



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Reference: Provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 and related bills

WEDNESDAY, 1 MAY 2002

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to: **<http://search.aph.gov.au>**

SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Wednesday, 1 May 2002

Members: Senator Cooney (*Chair*), Senator Crane (*Deputy Chair*), Senators Crossin, Ferris, Mason and Murray

Senators in attendance: Senators Cooney and Murray

Terms of reference for the inquiry:

For inquiry into and report on:

- (a) Provisions of the Criminal Code Amendment (Espionage and related offences) Bill 2002
- (b) Security Legislation Amendment (Terrorism) Bill 2002 [No.2]
- (c) Suppression of the Financing of Terrorism Bill 2002

WITNESSES

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department 1

LOWE, Ms Jamie, Senior Legal Officer, Information and Security Law Division, Attorney-General's Department 1

McINTOSH, Ms Susan Mary, Principal Legal Officer, Security Law and Justice Branch, Attorney-General's Department 1

Committee met at 3.49 p.m.

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

LOWE, Ms Jamie, Senior Legal Officer, Information and Security Law Division, Attorney-General's Department

McINTOSH, Ms Susan Mary, Principal Legal Officer, Security Law and Justice Branch, Attorney-General's Department

Mr Alderson—The terrorism package that was introduced in parliament consists of six bills, five of which were introduced initially, and a sixth, the ASIO bill, that was introduced a few days later. What we colloquially refer to as the main bill, the **Security Legislation Amendment (Terrorism) Bill**, principally does three things. It creates offences directed at terrorism and contains the definition of terrorism on which a number of provisions hang. It contains, as part of the terrorism package, proscribed organisations provisions that confer a power on the Attorney-General to proscribe an organisation if certain objective criteria relating to the terrorism connections of that organisation are met; and it contains a new treason offence to replace the existing Crimes Act treason offence, incorporating a new limb. I can speak more on that if you wish.

The second bill is the **Suppression of the Financing of Terrorism Bill**, which creates a financing of terrorism offence that fits closely with the terrorism offences in the main bill. It contains some provisions to facilitate exchange of financial transactions reports material between jurisdictions, and it also brings into the act some provisions in the charter of the United Nations regulations. Those were the asset freezing provisions which were done in very urgent circumstances following September 11. As part of this package, the government proposes that key provisions governing the asset freeze be moved to primary legislation.

The **Criminal Code Amendment (Suppression of Terrorist Bombings) Bill** contains offences to implement an international convention relating to terrorist bombings. There is a customs border protection bill, which contains a range of provisions, principally relating to access to information in certain circumstances. The **Telecommunications Interception Legislation Amendment Bill** is principally directed at clarifying the borderline between where search warrants apply to an email on a computer system and where telecommunications interception rules apply. As I mentioned, the sixth bill is the **Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill**, which confers the 48-hour detention power in limited circumstances for intelligence gathering by the Australian Security Intelligence Organisation.

The espionage bill is separate from the terrorism package, and the government has made it quite clear that it comes from a separate context and, in fact, had been introduced into parliament last year before the parliament was prorogued. My colleague Ms Lowe has the principal responsibility for that bill.

The last comment I would make is that there are two key themes running through the terrorism package. Firstly, there is the implementation of Australia's obligations under international treaties—in particular, the terrorist bombing and terrorist financing conventions

reflected in the bills bearing those two names—and mechanisms to encourage international cooperation and effective international efforts to deal with terrorist activity. Secondly, there is a focus on setting up mechanisms that will allow terrorist organisations to be stopped and potential terrorist activity to be stopped before that terrorist activity has actually taken place.

That preventative objective is reflected in a couple of areas: firstly, in terms of the capacity to freeze terrorist assets; secondly, in terms of the capacity to shut down an organisation, or at least its operations within Australia, through the proscribed organisations mechanism; and, thirdly, through the fact that the creation of offences directed at terrorism provides a better mechanism for police to intervene and investigate offences that may be about to occur. That is all I propose to say by way of introduction.

CHAIR—Senator Murray, would you like to ask some questions?

Senator MURRAY—Yes. It seems to me that, with regard to strict and absolute liability provisions in this proposed legislation, the physical aspect of liability is determined by a discretionary and subjective act, which is the Attorney-General's proscription of an organisation. Because the legislation, quite properly—because I do not think you can—does not define terrorism—

Mr Alderson—The legislation does contain a definition of terrorism, albeit a broad one.

Senator MURRAY—Yes, it does, but it does not define it in every specific circumstance; that is what I meant by that. Once that determination on a discretionary and, I suppose, almost unilateral basis is established by a political officer of the government of the day, then it follows through to the liabilities expressed. I think that in the subjective origin—whether wrong or right in people's determination—of that lies concern about establishing the physical matter. In contrast, if we refer back to the more mundane things that we have been dealing with today, the physical origin is mostly objective: your car is going too fast, you have not put in the paperwork, you failed to wear your badge—whatever the issue is, it is much more specific and precise. What do you say in reaction to that kind of observation?

Mr Alderson—Those concerns about the question of subjectivity were certainly taken into account in the way that the legislation was framed and there are a couple of things to note. One is the requirement in the legislation that the proscription has to be based on reasonable grounds. That, in part, is not only a prospective direction to the Attorney-General as to the way that the decision is to be made but it also sets up a basis for judicial review of a decision to ensure that a proper decision making process is being followed and that in fact it was a reasonable exercise of the discretion to conclude that those grounds applied. So that is the first thing to note: the incorporation of the satisfied on reasonable grounds test, which is certainly a more objective and a stronger hurdle than some of the international models for proscribed organisations provisions.

The second thing to note is that for a person to be convicted of an offence the usual court processes have to be followed. If it were alleged that 'this organisation has been proscribed and this person was financing it or a member of it' and so forth, the normal set of processes would apply where police had to investigate that, DPP make a decision whether to prosecute and a court finds the person guilty of that beyond reasonable doubt. Included within that is a defence

that, if the person was unaware of, to use a shorthand phrase, the terrorist connections of the organisation, they have a defence to the offence.

