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Official Committee Hansard

JOINT COMMITTEE ON ASIO, ASIS AND DSD

Reference: Review of ASIO's questioning and detention powers

TUESDAY, 7 JUNE 2005

MELBOURNE

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JOINT STATUTORY COMMITTEE ON

ASIO, ASIS AND DSD

Tuesday, 7 June 2005

Members: Mr Jull *(Chair)*, Senators Ferguson, Sandy Macdonald and Robert Ray and Mr Byrne, Mr Kerr and Mr McArthur

Members in attendance: Senators Ferguson, Sandy Macdonald and Ray and Mr Byrne, Mr Kerr and Mr McArthur

Terms of reference for the inquiry:

To inquire into and report on:

Review of ASIO's questioning and detention powers

(Review of Division 3 Part III of the ASIO Act 1979 under Part 4 Section 29 (bb)(i)(ii) and (c) of the Intelligence Services Act 2001)

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Committee met at 9.15 am

ACTING CHAIR (Senator Ferguson)—I declare open this meeting of the Parliamentary Joint Committee on ASIO, ASIS and DSD. This review is conducted pursuant to section 29(1)(bb) of the Intelligence Services Act 2001. The committee is required to report on the operation, effectiveness and implications of division 3 part III of the ASIO Act and to report its findings to the parliament by 22 January 2006. The committee advertised the review on 17 December 2004 and 98 submissions have been received, three of them confidential. This is the fourth day of hearings. I should advise those present that the Attorney-General has agreed, in accordance with schedule 1 clause 20 part 2 of the Intelligence Services Act 2001, that these proceedings should be conducted in public session with the following exceptions. The exceptions include evidence that has or may have a connection to a current or potential prosecution and evidence which relates to a past, current or future investigation, to ensure that the identities of ASIO officers and employees are protected and to ensure that the identities of prescribed authorities are protected. If or when any of the about circumstances arise, the committee will take evidence in closed session.

MACKEN, Mrs Claire, Member, Administrative and Human Rights Section, Law Institute of Victoria

STARY, Mr Robert, Executive Member, Criminal Law Section, Law Institute of Victoria

ACTING CHAIR—Welcome. I invite you to make an introductory statement before we proceed to questioning.

Mrs Macken—On behalf of the administrative and human rights section and criminal law section of the Law Institute of Victoria, we appreciate the opportunity to put our views before the committee today. The LIV recognises a legitimate need to balance a nationally effective counter-terrorism plan, including the imperative needs of an intelligence based regime to prevent terrorist attacks against Australian interests. The LIV firstly questions the necessity of a specific intelligence collection model as an addition to the ordinary procedures of questioning and detention under the criminal law. In the criminal justice model, a person can only be questioned as a suspect on the ground of a reasonable suspicion that he has committed an offence, with questioning to dispel or confirm that reasonable suspicion.

Given that no general power exists to arrest and detain a person simply to make inquiries of them, the ASIO Act is without precedent in Australian jurisprudence. Internationally, however, the ASIO Act 1979 contains some similar provisions to section 12 of the Prevention of Terrorism Act 1984 of the United Kingdom, where detention for up to seven days was permitted without judicial review. Detention could be based on an unspecified act of terrorism and was to facilitate the questioning as to the facilitation of terrorist attacks. The legislation was subject to judicial determination by the European Court of Human Rights. The court upheld the purpose of detention as to questioning but held that the length of detention breached article 5 subsection 3 of the European convention, the maximum detention in that case being six days and 11 hours.

The ASIO Act shifts from the traditional model of detention to a preventive basis; that is, questioning a person not suspected of committing any criminal offence and for the purpose of obtaining information as to potential terrorist offences. That the purpose of detention is

preventive is referred to in the report of the Senate Legal and Constitutional References Committee at paragraph 7.4. It is also true that proponents of the bill contend that it is intended to facilitate the gathering of intelligence in order to prevent terrorist attacks, not for the purpose of prosecuting the person detained. The LIV submits that preventive detention can be considered a legitimate counter-terrorism response but only when strictly controlled by legislative enactment. Further, preventive detention is a permissible strategy within a state's antiterrorism arsenal and in this respect no legal prohibition exists on detaining a person without criminal charge or trial. This view is confirmed by the UN Human Rights Committee in its general comments on article 9 of the International Covenant on Civil and Political Rights. This states:

Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law ...

In this regard, the LIV submits the questioning and detention powers under division 3 part III of the ASIO Act 1979 are currently beyond the scope of a permissible counter-terrorism response and do amount to arbitrary detention. In recognising the needs of an effective security intelligence agency in collecting information as to the potential for terrorist attacks, the LIV submits two principal arguments. These arguments are within the LIV's written submissions and reflect the recent comments of the Hon. Duncan Kerr MP in the *Proof Hansard* of this committee on Friday, 20 May.

Firstly, the LIV submits that the two-warrant system of the ASIO Act in relation to questioning and detention warrants should be narrowed. One key way the legislation could be tightened is the implementation of stricter controls for the 'reasonable grounds for believing' criterion in section 34F. This test is based on a reasonable belief that the person will fulfil one of the three listed criteria in subsections 34F(3)(a) to (c)—that is, alert a person of the investigation of a terrorist offence, not continue to appear or destroy evidence, for example. In other areas of the law where there is a prediction as to what the detainee would do in the future, it is always based on specific determinants. Examples in Australia include the Victorian Bail Act and the Queensland dangerous offenders act. Also, the Mental Health Act in Victoria has a list of determinants for reasonable grounds for believing. Given the exceptional circumstances allowing questioning and detention—that is, any person who is able to assist in the collection of intelligence for a terrorist offence—there must be clear and convincing evidence that reasonable grounds exist that the particular person is likely to do one of the factors listed in section 34F(3)(a) to (c).

Secondly, the LIV submits that section 34F is arbitrary for providing insufficient safeguards as to the judicial review of the lawfulness of detention. As detention under section 34F is not based on criminal charge, judicial review does not automatically arise on detention. As such, the LIV submits that it is imperative that division 3 of the ASIO act is clearly drafted to give a specific right of habeas corpus. To review detention, the person can only rely on a prerogative writ of habeas corpus. This right must be part of the specific sections of the ASIO Act, rather than being implied from the information provided in section 34E(3). It should also be made perfectly clear that the right to review the lawfulness of the detention in the Federal Court applies to both questioning and detention warrants. The judicial review should test the legality of detention. In regard to section 34F, this would require a court to determine the lawfulness of detention—that is, testing the reasonable grounds for belief.

The LIV has raised other concerns in its written submission. These include the issuing of warrants under section 34D, which does not require the issuing authority to be satisfied that relying on other methods to collect intelligence would be ineffective; the possibility of ASIO making an informal request to a person for questioning without seeking a warrant; the strict secrecy provisions surrounding the detention, including the two-year ban; the removal of the privilege against self-incrimination and the removal of the right to silence; the restrictions on legal representation; and the fact that the protocol cannot be legally enforced and only provides the basis for a complaint to the Inspector-General of Intelligence and Security or to the Ombudsman in relation to the Australian Federal Police. This concludes our opening statement.

ACTING CHAIR—Seeing that Mr Kerr got an honourable mention, I would like to invite him to commence questioning.

Mr KERR—I fear it may be like a flattering reference to Justice Kirby in the High Court, and thus doom my welcoming of the submission! There seems to be little lack of clarity in the Law Institute's position on the detention regime. On the one hand your submission says that the detention provisions pass the non-arbitrary test because a warrant can be issued only on the objective basis of 'reasonable grounds', but the substance of the submission is to oppose the detention regime. Could you clarify precisely where you stand and whether or not you are calling for any amendment of the detention regime, if it were retained?

Mrs Macken—Firstly, the LIV's position is that the detention power is unnecessary, given the questioning power for 24 hours and up to 48 hours. That is our first position. As an alternative submission, if it were retained, there needs to be stricter controls on the detention power under section 34F. In particular, the phrase 'reasonable grounds for believing' needs sufficient facts on which that belief is based. That is an approach echoed in the Bail Act, for instance, which has a specific list of determinants that an authority would have to take into account to keep a person in detention. Forming a reasonable belief as to future conduct is normal practice in preventive detention legislation. Principally, some of the factors for consideration are the criminal record of the person being detained; their previous offences; the type, frequency and duration of their past criminal offences; known connection to terrorists; and known connection to criminals, all of which relate to criminal propensity. Also, there is analysis of the mental state, character, physical condition, age and employment of the detainee, and predictions as to the likelihood that the particular detainee would do one of the factors listed in section 34F subsection (3)(a) to (c).

Mr Stary—To illustrate some of the deficiencies that we see in the legislation, there is a case example that we would like to refer you to. It is a prosecution that is currently before the courts. The comments that I propose to make are all a matter of public record. It is the prosecution of the only terrorist suspect in this state—Joseph Thomas, also known as Jack Thomas. I understand, of course, the rules of sub judice and contempt, but the manner in which Mr Thomas has been processed might be of some interest to the committee. Does the committee wish to hear this evidence in camera, or are you happy to have it ventilated in a public forum?

ACTING CHAIR—That rather depends on what you are going to say.

Mr Stary—These matters are all a matter of public record. They have been ventilated previously in various bail applications and committal proceedings.

Mr KERR—We should hear it, but I would first like to follow up and rule off on the point that Mrs Macken was just making. The point at which a detention warrant could be sought is where there would be a reasonable basis for belief that a person, if not detained, would leave the jurisdiction, escape or alert somebody—I think there are three tests. Is it your argument that we need to build more legislative criteria into that? I would have thought that it is implied that any judge before whom a request for such a warrant is made would take those factors into account in any case. It does not seem to me to add a huge amount by specifying a whole list of things that need to be taken into account when, on the face of it, they are the obvious things to be taken into account if you were applying your mind to the statute.

Mrs Macken—The use of specific criteria determinants in preventive detention legislation is normal because, rather than looking at the past conduct of the person that is being detained, you are making a prediction as to what they might do in the future. In order to direct the person's mind to what they might do the future—such as in the Bail Act, and I will quote a provision from it in a moment—it directs the facts on which a reasonable ground for belief can be based and—

Mr KERR—Usually, if I might say so, most of the amendments to the Bail Act have been done by parliaments infected by law and order enthusiasm to restrict the things that courts can take into account rather than in a surge of enthusiasm for civil liberties.

Mrs Macken—The principal case on reasonable grounds for belief in Australia is the George and Rocket case from the High Court of 1990. In that case the phrase 'reasonable grounds for believing' requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. When you are predicting what they might do when released—whether they will go and inform a person as to the investigation that ASIO has undertaken or whether they will abscond—you need specific facts and specific criteria on which the reasonable belief can be based. The example I was referring to is the Bail Act—and there are several others. In relation to an unacceptable risk under section 4(3)—and this is a Victorian act—it says:

(a) the nature and seriousness of the offence;

(b) the character, antecedents, associations, home environment and background of the accused person;

(c) the history of any previous grants of bail to the accused person;

(d) the strength of the evidence against the accused person;

(e) the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail.

Mr Stary—The suspect or an accused person is invariably represented at those hearings, where that criteria can be examined. Although it is true that in every Western country in terms of law and order campaigns where the various rights of individuals have been incrementally removed or confined, nevertheless, to spell out in detail relevant criteria is something that we would generally support.

ACTING CHAIR—You asked before about making comments relevant to a case that is currently being held. In discussions with my colleagues it would appear that the rules of sub judice that would normally apply still apply in a public section of this inquiry so you would need

to be aware of that in anything you say to us. Our concerns, of course, are that there are other provisions in the act which say that, if any other people are mentioned who are especially precluded, as I read out in my earlier statement, then we would need to go in camera for that.

Mr Stary—I am conscious of that, but these matters, as I said, have all been a matter of public record and have been reported in various forums. I certainly would not be in a position to compromise Mr Thomas's right to a fair trial—indeed, I am his practitioner. But the case is important because it is illustrative of how these provisions may be invoked and their effectiveness.

Senator ROBERT RAY—Mr Stary should proceed, but I hope he does not take offence if we do intervene if we believe that he is entering sensitive territory.

Mr Stary—I understand that. Mr Thomas, as the committee may know, is a person who is charged effectively with two terrorist offences—that is, receiving support from or providing support to a proscribed organisation, and receiving resources from a proscribed organisation. It relates to his activities essentially whilst he was overseas, in Pakistan specifically. Mr Thomas was a person who had been in Afghanistan for a period when the Taliban regime was in power. Mr Thomas was intercepted in Karachi in January 2003—prior, obviously, to this legislation being proclaimed. In the preceding two months he was interrogated extensively by both the Australian Federal Police and ASIO. In June 2003 he was repatriated to Australia, having not been charged with any offence in Pakistan.

Between June 2003 and November 2004 he sought to return to a life of normality in the sense that he was reunited with his family, he recommenced employment and in fact had another child in that period. In November 2004 he was charged with those offences relating to his activities principally in Pakistan. When he was arrested the Australian Federal Police, acting on information received by the various intelligence agencies, said to the court that he was regarded as still an al-Qaeda operative and a person described as a sleeper cell, waiting to be activated. In opposing bail—and, of course, the committee will know that, when a person is charged with a terrorist offence, they must show exceptional circumstances as to why they should be released on bail—the AFP and the Commonwealth Director of Public Prosecutions said that he was an unacceptable risk, apart from the very fact that being charged with terrorist offences required the showing of exceptional circumstances. They said, further, that there was an unacceptable risk that he would commit further offences whilst on bail and that he was likely to abscond.

In the intervening period, at the time when he was under covert surveillance—his phones had been monitored, his emails had been scrutinised and there was static covert surveillance of him—there was also a process in which he was informally interrogated by ASIO. The communication for that interrogation came through his legal practitioners. His legal practitioners played an important role in facilitating—

Mr KERR—That is you?

Mr Stary—Yes, that is me.

Mr KERR—You are using third party.

Mr Stary—I was trying to put it in a neutral way. There were various lines of inquiry that were required to be pursued. Again, as a matter of public record, these matters have all been previously canvassed. I will not go into any detail as to operational matters. But, having been arrested and charged with offences as the only terrorist suspect in this state, the authorities and ASIO in particular never sought to invoke any of these provisions. The process of charging and interrogating Mr Thomas was done either informally or through the criminal justice process.

We note that LIV has made submissions in relation to the secrecy provisions, the right to representation and the right to silence. It seems to me that, leaving aside the merits of the prosecution, there was the capacity to use the criminal justice process for this person—the only person identified as not only a terrorist suspect but also someone who should be charged in this state. Indeed, one of the things that has been subject to criticism was that, whilst one talks about secrecy and the right to silence, the committee will be aware that the Australian Federal Police had a commercial television network in tow at the point of his arrest. There was the issue of a press release to coincide with his arrest. Indeed, the Premier of this state was in parliament proclaiming the success of the joint state-federal cooperation that led to Mr Thomas's arrest. As I said, Mr Thomas is the only person in this state to have been charged with terrorism offences. When one would have thought this legislation might have been effective, it was never invoked.

Senator ROBERT RAY—But what I understand, with respect, is that you are basically saying or implying that the legislation exists to adduce evidence that will lead to a criminal conviction, when the absolute opposite is true. It is there, we hope, for intelligence-gathering purposes, more often than not with people who will never be suspects.

Mr Stary—I understand that. But one would have thought that Mr Thomas might be something of a goldmine of information in terms of the fact that he was born here, has an Anglo-Celtic origin and, having converted to Islam, was intimately involved in his community in Melbourne, which is said to be the source of his recruitment to Afghanistan.

Senator ROBERT RAY—Some people would take it as a stunning endorsement of ASIO's integrity that they did not use and abuse the potential powers they have to induce some evidential lines that they could later follow by police inquiries. The argument would be that ASIO in this case, if they only—and I am saying 'if' because we cannot confirm or deny this—used the array of criminal laws available to them and did not avail themselves of this legislation, acted with total propriety. There is no derivative use potential.

Mr Stary—Indeed. And there is no suggestion that they acted in anything other than a proper manner.

Senator ROBERT RAY—What you seem to be implying, Mr Stary—and it does get to the nub of the problem, I agree—is that there is enough in the Criminal Code to mean that this legislation is not necessary.

Mr Stary—Indeed. That is the point of the illustration: is there a demonstrated need?

Senator ROBERT RAY—But the whole heart of this—which no doubt you will dispute—is that it takes away the right to silence. The parliament has said that the potential of an imminent terrorist attack that will lead to innocent victims does on this occasion require the removal of the

right to silence. By all means context that. But in the Criminal Code there is almost an absolute right to silence. Here there is not. Hence, you cannot self incriminate. There is another argument to be mounted on derivative use and we are crossing that territory, as well.

Mr Stary—Yes. I understand that that is the conundrum that the debate throws up.

ACTING CHAIR—If anything, it would appear to me that you have actually strengthened the case of this legislation because where a person is suspected of a terrorist offence there is ample opportunity under the Criminal Code for something to be done. This legislation was put in place so that information can be gleaned from those who are not suspected of a terrorist offence but may have information which may lead to the prevention of an imminent threat at some stage in the future. I would have thought that this legislation is complementary to the issues that you raised in relation to Jack Thomas.

Mr Stary—Except to say that there is no demonstrated need for this legislation. The number of persons who have been interrogated in the Commonwealth is, as I understand, eight.

ACTING CHAIR—That is correct.

Senator ROBERT RAY—If it had been 800, we would be living in a police state. That would be the exact reason you would now be giving.

ACTING CHAIR—We are very pleased that it has only been eight, because it means that it is being used as a last resort.

Mr Stary—One cannot determine the effectiveness of those interrogations, because that is not a matter of public record.

Senator ROBERT RAY—That is a relevant question to raise.

ACTING CHAIR—That is relevant. But also, at the time of the introduction of this legislation many of the same arguments were put in place about what would happen in the future. At least now we have some history. We have taken evidence from people who have been involved in the process. We can start to have some idea of how it is going to work. It is true that there have been no detention cases. If at some stage in the future there is one or two we will be able to judge the effectiveness of it or whether it is warranted in the future. But we are reviewing the legislation as it has operated so far. At least we have some insight as to how it works. The fact that it has been rarely used means that we believe it is being used as a method of last resort.

Mr Stary—With respect, that would reinforce our argument that the sunset clause ought to apply and that the legislation should lapse, because of the history the committee has referred to.

Senator ROBERT RAY—I want to move on to another topic. A lot of evidence has been given objecting to the two-year secrecy period and the inability of someone who is either questioned or potentially detained to disclose what has happened to them. Say you are due to take the 6.12 out of Williamstown and work a day shift today. You do not turn up. You cannot tell Connex, your boss, what has happened. This could well cost you your job. Especially if you

are detained for a week, it could cost you your marriage, and so on. That is at the extreme but nevertheless—

Mr Stary—Ms Murphy from my office no doubt conveyed some practical difficulties—

Senator ROBERT RAY—These difficulties have been conveyed on the record by witnesses in Sydney yesterday.

Mr Stary—And I can say to you that that triggers an enormous amount of inquiries. The first person that is generally asked is the lawyer, and as soon as we say, 'We're not permitted to disclose anything,' that then triggers off a whole range of other inquiries. I wonder about the effectiveness of those secrecy provisions because they destabilise the person who has cooperated with the process.

Senator ROBERT RAY—There may be odd occasions when that rule could be extremely valuable, such as for reasons of tip-off. One of the things we have just been canvassing in the dialogue with witnesses is whether we should reverse it and have the onus of proof on ASIO, who would have to go to the issuing authority, not the prescribed authority—because we want a greater degree of independence—to get a suppression order put out there, at which the person to be detained or interviewed and their legal representative can be present. That seems to me to take the pressure off in 99 per cent of cases, but in the absolutely critical case in which you do not want someone tipped off, at least it remains in place.

Mr Stary—As it currently stands, all it does is encourage conspiracy theories from all of those persons that might otherwise associate with the person who is the subject of the warrant. It has the effect of tipping them off.

Senator ROBERT RAY—It is like a black hole: you know it is there but you cannot see it.

Mrs Macken—There have been statements today and in previous transcripts as to the fact that this act is exceptional and that detention powers have not been used and will only be used in exceptional cases. There is nothing in the terms of the act as currently drafted that expresses the view that it should be an exceptional power. It just says 'reasonable grounds for believing they will do one of these three listed factors'. There should be some limitation on the act that it be in exceptional circumstances. One of the ways I have suggested is to have a list of determinants as to the reasonable grounds, but even an expression that this power needs to be used cautiously if it is to remain is something that could further the act for the future.

Senator ROBERT RAY—No issuing authority has had to issue a detaining warrant. I think we have had some indication from issuing authorities that they would put the bar fairly high before they ticked it, I think. That is the impression we are getting. Absconding once the passport is suspended is going to be a very hard one to then prove because it is usually automatically taken away for the period of the warrant. Destruction of evidence, again, is a bit like trying to prove a conspiracy theory, so almost inevitably it will be the third ground, which we mentioned before—that is, the tip-off likely to warn others. When you say that is very broadly defined because of the word 'may', when I look at the actual three, I think it is much more narrowly defined then by the three rather than by the word 'may'.

Mrs Macken—But, as I understand it, it is one of the three alternative grounds, (a), (b) or (c).

Senator ROBERT RAY—Yes, it is. It does not have to be all three.

Mr KERR—But it has to be an affirmative satisfaction that one of those three grounds applies. It is a federal justice that will be making that determination, including a federal magistrate. They would have to be satisfied, on material produced before them which was persuasive, that one of those three criteria was satisfied. I think, as Senator Ray says, it is going to be very hard to satisfy one of the first two. It would only be in extraordinary circumstances that in relation to a person who has lost their passport you can make a genuine case that they can still exit the jurisdiction. Secondly, it is going to be relatively difficult to prove the second ground. The third is the one where you would ordinarily expect concern by the intelligence services to be manifested.

Mrs Macken—There are, however, no specific grounds in the act to have the reasonable grounds for belief in section 34F(3) tested in the Federal Court. It is an implied right under the information provided at the time the warrant is issued. To strengthen the rights under the act and to ensure that it is only used in exceptional cases, there needs to be some specific facts on which a reasonable ground is based as to future conduct. The test of reasonable grounds to believe is used in arrest and warrants for searching premises at the moment.

Mr KERR—But isn't that implied? Isn't it a necessary implication, not just a hypothetical one, that a warrant will not be issued unless the magistrate or judge before whom it is presented is actually affirmatively satisfied by facts presented to them, by material capable of objectively sustaining that conclusion, that there is a reasonable basis that if detention was not ordered the person would pass on information to a third party? It is true that there is no opposing counsel at that stage to test it but that is true of the issue of most search warrants and the like. If you put a whole list of criteria and you add to it a whole subtext of things that have to be ticked off, I am not sure how you would add much to the criteria. At the end of the day, the test is pretty clear and it is a pretty high bar to jump, I would have thought. I am not trying to advocate detention, by the way. I am being a devil's advocate here.

Mr Stary—I am not sure whether the committee would have any examples of where a warrant has been refused.

Mr KERR—One has not been sought, as I understand it.

Mr Stary—I suspect there would be a very liberal interpretation of the criteria. It would be a brave judicial officer who would refuse a request for a warrant. Although it is suggested that the bar is set at a very high level, I do not think in reality that is necessarily the case.

Mr KERR—With that level of scepticism, writing in more legislative rules is not likely to do anything more.

Senator ROBERT RAY—You are basically wanting a lot more judicial review but at the same time you are saying some of these judges have no spine. That is basically the implication. If they are willing to issue any warrant whatsoever, giving everyone access to judicial review to go to the same spineless characters does not seem to be too good to me.

