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PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD

Reference: Review of the ASIO Legislation Amendment (Terrorism) Bill 2002

THURSDAY, 2 MAY 2002

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JOINT COMMITTEE ON ASIO, ASIS AND DSD

Thursday, 2 May 2002

Members: Mr Jull (Chair), Senators Calvert, Sandy Macdonald and Robert Ray and Mr Beazley, Mr McArthur and Mr Leo McLeay

Senators and members in attendance: Senator Robert Ray and Mr Beazley, Mr Jull, Mr McArthur and Mr Leo McLeay

Terms of reference for the inquiry:

Review of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

WITNESSES

Committee met at 9.32 a.m.

CLELAND, Mr Bilal, Secretary, Islamic Council of Victoria

CHAIR—I declare open this hearing of the Parliamentary Joint Committee on ASIO, ASIS and DSD, and welcome witnesses and members of the public. The committee has been requested by the House of Representatives to inquire into and report on the proposed legislative reforms in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. Today the committee will take evidence from the Islamic Council of Victoria, the Castan Centre for Human Rights Law, the Law Institute of Victoria young lawyers section, the Federation of Community Legal Centres, the ACTU, the Victorian Council of Social Service, Amnesty International, Mr Joo-Cheong Tham and ASIO and the Attorney-General's Department.

I now welcome the representative of the Islamic Council of Victoria. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as the proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Cleland—I presume everyone has the submission that we sent in. It was a short submission. We had previously made a submission to the Senate committee that is looking into the terrorism laws as well. Going on what has happened, particularly in the United States, the Muslim community is very concerned that the term 'terrorism' may have more of an ethnic and religious connotation than it should have and that the community could be targeted unwarrantedly. There has been profiling based on religious and ethnic affiliation in the United States where one of the President's own security staff was unable to fly on a plane because he was an Arab-American. We would ask the parliament to make sure that that sort of profiling just does not have any role in Australia. Criminals should certainly be picked up but people should not be discriminated on the basis of their religion or their ethnic group. I have two articles here which I am not sure how I can make available to the committee. One is from an American Islamic site containing an article entitled 'Alienating Muslims' and another from the *Arab News*, Saudi Arabia's first English language daily. The *Arab News* has someone from the *Independent* editing it, which means it is better than some of the other local stuff. A staff writer has written on the US situation for Muslims after the terrorist acts last September.

CHAIR—If you would like to table those we can accept them.

Mr Cleland—The very term 'terrorism' can be used in a very emotive way. We have seen it used in our recent western history in many different ways, going back to the Second World War when the Germans described the French partisans as terrorists and took strong action against them. Mugabe now is saying that journalists and the democratic opposition are terrorists. In Turkey just recently a Kurdish man who put a Kurdish poem on his wedding invitation was arrested for spreading terrorist propaganda by using the Kurdish language. He may face four years in prison.

Most of our community—or two-thirds of our community—comes from overseas. Only about one-third is born in Australia. Those who have come from overseas often come from dictatorial regimes. They have come here for freedom. They have come here because of the situation. They are very worried that security concerns could be used to take away their rights. In many dictatorial countries, 'security considerations' are used to carry out all sorts of atrocities against the population. We beg the parliament not to allow that to happen in this country.

There has been a lot of criticism of the ASIO law in that it will allow the ASIO, which is an intelligence gathering organisation, to become a form of police force—a secret police. Everyone who has come from any dictatorial country knows what 'a secret police' means. It is frightening. Please take these fears into account. We do not want our community to feel that it does not belong. There has been a lot of nastiness, particularly since the September atrocities. We do not want our people to feel that they do not belong in this country. That is actually why I wrote that book that I have given to some of you this morning. We want our Muslim community and the non-Muslim community to understand that we have been part of this society for 200 years. We do not feel that we should be alienated—or that our people should be alienated—from the mainstream of Australian society.

There is Islamophobia in many countries. It does exist here in Australia. I do not think it is the overwhelming attitude, but we have had a very bad period with the *Tampa* crisis, the Lebanese rape gangs and then September 11, which was laid at the door of Muslim lunatics. Of course, terrorism is against our religion and it is against all civilised religions. In Islam, to deliberately target civilians or to deliberately intimidate civilians with armed force is considered to be terrorism. But 'terrorism' is a very emotional term and it is very dangerous once it becomes part of national discourse, because anyone can end up being called a terrorist.

The specific criticisms of the legislation are given on pages 5 and 6. I am sure they are common to a lot of submissions. They have been discussed here in the media; they have been discussed in various legal groups. The power to arrest is of great concern. There is a lot of cooperation with ASIO in the community because it is an intelligence gathering body. It is believed to be a genuine body looking after the security of this country. If it becomes a law enforcement body a different attitude may develop, and we do not want that to happen. We do need an efficient intelligence-gathering body in any country.

The right to hold people incommunicado is very common in dictatorial regimes. People disappear from the street—they cannot contact their families and they cannot contact lawyers. It leads to abuse of power in that situation, especially when the right of legal representation is actually denied in the suggested legislation. The right to remain silent is taken away. When people do not have legal representation and when they are held incommunicado this is open to abuse. If parliament feels that it has to do this and that there is just no way it cannot do this, it must make a provision that any use of excessive coercion or torture is very strongly punished by the Australian legal system—that there is a way of tracking it down and it is punished. As you know, in the United States there has been open discussion of the use of torture against those who have been arrested.

The fact that a person does not even need to be suspected of a crime to be arrested is also a very dangerous provision. I believe it is important to protect the population of Australia from abuse of power. I make one further point: 30 years ago I was involved with the Committee for

Democracy in Australia, which was a body dealing with the Ustasha. Ustasha was a terrorist group which I believe acted here in Australia, and ASIO knew about it and that was not made public. That means that there is a problem with any public body that is not strongly supervised. We believe that all of those problems of ASIO have been overcome in the reforms since, but there is always the danger of abuse of power—and that is what our system is supposed to avoid. Thank you.

CHAIR—Your relationship with ASIO at the moment is obviously good. Can you give us some indication as to what extent that cooperation between the community and ASIO extends?

Mr Cleland—Whenever we are targeted—such as when Muslims were being abused during the Gulf War and after the terrorist attacks in September last year—ASIO makes itself available, it lets the community know that it is aware of the threats that our community is facing and that it is looking at obvious threats to the community. We feel that they are a security blanket, actually, that they are protecting us. It is the same with the state police. They have been absolutely wonderful, particularly since the September occurrences here and with the Islamophobia on some of the talkback press. People were beginning to feel very insecure.

CHAIR—In your submission, you were quite critical of the press but in particular of the talkback hosts. Has that eased a bit?

Mr Cleland—Now it has, yes. But it can be whipped up so quickly and so easily, and I think that is a danger. We believe in freedom of expression, but freedom of expression should not include the right to incite pogroms.

CHAIR—Was it across the board on talkback radio, or was it specific shock jocks?

Mr Cleland—Shock jocks. The Human Rights and Equal Opportunity Commissioner made a statement on it, and I think I referred to it in the submission.

Senator ROBERT RAY—I think you quite rightly criticise profiling, but it does occur in other arms of government. For instance, Customs certainly profile. If you have a track record of visiting one or two countries where drugs are readily available and if you have visited there four or five times, you will be profiled. If you meet a certain age profile in certain countries, immigration will profile you. So it is difficult to write laws to outlaw profiling. Do you have any suggestions as to that?

Mr Cleland—If you wear a turban or a lady wears hijab or if you look like an Arab, that should not be an excuse. If you have been in bad countries or if you have a record, those sorts of things are different. But it should not be based on racial or religious group. There should be some link to something wrong before that can occur. The President's own security guard was put off a plane; you cannot say that he was profiled on the basis of his criminal connection. It was just because he looked Arab.

Senator ROBERT RAY—One of the questions we are trying to grasp here is whether this is a directed policy, because it has happened in a lot of countries around the world, not simply Australia. You read reports of it happening in a whole range of countries. Is it just assumption by lower echelon officials? I do not know.

Mr Cleland—It could be.

Senator ROBERT RAY—You do not know, either.

Mr Cleland—We know that it has caused terrible alienation within the United States amongst the Muslims and Arabs, and it has been taken up throughout the Muslim world as an issue, a grievance, with the US. We do not want that for Australia. We want Australia to have good relations with the Muslim world.

CHAIR—What about Britain?

Mr Cleland—Britain has a more sophisticated view of terrorism. It has had experience with the Irish problem, and it is not making sweeping laws. I have been watching all of the Islamic web sites in the world and the British ones are not complaining, and I think it is because Britain is within the network of the European Union, as well, and the people are protected from excessive abuse of power. The United States has a bill of rights, but it seems to be being served in the breach rather than in the fact. America has not settled down yet, I do not think. The situation there is a cause for concern for all of us. We do not want Australia to have that reputation.

Mr BEAZLEY—If this bill were to pass in some form, what would you consider an adequate defence, or at least a mitigating arrangement, for people who were picked up and detained in these terms—possibilities of legal representation, non-recrimination from statements? What sort of things do you think about there?

Mr Cleland—I think everybody has got a right to legal representation, but it is very dangerous if people are just taken incommunicado, without legal representation, and put in the control of public servants. I have been a public servant and I know that I would not trust all the public servants to always obey the rules of justice. I do not know. It is very difficult question, I know. But we do have to remember that Australia is based on respect for the rights of the human being and the individual. We should never move away from that, but we also, of course, have to look after the security of the country; I understand that. But that should not be at the cost of democracy and the civil rights of the population. There has to be protection of people's rights, and you cannot be just picked up because somebody thinks it would be a good idea to grill you for a couple of days. There should be some reason for it.

Senator ROBERT RAY—With due respect, I do not think the legislation is quite that bad. They cannot just pick you up.

Mr Cleland—I have been told that you do not even have to be suspected of a crime. You can be picked up—

Senator ROBERT RAY—No. It is true that you do not have to be suspected of a crime, but there are requirements on the Director-General to have ample grounds. That must be signed off by an Attorney-General and approved by a prescribed authority. So I do not think it is quite as—

Mr Cleland—The prescribed authority is probably critical. If it is subject to the power of the executive, I think it is a danger. It should be judicial. The executive's power should not be allowed to become too dominant. This is the way towards dictatorship.

Senator ROBERT RAY—You will not get an argument from me on that, but I am pointing out, just for the record, that it is not a low hurdle or just a nonexistent hurdle for someone to be picked up. It may be inadequate, but there are, at least, some safeguards there.

Mr Cleland—We have to rely on you to defend our civil rights. You are our representatives.

Senator ROBERT RAY—I am sure we will go on and tease out a few more areas of protections that need to be put in, but I did not want it to stand on the record that ASIO could just flippantly pick up someone. They have to have ample grounds, and ample grounds that can be checked by the Inspector-General. Those ample grounds are then checked by the Attorney-General, and then the Attorney-General, through the Director-General, makes a submission to the prescribed authority. They have to do all that. That may not be adequate, but it is not flippant.

Mr Cleland—Too many political people. Our judiciary is there to defend our legal rights. The judiciary must be involved, otherwise you get political representatives of the executive.

Senator ROBERT RAY—I think a lot of us would support that latter point. The higher and more mature level of the judiciary involved in this, the better.

Mr BEAZLEY—There has been a lot of discussion amongst committee members about forms that legal representation might take. Currently there is no provision in the act. In fact, the act would, in all probability, make certain there was not legal representation for the person who had been picked up for questioning. The suggestion has been put forward that perhaps a panel of security cleared lawyers would be one way of getting around it. If that were to occur, what sort of background would you like to see such lawyers to have, in relation to your community?

Mr Cleland—I think those lawyers certainly should have knowledge of the Muslim community. They should not be culturally illiterate.

Mr BEAZLEY—Or some should have it.

Mr Cleland—It should not be white Anglo-Saxon Protestants choosing all the security cleared political lawyers. There has to be some way that they reflect the demography of the Australian people.

Mr BEAZLEY—Your understanding of the background of lawyers whom your community may have used for a variety of purposes over the years—do such lawyers readily come to mind?

Mr Cleland—We have got quite a few in the community who are aware of the community and quite a few the community use from outside the community.

Senator ROBERT RAY—Would you be happy to have the Law Council in Victoria and New South Wales appoint such people?

Mr Cleland—Yes.

Senator ROBERT RAY—You quote in your submission:

Australia had no way to be certain terrorists, or people with terrorist links, were not among asylum seekers trying to enter the country by boat from Indonesia ...

I am not trying to politicise it. I hope you will be reassured that the Director-General of ASIO, giving evidence on Tuesday, said that there was not one occasion in the last nine months that the provisions proposed in this act would have been invoked in regard to asylum seekers.

Mr Cleland—Good. I am sure the intent is not evil but in the future it can be used by people with evil intent. That is what we have to be concerned about.

Senator ROBERT RAY—All right. You say that. Most of the witnesses coming before us are having this difficulty. They would like the bill opposed. But we say: if it is not opposed, how can it be amended to make it relatively—not entirely—acceptable? We understand that you and a lot of other witnesses have that difficulty. But I now put to you this question: having said that there is potentiality in the future, do you think a sunset clause of three years would assist?

Mr Cleland—Yes. Wonderful. There should be a sunset clause. But please do not use that to take away civil rights.

Senator ROBERT RAY—No, I understand that. I understand the position you are in in saying that you would support a sunset clause. I am sure you would vote against the bill full stop.

Mr Cleland—Yes.

Senator ROBERT RAY—Yes.

CHAIR—There may also be provision for this committee to keep a monitoring role on the situation as well. Are there any further questions?

Senator ROBERT RAY—Do you at least understand the rationale of why ASIO in the initial period like to keep people incommunicado?

Mr Cleland—Yes, I do. But that is open to abuse.

Senator ROBERT RAY—Yes, I agree. So if we had a panel of legal representatives, that would help in part? It does cause distress to other family members who do not know where the person is—I understand that. But it would mollify it a little, wouldn't it, if they had proper legal representation?

Mr Cleland—Yes. It is very important that they are not just cut off from the world. There are too many abuses in too many countries where that occurs. We are not aware of it often in Australia, but if you have been living somewhere where you have a dictatorship it is a very dangerous period.

CHAIR—Mr Cleland, thank you very much indeed for your contribution today.

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

That the committee takes as evidence to be included in the committee's records of exhibits the documents entitled 'Alienating Muslims' and 'Muslims in US face more discrimination after 9/11' and presented by the Islamic Council of Victoria.

[9.53 a.m.]

JOSEPH, Ms Sarah, Associate Director, Castan Centre for Human Rights Law

KINLEY, Professor David, Director, Castan Centre for Human Rights Law

CHAIR—I welcome representatives of the Monash University Castan Centre for Human Rights Law. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Prof. Kinley—We would, please. The first thing we would like to say is that we thank the committee for inviting us to give evidence. We are glad to have the opportunity to do so. We are not going to retrace the steps of our written submission beyond saying the following. First of all, we would like to make it clear that from our perspective we see terrorism as a gross violation of human rights. Laws are needed to curtail and to prevent acts of terrorism and to punish and to rehabilitate terrorists.

Human rights laws and international human rights laws recognise these issues expressly—the rights of others must be protected against terrorism, public order must be maintained, national security must be secured and public health must be protected. These are all elements of international human rights law. The challenge that I think is presented to a country such as Australia, and any other democratically governed country, is the legal response to terrorism and how one curtails and prevents it. We are a nation governed by rule of law, and one of the elements of the rule of law is the notion of the proportionality of the law that is introduced to deal with perceived crimes or dangers.

In our submission we have specifically gone to relevant jurisprudence under both the European Convention on Human Rights and the International Covenant on Civil and Political Rights—the former because there is so much jurisprudence on this issue in the European court in Strasbourg and, therefore, by analogy can be relevant to us; the latter because we are signatories, of course, to the ICCPR. The fundamental concern for us is one of proportionality within the bill. We have to ask the question: to what extent is there a serious and imminent terrorist threat? I would not know that to the fullest extent; I have no doubt that ASIO would know better than I. There is a public perception that it is not as great as in countries such as, for instance, the United States and the United Kingdom, and with respect to the United Kingdom not only after September 11 but also because of the ongoing troubles—less ongoing, thankfully, but still ongoing—in Northern Ireland.

The overextension of parts of the bill, which my colleague Sarah Joseph will refer to in detail in a moment, does run the risk of bringing the whole justice system into disrepute. I need hardly say to a committee such as this that reference to, and recalling of, the Guildford Four and the Birmingham Six in the United Kingdom, even though they were issues that were peculiar to Northern Irish terrorism, nevertheless show that it brought a good deal of opprobrium to the

justice system in the United Kingdom. That is not something I think we should take lightly in Australia.

Finally in this general introduction, it is quite possible, as we mention in our submission, that we can derogate from some of the ICCPR obligations that are placed on us. The United Kingdom has done this in its analogous situation with the European Convention on Human Rights precisely because it says it has a national security issue; therefore, it says the Prevention of Terrorism Act in the United Kingdom should be enacted. It does potentially violate, on the face of it, the European convention, so let us derogate from the European convention. In a way, it forces countries to come clean. Indeed, that Prevention of Terrorism Act has been seen as appropriate by the European court authority. If we were to pursue this with the bill in its current, and I think potentially violating, form, the most secure way to do that would be to come clean and to enter a derogation under the ICCPR. Sarah would just like to speak briefly on three specific issues.

Ms Joseph—I want to summarise our three specific concerns with this bill. First of all, the bill authorises incommunicado detention of a person for periods of 48 hours. There is no prescribed limits to the number of 48-hour periods in which a person can be detained in such circumstances, potentially without access to lawyers, family, friends and, perhaps, even doctors. We believe the provisions regarding detention in the bill are really quite vague. For example, it says that a person's detention must be 'arranged by a police officer'. What does 'arranged' mean? Where is the person to be detained? Are they to be detained in a police cell? What is the role of ASIO while the person is in detention? These are all things that should be spelt out in the bill rather than being left to be guessed at on a future date. So our first concern is incommunicado detention.

Our second concern is that there is no judicial oversight of this detention. The prescribed authorities are not judicial bodies. A federal magistrate does, on occasion, operate in a judicial role but specifically under this bill does not. Third, the right to silence in respect of certain offences—namely, terrorism offences and section 34G offences—the right to silence has been abrogated, in breach of our international obligations.

The final point I would like to note is that it is exactly these sorts of laws which played a significant role in the miscarriages of justice which were very widely reported and referred to by my colleague—the miscarriages of justice of the Birmingham Six and Guildford Four in the United Kingdom. It is not only in dictatorships that such laws can lead to very severe abuses of human rights. Britain has shown that it can lead to abuses in comparable democratic countries.

CHAIR—Just how serious do you believe our potential breaches are? We have had suggestion made to us that we could almost become an international pariah if we go ahead with this in its present form.

Ms Joseph—I would suggest that a breach is a breach. There is a clear breach, for example, of the provisions regarding right to silence—article 14(2) of the ICCPR. There is no judicial oversight—a breach of article 9 of the ICCPR. In terms of us becoming an international pariah, that really is up to the international community, which is not always consistent in these matters. I cannot predict what the reaction of the international community would be to that.

Mr BEAZLEY—There are varied views on the character of this legislation in comparison to some others. I think it would probably be fair to say that, on the evidence that has been presented to us by folk in your position, these laws are less draconian than the Canadian laws, have some features in common with the British Terrorism Act, and are more draconian in some aspects and less draconian in others in relation to recent American legislation with regard to the Patriot Act. There are many countries now legislating on terrorism issues to try and get to grips with the character of crime which is not easily characterised in the normal criminal law. Have any of them entered exceptions into the international agreements to which they are party?

Ms Joseph—To my knowledge, only the United Kingdom has thus far. The United Kingdom entered a derogation to both the European convention and the ICCPR in December last year—but not in respect of legislation like this. That was in respect of legislation authorising the detention of aliens pending their potential deportation to another country. Britain has, in the past, entered derogations to legislation like this in respect of Northern Irish terrorism, but they have removed them because they removed the relevant provisions in about the year 2000.

Mr BEAZLEY—You would think that at least the minimum that would be incumbent on the parliament if it passed this legislation without amendment would be that we would be duty bound to do something similar?

Ms Joseph—I think we would—as the legislation stands, there are clear breaches of the ICCPR—but obviously not of the European convention because we are not a party. Therefore, it is incumbent upon us to enter a derogation. However, as our submission indicates, a state's right to derogate under the ICCPR is heavily circumscribed. I am not sure—I have my doubts that a derogation would, in fact, save this legislation. But certainly I think a derogation is the minimum obligation that we should be thinking of.

Mr BEAZLEY—Of the people who have presented evidence to us so far verbally—not necessarily in their written materials—you are the first who has so far come forward and put this into the context of the overall global situation which we now confront. We are in an unusual position in Australia. For the first time we have had the ANZUS treaty invoked. The Americans declared that they had an attack upon their national territory, which is one of the criteria that need to be ticked off in determining whether or not an act has occurred which activates the treaty. We have responded to that. Any party to the treaty is entitled to respond within the terms of their own view of what their national commitment ought to be, but some sort of response has to be made. In this particular instance we have committed troops to a conflict in Afghanistan in relation to the activation of the ANZUS treaty.

In the past when ASIO has been functioning in national security matters in its relationship with its international counterparts and, indeed, with other elements of the Australian intelligence community, it has been very much in the context of a quiet reflection on particular individuals or particular movements that may be threatening. In relation to the period of the Cold War, some of it was counterintelligence and some of it was active intelligence in relation to the Soviet Union. It was not a hot war type situation. When you look now at the contemporary operations of ASIO or the Australian intelligence community, insofar as you can make them public, there is much of an element of wartime, of real time responses, of situations coming to the attention of intelligence authorities globally, which indicate that acts are about to take place or acts have just taken place and may be replicated elsewhere, and the international intelligence community

has some evidence of that. That crosses borders. It does not necessarily mean that the only concern that we would have about an activity in Australia would be an action against Australia. It may be an activity supporting something elsewhere.