Senator MURRAY—But there may be no terrorist connections of the organisation. To use some of the existing examples, what if you had an Attorney-General who made a decision that an organisation was terrorist and then two decades later people said, ‘Don’t be ridiculous. They weren’t terrorists at all, they were freedom fighters—quite rightly.’ Do you see what I am saying to you? They can be quite legitimately terrorist, don’t misunderstand me, but there may be some about which, on looking back, you think, ‘They weren’t really.’ The consequence of the decision to declare a terrorist organisation is a whole flow of events which constrain the courts’ abilities to deal with it, constrain the individuals’ rights and so on and so forth. It is that physical determination early on, against the parameter of value judgments and information which the Attorney-General receives, which is difficult to easily grasp, I think, in terms of prior judicial principles when we come to this sort of matter.

Mr Alderson—To grapple with the kind of issue that you are identifying, there are a couple of features of the bill that are designed to deal with it. The first is that there is a requirement on the Attorney-General to revoke a proscription if the objective grounds for proscription cease to apply. So, as you say, if over time there were cause for a reassessment, there is a requirement in there to revoke. There would also be the possibility for a person to make representations, to say to the Attorney-General, ‘You have this revocation power and the circumstances exist for you to exercise it.’

Senator MURRAY—Is there any capacity to compensate the person if they were proscribed and detrimentally affected and later on they were un-proscribed?

Mr Alderson—I guess that is dealt with in the same way that is generally the case with the criminal law—

Senator MURRAY—In other words, no compensation.

Mr Alderson—If there is a civil claim for negligence, that would be made out, or the Commonwealth’s *ex gratia* payment mechanisms under the financial management and accountability. But you are right, there is no separate provision for compensation in this provision. The second thing I was going to say was that, because of that defence, if you can demonstrate to the court on the balance of probabilities that you were unaware of any—say you were prosecuted for financing an organisation. If you can demonstrate to the court on the balance of probabilities that you were unaware of the terrorist connections of the organisation that make up the grounds for proscription then you are not guilty of the offence.

Senator MURRAY—The difficulty people concerned about this legislation are highlighting is that the person concerned might be well aware of the connections of the organisation, absolutely aware; they just do not agree that it is a terrorist organisation. As you know, examples have been used. It might be Fretilin, or the ANC 30 years ago. There are those sorts of examples. So the decision by the Attorney-General against his or her value set at the time and his or her information available at the time will determine a criminal consequence, but based on a subjective physical determination.

Mr Alderson—I would only add to that that the legislation builds on the notion of subjectivity by requiring the reasonable grounds and requires revocation if the assessment changes. In addition to that, ultimately these issues about freedom fighter-terrorist are extremely difficult issues. So the way this is designed is that really if you are talking about an organisation that is engaging in acts of violence and property destruction to pursue its ends then that is brought within—

Senator MURRAY—Such as Fretilin or the French resistance against Vichy and all that sort of thing.

Mr Alderson—Then there is built on the prerequisites a political assessment that can be made.

Senator MURRAY—Let us go back. The prime purpose of government is to be able to determine which organisations it is going to declare terrorist and have powers to deal with it. It is not essential to the pursuit of that aim for the abilities of someone to defend themselves to be unnecessarily proscribed. Really my question to you is: leave everything intact if you are going to do that. Is it still necessary, given that we all have to accept that it must be a subjective process that starts it, that you surely do not need in all the circumstances to go in with absolute and strict liability? What you have done is you have commenced a subjective determination, which may be right or wrong. I accept that. We may agree 100 per cent sometimes and 90 per cent other times. But you constrain the ability of an individual to defend themselves.

Mr Alderson—The contention that I would be putting forward is that at the end of this process you have a proper criminal trial where the issues of fact and intent will be assessed in court. In accordance with the usual approach, the facts of whether the person was directing the organisation, funding, a member or so forth and the fact that it was proscribed would both have to be proven beyond reasonable doubt.

Senator MURRAY—But the main fact does not have to be proven. That is whether it is, in fact, a terrorist organisation.

Mr Alderson—That is correct. You are quite right.

Senator MURRAY—That is the problem. If you cannot challenge the very basis under which it is determined, then you are severely affecting the defence of a person because they might not agree with a basic supposition. They might say, ‘Hey, we are an environmental organisation’ or ‘We are trying to free the East Timorese.’ I am using those examples deliberately because the Al-Qaeda thing is easy to determine. Aren’t you just going that step too far by so limiting the ability of peoples to defend themselves when you have already stacked it against them by saying, ‘This is proscribed organisation and these are the horrendous penalties that face you’?

Mr Alderson—There are three things. The first is the question: how can a person assert that this is not really a terrorist organisation? There are really two routes to do that. The first is that, under the Administrative Decisions Judicial Review Act, which will apply in full to this legislation so that you can challenge the validity of the decision, the basis for doing that is strengthened by the requirement for objective grounds. Certainly in the white-collar crime

context, that notion of a criminal trial being suspended while an administrative decision is challenged under the ADJR Act is quite a common one. So that would be the normal way a court would stay a prosecution while the judicial review issue was worked through and a verdict reached on that. Secondly, a person can directly bring the question into the criminal trial through their access to the defence that they were unaware of the terrorist connection.

Senator MURRAY—No, but they can be aware of it. The point I am saying is that they are aware of it. They might just disagree that there were terrorists.

Mr Alderson—If their disagreement is based on saying that the—

Senator MURRAY—See, your absolute liability and strict liability provisions give the judge no discretion in those areas.

Mr Alderson—They have the effect of removing the onus, essentially. The rationale for that is that, if a person claims, ‘I did not know about the proscription,’ that might too readily lend itself as a loophole in the legislation. That would undermine the attempt to firmly shut down the operations of the organisation. But if the person says, ‘Look, the assessment about this organisation is incorrect,’ the onus is reversed, but they have the opportunity to bring that question into the trial.