Mr Stary—I am not sure that that is right because we are not in a position to analyse the warrants that have been issued and those that may have been refused. Once we had that material then we could perhaps make that decision.

Mr KERR—I think it is on the public record that no detention warrant has been sought. Therefore, none has been refused. So we still are in a position where, in a sense, we are arguing about safeguards that need to be included.

Mrs Macken—Just with regard to that, though, the bar is really not that high. The second ground under 34F(3)(b) is:

may not continue to appear, or may not appear again, before a prescribed authority ...

That is effectively the same consideration as bail. In bail considerations, there are determinants that are taken into account such as whether they will come again before the court or whether they will appear. It is an assessment that needs to be made. The first ground states:

may alert a person involved in a terrorism offence that the offence is being investigated ...

With that, you are making predictions as to what a person will do in the future. How can you make a prediction as to what a person will do in the future unless you have a look at what they have done in the past? Our conduct is going to be similar to our past conduct.

Senator ROBERT RAY—I look at what we are doing in the present and I do not get as excited about this. I have an open mind, I assure you. Right now we can walk outside and I will give you $3.10 and we go down to the remand centre at La Trobe and Spencer Street and I can show you people who have been there for months who would love some of these provisions that they can only be held for a month. Then we can go out to Maribyrnong detention centre. People who have been there for months on end would love this one-week only detention that cannot be renewed unless there are new grounds and all the rest of it.

Mrs Macken—But they are suspected of committing an offence.

Senator ROBERT RAY—One wrong does not justify another in a civil libertarian's mind—I understand that.

Mr Stary—There are some safeguards in place with all those persons. They have got a right to representation.

Senator ROBERT RAY—That is right. They have got judicial review and they are there for months. Here, they can be held up for a week and not have judicial review. I know which one I would pick every time.

Mr Stary—Except if you are the suspect in the commission of a criminal offence and you are remanded in custody, that is an expectation that you may have. In this case, a person can be detained without being a suspect in the commission of an offence.

Senator ROBERT RAY—That is only because it has been entrenched in traditional law and we are all part of it, so we accept it. This is a different type of law. It is seeking to gather intelligence for a specific purpose and a specific set of evolving circumstances, so it does not apply to all the other legal constraints we have had. What this committee is interested in is a system that works but also has safeguards. We are very concerned about the safeguard side and are looking for practical suggestions where it can be strengthened.

Mr Stary—The institute's alternative position is that there be further safeguards added, particularly in terms of representation, the secrecy provisions that you have referred to and things of that nature.

Senator ROBERT RAY—And further judicial review. We have not pressed those with you today because we have heard so much evidence in the last day on those.

Mr Stary—They are detailed in our submission.

Mr KERR—One of the things that we have been tossing around more recently as we have had more discussion is whether there should be greater specificity in the warrant—not necessarily defining a particular offence but at least a band of matters that may be the subject—so that you do not have unfocused questioning that traverses the world generally.

Mr Stary—In the absence of that specific detail in the warrant, one would have thought the warrant would be subject to challenge.

Mr KERR—Quite possibly, but nonetheless as a practical question from the point of view of the lawyer saying: how do we prepare for this—

Mr Stary—And cooperate with the process.

Mr KERR—the witness refreshing their memory about matters that will be asked of them and the presiding authority in the questioning regime having some control over the proceedings. It would be of assistance, I assume.

Mr Stary—I accept that and I would think that it would make the interrogation process much more fruitful if that detail was provided.

ACTING CHAIR—I think we are out of time because we are running behind schedule already. Thank you very much for appearing before the inquiry today and for helping us with our deliberations.

[9.59 am]

SEMPILL, Mr Stephen, Private capacity

THAM, Mr Joo-Cheng, Private capacity

ACTING CHAIR—I welcome you both and invite you to make an introductory statement, after which we will proceed to questions.

Mr Tham—First, we would like to thank you for the opportunity to appear before the committee today, and we are particularly grateful, given the importance of this review of quite exceptional legislation conferring exceptional powers. There are three matters I will address in this opening statement. The first is the nature of these powers and of the organisation on which they have been conferred—namely, ASIO. Second, we submit that the provisions conferring these powers should lapse with the expiry of the sunset clause; and, third, we contend in the alternative that if these provisions or powers are to be continued then certain amendments should be made to these laws.

Let me begin with the nature of the organisation on which these powers are conferred. ASIO's brief, according to its act, is to protect the security of the Commonwealth. What is important for present purposes is that, at the heart of its task of protecting the security of the Commonwealth, as defined by the ASIO Act, ASIO gathers intelligence regarding activities that it considers within its broad statutory mandate to be illegitimate political activity. It is in that sense that we can say that ASIO polices politics. That is not to ascribe any sinister motives to ASIO but simply to read off its statutory functions. The danger of the inherent function of ASIO, in the sense that it polices politics, is that ASIO's understanding of what constitutes illegitimate political activity differs from the community's understanding of what constitutes illegitimate political activity. This danger is expressly recognised by the ASIO Act. Section 17A of the ASIO Act in particular states that the act:

> ... shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security ...

The danger that ASIO's function of policing politics poses to Australia's democracy is a very real one. For some, that danger stems from ASIO's history, and some would draw support from Justice Hope's statement:

> ... ASIO officers have shown a tendency to think of anyone they chose to call 'left wing' as subversive.

People such as I who protested at the World Economic Forum in Melbourne in September 2000 feel a degree of apprehension to find a picture of Osama Bin Laden on page 15 of ASIO's annual report for 2000-01 under the heading of 'politically motivated violence' and, two pages later, under a similar heading, photos of the Melbourne protest. Importantly, the danger that stems from ASIO's function of policing politics is exacerbated by the clandestine nature of ASIO's activities.

In short, we submit that it must be recognised that ASIO is a secret security organisation that inherently polices politics. Several key risks are posed by an organisation such as ASIO. There is clearly a threat to political freedoms, especially the ability to voice dissent; there is a danger of ASIO not being properly accountable to the public, which stems from the secret and clandestine nature of its activities; and there is a real risk of it breaching the rule of law by engaging in illegal activities. Again, these are not fanciful risks: one has just to look at the last major review, which was conducted by Justice Hope, to find that ASIO's interception activities, as Justice Hope found, were probably tainted by illegality.

There are two key means to ensure that a secret security organisation like ASIO that polices politics does not subvert Australia's democracy. The first is to ensure that ASIO's activities are subject to democratic supervisory arrangements. Placing ASIO under the direction of the Attorney-General is an important measure, as is having a committee such as this, to ensure proper parliamentary supervision of ASIO's activities. The second key means is to limit the powers that ASIO has. It is important to note that, before it had the detention and questioning powers conferred upon it, ASIO, while it had broad invasive powers to intercept and gather intelligence regarding security, did not have coercive powers. The reason for limiting these powers stems from, if you like, Lord Acton's maxim that if power corrupts, absolute power corrupts absolutely.

Senator ROBERT RAY—He ought to know—he was convicted of corruption a few years afterwards.

Mr Tham—Sorry; I could not catch what you were saying, Senator Ray.

Senator ROBERT RAY—It was more of an aside.

Mr Tham—I am sure it was a very intelligent comment, despite the murmurs! One antidote to these dangerous situations has always been to limit or divvy up power. In the context of ASIO and police organisations, the solution has been to confer upon ASIO invasive and broad powers of interception regarding security but not to vest it with coercive powers. The rationale or the belief has been that coercive powers are best vested in, or are seen to be the proper province of, police organisations—organisations that are more public and whose functions are more strictly limited to law enforcement.

Key changes were made to the character of ASIO as an organisation by these detention and questioning powers. These are clearly coercive powers conferred for the purpose of gathering intelligence. They are powers aimed at people who are not suspected of any crime, not charged with any crime—people who are entitled to the presumption of innocence. And these are powers that can be used in relation to a broad range of conduct. They can be used against so-called terrorism offences, offences that capture a lot of conduct beyond acts like bombings and hijackings. They capture, for instance, as we said in our submission, membership of the Liberal Party.

Senator ROBERT RAY—Now you're talking sense!

ACTING CHAIR—You just won a couple over!

Mr Tham—That is all right. Shall I end there?

ACTING CHAIR—You may even capture a few of the Labor Party!

Mr Tham—I am sure!

Senator ROBERT RAY—We are talking about the National Party, Acting Chair!

Mr Tham—What it is important to note are the crucial changes that these powers have made to the character of ASIO as an organisation. Its capacity to police politics has considerably broadened. That capacity has been amplified because now it hinges upon these broad-ranging terrorism offences. The cloak of secrecy around its activities has thickened with the far-reaching secrecy offences and it has now been vested with coercive powers that are normally conferred upon police. It is this combination of factors which makes all the more real, all the more acute, the danger of ASIO becoming—with no exaggeration—a secret political police. It is with such an understanding that we submit that provisions conferring these powers should lapse.

We say, firstly, that the principle that people who are not charged or convicted of a crime not be detained or be placed in coercive circumstances should prevail. Make no mistake, when these powers are exercised there is one certainty. The certainty is that people who are presumed to be innocent will suffer certain adverse consequences. They invariably have lost the right to silence. There will be disruptions to their daily lives through forced questioning. The effect is made all the more punitive by the fact that they are gagged from talking about their experience, even up to two years after the questioning, and if they are subject to detention warrants these consequences are made all the more severe. Contrast this certainty with the uncertainty of the value of the exercise of these powers—whether they in fact will produce intelligence that is valuable and that will prevent an imminent terrorist attack from being carried out with catastrophic consequences. ASIO perhaps might have got the wrong person.

It might be argued that surely this principle that we have just put forth should yield to a situation where these powers are used as a means of last resort. Two responses can be made to this argument. The first is that it does not properly characterise the current security regime. It is true to say that the Attorney-General must be satisfied that other means of collecting intelligence have proven to be ineffectual, but that same criterion does not bind the issuing authority and it does not bind the prescribed authority, who can in certain circumstances issue questioning and detention orders. More importantly, this argument begs the question: last resort in relation to what?

The key argument for these powers is that, even though they involve detaining and questioning people who are presumed to be innocent, they are required to prevent, in ASIO's words—and this is from their submission—'severe physical harm' that terrorism can cause to people and their interests? But the fact of the matter is that these powers hinge upon these broad-ranging terrorism offences, which means that they are not confined to prevention. Conduct that occurred solely in the past, so long as it constitutes a terrorism offence, can be targeted by these powers. Neither are they confined to conduct that actually carries a material risk of serious harm to life and property.

We say that the principle that people are presumed to be innocent and should not be detained or placed in coercive circumstances has especial force in light of the other investigative powers that are available. We have already canvassed in our submission the extensive powers that ASIO has in relation to foreign political organisations like Jemaah Islamiah and al-Qaeda. There are powers that can be exercised even without a suspicion of any criminal wrongdoing. Of course, police powers of detention can be exercised when there is reasonable suspicion of crime. Take, for example, a hypothetical situation where there are reasonable grounds for suspecting that a person has essential information regarding an imminent terrorist attack. That suspicion would at the same time supply reasonable grounds for suspecting that that person, in most situations, is committing an offence. If so, that person can be arrested, charged and detained. In addition, we say that these provisions should lapse because the provisions conferring the power to detain are arguably unconstitutional. There are reasonable grounds, we say, for arguing that these provisions authorise punitive detention by order of the executive.

In the alternative, if these provisions are allowed to continue, we submit that various amendments should be made to the statute provisions. Let me highlight two of those. First, we argue that these powers, especially detention powers, should be confined to circumstances where there is a reasonable suspicion of an imminent terrorism offence involving a material risk of serious physical injury or serious property damage. The argument for this is simple. Again, the rationale given for these powers is that they are required to prevent imminent terrorist attacks carrying, broadly speaking, catastrophic consequences. Our suggestion is basically an attempt to translate this rationale into legal terms.

Secondly, we say that the far-reaching secrecy offences should be repealed. In the alternative, the option of having secrecy provisions modelled upon the provisions found in the Australian Crime Commission Act should be investigated. I have circulated a table that basically compares the secrecy provisions in the ASIO Act and the ASIO detention and questioning powers with those that are actually found in the Australian Crime Commission Act. I do not want to go through the table, but let me point out three salient differences between the secrecy provisions found in the Australian Crime Commission Act and those that currently pertain to the detention and questioning powers. Firstly, the ACC secrecy provisions are only triggered upon the making of an order by the examiner. Secondly, even once an order is made, it is not of general application. It only applies to a person who is served with a notification of nondisclosure. Thirdly, that ban of nondisclosure automatically ceases when certain events occur. For instance, once criminal proceedings are launched, the ban comes to an end. Once the director of the ACC forms a view, after evidence has been assembled, that no criminal proceedings should be launched, the ban comes to an end.

In conclusion, our key contention is that these powers should be removed. It is perhaps appropriate to end with a recent characterisation of these powers. It says:

> How would one describe these powers? How is it that both major parties in Australia agreed with these provisions? The legislation is contrary to the Rule of Law. It is contrary to Due Process, to Habeas Corpus, to the basic rights which we have come to understand are central to a free and open society.

This quote was from an address given on 1 April this year entitled ‘Human rights and human responsibilities in the age of terrorism’. The speaker was former Prime Minister Malcolm Fraser.

ACTING CHAIR—I guess it would be fair to assume from the comments you have made today that not only would you be happy to see the provisions in this act lapse but you would be very happy to see the organisation of ASIO lapse.

Mr Tham—That is not true. I have been on the public record about this; in fact, today I have a piece in the *Age* where I state unequivocally that a security organisation is necessary. At the same time, it must be recognised that they carry very severe dangers to Australia's democracy.

ACTING CHAIR—You complained about the secrecy of the intelligence organisation. 'Its clandestine operations' was another phrase you used.

Mr Tham—That is right.

ACTING CHAIR—Can you tell me of any intelligence agency anywhere in the world that does not operate with secrecy provisions or clandestinely?

Mr Tham—I concede that, but that is the whole point: recognising the inherent dangers of security organisations. We accept the necessity and we accept their hypothetical features, but the point I made in the submission is that we recognise the dangers and recognise there are important ways to try and neutralise or minimise the dangers. In the context of this legislation, one important point is to limit the powers of such security organisations.

ACTING CHAIR—It is also one of the reasons why we have a parliamentary committee whose special purpose is the oversight of ASIO and the other intelligence organisations.

Mr Tham—I pointed that out in my opening statement.

Senator ROBERT RAY—This is more of a comment that you can respond to than a question. At the very end of your presentation you quoted Malcolm Fraser, so I hope you get the opportunity at some stage to go back to 1978 and the Hilton bombing and to see what security measures he invoked when he was Prime Minister of the country. This all looks pretty pale in comparison, but that is just an editorial from me. But I notice you also quote from a very eminent person in Duncan Kerr, so you have made up the ground there without a doubt!

Mr Tham—And I am waiting for the opportune moment to quote you, Senator Ray!

Senator ROBERT RAY—Yes, but finding something appropriate is going to be a lot more difficult. We play the devil's disciple role a bit to tease out the views of witnesses. I have heard an enormous amount from you today about the rights of individuals, human rights et cetera, but I also wonder what the rights are of those people in the Madrid station who were blown to pieces. I know it is an emotional counterpoint to put, but victims have rights too and it is generally considered the state has some sort of responsibility to try and protect victims as well. We try to get a process in place, a regime that can elicit that information but as much as possible protect human rights. You are getting at where do you draw the line, and that is what this committee hearing this all about. What about the victims? When you talk about habeas corpus and all the other entrenched rights, I would have thought that people have a right to catch a train to work in the morning without having their legs blown off or whatever else.

Mr Tham—Sure. A person’s right to physical safety is a very important right. A point I made, and all commentators made, when this legislation was proposed, and I will make now, is that these powers should not be evaluated in a vacuum. They are proposed in the context of a superstructure of existing investigative powers, and those are powers that should be used to protect people’s physical safety. It is not contrary to my position to—

Senator ROBERT RAY—But you see all those powers are eventually channelled into an evidentiary chase to lead to criminal conviction.

Mr Tham—Yes.

Senator ROBERT RAY—I do not challenge, in those circumstances, the right to silence; it has got to be an integral part of our system. But if it is intelligence gathering rather than criminal evidence collection the parliament has made a decision that the right to silence no longer applies. That is the centrepiece of this legislation: the criminal investigation system is insufficient in certain circumstances to evoke enough intelligence material. So when you say, ‘We’ll rely on the criminal system,’ we are saying, ‘It can’t produce what we need’.

Mr Tham—This is an argument that is commonly put—that these powers are animated by a purpose that is different from the powers that are conferred upon police—

Senator ROBERT RAY—Yes.

Mr Tham—and that this is about intelligence gathering and not about law enforcement. With respect, I think it is a distinction without a difference in this context, and I say this for a number of reasons. ASIO does not consider it to be a real distinction. If you go to its annual report, it considers that one of its key outputs in terms of intelligence gathering is the charging of people as much as terrorism offences. Clearly, this is a law enforcement activity. There are two other reasons. Operationally, you just cannot draw a distinction of any real substance. Australian Federal Police officers are integral to this statutory regime. Derivative use of information given by exercising the powers is clearly contemplated by the protocols that have been laid out before parliament where the prescribed authority is required under those protocols to advise subjects being questioned and detained that their evidence can be used in a derivative manner.

Senator ROBERT RAY—What you have done there is to shift ground. You have said that the way it is currently implemented has these weakness, all of which have either been acknowledged or are going to be considered by this committee. But it gets back to my basic question. You assert that the current Criminal Code and its related investigative activities can deliver the result we need. But, as long as the right to silence is there, surely it cannot. The alternative model may not be the model that you want, and I accept that. But, when you come here and say to us that the existing Criminal Code and its related investigative powers can deliver the same result, I have to contest it and get you to justify that statement. You have not so far. You have criticised the other regime, but you have not actually told me how the Criminal Code and its related investigative powers can deliver the result that this country needs.

Mr Tham—I have not shifted the ground. I reiterate the point that I make—and this is quite important, because the argument that the powers are aimed at a different purpose from police

powers has been run quite a few times. The fundamental point that I am making is that there is a distinction without difference in this context.

Mr KERR—Can I also be a devil's advocate for the moment and see whether there is a point which we can tease out here. Our existing investigative regime in the criminal jurisdiction also includes the Australian Crime Commission, which permits the use of compulsion to seek answers in relation to criminal law investigation where matters of serious and organised crime have been referred to the commission. So, within the existing law enforcement armoury, there is a compulsive questioning regime which waives the right to silence. I would have to put to you that, at least in areas where potential acts of terrorism are concerned, you would expect our legal framework to have similar entitlements to investigate the factual background of possible terrorism events, as we would with possible acts of serious and organised crime. This uses a different mechanism from the Australian Crime Commission, but you would expect the right to seek that information of nonsuspects and others who might have information to exist in some form. If you give it in the law enforcement sphere, you would at least expect it to also appear in the sphere which goes to the protection of national security interests and the kinds of events that could give rise to public danger if terrorism occurs.

Mr Tham—Not necessarily. I think the simple point is that, to evaluate the necessity of these powers, a key step is that you need to look at existing powers. That is the point of distinction with the Australian Crime Commission with organised crime. The point of distinction is this: ASIO does not have extensive powers of interception with respect to organised crime. However, before it was conferred these powers, it had extensive powerful interception in respect of politically motivated violence, and that is a point of distinction.

Mr KERR—I am sorry; I do not understand the point.

Mr Tham—All we are confining our attention to is the necessity of these powers from the point of view of intelligence gathering, investigation and so forth; for me a key step is to evaluate the existing powers and see whether they are up to scratch, if you like. A point of distinction between acts of politically motivated violence and crimes involving organised crime is that ASIO does not have extensive powers of interception with respect to the latter; it does with respect to the former. We might say that, yes, with organised crime—I am not saying this is my position—while we need compulsive powers, all we have are police powers. But that does not lead to the conclusion that we need the same with politically motivated violence because not only do we have police powers with respect to murders, hijackings and so on but, even before the conferring of all these powers, we also have the extensive powers of interception conferred upon ASIO.

Mr KERR—I accept that you can make that argument but it is a difficult one because law enforcement also has a regime which permits the interception of telephones and has a whole range of other capacities to intrude through search warrants into the same kinds of powers that ASIO might have. It does seem difficult to argue that serious and organised crime, which may not involve the threat of violence but may involve simply the distribution of drugs or something of that kind, warrants a legislative framework that entitles there to be intelligence gathering but does not entitle there to be intelligence gathering using similar powers but in a different forum when possibly an act of politically motivated violence involving the deaths of hundreds or thousands might be the consequence of failure to ascertain that. But that is an argument we will

have. The difference is that there is no detention power in the ACC. Assuming this committee rejects the supposition or the argument put forward that there is no case for a questioning regime, perhaps the restraint that you suggest that should apply across the board; that is, that the power could be exercised only with respect to imminent and serious—and I cannot remember the exact language you used—

Mr Tham—Imminent terrorism offence carrying material risk.

Mr KERR—If that were to apply to a test involving detention there might be greater community acceptance. Personally I would find it difficult to apply it across the board to questioning because we do allow questioning in the ACC to a whole range of matters which are not involving imminent and material matters. But we have gone a step further in this legislation: we authorise detention, which is not available for nonsuspects in any other environment. Do you think a logical case can be made to apply that stricter test at least for matters where a warrant is sought for the detention of a person?

Mr Tham—Clearly when somebody is subject to a detention warrant, in terms of limit on personal liberties, it is far more far-reaching than if they were subject to a questioning warrant. At the same time when you are subject to a questioning warrant you are subject to detention in particular form. I do not want to push this too far because as a matter of principle you distinguish between those two types of warrants. As I said in my opening statement, what we have attempted to do with our situation is translate what justification is given for these powers. According to ASIO’s words they are to prevent terrorism causing serious physical harm. We are trying to translate that into a legal test that applies across all of these powers. So, yes, I agree at one level but I am taking people at face value, I suppose.

Mr KERR—It is an outrageous proposition when you come to political statements.

ACTING CHAIR—What do you consider to be serious property damage? You talk about recommending that it only be involving a material risk of serious physical injury or serious property damage. What is your definition of serious property damage?

Mr Tham—It is a question of fact. The alternative formulation I will give to you in terms of trying to confine its powers is an imminent terrorist act, as defined under the Criminal Code.

ACTING CHAIR—What do you call serious property damage? You have used the term ‘serious property damage’. What do you think is serious property damage?

Mr Tham—I do not want to descend to that kind of detail in terms. Serious property damage and serious physical harm are phrases that are directly borrowed from the Criminal Code in terms of definition of terrorist act and I do not want to descend into particular detail. This is a question of fact that will be decided by the courts and will be decided by intelligence organisations in operational matters.

ACTING CHAIR—I do not know whether you mean the destruction of the twin towers or blowing somebody’s front door up in their house. I do not know what you would call serious property damage.

Mr Tham—I might leave you puzzling on that, I think.

ACTING CHAIR—You certainly have left us puzzling on it.

Mr KERR—I think his defence is that our legislation already includes that expression.

Senator ROBERT RAY—I am a bit puzzled and irritated by your last submission, where you say HREOC should review ASIO annually and publish the results. I have a feeling that ASIO is exempt from HREOC's remit, from any jurisdiction by HREOC so far.

Mr Tham—What is the question, Senator Ray?

Senator ROBERT RAY—If it is exempt so far, why have its activities referred to a body like HREOC, whose reports are taken seriously by a few people in this country, not many? I can think of a dozen different agencies I would rather have them reviewed by than HREOC.