We have had, for example, emerge in public—and there are many other things that have not emerged in public—the situation of a potential attack on Australian interests in Singapore and the definite intention to attack American interests in Singapore. We also had a situation in Rome that was dealt with by the Italian police. Without knowing all the detail—and I do not know all the detail—it is quite clear that the operations were not just products of the Singapore or Italian authorities operating alone. They had advice given to them, and the advice came from many countries. So what ASIO and the broader Australian intelligence community have to handle here is information which may be transmitted to persons in Australia, picked up by their other means of getting that information, which indicates that offences may be about to occur in which we have some degree of involvement. So we are not here necessarily targeting an individual for something an individual is going to do, but targeting an individual who may have information about what someone else is going to do in some other country.

Part of our cooperation in what is now an ANZUS invoked conflict entails being able to make a serious contribution and, in the process, almost certainly saving human life and an ultimate deprivation of somebody else's rights. In that set of circumstances, do you conceive of any way in which you might enhance ASIO's power to interrogate someone who will not emerge ultimately under any form of legal charge—and that is not anticipated by them—but nevertheless obtains for them information which can be used in a timely way to stop somebody else's civil rights being massively breached.

A part of the situation that ASIO confronts is that anybody with a smattering of intelligence and knowledge understands that, if an ASIO agent appears before them, their obligation to answer the questions that he or she puts to them is nonexistent and they can sit quiet and the situation can proceed. You would agree that this legislation pretty comprehensively proposes to make you pay a penalty for behaving like that but, in the absence of anything else that would compel a person to answer a question which might be helpful in saving somebody else's civil rights, what would you do?

Senator ROBERT RAY—You only have a minute to answer that!

Mr BEAZLEY—We like to get lots on the record!

Prof. Kinley—What you say is not something I would disagree with. What you are saying is to presume—and, indeed, that is the way you are presenting it—that the person who is to be asked those questions is somebody who holds information. Our concern with that is—and it is always the concern with human rights lawyers, or lawyers one would hope—that there will be some people who may fall into that net who are in fact innocent and who do not have any information. Therefore, you must weigh up their rights against those of the people who would otherwise be affected by the information held by somebody who is in possession of information that could have that domino effect. That is the reason we have this concern.

We are not even necessarily saying that these amendments of some kind are illegitimate. It is just that their proportionality, the fact that they should be circumscribed, is necessary. We think

it is open to debate as to where that limitation should be. We look at analogous situations and indeed where courts have passed judgement on this. That is why we reach into the European convention and into the ICCPR where all these sorts of questions have gone through the intellectual, bureaucratic and judicial mill and come out with some guidelines. So we are drawing on those and presenting them to you—and before ourselves—comparing them to the provisions in this bill. We see them as not being commensurate; we see them as stepping beyond that. We do not necessarily undermine the need for some sort of amendments, given the situation that we are in. It is just a question of their breadth, their extent.

Mr BEAZLEY—Supposing the bill were amended to incorporate a right of legal representation, to incorporate a capacity for the information not to self-incriminate—

Ms Joseph—That would alleviate a lot of our proportionality concerns. I think the incommunicado aspect of the detention is one of the most potentially dangerous aspects of this bill, as well as the aspect that there is no limit to the number of successive 48-hour periods that a person can be detained. Even in the United Kingdom—and I do not think one can underestimate the long-standing terrorist emergency faced in that country—under the legislation repealed in 2000 there was a limit to the length of time someone could be held, which was seven days. It may be that it is unlikely that someone would be held for more than seven days under this legislation, but potentially they can be held for an unlimited period of time without any access to family, lawyers or even doctors.

Mr LEO McLEAY—It is true that under this legislation, if the Attorney-General is willing to continue to sign applications and an authorised person is willing to continue to issue a warrant, you could hold someone indefinitely. Would you see some value in a provision being put in there if, as Mr Beazley said, there were a pool of lawyers who could represent these people and if a person had the right to apply to the Federal Court for release after they had been held incommunicado for 24 hours and also had the right to apply to the Federal Court for release whenever an application for any subsequent warrant was picked up?

One of the difficulties we have been told about by witnesses so far is that of—and this is what the committee would like to see—these warrants being issued by judicial officers. But if you do that you have got to find some way to split the prescribed authority into two parts. There is the person who issues the warrant—you might be able to get magistrates to do that; the judges may not be willing to do that—but neither the judges nor the magistrates would probably sit there and oversee these interrogations for 24 hours and 48 hours. So maybe you would have to split them and say that a judicial officer has to issue the warrant. If you wanted to raise the level of the person who was overseeing the interrogation, you might say that a presidential member of the AAT has to be the prescribed person who oversees the interrogation but that after 24 hours, and on every subsequent attempt to renew the warrant, the person who is detained has the right to go to the Federal Court and seek release. To protect both sides in that, you might have to say that either ASIO or the person has the right to ask for that hearing to be in camera. ASIO might say to us, 'If the person gets out into an open court, they'll alert their co-conspirators,' or, if the person is worried and thinks that a lot of these other people think he has told someone something, they might be at risk. So if either side could ask for a closed hearing—if you had those sorts of safeguards—would that alleviate some of your problems?

Ms Joseph—It would alleviate some of the problems because it would guarantee some level of judicial oversight or judicial intervention after 24 hours.

Mr LEO McLEAY—One thing I should have mentioned too is that it will probably also take away the offence of self-incrimination. If you are going to make people talk then they should not be able to incriminate themselves. This bill goes halfway to that; it says you are given immunity from criminal prosecution but you are not given immunity from the prosecution of a terrorism offence. So if you took away the right to silence, you also give them the protection that none of the information that they give can be used against them. However, it has been put to us that one of the problems with that is that a character might come and say, 'Yeah, I confess. I made the bomb,' and you cannot do anything about them.

Ms Joseph—There are other avenues of investigation. There can be other sources of evidence besides just a confession. If ASIO were to believe that the confession was real, at least they would know where to look.

Senator ROBERT RAY—Or the police would.

Mr LEO McLEAY—My problem—and I think it is a problem shared by most of my colleagues—is that we read the Attorney-General's second reading speech where he says, 'These warrants are a measure of last resort.' We would hope that we would not let the legislation become so easy to use that it becomes a matter of first resort. But we also accept that ASIO say that they need this for intelligence. The Director-General is on the record, from a hearing earlier this week, that he sees the main thrust of this legislation is to gather intelligence not to be used as a vehicle to launch prosecutions. So we want to help them have an intelligence gathering operation which gives a bit to them but protects innocent people who get caught up in a drag net.

Prof. Kinley—This is the basic principle that I was referring to at the beginning: the fact that we are ruled by law. The intention of this Attorney-General, and maybe every subsequent attorney-general, is to use it only as a matter of last resort and we take them on their word. But the fact is that there is nothing more secure than having that legislated, even if it is in some less than wholly defined way—in other words, there is room for some discretion—at least more defined than it is at the moment. The issues that you raise—the examples that you suggest and whether they would satisfy us—are ones that we think would be appropriate. They are analogous to what happens to ASIO and the intelligence organisations when they are seeking warrants to place listening devices or to obtain information in a covert manner. There they must present themselves for a warrant before a magistrate. So they are going to another authority.

Mr LEO McLEAY—Or they could go to the AAT for that.

Prof. Kinley—But they are presenting themselves to another authority in order to have an overview. And it would seem to us that this would be analogous. And if it is about intelligence gathering, that message can be conveyed to a judge, or to a magistrate, in camera in a way that would protect the integrity of the mission of the project but also provide some measure of safeguard for the individuals who are being held and interrogated.

Ms Joseph—I am sure the Attorney-General would intend to use this as a last resort, but there is always the worry, as the experience and the anecdotal evidence in the UK showed, that those provisions authorising seven-day detentions appeared at some stages to be used as mere fishing expeditions. The UK provisions were not like these provisions. They did not authorise the questioning of people who might just have information and yet had not committed an offence; they actually authorised the questioning of people in relation to actual terrorist suspects. I think the majority of people arrested under those provisions were eventually released and charged with no offence at all, which does tend to point to some level of fishing.

Mr BEAZLEY—I would be very surprised—and I think ASIO would be very surprised—if anyone that they picked up and questioned in relation to this actually emerged as a subject of charges. This is intelligence gathering here; it is not law enforcement.

Senator ROBERT RAY—I would just like to ask two or three questions. We have gone through the dilemma of witnesses appearing before us who would rather the bill be defeated. We have to say, 'Can you jump that hurdle for a moment and assume it is going to be passed. How would you modify it?' Firstly, what would your attitude be to a three- or four-year sunset clause on the bill? That means that the bill would be in operation for three to four years and then subject to review. Then if the government want it they have to reintroduce legislation.

Prof. Kinley—It certainly would give us the opportunity to see how it works and it puts the Attorney on his mettle. Are you going to use this only as a matter of last resort because it will only be there for three years?

Senator ROBERT RAY—You probably know that there is no public acknowledgment about the level of warrants issued for telephone intercepts. The Director-General of ASIO has said on the public record that he would have no objection to having the amount of warrants sought and granted per year on the public record, without identifying people.

Prof. Kinley—For interception or for this?

Senator ROBERT RAY—No, for this.

Prof. Kinley—That would be fine.

Ms Joseph—That information would be very useful in at least giving the public some impression of the extent of the use as well as the extent of, for want of a better word, acquiescence of the prescribing authority. With regard to telephone intercepts, I do know that in a case in 1995 Justice McHugh of the High Court somehow had some statistics on telephone tapping warrants and he claimed 99.5 per cent of them were actually granted. If that sort of statistic should come out of an exercise, I think that would be very useful information for the public, especially in conjunction with a sunset clause. I think a sunset clause would be a welcome addition to the legislation. Again, such a sunset clause did exist in the UK legislation and that stayed in place in some form for 16 years.

Senator ROBERT RAY—Yes, I understand that. The Attorney is already on the public record as saying that, 12 months into the operation of this bill, he is going to request this committee to review it. I would think if we put a sunset clause in there would be a variation

then. Twelve months before the sunset clause would come into effect, the committee would examine and make recommendations to the Attorney and then through to the parliament.

Prof. Kinley—The rationale that you raised for it being reviewed again after three years was precisely the rationale for the five-year renewal of the PTA—Prevention of Terrorism Act. People can have a look at it again. Of course, it always got renewed until 2000, but everyone then did look at it and concentrated on it.

Senator ROBERT RAY—One of the concerns you have raised here today is the possibility of a renewal of the 48-hour period time and time again. When you look at the criterion that is used for the granting of this, it relates to information people have and there will be a time limit on that. It is almost as though you get to a point where you can get no more information out of someone. Then another one of the criteria that the A-G uses that does not go before the prescribed authority says that the minister has to be satisfied that:

... if the person is not immediately taken into custody and detained, the person:

(i) may alert a person involved in a terrorism offence ...

It almost seems as though even though the prescribed authority cannot rule on that it is going to be the dominant feature when you go beyond 96 hours. You cannot get any more information out of anyone, but there may be good public reasons not yet to release the person to warn people, but in fact that is not included in the act in terms of the powers of prescribed authority.

Ms Joseph—With respect, you are making the assumption that the questioned person is complying with section 34G, in that they are giving all of the information that they might have. Even though it is an offence not to give the information, they might not do that. So there may still be information to get, on top of the other reasons to detain them.

Senator ROBERT RAY—That is right. One of our concerns is that, once the prescribed authority has issued a warrant and the person has been detained and brought before the prescribed authority, there seems to us no rules, regulations or guidance—other than one clause that talks about humane treatment—to govern how a person is interviewed. We do not even know whether they are going to go to jail or whether they are going to be put up in the Hilton Hotel down the road.

Prof. Kinley—No.

Ms Joseph—We do not know how much they can be questioned while they are in detention. As you have mentioned, the only provision regarding how they are treated in detention is 34J, that they must be treated humanely. It is good that it is there, but it could potentially be an empty guarantee if it is not supplemented by other safeguards.

Senator ROBERT RAY—Our job is to float ideas off to witnesses to get a bit of feedback. One of the ideas that we have been floating over the last couple of days is a requirement to be put in the act that ASIO develops a protocol governing their behaviour in that 48-hour period or any extension and have that agreed with the Inspector-General of Intelligence and Security and notified to this committee. It might be difficult to try to put in this particular act every

procedural rule but to do it in that particular way and not have the act start until a protocol is developed.

Prof. Kinley—While Mr McLeay was talking I was thinking about identifying this bifurcation between those who would issue the warrant and those who would supervise the interrogation—and obviously a judge is not going to just sit and watch the interrogation. If undertakings were made to the judicial authority that was giving the warrants that said, 'These are the means and the manner in which we are going to interrogate,' then there may be a certain degree of trust. But woe betide ASIO if it is found out that they did not abide by those, and they did have people standing up against walls et cetera. Maybe one of the statements of intent that could be part of that undertaking would be a protocol. I could see that adding to it. In a way, it is a good compromise because it gives ASIO the opportunity to state these things, yet it gives the judge the opportunity to say, 'We expect you to abide by these. This is your statement of intent.'

Senator ROBERT RAY—When you say that you are a bit disturbed by what Mr McLeay was saying—

Prof. Kinley—I was not disturbed. I did not mean that.

Senator ROBERT RAY—No, but even so, what Mr McLeay is aware of is that we are worried now, from yesterday on, of the constitutionality of this bill. It may well be coming out of Grollo v. Parma that, in fact, chapter 3 appointments cannot at least supervise the proceedings. So one of the things we are trying to think about is that it must be at least a federal magistrate who has to issue the initial warrant, but then it is AAT that sits in on the hearings. Then we are thinking that maybe it is up to a Federal Court judge to go beyond the 96 hours. But we are worried about the constitutionality of all that, as well. That is why, normally, as in this act, the person who issues the warrant would sit in, but we are worried about the constitutionality of that.

Ms Joseph—One thing that Mr McLeay suggested was that after 24 hours one has the right to make an application before the court for release, which would be an exercise of judicial power. But you are right; there are problems with a judge. I have not looked at the Federal Magistrates Act, but a federal magistrate may be a chapter 3 judge.

Senator ROBERT RAY—Yes, they are.

Ms Joseph—So there could be problems with them actually issuing warrants, but there may be a way of structuring some sort of level of supervision, such as a right of application of habeas corpus or something like that.

Senator ROBERT RAY—It seems to us—and we are no legal experts here—that Federal Court judges probably could issue the warrant. They are disinclined to do so because they regard it as administrative rather than judicial work. That might be an argument between parliament and the judiciary yet to be had, but let us put that aside. The real problem seems to be their ability then to sit there for the 24 or 48 hours and supervise these activities. Yet, from our point of view, we want to get people making decisions on this who have tenure and who are less likely to be able to be influenced by the executive. We are not even making the accusation

that one member of the AAT would be influenced by the executive but, because they are mostly reappointable positions, the perception is a problem.

Prof. Kinley—That is precisely the point. We agree with you. You raised the point, Senator Ray, that somebody may not have any more information to give but yet, if they are released, what they might alert others to would be the danger. They in fact have no information, but those who do would then be alerted. That is a real problem and, again, it was a problem that police, army authorities and security forces had with respect to terrorist organisations in Northern Ireland. I cannot provide an answer to that. I think it is a difficult one. You always have to reflect back on what happens when it involves somebody who really has no connection. This poor man or woman sits there for maybe four or five days and they really have done nothing wrong. It seems unconscionable that people should be put at that risk.

Senator ROBERT RAY—On this point, all of our witnesses are saying that. But there is a requirement on the Director-General for there to be ample grounds to go for it. It is then checked by the Attorney-General; it is then measured off and assessed by a prescribed authority. One presumes—and you are not right to presume, I agree—that ASIO is acting on other information, from a telephone intercept or whatever else. But that does not deflect from your ultimate point.

CHAIR—There being no further questions, I thank you both very much for being with us today. We really did appreciate your contribution.

Prof. Kinley—Thank you.

Proceedings suspended from 10.30 a.m. to 10.47 a.m.

FARAM, Mr David, President, Law Institute of Victoria

NASH, Ms Yvette, Chair, Young Lawyers Law Reform Committee, Law Institute of Victoria

RODAN, Mr Erskine Hamilton, Member of Council of Law Institute, Law Institute of Victoria

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you the hearings are legal proceedings of the parliament and warrant the same respect as the proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Faram—Yes, thank you. I would like to summarise the Law Institute's position in relation to a number of matters. I understand that this committee is particularly interested in our views in relation to the proposed legislation and how it affects children. Having said that, I would like to reaffirm the Law Institute's commitment to and agreement with the position adopted by the Law Council of Australia. At the outset we would say, in terms of legislation generally, that in our view it is up to the government to demonstrate that there are not now sufficient powers to enable the government to deal with any perceived or real threat arising from terrorism or threat of violence. We note that ASIO, as we understand it, currently has no

power of arrest or power to interrogate but the Australian Federal Police does. In our view it would be appropriate for ASIO and the Federal Police to work together in these sorts of situations rather than to enact legislation that has real and significant consequences for not only children but the population generally.

In relation to the period of detention, which it is anticipated might be imposed by this legislation, it is our view and the LCA's view that the fundamental principle of law requires that a person should not be deprived of his or her liberty unless they have been convicted of an offence or charged with a serious offence or unless they have been reasonably suspected of having committed a serious offence. Certain provisions of this proposed legislation undermine that fundamental tenet. We also say that, in terms of statutory accountability and control, as a general principle any detainee should be able to make contact with family or friends or to seek legal advice prior to being interrogated under the legislation. I will get to that, perhaps, in more detail later.

Again, as a general rule, we say that people should not be compelled to incriminate themselves in relation to being required to make statements. But, given the particular nature of this legislation, if that is to be the consequence—that people are to be forced to, in one view, incriminate themselves in providing information where they would otherwise not have to provide information—then there ought to be some sort of check and balance in relation to how that information is extracted. We also say that these are extensive and far-reaching proposed powers. Given the nature of the threat and the reasons for the development of this legislation, we would certainly say to this committee that the legislation ought to be the subject of a sunset clause.

In relation to matters concerning young people in particular, we would like to draw the committee's attention to sections 34F, 34G, 34L and 34M of the proposed rules. Our starting point in relation to these matters is that all children—that is, any person under the age of 18—are vulnerable citizens. They are vulnerable by reason of their physical and mental immaturity, and they need special safeguards and care. As we understand the proposed legislation, a differentiation is not made between children and adults. We are particularly concerned about what might be called the reverse onus of proof provisions as they apply to children. We would acknowledge that adults are much more easily able to understand the consequences of the reverse onus, but the reverse onus provisions caused us some concern from the outset. As we see it, the reverse onus provisions—that is proposed section 34G—effectively say, 'Unless you tell us what we think you know, even if you do not know it, you are committing an offence and liable to be imprisoned for five years.' If that is an appropriate understanding of how proposed section 34G is to operate, we say that there should be a clear distinction between how it operates in relation to adults and how it operates in relation to children.

Mr LEO McLEAY—I was told, when I asked this question the other day, that I would have to prove that I was ignorant.

Mr Faram—That is our interpretation, yes.

Mr LEO McLEAY—It might be a prima facie matter as far as I am concerned.

Mr BEAZLEY—If you invite a few comments, I will be a witness.

Mr Faram—It is a very difficult proposition to prove beyond a reasonable doubt that a person does not know what the interrogator expects them to know. As I say, it might be that, while we as adults find that concept hard to comprehend and understand, we are much more likely to comprehend and understand it than children.

Mr LEO McLEAY—We were told that proposed section 34M was lifted straight from the Crimes Act. That suggests to me that maybe we should review the Crimes Act.

Mr Faram—Is that the federal Crimes Act?

Mr LEO McLEAY—Yes.

Ms Nash—I believe it is almost entirely lifted from the Crimes Act. The significant difference between the Crimes Act provision and the proposed provision in this bill is that the Crimes Act provision applies only to children between 10 and 18 who have been arrested or children who have been arrested and charged, or if a magistrate orders that the search be conducted. In deciding whether to order that a search be conducted, the magistrate is given some guidance. The things that the magistrate must consider are the age of the child and the seriousness of the offence. Obviously, in this case, you are not necessarily even talking about an offence having been committed.

Mr LEO McLEAY—Could you provide us with a copy of those guidelines? Not today; later.

Ms Nash—Certainly.

Mr Faram—In relation to proposed section 34G, generally we would be saying to this committee that, if there is to be an offence committed, there is a threshold issue that has to be established. That would be that the state should have to prove beyond reasonable doubt that there was a reasonable probability that the person had information. That is a general proposition that we say should apply to adults and to children, but even if the government were of the view that that is too big a hurdle for them to jump in relation to adults we would certainly say that it should apply to children, that the government should be in a position to be able to satisfy itself before obtaining a conviction that it was beyond reasonable doubt that there was a reasonable likelihood that the child had information that he or she had refused to disclose.

Mr LEO McLEAY—You have just raised something which had never occurred to me. I was a bit unhappy the other day about 34M, but I must say that had never twigged me to the fact that maybe this bill does allow people to interrogate 10-year-old children. Is that your reading of it?

Mr Faram—That is certainly our reading, because it makes absolutely no differentiation between adults and children. We are simply dealing with 'persons'.

Mr LEO McLEAY—What does the criminal law do to make that distinction?

Ms Nash—Probably the keenest distinction at federal criminal law is that the period for which a child may be detained is only two hours, compared to four hours for an adult.

Senator ROBERT RAY—Surely, under the criminal law they are entitled to an interview friend being present.

Mr Faram—That is exactly right.

Senator ROBERT RAY—Is that the crucial difference?

Mr Faram—That is the crucial difference.

Mr LEO McLEAY—Does the criminal law say, 'These things apply to people over 18 but other things apply to someone under 18'?

Ms Nash—Yes, that is correct.