Senator MURRAY—Or they may even be innocently within an organisation which is terrorist. For instance, they might know about the organisation; they might participate in it fully. But the proscription and subsequent evidence may find that things were going on. An environmental organisation might be blowing up nuclear reactors, a fact which they were not acquainted with.

Mr Alderson—If they can show that, at all material times, they were unacquainted with the terrorist connections of the organisation—and I am paraphrasing because some of these defences are set out in (a), (c), (d)—and they can show on the balance of probabilities that they were unaware, then they have that defence. A second defence that is in there is that, if following the proscription, they take immediate steps to cease to be a member of the organisation, that is also a defence. So, if they wake up and read the paper and say, ‘Oh, this friendly community organisation is said by the government to be a terrorist group and has been proscribed,’ they have the opportunity to immediately cease their membership and then not come within the ambit of the offences.

Senator MURRAY—You know where I am going with this. It is essentially this. If you give great exceptional, unusual and discretionary powers to a political officer of a government of the day, you at least want to give whoever is charged as a result of that the maximum ability under the law to defend themselves.

Mr Alderson—This is premised on the basis that all those issues can be addressed in the criminal trial, and that the full process of jury trial and so forth will apply, but—

Senator MURRAY—Because what strict liability and absolute liability do, and we all know it, is lessen somewhat your defence.

Mr Alderson—They are used here in an unusual way.

Senator MURRAY—But that is the way they are used any time, because you do not have to prove mens rea.

Mr Alderson—Normally, if an offence is made strict liability full stop, the way that both the terrorism offences and the proscribed organisation offence works is that absolute liability and the Criminal Code framework is used as a mechanism to reverse the onus of proof and say, ‘Well, the question of whether you were aware is still part of the criminal trial but it is something for the defendant to establish on the balance of probabilities, rather than for the prosecution to prove beyond reasonable doubt.’ The rationale for that is that, if a person could simply assert they had no knowledge and fold their arms, it would be very difficult for the prosecution and a significant loophole in the use of this power to really deal with a terrorist organisation.

Senator MURRAY—But surely that is good. I do not think any of us—either your side of the table or ours, or in the general community—deny that these are exceptional powers to give a political office or a government. They are very unusual, exceptional powers. Nothing I have heard so far indicates to me that a government’s intention would be seriously undermined by enabling a defendant to have the full and traditional ability to defend themselves at law. What strict liability and absolute liability do in these circumstances, however qualified, is limit that—either somewhat or to a considerable extent. If you took away those strict liability and absolute liability provisions, certainly you make the job of prosecution harder but it does not destroy the intention, which is to declare organisations terrorist, to close down their moneymaking and organisational abilities and to stop them operating. It does not interfere with that at all.

Mr Alderson—It does strengthen the approach if you can say, ‘If you know absolutely nothing about what is going on and you are completely oblivious to what is going on, you are not caught in the net—but, really, if you have suspicions, if you think that maybe the organisation has this connection or what have you, the onus is on you and you really should be terminating your membership. You should not be putting any money into this organisation, because we have used this special power to say this organisation is not acceptable and is being shut down.’ So, from that day, there is a greater onus to underpin the exercise of this power.

CHAIR—Following on from what Senator Murray says, have you looked at proposed section 101.4? This is on possessing things for which you get life. If you read the following as a scenario: I ring up on my mobile phone somebody in a country where terrorism is being prepared and give them a tip as to how they might go about things, at this table now, and then Senator Murray says, ‘Can I have a lend of your mobile phone straight after?’, he is in a bit of trouble, isn’t he?

Mr Alderson—If he is unaware of the connection between the mobile phone and the terrorism, then he will not come within the terms of the offence. Obviously, my previous comments were specifically directed to the proscribed organisation but there is some overlap in the issues. The work that the absolute liability does here is to reverse the onus and say that it is for the defendant to establish that they were unaware of the terrorist connection. But also, because that is a part of the trial as framed by these provisions, both the police in investigating

and the DPP in putting together a prosecution will obviously have to look at these issues and say, 'Well, was the person unaware?'

CHAIR—If you look at 101.4, they will come along and grab me and I will say 'Yes, that is a fair cop' or whatever you say these days. I am sure you do not say that, but you know what I mean. They say, 'This was a thing that was used in connection with the preparation of, or assistance in, a terrorist act.' Mr Alderson, the only evidence the DPP needs is that from me and, say, from you or from Ms McIntosh saying, 'Yes, I saw Senator Murray take the phone from Senator Cooney straight after.' He is liable for imprisonment for life.

Mr Alderson—Two extra things would come into what you have outlined, Senator Cooney. The first is that the prosecution would have to prove beyond reasonable doubt that the phone was in fact used in connection with the terrorist act.

CHAIR—I have done that; I have confessed. I have said it is a fair cop, so that is proved. The second point is proved because I have proved that. I have said, 'Oh, yes, you have got me.' So they have proved that. Then the evidence is that Senator Murray has the phone. That is all they need prove and he is in jail for life.

Mr Alderson—Senator Murray would have the opportunity to say, 'Well, I was just passed the phone. I was not part of this network. I was not part of this organisation. I was unaware of the terrorist connection.' This is a lesser point because in this situation I am contending that you would not be guilty of the offence. In addition, of course, there is the public interest test for the DPP as to whether to prosecute. Also, the penalty for a person who does come within it and who was aware of the terrorist connection is a maximum only, allowing the court to make an assessment.

CHAIR—But it is absolute liability. So the only way he can prove it is to go under oath—which takes away his right to stand mute—and then he is subject to cross-examination. You ask, 'How well do you know Senator Cooney?' The person says, 'I must confess I have known him for some years now.' You would then ask, 'Has he come around to your room?' The person says, 'Yes. He has been around to my room.' You say, 'You did not know this was a thing used in the assistance of a terrorist act?' He has been called by the prosecutor to give that evidence and he has. You say, 'Now, Senator Murray, you say that you knew nothing about it.' As someone who is accused, you are in real trouble, aren't you?