Mr Tham—What arguments are set out in our submission is that, while we have broad powers hinging upon broad offences, the clear danger with these powers is the risk of arbitrary exercise. We have already set out in the submission that, for example, there are very cogent grounds for saying that membership of the Liberal Party is an offence under the terrorist organisation offence, but we know that these powers will not be used—

ACTING CHAIR—You not seem to like the Liberal Party very much!

Mr Tham—No, it is just an illustration to demonstrate the far-reaching nature of these offences. Terrorism as it appears in the Criminal Code is a term of art. It is a statutory label that captures conduct that has a very remote connection, a very loose nexus, to what ordinary people consider to be terrorist acts. It is important that that be brought to the fore when considering powers that hinge upon this base of terrorism offences.

Senator ROBERT RAY—I have no challenge at all to your assertion that there needs to be scrutiny. I just wonder why you picked a body with so little credibility; that is all. I cannot understand that.

Mr Tham—I suppose the principle is meaningful review of the exercise of the powers. If the senator thinks there is a more credible body to minimise the danger of arbitrary exercise, then of course—

Mr BYRNE—Just taking the point from Senator Ray, why did you not postulate judicial review, like a number of other submissions? A number of other submissions have said judicial review and, given that that occurs in a number of other instances, why not judicial review?

Mr Tham—I am supportive of judicial review. It has its limits, nevertheless. The limits are that the application of judicial review is to individual cases; it is individual cases that go through the courts. If there is arbitrary exercise—for example, the committee has heard about the perception in the Islam community about these laws being directed against them. At the very least there exists a level of perception. Whether there is in fact discriminatory exercise of these

powers would only be evaluated on a case-by-case basis. It is something that really needs to be evaluated on a more systemic basis, and judicial review is actually limited in doing that.

Mr BYRNE—That does not say much for the judge. You talk about imminent terrorism offence. The planning of the World Trade Centre attack took about four years. Using that is a criterion of imminent offence, you would not be able to prosecute that because it would be outside the ambit of what you would categorise as imminent terrorism offence.

Mr Tham—It depends what stage. You would not be able to use the detention and questioning powers against them, but that does not mean you cannot investigate or prosecute them by reliance on other powers.

Mr BYRNE—What if you need to use those powers? What if we could have use those powers and it could have precluded as a consequence of the information that had been obtained as a consequence of utilising questioning?

Mr Tham—If there is adequate proof—and this is the key—there is no reason under my formulation why, if the intelligence organisations had reasonable suspicion of an attack like the World Trade Centre, they could not use the powers.

Senator ROBERT RAY—Because you may have the knowledge and you may not be part of the planning or execution or even be responsible for it. Someone may have told you information that is totally relevant—even as to the timing or location—that can fit as part of the jigsaw, even though you are totally innocent. The organisations need to know that. Again, it is not about prosecution.

Mr BYRNE—I think that is the thing. They are effectively links in the chain, and that is the sense that we get and that is the reason why they need to use that. As Senator Ray has said, it is not as though those people are going to be prosecuted, but they might be a very important part of constructing a picture. Do you have any response to that?

Mr Tham—I understand that argument. My position is as I put to Senator Ray a few minutes ago. What you have with these powers is intelligence gathering for the purpose of law enforcement.

Mr KERR—I do not want to put words in your mouth, but would you have an objection if the power to seek answers under compulsion had been conferred on the ACC? Is it an objection to the mechanism and the means that have been employed and the breadth of those, or is it an objection that this kind of activity should not be the subject of inquiry through the use of compulsion, full stop? The point I make is that, had the power been given to the ACC simply by an extension of the act saying that, as part of the issues of serious and organised crime that could be examined, terrorism would be included, arguably you would have a greater capacity to use compulsive powers against nonsuspects than you do under the regime that has been included in the ASIO legislation.

Mr Tham—Part of my argument is the nature of an organisation in which the power is vested. If in fact there is an alternative organisation, like the ACC or the AFP, which are not clandestine

organisations and do not have the features of ASIO then clearly I can see some merit in moving that way.

ACTING CHAIR—Our time has come to an end. I thank you very much for appearing before the inquiry today and for your contribution. Is it the wish of the committee that this document provided be accepted as a supplementary submission? There being no objection, it is so ordered.

[10.38 am]

EMERTON, Mr Patrick, Private capacity

ACTING CHAIR—Welcome. We have received your submission, but we do invite you to make some introductory remarks, before we proceed to questioning.

Mr Emerton—Thank you for the opportunity to appear before the committee. Let me step into the lion's den. In some respects, my submissions are similar to those of Mr Joo-Cheng Tham. As my submission indicates, I believe that division 3 of part III of the act should be repealed or at least allowed to lapse with its sunset clause. The reasons that I give for this view are that the operation of the legislation is inconsistent with the proper role of ASIO as a security service in a democratic country. I would like to articulate why I say that. As we all know, ASIO's coercive powers in relation to questioning and detention are enlivened by the suspicion that someone has intelligence that is important in relation to a terrorism offence. But what sometimes seems to be forgotten is that the term 'terrorism offence' as it appears in this and other legislation, such as the Crimes Act, is a technical term and certainly is by no means limited to catastrophic acts of political violence, such as bombings and hijackings, nor even to preliminary steps in the preparation of such activities.

The idea of a terrorism offence covers an extraordinarily wide range of conduct. Here are some examples I came up with this morning. It would be a terrorism offence for me to teach a member of the Tamil Tigers how to undertake effective tsunami relief on the Sri Lankan coast. It would be a terrorism offence for me to write a letter on two occasions to a member of Hamas or Hezbollah, encouraging them to turn their organisations into open and peaceful political movements. As Joo-Cheng Tham has indicated—this may come as a shock, but it is not at all shocking to those familiar with the Criminal Code—it would very arguably be a terrorism offence for me to join the Liberal Party of Australia. I say that because the Liberal Party of Australia, together with like-minded organisations, is an organisation which fostered the doing of what is under Australian law a terrorist act; namely, the coercion of the government of a foreign country—that is, Iraq—by way of invasion of that country. The example is not meant to be humorous; it is meant to demonstrate with rhetorical force the extreme ambit of the concept of a terrorist offence under Australian law.

The example also serves another point beyond a rhetorical point. We all know that the DPP is not going to prosecute members of the Liberal Party for committing criminal offences, despite the fact that these are serious offences which could draw imprisonment for up to 10 years. Likewise, those who assisted the Tamil Tigers in their relief work may hope that at present they are not on ASIO's radar. On the other hand, my understanding is that those who support and communicate with various organisations in Palestine are very concerned about the interest that ASIO might take in their activities.

The reason I mentioned these examples is to try to illustrate as forcefully as I can the basis for my claim that these powers are inconsistent with or pose a threat to the operation of democracy. They give a clandestine organisation—a necessarily clandestine one because it is a security service—an extremely wide-ranging discretion to decide what sort of political activity will be

investigated and what sort will not. They therefore remove the determination of the legitimacy of political activity from out in the open, which is where it should reside in a democracy, and hand it over to an organisation which, by its very nature, is difficult to subject to democratic processes. By handing to a clandestine security service this power to police politics, the legislation threatens to turn ASIO into a coercive agency, enforcing what are in effect the political and foreign policy imperatives of the government of the day.

Mr KERR—Is the objection that you are making to the way in which the offences are defined in the Criminal Code? The general enforcement of those provisions is with the AFP and the DPP rather than ASIO. The real critique is that we have defined these offences far too broadly—a point with which I agree, by the way.

Mr Emerton—One could add that critique if one wished, but my point is that ASIO's exercise of these powers hangs precisely on this conception of a terrorism offence. Remarks have been made that these are being used as a last resort. There are two responses to that: a last resort from whose perspective—

Mr KERR—I am just going to stop you there because I think the analysis needs to be tested here. ASIO pre-existed the extension of the definition of terrorism offences and was set up to look at a number of things—espionage and politically inspired violence, essentially. It has been carrying on that role—sometimes with political criticism, sometimes without it—for a long time. The Attorney-General introduced to the parliament legislation dramatically expanding the definition of terrorism offences, and that does link to this legislation. But the principal decision to prosecute, to investigate or to conduct any criminal investigations still resides with the Australian Federal Police rather than ASIO. Isn't the real objection here that we should pare back the definition of terrorism rather than something that goes to ASIO's particular role? ASIO pre-existed it and presumably its life will extend into the indefinite future. Every country has some form of intelligence service.

Mr Emerton—As I said, I have no objection to the existence of ASIO. I do have objections to the extremely broad definition of the terrorism offences, but I was not intending to argue them in front of this committee, which is not currently reviewing that issue.

Mr KERR—But that is—

ACTING CHAIR—We had better let the witness finish his introductory remarks, then we will move to questions.

Mr Emerton—The broad ambit of terrorism offences interacts with ASIO's power. This legislation might become more acceptable if one pared back the concept of terrorism offence, but how far would one pare it back? One could pare it to nothing and then the legislation has no room to act. Instead of having the concept of a terrorism offence, the concept could be having, for example, reasonable grounds to believe that someone is preparing for a bombing or has intelligence relating to that, and then they can be called in. Using the concept of terrorism offence can evoke one thought—and Senator Ray referred to Madrid earlier—but it might have quite a different meaning. For example, joining political organisations and sending money to help the Tamil Tigers with their tsunami relief work in the areas of Sri Lanka where they are in fact the operative government, if not the legitimate government, is a terrorism offence. Instead of

defining or using the concept of terrorism offence, which picks up all of this range of activity, you could define it quite differently and then the objection might pass. If you defined it quite differently, one might wonder whether ASIO is the best organisation to be vested with the powers as well.

My reason for saying that as the thing is currently drafted it is inconsistent with democracy is that it hands the policing and the determination of legitimacy of political activity over to a particular group. I do not say that ASIO is unaccountable—it would be foolish to say that—but it is manifestly more difficult to hold ASIO to account than it is to hold, for example, the Federal Police to account. That is due to ASIO's nature. It cannot be otherwise when you have an organisation such as ASIO. That is the gist of my objection. It is a combination of ambit combined with organisation and the use of the terrorism offence as the trigger. In the second part of my submission I highlight what I describe as more technical points of objection. May I briefly recap on some of those?

ACTING CHAIR—Yes, please.

Mr Emerton—Although the Attorney-General, before approving a request from the director-general for the issuing of a warrant, must be satisfied that relying on other means of collecting the intelligence would be ineffective, there is no need for this requirement to be made out to the issuing authority, so the issuing authority can lawfully issue a warrant even if that matter has never been put to the issuing authority. I think this contrasts with comparable provisions in comparable legislation—for example, sections 45 and 45A of the Telecommunications (Interception) Act. This touches on something which came up in the discussion with Mr Stary when he appeared earlier. The issuing authority need not be satisfied of the further grounds necessary for the legal issuing of a detention warrant. The Attorney-General must be satisfied of the threat of absconding, a tipping-off or the destruction of evidence or material before approving a request, but those grounds need not be made out to the issuing authority. It would be quite lawful for the issuing authority to issue a warrant without those grounds having been made out to the issuing authority's satisfaction.

When one looks at some of the technicalities of the drafting, the safeguards perhaps do not run as far as they can. In operation, they threaten to undercut the thought that this operates as a last resort. There are worries about the capacity of the prescribed authority to issue orders for detention under section 34F, therefore this could result in someone being detained with no right to contact a lawyer. I note that the Attorney-General's Department acknowledges on page 27 of its submission that such detention is not required to be taken account of in a request for a repeat warrant although detention pursuant to a detention warrant is. So there is a type of inconsistency in treatment within the legislation of the way that people come under detention. Again, one can see the possibility of this in an operational fashion undercutting safeguards and undercutting the idea that detention would always be a last resort and there will be no incommunicado detention in Australia. There are questions about the precise interaction between section 34HB(6), which caps questioning at 24 hours, and section 34F(1)(e), which allows a prescribed authority to order a person to appear before them for questioning. Does one cap restrain the other power or does the other power operate to supersede the cap? So, when one looks at the technicalities of the legislation, there are worries about the drafting.

Again, in my submission I draw attention to some ambiguities in access to lawyers, particularly in relation to questioning warrants, where the legislation is not anywhere near as clear as it could be and I think ought to be. There is also quite a bit of uncertainty as to how access to lawyers under the legislation interacts with provisions of the Crimes Act which, when people are before Commonwealth authorities for questioning, automatically give them rights to contact lawyers and so on. I think there is room for technical considerations there. So there are these technical infelicities or room for revisiting the drafting and seeing whether it can be tightened up in certain areas, all of which to my mind, as they currently stand, suggests that in operation there is no guarantee that this will be used as a last resort.

I would reiterate that the real gist of my submission is that, given the concept of a terrorism act on which these powers hang and the highly discretionary way in which this will be exercised, given the vast range of things which count as terrorist acts but the very small number of things which ASIO is going to seek to coerce people over, as it is currently structured I think it is inconsistent with the traditions and values of Australian democracy. In the future if the attitudes of governments were to change or members of ASIO were to change—and political cultures can change, and in part they can change because institutions change to open up opportunities and new ways of acting if cultures change—things could be different. No-one would like to see that and I think that in drafting this legislation here and now we have to have regard to those future possibilities and contingencies. Although I imagine the committee may be more interested in the technical remarks on safeguards, I regard the remarks in my submission about democracy as equally, if not more, important.

ACTING CHAIR—Thank you, Mr Emerton. If we accept your proposition and your opposition to the continuation of division 3, we would not need any more questions, but I think we should go to some of the issues that you raise in relation to the continuation of the provision. You have mentioned that you are concerned about the scope of the definition of terrorism. What suggestions would you make if we were to include in legislation change that might minimise the scope?

Mr Emerton—Let us assume you are going to keep nonsuspects in the ambit if they have intelligence relevant to the investigation of an act of catastrophic political violence or an act or a threat to act for a politically motivated reason in such a way as to cause serious harm to persons or property—which to some extent borrows the language put forward by Joo-Cheng Tham in his submission. If one wished to keep using the wording of ‘terrorism offence’ I do not think that that wording is particularly helpful. I think it misleads. I think it does not illuminate. In my view, that could be cut out and we could describe directly the sorts of activities we want to pick up, which would be politically motivated violence posing a grave risk to the wellbeing of people or property, or some variation on those words. But if one wished to keep the language of ‘terrorism offence’ then one could adopt a formulation something like that put forward by Joo-Cheng Tham. HREOC put forward a very similar submission. They talked about the more serious terrorism offences—

ACTING CHAIR—How do you define a more serious terrorism offence? In my personal view any terrorism offence is serious.

Mr Emerton—We have a difference of opinion there—

ACTING CHAIR—We might have a difference of opinion, but how do you define a more serious terrorism offence?

Mr Emerton—In my view, sending $5 to Hamas so it can run a hospital to look after sick children in the Gaza Strip is not a very serious matter, although that is a terrorism offence punishable by up to 25 years in prison. In my view that is not a serious matter. An aid worker who finds themself on the Jaffna Peninsula in Sri Lanka and therefore is dealing with the local authorities, many of whom are members of the Liberation Tigers of Tamil Elam—

ACTING CHAIR—Which is not a proscribed organisation in Australia—

Mr Emerton—It is an organisation which is fostering directly or indirectly the doing of terrorist acts and therefore is a terrorist organisation under paragraph A of the definition under section 102.1 of the Criminal Code. Although it is not proscribed, proscription is not the only way to be a terrorist organisation under our law in Australia. So it is a terrorist organisation—it fits the description. Anyone who is there training them in how to deal with relief work is committing a terrorism offence. Not only do I not think that is a serious criminal matter; in my view it is not really something that Australian criminal law should have a view on. Certainly I do not see that it is anything that ASIO should be coercively intervening in. Yet this legislation gives that power.

So I can see how, intuitively, one might think there could be no degrees of seriousness in terrorism offences, but I think that intuition flows from using an intuitive concept of terrorism, whereas part of my submission is that this legislation hangs on a radically counterintuitive, extraordinarily counterintuitive, conception of terrorism. Again, as Mr Kerr was saying, we could debate the merits of that definition, but what I am focused on is: if this legislation is to exist, can it be changed in such a way that it does something different to what it currently does? For example, we should look at ‘imminent threat of harm’ or, if one does not like ‘imminent’, the planning of an activity that poses a serious threat to wellbeing. The use of ‘imminent’ is a bit fuzzy, because of course under the tests performed by Joo-Cheng Tham one could have begun investigating the twin towers attack well before it went off, because not only is blowing them up a terrorist offence under Australian law but so is preparing to blow them up, so is possessing a thing which might facilitate blowing them up and so is being a member of an organisation which is indirectly fostering their being blown up—and all those things would have been happening four years ago, way before any planes actually left the ground. So the concept of an imminent serious offence depends on what you count as offences; what counts as an imminent threat of an offence being committed can change. It would be a mistake to look at an imminence test and think you have to wait until the plane is in the air, if your range of offences includes planning to put planes in the air.

ACTING CHAIR—But the addition that we have in this legislation is a provision for someone who is in possession of information which might lead to the apprehension of people who are perpetrating an offence as opposed to just having knowledge of it. That is why the questioning warrants have been issued.

Mr Emerton—If the legislation limited its ambit to those who had information relevant to the apprehension, I would have fewer objections. It does not. The concept of apprehension, the concept of prevention, the concept of threat and the concept of harm appear nowhere in the

legislation expressly and nowhere by necessary implication, because none of those concepts are a part of it. The concept is intelligence important in relation to a terrorism offence that neither expressly nor by necessary implication involves the idea of the apprehension of suspects or the prevention of an offence, and the concept of terrorism offence neither expressly nor by implication involves the concept of threat or of harm. So I would have much fewer objections to the wording that you put forward but, unfortunately, that is not the wording the legislation contains.

Mr KERR—I accept that the technical definition of a terrorism offence is extraordinarily broad and far beyond that which Senator Ferguson, for example, would think of when you talk of ‘terrorism offence’. Senator Ferguson’s question—‘How can you have a less serious terrorism offence?’—is one that seems on the face of it to be perfectly straightforward. It is the sort of question that all of us would ask. Yet when you look at what is actually technically defined as a terrorism offence—although I think you do make a stretch to suggest that membership of the Liberal Party itself might be a terrorism offence—

ACTING CHAIR—That’s open to debate!

Mr KERR—Nonetheless, the point you make is undoubtedly true—that the reach of what is technically possible of being seen as a terrorism offence goes far beyond the bounds that most of us would expect. But we are not currently examining the breadth of the definition of terrorism under the Criminal Code. Those definitions and expansions were passed in the same climate as this act came in. Perhaps at some stage there will be a review of those and some paring of them back. I get the sense that your underlying concern here is as much that we have to be wary of turning ASIO into a secret police—that the institutional power of investigating, prosecuting and managing the criminal law has started to slip into this secret international organisation. Maybe I am wrong, but that seems to be your key critique. There are a whole range of subsequent critiques, but that one seems to be at the core.

Mr Emerton—Yes. But again we come back to this issue of ambit. I do not want to become too annoying, but I see the two as connected. As ‘terrorism offence’ is currently defined, it is tremendously broad—a vast range of politically connected activity, some of which is admirable, some of which is dubious and a small amount of which is criminal in the ordinary sense. ASIO, in deciding how to exercise these powers, inevitably must choose which, from that vast range of activities, they will focus on. The core of my thinking is that it is when those decisions are taken by a security service that the threat of a secret police, if you like, begins to emerge. It is not in the least a part of my submission that ASIO is acting as a secret police at present. I actually know very little about how ASIO is acting at present because it is all secret and I could go to prison for five years if anyone were to tell me. But cultures can change as a result of the institutional environment in which they operate. They can change due to other pressures as well, but why create an institutional environment that poses that threat?

If the trigger for these powers were very different—for example, if they referred simply to ‘investigating acts of politically motivated catastrophic violence’, or some more technical version of that—then that that would impose much less discretion on ASIO, because there is presumably very little of that happening in Australia. Ultimately, ASIO could focus its endeavours on all of that activity, and this fear of a political chilling or political targeting would

disappear much more. And then, of course, the members of the Liberal Party would have not the least thing to fear!

So, if these powers were, for a start, targeted to threats to Australia, it would make a difference. Of course, as they currently stand there is no confinement of their use to threats of a certain sort, let alone threats to Australia. Again, I do not at all make assertions about what ASIO is doing; I have no knowledge of what ASIO is doing and I am not allowed to know. But it is conceivable that ASIO would exercise its coercive powers because it believed that it would facilitate some intelligence cooperation with an intelligence agency of another country to do something in Australia. Conceivably, we could then find that someone in Australia is questioned and/or detained, not because they are regarded as posing any threat to anything in Australia, not because they are regarded as having any intelligence connected to any threat to Australia, but because they have information which is useful in some intelligence agreement or political or foreign policy game that is playing out between ASIO and some foreign service. That is a concern.

Mr KERR—That is almost certainly the case and, indeed, probably desirable, in the largest measure, in the sense that, if there are currently people planning another attack equivalent to the one on the World Trade Centre, and some Australians or people who come within this jurisdiction become involved in it, you would expect that matter to come within the remit of this legislation.

Mr Emerton—Of course. And what if those people are the African National Congress planning to liberate South Africa?

Mr KERR—I understand that. But an exclusion of the capacity to examine things outside of the jurisdiction would seem unwarranted. The legislation can be absolutely prescriptive and narrow, in which case it would satisfy many of your concerns, or else the way in which it is practiced can demonstrate an implicit acceptance of the fact that it was intended to operate only with respect to more serious matters and in ways that would have community confidence. Obviously, one of the things that we are looking at is whether or not, if the legislation is extended, there should remain a sunset clause. Those who urge that there should remain a sunset clause do so on the basis of exactly the sort of fears that you are addressing. They accept that the questioning powers may have only been exercised eight times and they accept that they may be exercised with restraint at the moment, but they say personnel can change, circumstances can change and, given the breadth of all these provisions, cementing it into legislative form with no point at which it lapses, ultimately, is to facilitate a gradual change of culture which is then incapable of our supervision. Could you tease that out?

Mr Emerton—If I can turn your remark from a question into an assertion, I will then assert it. If this legislation is to stay on the books in its current form, I would regard a sunset clause as utterly imperative. You know that I have for the past six months—as much as one does as an academic sitting in one’s ivory tower—been trying to engage with this committee’s work quite extensively in these areas. I have sent in a number of submissions in relation to proscription listings and so on. I take the work of this committee very seriously. I have remarked both in this current submission before you and in those other submissions that democratic oversight by a parliamentary committee of this sort is one crucial way to differentiate between a security service in a democratic country and a security service in something which is tending towards

more of a police state or an authoritarian country. A sunset clause is crucial for triggering a robust sort of review. I know there have been some discussions about the committee having a type of disallowance power rather than a sunset clause. Something like that seems to have been canvassed in some of the hearings.

Mr KERR—I canvassed the idea that we might have the legislation continue indefinitely, subject to this committee making an affirmative report to the parliament on an occasion—say, every three years or something of that kind—so that if there were no affirmative recommendation it would lapse automatically and expire. But it would not give a finite cut-off point, because it is difficult to anticipate when circumstances would be such that we would have confidence that real threats have ceased to exist.

Mr Emerton—I would think that alternative is better than nothing, but a sunset clause, which therefore triggers a full inquiry by this committee and then a full parliamentary debate and a full return of the matter to the various party rooms—a full invocation of the apparatus of Australian democracy—is much more preferable from the point of view that I am arguing. One can see degrees of democratic control, and the parliament is the highest one. That is why I would support a sunset clause very strongly as a minimum to make the legislation acceptable.