Mr Faram—Specific conditions are included in every state, and certainly in the federal Crimes Act, to deal explicitly with the rights of children, because they, at least until now, have been deemed to be citizens of a different class requiring protection.

CHAIR—With respect to those present rules applying to the under-18s, generally are you happy with them or should there be some improvement on that?

Ms Nash—In a general sense the Crimes Act provisions relating to juveniles are adequate to protect them, yes. There is an interview friend made available; they also have a lawyer available to them. Those things, in combination with the limited detention period, have been shown to adequately protect the rights of children while still maintaining law and order.

Mr LEO McLEAY—Could we be barking up the wrong tree and could the officials say, 'Of course, those provisions would cover this'?

Mr Faram—I don't think so.

Ms Nash—They would seem to be specifically excluded by the nature of this legislation.

Mr Faram—Because they are not specifically included.

Mr LEO McLEAY—I think you can rest assured after this five minutes they will be on our list.

Senator ROBERT RAY—You have a problem here. You must have ample grounds and you must go through all these tests, but you could have, for instance, and more likely, a 14-year-old taken into detention with no contact. Meanwhile, the family would probably go to the state police, saying that their child is missing. I wonder what happens from there.

Ms Nash—One wonders about the resources that might be wasted.

Senator ROBERT RAY—No, I just wonder what happens when the state police find out that the person has been detained under this. What would they then do.

CHAIR—Put over an alert on every radio station in Melbourne, saying, 'Anybody knowing the whereabouts of'—

Senator ROBERT RAY—It is a difficulty.

Mr Faram—It is a difficulty.

Senator ROBERT RAY—We know that the contacting family provision is here for good reason—so that the detention of someone does not alert the whole organisation that they are under suspicion. In these circumstances, with a child, it is quite different.

Mr Faram—Certainly, that is our position. Talking specifically also about 34F in relation to the period of detention, picking up Yvette's comments, currently the federal Crimes Act allows for a four-hour compulsory detention period for adults and two hours for children. We make no comment about the sufficiency or otherwise of that period of detention for ASIO or Federal Police purposes in this environment. However, we certainly would say that if there is to be a period of detention imposed on children, serious consideration be given to it being a lesser period than otherwise would apply to adults. In terms of section 34F, with respect to the circumstances of the interrogation and how that is to be carried out, given that it is proposed under this legislation that the right to self-incrimination is effectively abrogated, we would certainly strongly say, in relation to children in particular—and I suppose as a general comment—that there should be specific provisions made for the provision of an interview friend.

There should be a specific requirement that everybody, but in particular children, be advised of their rights, be advised that they are required to answer questions, be specifically advised that in the event that they do not answer questions they are likely to commit an offence punishable by imprisonment.

Senator ROBERT RAY—Can I interrupt you for a moment, as you are raising things that we want to pursue. One of the things we have been looking at is saying, 'Yes, we understand why X can't ring up their local solicitor, who could be involved.' One of the things we have been suggesting is a panel of senior legal people, maybe recommended by the Law Council in each state, who can be drawn on. These senior counsel are very experienced and they know they are only going to get called on at most once a year, and maybe only once in their lifetime. Would that avoid the need for an interview friend and all the rest—by having a legal representative there throughout the whole proceedings, representing their interests?

Mr Faram—It would certainly be an option, I would think.

Ms Nash—Currently the federal criminal law specifically makes provision for a child to have a lawyer as an independent interview friend, but it also provides for them to have an interview friend in addition. So the interview friend might just be there to hold their hand in a very stressful situation, rather than the lawyer, who is there for the specific purpose of providing legal advice. To go to what you were saying earlier, it might similarly be possible to have a panel of independent persons who were considered appropriate for the specific type of questioning.

CHAIR—That pool of lawyers would cover everybody—children and adults.

Ms Nash—Certainly.

Mr Faram—I assume that that would be subject to ASIO clearance of the various people nominated for the panel and those sorts of things. I guess there would be some sort of threshold issue there as well.

Senator ROBERT RAY—This is a difficult question because we don't want lawyers simply with an ASIO way of thinking or a particular form of thinking, so that is difficult. That is why we were looking for a responsible body to recommend senior people. I don't think anyone has made up their mind on that security clearance; it is a tough one.

Mr LEO McLEAY—But they might be people who are nominated after negotiations between the Law Council of Australia and ASIO, so that the Law Council puts the list up.

Mr Faram—On a recommendation from each of the state bodies. I guess you would need, if this proposal was taken up, a few people in each state. I think that would be a good idea.

I was talking about the positive requirement for any person, but in particular children, to be advised of the possible commission of an offence and the possible consequences if they fail to disclose information. We would also say that there ought to be a positive requirement that the right to complain which is provided for in the proposed legislation is in fact explained to them. The proposed legislation sets out a protocol whereby people can complain but there is nothing in the legislation which requires someone in authority to tell the person that they have a right of complaint.

Mr LEO McLEAY—Doesn't 34E do that?

Senator ROBERT RAY—34E(e).

Mr LEO McLEAY—I thought 34E explained all the things you were just talking about. They have to be told how long the warrant is there for; they have to be told what offences they can—

Senator ROBERT RAY—One of the criticisms is that they only get told once—right at the start.

Mr Faram—I beg your pardon. That section does require that—at the outset.

Senator ROBERT RAY—We have then asked the question: so what? What then happens? The Inspector-General has said to us that it is his intention to sit in on all these interviews, at least in the initial period, which is a bit reassuring, because he does have the powers of an ongoing royal commission in relation to ASIO. It is still a bit fuzzy, though.

Ms Nash—The young lawyers section does have some concerns that young people might be intimidated by the sheer number of people in authority positions who are surrounding them. I

would have some concerns if the people referred to who you can complain to are there, plus interviewing ASIO officers, plus the prescribed authority, even if they are permitted an interview friend and a lawyer on their side.

Senator ROBERT RAY—We do not yet know, because there are no protocols or anything else, where these interviews will take place. In a room this big, with the Inspector-General sitting up the back, it may not be a problem. If it is a prison cell or a police interview room, your point comes into play.

Mr Faram—Or in the case of a preliminary strip-search, which may or may not be conducted in a room this big, with a number of people looking on.

Senator ROBERT RAY—There are, of course, prescriptions as to who can do it.

Mr Faram—Indeed, and that is what I wanted to address last—proposed section 34L. We do have specific concerns about that in relation to strip-searches. In fact, we have no objection to the protocol that has been set out in the proposed legislation, but we say that there really is a threshold question in relation to children, and that is whether a strip-search ought to be undertaken at all. We would say that, if there is to be a strip-search of a child, independent authorisation ought to be obtained from a magistrate.

Senator ROBERT RAY—Can Customs do that now?

Mr Faram—I have no idea. I do not know, and I do not know whether their powers would extend to children, but it is reasonably easy to assume that children between the ages of 10 and 18 undergoing strip-searches will be substantially more open to psychological consequences as a result of this sort of procedure than adults. So special care has to be taken in these circumstances. If it is the view of the authority or the Director-General that a strip-search is appropriate, independent authorisation and appropriate reasons must be established for the conduct of strip-searches on a child—reasonable protocol.

Mr LEO McLEAY—If you read 34M(f) you get the impression that to do a strip-search on a child they probably do have to go back to the prescribed authority anyway or get the authorisation over the telephone from the prescribed authority. Then you have those provisions where you have to have a parent or guardian or someone else who can represent the child's interests. To get a strip-search of a child, they have to go back to the prescribed authority and those things in (f)(i) and (ii) come into effect.

Ms Nash—There are some concerns about the fact that it is a prescribed authority, which can include members of the AAT who, not having tenure, could be subject to political pressure where our federal magistracy is not. That is one concern in relation to their granting warrants generally as well as permission to strip-search. In terms of the parent or independent person being present, that is appropriate, but there is still the threshold issue which is addressed currently in federal law of whether, given the seriousness of the offence and the age of the child, the child should be strip-searched at all.

Mr LEO McLEAY—Can you provide us with those guidelines?

Ms Nash—Yes.

Mr Faram—Going back to the specific question in relation to 34M(f), which states that if, in the authority's opinion, a person is unable to manage his or her affairs, we are saying that there should be an independent assessment of whether the child can manage his or her affairs.

Mr LEO McLEAY—I would have thought that that was for someone over 18.

CHAIR—It says:

... the person being searched is at least 10 but under 18, or is incapable of managing his or her affairs ...

Senator ROBERT RAY—Given the view, almost the obsession, in this bill not to have anyone know that the person is taken into custody, it would be very rare for ASIO to want to strip-search a child because that automatically involves a parent or guardian being notified that they are under detention.

Ms Nash—Presumably a parent or guardian would not be notified in circumstances where the parent or guardian is the person about whom the child is being questioned, and there is provision for an independent person rather than a parent.

Senator ROBERT RAY—I thought that provision was optional as to the child's choice, not the authority's choice. Have I misread that?

Ms Nash—My understanding is it is where it is not possible rather than necessarily the child's choice.

Mr LEO McLEAY—I think it is the child's choice. It says:

... must be conducted in the presence of a parent or guardian of the person or, if that is not acceptable to the person—

that is, the child—

in the presence of someone else who can represent the person's interests and who, as far as is practicable in the circumstances, is acceptable to the person ...

I do not know how you get a person who is 'where practical' acceptable to you.

Ms Nash—My misunderstanding.

Senator ROBERT RAY—We understand these sections have been taken from other acts, and I think we had a list read into the record—I cannot bring them immediately to mind—but the other thing that would militate against their use is the commonsense of ASIO, one would hope. I do not think ASIO wants headlines that they picked up a 10-year-old child and strip-searched them and interviewed them for 48 or 96 hours. It would not be the PR coup of the century, would it?

Mr Faram—The requirement to videotape interviews provides a good protection, in our view. It is not inconceivable of course that the parent or guardian might also be in detention at

the same time as the child—for pretty obvious reasons, I would think. In those circumstances, how does a child make an assessment about the suitability or otherwise of a next friend who might look after his or her interests while the strip-search is being undertaken. In those circumstances, we might say it would be appropriate to go to an independent authority so somebody like a magistrate can satisfy himself or herself that a strip-search in the circumstances is absolutely necessary, having taken into account and trying to balance the interests of ASIO and the child. It might be that ASIO wants to interrogate the child simply because they think the child has information about his or her parent.

Mr LEO McLEAY—It would be pretty awful if we actually had children informing on their parents.

Senator ROBERT RAY—Mandatorily—

Mr LEO McLEAY—This is the Stasi all over again.

Mr BEAZLEY—You would not have been on the parliamentary side in the English Civil War, mate. Those were the days when we used to show you the business end of a pike when you challenged the parliamentary majority.

Mr LEO McLEAY—Never a Cromwellian.

Mr Faram—You are exactly right of course, and that is a real difficulty when the act does not make any differentiation between persons. It can be husband against wife, child against parent—all sorts of combinations. The government might think that is appropriate in the circumstances. What we say is that if we are dealing with children then let us make sure that the children are appropriately protected.

Senator ROBERT RAY—Taking you back to the start of your submission at point 1, you argue that it is for the government to demonstrate that existing powers are inadequate to meet any potential security threat. Most people sitting at this table would acknowledge that the more transparency there is in government the more honesty and accountability there will be. But in certain matters trust is given to the executive and one of those certain areas is the security area: they cannot be expected to come along to a public hearing and lay out all the evidence and their problems in public. Just the very nature of ASIO prevents them from doing that. I am wondering just how they do it without abrogating their responsibilities in terms of secrecy, how they can actually prove that first point. They can do it to this committee in camera, they can do it to the Attorney-General and a range of people; but I am not sure how they mount that publicly.

Mr Faram—I am not sure that I understand the point of the comment.

Senator ROBERT RAY—You say:

> It is for the Government to demonstrate that existing powers are inadequate to meet any potential security threat.

ASIO may have within its knowledge from time to time individuals who have information that it cannot compel them to produce because, under existing law and the right to silence, leaving

self-recrimination aside for the moment, it cannot compel that information to be provided to then go and protect the civil rights of other people. But most of the information they may have gathered to prove that point could have come from bugging, from telephone intercepts, from whatever else. They cannot really adduce that in public to prove their case. That is my point.

Mr Faram—I do understand what you are saying now. That part of the proposed legislation dealing with a positive requirement to disclose information is not dealt with by existing powers, but certainly under the existing powers ASIO does have clearly very extensive power to investigate, to collect intelligence. It cannot interrogate, it has not got the power of arrest; the Federal Police clearly do have those powers of arrest. You are right when you say the legislation does not compel disclosure of information reasonably suspected of being within the purview of a particular person, but the government also has defence powers. My understanding is that defence powers give the government a very wide range of options to do things in the case of a national emergency or an impending national emergency, such as might be anticipated by—

Senator ROBERT RAY—Can I just interrupt you here. Our problem with this is that it may not necessarily be our national emergency; it may be a national emergency in the US, in Great Britain, in Italy or in Singapore where vital information exists within Australia to stop a mass intrusion on human rights in those countries via a terrorist act.

Mr Faram—That is a fair point.

Senator ROBERT RAY—If all terrorist organisations were in different areas, did not talk to each other and did not operate beyond international borders, your point would be a lot easier.

Mr Faram—I agree; we had not considered the extraterritoriality of this legislation. We are looking at it specifically from an Australian threat position. Your point is made.

Mr LEO McLEAY—This legislation would probably be used when they get advice from some other extraterritorial source.

Mr Faram—It is an interesting point that is raised. I cannot give you details, unfortunately, but I will be happy to supply them. I am reliably informed that New Zealand have dealt with this type of issue without introducing substantial legislative reform such as is anticipated by this act. It may well be that a look at the New Zealand model might be of assistance to this inquiry. I cannot give you the details, but I certainly understand that there have been no substantial legislative changes to the procedural rules adopted in New Zealand.

Senator ROBERT RAY—Yet we can look at the other examples of Canada and the UK, can't we? And I think everyone acknowledges that the Canadian act is more severe even than this one.

Mr Rodan—Has ASIO said to this committee that there are certain types of information that they see as totally classified which would come under the term 'terrorism' that are available to them or could be available to them in Australia if they had these powers? Have they ascertained or told you of any reasons that they need these extra powers?

Senator ROBERT RAY—This is a catch-22. If they had, I could not tell you. I think I could probably make this point. Are there sufficient safeguards in place to second-guess ASIO? That falls into two areas. You could put a whole series of safeguards into this bill: the right to avoid self-incrimination, the right to legal representation, protocols on interview behaviour, a sunset clause—a whole range of things to make abuse far less likely. That is one stream, and we have been listening to a lot of suggestions and we are mulling them over.

The second stream is that there is already a supervisory mechanism in the Inspector-General's office, which has the virtual powers of an ongoing royal commission and which can look at all these matters that ASIO is involved in and report either to the Attorney-General or, ultimately, the parliament when abuse occurs. People may not have total trust in the Inspector-General and the way it operates, but so far at least there has been very little criticism levelled at the behaviour of the Inspector-General at any level. It has worked particularly well. So it is not completely unfettered; there are some checks and balances. We are trying to measure where the checks and balances should be.

Mr Faram—In relation to children—making an appropriate observation about the Director-General's powers—his report to parliament about abuse is reactive; the abuse has happened before it is reported. We are saying in relation to children that there ought to be processes adopted whereby every attempt is made to ensure that abuse simply does not happen so that no report is necessary at any stage.

Mr BEAZLEY—To be fair to Mr Rodan, the sorts of concerns that you expressed or the queries that you had were effectively answered by the Director-General. He was one of the first people to make a statement to this committee, and he does want the act.

Mr Rodan—I accept that.

Mr BEAZLEY—I assumed from the detail of his testimony that he did!

Senator ROBERT RAY—One of the things we have been mentioning that was not obvious in this bill until the evidence was given is the Director-General's assurance that he has no problem with the publication in the annual report or wherever of the number of warrants sought and the number of warrants granted. That will indicate to bodies like yours whether this is being used as a matter of last resort et cetera. Maybe, in conjunction with a sunset clause, in three years time we will be able to review whether this act has been effective. It may even be unnecessary; it may not be invoked once in that time. We do not know but it will give us at least a guide. Then, if there is a sunset clause, it will have to be re-presented to the parliament and it will be reviewed by this committee two or three years down the track.

CHAIR—There being no further questions, I thank you all very much indeed for your time today. That was most helpful. We look forward to hearing from Ms Nash a little later on.

Mr Faram—I thank the committee for the opportunity.

[11.23 a.m.]

LAWSON, Mr Damien, Spokesperson, Federation of Community Legal Centres

SMITH, Ms Sally Anne, Policy Worker, Federation of Community Legal Centres (Vic) Inc.

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I now invite you to make some introductory remarks before we move on to questions.

Mr Lawson—I thank the committee for giving us the opportunity to speak with you today. As you are no doubt aware, there has been a large amount of community concern and community legal centres have been in part involved in fielding that. Before I make our introductory remarks, I would like to repeat what other witnesses have probably said: we are concerned about the time line for public consultation on this legislation. The government had a large number of months in which to consider this legislation and have given the public very little time in which to look at the scope, extent and problems of it.

Senator ROBERT RAY—Technically, we were supposed to report tomorrow, which meant that these public hearings would have been held weeks ago—so the committee tried to extend the time for consideration. I know you did not mean that as a criticism of the committee, but we have tried to give much more time than what the original time line allowed.

Mr Lawson—I am aware of that, and I really commend the committee for actually giving an additional amount of time and being quite cooperative in terms of allowing later submissions—I understand that. But, to the extent that parties in the Senate have some role in determining the time line, I think that criticism should be taken on board by both houses of parliament.

I work for the Western Suburbs Legal Service in the western suburbs of Melbourne, but I am here representing the Federation of Community Legal Centres with my colleague Sally Smith. The Federation of Community Legal Centres is a peak body representing over 40 community legal centres in Victoria. We assist 40,000 to 50,000 people every year. Overwhelmingly, the work that community legal centres do is with people from the most disadvantaged groups in our society. As I am sure all of you know, the legal aid system in this country creates a lot of difficulty for people in terms of accessing the law. Community legal centres are trying to address some of those problems.

We have been very active in positive law reform over many years. We see the rule of law and the rights and protections in the criminal justice system as being fundamental to the wellbeing of our clients and our clients' ability to access the law as a means of justice. To that extent, we are extremely concerned by the proposals in this legislation and in the package of legislation that is currently before the Senate. I know you have had quite detailed outlines from the Law

Council and others about concerns with the bill. We would share those concerns as well. I will quickly run through some of those concerns.

Before I do that, I think it is difficult to understand the problems with this legislation that you are considering without considering the scope of the proposed terrorist offences that are outlined in the other pieces of legislation—the Security Legislation Amendment (Terrorism) Bill 2002 and the Suppression of the Financing of Terrorism Bill 2002. The scope of that definition of 'terrorist act' and the ancillary offences are so broad in scope that we think it is not beyond the realms of possibility that a whole range of groups and people in society, who perhaps commit unlawful acts and who perhaps should attract criminal law investigation and penalties under criminal law, would instead potentially be charged with terrorist offences or would be considered as people who were involved in terrorist offences.

That is how you need to view this ASIO legislation. The legislation says, quite clearly, that ASIO will be given these special powers to investigate terrorist offences. Given that the definition of 'terrorist act' could involve some trade union activity or activity by a range of social movements—protest activity, civil disobedience or other—we would say that that brings these powers within the realm of people connected with those actions; as being justifiably under this legislation and being subject to these proposed powers. That is of great concern. There is already a history in this country of ASIO operating in a manner that is politically partisan—in particular, targeting the union movement and social movements at various times in this country's history. We do not believe that it is appropriate that ASIO should have the power to detain people and interrogate them in this way merely because they are involved in those sorts of activities—union activities or social movement activities.

In terms of the specific concerns, obviously the indefinite detention without trial is the fundamental issue, and it is the threshold issue. I know you have been considering particular safeguards that you might put in if this legislation is enacted. But we would say that you need to focus in on that issue, itself: is it appropriate for this type of detention to take place? We would say it is not. This is a principle that goes back to the time of the Magna Carta, 800 years ago. The Magna Carta—a copy of which I saw in parliament last time I was there—says that no-one should be imprisoned without being tried by their peers subject to the rule of law.

Effectively, what this legislation would enable is a single member of the AAT appointed by the Attorney-General to detain someone indefinitely. To us, it just seems incredible that this is even being proposed. It is not merely someone who is suspected of having committed an offence—it is someone who is said to have information regarding a terrorist offence. Bearing in mind how broad in scope a 'terrorist offence' is, someone who commits serious damage for political reasons, someone who disrupts an aspect of industry for political reasons, someone who creates a risk to a section of the public for a political reason is committing a 'terrorist offence' and could fall within the scope of this legislation.

Obviously detention incommunicado without the right to a lawyer or contact with a family member is of grave concern to us. As you would have seen in our submission, this contravenes international human rights standards in relation to forms of detention or imprisonment, basically the body of principles for the protection of all persons under any form of detention and imprisonment, and violates some of those principles. We are extremely concerned about the proposed removal of the right to silence. I think it is really important when talking about this

that we bear in mind that the people who are being detained under this act are not necessarily suspected of having committed any crime, and yet their right to silence is being removed. So you would have a situation in this country where someone who is charged with murder under the existing criminal law would retain the right to silence, but someone who is not suspected of having committed any crime would not enjoy that protection and that fundamental right that we have had for hundreds of years. Similarly with the right against self-incrimination.

It is really important in relation to that that, while the right against self-incrimination protects someone, the information that could be used in that way is only related to terrorist offences. Given the broad scope of 'terrorist offences' and given our concerns that a large number of people potentially could be charged with terrorist offences, if the definition of 'terrorist offence' stands, it is not enough just to say that information obtained in this way will not be used in the normal processes of the criminal law. You have already heard the concerns in relation to children. We echo those concerns. We believe the bill contravenes at least six articles of the Convention on the Rights of the Child—I will not go through those articles, I can give those to you. That is a convention we have signed up to, that is a convention we have the responsibility to uphold in this country and that needs to be looked at by the committee.