The penalty is life. Any penalty is pretty grim, but life. He cannot deny that it was a thing used 'in connection with the preparation for the engagement of a person or assistance in a terrorist act' because I have confessed to it and that is that. If you go to 101.5, it is the same thing. Say he collected a document from me. It was a document that I made out perhaps in some foreign language. I would not have been able to do that, but say I could write a foreign language, I could have written off in a foreign language that he did not understand. If he collected it, again, he would get a second life sentence on the one day.

Senator MURRAY—Doesn't that breach the basic principle we fleshed out today? We were told by a number of witnesses in submissions that strict liability is really intended to apply for anything less than imprisonment. Here we have got both strict and absolute liability applying where you really have got a serious penalty.

Mr Alderson—Yes. This is in accordance with what I was saying this morning. There are different bases. Certainly the more common categories are the low penalty offences. This falls within the alternate rationales of the seriousness of the consequences.

Senator MURRAY—I hate to use a pun in circumstances like this, but isn't this overkill?

Mr Alderson—It has not been thought so, for example, by the British parliament. This has been framed consistent with the way the British terrorism offences work, for example, and is really a response to the seriousness.

Senator MURRAY—But we have no history or record of their long, unfortunate interaction with terrorism on their soil.

Mr Alderson—Certainly, but I guess it is in part taking account of the experience of the way to have a strong mechanism, one that is designed to really guard as strongly as possible against terrorism, subject to having a criminal trial where the factual basis must be proven beyond reasonable doubt and where there is a full opportunity for the defendant to raise their lack of culpability.

CHAIR—We have been told in other committees that nobody can point to—at this stage, and I know we have got to be prepared to understand that—any present threat of terrorism in Australia, against Australians anyhow. In another committee I asked people from the community. They said they had had opportunities to talk to people from various communities within the overall community and none of them saw any signs of terrorism. England was the country that gave us the Diplock courts and the wrong judgments in the Birmingham Six and all that sort of stuff. Do we really want to compare ourselves to them?

Mr Alderson—In terms of your question about the terrorist threat, the main thing is that this is really an attempt to set up the mechanisms to give the investigatory powers, to have the sanctions and to have the intelligence gathering powers to do what is possible to prevent an equivalent to September 11.

Senator MURRAY—The point I was making to you earlier is you can leave all that framework in but you have now got to the stage where somebody is in court defending themselves and you have taken away the common law defences, which have applied to people from time immemorial in our system, based on an original subjective assessment—maybe on good judgment, maybe not—by a political officer of the government of the day. It just does not seem to be a necessary part of the whole intention. As I said to you earlier, you want to proscribe the organisation, stop it operating and close up on its members, and you can do all that, but those who land up in court should have the opportunity to defend themselves.

Mr Alderson—On that question of defences, I am realising that this is a point that I failed to raise before the other committee. There are general defences in the Criminal Code that do apply across the board to Commonwealth offences and some special defences for strict and absolute liability, which are really designed to ameliorate some of the potential injustices that can arise with strict and absolute liability. They are the defences of intervening conduct or event, duress, sudden and extraordinary emergency, self-defence, and lawful authority. So there is also a set of

general defences, not specifically in this bill but under Commonwealth legislation generally. The broader question you are raising is a fundamental philosophical discussion.

Senator MURRAY—No, it is more than that. What you are suggesting breaches the principles that you have already established on the following basis: it establishes a regime of absolute and strict liability in circumstances where there is a very severe punishment. To my knowledge, it does not apply elsewhere in Commonwealth legislation. Maybe you can correct me, but I do not think so. Secondly, you intend to breach it having had no experience of any kind—nothing—to justify breaching it. Thirdly, you offer it up in circumstances where it is not essential to the achievement of the government's objective, which is to proscribe organisations and to close them down.

Mr Alderson—The view that I have put forward in terms of shutting down an organisation to put the onus on people to cease to finance the organisation, to cease to be members and so forth, is a central part of how this is meant to work. I should also say that—lest, in explaining the rationale of this legislation, I am seen to be disregarding the kinds of points you are making—obviously the kinds of issues you are raising are receiving close consideration in the examination of this legislation going forward. But, in weighing the balance, the argument for maintaining this kind of approach is really in trying to have the strongest possible framework consistent with someone having the normal due process of law and subject to the other police discretions, prosecutorial and sentencing discretions that are built into the system, to say that the nature of a proscription is that once it is done you ought to be guarding against any involvement in this organisation, that it is really off limits and is something nobody should be dealing with.

Senator MURRAY—Yes. If I can encapsulate it in a different way: my reading of both community and the political class as a whole is that there is no disagreement with the need to significantly improve our ability to close down terrorist organisations in the true meaning of the word. But there is a great fear that there will be unintended consequences: that the wrong kind of organisations will be closed down and that injustices will be delivered to individuals. It seems to me in what you have said so far and in my understanding of the legislation, that the strict and absolute liability regime for a person who actually lands up in court adds not much to the main objective of the government, but for an individual it puts up quite considerable barriers to them conducting a defence in the normal way we would expect when facing life imprisonment.

Mr Alderson—There is probably not much more I can add.

Senator MURRAY—I did not think you could. I respect the fact that you have to argue for your bill, but I wanted you to clearly understand the point I wanted to get across.

Senator COONEY—Remember Martin Bryant? He shot about 30 people. He would not be caught by any of this, would he?

Mr Alderson—I do not want to give a definitive legal view on that but my commonsense view is no, and that is quite deliberate in that in dealing with a Martin Bryant it would, firstly, be properly dealt with as a murder trial. This is not only about the degree of damage; it is about the underlying context of terrorist organisations, mechanisms to deal with the financing of them

and having offences tailor made to the terrorism context. You are quite right in saying that and my understanding, too, would be that this would not apply to a Martin Bryant.