Senator ROBERT RAY—You mentioned you were sitting up in your academic ivory tower. The first 15 pages of your submission go to the broad argument. I am not going to go to pages 16 to 36 other than to thank you for all the work you have put in, because you have analysed some of the technical inconsistencies and deficiencies which, I promise you, we will go back and look at. I did not want to explore them in detail here today because we are a bit pressed for time.

Mr Emerton—Thank you for the acknowledgment.

Senator ROBERT RAY—We very much appreciate the effort you have put in there. That is good stuff. One thing that troubles me most about the process here is that the issuing authority issues a warrant and then the questioning process occurs and there is no way, generally, that anyone—other than maybe ASIO or the Attorney-General's Department or the Australian Federal Police—can assess whether that questioning period properly relates back to the warrant. I see in other jurisdictions search warrants and other things issued and the power constantly exceeded. The seizure of electronic records is a classic example. I am wondering what process could be put into place to ensure that what is either contained in the warrant or the reasons for the warrant—which is not always adduced in a public sense, and especially not to the interviewee's legal representatives—matches the other part of the process.

Mr Emerton—It is a very fair question. I can think of a few things. My first thought is that the warrant could be challenged for legality in the Federal Court. The whole treatment of Federal Court challenges in the legislation is a little odd, because in a sense, when you look at the litany that the prescribed authority must recite, it is the highlight. But, on the other hand, the legislation makes no express provision for access by a person subject to a warrant to the registry of the Federal Court, for example. One thought is that, because a chapter 3 court's operation cannot be infringed by legislation, perhaps it was taken as going without saying. But to some extent perhaps that could be made express. From discussions of this in evidence given on 19 May it seems that ASIO at the moment is perhaps a little unsure of exactly what its protocols would be if a Federal Court challenge was sought.

If a Federal Court challenge was sought, I imagine that is one way. That evidence at that stage, I think, would have to be adduced, subject to the operation—I have been very busy marking; I am not sure if they have passed yet—of the amendments to the national security legislation. If they have gone through and will therefore affect civil procedures and therefore Federal Court challenges under this legislation, maybe that stuff will not come out. But at present it does. So that is a last resort.

Senator ROBERT RAY—Let us say the prescribed authority have heard questioning, let us say, for 15 hours and the legal representative of the person being interviewed says, 'This is not relevant, in my view, to the warrant. I am going to the Federal Court.' Could they disclose to the Federal Court—and overcome the two-year secrecy provision—the details of what has gone on so the prescribed authority could mount their appeal?

Mr Emerton—I will not hold myself up as an expert in constitutional law, but my understanding is that chapter 3 would protect the Federal Court's proceedings there from legislative infringement in the same way as the parliament's proceedings cannot be infringed. I would think that chapter 3—

Senator ROBERT RAY—So that is one alternative.

Mr Emerton—I am not sure if it has passed yet, but the amendments to the national security information legislation are very worrying. I canvassed them briefly in my submission. They may change that. So that is one way it could be done—through a Federal Court hearing. Not having seen the videos and so on I do not really have a strong intuitive sense of how it actually plays out. How much information is the prescribed authority given by ASIO as to the grounds on which the warrant has been sought? Under the legislation, my understanding is they need be given none. As a matter of practice, how much are they given? I am not sure.

I would have thought another important strait must be the Inspector-General of Intelligence and Security, who in my understanding does have the power to get that information from ASIO and therefore would have the power to intervene under I think it is section 34HA if they thought something was odd, like slippage between the grounds of the warrant and the matters on which questioning was being undertaken. So the Federal Court—kind of powerful but in a sense ponderous—getting the prescribed authority involved has no legislative basis at the moment and has its own difficulties. Probably the Inspector-General of Intelligence and Security is the most natural current player to play that role.

There are timelines on which information must be given to the Inspector-General. I am not sure how quick those timelines are without actually opening up the act, but I would look at those timelines. If all that can be got to the IGIS straightaway, if the lawyer thought 'Things are looking a bit fishy here', they could contact the IGIS, they could then compare what is being asked with what grounds there were, to see if they match up. Probably the inspector-general is the most natural oversight body to deal with that worry.

Mr KERR—Taking Senator Ray's question just one step further, everything would become much more transparent were the warrant on the face of it to disclose not necessarily the specific statute that might be breached but the area of concern that the questioning was to address.

Mr Emerton—That would certainly be true. I know the warrant has to be shown to the lawyer if the lawyer attends. Again, I am not sure what the practice is here. When the warrant is served on the subject of the warrant I am not sure if they are given a copy which they are allowed to retain. It says a copy must be given to the lawyer if they represent themselves and have then contacted a lawyer. I am not sure if they are themselves are allowed to retain a copy to look at it. There are issues to do with who gets to see warrants and respond to them—

Senator ROBERT RAY—The biggest issue is what is on the warrant, and we are going to pursue that.

Mr Emerton—But of course, the more that is on the warrant, the more transparent it is. I assume ASIO would have strong objections to having to say too much on the warrant because it is not going to want to disclose the information that it is working with—although it has the extensive secrecy provisions. Nevertheless, one can imagine some things are too secret even to be secret.

Mr KERR—One understands all that.

Mr Emerton—You can name the offence, for example.

Mr KERR—Nonetheless, given the point you make about the breadth of the nature of matters that come within the definition of terrorism offences, without any difficulty in impeding the work of ASIO you could assist those who are the subject of questioning, the officials who conduct the questioning, the prescribed authority and the like.

Mr Emerton—Of course it could. I am not aware of the practice of how much information is presented to the issuing authority. I flag certain grounds which are grounds for the lawful issuing of a warrant because the Attorney-General must be satisfied of them but which are not grounds which need to be made out to the issuing authority. The issuing authority is a judge who is likely to be used to dealing with sensitive security information, who deals with other information in other contexts and who may be called upon to hear the Federal Court matter in any event where it would all be adduced. I take it they are a person about whom ASIO could have no reservations with regard to disclosure. In my submission and in others, one way to meet this issue would be to ramp up the grounds that need to be made out to the issuing authority, at least at the beginning. That would be one way of helping—

Mr KERR—That does not assist any transparency unless the issuing authority makes plain on the warrant an area of inquiry, which then can of course be the subject of the inspector-general and others asking whether the questioning conforms. Let me put it this way: we have lots of laws which authorise search warrants. None authorise a general search under criminal law for any material that might be related to any offence.

Mr Emerton—I was not aware that that was the way that warrants were being worded, because I have not seen any. If warrants are being worded in that way—‘We suspect this person has information relevant to some terrorism offence or other’—and that is all they say, then I take the force of your point. I had assumed that they had, for example, named an offence and perhaps even some broad matters that might be enlivening that offence. So, if they are being written in

that very broad way that you are describing, I take your point and would agree: the more transparency the better.

Mr KERR—We still have to take final evidence in relation to this matter, so we are not quite certain ourselves. We have been given different accounts.

Mr Emerton—If they read like that, I would think that that is outrageous, to be frank; that is unbelievable. Senator Ray, you referred to the latter part and the technical work. Would the committee take a supplementary submission on further material of that nature if, under closer reading of the act, more of that has occurred to a witness?

Senator ROBERT RAY—I am but one humble vote amongst six, but I am sure that we would.

ACTING CHAIR—I am sure that we would be willing to accept any supplementary submission that you wish to make. There being no further questions, Mr Emerton, thank you very much for your contribution and for the time that you have obviously spent on putting the submission in.

Mr Emerton—Thank you very for the opportunity to give evidence.

ACTING CHAIR—It does help us in relation to our inquiry. Thank you for your contribution this morning.

[11.18 am]

MOGLIA, Mr Simon, Associate Public Defender, Victoria Legal Aid

ACTING CHAIR—I welcome the representative from Victoria Legal Aid. Do you have any comments to make on the capacity in which you appear?

Mr Moglia—I appear on behalf of Tony Parsons, who is the managing director of Victoria Legal Aid. The capacity in which I appear is to give evidence in relation to the written submissions. I will need to be careful not to go into my personal views, and I will try to do so. I may need to take some things on notice.

ACTING CHAIR—I invite you to make some introductory remarks and then we will proceed to questions.

Mr Moglia—The committee will be aware of the submissions that we have made in the paper. I do not propose to just read them out, but it seems to me that they fall under a few different headings and I will name three of them. But, before I do that, I would like to thank the committee for the work in bringing the act into place in the form that it is. It has done quite some travel since it was first put before parliament. Of course, the comments we make today are critical; nevertheless, they do not ignore the work that has been done already.

Firstly, it is our submission that, overall, the powers given to ASIO under this part of the act are disproportionate in general to the threats faced or the possibilities to be achieved under the exercising of the powers. Secondly, if the powers are to be retained by parliament then the detention powers go too far. Thirdly, there are a number of other amendments—I will not call them minor—in relation to secrecy provisions, legal representation and the like that I would like to address. Finally, I will turn to the sunset clause and indicate our position in relation to why that should be retained.

The general concern which Victoria Legal Aid expresses is that if derogation of human rights and all that they mean in the current international climate is to enter into the Australian psyche as some kind of social norm then this act goes too far. We would draw a distinction between those acts which are normally and ordinarily part of the ongoing development of Australian society for the good and betterment of all or the civilisation of the community, but there are those acts like this one, which—I think it is uncontested—is an exceptional act. It is an extraordinary set of powers for an extraordinary set of circumstances. It would be our submission that perhaps this is justified if parliament deems it to be so in the circumstances, for a period of time, but it brings in very serious consequences if they are to enter into the ongoing development of Australian society in the same way as other norm-setting acts do. This part of the act should rightly, in our view, be seen as an extraordinary part and should therefore be given extraordinary limits to match the circumstances that bring them into place.

We ask the committee to consider that the effects of this part are not merely the meeting of particular needs at a particular time but have a place to play within Australian history. They will have an effect on the way Australians and Australian organisations see their role and are

Australian, in every sense of the word. We place our comments in that context. This part of the act has a very serious effect on Australian legal history. Our final points will be in relation to particular discretions and powers and that there might be some improvement in how they are exercised and what the extent of those powers are.

Alternatively, we raise the question of detention and the criteria that are used to assess whether or not detention is justified in the circumstances—that is, the words of the act are reliant upon the possibility of flight, destruction or further information being disseminated. It is our position that the mere possibility of those kinds of conduct is not enough to justify detention or the issuing of detention warrants. Much has been said this morning and in previous days which I have had the benefit of reading about whether or not there might be some distinction between kinds of terrorism offences and the like. I cannot comment on those. That is not something that Victoria Legal Aid has turned its mind to prior to today, but I will certainly take that on notice. Personally, I cannot see that we would be opposing any refinement along those lines to restrict the very broad powers that are given to ASIO.

Secondly, with regard to amendments, we want to raise a number of specific issues. Firstly, there is interplay between the restriction of documents and the information available to legal counsel or those responsible for assisting people before the prescribed authority. Those people subject to the warrant must assess whether or not they are willing to proceed, whether they wish to make complaints to the inspector-general or whether they wish to apply for a writ before the Federal Court. Without that information and without the ability to discuss that information with their legal counsel, those standards cannot be ascertained by the person subject to the warrant.

The secrecy provisions and the ability to look at documents go hand-in-hand. If you remove documents from the people responsible for monitoring the standards in an individual case—and, in my submission, that is the legal counsel for the person subject to the warrant—then it is perhaps to be said that the secrecy provisions are redundant: ‘If we don’t tell them nothing they can’t divulge nothing.’ But, if the secrecy provisions are to remain in the form or a similar form to the one they are already in then a relaxation of the level of documentary disclosure would be warranted. That would have, in my submission, some benefit to the legitimacy of the regime that is in place. It would mean that participation by a person subject to a warrant would be in the full knowledge of the community and backed up by the safeguards of having legal counsel who can help them to assess the standards that are appropriate. Without documents, the secrecy provisions are redundant and it does not assist counsel to assist the tribunal.

I want to address some issues in relation to legal representation. Something has been said on previous days about how the Attorney deals with requests for funding. I understand what has been said. However, my understanding of the actual ability of the Commonwealth to fund legal counsel for people who are the subject of warrants is different. Firstly, on one reading of the priorities of the Commonwealth, there must be a charge. Clearly, that is not what we are talking about in relation to this part of the act. Secondly, there is a discretion if and only if there are funds available—and I would underline that—for the Attorney to allocate for a particular purpose. In Victoria, I think it is a matter of public record that there are some substantial funds available for Commonwealth purposes. It is unlikely that, in the near future, Victoria will be in a position not to be able to ask the Attorney for assistance. I cannot speak for other states. That may very well be an issue. The ability of the Attorney to allocate funds for counsel is contingent upon there being money in the pocket. That is not to be presumed. Our position would be, rather,

that this should be a Commonwealth priority. The committee should recommend that counsel and advice for somebody subject to a warrant should be a priority on its own and of itself regardless of any of the other criteria.

As it is plain in our written submissions, I would merely repeat the concern that we raised about detention, strip searching and the like of people under 18. These are children and they should be protected from the extensive procedures available for more adult members of society. I would further mention, not by way of submission but by way of acknowledgment of previous submissions, the raising of the concept of procedural time before the prescribed authority—that is, time during which questions are not asked of the person subject to the warrant but time when the authority could entertain submissions or information from legal counsel. Certainly, there have been some concerns raised, which we would share, about monitoring of interviews or conferences wherein the subjects are asking for information about what their rights are. That would quite obviously circumvent the protections due to people who are not even suspects to obtain information and thereby be able to assess what standards they would like to hold any authority to.

My third point is in relation to the sunset clause. It is our submission that the onus rightly rests on the parliament to prove, to whatever standard, that there is a requirement for ongoing powers of this kind. It would be wrong to suggest that it is for the community to prove to parliament by lobbying or any other kind of review process that it should be removed. The onus—we say, rightly—lies with ASIO, this committee or the parliament in general to have specific, exceptional reasons why these exceptional powers should exist. It is what has happened so far and it should continue. The onus should be on those who would grant powers rather than those who would seek to change the day-to-day law.

I note that there has been a very narrow basis for assessment on the efficacy of the powers and the way they have been used. I do not appear today to make any complaint about that. I have not heard any information and I am not privy to any information that would lead to any criticism about how they have been used. But, on limited information, this committee and the parliament should be reticent to assume that good behaviour over two years will mean good behaviour in perpetuity. That may sound cynical. It is not intended to be cynical. But the parliament must restrict powers where powers are broad. Powers must not be given, in our submission, on trust that the custodians of the powers will deal with them properly. That trust is often well placed. However, I will not descend into opinion polling or repeating recent press stories about how powers legitimately retained are sometimes negligently used.

In relation to comments from ASIO, I believe, on the first day of these hearings—the 19th—there was a question about whether it would ever be convenient to review parts of the act. There were some comments made about what would happen if the review were to fall due at a time when the act was in full force and there was some controversy around. It would be our submission that it would never be convenient and that is why there should be fixed periods for a sunset clause. That would allow people to plan for it, and no doubt the agencies in question would have some contingencies if their resources were to be taken up with actual implementation. That is the overview.

ACTING CHAIR—Thank you, Mr Moglia. Amongst the recommendations that you make is one that the inspector-general be present during all periods of questioning. I think it is a matter

of public record, and one of my colleagues will stop me if it is not, that the inspector-general currently has adopted the practice of attending at least parts of all questioning periods but he has not been present for all of them—although he was present for—

Mr Moglia—Twenty out of 21.

ACTING CHAIR—the entire questioning in the first three cases that were heard. He sat through the whole process for the first three, and, although your submission talks about three cases, you now know there have been eight. Does the fact that he attends at least part of the questioning—maybe one full day—to see the process is being conducted properly, give you some reassurance? You are talking about enshrining this in legislation, when it might not be physically possible for the inspector-general to be at every questioning.

Mr Moglia—Of course there are resource limitations, and we must all accept that, but our submission is that when you are dealing with extraordinary executive powers then perhaps extraordinary resources are required to monitor them. We make that—

ACTING CHAIR—I think he does send staff when he is not there himself. He does send staff. But you are making the request that he himself be there all the time.

Mr Moglia—Perhaps that is something for me to take on notice. I am not sure we are submitting that the inspector-general be present in person but that some presence of an independent monitoring kind is not only appropriate but also required. The issues there would seem to me to be that, in an environment where information is scant and the review of what is done is not easy for the public to access, nor indeed for the person subject to the warrant or, certainly, their legal counsel, the requirements of the role of the inspector-general as a pseudo-independent body—I say ‘pseudo’ because it is part of the executive—are raised and there has to be extraordinary supervision required. Whether that is by the inspector-general himself or herself, whoever it may be at any given time, there must be some independent presence.

ACTING CHAIR—Does the fact that there have been eight cases rather than the three that you knew about when you put in your submission alter your view at all in relation to the need for questioning powers? You have suggested that because there were only three the information gathered could be gained from another source. Does the fact that the powers have been used eight times rather than three alter your view at all in relation to that matter?

Mr Moglia—I cannot say it would. In some years, hopefully, there might be none. In other years, there might be many. We accept that. The exigencies of whatever happens will determine that. So we cannot really take comfort from that; that is just as it is. What we do say is that there have to be these extraordinary measures to make sure that, whether there are 100 or there is one, there are appropriate checks and balances and a proportionate use of force or detention and questioning powers. It is a matter of principle.

ACTING CHAIR—We have no way of judging the detention process because that has never been invoked.

Mr Moglia—That is right, and that is the reason we submit that the sunset clause should remain—or be extended, if that is the will of the parliament—to enable us to have further review

if such a time should occur that there has been use of the more difficult powers, if I can call them that.

ACTING CHAIR—I presume in your submission, when you are talking about the extension of powers you are talking about the extension of the legislation and not increasing the powers? You are talking about the extension of time?

Mr Moglia—We certainly do not envisage any support for extending the powers. We can see that there are some refinements to be had, if the powers are to continue, but our basic position is that the detention powers, for example, go too far per se.

Senator ROBERT RAY—You would have known that the ASIO evidence and the Federal Police evidence is that they did not seek any extended power.

Mr Moglia—Yes, I noted that.

Senator ROBERT RAY—So did I. I am not going to go over some of the areas you have traversed, as you are something like the 25th witness and we have covered them in depth. But we have not really covered legal aid in depth. It appears to me that it is in ASIO's interest that interviewees be accompanied by legal counsel, so that their full rights are understood, even though the prescribed authority details them, because, if they were ever to prosecute and they did not have proper legal advice, you would think that the cases would weaken. I think you mentioned that, if they were under charge, they would get almost automatic right to legal aid but here, because there is no charge, they do not. Yet we have the extraordinary position that we have imposed the right to detain or compulsorily question. It has fallen between two stools, I take it. What can we do about it?

Mr Moglia—Firstly, there are two priorities set in the legal aid agreements. I understand that they are in kind in each state, although the only one I have access to is Victoria. The first set of priorities is about charges. I accept and concede that that is not appropriate in relation to this part. The second is about special circumstances in general. Special circumstances are particular things about disabilities, language issues et cetera. That is usually how we talk about special circs. But, in relation to the same head of priority, the Attorney is able to allocate funds or agree to allocation or allow a previous agreement for the allocation of assistance to apply in a new case. So there is an opening there.

Mr KERR—Which attorney—the state attorney?

Mr Moglia—No, the Attorney-General; I apologise.

Mr KERR—For the Commonwealth?

Mr Moglia—Yes. As I understand it, that is probably how it has arisen. I notice the evidence of previous witnesses that says that it has not been a problem, that it has happened and that money has been available. I can only assume that it is under that priority that it has been given: firstly, there is money in the pocket and, secondly, the Attorney-General has been willing to allocate it to this assistance. That brings us to the real question. If there is not money in the pocket—the allocation for the year is depleted—that would mean that there is no option for the

Attorney, perhaps bar some new appropriation, to actually allow any assistance of any kind whatsoever, except through imploring some community group to offer it pro bono. In a structural sense, there is a real issue there that needs to be dealt with. I do not think I am going further than the brief that I have in saying that we suggest that there should be a guideline—a priority—set, on its own, which indicates that money has to be there. If terrorism is so important—which everyone concedes it is—and information about it is peripherally important but nevertheless important then that information should be able to withstand the challenges, which in my submission means that it must be on the basis of good legal advice, and there must be the money available. That would be the submission—that it should lie in that guideline.

Senator ROBERT RAY—I have one other question. You did not go into it in any length in your submission, but the question of derivative use has come up constantly. The stated purpose of the legislation is to gather intelligence. What would your attitude be if state or federal police were suggesting questions in the process to assist them in later criminal investigations via derivative use rather than just as an intelligence-gathering exercise?

Mr Moglia—I think that, given that we are opposed to any derivative use, our position would be, clearly, that that would be a perversion of the purposes of the act—and certainly of this part. This part is about the safety of the community, and that is conceded. It is about gathering information that is going to keep people safe. If it continues in that vein then well and good, but if it is to be used for alternative purposes in the way that the senator suggests then we would have very grave issues with that. It would be information that we would want to be able to challenge. There is a very real question then as to whether we are going to be able to have access to the information actually given before the prescribed authority to be able to assess whether or not it is relevant, admissible information that should rightly be used in a court of law in relation to criminal matters and whether it should be excluded on some public policy ground.

Senator ROBERT RAY—I think the intention of the parliament was that, if material incidental to the questioning comes up that indicates a criminal offence and other investigative methods can be used to gather that evidence, they should be. But I do not think it was ever contemplated that the process should be so skewed as to provoke that evidence into coming forward.

Mr Moglia—That is right, and so we would oppose it. Derivative use is a ‘how long is a piece of string?’ question, isn’t it? How do you derive it and how many steps do you go through before you can say it comes from another source? That is difficult to say. If the parliament were to see fit to refine how it understands derivative use to be or what would be permissible, then well and good. But I am not sure it has done that so far.

Senator ROBERT RAY—No, it has not.

Mr Moglia—I can see that it has used derivative use in other acts in terms of ASIC and other agencies.

Mr KERR—Those acts are designed and intended in some circumstances to facilitate the prosecution of offences. As you and Senator Ray have said, this is designed very specifically to permit the gathering of intelligence, largely for protective reasons. I guess your categorisation of

information being sought in relation to current and pending prosecutions would be that it is improper.

Mr Moglia—Yes, clearly. Our submission—and it has to be, on my evidence—is that we oppose any derivative use at all, for all of those reasons, chief among which is the purpose of this act: it is not about suspects.

Mr KERR—I have a general question. You said that the onus is on those asserting the need for the legislation to continue. The Director-General of Intelligence, in his submission to us, has said that that onus has been discharged—that in fact the international security environment for the foreseeable future is now such that we should be satisfied that we can entrench these powers, that it is necessary to do so and that there need not be any continuing point at which the legislation ceases to have operation. I assume that your submission implicitly rejects that conclusion?

Mr Moglia—It does, for two reasons. Firstly, there are what I would call the structural reasons that I have mentioned about what such a power means in the legal history and the psyche of a nation et cetera. Does it mean that an atmosphere of derogation from standards is to be accepted as a norm? We oppose it on that basis. Secondly, and more specifically—and this comes to something that we have commented on—it is not a question of whether or not specific powers have been used fairly and properly in a finite period of time. The proper question for the parliament to face—and thereby this committee, in my submission—is whether the powers in their stated terms are so broad that they are unsafe and lend themselves to possible—and it need only be possible—future abuse. Much has been repeated about change of staff and change of circumstances—those things go without saying. But enacting wide powers with acknowledged possibilities for abuse, when in fact there are proportionate and easily obtainable means for restricting the possibility of abuse, is a dangerous area for a parliament to move into. I have probably just taken the long way around of saying what the ICCPR says: it has to be proportionate.