We are extremely concerned in terms of the proposal that the AAT would be issuing these warrants. I know the committee is very much aware of that. The one point we want to emphasise is that it seems incredible that there could be a proposal that, effectively, the same minister, who in a sense is applying for the warrant—we know in this case it is ASIO that is applying for the warrant but the Attorney-General has to approve the application and in a sense, to the extent that ASIO reports to the Attorney-General, the Attorney-General is applying for a warrant—also appoints the person who is examining the warrant.

Mr LEO McLEAY—And is going to reappoint.

Mr Lawson—That is right.

Senator ROBERT RAY—Not appoints—reappoints. He appoints the judges as well.

Mr Lawson—No. Under the terms of the legislation, the government appoints all AAT members and reappoints all AAT members. But, under this legislation, there is a proposal that the Attorney-General selects which particular AAT members will examine the warrants.

Mr LEO McLEAY—I actually wanted to take you to you to that. Seeing as you have raised it, I will ask you about that now. Yesterday we had the woman who was the registrar of the AAT appear before us and I asked her how she envisaged these matters arriving at the AAT's door and being given out—will they be distributed by the head of the jurisdiction, by her or by some system of osmosis? She said that currently she was the contact with ASIO for telephone taps and she just doled them out and that she imagined that this would occur in the same way. But while I was reading your submission as you were talking, I also re-read 34B and it does give you the impression that the minister will write to a particular prescribed authority, to an individual person.

It does give you the impression that the minister will write to a particular prescribed authority, to an individual person. If that is a fact, then I think it would be extremely improper for the AAT

to be dealing with it because it is not about appointment, it is about these people being re-appointed. They are on five-year tenure and some of them are on seven-year tenure. If you are the person who is getting these all the time, and you do not perform—-and performance criteria are applied to the AAT where they are not applied to the judiciary—what is the performance criteria? If you do not agree with the minister you do not get re-appointed.

Can you tell me—and I am going to ask the Attorney-General's people when they come back, so they had better be aware of this—why you believe specifically that the minister will appoint individual magistrates or AAT members? Is the answer to this just in plain English there?

Mr Lawson—He may or may not do that. But the act effectively allows him to do that as 34B says:

(1) The Minister may, by writing, appoint as a prescribed authority:

(a) a Federal Magistrate; or

(b) a person—

Presumably, it is likely that there will be a number of members appointed because the Attorney-General would write a letter saying, 'These AAT members are the prescribed authorities for the purposes of this act.'

Mr LEO McLEAY—I would have thought that there is a different prescribed authority every time one of these warrants is issued. A warrant is issued and a person becomes a prescribed authority.

Mr Lawson—I would say that is even a worse situation. There are two scenarios. You could have a standing statement from the minister where the minister says, 'These people for this year are the prescribed authorities for the purposes of this act.' You could have that situation or you could have a situation like you say. It comes up. They want to detain someone for a period of time. Then the minister says, 'Okay, this is the person who is going to hear the warrant.' That is even more concerning.

That is not to say necessarily that this minister would abuse it or that the particular AAT member would abuse it. When making these sorts of legislation we have to think about 20 years' or 30 years' down the track when we have a different government and a different political character to our government. Sally will read out something in a second. You only have to look at places like Malaysia where the executive does use this type of legislation in a very politicised manner. That is our concern.

Mr LEO McLEAY—I guess most of us do not like the idea of the AAT issuing the warrants any way and, if there could be a judge do it, that would be a better option. But, whichever group of people are going to be issuing them, I would be less concerned if these things were sent to the head of the jurisdiction and the head of the jurisdiction decided on a random selection such as, 'You are doing it this time,' 'You get it next time.' I would be more concerned if the Attorney-General said that the head of the jurisdiction has to decide from one of these three people who I have nominated and I would be terribly concerned if the Attorney-General was

writing to the head of jurisdiction saying, 'This person will be the person who will deal with this matter.'

Mr Lawson—Well, 34B allows those two scenarios, I would say. I think it is likely that the second scenario is what would probably operate. But it seems to allow the third scenario where, in a particular matter a particular person would relate. The second scenario is concerning enough, as you say.

I might just quickly finish our introductory comments, then Sally wants to say something. As I said, we have concerns, given ASIO's history in this country. We know there have been some significant changes but overall we have a situation where we have an institution which is, by and large, a secret organisation only answerable to the executive. It has a history of a very politicised operation. There have been various inquiries that have shown that—the White inquiry, the Hope Royal Commission. The Wood Royal Commission, while focusing on the Special Branch, talked about some of those relationships and the politicised nature of the intelligence groups that worked closely with ASIO in various police forces.

In Victoria we have had our own experience with our Special Branch and now the Protective Security Intelligence Group, which operates very closely with ASIO, who quite clearly from records that have been put on the public record, placed under surveillance a whole range of groups—anywhere from the Labor Party through to various environmental organisations, church bodies, community organisations and groups of that nature. Given that history, we think it is absolutely imperative that we be extremely careful about what powers are given to an organisation that is secret and has that history.

Senator ROBERT RAY—Can I just ask you: this is the one thing that jars me in your submission. I am not going to argue 50 years of history of ASIO, but can you give me one example since the Hope royal commission where ASIO has acted as you say in this submission:

… one of political partisanship and inappropriate use of its extensive powers to interfere in the political arena.

Can you give me one example? Let us say from 1985, about the time of the Hope royal commission. Can you give me one example where that has occurred from ASIO—not Special Branch but from ASIO?

Mr Lawson—Firstly, we only know about that history because of, in part, the Hope royal commission. Since legislative changes to ASIO it has been much more difficult for people to raise questions about ASIO. For instance, it is an offence now to name an ASIO officer. It was not the case. As you just outlined before, there is a whole range of things that ASIO do that we cannot talk about that you, perhaps, are privy to—I do not know—but I am not.

Senator ROBERT RAY—I sat on the security committee for six years. If you think I would tolerate political partisanship coming out of ASIO from 1990 to 1996, you are wrong. And I have sat on this committee for the next six years—sure not with quite the same powers of overview—and I have never detected that. We keep going back to Brigadier Spry. You and I would be in a love-in, in agreement, as to how bad ASIO was in those days. But I have not seen the evidence, in the last 16 or 17 years, of that political partisanship that is in your report and a couple of other submissions.

Mr Lawson—The evidence that is on the public record in the recent period is the activities of the New South Wales Special Branch and the Victorian Protective Security Intelligence Group. Both those organisations operate very closely with ASIO. To my mind, they only give a window into the view of intelligence agencies about what groups in society are appropriate to place under surveillance.

Senator ROBERT RAY—But neither of those two groups have an Inspector-General examining their files on a day to day, week to week, basis, do they?

Mr Lawson—No, but they have a state ombudsman. In Victoria the ombudsman did do an investigation into the Victorian Protective Security Intelligence Group.

Senator ROBERT RAY—It just seems to me you can only back up that by way of allegation of association with other bodies. That is the point I make. I am not being overly critical. There is a lot in your submission I agree with, but that one just jarred me because it just does not seem to reflect reality.

Mr LEO McLEAY—It is best not to have sweeping statements.

Mr Lawson—Absolutely. Members of parliament I am sure would not ever make sweeping statements!

Senator ROBERT RAY—Unless we are covered by privilege!

Mr LEO McLEAY—We do not make smart-arse statements, either.

Mr Lawson—The point we are making is this: if you have a secret body whose job is to some degree to place under surveillance political activity—and there is some evidence that a whole range of political activity that certainly the Federation of Community Legal Centres would view as being legitimate political activity: our own organisation we know was bugged by the Protective Security Intelligence Group in Victoria in the late 1980s—

Mr LEO McLEAY—But not by ASIO.

Mr Lawson—As I am sure you know, there is a close relationship between the police intelligence groups and ASIO. The point we are making is this, and it is the same point that Justice Murphy made in the Church of Scientology case: it is that characteristically from time to time intelligence agencies exceed and misuse their powers. He said that the Royal Commission into Intelligence and Security, for one, found that there had been at times departures by ASIO from the principles of propriety including legality. We say that in part stems from a politicised approach.

The reason why this is dangerous in the climate that we have currently with regards to terrorism is that it is very easy for people to be labelled as terrorists inappropriately. That is our concern. Given the scope of the definition of 'terrorist offence' and given we know that ASIO to some degree equates various protest activity with politically motivated violence and in some instances terrorism, we have concerns about this and we have concerns that ASIO would be given powers to be able to detain people in this way. They are concerns. You say that they are

concerns that will not be realised. We hope that that is true, but we are saying that the legislation—

Senator ROBERT RAY—Don't verbal me. I am only on the political partisanship angle. There is a lot else in your submission I agree with. I just wanted to ask you because if you do have direct evidence of political partisanship this committee would love to know, because we will pursue it.

Mr Lawson—I will leave it there. I think the point that we have made is clear. We will have to beg to differ on that.

Senator ROBERT RAY—It is not a matter of begging to differ. You have not put the slightest bit of evidence forward to support the case. That is what we are looking at: that part of the case.

Mr Lawson—I think I have already answered your question. The case that we are putting is this: we know that ASIO does place under surveillance a whole range of protest activity and political activity in this country. Our concern is that they can be inappropriately labelled as terrorist in the context of this raft of legislation.

Sally wanted to outline some comments on the Malaysian experience which I think are important to understand, as to how in a future situation this legislation could be used.

Ms Smith—Our fears about the proposed legislation are heightened when we look at similar systems of detention in other countries. Evidence from these systems of administrative detention clearly illustrate that the suspension of basic human rights and safeguards has facilitated the mistreatment of detainees. In Malaysia the Internal Security Act permits the indefinite detention without trial of any person suspected of posing a threat to national security. During an initial 60-days investigation period, detainees can be held incommunicado, denied access to a lawyer, family members and independent medical attention. Human rights groups such as Amnesty International have documented consistent accounts of torture and mistreatment of detainees under this act, and over 1,000 people have been detained.

This example and many others illustrate that unless fundamental human rights and safeguards are preserved then we face the very real risk that abuses and mistreatment will occur. It is the role of a democratically elected parliament to ensure that the laws do not leave us open to this possibility. In an attempt to protect our democratic system from terrorist threats, it would be foolish to abandon the very fundamental rights, freedoms and safeguards that underpin and define our democratic system.

CHAIR—Thanks for that. One of the things that you raised in your submission was that you did not agree with the definition of terrorism: it was too broad. We have heard that. I do not think that we have yet got a definition of terrorism. Have you got one?

Mr Lawson—No. The United Nations does not have a definition of terrorism. As you know, there are difficulties with the negotiations, currently, on a broader convention precisely for that reason. It comes back to our view that the government needs to be making a case of where the existing criminal law does not adequately cover the sorts of acts that we saw on September 11

or any other sorts of acts that could be sensibly described as terrorist acts. We would say that the existing criminal law does cover those sorts of acts and covers any other sorts of acts. Obviously murder, criminal damage, grievous bodily harm, conspiracy, and aiding and abetting are the sorts of offences which our existing criminal law has and which can be used.

When the question was put by the Senate committee to the government as to what area of the existing legislation does not adequately deal with terrorist offences, the only example that seems to have been given is in relation to training. Perhaps there is a need for a specific amendment to the criminal law for those who are involved in training of people to commit serious criminal offences, but there is not a need for this sort of broad, wide ranging definition of terrorist offences with all the reversal of onus of proof and the absolute and strict liability approach to the ancillary offences—all attracting life imprisonment—that the government is proposing. That is why you have the Uniting Church, the Catholic Church, the ACTU and the Law Council of Australia all very much up in arms about this issue. As people have said, it is this wide ranging approach which we have real concerns about, given the experiences of countries like Malaysia and others, where these types of offences—perhaps not now, perhaps not tomorrow, perhaps not in five years—could be used to investigate and charge people who are involved in genuine political activity. To the extent that this legislation is attached to that definition of terrorist offence we raise that issue.

Mr BEAZLEY—We have a bit of a problem in that we are not actually dealing with the primary act here in terms of definitions.

Mr Lawson—Yes, it is difficult.

Mr BEAZLEY—It is interesting to get views of folks on it. Whatever people decide terrorism will be, this relates to some of the investigation of it. In your remarks a bit earlier on you talked about your concerns about detention of children and those aspects of the act related to strip-search and the like. We have been told that those sections of this act are basically directly lifted from the federal Crimes Act and from the Customs Act. In your legal centre's experiences, what are the particular problems that have emerged with the operation of those acts in relation to children or strip-searches generally that you might be able to furnish us with to give us some advice on what may be potential problems with this?

Mr Lawson—What we can pull together quickly for you by tomorrow we will try to do, but we can certainly say that there is experience in particular with state police using searches in an inappropriate manner. It is an ongoing problem, and one of the ways we attempted to address it in Victoria, with the cooperation of the state government, was to set up a system of independent persons that are available. It is an ongoing problem. But the problem stems from the detention itself, and I think that is what the committee needs to wrestle with. I do not think we can get away from the point that, while the government says it will not use this willy-nilly, while ASIO says it will not use this willy-nilly, that needs to be in legislation. You cannot just put something in legislation and say, 'Don't worry, we won't use it.' You can put all sorts of safeguards in, but it is the detention itself that is the issue: it is the fact that someone is being deprived of their liberty without a trial—they have not committed any offence, they are not suspected even of committing an offence—for 48 hours or indefinitely.

In terms of the treatment issue, there are concerns about where are people going to be detained and whether police are able to question people while they are being detained. We have got a procedure for ASIO questioning them, but are police able to question them? What penalties are there for ASIO or for police who violate the processes set out in this act? If an ASIO officer does act inappropriately, how do you take action against them, because it is illegal even to name them? You are not even going to know their name necessarily. But on top of all of that, fundamentally it is the detention itself that is the problem, that you are being deprived of your liberty for at least 48 hours, if not longer, if not indefinitely.

Senator ROBERT RAY—Can I just take you back to strip-searches. The big difference between this and Victoria is, as I recall, that in Victoria people can then take legal action and sue for damages.

Mr Lawson—As they have done successfully. Our legal service was involved in a case where a woman was going in to pay her parking fines and they pulled up her name on the computer and found out that she had warrants and then strip-searched her, and she sued the police and got a large sum of money. It happens all the time. It is happening increasingly. It may not be possible to sue an ASIO officer you cannot name, perhaps. I do not know. The point is: do we want a situation where people are being deprived of their liberty when they have not been shown to have been involved in any crime?

Can I make one quick point on that—that is, I question even the investigative purpose of this legislation. Firstly, if you take someone out of a scene for 48 hours and you do not want anyone else to know, surely if they are connected with terrorism and disappear for two days that in itself alerts terrorists that someone is on to them. Possibly that is a good thing. If terrorists think someone is on to them maybe they will not go ahead and do whatever they were going to do. But the whole argument about incommunicado can cut both ways. Holding someone incommunicado could just as much alert a terrorist network as much as not allowing information to be given to them. Secondly, if someone is really involved in acts of terrorism—if they are going to be involved in flying planes into buildings—surely just being asked questions is not something that is going to afford a lot of information. Surely the best tools for ASIO are the things they have now—phone tapping and things of that nature.

Thirdly and finally, the question I have is that you raise the point that you are not going to want to hold people for a really long time once you cannot get any information out of them. But the experience in overseas jurisdictions has been that the whole reason you want to detain someone for a long period of time is that, because there are prohibitions against mistreatment, that is precisely the way you effectively break someone down mentally so that they do answer questions. In some instances that constitutes torture. Holding someone for six days incommunicado and then questioning them at the end of the six days, not at the beginning—

Senator ROBERT RAY—There are a number of weaknesses in this legislation. There is absolutely nothing in this act to say, to limit or describe how a person should be treated the moment a warrant is issued and someone is detained before a prescribed authority. We do not know if they are entitled to be jailed or detained in a jail when they are not being questioned—we know none of that. One of the proposals is that ASIO should be required to develop a complete protocol for their behaviour in this period and have that at least approved by the

Inspector-General and maybe this committee, because we simply do not know what happens in the 48 hours.

Mr Lawson—That may be a minor improvement but I do not think that would address the problem. Unless it is in legislation and unless there are serious penalties for acting inappropriately—

Mr LEO McLEAY—There are not any provisions for penalties. It says in the bill that you have to treat people humanely, but it does not define 'humanely' and it does not provide any penalty for treating people inhumanely. That is something we are going to pursue. One could say, 'Well, this is a bad bill,' and the committee could have a one-line report that says that, but I do not think that is what the committee will end up doing. So you might need to try to make it work. Firstly, would it be a more acceptable provision if the warrants could only be issued by a judicial officer, not by an AAT member? You might have to have the AAT members be the people who oversee the interrogation, because we have been given some evidence that says that there have been decisions by the High Court that would prevent judges or magistrates from doing that. So you might have the magistrate or the judge issue the warrant and the AAT person oversee the matter.

Secondly, would it be a more acceptable provision if a person, after they had been in custody for a certain length of time—say 12 hours or 24 hours—had the right to apply to the Federal Court for release and that there was a panel of lawyers from which people could choose a person to represent them and, every time the warrant came up for renewal, they could again apply to the Federal Court for release and for security people to protect them? You might have a provision where either side could ask for a closed court hearing. Would it redress some of the balance back towards the person who has been detained? And maybe you could say, 'You are only here for an intelligence-gathering operation; you are not here for us to build a case against you with a view to prosecuting you. If we are going to take away your right to remain silent, then we should also indemnify you against any of the evidence you give being used against you in any other matter.'

Mr Lawson—Including terrorist offences; is that what you are saying?

Mr LEO McLEAY—Yes.

Mr Lawson—Obviously these are all minor improvements. I can see big problems with the things that you just outlined, as well.

Mr LEO McLEAY—Tell me about those.

Mr Lawson—The point is that the whole way this legislation is set up is that it will reverse the onus—the onus being on someone who is held incommunicado to somehow say, 'Yes, I want to go to the Federal Court.' You have got to think about the types of people who might be detained by this. These people, like many of our clients, have no experience of the court system in any way except in a very disempowered way.

Mr LEO McLEAY—But we are also saying that there would be a panel of lawyers who maybe the Law Society would nominate—who would be pretty good lawyers, one would

think—who would make themselves available to do this work and be there are all the time with it.

Mr Lawson—These may be small improvements but, certainly, we think in the first instance that this type of legislation will be used to haul in a whole range of people from the Arab and Muslim community. We know already from our clients in our legal centres—particularly the community around my legal centre, but from a range of legal centres—where you have had members of the Arab and Muslim community who have been visited by ASIO and the Federal Police already and questioned in their homes. They are not aware of what their rights are. In some instances, members of the Arab and Muslim community have already been labelled inappropriately as terrorists, and they have had their accounts frozen. At the last committee we talked about a businessman in Melbourne who had his accounts frozen. We have since talked to one of our community legal centres who has had to assist people in the Arab and Muslim community in their community who have had their bank accounts frozen, and it was wrong; it should not have ever happened. This was in relation to this listing process that occurred in December last year. They had no idea what do about this.

You are going to have a situation where people will be whisked away; they will have no contact with their family and friends, and then you will say to them, in that context, that they are being detained. Presumably they will be told, 'We can detain you for a long period of time. If you do not answer our questions within 48 hours, we will go back and ask to lock you up for another 48 hours and, if you do not answer questions then, we will go back and ask to lock you up for another 48 hours. But it is okay; you can go to the Federal Court and say that you do not want to be detained.' Clearly, the Federal Court being involved in some way is a minor improvement on what we would have now. But, fundamentally, it comes back to this point: should we have a situation in this country where someone who is not suspected of a crime is able to be detained for two days, when someone who is suspected of a crime can only be detained for a reasonable time by police, which usually adds up to something like 12 hours?

Mr LEO McLEAY—Federally, we are told it is four hours.

Mr Lawson—The courts interpret this, and there have been situations where people have been detained for longer if the court thinks it is necessary for the purpose of the investigation. But you see the point I am making. You have this complete imbalance between someone who is not even a suspect who has had their right to silence abrogated and is being held purely to provide information who can be detained for two days and someone who may be suspected of having committed murder who could possibly only be detained for four to 12 hours. It is a remarkable situation.

CHAIR—Just on that point you raised about people in the Muslim communities and the difficulties they were having, were any complaints made to the Director-General of Intelligence and Security?

Mr Lawson—The solicitor at the legal centre had to go through a number of hoops to get the accounts unfrozen, and eventually they were. I am not sure for how long the accounts were frozen. In the case of the chap in Melbourne, he had his accounts frozen for a month.

Senator ROBERT RAY—By whom?

Mr Lawson—In his case, by the bank. We have a concern about this situation and it relates to this legislation as well. You have this process going on where people are really concerned about terrorism and, rightly so, concerned about the attacks on September 11. You have this whole listing process going on at an international level and at national and state levels. People are being labelled inappropriately as terrorists. You may get your bank accounts unfrozen and you may no longer be listed as a terrorist, but in some senses the damage has already been done and it is the same for this legislation. ASIO might come along and take someone away for a couple of days and then find out that they have got no information and release them. What is the impact then on that person in their community when the people in that community will presumably know that ASIO have taken them away?

Senator ROBERT RAY—I am trying to get this right in my own mind. We do not want names or any identification, but the bank has frozen a bank account. Do you know at whose request? This is what is not clear to me.

Mr Lawson—To understand how it currently works, I would point you towards the transcripts from the Senate inquiry into the security legislation where we went through a lot of this. The Suppression of the Financing of Terrorism Bill 2002 outlines a couple of processes. It outlines a process for creating offences of financing terrorist acts, but then it also outlines a process which mirrors the regulations that were passed in December last year for listing individuals and organisations who the Minister for Foreign Affairs says is connected with terrorism. Then that list is sent to financial institutions who act on that information and freeze accounts they believe are connected to that list. The point I am making is this: the financial institutions are erring on the side of—

Senator ROBERT RAY—That was not the question. I am just trying to get an answer. Do you know who requested the freezing of the account? You may not know and that is fine.