CHAIR—If I was a racist and did terrible damage to someone's house, then I would not be covered by it either because I have not done it for a political, religious or ideological cause, I have done it because I am just a rat and a racist.

Mr Alderson—I would say that a racist person defacing a house would be very unlikely to be dealt with under these provisions. In fact, it would not be dealt with under these provisions. Obviously if you escalate up the scale to a group of racists engaging in serious destruction, there would still be a significant question as to whether it would be pursued under these kinds of provisions, but I could not say that legally, in that more serious escalated context, it would not fall within this.

CHAIR—Take the person who was recently convicted in Melbourne for shooting a security guard. He would not give his name for a while, then we found out who he was. He might be a terrorist because he did that with the intention of advancing a religious cause, so he might be caught by this but Martin Bryant would not. Knight was his name. And a person who, for a political cause, cut down some telephone wires could get life for committing a terrorist act, but if it was young hoons going around the suburbs belting people up and cutting the telephone lines to the house, they do not get anywhere near life. I am not sure what the penalties are but I do not think it is anywhere near life. Has the department thought about the proportionality of that?

Mr Alderson—It certainly has. Firstly, I would query whether cutting a telephone line would come within this, in that, in the context of this being terrorism, you are talking about serious disruption of an electronic system including, in the examples it gives, an essential public utility, essential government services or a financial system. I would contend that cutting a telephone line would not come within that. It is really directed more at, say, a serious hacking attack on a computer system that is regulating the financial system or a hospital or something like that.

CHAIR—Can I go through that with you? Action falls within the subsection if it:

- (e) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system ...

A 'telecommunications system' must be the wires that bring your telephone—

Mr Alderson—I think the key word, though, is 'system', in that it is more than just a line, it is the serious disruption of the system. Secondly, in response to your question, it is an unavoidable aspect of framing offences that there will be conduct that will fall within more than one offence. A course of conduct that involves a sexual assault that is hitting the victim, that is threatening the victim, is really only one course of conduct but it will come within four or five different offences under state law, and those may have different maximum penalties, depending on which aspect of the conduct you are looking at.

This is saying that, at the moment, a terrorist act—a September 11—of flying a plane into Parliament House will include the offence of damaging Commonwealth property, which may be

10 years; it will include killing people, which would carry life; it will include a whole range of offences. The principle on which this is based is that if it comes within the definition of terrorism, then we need to think of it and be able to deal with it in this broader terrorist context.

CHAIR—Conventional crime is covered in state law. The Commonwealth could be seen as making a claim for a lot of the offences that up till now have been dealt with at a state level. I do not want you to comment on that but—

Mr Alderson—There is a quite conscious intention to enable the Commonwealth to deal with terrorist acts, based on the premise that, if you are talking about terrorist attacks on Sydney and Melbourne, we ought not to be viewing them as purely state matters. There is a national issue there.

CHAIR—Let us say you are the judge and a person is charged with causing damage to the telecommunications system—or two or three people cut down a series of telephone poles. You might charge them with a Commonwealth offence and a state offence. Let us say there was a provision for training and it was a Commonwealth offence under clause 101.2. What would the judge say? Insofar as it is a state offence, the onus is on the prosecution and they have to establish each element of the defence. But insofar as it is a Commonwealth offence all the prosecutor has to do is establish that this person provided training. If you think he has committed this Commonwealth offence, this is the law you apply. If you think he has committed a state offence, this is the law you apply.

What is a jury going to do? This is all very interesting and all very clear. There are different onuses and different issues to keep in mind. The jury is told, ‘This is what absolute liability means: it does not really matter what this person intended or whether he or she reasonably mistook the state of affairs, or had a reasonable belief that the facts were different from what they were. That does not mean a thing, because this is absolute liability. There is also an element of strict liability amongst these offences and that does not quite mean what absolute liability means. Strict liability means that the evil does not have to be intentional, as long as the evil was done. But if you think he or she had a reasonable belief in the facts, which would have exculpated him or her, then it is excused. Now we come to the next issue, which is intent. I will describe that to you.’ What is a jury going to do with all this?

Mr Alderson—I honestly do not see a problem there, because I envisage that the prosecution of these terrorism offences will be very rare. They will raise the same issues in principle as already must be faced in a far larger number of, for example, drug trafficking cases, where it is very commonly the case that you have a Commonwealth drug importation offence and a state drug sale offence. There are mechanisms to allow the state or the Commonwealth DPP to take those forward in tandem for them to be dealt with in court. In those drug offences there are provisions about deeming and onuses, and quantities of drugs and how you prove those. These are issues that already must be faced in a far larger number of cases dealing with drugs and fraud and other matters.

CHAIR—But they are going to have to apply different tests to almost the very same offence.

Mr Alderson—I do not know about it being almost the same offence in that they are directed at different things, because an important component of the Commonwealth terrorism offences is

this terrorist component and you have to prove the facts relating to the terrorism act, which would be quite distinct from any state issue of murder, property damage or so forth. So there will be different sets of issues. But, by the same token, if you were to prosecute together a state murder charge and the Commonwealth terrorism charge, the evidence and the issues to do with a person's mental state would come out first in the prosecution case for the murder and in the defence for the terrorism charge. In a way, that highlights the fact that in the course of the trial there is going to be evidence from both the prosecution and the defence about the person's mental state.

I might say that the double jeopardy provisions in the Crimes Act will also be applicable. If you are talking about different aspects of the same conduct, you do not have a double jeopardy situation. I think the test that the court applies is: is the essence of the culpability in each case the same? The double jeopardy principle that is provided for in common law and under the Crimes Act is that you cannot be punished twice for what is in essence the same conduct.

CHAIR—This would give the police a good bargaining tool, wouldn't it? The police could say, 'We have found you here with some explosives. We think that you have got these explosives and you have made use of the explosives for terrorist purposes.' If you were to plead guilty to a crime that did not include terrorism, you would save yourself a few years.