The extent of the powers, which is what must be addressed—not the actual use of them—is disproportionate. They go too far. There is no evidence, on the evidence of ASIO, as I understand it, that there has been a need to detain anyone. I think that was their evidence on the Friday when they appeared. That is an acknowledgment that so far we have not needed those powers. If we do not need them, we cannot say that there is a demonstrated requirement for the powers to exist. I accept that there are concerns—that there might be information out there that we need. At this stage, there is no evidence that would support a review that we should keep the power.

Senator ROBERT RAY—You mentioned proportionality. I usually go on a long rave about DIMIA et cetera, but I will not.

Mr Moglia—It is a term of art; it is unfixed; it is always open to the circumstances. That has to be conceded. But I think that what is now clear is that the authorities cannot provide any information that can suggest to this committee and thereby the parliament that these powers are needed. It is okay to say that they have not been abused—well and good—but that does beg the question, and we cannot answer it, absent there being some data. That would be my submission.

Senator ROBERT RAY—Just say the reverse is true. We bring in an amendment that deletes that, and the very circumstance that it was there to cover happens in three years time. Who is responsible? ASIO would say, 'That's the parliament's fault. It didn't give us enough powers.' It would become a blame-shifting exercise. That is the other side of it. I am not saying that demolishes your argument, but there is that side.

Mr Moglia—That is the value of proportionality, isn't it? It is not too difficult to have hypothetical situations which would justify anything. It may be that we want to increase the breadth of the powers because we can think of hypothetical situations in which they can be useful. That has to be conceded. That is the nature of hypotheticals. What proportionality brings into play is the real need to justify, on grounds which have a reasonable basis, the need for an extension of powers. What we say is that, if it is to be conceded or if it is to be found by parliament that this part continues to remain in the act—which we oppose, but, alternatively, if it is to remain there—the specific power about detention still goes too far. It can be restricted in a reasonable and proportionate way—proportionate to the kinds of risks we are facing.

Senator ROBERT RAY—If we changed the word from 'may' to 'probable' would that help—that there is a probability of the destruction of evidence, a probability of absconding or a probability of default, rather than that there 'may' be?

Mr Moglia—That brings me to a question about the wording used to justify the warrants themselves. If you will forgive me, I will go to that more general question. That is the question of whether or not there will be substantial assistance—it is in 34D and it is about whether a warrant should be issued. That relates to whether or not a warrant is going to assist. Of course a warrant is going to assist. It is going to get somebody before a table to answer questions. There is no question about that. So the test of whether it is going to offer substantial assistance is meaningless, with respect. The real question then is: what is the next test about the nature of the intelligence? It just relies on the question of whether it is important in relation to an offence. That is not very specific. It is not very helpful, I would dare to submit, for any kind of review about how these powers have been used.

Is it important? In hindsight, that is not going to be hard to prove, perhaps. But, if we do not know that the trains are going to be blown up in Madrid, it is difficult to say how you would assess mere importance for the use of powers to detain and question. That brings me back to the question. The parliament should not enact on the basis of reasonable hypotheticals. Parliament should enact on the basis of sound reasons or of actual evidence which gives rise to reasonable grounds for a genuine belief—those kinds of terminologies, which are commonly used in the criminal justice sector in relation to investigation.

ACTING CHAIR—You contend that the detention powers go too far, using probably the same arguments that were used when the initial legislation was introduced and reviewed by this committee.

Mr Moglia—Yes.

ACTING CHAIR—The parliament then determined to leave that power in, because it was to be used as a last resort. You should draw some comfort, I would have thought, from the fact that it has never been used. I know there are two arguments: if it has never been used, is it necessary?

But, as Senator Ray mentioned, if you take it out and then, six months down the track, we find that that power is required, it is a bit like throwing the baby out with the bathwater, isn't it?

Mr Moglia—It is a big 'if', and I would rely on my previous evidence. But, if the powers were to be retained—

ACTING CHAIR—We wish we had some instance where it had been used so that we could pass some judgment on it too, but we cannot, because it has never been used.

Mr Moglia—Therein lies the need for a further sunset clause. We have not exhausted a reasonable period of time to see whether legislation is in its proper form. It is an incremental process and we need to do that.

ACTING CHAIR—I do accept that.

Mr Moglia—The issue, which I think Senator Ray raised on another occasion, is that there are tests as to whether or not a detention warrant should be granted—the risk of flight, the risk of destruction, the risk of disseminating information. Those, we submit, are low thresholds, as has been worded in the act. We oppose that power being retained but if it is then those tests should be increased—those thresholds should be higher. It should not merely be that there is some suspicion that there may be a risk of flight. That would not be enough. It is not enough in relation to criminal suspects on bail. It should not be enough for nonsuspects in relation to mere information whose significance the individual subject might not even be aware of.

Mr KERR—Can I put a proposition to you here about the threshold for detention. If you included a provision that detention could be authorised only where there was a reasonable belief—or whatever formula you wish to use to express it—that there was an imminent threat or actual prospect of harm to persons or property, would that in a sense satisfy your concern? It would leave open the questioning regime, for which parallels exist in the ACC and a whole range of things, A number of specific critiques have been made around the questioning regime, but nonetheless it would leave that regime—but not detention—open. In that situation matters could be canvassed in relation to the whole intelligence environment but detention would be available only when the existing three tests were satisfied and there was some link to the sorts of circumstances that the parliament really did intend—the matter of last resort. I was wondering, if we do keep these powers, whether that would be the kind of framework that you would urge upon us.

Mr Moglia—I think I have come to the spot where I will have to take that on notice but express a personal view—and I am happy to express a personal view as long as I am not stopped! It would go some way towards that. However, what I would submit should accompany that is some ability to review that assessment. The issuing authority does not have the capacity to do that. If an issuing authority, duly constituted—and I know there have been issues about tenure raised in relation to that question by other witnesses, and tenure would be an issue that I would raise—were to be across those issues and able to assess them, they might be somebody that the matter would return to if there were some question about detention. But my response is that there would need to be transparency about the nature of the material, the nature of the issues and the assessment made in relation to those issues along the way, to assess whether or not detention is justified in a given instance. At the moment it is too—

Mr KERR—I certainly accept that there needs to be some capacity to examine and to ensure that this was not a misused power. But, equally, if we are restricting it to instances where there are genuine last resort circumstances, putting aside how we define that test, then you would not want to have much opportunity for technical objection and argument, because we are then saying, 'Look, this is a circumstance in which the ordinary citizen would very much expect these powers to be exercised.' You would not then expect there to be an opportunity for judicial review, for example, or anything of that kind to be interposed in a way that would be a technical bar to the exercise of the powers above and beyond those which already exist.

Mr Moglia—I can see the merit in that argument. We return then to the question of the quantum of legal assistance that might be provided. It might be that the Commonwealth would have an interest in providing such legal assistance as would enable senior and experienced counsel to act in these kinds of matters. That could offer a legitimacy to just proceedings in relation to questioning, as opposed to adopting a stonewalling approach, which perhaps you are suggesting, of not having appropriate advice or access to appropriate information—so that stonewalling is the only option available to people. There has to be a real investment in the quality of the proceedings, in the hope that what might be seen as low-quality interventions are avoided.

Mr KERR—Another thing that struck me, as you were speaking—and I have not tested this as an idea, so it may in the end sound silly—related to the situation that exists in, I think, Queensland. They have a statutory role for the challenge of decisions that have been made by their equivalent of ICAC. That gives the opportunity for any application for a warrant to be tested by an independent counsel who appears in those circumstances—not briefed by anybody; in fact, the people in relation to whom the warrant is sought would not know that counsel. There is there at least an opportunity for the alternative case to be put in the public interest. That is the sort of role, presumably, that legal aid could fund, if there were provision for that. I do not think it has ever been exercised in any Commonwealth jurisdiction. Are you aware of that Queensland—

Mr Moglia—No, I am not.

Mr KERR—I suppose that is a role, in some ways, that the Inspector-General of Intelligence and Security plays at a later stage but not at those earlier stages?

Mr Moglia—And, with respect to the inspector and the office, without some teeth, it must be said. I think it was reported that somebody had called them useless. I will not go that far, but there is no capacity for the inspector-general to compel any compliance with any proceedings. That is a real problem, whereas recourse to judicial review through the Federal Court in any writ that is sought, for example, does. Similarly, any representation before the authority or before the court by any amicus brief would also need to be able to address real toothy issues, if I can put like that.

Mr KERR—It becomes very complex, because you obviously need to security clear the amicus to a very high degree if you are going to give a practical value to that intervention. Again, how much the community would be reassured by the fact that you say that you are providing this additional safeguard, I do not know. But, if it does commend itself to you on reflection, drop us a note. Otherwise, let it just slip.

Mr Moglia—I will certainly raise it. The chief concern that we are raising of course, which is transparent, is that it is in the community's interests. So it is not about another expert being satisfied; it is about there being processes—and usually it is about transparency—that are in place. But I will take that further and raise that, with possible submissions.

ACTING CHAIR—Any further questions? Thank you very much for appearing before us today and helping us with our inquiry, as we deliberate on the future of this legislation. We appreciate your contribution.

Proceedings suspended from 11.58 am to 13.29 pm

DIAS, Ms Marika, Representative, Federation of Community Legal Centres (Victoria)

DUFFY, Mr Richard, Representative, Federation of Community Legal Centres (Victoria)

NICHOLSON, Mr Dan, Representative, Federation of Community Legal Centres (Victoria)

CHAIR—Welcome. I invite you to make some opening remarks, then we will proceed to questioning.

Ms Dias—The Federation of Community Legal Centres is grateful for the opportunity to appear here today before this committee. The Federation of Community Legal Centres recommend that the sunset clause contained in section 34Y of the act remain and that, accordingly, division 3 of the ASIO Act cease to have effect after 23 July 2006. In support of this recommendation, we wish to make a number of oral submissions regarding the necessity of the powers, the infringement on fundamental legal principles that they represent and their proportionality.

Should the committee be inclined to recommend the continuation of these powers, we would submit that there should definitely be a further sunset clause inserted. If so, the Federation of Community Legal Centres would like to draw attention to a number of issues with the current legislation. My colleague Dan Nicholson will highlight a number of these key issues, which, as we said in our submission, must be addressed if the powers are to continue. We also think it is very important that the committee bear in mind the impact of this legislation on the community. I suppose in this regard the Federation of Community Legal Centres are in a somewhat privileged position because of our work with communities conducting casework and community legal education. Perhaps we are in a good position to provide the committee with some insights in this regard. Richard Duffy, who is a community legal education worker, will make some preliminary remarks on these issues.

With regard to the issue of necessity, judging from other submissions to this committee, it seems fairly clear that eight questioning warrants have been issued since the commencement of division 3. The usefulness of the information yielded through the execution of these warrants, however, remains somewhat unclear. In their submission to this committee, ASIO reflected that the powers have enabled them to collect substantial and valuable intelligence important to progressing a number of investigations. They also asserted in their report to parliament in 2003-04 that the questioning warrants have provided valuable information.

We would suggest that, based on these somewhat vague reflections, it is impossible for the community to say with any certainty that the intelligence obtained justifies the continuation of the powers. The actual usefulness of the information cannot be evaluated with any degree of certainty by the community. In this sense, we would suggest that there has been a failure to demonstrate the necessity of the powers. In this regard, it is also impossible for the community to gauge whether ASIO's traditional powers and processes could have similarly worked to obtain the intelligence gathered using division 3 warrants.

There is also a tendency for proponents of the powers to argue that the current national security environment or the counter-terrorism environment as such necessitates these powers. We would call into question this assertion and certainly urge the committee to consider it critically. In their submissions to this committee, there is a consistent failure on the part of ASIO, the Australian Federal Police and the Attorney-General's Department to actually substantiate this view, short of simply making the assertion. In our submission we say that it is also not adequate justification to argue that the powers might be needed at some time in the future.

For example, in ASIO's submission to this committee, they effectively argued that, were extreme circumstances to arise, it would be good to have the detention powers on hand. But given the coercive and extraordinary nature of these powers, we very firmly believe that it is crucial that the necessity be demonstrated by reference to current circumstances and currently foreseeable circumstances and not to some notion of worst-case scenario. It is always possible to envisage extreme hypothetical circumstances. By ASIO's own admission, in the sense that they raise this, these circumstances do not actually exist at present. We do not agree that these projections or imaginings demonstrate the necessity for the powers.

Given that the necessity of the division 3 powers has not been clearly demonstrated, we would submit that the powers actually represent a disproportionate response to a perceived threat of terrorism in that they abrogate certain fundamental human rights and legal principles and provide ASIO with these very broad coercive powers. I do not propose to go into great detail looking at these issues now, particularly given that many submissions to this committee and many witnesses here today have explored these matters in detail. In particular, we would refer to the submissions of Amnesty International, the Public Interest Advocacy Centre, the Human Rights and Equal Opportunity Commission, Victoria Legal Aid et cetera. However, I will just highlight a number of the key aspects of the legislation that we feel render it somewhat disproportionate.

Of particularly grave concern is the detention of nonsuspects. It is an inherent part of division 3 that persons believed to have information may be detained. We also note that in this regard that the Federation of Community Legal Centres supports the argument made by the Human Rights and Equal Opportunity Commission and George Williams that the questioning warrants themselves create a de facto situation of detention. There is also the absence of any right to be brought before a court as soon as possible after detention to determine the lawfulness of that detention—the principle of habeas corpus. The possibility of incommunicado detention is also a cause for concern, particularly in the case where a questioning warrant is converted to a detention warrant on the direction of the prescribed authority.

The lack of judicial review and oversight is also a concern. We certainly want to highlight the fact that the prescribed authority may simply be an ex-judicial officer or a judicial officer acting in a personal capacity only. The excessive duration of questioning in detention is a concern, particularly when an interpreter is used. The abrogation of the right to silence, the imposition of criminal penalties for a failure to produce information and that subtle shift in the onus of proof in relation to that offence are all causes for concern. Also of concern are the substantial limitations on the right to legal representation and the secrecy provisions, which stifle public discussion and perhaps also have the effect of increasing ASIO's coercive powers and even increasing its lack of accountability.

Mr KERR—Could we just go back a step. You mentioned a 'subtle shift'. I did not understand at all the point you were making.

Ms Dias—I was just referring to the fact that a person who fails to produce information and is then alleged to have committed the offence of not answering ASIO questions is required to bring forth some evidence to demonstrate the reasonable possibility that they did not have that information. So the onus shifts to them rather than it being presumed that they are innocent of committing that offence and the prosecutor then being required to prove that they did have that information and refused to provide it. Is that clearer?

Mr KERR—I sort of understand it now.

Ms Dias—In more of the sense that I intended.

Mr KERR—I just did not know what you were referring to.

Senator ROBERT RAY—If you are you saying there is a reverse onus of proof then I do not understand.

Ms Dias—I did not say reverse. It is a shift, because it is not entirely reversed.

Senator ROBERT RAY—But if someone is charged with withholding evidence, the onus of proof is still with ASIO and the prosecution, surely?

Mr Nicholson—It is more the evidentiary burden that is shifted. Maybe we can deal with that in a bit more detail in a while.

Senator ROBERT RAY—I would be interested to hear it later, Mr Nicholson, because that has not been raised with us before.

Mr Nicholson—Certainly, yes.

Ms Dias—That is an issue that you—

Mr Nicholson—I will raise it briefly. Maybe we can deal with it in questions afterwards.

Ms Dias—I suppose the final concern that we would like to raise, which is perhaps of greatest concern to us, is that the powers have the potential to be applied to a very broad range of persons. This was discussed at length earlier today. The powers are effectively activated by reference to the terrorism offences contained in the Criminal Code. These offences are very broad ranging in character and seriousness. It is also important to note that many of these offences do not actually require the intent of the alleged offender. In this regard, we would submit that the scope and the nature of the powers are clearly disproportionate to their purpose. For example, it would certainly be disproportionate to use such coercive powers to obtain information only with regard to an association offence or what might be regarded as one of the more minor offences out of the swathe of terrorism offences that exist.

If the sunset provision is removed, we would suggest that these powers will potentially become an ordinary part of the legal landscape—that is, that the derogation from standard legal principles and international human rights standards et cetera that these powers embody will become a standard part of Australian law. In our submission we say that it is not currently justifiable, nor is it possible, to guarantee future justification. For that reason we would submit that the sunset clause should remain and accordingly the powers should lapse in the coming year.

Mr Nicholson—I will deal with the issues that we would seek to highlight if the committee intended to recommend that the legislation be retained or extended in some form. They are issues which would need to be addressed as a matter of urgency to reduce the adverse impact of the legislation. I will not go through everything in our written submission—there are 10 points there—but I will just deal with three broad issues. Firstly, I will look at limiting the scope of the powers. Secondly, I will look at the question of legal representation and, thirdly, I will look towards increasing accountability in the exercise of these powers.

Firstly, on the question of limiting the scope of the powers, we have read in the submission from ASIO that the questioning warrants are being used when the threat of harm is imminent. We reiterate the point that other people have made today that this idea of imminence is not reflected in the legislation at all. In fact, the test is much broader than that. There are no requirements for imminence or threat to life. Indeed, the matters could be entirely in the past. We believe the powers should be triggered only in the most serious terrorist offences. We would probably agree with Mr Joo-Cheong Tham's proposal in relation to the imminence and seriousness question. We would also submit that the use should be limited to those suspected of offences, because we cannot see the justification for using such coercive powers against those not suspected of any wrongdoing.

On the issuing of warrants, in order to make the legislation accurately reflect the idea that this is a matter of last resort, we would argue that ASIO should be required to satisfy the issuing authority of all the matters that it is required to satisfy the Attorney-General of, rather than the issuing authority having to be satisfied of considerably fewer matters, as is the case now. In terms of the right to silence, we have great concerns about it being abrogated in such a secretive and far-reaching scheme. We have a particular concern about the operation of the offence under section 34G of the act that Marika referred to before. We would also say that immunity should be complete. It should include derivative and use immunity, given that this is supposed to be only about intelligence gathering.

Turning to the legal representation question, again, this has been pretty well covered in our submission and that of Victoria Legal Aid. We are particularly concerned about the fact that there is no requirement to inform you that, under a questioning warrant, you are permitted to contact a lawyer of your choice. We are concerned about the possibility of someone not being allowed to contact a lawyer if they are considered a security risk and about the fact that questioning can take place in the absence of a lawyer. Also, as Marika pointed out, there is the possibility of detention via a questioning warrant being converted, effectively, into a detention warrant with the authorisation of the prescribed authority, and there is no requirement in that case that a lawyer be contacted.

We point out that in the absence of legal representation the requirement that people be informed of their rights is rendered quite ineffectual. In their submission IGIS noted that it is

difficult for subjects to take advantage of their rights, such as raising queries with the prescribed authority, and that that is probably an indication of how, in the absence of legal representation, those rights are not very effectual. We say that people should have the right to legal advice before questioning, which is not the case now. We point out that the legal profession is already pretty closely regulated, and there are also offences relating to disclosure under this act, so in light of those two things it is difficult to see how the restrictions on legal representation can be justified. We note that practice seems to indicate that lawyers have been allowed to be present at all times and therefore we do not see any right not to incorporate an unqualified right to legal representation into the legislation.

We believe the role of the lawyer is unduly limited. We submit that they should have access to documents referred to during questioning, which is not the case now. They should be able to intervene where the questioning exceeds the limit set out in the protocol—that is, where it exceeds the safeguards—and make submissions on questions such as extending time or whether the warrant is specific enough. Again, the IGIS submission seems to indicate that some of these things are current practice, which is great, but we would submit that in that case there is no reason not to put them in the legislation. There should be a right in the legislation to legal aid. Again, it should not be down to discretion and practice.

Briefly, on the question of increased accountability under this legislation, we make the point that the very nature of ASIO as a secretive organisation makes it an unsuitable candidate for the level of accountability and transparency that these powers require in a democracy; however, there are issues of accountability that should be addressed. On the question of the remedy to the Federal Court, this right has little practical effect. If people do not have access to enough information about the reason for their detention, which could form the basis for seeking a review, in the absence of legal representation it is difficult to see how you could reasonably go to the Federal Court. There is also no explicit right to contact the registry of the Federal Court. This should be put in the legislation.

More broadly, a lot of the procedural safeguards seem to rely on good practice or on the discretion of the prescribed authority. We are concerned about that. If these procedural safeguards are being adhered to then they should be put in the legislation. Given the amount of discretion that the prescribed authority has, there should be some mechanism for complaints or better accountability in the way they exercise that discretion. We argue that the protocol should be given legislative force, including remedies for any breach of it, and that it should be required that a copy of the protocol is given to the subject of the warrants and to their lawyer.

Finally, on the secrecy provisions, although I will not go into it in detail because I am aware of the time, we call on those to be repealed or, in the alternative, for serious changes to be made in relation to the definition of operational information and the nature of the offences. As much as anything, these secrecy provisions compromise accountability and transparency in the exercise of the far-ranging powers under this act. Thank you.

ACTING CHAIR—Like a lot of other people who have made submissions to the committee, you have talked about this legislation applying only to the most serious of terrorism offences, yet I have failed to be convinced by anybody of what they consider to be the most serious of terrorism offences. Nobody seems to be able to define what they think are the most serious of terrorism offences.

Mr Nicholson—I heard the evidence given by Mr Patrick Emerton in response to this question. There is a difference between the planning and carrying out of the Madrid bombing and something like giving $5 to Hamas to run a hospital on the West Bank—I think that was the example that Mr Emerton gave. There are degrees of imminence of threat and of the directness of the way that life is threatened. We have pretty broad terrorism offences under the Commonwealth Criminal Code.

ACTING CHAIR—We do. But this new legislation does not cover terrorist offences. Those that are suspected of terrorist offences are dealt with somewhere else. We are talking about people who might have information relating to imminent terrorist activity.

Mr Nicholson—That is right. I am concerned, these powers being quite coercive and far-reaching, that if they apply to anyone who has information relating to an offence of association, then you are covering a pretty fair proportion of the population. If you really look at the arguments about what constitutes a terrorist organisation and what constitutes a terrorist offence—I will not go over the Liberal Party question again—the concern is that when you have these powers—

ACTING CHAIR—You might as well—everybody else has.

Senator ROBERT RAY—The problem is that you have to argue to the committee that a director-general would be dopey enough to invoke these powers for a $5 donation to Hamas's medical expenses, that an Attorney-General would endorse it and a Federal Court judge or magistrate would then tick-off on it.

Ms Dias—We are certainly not in a position to make that argument; but we are also not in a position to argue the contrary.

Senator ROBERT RAY—But there is at least scrutiny in the system thus far by those three people—by the inspector-general of security, by this committee and the courts. Presumably, if there was ever an appeal to the Federal Court by the client's legal representatives, it would be a matter of ridicule, to use that extreme example of a $5 donation again. We are constantly enjoined, 'Don't have legislation that might be there to meet a future contingency that is extreme,' but I think you are running the extreme argument the other way, which is just as ridiculous.

Mr Nicholson—Part of the issue—and I will let Richard Duffy discuss his views also—is the perception of these powers in the community, so why should we not have the legislation reflect how these powers should be exercised? There is the unfortunate situation where people see what is in the legislation and that leads to genuine fear in the community.

