this was about policy and law rather than the specifics.

Mr McDonald—The Clarke inquiry is a classic example. The Clarke inquiry has made a number of policy recommendations but the basis of those policy recommendations is relevant to some quite sensitive stuff, behind it, relating to the case. So you could have something that is quite sensitive that warrants an amendment to the legislation, and that happens all the time. With just about every piece of legislation that we have in the

security area there is usually some experience on the field that relates to matters that are quite sensitive that are behind it. So it is really important for the National Security Legislation Monitor to have available all the information that can be given to that person, him or her. Therefore, so that we do not hamstring that person in any way, it is important to have the sorts of protections that we have here, even though that person obviously will be making policy observations.

Senator LUDLAM—Okay. Could you just confirm for us then that apart from the annual reporting mechanism—I think the intention there is reasonably clear—the monitor will not be reporting in any form directly to the parliament?

Mr McDonald—No.

Senator LUDLAM—Will the referrals that come from the Prime Minister's office be made public? Will the parliament know when the Prime Minister has requested some activity of the monitor?

Mr Fleming—That is not a requirement in the legislation.

Senator LUDLAM—So we may not know. Okay. We have heard a diversity of views this morning about whether the monitor should be able to provide comment or analysis of proposed legislation and there is a pretty serious discussion paper before us at the moment. Can you give us your views on that and why you landed where you did?

Mr McDonald—Certainly the intention of the Attorney-General is that that discussion paper and the consultation that we derived from it would be examined by the monitor if this place passed the legislation and we were able to appoint someone. It was certainly the intention of the Attorney-General all along that matters in that discussion paper—and other proposals too—would be examined by the monitor.

Senator LUDLAM—Okay. Not once it has been passed by the parliament?

Mr McDonald—No.

Senator LUDLAM—If the monitor existed today, that document would be on his desk?

Mr McDonald—There is nothing to preclude us referring stuff to the monitor.

Senator LUDLAM—Your interpretation of the drafting at the moment is that, even without the specific referral from the Prime Minister's office, the monitor could have chosen to call in that discussion paper or any other matters relating to that?

Mr Fleming—No, it would not be within the core roles in clause 6, because it is not a law yet. It would depend on the referral power.

Mr McDonald—That is true.

Senator LUDLAM—So to clarify: the monitor will not be investigating proposed legislation unless specifically requested to do so by the PM's office?

Mr Fleming—That is correct.

Senator LUDLAM—Can you clarify for us who will actually staff the office of the monitor? Will they be officers of the DPM&C or Attorney-General's? Where would they come from?

Mr Fleming—They would be officers based within the Department of the Prime Minister and Cabinet.

Senator LUDLAM—Are new FTEs proposed or are they to be drawn from the existing staffing?

Mr Fleming—There are new FTEs.

Mr McDonald—In my opening I pointed out that we in Attorney-General's would do a lot of work, as we might with a piece of legislation, to ensure that the monitor's job is as easy as possible. We would obviously provide a lot of material and, if the monitor asked us to assist him or her in any way, we would provide that additional assistance.

Senator LUDLAM—Under clause 29 the only obligation that the monitor has for reporting is the annual report. Is there anything foreshadowed to require the monitor to provide at least some sketch of each of the individual reports that he or she had conducted during the year? My reading of it is that it would be entirely possible that a request from the Prime Minister's office could fly completely under the radar, a body of work could be undertaken and a report given to the PM and not to the parliament. I take it it is entirely possible that quite a degree of work could be carried out with no real reporting obligations at all. Is that fair?

Mr Fleming—Other than the requirement to report back to the PM on work that the PM has referred.

Senator LUDLAM—Could you give us your thoughts on the proposed amendments that some have suggested that bodies other than the Prime Minister's office be able to refer matters to the monitor. The PJCIS is one. I suspect the Attorney-General's office would reserve the right to be able to refer matters. What do you think of those ideas?

Mr McDonald—My initial thought about the problem with that is that someone has to take responsibility for the resources that are available to the monitor, so it is important that one portfolio control that flow. In that way that portfolio can ensure that the monitor is given proper support. Those are just my thoughts.

Mr Fleming—Within that core role of the monitor in clause 6 there is nothing to stop anybody saying to the monitor, 'Have a look at this.'

Senator LUDLAM—A number of submitters have raised concerns about the degree to which our obligations under international human rights instruments can be considered by the monitor and used as a benchmark against which to judge what is operating here. Can you give us an idea of how you see the bill operating in that regard?

Mr Fleming—Under clause 8, in performing his or her functions, the monitor must have regard to Australia's obligations under international agreements as enforced from time to time and, obviously, key relevant ones there will include the human rights treaties and conventions.

Senator LUDLAM—So you do see that as a core part of it?

Mr Fleming—Yes.

Mr McDonald—And in section 3 it says it is an object of this legislation.

Senator LUDLAM—The last question from me—unless you say something particularly controversial!—is this: can you clarify whether the monitor will actually be an individual statutory authority and just sketch for us the administrative arrangements that are going to apply? Supplementary to that, can you tell us your anticipated staffing and resourcing for the office?

Mr Fleming—It is an independent statutory appointment within the PM's portfolio, so the position itself does not fit within the department. As to the administrative support within the department, we notionally have two people in our minds, but a lot of it will depend on how the monitor, once appointed, chooses to work—whether, for example, that is in short bursts with a heavy load for a couple of months in each annual cycle plus a bit more as needed, or whether the monitor might prefer to be doing a number of hours a week each week throughout the year. So we are ready to be flexible.

Senator LUDLAM—There is quite a backlog, I guess—since 2005, at least. There is a lot of work. This person is going to be a bit snowed under. Just for clarity: will the monitor be able to be called before estimates committees, for example? There is a curve ball for you.

Mr Fleming—I do not know the answer.

Senator LUDLAM—Could you take that on notice, please.

Mr McDonald—On the face of it, I do not see why not. The other statutory appointees, like the Inspector-General of Intelligence and Security—

Senator LUDLAM—And the Ombudsman.

Mr McDonald—and so on do. But we will check that.

CHAIR—You can take that on notice just to clarify it for us.

Mr Fleming—Yes.

Senator LUDLAM—If the answer turns out to be a no, then can you just report that back. I have no other questions.

CHAIR—As there are no further questions, I thank both of you for allowing us to call you earlier. I appreciate your cooperation there. Thank you for appearing before us today. That concludes our hearing. We now stand adjourned until the tabling of the report on 7 September 2009.

Thank you also to Hansard, particularly to Broadcasting for the telecommunications that was used throughout the hearing this morning, and thank you to my committee members and the secretariat.

Committee adjourned at 12.37 pm