Mr Alderson—What I would say about that is that, firstly, the police would be giving themselves a lot of work to do. If we are talking about someone possessing explosives, for the police to add to their job the task of showing the political, religious and ideological cause, the intent to engage in serious property damage as read in a terrorist context or the intent to engage in serious harm, then that is a lot of extra hurdles they are adding. Secondly, both the police and the prosecution have proper internal processes for making these decisions in an accountable way and ultimately there is public exposure, when the matter comes to trial, as to whether it has been done in a legitimate way. There has been evidence, I think, from the AFP to the other committee on this issue, that police just would not deal with someone merely in possession of explosives as a terrorism kind of offence; you need this other terrorism context.

CHAIR—How quickly did the authorities get out of the block when the Communist Party Dissolution Act was passed in 1950?

Mr Alderson—I must admit that, although I have looked at the act and the case, I am not familiar with the other events surrounding that, other than to say that the Communist Party Dissolution Act was an act of a very different character to the legislation that is currently before the parliament.

CHAIR—But I think it was in the same sort of context. There is legitimate concern, like there was with communism at the time, but it is used to gather all sorts of powers. I was saying earlier that the classic example is the Salem witch hunts. I do not believe that they were witches, though perhaps they were. I do not know whether I believe in witches, for that matter. But with great conscience and with great aplomb they hung a few people because they were witches. That was because of the mood of the time.

I am not sure how this was put together but I suggest—and you might not want to answer this—that this is legislation that has been written at the suggestion of our investigative and

policing agents such as ASIO, ASIS, DSD and probably the Federal Police. It seems to me that everybody got together and said, 'We will put this in, yes. We will drop this in. Absolute liability, yes, put that in there. Make it life,' and bang, it is all put into the computer and then it comes out as legislation. Is that unfair?

Mr Alderson—Yes, I think it is. To give an example, in the consultation process within government the Privacy Commissioner, for example, was involved. You may or may not agree with all of the things in the legislation, but the way that it was developed included an examination of the foreign models, both existing and proposed, and a reading of what was proposed against our existing institutional and legal framework. I think that is quite a key thing in terms of the accountabilities that are there for the police and the prosecutors and the openness of our court system as well as the consultation process, which involved competing considerations—the rights issues, the privacy considerations and so forth.

CHAIR—Senator Murray, did you want to ask some further questions?

Senator MURRAY—I had a wicked thought.

CHAIR—Let us hear it.

Senator MURRAY—On Monday the *Australian* published an interesting set of articles on mental illness. One of their remarks was that over 18 per cent of Australians have a significant mental illness, including depression and all sorts of things. The wicked thought that went through my mind was that you might expect that one in five of our attorneys-general would have a significant mental illness, and I wonder if their state of mind matters when they proscribe an organisation.

It goes back to the discretion of somebody who is elected as a politician to declare organisations and then, to that organisation, you attach great powers. For somebody like me, coming from southern Africa, I know what those kinds of things lead to in the wrong hands—we have had this discussion before. If you can think of any of the ratbag loony parties at the extremes of our political spectrum and imagine that for some reason they attain parliamentary power and they had an Attorney-General with this legislation in their hands, would you really want that to happen? This provision gives great power. You know it does; I know it does. I just say to you that, if you are going to give great power, you must protect the individual who faces that great power when they are before the courts of the land. In terms of this inquiry, your absolute and strict liability provisions double up the difficulties.

Mr Alderson—On the comment about an Attorney-General from the extreme or labouring under some impairment, firstly, we would say that there is an aspect of confidence in our legal and political systems and in the robustness of the institutions we have. On top of that, what locks in the accountability is the availability of judicial review. In issuing remedies against administrative decisions by Commonwealth officers, there is, effectively, the constitutional entrenchment of that in the part dealing with the judiciary. So a decision that cannot be justified by reference to objective facts about terrorism will be amenable to that judicial review process. There is also the requirement for the decision to be gazetted and notified in newspapers which, again, puts it in the public sphere and allows the appropriate debate about that.

CHAIR—Corporate crime could become very severe, and I suppose drug importation could become even worse than it is. Even the wrong use of the Internet and the electronic system in Australia could become severe. Now that we have brought in absolute and strict liability at the terrorism level, why should we not bring it in at that level too? They are very heavy vices that we want to get rid of. If it is all right for terrorism, why should it not be all right for that?

Mr Alderson—Again, I suppose there is a consciousness that the events of September 11 are just so dramatically different to anything that occurs in the normal criminal context that there is a strong rationale for a very different approach and that is the reason why these have not been framed as more general Commonwealth provisions to deal with serious crime but have been limited to this terrorist context. It is on quite a different plane, but the issues with organised drug crime and so forth have been dealt with in different ways. Obviously there was legislation last year addressing those kinds of issues.

CHAIR—The telecommunications intercept act starts off by saying that you should not intercept telecommunication intercourse, but a number of particular bodies are excepted and that keeps expanding. There has been this legislative troop over the years but, in any event, I understand what you say.

Senator MURRAY—The difficulty for me is that, in dealing with a genuine problem which does need addressing, it seems to me that the construction of legislation increases the potential for injustice to occur: unintended consequences and organisations proclaimed that should not be. Injustices occur where individuals are not able to defend themselves as they would normally. If rebuttal of that is either ‘trust us’, namely the government, or ‘trust the robustness of our political and public institutions’, you have to look behind that.

Let us take one key institution. The investigatory authorities include the police. Right now in my state of Western Australia we have got a royal commission into police corruption. You just had one in New South Wales; you just had one before that in Queensland. There is a core of corruption in our police force that you will never get rid of. That is not a robust institution. An institution has to be very careful to keep an eye on it because the majority of police are very good. Policemen and policewomen cannot get rid of that minority who, since the start of Federation, have been in there roting and abusing their police powers. That is why you keep having these royal commissions. Let us step back a little further. You talk about the robustness of our political institutions. In my state of Western Australia, we have had two former premiers and a former deputy premier jailed, and right through the country politicians of all kinds have been jailed. So there is a percentage of politicians who are corrupt and criminal.