Ms Dias—It is very important that this legislation—and all of our legislation—is very clear about what is does and does not allow. Senator Ray is saying it is unlikely that an Attorney-General would sign off on this—they would have to be dopey, as you put it—and, yes, possibly they would have to be dopey. But, if the legislation allows for it, maybe there could be a dopey Attorney-General—I do not know. We cannot predict these things, so it needs to be clear.

Senator ROBERT RAY—It is just that proportionality is always mentioned and yet no-one has been detained as yet. I invited a witness this morning to pay the $3.20 to go up to the corner of Spencer and LaTrobe streets and look across the fence at people that have been there for months and months on end. Yes, they have been charged, but they have yet to face their day in court. Or go on back out to Maribyrnong and have a look at the people that have been there for over a year—that is proportionality to me.

Mr Nicholson—Our response would be that if this parliament were to do a review of the Migration Act we would be happy to give our full and frank opinions on how it operates.

Senator ROBERT RAY—Of course that is the reaction, but I am talking about proportionality here, because that is always what is brought up with us. As an elected parliamentarian I ask: who is worse off in our society—eight people who have been called in for questioning with legal representation and a whole raft of safeguards put in to protect them or some of these other people who seem to just be ignored?

Ms Dias—That is not really what the proportionality argument is about. It is not about comparing groups of people under different pieces of legislation. It is about looking at this particular legislation and the aims of that legislation and whether the powers that it gives and the incursions that it entails are proportionate to the stated purposes.

Mr BYRNE—But you are looking outside of a framework. You are looking at it like the attack on the World Trade Centre has not occurred and the Bali bombing has not occurred. The framework of the legislation has been driven by these terrorist acts. ASIO are working to prevent those sorts of terrorist acts occurring within this country, so the analogy that you use in terms of the Liberal Party and stuff like that is irrelevant in some of the stuff that we have seen.

Mr KERR—As bad as they may be!

Mr BYRNE—As bad as they might be! But the whole legislation is being driven by these catastrophic events that lead ASIO to believe that these events could be perpetrated on Australian soil. That is the compass—that is what drives the legislation. That is the framework that powers it. But you argue this well outside those sorts of frameworks. That is why some of the examples you put forward do not resonate, because they are just not in accordance with what actually powers the legislation.

Mr Nicholson—Our response would be that we are working off the legislation because basically it is all we have got in terms of information. There is not a lot of information about how these powers are operating in practice in the public arena, so what else are we supposed to rely on in order to try and review the—

Mr KERR—I think their case is essentially that because of the moral and emotional resonance of these events we have permitted legislation to extend beyond the point which would normally provoke a cut-off, and they are trying to draw attention to the reach of this, which goes beyond the sorts of things that we all—

Mr BYRNE—Notwithstanding what you have said, our perspective is that—

ACTING CHAIR—I do not think we should have a debate.

Mr BYRNE—Exactly. We are trying to inform you that from our perspective, with the evidence that we have seen—some that is obviously not available to the public—we understand very clearly the imperative that drives this legislation and some of the practical applications of it. But some of your arguments, from what I have heard, come from outside of that framework. That is why they are not resonating with us.

Mr Nicholson—A lot of our arguments come from us being out in the community doing legal education and casework and hearing what the community thinks about these issues. So perhaps it is an appropriate time to turn to Richard.

ACTING CHAIR—We spend a bit of time in the community too, you know.

Mr Nicholson—Good!

Mr Duffy—I suppose it is not odd for me to come along and speak to you about what I am going to speak to you about today, but I would probably not normally be in a position to come along and speak to you about some of this stuff. I am not a lawyer; my main role in working with community legal centres is to educate people about the law—to help people understand it. It is a bit of a preventative measure in some respects, but I suppose it is also about helping people participate in the legal system. That works well with most issues, and we do not have any trouble filling legal education sessions on any number of different issues that we might run sessions on.

That is why this issue is so peculiar. We were asked by a working group at the federation to come in and give some advice around how we might run legal education sessions in the community about the antiterrorism laws. We have done that, and in the process we have contacted about 50 organisations across the state to get some opportunities to run sessions with community groups and individual organisations. But to date we have had very limited success in getting those opportunities. I think at the last count we had about half-a-dozen across the state, and most of those were for workers that work with ethnic organisations or peak organisations such as the Islamic Council of Victoria and those types of organisations.

ACTING CHAIR—The fact that only half-a-dozen organisations were interested might be an indication of the level of community concern.

Mr Duffy—I will talk a little about that in a second. I want to also talk about where I work. I work in the northern suburbs of Melbourne, in the City of Whittlesea. It is characterised by a fairly high percentage of people from a non-English-speaking background. A growing and significant proportion of those people are from an Islamic background. Another focus of our working group has been to try to get information about the law out to Muslim organisations. Given that a number of the organisations that were proscribed were Islamic organisations, we thought that there might be a perception that the laws are unfairly targeting people from that background. In our attempt to get information out, we have contacted a number of organisations in our area. The silence has been deafening. We thought that we might not have been selling the sessions properly, we might have been missing the point and there might not have been interest in the community. But we have been told by workers who work very closely with people from an Islamic background that there is a fairly significant level of fear in that community about the

laws—and these are people would not necessarily be involved with or support organisations that might be considered to be terrorist organisations. There is a perception amongst people from a Muslim background that anything to do with the word 'terrorist' is something that they should really keep clear of.

We normally encourage people, even if they are never going to be on the wrong side of a particular law, to come along and find out about the laws and see what is happening. In this instance there is no opportunity for us to do that. There is no way for us to get information to or discuss these laws within those communities, which is a concern for us. I am not in a position to talk about the ins and outs of the law. But from our position—and I work with a number of other community legal educators across the state—we are all experiencing how the laws are impacting on people in the community from that particular background. That is the main reason I decided to come along and speak to you today. With the people we have tried to engage, the fear is not about terrorism so much but about the impact the laws might have on them or their communities. This is coming straight from workers who work with people in the field. It is not something we have just decided might be a reason why people are not coming to our community legal education sessions. If that were the case we would choose another issue and move on.

ACTING CHAIR—I am somewhat confused, Mr Duffy, not just by what you have said but by what some of the other witnesses have said today. I remember being told in my younger days that sometimes a little information can be dangerous. In other words, if people do not fully understand the implications of what they have been told in relation to a law or any other matter, a little bit of knowledge makes them frightened. If you cannot get people to attend education forums, then they are going to be left with a piece of information which might lead them to draw the conclusion, out of ignorance, that they do have something to be fearful of. An overwhelming majority of Australians of every background are law-abiding citizens, and law-abiding citizens have nothing to fear.

Mr Duffy—The people in these particular communities would be the same. They are law-abiding people. That was something that I wanted to come along and share with you. I think there is a responsibility for law-makers not only to make laws to protect people but also to make sure that people understand those laws so that fear is not created because of the creation of particular laws.

ACTING CHAIR—But 95 per cent of Australians do not fully understand any law that is ever made. If I go into my community, I will have a different reaction: nobody could care less about these laws.

Ms Dias—They may not feel so directly targeted by the rest of these laws.

ACTING CHAIR—If you are talking about direct targeting, if you give somebody only a piece of information or half the information, they are more likely to feel as though they are targeted than if they did not know at all. That is the point I am trying to make.

Ms Dias—Certainly, and I accept that, but that is obviously not our project. Our project is to try to illuminate matters for the community so that they have a good working awareness of the way that the legislation works.

ACTING CHAIR—You have to do it very thoroughly if you are going to illuminate it, because it means that every single person in the community has to fully understand every segment of the law that is being put into place. Otherwise, if you are trying to disseminate this information and they do not understand it or they only understand a portion of it, then all that does is spread the ignorance in the community.

Ms Dias—I think that it is also very important, however, to look at what Richard is speaking about, this fear in the community, in the context of the raft of legislation that was introduced post the events of September 11 in 2001 and the Bali bombings. All the legislation was effectively counter-terrorism legislation. What has occurred is that all of the organisations that have been proscribed are Muslim organisations, so naturally there is a perception, which is perhaps conducive to fear, that this particular section of the community is being targeted. Certainly, I note in the transcripts from evidence given in Canberra that there was an admission roughly that, in fact, yes, that is the community group we are targeting, because that is where we believe the threat lies.

ACTING CHAIR—It was not an admission; it was an acknowledgment.

Ms Dias—Yes, an acknowledgment—however you want to characterise it. Nonetheless, that statement was made. So I think it is relatively understandable that this fear derives from that.

Senator ROBERT RAY—Mr Duffy has given factual evidence that people are reluctant to attend the educational things and I think we can just accept that as fact. What I am trying to understand is: when you disaggregate the reasons for their nonattendance, how much of it is due to the raft of legislation and how much of it is due to the climate that the media and others may have created? It is not easy to apportion, but I would not have thought it was driven entirely by the legislation. I would have thought that the atmosphere created even by Hollywood films, by television documentaries, by Fox News and all the others put together would be an equal driving factor. You might like to comment on that.

Mr Duffy—I take your point. I also take your point about the five per cent of people that might be affected. But I look at the ways that other types—

ACTING CHAIR—I am not sure of that percentage, by the way.

Mr Duffy—But, even if the percentage of people fearful of how laws might affect them were two per cent, I think it is too much in a society like ours. With lots of other types of laws that get rolled out there comes some education. Look at changes that are happening to family law. There are reams of information around that talk about the changes to the laws, but we cannot find anything to base our legal education sessions on around antiterrorism. We rely on other community organisations who have the time and expertise to look into them and develop this stuff, but we do at some level rely on the law-makers to give us that information.

ACTING CHAIR—But surely one of the reasons is that probably half of Australia is directly impacted by changes to family law legislation, whereas there are very few people who feel that they are impacted by this legislation—very few.

Mr Duffy—I take your point, but I think that two per cent or five per cent is still a considerable part of the population.

ACTING CHAIR—I understand.

Mr KERR—Isn't it your case that amongst the people who are adherents of the Islamic faith the percentage is very much higher? Amongst that community, a failure to provide factual, neutral information has given rise to a certain degree of fear of the legislation which probably is unjustified but nonetheless exists. Is that what you are saying?

Mr Duffy—Yes.

ACTING CHAIR—Can I just go back to one of your statements, where you talked about the implementation of this legislation. You said you felt that it should not be extended because the circumstances simply do not exist to warrant it.

Mr Duffy—The need has not been demonstrated.

ACTING CHAIR—The need has not been demonstrated?

Ms Dias—Yes, which is quite a different proposition.

ACTING CHAIR—How do you know?

Ms Dias—I am making these submissions based on what I know and what we know. Obviously I cannot make submissions based on information that has been classified or that is unavailable to me. From our perspective, the statements that we have made here today are based on what information is available to us and to the community. On that basis, I feel fairly safe in stating that the need has not been demonstrated to us.

ACTING CHAIR—So what circumstances should exist for it to be able to continue? You say that the circumstances do not exist. We are not aware of all the circumstances either.

Ms Dias—Right. The question you ask is slightly difficult.

ACTING CHAIR—That is not the reason I asked it, of course.

Ms Dias—I will take your word for that. I suppose it is a very difficult thing for the Federation of Community Legal Centres to enter into that debate, because we have a number of objections to the legislation per se. There are a number of things that we, and my colleagues in particular, have raised regarding this legislation—a number of issues that we certainly want to highlight. I suppose it becomes a matter of trying to speculate. If this situation arose, would it then be okay to do this or that? That kind of task could go on ad nauseam. I do not necessarily know that in the context of this particular review that is a very useful debate to enter into, because I firmly believe, as I have stated, that we need to look at the current situation, look at what has been demonstrated to us and then make a decision from there. We should not engage in these sorts of exercises: these mental gymnastics of speculating about what it would take if we did this or if we that.

Mr KERR—I do not like being a devil's advocate, but here I will need to be. What has been demonstrated to us has been that we have had the September 11 bombings and we have had the Bali bombings of Australians. These have all happened in a reasonably recent time frame. We know that there still exists a network, albeit that the public media suggests a weakened network, around al-Qaeda. That is the contemporary framework. We have heard on the public record from ASIO that the threat has not been reduced to a degree that we should feel that this legislation is no longer necessary. Even taking out the fact that they say it should continue indefinitely, that is the state of our knowledge of contemporary security settings. I think the chair is asking: in that circumstance, why do you make the case that they have not demonstrated at least a threshold argument that there is a continuing need at least in the short term for a continuation of these powers?

Ms Dias—I suppose—and I do not think Senator Ray will like this—I would want to raise issues of proportionality in that regard. What degree of threat are we talking about here? I note that ASIO—I think it is in their report to parliament—categorised the threat at present as being a medium-level threat in Australia and as a high-level threat to Australian interests overseas. They characterised that as something that is not likely to change. Looking at the various departures from fundamental legal principles that take place in this particular part of the legislation, if we are talking about the level of threat then we would suggest that these departures would be things we would be looking at more in states of emergency. A number of the submissions refer to that, and the Human Rights and Equal Opportunity Commission is particularly strong on that point. When you abrogate human rights or fundamental civil liberties in this way, you are talking about quite extreme situations, and yet ASIO are talking about a medium-level threat and we are not seeing concrete examples of this extreme threat that would seem to justify such a departure.

Senator SANDY MACDONALD—One argument you have not used which you could use is to say that the need for these powers has not been demonstrated because they have only been used eight times or because there have been no detention warrants issued. Is that an argument that you would like to use?

Ms Dias—It is not.

Senator SANDY MACDONALD—That is a two-edged sword, because they are a method of last resort.

Mr Nicholson—Put it this way: we would not be happier if they had been used 100 times. No, it is not an argument we would seek to rely on. I might raise one thing that is tangentially related, if that is possible. We note that ASIO in its submission talks about this part of the act being inserted at a time when there was considerable uncertainty and says:

> The legislation has shown itself to be a carefully considered and balanced scheme containing clear and workable provisions

This is in support of the argument that the sunset clause be removed altogether. Given that a significant number of the powers in the act have not been used at all, it seems to us almost impossible for ASIO to say whether the legislation has indeed shown itself to be carefully considered or balanced. I cannot really see on the basis of that any justification for removing the sunset clause altogether.

ACTING CHAIR—It is also then unwise for you to talk about the adverse impact of the legislation. In the case of detention, there has been no adverse impact because nobody has been detained. In the case of the questioning warrants, there have only been eight. I would have thought that the impact of this legislation currently on the Australian community has been quite minimal. One of the difficulties we have in reviewing the legislation after a couple of years of operation is that we do not have enough experience to know. That is why one of our continuing roles is to continue to monitor what is actually happening in relation to the effect of this legislation on the community.

Mr Nicholson—Yes, and I guess our concern with the secrecy surrounding these powers is this: when are we going to be in a position to properly review its operation and effectiveness?

ACTING CHAIR—We would hope in five years time—

Mr Nicholson—Given the secrecy provisions, I doubt that civil society or groups like us are ever going to really find out enough to accurately measure its operation, effectiveness and impact. Certainly, one of our fundamental concerns about the legislation is that it is inherently shrouded in this secrecy, which will make proper accountability and transparency impossible.

Senator ROBERT RAY—Certainly for us to ask you whether it has been transparent enough or fully accountable is impossible. I think we have to concede that. Your point there is valid. In your oral presentation, Mr Nicholson, you said—and I am summarising your view—that basically it should be in the legislation that you cannot be questioned without legal representation. We do allow in rare circumstances questioning to start before legal representation is there. We do so because we do not want the issue of legal representation artificially used to delay the start of questioning for vital information. In other words, we have to leave open that possibility. Yet the protection we then leave in is that we expect the retired judge who is the prescribed authority to be able to assess whether it is urgent to keep the questioning going or start it off without legal representation. I have this dilemma: your submission and those of like-minded bodies say they want more and more judicial review and appeal rights, but at the same time you do not trust the judicial official present to enforce the rights.

Ms Dias—But that particular official—and I am sure that you can see this point—is not there in a judicial capacity as such. That official is there in a personal capacity.

Senator ROBERT RAY—Integrity does not shift according to the role they play. That is my point. I would have just thought that, in that specific instance—and this is where ASIO says it is absolutely urgent to get this information and they cannot afford to wait until the lawyer is there, but you have the Inspector-General of Intelligence and Security to enforce standards and you have the prescribed authority—it is not as big a danger as you say it is.

Mr Nicholson—The legislation says that certain rights have to be given to the subject of the warrant before questioning can start. I guess our point would be that really a lot of those rights are ineffectual and it is difficult for people to exercise those rights in the absence of legal advice to tell them what they actually mean and how they can be exercised. We say that the lawyer should be there at that stage. As I said, I think, in my earlier submission, the IGIS submission indicates that they do think it is difficult for subjects of warrants to address the prescribed authority themselves directly about issues of their rights. That is why we would say it is

absolutely essential. Sure, it does create some operational difficulty for ASIO, but, at the end of the day, these are quite extraordinary coercive powers. It is a question of where you draw the line as a safeguard. We say that certainly not only having a right but also having a proper understanding via legal advice is where you draw the line.

Senator ROBERT RAY—I would contest very strongly your phrase ‘extraordinary coercive powers’ to be able to question someone. I think the extraordinary nature of it is taking away the right to silence. That is the big threshold question we have had to face, not whether someone can be questioned, especially as there has been no compulsory detention at this stage.

Mr Nicholson—I do not want to split hairs, but I guess by ‘coercive’ I meant that removal of the right to silence.

Senator ROBERT RAY—I am trying to focus on this problem of us not wanting to leave it open as a device. Let us say Mr X is pulled in. He knows solicitor Y. He has had a very dubious life espionage wise, so he nominates him as his lawyer knowing that ASIO will reject it. Therefore days may pass before the questioning can start.

Mr Nicholson—I reiterate my point that the legal profession is already pretty closely regulated in terms of character grounds, so I am not sure of the need.

Senator ROBERT RAY—Don’t check with the tax department on that, please.

Mr KERR—I have two questions about your submission. We discussed initially the shift of the burden of proof in relation to a failure to provide an answer. I think Senator Ferguson said we had not heard anything from any witness about that previously. Could you take us to that and your concerns, and what you would suggest by way of remedial action that we ought to consider.

Ms Dias—Obviously, the section of the act that we are referring to is section 34G, in particular subsection (3), I think, and (4).

Mr Nicholson—It is subsections (3), (4), (6) and (7).

Ms Dias—A person before a prescribed authority for questioning under a warrant must not fail to provide the information requested in accordance with that particular warrant. Obviously, an offence is created and it is subject to a term of imprisonment as the maximum penalty. However, the subsequent subsection, subsection (4), states that that does not apply if the person does not have that information. What is noted at that point is that the defendant bears the evidential burden in relation to showing that. That is the issue we were raising, and what we are envisaging is a scenario where someone does not have the information and is then required to adduce evidence to demonstrate that they did not have that information, which would seem to be an incredibly tricky task.

Mr Nicholson—They would effectively lose their right to silence in the questioning process and subsequently in the criminal process.

Mr KERR—They do not have a right to silence in the first place under this regime.

Mr Nicholson—We have raised that as a concern, but they would also lose it in a subsequent criminal process in relation to that offence. They would be in a position where they would have an evidentiary burden—they would have to give evidence in order to refute the assertions.

Mr KERR—I am not quite understanding this as you put it to us now. We will accept supplementary submissions. If it is possible for you to identify the vice that you say exists in a practical sense, give us a couple of practical illustrations, I am sure we will have a look at it. But it is not something that has been raised as a large issue by other submissions.

Mr Nicholson—I think it is in the Amnesty submission as well.

Mr KERR—It probably is.

Ms Dias—We would be happy to provide a supplementary submission in that regard if the committee were happy to accept it.

Mr KERR—Your submission talks about derivative use immunity. I think your suggestion is that, if somebody is examined under these provisions, they should obtain not only protection from the use of the evidence in a direct sense but also transactional immunity—in other words, to cover derivative use as well. There is a logical difficulty here. The aim of this exercise is to neither facilitate or get in the way of the operation of the ordinary criminal law but rather to enable our intelligence services to build an intelligence profile, to anticipate and to intervene to prevent things like bombings and other acts of terrorism. If in the course of a legitimate inquiry to develop that intelligence base you effectively immunise against prosecution persons who may have perpetrated those acts so that we cannot use what they say in the proceedings nor the things that are revealed in the course of that, it does seem that that is not a satisfactory outcome either. This should neither immunise people nor should it be misused as a device to obtain material to support a prosecution. The reason we have done this is to enable us to inform ourselves against risks of potential attack.

Ms Dias—But I do not think it necessarily follows that there would be some sort of immunisation from prosecution altogether. It simply means that the information derived through use of this legislation—

Mr KERR—It may well be an effective immunisation. You would have to be very selective of who you ask. You would never want to examine a person who you suspected of possible complicity in terrorism because you would ask a question and they would respond—they would perhaps add to that information and they would say, ‘Yes, and the bomb that I planted was planted in the train station.’ Then, if you find the bomb, you cannot use it because it has transactional immunity. That would not be the kind of outcome that most of us would accept as a commonsense outcome. One of the concerns that was addressed to us earlier today was that these proceedings may be being accidentally misused by being directed towards asking questions that might assist in a current prosecution. That raised concerns from members of this committee, and witnesses said that would be a misuse of it. But, equally, I am trying to put to you that it would seem to me to be inconsistent with the objectives of the legislation if as a consequence of an intelligence finding exercise there really was a serious act of terrorism and the accidental by-product of that was that by seeking that intelligence out and questioning people you immunise them from the possibility of prosecution. I am sure no-one would ever really intend that.

Ms Dias—Having had that put to us at this point in time and not having had a great deal of time to reflect on it, initially my reaction would be that I suppose I cannot envisage that that would preclude prosecution altogether. It is very difficult for me to envisage that because I perceive the intent of these arguments about derivative use to be that in that particular scenario that you have described, for example, there could still be prosecution of that offence, providing that the standard techniques of criminal investigation and police investigation were undertaken and led to that offence being uncovered.

Mr KERR—That is highly unlikely. This is the sort of question that arises in the jurisprudence of the United States more often than it does in Australia, in that if you do not give the appropriate warnings and what have you then you have complete transactional immunity against anything derived from those inadmissible circumstances. It really does mean that often people simply cannot be prosecuted because of anything that suggests that that evidence that came forward became known as a result of these proceedings. Even if you discover the bomb and it has the suspect’s fingerprints on it, you cannot adduce the fingerprints because you would not have found the bomb but for the admission that was made, and that has transactional immunity. So you have a whole series of knock-on consequences. All I am saying is that that one particular aspect of your submission probably needs a bit of extra work.

Ms Dias—I see the point that you are making, and it is certainly not something that we have covered in a great deal of detail. Obviously, if that was something that the committee would be interested in hearing from us on we could certainly explore that further in further written submissions. But I would also refer the committee to the submissions of other organisations that I think have dealt with that in a little more detail—Amnesty International, HREOC, the Law Institute of Victoria and Victorian Legal Aid have all touched on those issues and could possibly illuminate those matters a little more than we can right here and now on the spot. But we would certainly be happy to provide a further written submission relating to that.

ACTING CHAIR—We have exceeded our allotted time, but on behalf of the committee I would like to thank you for appearing before us today and for the information that you have given the committee, which will no doubt help us in our future deliberations. Thank you very much.

Mr Nicholson—Thank you for listening to us.

[2.25 pm]

GOULD, Mr Rowan, Chief Executive Officer, Islamic Council of Victoria

SENTAS, Ms Victoria, Volunteer, Islamic Council of Victoria

ACTING CHAIR—Welcome. I invite you to make an introductory statement, and then we will proceed to questions.