Mr Lawson—My understanding is that the financial institutions, after looking at the list that had been provided to them, have frozen accounts of people they think are somehow connected to the list.

Senator ROBERT RAY—Provided by whom?

Mr Lawson—Provided by the government.

Senator ROBERT RAY—Through what method? Through what agency?

Mr Lawson—I am not sure what agency distributes the list but the list is publicly available. By regulation in December last year, the government made a list of individuals and organisations that they say are terrorist organisations or terrorist individuals. Those lists have been provided by someone in government—either ASIO, or probably AUSTRAC—to financial institutions and those financial institutions are required to freeze accounts.

Senator ROBERT RAY—So that happened in this case?

Mr Lawson—Yes. It has happened to—

Senator ROBERT RAY—No, not that the account was frozen but that it was as a result of government action?

Mr Lawson—Yes, indirectly from government action in the sense that the government makes the list and then the financial institutions take that list and use it.

Mr LEO McLEAY—You have gone from the specific to the general, I think. You have told us that the bank account was frozen by the bank. Can you tell us whether the bank had this list and that was the reason the bank froze it?

Mr Lawson—In the case of the common businessman, that is what happened. In this case, my understanding is that a similar thing happened, but I do not have the full detail of exactly what happened. We can undertake to make sure that you are given that. We were told information by the solicitor in this community legal centre who basically contacted us based on hearing about what we talked about the last committee hearing. They said, 'This happened to us. There are some members of our community who this happened to and I had to call everyone to get these accounts unfrozen.' The reason I raise this point is that it is concerning and distressing for these particular people, and I understand why you are concerned about it, Senator Ray.

The point is this: you have a situation where lists are being made all around the world of people who are described as terrorists. Our concern is that a similar process will happen with this—that ASIO will be provided, as you have talked about, with information perhaps from foreign intelligence agencies such that: 'We are concerned about these types of groups of people or these particular individuals. You have to go off and grab them and interrogate them for 48 hours or six days or 10 days.' How does ASIO check the information that comes from the FBI or MI5 or a European intelligence agency or the Singaporean intelligence agency or the Malaysian intelligence agency, which locked up 1,000 people under the ISA? How do they check that information? There is all sorts of naming going on at the moment, and our concern is that those powers would be affected by that type of climate.

Senator ROBERT RAY—I am not defending the methodology, but the Director-General has to have ample ground to go to the Attorney-General, and the Attorney-General has to make a judgment on that and so does the prescribing authority. So it cannot just be an arbitrary or capricious choice.

Mr Lawson—No, it cannot.

Senator ROBERT RAY—I think that is what you were inferring just then.

Mr Lawson—No, not at all. I am saying that you only have to look at the warrant processes that occur in the normal criminal jurisdiction to see that judicial authorities or magistrates rely a lot on the information that is provided to them. How much checking is the Attorney-General able to do of the information that ASIO provides to him to form a view that a warrant is necessary? Essentially, it will come back down to ASIO forming a view that they need to detain someone because they have information regarding a terrorist offence. Given that we already have examples of innocent people having been affected through this process of labelling people in the community as terrorists, we have concerns that a similar thing could happen in this case. That is just innocent people. Then you have the problem of this broad definition of terrorism,

and all sorts of legitimate political activity could be labelled as terrorism and therefore brought into the net.

CHAIR—There being no further questions, I thank you very much for the contribution you have made today. Will you follow up on those couple of aspects, please?

Ms Smith—Yes.

Mr Lawson—Thank you.

CHAIR—We will declare an adjournment now and resume at half past one.

Proceedings suspended from 12.12 p.m. to 1.26 p.m.

BURROW, Ms Sharan, President, Australian Council of Trade Unions

BOWTELL, Ms Catharine, Industrial Officer, Australian Council of Trade Unions

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Burrow—Yes, thank you. We view the bills proposed as being incredibly serious in terms of their impact on democratic freedoms. While we understand that they are separate bills, there are links, clearly, with the matters before a Senate committee at the moment—we think they are interrelated and they concern us greatly. We know that there is an argument about how many safeguards there are in the legislation, but we need to highlight that we think that is about giving it a veneer of respectability. You can drive a truck through them, frankly, when you look at the detail.

It seems to us that the challenge for people considering these laws is to think of themselves as law makers—we put this submission to the Senate—and to ask whether or not, as champions and representatives of the Australian people in regard to democratic freedoms, you can honestly recommend these as laws that an Australia committed to democratic freedoms would want to have, to hand on to its children or its grandchildren.

The key concerns for us are essentially driven by a number of issues and the first is the absolute failure to respect the separation of powers. It does seem to us that you cannot think about these issues without thinking through what the role and rights of the legal processes and natural justice are in this country; the role and the responsibilities of parliamentarians; and the very real and deliberate reasons why they are separated in this country—because of our respect for democratic freedoms.

We believe that the specific powers for ASIO in regard to detention have the potential to turn ASIO into a secret police. We do not make this comment as a sensational piece. We believe that there are many, many Australians who have actually become citizens of this nation because they have fled from nations where similar powers were in place and that they lead to secrecy and an oppression of citizens that we would not like to see in our democracy. We cannot believe that the government is seriously proposing the abolition of the right to silence or, in fact, a period of time without legal rights and representation. We believe that, despite the periodic provisions, if you like, about detention, there is a capacity for indefinite detention of suspects and non-suspects. The question about incommunicado detention, or detention without legal rights and representation, is of serious import.

The link to the definition of terrorism is something that I want to touch on for a moment because it inserts a new definition of terrorism offence into the ASIO Act. It is the same as the other five bills in that sense and it suffers from the same problems. We referred to them in our submission to the Senate inquiry. It seems to us unbelievable that a person can be seen to

commit a terrorism offence even if no terrorism act occurs. For example, you can belong to a banned organisation possessing a thing which, by definition, is not something we can even enter debate on, because the notion of a 'thing' is just so broad and ill-defined.

We could go through our concerns regarding the new powers, the power to get a warrant for questioning, the issues we have about what ASIO has to do to get permission to seek a warrant, the fact that there is no requirement that the person is a suspect or that any terrorism act has been committed. As I said, there is the issue that it gives the appearance of the separation of powers but actually, because the AAT is a non-judicial body with members appointed by the government for fixed terms, in our view it does not satisfy the fundamental requirements for a separation of powers. We can talk to you about the powers of the Federal Magistrate or the AAT members. We do think there is a very low threshold. Even if we were inclined to agree that these might be justifiable laws, the threshold for approving custody is totally unacceptable. We would go much further than that and ask you not to accept it at all.

We can deal with those and other issues during questioning. Let me conclude these introductory remarks by saying this: it seems to us unbelievable that one person or, by delegation of the Attorney-General, another, who is a parliamentarian, can assume for himself that level of power over people's rights, with no judicial respect for natural justice or due process. In a country like Australia, where our laws have been very clearly designed to separate the powers, it is unbelievable that one person can give the right to ASIO to approach a person specifically appointed by the Attorney-General himself to gain the right to detain people for 48 hours without legal representation. In doing so, the links with the other related bills mean that you do not actually have to commit an act of terrorism to find yourself in that position.

When you consider that that same person, the Attorney-General, would also have the power in related bills to determine whether an organisation was proscribed or banned, and therefore the definition links potentially to any member of that organisation or people associated with activities of such an organisation, without the natural protections of our judicial laws, that seems to us to be way beyond anything we would ever have believed that an Australian parliament would seek to do.

So for good reasons, not just for sensational reasons, we do not believe we would be here talking about these particular powers and the related bills in the context of an Australia that values democracy. For us, when you put together the holistic impact of these bills, you are talking about the kind of powers that Menzies tried to get through in the McCarthyist era, which were put to the Australian people and the Australian people said, 'No.'

We say to this committee and to the Senate: if there are reasons why the current criminal law in Australia does not work, if the powers around incitement, conspiracy and the natural, tried and tested powers of the police and ASIO are not adequate, put before us the reasons, the examples, the fears of the politicians that are based on evidence in terms of the inadequacy of our existing laws, and we will be happy to engage in that debate.

But we urge you, as law-makers, not to put in place the kind of laws that would restrict democratic freedoms in Australia—where we have no evidence that we are under any threat of terrorism—or that you might say are safeguarded by and would never be used, in the way in which we perceive they could be used, by the current politicians, but which are actually putting

in place our democratic foundations, or lack thereof, for the future. For that reason, we urge all members of parliament, whether it is the parliamentary committee here, or the senators who will look at this and related bills, to simply judge that they are not appropriate for the Australian democratic culture that we have grown up in and wish to hand on to our children.

CHAIR—In his second reading speech, the Attorney-General made reference to the fact that this process was a matter of the last resort. I gather from what you say that, even in extraordinary times, we have no room to give way on anything.

Ms Burrow—I believe that we have, and the legal brain, Ms Bowtell, is sitting near me. But we believe that the criminal laws of this land are set up for good reason, and if their current capacity is inadequate by the judgment of the Attorney-General or any other politician and they wish to look at how to amend our laws, then let us do just that. But let us not fall into the trap, in trying to justify that in a moment of concern—due concern, if the Attorney-General believes that to be the case—and so erode the separation of powers and therefore damage our democracy. That would be untenable as we create the foundations of a future democracy.

CHAIR—I move to those step by step items that you alluded to in your opening statement and that are in your submission. First, I go to the issuing of warrants. If we are stuck with this bill, what process would you advocate to try to make it a little more satisfactory? What process would you go to in terms of the issuing of warrants?

Ms Burrow—We believe that you are not stuck with this bill; you have a democratic duty to make a decision about it and we are trying to urge you not to accept it. We would return it by way of rhetorical question: what is it about the current warrant system that has failed?

Applause from the gallery—

CHAIR—While I appreciate having the gallery here, can I just say that, under the ASIO Act—and this committee is covered by the ASIO Act—these inquiries are supposed to be held in secret. While that might appear to be funny, the reality is that a great deal of hard work has gone on to make sure that these are public hearings. I want to keep it that way; but, if there is any interruption, unfortunately we will have to call the thing off and go back into a closed shop, and I do not particularly want to do that.

Mr BEAZLEY—In your opening remarks, you acknowledge what is obviously the case: there is a relationship between this bill and others on the question of definition of terrorism. There has been a deal of comment in the public that, even though there appears to be an exclusion in relation to industrial activity and industrial relations, the operation of the definitions which have been put in place might not exclude that. Does the ACTU have a view, having had a look at the detail of that legislation, as to whether it is sufficiently safe with regard to industrial activity?

Ms Burrow—I will ask Cath to address the legal question and then I will come back to some specific examples.

Ms Bowtell—Obviously, we have had a look at the definitions of 'industrial action' that have been used in other legislation, and how that has been interpreted by the courts. Primarily, it has been through workplace relations legislation that the courts have looked at 'industrial action', so

the interpretations have been done in the light of trying to prevent and settle industrial disputes, rather than looking to see whether someone will be exposed to life imprisonment.

Given that caveat, what you see in the definitions of industrial action is that, for example, picketing—at least, certain types of pickets—has been held not to be industrial action. The case was the National Union of Workers v. David's Distribution in the Federal Court, where the court found that at least a low-level picket, an information type of picket, was not industrial action; a picket where you sought to persuade members—members of the public and members of the work force—to not cross the picket might or might not be industrial action; and where you actually turned people away then it probably was. So, depending on the response of the people who come towards your picket and how perhaps you constitute the picket at various times of the day, you may move in and out of engaging in industrial action and therefore in and out of being caught under the exemption in the security legislation amendment bill or outside the scope of that exemption.

Similarly, in relation to the exemption for lawful protest, advocacy and dissent, most aspects of political activities attract some elements of unlawfulness, whether it is creating a nuisance, engaging in a trespass, blocking a public highway and so on, so most of the normal routine activity of members of affiliates of the ACTU would take place outside the so-called protection that is built into the definition of 'terrorist act'.

Ms Burrow—Yesterday, of course—it would not be lost on you—was May Day, and last night I had occasion to reflect with some 200 people in Canberra on our history and indeed on these proposed laws. Working people, I think you would agree, around the world are the loudest voice in protection of democratic freedoms as well as workers' rights. We were thinking about our history and, if you think back to the opposition to the Vietnam War in this country, to the opposition to apartheid in South Africa, to the free East Timor campaign, to current deliberations for us about the atrocities which we think will be named war crimes in the Middle East at this point, you will find that any of those movements grew in opposition to the government policy of the day. Of course, those of us who were involved in those community protests would have belonged to organisations that may very well have been prescribed or banned at one time and most of us would have to say we engaged in political/industrial activity that was just on occasion a tad unlawful—but for good reason, as society changed its mind by dint of public debate and therefore public policy followed.

Mr BEAZLEY—In your presentations to the Senate committee which is actually considering the definition, you have got your general objection to the bill as a package and the rest of it. Just about everybody who has come before us has a similar position. You have then put forward suggestions as to the way in which, assuming the legislation is not defeated, it might be changed. Have you put to the other committee, or are you developing, a definition in relation to industrial action—I accept that you are talking about political action as well—specifically whereby the sorts of problems that you think might well emerge in this legislation could be by changes to it effectively excluded?

Ms Burrow—To be very frank, we believe that it is such a serious issue that we have not dealt with the question of amendments, because our lobbying to the opposition parties has been to oppose the bills. I think that, even if we wanted to do that to protect ourselves, we have a moral responsibility and a reality check that says that, in many of these issues where you are

actually dealing with causes that could be seen to be not only against the public policy of our government of the day but indeed against governments in other countries, there has to be the democratic freedom to be able to have those views expressed publicly. No matter what definition we put up to protect ourselves not only could we still leave ourselves exposed on the political action front but we could well abdicate our responsibility as a voice of working people to defend the political rights of other citizens. To that extent, I understand what you are saying, and normally that would be a responsible course of action for us. We feel that would be perhaps just too self-protectionist in an area where we are, frankly, concerned about the democratic freedoms more broadly.

Ms Bowtell—The problem with the definition of terrorism relates partly to the exemptions not exempting what they purport to exempt but partly to the stem—that is the characterisation of acts as unlawful because of the religious, political or ideological motive of the person carrying out those acts—rather than the acts themselves. So it is the criminalisation of the motive that is fundamental to the problem of the definition of terrorism. Once you have criminalised motive—political, religious, or ideological—it is very hard to draft an exemption that would sufficiently cover what we would see as normal political or industrial dissent, namely people who work against the current perceived view.

Ms Burrow—There is another reality for us. We defend and indeed fight for working representatives around the world who just disappear. That happens every day. Our colleagues in international struggles can disappear for two, four, six, eight days, or indeed months or years in some cases. It seems to us unbelievable that we could even begin to think about an agency of an Australian government that would have the powers to detain people, with no public knowledge and no legal rights around that issue of detention. From that point of view, when you link the two, it is untenable that we would try to seek to define protections for ourselves and our members in a context where we think the whole set of bills is unacceptable in terms of our democracy.

Mr BEAZLEY—The problem with simply blanket opposition is that Australia amongst democratic nations of a reasonable human rights record is not Robinson Crusoe on this legislation. We have had a variety of evidence presented to us in the course of the last couple of days. The people who are knowledgeable about the effects of acts in the UK, Canada and the US, for example, which are three countries with a similar democratic tradition to ours—in the case of one of them, ours is an outgrowth of it—have all characterised those acts as less draconian than this in some aspects and more draconian than this in others. Currently, from the people who presented themselves to us, at the moment the world's worst practice is in Canada in regard to the legislation it has put in place.

The legislation is there for a particular reason and that is that all of those particular countries and those governments have perceived now that we confront an extraordinary threat, we have extraordinary problems and there needs to be a capacity to obtain information and exchange it. That information having been obtained and exchanged has already given evidence in the last few months to the blockage of and prevention of acts that would have ultimately deprived the civil rights of a whole variety of human beings who have absolutely nothing to do with the political issues involved, particularly in the case of potential threats to Australian and American embassy activities in Singapore and to the United States embassy in Italy. There is a perception there that there is actually something that you have to get to grips with. The Australian

government, irrespective of whether it has actually arrived with the right mechanisms, is not unique in attempting to do that. Assuming that others see a need for it and that we are involved with it, the questions then arise: what sort of extraordinary measures should we take? How long should they last? What protections ought to be put in place?

It is hard to turn away from an initial viewpoint of total opposition to one where you actually start to tinker with what might be measures that you regard as unacceptable anyway. Has the ACTU put in any detailed thought as to what particular protections ought to be put in place for people caught up in this? What changes ought to take place to warrant procedures and the like that might offer some degree of protection in human rights terms that you regard as significant?

Ms Burrow—The answer is no. To the extent that we looked very carefully at these proposals, it is true to say that we thought through the impact, the possibilities for amendment and then came down on the side of the fact that we could not support any of them. Having said that, Cath can give you an analysis by international standards. You would be aware that there was virtually no debate in some of the countries that have now moved amendments to their existing legislation. We still remain unconvinced by any example. I hear what you say, but there are no public examples on the table that would allow the Australian public to debate the matter.

I think that is a fair request. If we are going to change the very fundamental nature of our democracy and the separation of powers, there are some things where I do not think it is adequate to say that our political representatives have all the knowledge. I think we should have a legal, public and political debate about examples that you refer to but which are not in the public lexicon. I absolutely respect that there may be some very real threats that other people know about; I do not. If they are there, what is it about our current laws—and I think this is a question we will keep asking—that makes them inadequate for Australia to deal with them?

Mr LEO McLEAY—I suppose the answer to Sharan's question is this: what we are told by the bureaucracy and by ASIO is that this legislation is here for intelligence gathering, not primarily to promote a case against someone. They see it in this way: information may come to their attention that someone knows something about a terrorist act, but under current law there is nothing they can do to talk to that person about their knowledge. There is no law to deal with someone who knows something is going to happen, so that they can inquire into that by talking to them. The police have powers to do those things, but ASIO do not have those powers. They say that this legislation, which they see primarily as an intelligence gathering operation, will allow them to act upon information that they may get from outside Australia about a threat that is posed either here in Australia or somewhere else. So they say to us that that is where the current law fails; that under the current law they cannot act on that information by going and talking—

Ms Burrow—That worries me even more, because what it says is that ASIO wants the powers to be the secret police service. If ASIO cannot operate in partnership with the police, then I am not sure why not, and I have to ask you: are you not concerned that somebody could be detained because ASIO wants information; be forced to give up their right to silence or face draconian legal consequences; be not entitled, despite any lack of confidence or knowledge about the role and rights of ASIO, to legal representation to protect their rights; and then for ASIO to be able to go back to the very man who gave them the power to do that in the first

place and get an indefinite extension? Doesn't that worry you? It frightens the hell out of me, I have to say.

Mr LEO McLEAY—If you had been here earlier today, yesterday or the day before, you would have heard all the reservations that all of us have about various elements of this bill, but you said twice in your presentation: why is the request there? I am answering what we understand as to why the request is there.

Ms Bowtell—If there are inadequacies in the power of ASIO to ask questions of people, it does not therefore follow that there should also be a power for custodial warrants, that those custodial warrants should be incommunicado. In fact, there are further flaws, having reread the legislation last night. The 48 hours start ticking, for example, from when the person is first brought before the prescribed authority.

Mr LEO McLEAY—That is not clear. It may start a lot earlier than that. It may start when the warrant is issued.

Ms Bowtell—No. There is express reference in the legislation to the 48 hours starting at the time—

Senator ROBERT RAY—Even ASIO now says that is—

Ms Bowtell—Fine. The fact that you need to obtain information does not justify waiver of a whole lot of other rights that apply when the police want to question you in relation to a serious offence in the state of Victoria. There is no right to complain if you are detained by state police, for example. You have a right to complain if you are detained by Australian Federal Police or by ASIO but not if you are detained by state police. These things are perhaps drafting errors, but they certainly create a climate of concern about why ASIO would even want those powers if they also want to attach to them all the other things that go with it.

Mr LEO McLEAY—What if there were a number of suggested safeguards inserted in this legislation that would provide people with the ability to have legal representation and to have warrants issued not by AAT people but by Federal Court judges? We have also been told that that might not be possible. Is this an administrative act or is it a judicial act? The Federal Court judges have said they do not usually like doing these things anyway. The committee wants to put a higher level of scrutiny on this—for judges to issue the warrants and AAT people at the higher level than part-time ordinary members—for example, presidential members—to oversee the questioning and for people to be able to petition a Federal Court for release after a period of time. Those sorts of safeguards could be put in place to balance the need that ASIO say they have for this information to avert catastrophes, as opposed to people's rights to freedom and to not be held in administrative detention. You could take away the provision in the bill that says that you can be caused to incriminate yourself and then be prosecuted for incriminating yourself. You can have five years for talking or five years for not talking, whichever you want to do, you can have five years. You cannot have one and not the other.

Ms Burrow—If you look at our submission, you will see that 2.6 to 2.11 addresses some of those issues. We say:

The role of the AAT should be replaced with a judicial officer.

We say there should not be a capacity for the extended detention of persons and that 'if the power is retained, there should be an absolute limit.' We cannot abide the thought that there would not be legal representation provided for. I do not think anybody, any human being, should be faced on their own with a powerful force with official responsibilities like ASIO. We cannot pretend that that is in anyway reflective of the human rights law internationally. We have to say that there is a question about the imprisonment. You raise the five-year issue for giving up rights. There are issues we have not touched on about where it would apply to minors.

Mr LEO McLEAY—Your submission is wrong in part of that.