You see the point I am making: in every institution there is a core or a percentage, however small, of people who are capable of doing the wrong thing. Now you have produced legislation which gives immense discretionary power and investigatory power and all sorts of other powers to people in a good cause. You hurt the abilities of people caught up in that to protect or defend themselves. So the philosophical underpinning and expectations that you present have to be challenged. You know very well, as a trained and very capable legal mind, that the reason our common law has been developed like this is that we have found over centuries that you need to protect yourself against the minority who abuse power and who act contrary to the interests of the individual. Never mind all of the other issues to do with the bills. I cannot see why in that

environment, when somebody is before the courts facing life imprisonment, you want to strap them down further with absolute and strict liability provisions. I just cannot understand that.

Mr Alderson—The fact that we have premiers and deputy premiers jailed in this country is positive testament to the strength of our system.

Senator MURRAY—It is a good thing; I agree. But say one of them had been the Attorney-General, who was proscribing an organisation. You might find that out later and jail him.

Mr Alderson—Again, I have been through the mechanisms designed to deal with that but, on a more philosophical level, just briefly—this is more a matter of personal interest, having done some study of the history of the NSW Police and their legal regulation—there was a time back in the '60s when the NSW Police had virtually no formal powers and yet abuse of the citizenry and misconduct was rife. There has been a Commonwealth and state process over the last 30 years of putting things on the statute book—having powers and accountability spelt out in legislation—that has helped bring some of these things out into the open and avoid this more closed door system about which you rightly express concern.

Senator MURRAY—But the one in 100 corrupt cops—never mind the other 99 who are good—you just cannot get rid of. It might be the person doing the investigation, as Senator Cooney says, verballing you over the fact that you chopped down a few telephone wires and were a member of organisation which has been proscribed. The politician who, 10 years on, might be jailed for corrupt behaviour, is the one who was the attorney-general at the time. You cannot—either you as a legislation designer or us as legislators—design a system against those few who will use power improperly or act improperly and, therefore, you have to design the system to protect them against that occasional injustice, miscarriage of justice or denial of justice. What you are doing here is not doing that. You have mentioned a number of protections—yes, I acknowledge that, and I give you the respect you need—but here you are still limiting the ability of somebody who faces a life imprisonment to defend themselves. Even a soldier at war does not face life imprisonment, under the Geneva convention. You could have done the most terrible things but, if you are a soldier, you do not face that.

Mr Alderson—Yes, there is probably not much further I can—

CHAIR—Would it be fair to say that the [Security Legislation Amendment \(Terrorism\) Bill 2002](#) and related bills extend almost exponentially the offences for which people can be arrested?

Mr Alderson—No, I would not agree, Senator, that it was an exponential increase. I would say that, in practical terms, it is a very small increase. As has been pointed out, in many of the cases you would have a lesser and probably less appropriate offence. In any case, if a person does engage in serious property damage or serious harm interfering with an electronic system, there will be another offence already. What this does is say that, if it has the terrorism context, it is dealt with as terrorism. That also links to these other provisions about shutting down the organisation, freezing assets and so forth, but I do not think there would be that many people whom there would be no basis to arrest at present.

The one category that really is a new category of people who could be prosecuted for offences under this but probably cannot be prosecuted at present is that of those who assist an organisation, for example, by financing it, knowing that the organisation is engaged in terrorist acts but not providing that funding for a specific terrorist act. The limit on aiding and abetting conspiracy is that, to be guilty of those offences, you would need to have provided the funds for that bombing over there whereas, under this legislation, if there is that broader terrorist connection—if you are funding an organisation that is engaging in terrorism but you are not giving them money to do that specific bombing—then you are caught. That is really the main category.

CHAIR—But authorities could arrest you for providing training in the use of firearms without doing more than just simply saying, ‘This is a terrorist organisation, we are going to arrest you,’ or if you direct the activities of an organisation or you possess a thing. Indeed, you might be arrested and held and the proceedings are not taken against you. There is a whole series of circumstances under which the authorities can arrest you, even if they do not proceed.

Mr Alderson—But you must have reasonable grounds to suspect that terrorist connection to arrest and, ultimately, you must prove it beyond reasonable doubt to convict.

CHAIR—I am not talking about conviction, just to arrest and to have a person in custody for a few days.

Mr Alderson—You would need evidence of that terrorist connection to arrest. My hope is that through (a) the preventive powers of this legislation, (b) effective national approaches and (c) good grace, we do not end up with a multitude of terrorism offences in this country.

CHAIR—What you do is swear out an affidavit—‘I suspect that this person may do this’—and, in fact, nothing might ever happen. That is all you need do. The judge signs off and, bang, he is arrested, and that is the end of the matter. You let him go a week later, but you have achieved your purpose.

Mr Alderson—But, again, whether you have terrorism offences or other offences, you also need warrant issuers—magistrates and so forth—who take their job seriously.

CHAIR—Yes, but they just go on the affidavit. If the proceedings were not continued, the magistrate is not going to even know what happened to the warrant he issued.

Mr Alderson—But if you go by way of arrest by warrant, there is that decision. If, for a Commonwealth offence, you detain a person, then beyond four hours you need an extension. That has got to go back to a magistrate or, in limited cases, to a justice of the peace. Then, beyond that, there is a bail determination to be made.

CHAIR—Under the ASIO Act they have a right to hold them for 48 hours, haven’t they?

Mr Alderson—I am talking about the arrest for a criminal offence. The ASIO powers are a separate category where, for intelligence gathering purposes, there is that distinct power to detain.

CHAIR—You are right, in talking about the power of arrest, that there is the four hours. That is absolutely correct; I was intending that. I was also intending to ask you about the power of ASIO, because under this terrorism act they can now arrest in respect of many matters that they could not before. In fact, they could not arrest before.