Mr Gould—Firstly, thank you for inviting the council to appear before the committee. By way of introduction, the Islamic Council of Victoria is a non-government organisation and the peak representative body for the many mosques and Islamic societies that comprise the Muslim community of the state of Victoria. We welcome the opportunity for public participation and consultation in reviewing division 3 of part III of the ASIO Act, and, in that respect, we thank the parliamentary joint committee.

We should say at the outset that we recognise the need to adequately equip law enforcement agencies to protect all Australians from the threat of violent acts of terrorism. We also reiterate our unequivocal condemnation of the murder of innocent people wherever it occurs and for whatever political end it may seek to serve. Such acts are repugnant to any notion of humanity, respect and tolerance—human values common to all peoples, regardless of their faith.

World events in recent years have impacted on the Australian Muslim community in a manner which is unprecedented in our history. The term ‘terrorism’ is not value neutral. Ill-conceived and unsupported racial and religious stereotypes have reinforced an intractable link between the term ‘terrorist’ and people of the Islamic faith. These unsupported racial and religious stereotypes have emanated from a loud minority, which includes segments of the media. It has served to create an environment of distrust and suspicion against Australian Muslims. The threat of terrorism has changed the lives of all Australians but, if you practise the Islamic faith, the adjustment to this new threat has been made even more difficult. We say this in the context of this review of division 3 because, despite assurances to the contrary, it is a fact that any laws that increase the powers of a clandestine organisation such as ASIO in connection with this threat of terrorism have a particular and pronounced impact on the Australian Muslim community.

Whilst the council support reasonable and lawful initiatives of law enforcement authorities to safeguard all Australians from acts aimed at harming innocent people, we have grave reservations at the prospect of escalating the powers of any law enforcement or intelligence agency at the cost of our fundamental civil rights. It has always been our position that the existing legislation was sufficient to empower our law enforcement and intelligence authorities to combat any potential threat of terrorism, and that the failures that have allowed terrorist attacks to take place are either due to a failure to adequately implement the existing powers, or, sadly, could not have been prevented by law enforcement alone.

Our criminal justice system has developed over many years and in that regard we believe that any measures to combat the threat of terrorism must not derogate from fundamental principles that are central to and underpin the administration of justice in our democratic society. It is

therefore the submission of the council that ASIO's powers under division 3 of part III of the act be allowed to lapse on 23 July 2006. However, if the committee is of the view that the excision of division 3 is not warranted, then we submit that it is necessary to make significant amendments to the division. These amendments should not be understood by the committee to be a general acceptance of the legitimacy of the division.

Moving to specific matters, the council has grave concerns about the expansion of the powers of clandestine organisations such as ASIO. Matters impacting on individual liberty and freedom are best dealt with in the transparent and accountable environment of our criminal justice system. Our first concern is that, in the absence of the judicial oversight that applies to the work of our police, an organisation such as ASIO, which is secretive and not independently accountable, may be more likely to abuse such power. ASIO is a clandestine organisation which is intended to carry out the collection and analysis of information. The power to compulsorily question and detain goes beyond the intended scope of ASIO's operation and should never have been granted to ASIO. These are matters for the police as they are limited to criminal law enforcement.

On the breadth of the powers and the Muslim community's reaction to them, the detention and questioning powers under the act rely on the extremely broad definitions that trigger their operation. The uncertainty that pervades division 3 is a matter of significant concern to us. Our view is that, if it is not repealed, division 3 should be limited only to circumstances where there is an immediate threat of a terrorist act or where there is risk of serious damage to property or life. In order to allay community concerns over the existing provisions, the Director-General of ASIO, Mr Dennis Richardson, held community consultations with the Islamic Council of Victoria. We welcomed this initiative by Mr Richardson and, let us say this, we found Mr Richardson to be a man of integrity and we respect the measured and restrained way in which ASIO has, under his guidance thus far, exercised its powers under division 3.

Having said that however, his presentation to the community merely served to highlight how vague the circumstances that could trigger these coercive powers really are. At the end of a significant period of questions the audience had no greater clarity on how division 3 operates in practice. It is important to reiterate that it is not a lack of understanding of these laws that creates fear and distrust in our community, but the laws themselves. For example, as a predominantly migrant community many Australian Muslims have a practice of sending money back to family members overseas or visiting extended family in their ancestral villages. Further, at certain times of their religious calendar charitable giving is a prescribed part of the Muslim faith. Although these are legitimate charitable donations, what certainty does the community have that the broad discretions under the act are not triggered in those circumstances? Questions like these were posed to Mr Richardson at our consultation and he was unable to answer them. In our submission, the inevitable result of not knowing what actions will trigger these kinds of powers is the creation of a climate of fear, apprehension and a fundamental distrust of the government.

For example, we have anecdotal evidence from a member of the Muslim community in Victoria who is involved in sending charity money overseas. On our advice he contacted the Australian Federal Police and the Attorney-General's Department to disclose his activities so that he could have some certainty that he was not falling foul of the law. The departments were unresponsive and unhelpful and he had to abandon his work. There are a number of examples along these lines that illustrate the problem. There needs to be more certainty that legitimate

activity which is not intended to support any violence but which currently may fall within the broad definition of a terrorist act will not trigger division 3. This will go some way towards allaying the fears of the Australian Muslim community that this legislation merely serves to target them. These fears, we submit again, are not merely due to a lack of understanding in the community about the laws but stem fundamentally from the breadth and vagueness of the provisions themselves.

Going to detention without charge, the power of detaining without criminal charge violates fundamental precepts of our criminal justice system, including the presumption of a right to liberty and the presumption of innocence. As it currently stands, a person may be held for a longer period for information gathering purposes under division 3 and they can be held for actual suspicion of having committed a crime under the Crimes Act. The detention powers, coupled with the act's secrecy provisions, have the potential for significant social impact. The nondisclosure provisions have the effect that a person who may not have committed any offence disappears for seven days. They cannot tell family or friends or religious leaders or employers. They cannot receive counselling for what would be a highly traumatic experience for fear of five years imprisonment.

We take this opportunity to remind the committee of the history of some of our regional neighbours. For example, legislation in one country, which provides for detention without trial, which was originally aimed at curtailing a communist uprising in the 1960s, is applied today to jail dissidents and human rights and political activists indefinitely and without charge. The point is that once powers are on the statute books they may be directed to citizens and abused in situations that were never contemplated by the legislation. At the very least we would therefore recommend an additional sunset clause for this power.

Further, we would like to remind the committee that, as a predominantly migrant population, many Australian Muslims have come from countries in which there is little respect for human rights. The point is that, for a person who has lost personal liberty, there is nothing more precious than liberty. If Australia allows its respect for civil liberties to be eroded, what hope do we leave for people who live in autocratic regimes elsewhere in the world? Legislation like this will be deliberately exploited by such autocratic regimes, including those in the Muslim world, to deflect attention from their own rights abuses and to in fact reaffirm their own draconian practices, including detention without charge.

The fact alone that such laws exist on our books weakens our position and the sometimes high moral ground we have taken in relation to some of our neighbours in the region who are themselves going through a process of democratisation which includes removing laws like these. In fact, the word among our own community is already, 'What difference is there to X?' where you can insert a country of your choice. In summary, detention without charge is abhorrent and should be repealed.

We also submit that the secrecy provisions should be repealed. We refer again to the social impact when persons are not permitted to speak about the traumatic experience of detention or questioning. The secrecy provisions also remove an important mechanism by which ASIO, an arm of the executive, is held accountable according to democratic principles. If the secrecy provisions are not repealed, in the alternative we submit that the act be amended so that the onus for showing the necessity for nondisclosure is shifted to the prescribed authority. The authority

should make a case-by-case assessment of the necessity of nondisclosure of information on the basis that it is in the interests of national security.

Finally, in relation to access to legal advice, our submission is that the act must contain a clear statement that detainees have a right to access a lawyer for both questioning and detention. They should be allowed to contact a lawyer of their choice. The lawyer should be allowed to see all documentation referred to in the questioning and to confer with their client confidentially. Further, the lawyer should be able to intervene to provide advice for their client and to protect them from oppressive questioning. The lawyer must also be permitted to communicate privately with the client. The right to unfettered legal advice and representation is critical, especially given the absence of the right to silence and that a number of criminal offences may flow as a result of the questioning. This right to access is all the more imperative in view of the fact that many Australian Muslims come from non-English-speaking backgrounds.

That concludes the council's opening remarks on what for us are some of the main issues. We also refer you to our submission. We are broadly in agreement with others, including our counterparts in New South Wales, who have given evidence today and in Sydney to the effect that the operation of the powers should be either limited or repealed entirely.

ACTING CHAIR—You made the point that you had anecdotal evidence of someone sending money back to their former home. Then you went on to say that you gave specific advice to the person concerned. Is it anecdotal evidence? I am not quite sure how you can have anecdotal evidence and then give specific advice to the person concerned.

Mr Gould—In relation to the particular instance which I cited, perhaps 'anecdotal' was the wrong word to use. Anecdotal evidence exists in relation to the operation of Muslim charities in Victoria and in Australia generally to the effect that these provisions have basically made them a lot more fearful. That particular instance concerned a situation in which someone came directly to us and said, 'I'm worried that I may fall foul of the laws.' We said, 'Speak to the Federal Police.'

ACTING CHAIR—So it was not anecdotal evidence; it was direct evidence. That is what you are talking about, isn't it?

Mr Gould—It is from an anecdote which I am telling to you, so I suppose it is an incorrect use of the word 'anecdote' there.

ACTING CHAIR—That is okay. It just seemed strange to me that you used the term and then went on to quote a specific example.

Senator ROBERT RAY—We have heard a lot of evidence but I found one of your comments to be the most extraordinary yet: that autocratic regimes overseas would take succour from this particular piece of legislation. I thought they might look at the American example, where 1,100 people are held as material witnesses, or to the French legislation, where you can be held not for a week but for three years. I do not think that, when the world despots have their seminar, we will be high on their agenda. That one I do find hard to swallow. You understand that we have to test these things at these committees.

ACTING CHAIR—They are unlikely to use our legislation as a template.

Senator ROBERT RAY—Unless you want to add further comment, I am going to dismiss that part of your evidence.

Mr Gould—They may in fact use the American legislation, they may use French legislation—that is a hypothetical situation, but with countries, especially in our region, that we are the closest neighbour to, it does not help that we are following suit. That is essentially the point.

Senator ROBERT RAY—But we are not following suit, with due respect. We have carried legislation that I think it is legitimate for you to oppose—to ask for the sunset clause to cut in. But I hardly think it is the most draconian legislation that would exist in our region or in comparison—

Mr Gould—That is certainly not our submission.

Senator ROBERT RAY—I think you said we would give succour to autocratic regimes with this legislation. I just cannot see that part.

Ms Sentas—I think the point of that comment is that this is exceptional legislation. We are going down this path of giving ASIO coercive powers, which is quite extraordinary and unusual, and that does have some semblance to other parts of the world where there is more of a progressive shift towards bodies having those kinds of coercive powers. So it is about saying that we need to be careful. We have got these laws on the statutory books that are there to ensure that we do not move towards that path.

Mr Gould—Essentially, we cannot convince you of what a political leader in another country may take as an example, but we think that it is a possibility, having seen the rhetoric of some of our near neighbours.

Senator ROBERT RAY—I cannot see the leaders in Burma sitting down at the next cabinet meeting and saying, ‘Look, in Australia there is the potential to detain someone for a week.’ They might talk about us deporting Australian citizens to the Philippines—that would not surprise me—but that one just does not sail with me.

ACTING CHAIR—I do not think I have heard the word ‘clandestine’ used quite as often as I have today in describing ASIO’s operations. How do you expect an intelligence organisation to operate if it is not clandestine, in secrecy?

Mr Gould—We do not have a problem with ASIO being a clandestine organisation. I think the point is just that the organisation should remain an intelligence-gathering organisation and should not be given police powers. Do you want to add to that, Ms Sentas?

Ms Sentas—One of the points that is made in the council’s submission is that there is a very broad range of what are defined as terrorist acts. We have given the example of financing a terrorist act: it is potentially a terrorist offence to be reckless as to where money is going. We also note the association offences, where two or more associations with somebody indirectly related to a terrorist organisation will see you falling foul of the law. What we are suggesting, as

has been suggested by other submissions, is that the basis of the power is way too broad and it should be limited to the proportionality of what is at stake here in terms of preventing serious acts of harm or terrorist violence.

ACTING CHAIR—I think proportionality is a judgment, isn't it?

Ms Sentas—Yes.

Mr KERR—One of the points in your submission that struck home with me was that there is an obligation to provide charity, and I think there is a cultural phenomenon of remittance in that many people arriving here more recently support extended families back home. In those circumstances I can understand a wider fear about the impact of the very wide definition of terrorism that is included in the Criminal Code. But that very wide linkage would remain even if this legislation were repealed. If we took this legislation off the books entirely, people would still be the subject of potential criminal proceedings instigated by the Australian Federal Police in relation to the sorts of issues that you raised—for example, where a member of your community came to you and said, 'Look, am I at some risk if I make this particular remittance?'

Mr Gould—It may be the case that things may still fall under existing legislation. All we are equipped to say to you is that in the community the fear is not that they are going to be the subject of criminal proceedings; it is that they are going to be picked up off the street and disappear for seven days, they are not going to be able to speak to anyone about it and the media cannot report it. All we can tell them to reassure them is: 'Speak to the Federal Police before you do anything. ASIO are very reasonable people.' For a lot of our community who have perhaps less of a base level of trust in ASIO and retired judges than the majority, it does not go very far towards allaying their fears. In fact, the kinds of things that are being said are: 'Look, I heard that they can take your kids off you and hold them incommunicado to use them as leverage.' When I explain that you have to be over 16, that you have to have a parent and that the 12-year-old requirement was mooted but was not put in, it does not go very far towards reassuring people. That is anecdotal evidence again.

But certainly, as the peak body, we speak to the community at a broad level. There is a discernible level of distrust of the intentions of and the motivations behind this legislation, which is essentially seen as singling our community out. I hastily reassure you that I am a law-abiding citizen, but if ASIO were to come knocking on my door all I know is that I am a Muslim and the fact that I am a law-abiding citizen has to be proven. That is the perception that a lot of the community has.

Senator SANDY MACDONALD—The legislation has now been in operation for nearly two years. Surely the operation has allayed some of that mistrust that you talk about. It is one thing to say you might have great apprehension about the operation of some legislation. It is very easy to stir that up. It is not that you have agents provocateurs in the community, but people can easily talk about things which make other members of the community, especially a minority group, feel that they are being victimised. But there have been only eight questioning warrants and no detention warrants. Clearly the operation of the legislation has been properly conducted. To the extent that there is interest in the community, and particularly in the Muslim community, don't you think that that concern, if it was there in the first place, was misplaced? If it was there, don't

you think that they certainly would have been reassured by what has gone on in the last little while?

Mr Gould—It would not be unfair to think that, but our perception is that the level of fear and mistrust about the way the laws operate or could potentially operate has not reduced significantly. The fact that only eight warrants have been issued was raised at the consultation that Dennis Richardson had with us. It did reassure people, because the fact that only eight had been issued meant that there was not a lot of stuff happening that we did not know about. But the fact that the laws continue to be on the books is what concerns people. Some sections of the community are perhaps slower than others to become informed. In this last round, when we have had the review, people who were not previously informed have found out more about it. As someone said before, perhaps a little information is not such a good thing. In this situation, as they become more informed, it does not really reassure them.

Ms Sentas—Also, the experience of the Muslim community is that there has been quite a high level of informal questioning by ASIO. We also note the submissions of the Islamic Council of New South Wales and the Australian Muslim Civil Rights Advocacy Network where they raise serious concerns around the use of threat of a warrant to potentially procure assistance in informal questioning. That kind of experience is circulated in communities and it does not lead to much confidence in terms of accountability.

Senator ROBERT RAY—I do not think we would look with much approval on ASIO threatening a warrant to extract information. Informing someone that that may be the ultimate consequence is different from threatening, you see. Have you had an actual example where you believe that ASIO has used it as leverage and a threat rather than advice that they could be subject to a warrant?

Ms Sentas—We do not personally have an example of it but I think, given the allegedly very strict basis on which ASIO seeks requests or warrants from the Attorney-General, it would seem counterproductive or contrary to those strict legal bases that in practice they are told, 'If you do not cooperate with us then we will get a warrant.' It belies the fact of the strict legal bases upon which a warrant—

Senator ROBERT RAY—We think there is a very thin line. We would encourage ASIO to go and interview people, outside the warrant process as a preference, which is what they have done for 50 years. We would encourage them to do that under the normal process. We would probably encourage them to remind people that there is an alternative process. I think both those things are legitimate but threatening to say, 'Unless you cooperate, I am going to get a warrant,' is outside it. If you come across an example of that—I should not speak for the committee—we would like a supplementary written submission to that effect because we need to know it.

Mr Gould—We are in the situation where the media is nobody's friend because the community—

ACTING CHAIR—We would probably agree with that.

Mr Nicholson—has heard that ASIO, even though it is not supposed to, could potentially threaten someone using those means. We are behind. We cannot tell them, 'No, ASIO doesn't

have the power to do that and they are really not supposed to.' That is the level at which we would have to pitch it and it is not very convincing in our experience.

Mr KERR—One of the things that is coming through is that, in the face of the actual implementation of the system as we see it, there is a much higher level of fear in Islamic communities than would perhaps be seen as a rational, objective and understandable outcome. I suspect that—and I will just get your feedback on this—some of this relates to the legislation itself. Part of it relates to the whole range of television press reportage and characterisation of the Islamic community in Australia, which has nothing to do with this legislation but is on top of all that. Assuming that at the end of the day this committee does not accept that the circumstances are such that we will just allow the legislation to expire and it will remain in some form or another either for a short term or indefinitely—assuming that, because we obviously have not made any such recommendation—how should we propose addressing this high level of fear and concern in an effective way? What is the most appropriate response other than, say, repeal of the legislation and the very broad definition of terrorism acts, assuming that that is not going to be or may not be the consequence of this process?

Mr Gould—In answering your question, certainly there is a high level of fear, and in part it is due to the context. Uninformed opinion, whether it is in the media or generally in the community, does not help. It also does not help that all the proscribed associations under the act are, as far as I am aware, Islamic in character, or at least in name. I think it may be artificial to separate the context. The context in Victoria, for example, is that we have people who are alleging that Muslims are coming to Australia in huge numbers to infiltrate the country and declare it a Muslim nation, that all Muslims are essentially terrorists and, if they are not, they are having you on. Those kinds of opinions, which are held by a minority but a loud one, are out in the community. I think it is artificial to separate that context from the people who administer the act, ASIO. In our community's mind it is not inconceivable that ASIO officers may have prejudices against Muslims or even that one day we might not have a director-general as professional as Mr Richardson.

Measures outside the scope of repealing the act, for one thing, include recognising that other organisations and other movements around the world may have a violent nature. In acting on that fact, we need education and rhetoric backed up by concrete measures. I am not qualified to suggest what those are, but we need to back up the statements by people like Dennis Richardson and Mick Keelty, who we have a high degree of respect for, who basically say, 'We're targeting criminals, not Muslims, and it doesn't matter whether they are from a Catholic or a Muslim background.' Mr Keelty was engaging in some minority solidarity there.

Mr KERR—It would be very interesting, if we ever proscribed the IRA, to see the degree of concern amongst some groups if the IRA became active again. All this used to be an issue of fundraising amongst many of my friends and colleagues, I think across all political parties and including judges and what have you, giving to groups that were broadly in sympathy with the work of the IRA at times when it was certainly conducting terrorist activities in Ireland and England.

ACTING CHAIR—It would be even worse if they proscribed it in New York.

Mr Gould—That would go some way to allaying the fears of our community, but there are examples in the history of the IRA in England and the way the British government has dealt with that that members of our community who are aware of those use basically to say, 'Look, here was a democratic government, and all the safeguards were there, but miscarriages of justice still took place.' What we are essentially saying is that that would, I suppose, allay some of the fears that we are a particularly targeted community, but the essential issue is that these laws in themselves are, we submit, draconian and unnecessary curtailments of civil rights.

You used the example of the IRA. A lot of us say, 'They're not really a threat; that's never going to happen.' Many in the Muslim community do not really understand why particular organisations of an Islamic character are so widely feared. We would say that, with these kinds of laws, firstly, there is a line that has to be drawn on curtailment of civil rights. We would submit that it is naturally easier for the government to draw that line further out when it is only a minority which is affected. Secondly, irrespective of where that line is to be drawn in terms of a moral or civil rights assessment, there is still a point of diminishing returns. We would say that drawing the line any further out just creates too many problems and can in fact have the opposite effect to that which is intended.

Mr KERR—Can I ask you to focus on the question of what we should recommend. Perhaps you can come back to us later. But it seems to me that there are three possibilities that this committee will have to consider. The first is to allow the legislation to lapse. The second is to allow the legislation to continue subject to a further sunset clause or some mechanism of that nature. The third is to follow the recommendation of the inspector-general—that is, to allow the legislation to continue as a standard part of our intelligence arrangement. Those are the three possibilities. There is a whole range of subsidiary possibilities of recommending changes to particular components of the legislation if it remains.

Taking the possibility that either of the second two may emerge as the recommendation of this committee, it really troubles me that there is this very strong fear amongst the Islamic community. It does seem to me that we are in need of some further practical guidance from you, representing the community, as to what could be done, assuming legislation of this kind remains on foot. Certainly our view and I am sure that of the Australian parliament is that it is aimed at terrorist acts and criminal behaviour rather than persons on the basis of their choice of faith. It would be a very unfortunate outcome, I am sure, from all of our points of view if the legislation is kept in force in some form or another and this fear remains.

I do not necessarily want you to answer now, although, if you have an idea now, please do so. But can you reflect on the way we could shape recommendations that actually respond to this reality that has come through to us in a way that we did not expect. When we had some hearings earlier, the Director-General of ASIO, Dennis Richardson, said he had not had such sentiment coming forward from the Islamic communities before. I think my starting point was that there is a reasonable understanding of this out there and this is not an issue that is causing a high level of fear and distress. But, when we sat down and heard what people were saying, we found that, rightly or wrongly, it is.

Ms Sentas—There is a simple answer to that. There is a direct relationship between the level of fear and the expansiveness of ASIO's powers. Specific recommendations, if division 3 is not to be allowed to lapse, would be around the secrecy provisions in particular. They have an

incredibly negative impact on the Muslim community. It should be ensured that section 34VAA is repealed or alternatively that there be some kind of case-by-case determination by the prescribed authority, as has been raised by other submissions, so that it is not a blanket exclusion. That level of secrecy—not being able to talk to religious leaders, counsellors or one's family—has a really debilitating effect on the community. Sending money overseas or thought crimes—or what I think has become a thought crime—or talking to and associating with other people who may or may not be directly or indirectly related to a terrorist organisation means that you can fall foul of these provisions and invoke the powers. I think that is an important measure that needs to be qualified in the legislation.

Mr Gould—Essentially, I agree on the secrecy and the nondisclosure provisions, the fact that there is no right to silence and that the acts, as I understand them—I am not a lawyer—are not targeted enough to actual serious acts of terrorism and that broader acts such as association or sending money, even without knowledge, can trigger these kinds of powers. If there were a clear statement or some way to tighten up the operation of these powers so that it was much easier for us and other people to say they really were laws of last resort, and not just have to rely on the reasonableness of ASIO to use them as a last resort, that would go some way to allaying that fear.