Ms Burrow—To the extent that Kim and you have asked whether or not we have made suggestions, that is true. Our first and foremost question—and our piece of vehement opposition—is: is there no way that you can respect the current separation of powers and provide for ASIO to work in partnership with those judicial and police powers rather than give to an administrative and intelligence gathering organisation the sorts of powers that we would only give to police and then all of the safeguards inherent in our criminal laws?

Senator ROBERT RAY—One of the problems is that most of us for some of our lives have observed police force and Special Branch. When we look at those we look very kindly on ASIO.

Ms Burrow—Let's not give them some of the same characteristics.

Senator ROBERT RAY—I think that is right. When people, as an alternative, suggest the police, I just wonder if they have thought through the experience of state special branches which have a worse history than ASIO.

Ms Burrow—And if they were up for debate in terms of review of some of the judicial powers and the powers of warrant and detention, we might well have a view that is in accord with yours. But I was quite serious: we do not want to emulate some of our worst fears in that arena by actually replicating powers that we would probably have some concern about in terms of people's rights in respect of ASIO.

Senator ROBERT RAY—Just one last thing: the problem we have in meeting your point on the AAT is that, I suspect, probably not everyone here agrees that that is a problem—that we would prefer a much higher level of consideration and independence of consideration. But it appears that in a reading of Grollo v. Palmer there is a distinct possibility that—and no-one can ever say it with certainty—if we were to say a Federal Court judge were to issue the warrants or to sit as a prescribed authority through the proceedings, it would be struck down in the High Court. And so that is giving us some difficulty.

Ms Burrow—We would say that is about rights and protections. That is why we have those judicial proceedings, with the laws of natural justice that give people rights of appeal but which do not exist except in the very narrowest way in any of these bills.

Mr BEAZLEY—You are looking for examples of the sort of problem that this is supposed to deal with, whether or not there is sufficient reason for ASIO to cross a line or is ASIO crossing a line? A lot of the weaknesses in this act go to the extent to which it is not made clear that ASIO is not advancing beyond its essentially intelligence gathering task. The warrants under this, for example, are exercised by the Federal Police, not by ASIO; it is not a suggestion that ASIO should be armed and so on. They do operate in conjunction with the Federal Police anyway. I know of practical examples and detailed examples. For my pains, for the last 17 years of my life until last November I was a regular recipient of security briefings and a participant in security committees of cabinet and of ongoing operations from intelligence agencies and the like. So I have some feel for what they are trying to handle. What they are trying to handle is this situation which has emerged as a result of understandings developing since September 11. Prior to that point in time, and certainly during the Cold War, the preoccupations of intelligence agencies were what you might describe as 'leisurely'—'Have you been penetrated by some KGB spy? Is there a Russian operation doing this, that or the other?' And they did them often in a very heavy-handed fashion and they described people as political threats when they were not. But they were essentially dealing with a situation in which nobody's lives were under threat. Insofar as somebody's liberties are at threat, there may well be a problem for the target of that particular investigation and you need to put in place checks and balances for that.

What they are now dealing with in the sort of information they gather is a different set of circumstances. To put this in a purely hypothetical sense—and it crosses national boundaries, I might say—but the hypothetical example I will use has real equivalents. As you are aware, most security agencies have a capacity to gather information via a variety of technological and human means. In the course of it these days, they get real time information. A call from person A in Canada to person B in Australia reveals a conversation in which they say, 'We have just been talking to a few of our friends, and if you thought September 11 was a pretty good demonstration wait until you see what we are about to do.' And they say to person B in Australia, 'I don't know all the information on this, but if you talk to someone else you might get it.' The problem is this: if there is reality in that, in the case of the World Trade Centre, 2,850 people subsequently had the totality of their civil liberties destroyed—their health and happiness, and that of their families.

What do you do in those circumstances? How do you get the information that stops that happening? These are real time things. Somebody exchanged that sort of information. Conceivably, the people who work at the Australian and US embassies in Singapore are alive today because they got that information in a timely fashion, as are those who use the water system in Rome—those poisoning that system may not have been capable of isolating the American embassy so not only Americans but also Italian citizens would have been affected. If they get that sort of information, they are actually capable of acting in a way that prevents large numbers of people's civil liberties being terminated. We are not existing in a hypothetical situation. Given that sort of requirement, is it a reasonable thing to assume that there needs to be a capacity on the part of the agencies to be able to question someone who might have knowledge of such an event taking place, albeit with appropriate civil liberties backings for the people concerned?

Ms Burrow—I do not profess to be an expert, but I have shivers going up and down my back. No-one is untouched by September 11; no-one is untouched by what is going on in the Middle East; and no-one is untouched by the aspirations for democracy of people in places like

Burma who are being oppressed. We could all say that, if there were infinite trust in the world and if all of our democracies were of the sort of integrity and had all of the protections you espouse, what you are putting forward might be a fair thing. But I keep coming back to our history, and that is the only touchstone I have—as I am a history teacher by trade. You and I all know of the files that were kept on people through the McCarthyism era, through the anti-Vietnam War era, through any of the civil protests against either the policies of our government or collectively our government and the governments of the world.

I can tell you right now that if you flipped from our nation to another one, I am black listed, for example, by the Burmese authority, Myanmar, as they call themselves. They say I cannot get a visa because I am a 'very dangerous woman', and that was actually before I became ACTU President. That was when I was president of the teachers' union, and they said the international teachers were a very dangerous body—because it is about information. The fact that teachers of the world could potentially go into Burma and somehow overthrow the SLORC—or whatever they call themselves these days—is laughable. But I can tell you that I have friends who are teachers, who are lawyers, who are working people's representatives, who have disappeared in Burma—and well could I.

Our Australian government would find it horrific to think that a union leader, a political leader or a member of a parliamentary party would disappear with no legal rights and be detained because someone said: 'They have information we need, and we have to have a capacity to get it. If that means forcing them to give up the right to silence, so be it.' Yes, what you paint is, I do not doubt, very real in the minds of politicians who are part and parcel of those debates. But we paint to you and say you have an equal and opposing set of responsibilities to protect the rest of us from erosion of democratic freedoms. I would say that, on balance, if the Federal Police and ASIO cannot work in partnership to deal quickly with all of the judicial protections that we now enjoy then let us debate that, but let us first of all look at how you can make the separation of powers work so that the partnerships are possible to protect us from the sorts of very real potential situations you see.

I can only plead with you. I know that it sounds extraordinarily passionate and emotive, but again I say to you we had tens of our friends in Colombia killed last year. We know about the realities of people who are simply detained because they act in the interests of democracy, working people's rights or any of those causes. For us, it is such a serious piece that I am here today. We are very concerned about this.

Senator ROBERT RAY—In the last 15 years, has the ACTU ever complained about activities of ASIO?

Ms Burrow—Of course, we had occasion to be concerned during the refugee situation last year, when the telephone calls to the ship—

Senator ROBERT RAY—Sorry, that is DSD. We are talking about ASIO. From time to time—not in your submission—people have alleged that ASIO acts in a politically partisan way and all the rest of it. I am quite ready to concede that 30, 40 or 50 years ago there were great imperfections. But I am just talking about the time that I have been looking at ASIO, in the last 15 years, to see whether your organisation has had to complain about any involvement you may

have had with them—that they have interfered with and observed illegally union activities, et cetera. I am just asking: has a complaint ever been lodged?

Ms Burrow—We did not make a complaint during the MUA dispute—I was going to go on to say that—if you go back in our history. But we had reason to be concerned. I think if you sat around our table sometime and heard some of the stories of some of the community groups that talk to us, there would be some measure of concern. Have we actually registered complaints—no, we have not. But if, in the last 15 years, we have not actually got reason to lodge, or evidence to lodge, a complaint then why does that mean that we should give up what are very real protections that make ASIO a more trusted body today than it was 40 years ago?

Senator ROBERT RAY—Hold on, there is no need to knock down a straw man on this.

Ms Burrow—But that is what you are suggesting.

Senator ROBERT RAY—No, I am not. It is just that people in Sydney and again today—not you—have made allegations that ASIO is in some ways politically partisan and interfering in the political process. As you are such a large organisation, representing such a diverse group of constituents, I am asking—it is not for any other purpose—whether you have ever lodged a formal complaint in the last 15 years about ASIO. You say no and I am satisfied with that.

CHAIR—We have just about run out of time. I thank you both very much indeed for being with us today and for the manner in which you presented the evidence. Thank you.

[2.13 p.m.]

FIFER, Mrs Dimity, CEO, Victorian Council of Social Service

PETTITT, Ms Annie, Policy Analyst, Victorian Council of Social Service

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make any introductory remarks before we proceed to questions?

Mrs Fifer—Yes, thank you. You would have received our submission. Since writing it we did appear before the other Senate committee. There were a few extra points we made there that I might allude to. Specifically, I guess, what we are saying is that we do not want to question the need for this bill, though I think we are completely in agreement with those organisations that still do not perceive that there is a gap in current legislation—that there is a need. But if we move to the next step and work on the assumption that there is a need for this bill, we actually question whether it is workable and whether the level of unintended consequences is working against the principles of democracy that we are seeking to maintain through having an anti-terrorism bill in the first place. So it is the level of workability and implementation of this bill and its conjuncture with the other suite of bills that we are mostly concerned about.

You will have ascertained, from page 4 onwards, some of the more specific questions. We are always asking what-if questions about the day-to-day workings of the bill in practice and the level of interaction by you as a committee. We would like to support an increased role by the joint committee in monitoring this bill. If you asked whether that extra level of monitoring that we are asking for will be a bureaucratic nightmare, I would say, 'Is this the sort of bill that is going to be used 365 days a year?' If it is, this is becoming quite outrageous. Are you talking about this bill being used once a year, once every five years or once every 10 years? Any dollars and resources spent on ensuring that the processes and the infrastructure are squeaky-clean will be well worth it.

We are talking about some of the worst impacts upon our democratic society. We are not talking about break and enter crimes; we are talking about the top notch—treason and terrorism. We believe that if you want the integrity of this bill to go ahead, you need the integrity of process to support that. The expenditure of any amount of dollars is appropriate for the implementation of some recommendations, which we have been quite specific about. The reason we are seeking changes that reflect democratic principles of transparency and accountability is the very reason that you say you need this bill: you want to protect the democracy of Australia against terrorism. We are always calling you on that and saying that, if that is what you want, we are adding to the bill.

We would like to make two extra points. One, as was clarified in the previous Senate hearing, is the definition of 'terrorism'. We feel that there is a third element that the definition has missed. We do not believe that a cause—whether it is religious, political or ideological—plus

violence equals terrorism. We are very concerned that no-one, even at the UN level, has yet nailed a satisfactory definition of 'terrorism'. It says in the bill that lawful protest, advocacy and dissent are outside this ambit, but I would like to put forward that unlawful protest, advocacy and dissent are still allowable in Australia. It goes against the Criminal Code if I put a brick through a window, but I have the right to not be called a terrorist. I must be put under the Criminal Code if I damage property, but I also have the right to not be called a terrorist. The missing part of the bill is of concern because it opens up certain gateways. I am not supporting criminal or violent activity but, if you do go down that path, there are appropriate criminal avenues. This bill has not tidied up certain issues. Anyone involved in unlawful protest, advocacy and dissent might end up under this bill. I do not think the proper definition of 'terrorism' has been nailed. We concur that social and policy definitions are missing around the fact that someone is involved in terrorism. It is not just cause plus violence; it is your desire to overthrow the social norms of a society. We feel that that missing part needs to be named, otherwise we will have people at the Woomera detention centre who may be doing unlawful protest et cetera, but they will not be terrorists in this sense of the term. We find that your definition is harmful and it brings unintended consequences.

The other thing that we are concerned about is whether the ASIO committee is going to recommend that some of the recommendations in your report of 1999 go ahead. We are concerned at the range of organisations that are alluded to in your bill and the other bills. At the moment, we are seeing proscribed organisations—some of those are UN defined and some of them are non-UN defined—non-proscribed organisations, potentially proscribed organisations and potentially non-proscribed organisations. We are not happy with what happens with a proscribed organisation necessarily, but we are very concerned at the ambit of all those other categories. We are wondering whether your committee is going to ensure that ASIO has working definitions and memorandums of understanding signed off by yourselves to ensure that the range of organisations within your bill does not, as the previous speaker said, mean that just about anyone involved in an ideological, religious or political cause could be within the ambit of this bill.

Senator ROBERT RAY—You were referring then to proscribed, not prescribed, weren't you?

Mrs Fifer—Yes, sorry. I got the spelling wrong. It is 'proscribed'.

CHAIR—Thank you very much indeed for that.

Senator ROBERT RAY—You are different. You have come along here and said you are not going to challenge the need for the bill. Can I just test these concepts out with you to improve the bill. Do you think the bill would be improved with a sunset clause of three years?

Mrs Fifer—Can I just go back to the reason that we are not coming along here to dispute the need for the bill. It is that we do not come from a legal background.

Senator ROBERT RAY—I understand that. That was not a value judgment.

Mrs Fifer—It is more a pragmatic response.

Senator ROBERT RAY—Yes.

Mrs Fifer—So we do not support that there is a need but we are saying in a pragmatic sense: if it does go ahead, please—

Senator ROBERT RAY—Yes, that is fully understood.

Mrs Fifer—That is fine. On the sunset clause: yes, we would agree with anything that increases the accountability of this bill. Even more than that, I do not want to see three years go past without monitoring all the way along, which is why we have made a number of these suggestions. Even three years is a window of opportunity that we would say is totally inappropriate without increased transparency and accountability, which is why we are suggesting the concurrent monitoring to occur. There is too much left behind closed doors, we are saying.

Senator ROBERT RAY—Are you aware that ASIO has indicated at previous hearings here that, unlike telephone intercepts, they are quite satisfied to publish through annual report or whatever other means necessary the amount of warrants sought and obtained in regard to this act?

Mrs Fifer—Okay. We would say there is a whole suite of processes that need to be implemented. Just having an annual report that documents how many times it was used in a year is still not good enough. We argued the same case here to the Victorian government with their peaceful assemblies bill. That is absolutely imperative but it is only one process. It is all the way down to: we are not happy about the videoing that occurs. We would actually want to see a concurrent monitoring process happening all the time.

Senator ROBERT RAY—What about this: we have been floating around a suggestion that access to legal representation can be seen as a difficulty if it is just ringing your own lawyer who may then notify people of potential terrorists. So the alternative was to set up a panel of lawyers nominated by the Law Council to give legal representation to anyone in the situation.

Mrs Fifer—I think that would be a useful idea. But can we also articulate that we are talking about two sets of rights here. We are very much supportive of looking after the particular rights of the detainee or whatever we are going to term a person that comes under the ambit of this bill. We are also looking at the rights of the democratic institutions. I hope that was actually clear—that you are also looking after protecting democracy and the institutions at the same time as you are looking after the rights of the individual who is moving through the ambit of this bill as it is implemented. I think that is a very useful suggestion but I am hoping it was clear enough that we are also talking about protecting the whole system here as well.

Senator ROBERT RAY—This is not the first bill to take away the right to silence, but it is virtually the first bill that makes it mandatory to give information but does not rule out self incrimination. Would ruling out self incrimination improve the bill?

Mrs Fifer—I am interested by that comment. A migration act—I cannot remember which one because there was a whole pile of them—that was passed in either 2000 or 2001 actually had some very unnerving clauses that the minister or one of the minister's delegates could make

negative inferences regarding someone who is applying for asylum. It was actually articulated in the bill. So I do not think this bill is the only one that goes along those lines. I was more impressed that they actually named such an outrageous sort of statement.

Senator ROBERT RAY—I have not seen that. This makes it mandatory, by way of a very stiff jail sentence, if you do not respond to questioning and give answers. You can look at other acts which say you must give information, but virtually every one of those acts does not allow you to self-incriminate, whereas this one does.

Mrs Fifer—Yes, and we would be very concerned about that. They were some of the principles as to why we articulated a different approach once someone is under detention. It is an understanding that there may be someone who is innocent who has had a different experience of the criminal justice system or a political system and who knows that to actually speak out incriminates yourself. I think in a multicultural Australia it is very inappropriate for us to think that everyone is working under the assumption that people would understand that what this bill is asking is that you must actually speak out. I think it is actually very naive, when we think about the experiences that different people that come to our country have, as they interact with our different political institutions.

Senator ROBERT RAY—There is just one last issue, which I think you mentioned in your submission and you may want to expand on: the right granted under this act to hold children to 18 years old—indeed, even go to the extent of strip searching. Did you want to expand on the point you made in your submission?

Mrs Fifer—I just want to ask whether the committee is clear whether this was a drafting mistake or intentional. It came as a bit of a shock. It looked like: 'Okay, over here we want to insert some clauses about the types of searches,' and then suddenly someone realised: 'Oh, we have actually got to articulate some of the rules behind that,' and then suddenly we were dealing with under 10-year-olds and people who actually were not aware of their own faculties. We were just totally appalled by that—the idea that we might have 10-year-old terrorists in Australia.

Senator ROBERT RAY—If you look at 34M(f), I do not think it is an oversight. It is there deliberately, surely. I do not think it is a typo.

Mrs Fifer—I am being facetious.

Senator ROBERT RAY—Okay. Sorry. You are being so earnest I took you as being literal.

CHAIR—I think those provisions have been lifted from other acts. I understand it is the same as provisions in the Customs Act.

Mrs Fifer—We would say that it is just totally inappropriate and absolutely should be removed.

Mr BEAZLEY—Yours is a very interesting submission from two points of view. Firstly, you have a crack at talking about what a definition of terrorism ought to be and then, probably like most sane individuals, you then throw up your hands and say, 'Wait for the United Nations and

amend the legislation as soon as the UN has arrived at a definition about terrorism.' Though we are all here fascinated by the definition, it is probably somewhat beyond our mandate, since ours is a dependent piece of legislation, not the defining piece of legislation when it comes to that.

Mrs Fifer—Yes.

Mr BEAZLEY—The other thing is you have tried to get to grips with how you might make a few of these things accountable. I am interested in your view on things like selfincrimination. There is plenty of law around in Australia which can at least in whole or in part compel you to incriminate yourself. We do it to businessmen under the ASIC legislation. You may not withhold from ASIC a document which ASIC demands, and if that document that you provide to them subsequently reveals a criminal activity on your part you are down the gurgler. It is part of the evidentiary base against you. If you also happen to be a businessman who is questioned on that material, there is a limited degree of protection for you there in regard to selfincrimination. Of course, before royal commissions in this country you get plenty of opportunity to create problems for yourself but there are, again, some limits and hedges around where those royal commissions might ultimately take you. What sort of protection do you think should be in here in the area of selfincrimination? Bear in mind that the principal purpose of this legislation is not actually to accumulate an evidentiary base for a prosecution but to accumulate an information base to prevent some other acts elsewhere. What sort of protection do you think you ought to put in this sort of bill, given that background on selfincrimination?

Ms Pettitt—It is very difficult to say. I would like to highlight something that was raised in our submission, which is that the UN Commission on Human Rights has affirmed that all measures to counter-terrorism must be in strict conformity with international law including international human rights standards. I think we would maintain that the right to silence and the right to freedom of expression and freedom of association are fundamental human rights recognised by the international human rights system, and it seems this proposed legislation effectively undermines that. In answer to a recommendation for what an alternative is, I am not sure we are actually in a legal position to answer something that.

Mrs Fifer—We were frustrated in responding to this. I guess, like you, we did decide to address this particular angle on the UN definition, and I think it would be wonderful if Australia could come up with the most amazing definition possible. The next thing is that, because we did not have that legal background, we wanted to ask those 'what if' questions. We wanted to ask those naive questions such as: is the committee convinced that this bill will not be contributing to other unintended consequences? I take your point about businessmen and the ASIC laws. At the end of the day, businessmen may get a white-collar crime of four years, but we are talking life imprisonment here. We are talking about a very, very serious crime. So it is absolutely imperative that we ensure that, for those people who may be innocent who move through this bill, their rights are absolutely protected.

The only suggestion we could come up with is that, all the way along, there should be a second independent check, because we found that at this stage everyone had a perceived conflict of interest—all the ministers that were alluded to; and I am appalled at the fact that not even officers of ASIO have delegated powers. We now have persons, and so there seems to be some perhaps implied contractual relationship. But everyone already involved in this bill, as

you tracked through it, had a perceived conflict of interest to ensure that this bill went ahead in its way. We wanted to ensure that there was someone totally independent who did not have any of their roles prescribed in here to ask those questions and check off. That would mean that, at any time an innocent person was caught within the ambit of the bill, you could remove that person and ensure that their rights were protected—an organisation or an individual.

What we are really concerned about is that no-one named in the operation of this bill has enough transparency, accountability or independence to protect the innocent. If a person goes through and, at the end of the day, gets the tick in the terrorist box—great. I hope that only happens once every million years. But we are really worried about the potential level of innocent people and all those involved in the implementation. And I agree; I feel for you, and I feel for ASIO having to implement such an amazingly appallingly drafted definition of terrorism and all the rest of it. You have to live with the consequences of someone else's drafting, and that must be appalling. So I am saying, because of that, your committee has even more responsibility to ensure that the rights and the democracy of individuals and organisations are looked after. I can just see a vacuum cleaner of an amazing number of organisations being in the ambit of this bill. Because you are not just looking at violent actions but threats of action or potential action, that whole dealing in information that may be relevant is just huge. I cannot imagine a warrant never being given, because it is said that you detain someone if you think they might give a piece of paper away or make a phone call. Can you ever imagine that anyone is going to sit there and not give a warrant?

Senator ROBERT RAY—I am sorry; where is that?

Mrs Fifer—I will find you the clause, if you like.

Senator ROBERT RAY—Thank you. I am unclear about whether you are referring to 34C(3).

Mrs Fifer—Yes, 34C(3). The warrant is requested because they may 'destroy, damage or alter a record or thing'. Yes, in terms of risk management, I can imagine that anyone trying to implement this bill would always be erring on the side of caution because of the scary consequences if they did not. That means that, if you are innocent, are you being brought into the loop earlier and earlier. Because this is a risk management exercise, you would hope that the officers of ASIO would act in a very cautious manner, and that can work for and against these consequences we are talking about. That is fantastic for those who are guilty, but it is devastating for those who are innocent.