Mr Alderson—I do not want to seem semantic, but ASIO cannot arrest for these offences. What can happen is that if you go through the hoops of the Attorney-General meeting the criteria and then the prescribed authority, who is a magistrate or AAT member, meeting the criteria, then ASIO can question the person and they are held there. But the actual arrest has to still be done by police.

CHAIR—But they can hold them.

Mr Alderson—They can hold them.

CHAIR—I am sorry, I am putting this badly. It is proper that you go through the semantics because they are important. ASIO can now investigate these offences.

Mr Alderson—No: I am sorry, Senator, that is neither the intention nor the case.

CHAIR—If I can explain what I mean, I would have thought this would enable ASIO to put people under surveillance for these matters on the basis that they might be involved or might intend to be involved in these matters.

Mr Alderson—A very important distinction is maintained, which is that the nature of ASIO's role under its legislation remains the same; it is not being given a new role in investigating criminal offences—that remains with the police. But in relation to the ASIO bill, the rationale and the way it works is that there are some cases where stopping a plane going into a building, or what have you, is so serious that we are going to put the police at bay and say, 'Getting evidence of a possible offence is secondary here. What we must do first is give ASIO an additional power to perform their normal role in gathering intelligence.' And that has got a preventive objection, so we say, 'Put the police at bay while we see if we can stop something happening.' ASIO's powers are limited to its intelligence gathering function and it is being given no role to arrest people or to investigate criminal offences.

CHAIR—For some reason, I thought that they had power to obtain the detention of people for up to 48 hours.

Mr Alderson—That is quite correct. I am saying that both in the legislation and the objective there is a conceptual distinction that they do have that 48-hour detention power—

Senator MURRAY—That is for a different purpose.

Mr Alderson—Yes. It is built in as a quite distinct step before the criminal investigation.

CHAIR—What I am trying to say—and I am not saying it very well—is that ASIO just cannot, I would imagine, gather information at large. There has got to be some sort of

framework that you gather information and intelligence about. Hopefully, you are not gathering intelligence because you are going to a football match.

Mr Alderson—That is right.

CHAIR—I would not have thought they would have power to do that.

Mr Alderson—No.

CHAIR—But this new raft of legislation would extend the sorts of areas that ASIO can investigate, I would have thought. That is all I am saying.

Mr Alderson—I do not think it extends the areas in that, if there were someone planning to bomb a building in Australia or to blow up a vehicle or what have you, ASIO would already have the function and the duty to see what it could do to find out about it, report to the government and see what could be done to prevent it. ASIO would already have that. But it is being given an additional tool to achieve that existing objective which is subject to prerequisites, the 48 hours—

CHAIR—You have made the point well. I just think that—with the ability of the Attorney to declare things, to proscribe organisations and use things that could be used as evidence—to suggest that we are now committing an offence under this bill, that would enlarge the area than which ASIO could look at, but I do take your point. Do you want to say something about the suppression of—

Mr Alderson—Espionage?

CHAIR—Espionage, yes.

Ms Lowe—The espionage bill is aimed at achieving two things. The first is strengthening Australia's espionage laws and the second is modifying the language of some offences in part VII of the Crimes Act for the purpose of insertion into the Criminal Code. I note that there is one issue that was raised in the *Bills Digest* regarding the reversal of onus of proof in regard to the soundings offence. I can advise you that a response to that issue has been prepared and is currently with the Attorney. The Attorney is overseas at the moment, as you would be aware, so there might be some delay in getting that response to you but that was an issue that has been raised by this committee.

CHAIR—What is a sounding?

Ms Lowe—It is actually a very technical thing. It is basically taking soundings or details of things regarding the ocean, so it includes the tide, the depth of ocean and the ocean floor.

CHAIR—This is not quite so savage in terms of reversals of onus and things like that.

Ms Lowe—No, I do not think so at all.

CHAIR—It is almost a pure bill.

Ms Lowe—I like to think so.

CHAIR—I wonder why that is.

Senator MURRAY—It is a softer touch.

CHAIR—Yes. We go in for only 25 years imprisonment instead of life. I do not think there are any provisions as to absolute liability in this and no provisions as to strict liability.

Ms Lowe—No. That is right.

CHAIR—‘Security or defence’, it used to be ‘security or safety’, didn’t it?

Ms Lowe—It used to be ‘safety or defence’; that is right.

Senator COONEY—‘Security’ might be wider or narrower than ‘safety’ but, in any event, that is it. The only other thing we should ask you is: it makes it an offence to help people against overseas countries that we are friendly with, does it not?

Ms Lowe—It creates an offence whereby, if you communicate security or defence information to another country for the purposes of advantaging that country, you are potentially liable for an espionage offence.

Senator COONEY—What I was thinking about was if you were advantaging one of our allies.

Ms Lowe—It does not distinguish between allies or friendly or nonfriendly countries.

Senator MURRAY—So it is a broad definition of treason, is it not?

Ms Lowe—Basically, it is treason in nonwar times, which is why it has the lesser penalty.

Senator MURRAY—It is advantaging a foreign country in terms of your own country’s security.

Ms Lowe—That is right.

Senator COONEY—It leaves the judge with the discretion to go in camera, does it?

Ms Lowe—That is right.

Senator COONEY—This does not seem quite as worrying as some of the other bills. That is because you wrote it.

Ms Lowe—Absolutely.

Mr Alderson—I would like to thank the committee. I have participated in a number of these briefings and find them to be extremely valuable as an opportunity to talk through some of these issues in some detail.

Senator MURRAY—Yes. It is a different style from other committees.

Senator COONEY—I would like to thank you. You have come down whenever we have wanted and you have elucidated things terrifically. It is a worrying set of bills. I would have loved to have seen how they were prepared. Thank you, Ms Low, for coming down. Are you going to come again?

Ms Lowe—Any time the espionage bill pops up, I usually appear.

Senator COONEY—You have the broad sweep of criminal law, whatever we want: white-collar crime, drugs, espionage and what have you—terrific. Thank you to *Hansard* for working all the way through and putting up with the phone lines from Perth.

Committee adjourned at 5.12 p.m.