In relation to Dennis Richardson, the director-general, not having found that: I do not know what other consultations he has undertaken with the community, but he certainly spoke to leaders in our community. We are seeing that people are generally quite relaxed at the leadership level because we know that we have a relationship with the government and we are not tied to any suspicious organisations. But below that, at the grassroots level, there are people who have a significantly higher level of fear.

Mr KERR—There is a large amount of money remitted both to family and to charitable organisations, which I think is partly a religious obligation. It is my understanding that there is an obligation to make charitable donations as part of the practice of being a Muslim, but there are also family obligations in many communities to make remittances. I assume that no-one is frightened of sending money back to mum and dad. If I am wrong, tell me. I assume that fear might exist where they are giving money to an Islamic charity. There have been some stories in the press that some of these Islamic charities are fronts for political organisations that may be proscribed or what have you. The mechanism that you used was to say, 'Contact the police and see whether they'll tick it off.' What was the response to that? Are you suggesting there should be a capacity to run something past ASIO or the AFP just to get a tick-off that it is okay? What sort of practical suggestion do you have here?

Mr Gould—That was not a recommendation. That person basically had a business to facilitate these donations. He wanted to know what, if anything, would fall across the line. Apparently he was not told anything; they just listened to him and did not say anything. Firstly, if there were that kind of mechanism, it would make it quite difficult for many in our community to go through that process every time they wanted to make a donation.

Mr KERR—I am not arguing for it; I was asking whether you were arguing for it.

Mr Gould—We did not have any knowledge of what other avenues he could pursue. Donations back to home countries can range from donations to mum and dad, grandparents or

the extended family, or towards the building of, say, a mosque in the village or town. Once you get to that level, people start to be fearful because the context in which they are operating is that if the government of a country were to suddenly adopt a view that Muslims are undesirables then these kinds of donations are exactly the things which they expect would attract unwanted attention. From our perspective, it appears that many in our community do have a perception that some in the government do not appreciate Muslims or they see them as undesirable. So all I am saying is that that can be a trigger. Even though I think that those kinds of donations would be fine, that is a level that starts to trigger interest.

If people make a donation but there is no particular place they want to make it to then, in the same way that many in the Christian community would want to give it to, say, a large Christian charity, they would feel more comfortable giving it to a large Muslim charity, but there is a fear that it might later be discovered that some of the funds of the charity have gone to something which the government then decides is going to be listed or proscribed—I do not know what the terminology is. So, in a roundabout way, they are going to attract that attention. The government does not have the time to go and seek out every single person who has made a donation of $20, but the fear is there. That is all that we are saying.

ACTING CHAIR—I think we had better wind it up there. Mr Gould and Ms Sentas, thank you very much for appearing before us today and for your contribution to our deliberations. We appreciate your time and your effort. Thank you.

[3.12 pm]

BIESKE, Ms Nicole Simone, Member of National Legal Team, Amnesty International

SMITH, Ms Rebecca, Advocacy Coordinator, Amnesty International Australia

ACTING CHAIR—I welcome the representatives of Amnesty International. I invite you to make some introductory remarks and then we will proceed to questioning.

Ms Smith—Thank you. I would like to begin by thanking you for the opportunity for Amnesty International to appear before you today. I would also like to share our appreciation of and thanks to the committee secretariat for allowing flexibility in the timetable so that we could get membership representation here today. Thank you very much for that. I would like to start off by providing a little bit of context. As you would be aware, Amnesty is a global membership organisation. We now have over 1.8 million people across 150 countries dedicated to documenting and countering human rights abuses. We are an independent movement free of any particular ideology.

As the committee would be well aware, Amnesty has been working on national security legislation since its introduction in 2001 and we did provide a comprehensive submission when the division 3 amendments were introduced. Keeping this in mind and also the commonality and consensus with many of the other people and organisations who have appeared before you today, we would like to target our opening remarks to the substantive points of our current submission. To this end I would like to introduce Nicole Bieske, who is a member of our national legal team. She will address these points in detail.

Ms Bieske—The first point that I would like to make is specifically in relation to human rights obligations. One of the concerns that Amnesty has as an organisation is that human rights are not just for the good times. Human rights in fact are for the bad times. They are there to set the standards when things are difficult. So that is something that we would like to be kept in mind as we are analysing any of this legislation. As Rebecca has mentioned, we have been active on this legislation since the beginning of this process in 2001 and we remain concerned that the legislation still breaches our international obligations. We do acknowledge the information from ASIO that they have used their powers under the act eight times. We acknowledge that they have said that all eight warrants have been questioning warrants. However, this does not allay our concerns regarding the legislation. The issue is not whether it has been used; the issue is whether it exists in legislation—and it does. That is the reality that we have to consider.

Our fundamental concern is that the act provides for detention of people who have not been charged for up to seven days. Our position is that this may amount to arbitrary detention, which would be in breach of article 9 of the ICCPR. Amnesty International is opposed to any government detaining a person unless that person is charged with and prosecuted for a recognisable criminal offence without delay. The fact that ASIO has not yet used the detention warrant does not in any way mean that we should not be concerned about the possibility of a detention warrant being used. In any event, as acknowledged by ASIO, the detention warrant process has been contemplated, so it is not outside the realm of possibility for them.

Our second concern relates to the incommunicado detention or possibility thereof. The act removes or undermines protections required under international law, including the right of prompt access to and assistance from a lawyer, the right to communicate and receive visits, and the right of foreign nationals to contact their embassy. The act creates the possibility of incommunicado detention of persons if they are unable to access a lawyer or their family. Amnesty International has grave concerns about such a possibility as in other places systems of incommunicado arrest and detention have facilitated mistreatment of detainees. We are particularly concerned about the application of the detention and strip search provisions to children 16 and above. We understand that the initial proposal was 10 and we were appalled by that proposal. We remain concerned at the inclusion of 16 and above. We are concerned that this breaches in particular Australia's obligations under the Convention on the Rights of the Child whereby detention of children should be a measure of last resort.

As has been emphasised by many organisations before you, we are also concerned about the limits on the ability to access legal representation, and the role of lawyers. We are particularly concerned that the legislation does not appear to clearly protect a person's right to access a lawyer if it is a questioning warrant as opposed to a detention warrant or, additionally, a questioning warrant that is converted into a detention warrant. There is in fact very little information or detail in the ASIO Act as to the position of a person who is the subject of a questioning warrant, and that remains of significant concern to us in relation to the clarity of the drafting.

We have been concerned since the beginning that the act prevents a foreign national from contacting their embassy or an international organisation and we believe that this may be in breach of the Vienna Convention on Consular Relations, specifically article 38C. We are also concerned, as is the Federation of Community Legal Centres, that the act shifts the evidentiary burden and that it has the effect, to a degree, of reversing the presumption of innocence, which may, again, be in breach of the right to a fair trial. The question in relation to that, which we are happy to get into later on, is: how you prove that you do not know something? That is what this act would require you to do.

Finally, our significant concern is in relation to the secrecy provisions, and in particular the limits on outside scrutiny, because of the operation of the provisions in 34VAA. These provisions particularly impact on the ability of organisations other than ASIO to comment on their operation and effectiveness, which I note is part of the remit of this committee. These provisions may also limit the possibility of an appeal to the Federal Court or a prosecution for contravening the safeguards that are included in section 34NB of the act. We have recognised those safeguards as commendable but we are concerned that it may not be possible for prosecutions to occur. We are also significantly concerned because it limits the role of organisations such as ours to monitor and to keep track of what is actually occurring under this legislation. In light of all this, Amnesty International would encourage the committee not to renew the amendments to the ASIO Act once they cease to be in force on 23 July 2006. We welcome any questions.

ACTING CHAIR—You say that you recognise the need for an appropriate response to any increased threat to national security. Obviously, you consider our legislation to be an inappropriate response. What do you consider to be an appropriate response?

Ms Bieske—We would expect that an appropriate response would acknowledge human rights and abide by our human rights obligations. We are concerned, as I have indicated, that this legislation in fact does not do that.

ACTING CHAIR—You do not give us many clues, do you? You tell us what we cannot do; you never suggest what we could do.

Ms Bieske—Indeed. It is not our role to suggest what you can do; it is our role to comment on the concerns that we have in relation to the human rights issues in legislation that currently exists or is suggested.

ACTING CHAIR—You also mentioned that human rights are not just for the good times—they are for the bad times as well. When you are considering the effect of legislation, the fact is that it was introduced to cover people who may have knowledge of a terrorist attack somewhere else—Madrid for example. If someone had some prior intimate knowledge or information that might be used to prevent that attack, but was not involved and could not be accused of an offence or a terrorist act, don’t you think we should consider the human rights of the victims?

Ms Bieske—Absolutely. We comment in relation to human rights violations perpetrated by armed groups—or what you would call terrorist groups—as well as human rights violations perpetrated by governments. So we do require the protection of human rights, but we believe there is a framework that can be established that does accurately and adequately protect human rights and ensure that they are recognised. We have been advocating this internationally in various countries, some of which you have referred to and many of which you have not, since, in particular, September 11.

ACTING CHAIR—What is the framework that should be in place? For instance, take a person in Australia who was not suspected of being involved in any way but had information that could have prevented that attack. Without this legislation, how would we get that information?

Ms Bieske—Our fundamental concern in relation to this legislation, as I said, relates to the detention process. We do not believe that that detention process is or should ever be acceptable.

ACTING CHAIR—You are not answering my question.

Ms Bieske—I am, in fact. I am pointing out to you that we have concerns about the legislation that is in force, which is not say that it would not be possible to introduce legislation that would not include the detention provisions or that would, if you have a questioning power, allow access to a lawyer, and that would not equate to de facto detention in that respect. We have pointed out the specific concerns that we have about the legislation that is currently in place, which is not in any way to say that you could not enact legislation that dealt with our concerns.

Mr KERR—I think you have got the misfortune of appearing last after two days of submissions, many of which have covered much of the same ground, so we may be a bit grumpy and impatient about some things.

ACTING CHAIR—We will try not to be.

Mr KERR—I would like to address a couple of points. The first is about the right of access to consular officials, which is not a point that has been raised, I think, in any other submission that we have heard so far. Are you asserting that this needs to be statutorily based rather than simply relying on the provisions of the existing legislation, which does give a power to the issuing authority to specify other persons a detainee is entitled to contact? Do you think it actually needs to mention the Vienna convention?

Ms Bieske—We do, yes. The difficulty we have is that we know that there are eight warrants only because that information has been provided to this committee. We do not know who the subjects of the warrants were, and we do not know if they were Australian citizens or not—we do not know if that obligation has been complied with or not. We believe that for that purpose of ensuring that it is complied with, it should be specifically included. That is something we have had in our submissions from the very beginning—from 2002—and it has not been picked up by this committee at any point.

Mr KERR—I am still trying to wrap my mind around the reversal of the onus of proof. I do understand the point you are making. You say it is very hard to prove a negative. Equally, it is almost impossible for the prosecution to prove a negative. That is why in some instances, where a matter would be peculiarly within the knowledge of a person, the criminal law has always, either at common law or via statute, had a reverse presumption of evidence in that kind of circumstance. I am just wondering whether this is one of those circumstances that normally would attract an evidentiary shift in the presumption or whether this is something that is outside where we would normally have allowed it to be and is common in the rest of the legislative frameworks that we have developed. Can you try to clarify your concerns. Whilst the point you make is true—that it is difficult for somebody to prove a negative—one would have thought that all that is being called upon a person to do is to provide a basis for the claim that they have no knowledge. It would mean giving sworn evidence, for example.

Ms Bieske—You will note that the legislation requires that the person show a reasonable possibility that they do not have information. They do not just have to suggest; they actually have to meet a standard. Part of our submission is that that standard is too high. But my understanding is that, generally speaking, the evidentiary burden rests with the prosecution, as it does for the majority of prosecutions—I am not a criminal lawyer, so I do not have the expertise.

Mr KERR—Indeed it does. But there are some circumstances that have always historically been in the criminal law, and included by statute later, where a matter is peculiarly within the knowledge of somebody. Take, for example, a provision that requires somebody to hold a particular licence or permission or something of that kind. The prosecution could not reasonably be expected to prove it, and sometimes the evidentiary basis would be shifted to the person who was subject to those charges. Perhaps come back to us on that. I can see it both ways here. I can see why it may present a difficulty under some circumstances, but equally I can see that unless you have something like that it would be awfully hard for the prosecution to say, 'This person failed to answer the question,' if there was an assumption that simply standing mute did not give rise to a presumption that you were failing to answer.

Ms Bieske—If you consider the legislation in its full context, you see that it is inevitably a frightening experience. You are being detained or questioned by ASIO in a de facto detention process. You may or may not have a lawyer, who really cannot give you advice while you are

being questioned. So there is concern starting with that context: that a person who may not answer may be frightened, may not understand or may want to speak to the lawyer before they can fully answer the question. That is the context within which this would be occurring. In any event, our position is that the shifting of the evidentiary burden is inappropriate, particularly in relation to these offences, because, as I said, I cannot understand how you can prove that you do not know something. I have never been to Tanzania; I cannot prove it to you. How can I prove that I do not know something or that I do not have something?

Mr KERR—You give sworn testimony to the fact that you do not know it. You simply stand up in court and say, 'I swear I did not know it.' Then you have discharged the evidential burden.

Ms Bieske—The problem that that gives rise to—and this was also pointed out in the submission of Patrick Emerton—is that, in effect, you are forced to testify. To some degree you should have that choice, and you really do not, because to clear yourself you are forced to testify if you are prosecuted. I note also that the ASIO report states that there is currently one person who has been charged with a 34G offence. It will be very interesting to see, firstly, if that is going to be open to the public for us to monitor and understand how the process might work and, secondly, what that person has specifically been charged with, because we do not know. So it has those flow-on implications as well as the problems that we initially have in terms of being forced to testify, as you just said. The only way you can prove your innocence is to testify.

Mr KERR—I understand. If you could come back to us with a little more detail on this, that would be good. At the moment, even I—with a fair disposition towards shifting this out as far as I can—hear the argument but I am still not persuaded. If there is a substantial point here, I would like to be able to absorb it and treat it on its fullest merits rather than on this kind of discussion, where I am not really grasping sufficiently what you are putting to me.

Ms Bieske—We can do that.

Mr KERR—Those are the only two points that have not been addressed at length. I am sorry: you really are getting the backwash from all of us who have been hearing lots and lots of submissions.

Ms Bieske—We anticipated that would be the case.

ACTING CHAIR—I want to follow up on one thing. I talked earlier about appropriate responses. Is there any detention regime in any country anywhere in the world that you approve of?

Ms Bieske—I cannot profess to have knowledge of every country anywhere in the world, I am afraid.

ACTING CHAIR—We are looking for some models. We think ours has a lot of safeguards, and you do not like ours. So I am trying to find one we can model it on.

Ms Bieske—We cannot profess to have knowledge of every regime that exists around the world. You would be accurate in observing that our role is to be critical of the human rights implications, so we have been. I know that you have considered the example of Canada. We

have made submissions in relation to the Canada review that is currently taking place. With the United Kingdom and the House of Lords decision, we made a submission in that application as well. So we have been active to try and ensure that human rights are protected. We believe and hope that you would acknowledge that everybody can always improve.

Ms Smith—We can give further evidence of our contributions to those processes, too, if that would assist.

ACTING CHAIR—Sorry?

Ms Smith—We could give a supplementary submission on our comments to the Canadian and UK governments.

ACTING CHAIR—It is not that so much. I would hope that Amnesty International, through its various arms throughout the world, would have at least one of these detention regimes that it considers to be better than any other. Even if Amnesty did not like it perfectly, that might be one that we should aspire to. I simply do not know what that one is. At the introduction of this legislation, there was a tremendous amount of time devoted to putting what we consider safeguards into this legislation. Senator Ray has gone, but you have heard him raise today on many occasions the fact that if people had a choice they would choose this piece of legislation over many others that exist. That does not mean it is perfect. But he is saying that they would choose this over many others. I would be interested if you had not a model piece of legislation but at least one instance of a detention regime you think we should aspire to.

Ms Bieske—The difficulty that I have with what Senator Ray has been saying in relation to, for instance, mandatory detention for asylum seekers—which is something that Amnesty have been very active on—is that we believe that that is a breach of human rights as well. We believe that that fundamentally breaches the right to be free from arbitrary detention under article 9. So our response to that is that that is bad and this is bad. They are bad in differing ways and to differing degrees.

Mr McARTHUR—Have you got some that are relatively good and some that are relatively bad?

Ms Bieske—We would not classify them in that way.

ACTING CHAIR—Everything is bad?

Ms Bieske—Not everything is bad, but everybody can always improve. Consider, for instance, on a different issue, Europe's prevention of torture regime. The countries that you would not expect to have problems in fact acknowledge that they can improve. Austria, for instance, has been criticised and will improve. You may think that they have wonderful standards, but they could still improve. That is our role; that is our job: to work countries towards those standards.

Mr McARTHUR—So you have not got any relative positions? Obviously, some countries are worse than others in this whole area of 'human freedoms'. But you are saying that your organisation is challenging every country around the world. Is that your position?

Ms Smith—Where there is a breach of international human rights standards, yes.

Mr McARTHUR—I have read some of your stuff challenging even Australia. But between Australia and some Third World countries I would suggest there are obvious differences.

Ms Bieske—In our annual report, we cover 148 countries—I have to check that—and make varying degrees of comment about all of them. Absolutely: different regimes have different problems in different ways. So the criticism we make within Australia may not be the same as the criticism we make in Canada; it may be a different issue. But we do not say, 'This one's better and this one's worse.' We just acknowledge the human rights standards.

Mr KERR—You have some absolute standards that you want to hold countries to—

Ms Bieske—Of course we do.

Mr KERR—for example, in relation to the death penalty—

Ms Bieske—Torture.

Mr KERR—and detention without charge.

Ms Bieske—Arbitrary detention.

Mr KERR—So this is a derogation—albeit, I think the committee would say, not to a substantial degree. I think that would be the general view of the parliament. But it is a derogation from that absolute standard that Amnesty urges upon every jurisdiction.

Ms Bieske—That is our concern and has been our concern throughout in relation to the standards that we need to achieve.

Mr McARTHUR—What does Amnesty think of September 11?

Ms Bieske—We condemn the act, of course. We condemn any act which has those implications.

Mr McARTHUR—Do you think you should make some attempt to prevent a similar occurrence?

Ms Bieske—Of course we should, and we would hope that that could be done, as I indicated before to Senator Ferguson, with appropriate compliance with acknowledged human rights standards. We criticise both sides. We criticise all people who perpetrate human rights breaches. We do not pick on particular governments; we criticise everybody, and we are critical of any country that breaches those standards.

Mr McARTHUR—The governments of the day have to take some action if you respond to the—

Ms Bieske—We acknowledge that as well, but we would hope that that could be done, as I indicated to Senator Ferguson, in compliance with human rights obligations.

ACTING CHAIR—One of the difficulties that we have in framing legislation is that sometimes we are almost forced to make a decision or take a stand and make some compromise. You do not have to, because you can have a blanket rule that this is your standard and you are not going to deviate from it one iota. We sometimes have to make some decisions when we consider the human rights of people who are potential offenders and those who are potential victims. I think, unlike you, some of us would tend to come down on the side of wanting more to protect the human rights of potential victims than the human rights of potential offenders. That is something that you cannot do, because you have the same standard for both.

We have to try and provide legislation which we think fits the bill—in other words, which provides the best outcome for both sides. I think that is where we differ. A lot of work was done by this committee on the original legislation to make sure that we at least came as far as we could in meeting the concerns of community organisations, and we did come a long way. We did not come as far as everybody wanted, but in the end those of us who were involved in the passage of the bill felt that we had a pretty good outcome. There was a lot of discussion between opposition and government. There is a variety of views on this. We tried to complement all of those views in the best way possible.

Ms Bieske—I am certainly aware of the work that was done by the committee, but the concern that we still maintain is that this legislation goes too far. It goes too far in the detention regime, in particular in relation to the questioning regime. We are very concerned about the clarity in the legislation about access to lawyers, whether you are detained, whether you can leave, and all the information which is detailed in our submission. We acknowledge that that work has been done, but we still have concerns about it. We are concerned that in your attempt to protect the victims you are in fact going too far, casting too broad a net and violating some of the fundamental rights that we believe should not be violated.

ACTING CHAIR—I do not know how we are going to accommodate everybody and all of those concerns. That is why I said that, if you could come up with the model that accommodates everybody, we would be very pleased. We would have a look at it too. We share your concerns. I do not think any person involved with this sort of legislation is not concerned about the human rights of individuals, but sometimes we have to take some decisions which are not easy.

Ms Bieske—I would also like to draw the committee's attention to the fact that our submission also goes into some detail in relation to the operation of the legislation and the specific concerns that we have about that operation.

ACTING CHAIR—I noted that you talk about the executive and ministerial discretion and things like that, which are issues that we have looked into.

Mr KERR—We have had a lot of submissions—

Ms Smith—We appreciate that.

Mr KERR—and we are not trying to dismiss your particular submissions, but the two that I was drawing attention to are ones that have not been discussed at length or the subject of other submissions.

Senator SANDY MACDONALD—I wanted to check that the main point of the last discussion was that the thing that Amnesty find most objectionable in this legislation is the detention warrants.

Ms Bieske—Correct.

Senator SANDY MACDONALD—If it were not for them and what you regard as the arbitrary nature of that potential detention, you do not have a lot of problems with the rest of it?

Ms Bieske—We do. As I have indicated, we have problems with the questioning warrants—access to lawyers in particular and the exact detail of the questioning warrants. There was the list that I went through initially: the application of the legislation to children, the relationship to foreign nationals, the evidentiary burden in particular, also the secrecy provisions, are of significant concern to us. So just removing the detention, no, that will not be sufficient to deal with the concerns that we have.

Senator SANDY MACDONALD—We can't buy you off by just removing the detention provisions?

Ms Bieske—Unfortunately not, I am sorry!

Senator SANDY MACDONALD—We will leave it there, then!

Mr BYRNE—With respect to 34VAA, the secrecy provisions, Senator Ray put forward, I think it was yesterday, that a lot of the evidence that we have received from organisations such as yours and community legal services is that this is a key issue. But he was soliciting a view, and I would too, from you. For instance, if a warrant has been issued so that the onus of proof in terms of the secrecy comes back to ASIO and they then felt the need for these secrecy provisions, they would have to prove that to the issuing authority. If the issuing authority were convinced then a blanket ban would be applied. Do you have a view on that?

Ms Bieske—I would anticipate that, rather than this blanket requirement, that would be a better way for the legislation to operate. But our specific concern is that organisations such as ours are unable to monitor the human rights implications and concerns of this legislation, which effectively means that we are unable to comment on half of what this committee is considering. So we would also want that to be considered.

Mr BYRNE—But you argue that it would be a step forward?

Ms Bieske—It would be a step forward, yes.

Mr BYRNE—Okay.

ACTING CHAIR—As there are no further questions, thank you very much. I know you have sat and listened to a lot of today's proceedings, so you would have heard a lot of the questions that have been asked, which have indeed covered some of the issues that you raised. I do not want you to feel you have been short-changed, but we would only be repeating exactly the same things if we continued. Thanks very much for your contribution and for your submission to the inquiry. I am not sure that we will come to conclusions that you will agree with entirely because I do not know that we ever have in the past, but thanks very much for your contribution. We do appreciate it. We will take all of those things into consideration in our deliberations.

Ms Smith—Thank you.

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

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

Committee adjourned at 3.43 pm