Mr BEAZLEY—We seem to have arms-length and disinterested people circling this bill. The fact is—and I thought this was interesting in your submission—that you are trying to find mechanisms whereby they go in. You have the Inspector-General circling the bill and then deciding to put himself right in: on day one, he decided he would attend all interviews. So you have the Inspector-General inserting himself.

Mrs Fifer—Yes.

Mr BEAZLEY—The prescribed authority in this bill—and this may not be legally possible for him to do on the basis of the evidence put—is supposed to be in there supervising the

officers who are engaged in the interrogation. So he is more or less circling these particular propositions. You have the obligation every 48 hours, or whatever, to go and seek some sort of renewal. So there is another argument up to the Attorney-General, although he is not necessarily as independent as you would think. Then you have this committee being reported to somewhere down the line. A lot of suggestions are being made; these are the sorts of suggestions that are being made. Apart from tightening up the actual process itself by putting more definition into the issue of the warrant, the means by which the interrogations are to be undertaken and all the rest, there is the suggestion that there ought to be a panel of solicitors or lawyers—selected by the law institutes and the like, not by the government—to represent the interests of somebody who has been picked up. That is one of the suggestions that is out there.

Mrs Fifer—Yes.

Mr BEAZLEY—There have been suggestions about more detailed—and you are one of the people who have made this suggestion—reporting into this committee about what it is that folk are up to. There have been suggestions about indemnifying against selfincrimination in these circumstances. These are the sorts of things that are being put out there. You inserted the committee in your particular proposition, for which we all thank you. Do you have any other views? If somebody has been picked up, what would you like to see in terms of the protection of that individual?

Mrs Fifer—The reason we did this—it is almost like videoing someone who comes in the ambit of this bill, although I suspect that there are probably things that happen behind the scenes with some ASIO officers that we would prefer not to see—was because we wanted someone who does not have a role. So even that independent panel of solicitors we do not think would be good enough because they actually have a role at that point in time to look after the human rights of that particular person. We want whatever it might be and that might be a panel. We do not have a specific practical solution, but it should be someone who is looking at the transparent accountable application of the bill all the way along, because you have too many people going in and out.

Also, I could not agree more about the Attorney-General, and there is a group think that happens. We have to understand human psychology and group psychology in these things as well. There is a group think that happens. I bet your boots that after the third or fourth time a warrant comes up, with the sort of power dynamics that go on with people, people perhaps would not be saying no to the Attorney-General. I want someone who is never actually involved in any of the decision making process to stand outside so that they are intellectually and psychologically removed from it so that they can ask those squeaky clean questions and put a halt to things. Because we are looking at political motives, it is absolutely imperative that you ensure that those conflicts of interest are looked after, which is why I am very questionable about the Attorney-General. In fact, this bill talked about the minister, and I am under the assumption that that is the Attorney-General. One of the other bills said that it could be delegated off to someone else, which was a bit of a worry.

Mr LEO McLEAY—It could be some other minister if the Attorney-General is not in the country at the time.

Senator ROBERT RAY—The Minister for Justice and Customs because they are both sworn in at the same point—

Mrs Fifer—Okay. I wish we had something to hand to you. However, we are saying that all of those suggestions are fine and they look after individual parts, but we need someone independent of the whole process that is instituted. Like I say, if you said to me, 'Well, that would cost an arm and a leg and a fortune,' I would like to know how many times this bill is going to be instituted all the way along the line because that is a complete worry. So it is tracking the innocent person. I think you could get to the end of this bill and be innocent and be caught because of the poor drafting and the poor implementation. With life imprisonment, that is just outrageous in our democratic country.

Ms Pettitt—It is about supporting the innocence of the person before they are proven guilty, as opposed to it being presumed the other way.

Mr LEO McLEAY—You will not get life imprisonment under this one. You get life imprisonment under the terrorism legislation.

Mrs Fifer—The security one.

Mr LEO McLEAY—The penalties in this one I think only go to five years.

Mrs Fifer—Am I right in assuming that this is like the vacuum cleaner process that might actually move over to the other one?

Mr LEO McLEAY—Someone down the back just said, 'Oh, well.' The point with these hearings is that we make sure we know what we are talking about. There are too many issues here where it is too easy to go from the specific to the general and then get it all wrong. The ACTU's submission was wrong on a very important part. A number of other people have come in after having misread some of these things. The legislation that you will get life imprisonment for is the one covering the committing of a terrorism offence. The offences that are in this bill in the main relate to imprisonment for five years. As ASIO tell us, they do not see it as a power that they are going to use. They want to use it for information gathering, not for making a case against someone under the terrorism legislation and indeed if you are compelled to answer, as this rule does compel, you are indemnified partly against some crimes. If you incriminate yourself, you cannot be prosecuted for a criminal matter; you can only be prosecuted for a terrorism matter.

Mrs Fifer—Thank you for clarifying that. Would I be right in assuming that you probably would not end up being prosecuted under the ambit of the other bill unless you had come through the operations of the ASIO legislation?

Mr BEAZLEY—No, quite the reverse.

Mr LEO McLEAY—That is the point we were trying to make at the beginning. ASIO tell us that the people they want to use this bill to pick up are third parties—someone who can help them in their investigation. In respect of the powers in this bill, if someone turned out to be the terrorist, that would be most unusual. This bill is intended to bring in other people who may

have some knowledge of a terrorist act that is about to occur or could occur to help ASIO to go after the people who are going to perpetrate the terrorist act.

Mrs Fifer—That is exactly what unnerves VCOSS because that ambit is huge. That ambit of people who are potentially in receipt of information or knowledge in an ideological, political or religious cause affects a very large section of our population who could potentially be looked at by ASIO in its operations. I am not saying that they do know, I am saying that the ambit of this bill is really quite large

Mr LEO McLEAY—What if someone in Australia was preparing a terrorist activity, the result of which would blow up this building here today, and there was someone else out there who was not a co-conspirator, but who knew what was going to happen? Would it not be in the country's interests and particularly in our interests, as we sit in this building today, that someone can go to that third person and interrogate them? ASIO tell us that, at present, they do not have the power to interrogate that third person.

Mrs Fifer—If we pretend that one person is going to do the potential act and two more people know about that act, ASIO does not know who those two extra people are. They may go and look at another 10 people to choose—

Mr LEO McLEAY—No.

Senator ROBERT RAY—Ample grounds.

Mr LEO McLEAY—They tell us that a lot of electronic and personal information comes to them. It comes to them from people in Australia and from overseas. Let us say that they become aware of the fact that I know that the Dallas Brooks Convention and Function Centre is going to be bombed. I am not part of the plot to bomb the centre, but I know about it and I actually know who is going to do it. Let us say that they have obtained that information from some other source—electronic or human. They know I know. Should they be able to find some way to come and ask me so they can stop the bombing of the Dallas Brooks centre?

Mrs Fifer—Yes, and I do not think it is those people we are concerned about.

Mr LEO McLEAY—They are the people this bill is concerned about.

Mrs Fifer—Does the committee believe that there are any people who may be innocent who would come under the ambit of this bill? VCOSS is quite circumspect enough to admit that if it has got anything wrong, that is fine. We have read the bill a number of times. We would like to know whether you honestly believe that an innocent person would never come under the ambit of this bill. If you are convinced and you can prove it to us, that would be wonderful.

Senator ROBERT RAY—We cannot guarantee that the criminal system does not wrongly convict people—it does on occasions. There seems to be an assumption—I hope it is not in the legislation—that people can almost be picked up at random. There have to be ample grounds considered by the director-general, who is accountable for his job if he acts arbitrarily and capriciously. It then has to be endorsed by the Attorney-General, who holds political office, so if the Attorney-General is capriciously throwing out warrants he will not be Attorney-General for

long. Then it has to go before a prescribed authority. Three different people have to come to the conclusion that there are at least ample grounds for detention. That is not to say that all the rest of the protection should not be put in. Witnesses might come along and say that this could be totally capricious, but I am not sure that it is true in the context of this legislation.

Ms Pettitt—The committee makes it sound like a nice friendly process that the person is going to be going through, but the bill clearly outlines certain measures and it is the measures that we would question—for example, the 24 hours in detention when a person has no access to their family. The committee makes it sound like a friendly process and that we are just going to bring them in for questioning.

Senator ROBERT RAY—If you had been at the entire proceedings, Ms Pettitt, you would know that is not our view. You would know that we have asked questions about how there should be a protocol governing ASIO and the prescribed authority's behaviour over the 48 hours and about how you could possibly have such a piece of legislation. We do not know, for instance, whether anyone who is detained is going to be dragged off to jail in between questioning. We do not know whether they are going to be taken to the Hyatt and put up overnight. We do not know and we want to know. As for your characterisation, fair enough, but it is not of our view.

Mr BEAZLEY—This is not the committee's bill.

CHAIR—It is not our bill.

Mrs Fifer—No, we understand that, and that is why at the beginning we said that we are working it through. We are asking: is the bill good enough for you in terms of its implementation? What is going to be the committee's role in monitoring it? Don't forget that democracy is also about perceived transparency and accountability. We and many other people across Australia are worried about this bill because it is not just about reading the clauses and the words, it is about the messages you send out. The message that you also have to send out is that you are above and beyond looking after. I do not think any of you could say, 'Here are the words; it is just black and white on paper. Believe us; trust us.' We all know that political institutions are going through a very unnerving time. Please up the ante to ensure that the citizens of Australia can be absolutely guaranteed. Go over the top in your integrity and processes. Yes, we are worried about the unintended consequences and the other messages that you are sending out, and we do see that there is a perceived conflict of interest.

Senator ROBERT RAY—We would like to see you send out that message—I agree with it—and a message to potential terrorists that if they behave in that way they will be caught. Therefore we protect the whole citizenry that way as well.

Mrs Fifer—VCOSS, as well as many other non-government organisations, has a long history of upholding democracy in this country, but we do not believe it is our job to sell the legislation of any government.

Mr BEAZLEY—Except perhaps the GST—but that was ACOSS. That ended in big rankles—

Mrs Fifer—I will just let it go.

Mr BEAZLEY—You will be pleased to know that half the members of the committee would like that proposition. To get back to the questions you have asked us in relation to the bill, most members of this committee are dissatisfied with substantial aspects of the bill, and there are going to be recommendations on changes. My concern is that from the evidence that has come in, it is evident that there is not really a complete understanding—and it is left unclear—of what is being intended. It is conceivable that somebody who is picked up and questioned under this legislation might ultimately end up with charges related to terrorism—unlikely in the way in which ASIO contemplates being able to use it. It is interesting that the only people who have had anything friendly to say about ASIO since these inquiries began were the Muslims this morning. They know darn well—at least they were honest enough to admit it—that over the last decade members of the Islamic community, since they started to be demonised in some circles in Australia about a decade or so ago, and ASIO, in protecting them and giving them assistance to investigate threats that are coming to them, have built up a relationship that those particular individuals do not want to see destroyed. They then had an objection to features of the bill. The ASIO of today is very different from the one I recollect when I was a student.

We are not actually dealing with an organisation that is a behemoth or a moloch that is dangerous to the people who it is supposed to be protecting, but that does not say that you ever do a piece of legislation on trust. It is important to get at the guts of what this is actually proposed to do and that is to give information in a timely fashion about a problem that may be a problem for a large number of people's civil rights. How do you get the right protections against selfincrimination? How do you get the right representation for a person who is picked up under this? If you have additional views about how that might be done, we would welcome them.

Mrs Fifer—Do you mean in terms of a subsequent written—

Mr BEAZLEY—Yes.

Mrs Fifer—Okay.

Senator ROBERT RAY—Did you have any further written material you wanted to submit to the committee today?

Mrs Fifer—No, but we probably would send in another one or two pages in terms of what we have heard here today.

Senator ROBERT RAY—That would be helpful. Thank you.

CHAIR—Thank you very much indeed for being here today and we look forward to receiving that. Thank you.

[2.52 p.m.]

MAHON, Ms Claire, Member, Amnesty International Australia National Legal Group, Amnesty International

CHAIR—I welcome the representative of Amnesty International to our inquiry. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of the parliament. Do you wish to make some introductory remarks before we proceed to questions?

Ms Mahon—I do, thank you. I would like to start by thanking the committee for the opportunity to appear here today and to address this important legislation. Amnesty International is a worldwide movement of volunteers who campaign to promote the human rights standards enshrined in the Universal Declaration of Human Rights. Amnesty International has been following the introduction of antiterrorism legislation in a number of countries since the tragic events of September 11. While Amnesty International recognises the government's desire to respond to the international security concerns, it is vital that such a response is within the parameters of the international human rights framework. Human rights are not legal niceties that are to be complied with as and when is convenient, but rather they constitute the bare minimum of safeguards necessary to protect the safety of individuals from the abuse of power.

Amnesty International has no role here today in telling the government what an appropriate response to the shocking events of September 11 would be. Rather, our role here is to draw your attention to the way in which the proposed legislation may potentially violate fundamental human rights. Amnesty is mainly concerned with the way in which this proposed legislation allows for the indefinite incommunicado detention of persons, including children, without charge. Amnesty International is also concerned with the way in which the proposed legislation provides for the reversal of the usual onus of proof which has the effect of removing the right to presumption of innocence, the right to silence and the protection against selfincrimination.

Amnesty International submits that all persons detained under this legislation must be treated in compliance with all human rights standards including the International Covenant on Civil and Political Rights (ICCPR), the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Standard Minimum Rules for the Treatment of Prisoners. Amnesty also draws to your attention similar standards for detention in the provisions and decisions of the European Court of Human Rights and the European Prison Rules.

International law and standards provide that all persons who are arrested or detained should be informed immediately of the reasons for their detention and notified of their rights, including the right of prompt access to and assistance of a lawyer, the right to communicate and receive visits, the right to inform family members of their detention and the right of foreign nationals to contact their embassy or an international organisation. These rights are contained under article 9

of the ICCPR which was ratified by Australia in 1976, and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which was adopted by consensus by the United Nations General Assembly in 1988. These rights are important safeguards against arbitrary deprivation of liberty and incommunicado detention. Amnesty International notes that several of these rights are removed by this legislation.

Amnesty has concerns with the way in which this legislation fails to ensure that detainees can be brought before a court to rule on the legality of their detention, as required by article 9, subsection 4 of the ICCPR and principle 11 of the UN Body of Principles. Amnesty International has concerns regarding the incommunicado detention of persons under this legislation and particularly the inability to access legal representation. International human rights bodies such as the Human Rights Committee and the Special Rapporteur of the Commission on Human Rights on the Question of Torture have recommended against the use of incommunicado detention. Incommunicado detention has been widely condemned as a serious violation of human rights that often leads to other abuses.

Amnesty is also concerned with the abrogation of the right to silence in proposed section 34G(3) of the legislation and the privilege against selfincrimination in proposed section 34G(8). The right to silence is broadly recognised in international law, including most recently in the Rome Statute of the International Criminal Court. In addition, article 14(3)(g) of the ICCPR protects the privilege against selfincrimination. Amnesty is concerned with the impact that this legislation will have upon the right to be presumed innocent. Article 14(2) of the ICCPR and article 11 of the Universal Declaration of Human Rights protect the right to be presumed innocent. By shifting this burden of proof onto the person who is held in detention, as is done in proposed section 34G, a detainee is denied the right to be presumed innocent until proven guilty and therefore also the right to a fair trial.

Amnesty is concerned that this legislation may result in arbitrary detention, contrary to article 9 of the ICCPR. Amnesty is opposed to any government detaining a person unless that person is charged with a recognisable criminal offence without delay. While Amnesty recognises the need to question people who have information about criminal activity, it is Amnesty's belief that it is a violation of fundamental human rights to detain under this legislation potentially indefinitely a person whom authorities do not intend to prosecute. Finally, the fact that this troublesome legislation applies to minors and allows for children to be strip searched and detained is of further concern to Amnesty and potentially violates the Convention on the Rights of the Child. In short, Amnesty International does not believe that this legislation adequately provides for the protection of human rights and believes that, if introduced, it will lead to numerous breaches of Australia's international obligations.

I would like to table the report *Rights at risk: Amnesty International's concerns regarding security legislation and law enforcement measures*, which outlines Amnesty's concerns regarding the security legislation and enforcement measures of proposed legislation all around the world.

CHAIR—Thank you very much indeed for that. In that run-down, the only highlight of your submission you did not cover was the area of compensation, which you have promoted. That is one of the things this committee has been looking at over these three days—whether or not there should not be some protocol for ASIO to follow in terms of the whole process, because it

is wide open at the moment. I wonder if you would be happy to have some sort of formal protocol. Obviously, that would be overseen by the Inspector-General, and maybe by some other authority, and it could ultimately lead to compensation provisions which you are advocating.

Ms Mahon—What would the form of that protocol be?

CHAIR—One of the difficulties that we have is that we really have no indication, once a person comes in for questioning, of what form that questioning will take, where it is going to held, how they are going to be held and what the nature of the questioning may be. That seems to be broadly open. I was just wondering whether or not you had thought that one through—whether you were concerned about the nature of the inquiry and how it may be conducted—and whether or not that was leading to the clause in your submission regarding possible compensation for people who may have been wrongly held.

Ms Mahon—Amnesty certainly has concerns with the way in which this legislation does not provide many specifics about how a person will be detained, how long they are detained for, when the period of detention begins and all of the elements which you have discussed. We have proposed that one way to assist in making this bill less likely to infringe upon human rights is to include a provision for compensation. While we encourage some of the changes which you have flagged, Amnesty still believes that this bill will result in a violation of fundamental human rights. For example, we look to the fact that there is a provision in the bill which requires that prisoners must be treated humanely. However, there is no penalty provision if this requirement is not satisfied. There is no checks-and-balances system which requires people who are obliged to act humanely under this act to do so, because there is no penalty if they do not.

CHAIR—I think that is one of the things we are trying to come to grips with, too. That is why I wanted to flesh that out.

Senator ROBERT RAY—I think you have probably heard us go over all of the ground so I will not put you all through it again. I was interested in the compensation thing, too. We could go right through your submission again but you have been pretty dogged, being here all day. You have heard us go through all of the issues, I think, so I will not revisit them at this stage.

Ms Mahon—If you want to put questions to me, I would welcome the opportunity for Amnesty to answer and make submissions on those questions.

Senator ROBERT RAY—I have read the submission so I am pretty clear on your position.

Mr BEAZLEY—I feel almost remiss in not quizzing you at length as with the others, but you are very clear on what you think is wrong with the bill and the areas that you think need to be addressed for coverage. If there was proper legal representation for each of the detainees and some prevention of selfincrimination in relation to what may be asked of them and if there were protocols for questioning and detention with some form of penalty associated with the breach of them combined with a limitation on the period of time that somebody might actually be picked up and cat-and-moused and played with, would the bill be almost acceptable to Amnesty?

Ms Mahon—Amnesty would certainly be cautiously encouraging of the amendments, but that is well and truly as far as we would be able to go. While further protections are needed to safeguard the violations of human rights which could occur under the current bill, even if you did make the changes which you have been proposing here today, there are still fundamental problems with this bill. There are still no penalties imposed for the misuse of power. It still allows for the detention of people, including children, without any charge—without any commission of a criminal offence or any suspicion of a criminal offence. It allows for those people to be detained, as we have heard here today, usually where there would be no issue of them being involved in a terrorist act, but where they may know something of a terrorist act. It can then compel those people to forgo their right to silence and coerce them into answering questions under the threat of a five-year imprisonment if they fail to answer any questions, which then makes them liable to having breached a criminal offence. Amnesty still has huge concerns with those issues.

There is still a reverse onus of proof in this legislation, which is one issue that the committee has not discussed amending. It removes the presumption of innocence. It means that a person who has been detained has to prove why they should be presumed innocent instead of guilty. This is contrary to the history of criminal justice that we have in this country. So far we cannot see any reason why the history of the law in this area needs to be overturned and is not applicable to the situations that we face today. The violation of the right to silence is something that will clearly remain in this bill, from the comments I have heard you make today. That is something that Amnesty could never be happy about or agree with.

The other issue that Amnesty has with the suggestions that you have been making today is in relation to the recommendation that a panel of lawyers be appointed. Amnesty would still submit that the right of a person to choose a lawyer for themselves must be maintained. It must be a lawyer of your own choice if you are detainee under this act. Providing for a government appointed panel of lawyers or for an independently appointed panel of lawyers may be taking small steps towards alleviating the problematic aspects of this bill, but the future scope for abuse is still far too risky. I would draw your attention to the fact that even the Rome Statute of the International Criminal Court, which covers such heinous crimes as genocide and crimes against humanity, still provides for the presumption of innocence and access to a lawyer of your own choice.

CHAIR—Thank you very much for being with us today and for your submission. We appreciate it.

Ms Mahon—Thank you.

Proceedings suspended from 3.07 p.m. to 3.17 p.m.

THAM, Mr Joo-Cheong (Private capacity)

CHAIR—Is it the wish of the committee that the document entitled *Rights at risk: Amnesty International's concerns regarding security legislation and law enforcement measures*, and presented by Amnesty International, be taken as evidence and included in the record as an exhibit? There being no objection, it is so ordered. Welcome, Mr Tham. For the *Hansard* record, would you please state your full name and the capacity in which you appear before the committee?

Mr Tham—I am a lecturer at the Law School of Victoria University and appear in a private capacity.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House of Representatives or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Tham—Yes, I do. I tendered a supplementary submission on Tuesday, and I understand that members of the committee have copies of that. As I stated in my submission, my ultimate position in relation to this bill is that, essentially, it should be abandoned in toto and that a parliamentary committee of inquiry be established, comprised of Commonwealth and state parliamentarians, and armed with broad terms of reference. In fact, the committee could take a lead from the terms of reference that were given to Justice Hope when he undertook the Protective Security Review report, which was commissioned after the Hilton Hotel bombing. The proposed commission of inquiry should have ample time to report—say, a year or so.

I want to use this opportunity of making an opening statement to basically distil the main reasons for my ultimate position that this bill be abandoned. I will not make any comment regarding the operation of the bill, other than to note that its operation and the breadth of powers that it arms ASIO with hinge upon the terrorist offences being introduced, in part, by the Security Legislation Amendment (Terrorism) Bill 2002. That really constitutes the first main reason why the bill should be abandoned. The offences introduced by the Security Legislation Amendment (Terrorism) Bill 2002 are very wide ranging and, in many instances, bear little relation to what people consider to be terrorism.

I have set out in detail in my submission to the Senate Legal and Constitutional Legislation Committee my argument—and I think it is an eminently plausible argument—is that the offences proposed by the bill would catch certain instances of picketing and public demonstrations, and would also catch businesses that do not have an effective system of inquiry directed at their customers' usage of items when those items are in fact used for terrorist purposes. I will not actually traverse that material, which is set out quite clearly in my submission to the Senate committee.

The second reason—I will not labour it because other organisations have elaborated upon it—is that this bill clearly commits egregious breaches of the rule of law. The current Chief Justice

of the High Court said in a speech recently that one of the key tenets of the rule of law is that citizens have access to the courts to prevent the law from being ignored or violated. It is quite clear that persons being detained incommunicado do not have such access to the courts.

The third main reason for abandoning this bill is that extreme caution should be shown before additional power is conferred upon ASIO, which is a clandestine and relatively unaccountable organisation. We can accept that secrecy is necessary for the effective operations of ASIO—in fact I conceded that in my submission. At the same time, it constitutes a strong reason for requiring compelling justification before we invest ASIO with additional power. The reason is simple: such secrecy poses a formidable and, at times, insuperable barrier to its proper accountability.

I have set out in my submission the various mechanisms and why I think they are limited. I am not going to traverse them but I want to illustrate my point by raising a news report about the attempted bugging of Laurie Brereton's office. I am relying exclusively on newspaper reports, which are the only information I have. Around early 2000, when the killings in East Timor were running apace, there were concerns about the leak of a Defence Intelligence Organisation report linking the Indonesian military to the militia that were committing the killings in East Timor. According to newspaper reports, the Australian Federal Police and the Defence requested that ASIO bug the offices of the shadow minister for foreign affairs at the time, Laurie Brereton. Again, according to reports, ASIO declined on the ostensible basis that its powers were confined to espionage. More than two years after the purported request an article appeared in the *Canberra Times* basically documenting this attempt to bug the offices of Laurie Brereton. Reports say that this prompted a meeting between Dennis Richardson, the Director-General of ASIO; Simon Crean, the then opposition leader; and Laurie Brereton.

From this episode, I want to draw the point that secrecy prevented various mechanisms of accountability that apply to ASIO from operating. As a slight digression, the first point is that, as members of the committee are well aware, ASIO's powers are not confined to espionage; they are confined to security. The concept of security as defined by section 4 of the ASIO Act is more encompassing than espionage; indeed, it embraces attacks on Australia's defence system. My submission is that that would include the leaking of the Defence Intelligence Organisation report. The point simply is that the legislation is quite clear: if the Attorney-General and ASIO were so minded, a warrant could have been issued to legally bug the offices of Laurie Brereton. It was not and I am not suggesting it was—it was not.

The point I want to make is how the various other mechanisms that apply to ASIO could not operate because of the secrecy attending this request. The Inspector-General of Intelligence and Security has powers to initiate his own inquiry and can respond to complaints. That, of course, presumes that he or somebody else actually knows about it to complain. According to reports, nobody did. I presume from the reports that this committee did not know about it. Even if you did know about it, you would have been statutorily prohibited from inquiring into this episode because, according to the Intelligence Services Act, your brief does not encompass individual complaints or operational matters.

The third mechanism is section 21 of the ASIO Act, which requires ASIO to consult regularly with the opposition leader. That, of course, was used after the *Canberra Times* report occurred, but the point to be made was that that consultation occurred after a leak to the *Canberra*

Times—according to the reports—and it prompted the Director-General of ASIO to act. From all guesses and from my reading of the statute, that leak was probably illegal. As the committee is well aware, there are strict prohibitions and criminal penalties applying to the communication of intelligence information with regard to ASIO.

The point of my running through this episode is to show that the question about the accountability of ASIO is really not an academic exercise. Let me quote Justice Murphy in the leading judgment concerning ASIO—the Church of Scientology v. Woodward. Referring to ASIO and security organisations like ASIO Justice Murphy says:

> The necessity for such controls—

he is referring to accountability controls—

> is demonstrated by the history of such organizations here and overseas. Characteristically from time to time they exceed, and misuse, their powers. The expectation that they will do so, creates a climate of apprehension and an inhibition of lawful political activity, even at the highest levels of government.

Justice Brennan, in the same judgment, referred to the chilling effect of ASIO powers. We can take a leaf again from Justice Hope, in the Protective Security Review report. As members of the committee might know, Justice Hope is not exactly an unfriendly person towards intelligence services—in fact he chaired various royal commissions into intelligence services. Justice Hope commented that there had been various departures by ASIO from the principles of propriety, including legality.

I will move on to the main reason that this bill should be abandoned in toto. There has been inadequate explanation of or justification for the necessity of the powers that are conferred by the bill—powers that the Attorney-General, in his second reading speech, characterised as extraordinary. All we have to cling to are vague references to 'a changed security environment' and the like. Again, let me quote Justice Hope to show the parlous nature of this justification. Justice Hope's report runs to 300 pages and it took more than a year to complete. After reviewing the various powers ASIO and the police have, he said:

> The short survey I have made shows that Australian police forces—in the case of intelligence collection, with the co-operation of ASIO—have adequate powers to combat and to prevent attacks on VIPs or terrorism likely to occur here.

This conclusion can be reinforced by looking at ASIO's extensive powers, in particular its powers with respect to the collection of foreign intelligence. Section 4 of the ASIO Act defines 'foreign intelligence' as 'intelligence relating to the capabilities, intentions or activities of a foreign power.' 'Foreign power', in turn, is defined to include foreign political organisations. So it will include, for example, an organisation like Al-Qaeda.

For the Attorney-General to issue a warrant with respect to the collection of foreign intelligence—for example, something relating to Al-Qaeda—he or she only needs to be satisfied that the collection of that foreign intelligence is important to a matter relating to the defence of the Commonwealth or to the Commonwealth's conduct of international affairs. Note that there is no requirement that the person affected by the warrant be suspected of or reasonably suspected of or engaging in a crime or, for that matter, in activities prejudicial to security. That requirement pertains to, for example, the more invasive warrants that ASIO requests—for

example, warrants for listening devices, tracking devices and so on. There is no requirement that the warrant will assist, let alone substantially assist, the collection of intelligence. Again, this requirement applies to search warrants and computer access warrants that ASIO requests.

Let me illustrate this with a 'ticking bomb' scenario: ASIO, through one avenue or another, finds out that a particular person is reasonably suspected of having information regarding an Al-Qaeda plot to bomb an American embassy, whether it be here in Australia or in Singapore. That person does not have to be a member of Al-Qaeda. That person could be a relative of a suspected Al-Qaeda member or a lawyer of a suspected Al-Qaeda member. The person could even be as young as eight years old—it does not matter for the purposes of the act. Under current powers, without a single amendment, ASIO—if the Attorney-General is so minded—can legally place tracking devices on a person, tap the person's phone, place listening devices in the person's house, inspect the person's letters and so forth. That can occur without a single amendment. It is in the context of these extraordinary powers that ASIO presently enjoys that we have to consider whether the additional powers that are found in this bill are required.

One cannot deny that the world has changed since September 11. It is quite clear in one respect. It has changed in the sense that there is greater pressure on people like yourself—politicians—to respond to what Eva Cox has described as 'the moral panic' and to pass some sort of legislation, even legislation that the Attorney-General has characterised as 'extraordinary'.

But a key question for the committee and a key question with respect to any legislation that purports to counter terrorism is: what is the demonstrated need for such powers—powers which, in this bill, allow and empower detention without trial or charge? We know, for one, that there is no specific known threat of terrorism. We know that because the Attorney-General has said it numerous times. Again, all we have are vague references to a changed security environment and so on and so forth. This really is a scandalous failure to justify this bill, and, in fact, a scandalous failure to be democratically accountable. This failure is thrown into stark relief when we look at what Justice Hope undertook in the wake of the bombing of the Hilton Hotel: a report of more than 300 pages, that took more than a year to produce.

Lastly, I am going to quote from Justice Kirby in a recent article entitled *Australian law—after September 11*. These are salutary words to be borne in mind. Justice Kirby said:

> Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul ... Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately ... Always it is wise to keep our sense of reality and to remember our civic traditions ...

These are salutary words and it is important, finally, to bear in mind that being tough on terrorism, whatever that means, might very well mean being weak on democracy. This bill should be abandoned.

Senator ROBERT RAY—Do you want to elaborate a bit further on your contempt for the people at the table, about us reacting to 'moral panic'? We have spent three days listening intensively to criticisms of the bill and I assure you when it gets to the Senate it is not going through in half an hour—if it ever gets through. That is why we are having these inquiries.

Mr Tham—That is true, and the process of this inquiry should be commended. What I was alluding to is a general change in the climate, and that is quite clear.

Senator ROBERT RAY—Can I take you to that. The proposition you are putting is logical in one sense—that you say that there is no terrorist threat in Australia—but we would argue—

Mr Tham—I am sorry, I did not actually say that.

Senator ROBERT RAY—You quoted someone else as saying that there is no immediate terrorist threat in Australia. But, whatever you said there, I just want to make the point that that is not simply our responsibility. If there is a terrorist threat anywhere around the globe that we can assist in preventing, would you concede that it is also our duty to act?

Mr Tham—That is true, but that is not a novel proposition. ASIO has been dealing with terrorism for a long while—decades. ASIO has been dealing with foreign terrorist threats for a long while. To say that does not take us very far.

Senator ROBERT RAY—No, but on two occasions in your oral submission—once by quoting Justice Hope and then about five minutes later—you have returned to the fact and Australianised it: 'within Australia there is not'. I am just trying to make the point that, external to that, there clearly are terrorist threats and, if we can contribute to the curbing of that anywhere around the world—this is not an argument for holus-bolus adopting the legislation, but it is not 'moral panic' that we would consider legislation that would assist our agencies to prevent terrorism somewhere around the world.

Mr Griffiths—By locking up 10-year-old children?

Senator ROBERT RAY—You have heard me on that. Next time, put a submission in and we will hear from you.

Mr Griffiths—I have.

CHAIR—You are out of order at the moment. Are there any further questions? I was interested in your submission where you referred to the oversight of ASIO and the security organisations—you mentioned their capacity to report to the Attorney-General, the Inspector-General and, indeed, the work of this particular committee.

Mr Tham—Yes.

CHAIR—How much more do you believe they have to be given, in terms of the oversight of the working of security organisations?

Mr Tham—I am not quite sure what the question is.

CHAIR—On page 13 of your submission you talk about the accountability measures for ASIO being limited in their scope and efficacy.

Mr Tham—Yes.

CHAIR—You cite that they report to the Attorney-General, they have the Inspector-General looking after them, and there is this joint committee. What are your thoughts on what would be an ideal situation for the supervision of security organisations?

Mr Tham—I think the point I was trying to make in my oral presentation and in my submission is that I concede that security organisations need to have some measure of secrecy to effectively operate. In turn, that would infuse any accountability measures that would apply to it. I concede that. But that is precisely the point. Before we hand over power to intelligence organisations, which requires secrecy, we require compelling justification. That is the point that is being made. I do note some weaknesses in the current accountability measures, but that is not the point I was making in my oral presentation.

Senator ROBERT RAY—For the record there are two other accountability mechanisms—but I do not think either satisfy you or I necessarily—security cabinet supervises ASIO and the secretary's committee also. So there are two other steps in there where they have to justify themselves, at least once a year, and go through their classified report in detail.

CHAIR—Any other questions? Thank you very much for your lengthy submission today. I recall to the table, please, representatives of ASIO and the Attorney-General's Department.

[3.38 p.m.]

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

ATWOOD, Mr John, Acting Assistant Secretary, Public International Law Branch, Attorney-General's Department

HOLLAND, Mr Keith, Assistant Secretary, Attorney-General's Department

MARSHALL, Mr Steven, Legal Adviser, Australian Security Intelligence Organisation

RICHARDSON, Dr Dennis, Director-General, Australian Security Intelligence Organisation

CHAIR—At the conclusion of the three days of public hearings, I was wondering whether or not ASIO or the Attorney-General's Department, after hearing the evidence that has been given, have anything they would like to put on the public record in response to some of the evidence.

Dr Richardson—I would like to briefly address some of the issues raised over the last three days, not from a legal perspective but from a perspective of my own role and responsibilities. There has been a fair bit of discussion about the threat environment. I did put on the record before the Senate Legal and Constitutional Legislation Committee some quite detailed advice relating to that. I also made a few comments the other day. I would stress that the key point that I would make in respect of the threat environment is that this particular bill—and the package of legislation of which it forms part—cannot be considered simply in the narrow framework of threats to Australia within Australia. I know that point has been made by others, including members of the committee.

I think that, even within the framework of threats to Australia within Australia, our environment has changed significantly through our involvement in the war on terrorism. In that context I would mention that, since September 11, bin Laden has made two specific mentions of Australia. He made specific reference to the Australian troops in East Timor being part of a crusader force, and he made another reference to Australia. That is significant: prior to September 11 he had only previously referred to the United States and its allies; since September 11, he has made mention of a very small number of countries and, on two occasions, has included Australia.

Mr BEAZLEY—Those remarks were directed towards not the Australian forces in Afghanistan but the Australian forces in Timor?

Dr Richardson—That is right. He actually referred to the Australian forces in East Timor as being a 'crusader force', splitting a Muslim country. Beyond Australia, we have seen the real threat to the Australian High Commission in Singapore, which has been referred to by others. But Australia's responsibilities go beyond our own people in our country. We have a responsibility for the security of foreign interests in Australia, and US interests worldwide are at

a significantly heightened threat since September 11, including in Australia. We have a responsibility to ensure that those very few people in Australia who could be tempted to involve themselves in, or assist with, the conduct of terrorist acts abroad—we also need to take that into account in our thinking about threats.

In a broader context still our own citizens can be victims of terrorism abroad, as was the case on September 11. So, simply by being on the planet, we have an engagement in the issue whether we like it or not. Speaking personally, I believe we have a responsibility to seek to do what we can within the law to minimise the risk of terrorist acts within Australia and of people in Australia being involved in such conduct abroad. That is what the bill seeks to do.

There has been a lot of comment about the definition of 'terrorism' in a related bill. Without getting involved in the detail of it, I believe that any definition of terrorism needs to be broad rather than narrow. Unfortunately, terrorists are not mad—as much as that might comfort us to think so. They are intelligent, highly motivated, often highly trained and are sometimes prepared to give their lives to achieve an end. They are also incredibly patient and operate to their own timetable.

The Law Council of Australia suggested that the definition of terrorism should relate only to injury to people, not to property. But what about cyberterrorism? That will confront us some day. Some witnesses used the word 'catastrophic' in referring to terrorism, but terrorism does not have to be a September 11 type of attack. The nature of terrorism has consistently changed over the last 20 years and will do so again. Terrorists do not abide by definitions; they have no boundaries. As a civilised society we do and must have boundaries. The definition in the related bill, as broad as it is, does have boundaries, which would ultimately be determined by the courts independent of the executive.

There have been a number of comments about the usefulness of the bill. Certainly it provides no guarantee and certainly it would not, of itself, prevent terrorism. However, I believe it will fill what is an existing gap in powers. In respect of some of the more specific points raised over the past three days, I have no view from where I sit on who a prescribed authority should be. That is a matter for the government and for the parliament. I believe it would be a good thing to develop a protocol about the conduct and responsibility of ASIO officers in relation to detention and how people should be treated. I believe such a protocol would be needed anyway and believe personally that, in terms of public trust and confidence, it ought to be approved by the Inspector-General and considered by this committee. The memorandum of understanding that was put in place between ASIO and AUSTRAC following an amendment to the ASIO Act in 1999 is one possible model to follow, but I have no doubt that, given the proposed powers in this bill, there may be other models as well

Conscious of the fact that some very learned people would have contrary views to my own, I would like to make the following points on the question of access to legal representation. I have no comment on the suggestion that someone detained should have access to independent legal advice. However, I would have concerns from where I sit about someone detained having access to a legal representative, up-front, to engage in an adversarial process. I believe that would defeat the purpose of timely intelligence in certain crucial situations. I should also add that the point made this morning by the Law Society of Victoria was well made in respect of the detention provisions relating to people between the ages of 10 and 18. There is nothing in the

bill that distinguishes detention of adults and detentions of people who are below the age of 18 and I think there ought to be some room to work on that.

In respect of the comments about a sunset clause to the proposed act, I would make the following comments: in my view the gap in existing powers, which we are seeking to fill is not time specific. The sort of situations that I think are likely to lead to detention warrants being sought are September 11 type situations. It is not possible to predict when such situations might arise. For instance, you could put in place a three- to four-year sunset clause, have the act expire and have a major incident six to 12 months later. Practicalities would likely prevent the act being resuscitated quickly, for instance, if we were in the middle of an election period. Personally, I wish we had put forward this proposal previously and I wish there had been a law like this in place before 11 September of last year. It is in the period of intense activity following such incidents when powers of this kind are more likely to be considered and perhaps required. Having said that, I take the points that have been made about the need for review mechanisms, even if those review mechanisms are on some continuing basis. Contrary to the comments made by some witnesses, ASIO does not operate in a political partisan way. I was not going to address this issue, but given the number of people who have made that assertion, I believe that I should put that very firmly on the record.

The current ASIO Act was passed with bipartisan support in 1979, following the first Hope royal commission. I am not aware of any instance of abuse, in the context of political partisanship, since 1979. The Combe-Ivanoff affair in 1983, soon after the election of the Hawke government, understandably aroused intense interest and led to a royal commission. In that context I am not aware of any claim of partisanship in ASIO's actions.

Mention was made by the previous witness of Mr Brereton. I would like to put on the record—simply because it has been raised before this committee—that, as the principals involved are aware—because they have been advised—no request was made to ASIO to intercept anyone's telephone. An inquiry was made of ASIO as to whether we could. There is a substantive difference there. Also, in respect of that, if I could respectfully disagree with the previous witness, one of the definitions of security in the ASIO Act is 'attacks on the defence system'. That would simply not allow us to take any action in respect of leaks concerning the Department of Defence. That is very firm legal advice that I have, so I would simply disagree with the previous witness.

The last point I make in respect of partisanship is something which I know the members of the committee are aware of, but which I will put on the public record again today because I think it is important. It is that, under the ASIO Act, the Director-General is required to 'consult regularly with the Leader of the Opposition in the House of Representatives'. Secondly, under the act, the Leader of the Opposition is required to receive copies of the classified annual reports produced by ASIO. In other words, precisely the same classified report that goes to the Prime Minister and to the National Security Committee of cabinet is also provided to the Leader of the Opposition.

In respect of comments made yesterday by the New South Wales Council of Civil Liberties, I would just say that we all have a responsibility to try to get our facts right. We sometimes make mistakes and, as in yesterday's evidence here, the New South Wales Council of Civil Liberties sometimes get their facts wrong. Contrary to their assertion yesterday, there is no requirement in

law for ASIO to provide copies of warrants in respect of enter and searches. That is a requirement for law enforcement agencies; it is not a requirement for ASIO.

I should add that, since September 11, we have conducted a number of enter and searches. In respect of two of those, the individuals concerned asked for a copy of the warrants. We said we would not provide a copy of the warrants but that we would enable them to read the warrants in the presence of their legal representatives. We have done that on two occasions. Contrary to the evidence of the New South Wales Council for Civil Liberties yesterday, the warrants are not shown in blacked out form, the warrants that are shown have two things blacked out: (1) the date of the warrant; (2) the number of the warrant. Nothing else is blacked out.

Finally, I would simply repeat what I said on Wednesday: I understand the genuine concerns expressed by many of the witnesses. As I said myself on Wednesday, powers of this kind should not be granted lightly; they ought to be subject to inquiry and they ought to be subject to robust debate. I think the points made by the leaders of the Islamic communities, in both Sydney and Melbourne, have been well made. I think there is a real challenge for the relevant authorities, including ASIO, in Australia to ensure that we operate and manage our business in a way that instils confidence across the community. Certainly, since September 11, some members of the Islamic community have been subjected to abuse and I think three mosques and three Islamic schools have been subjected to arson attacks, and they are issues that ought to concern us. I am very conscious of the fact that an organisation like ASIO, with its powers, has a real responsibility and a real challenge to ensure that, in the exercise of its powers, it maintains the confidence of communities. As I have stated previously, we target individuals and we target groups; we do not, nor should we, target communities.

CHAIR—Thank you very much, Dr Richardson. Mr Holland, is there anything you would like to put on the public record?

Mr Holland—Yes, thank you. There has been some discussion over the course of the last three days about the differences between the proposed Australian legislation and overseas legislation. For the benefit of the committee, we have prepared a matrix that shows the UK provisions, the Australian provisions, the Canadian provisions and the US provisions, which we think might assist the committee in its deliberations. We have also done a summary of the UK provisions in particular, since they seem to be the major focus of alternative approaches to the legislation.

CHAIR—Thank you. Is it the wish of the committee that the additional submission by the Attorney-General's Department entitled, 'UK Anti-terrorism Legislation', at the top of the first page, and definitions be accepted as evidence and authorised for publication? There being no objection, it is so ordered. Thank you very much, gentlemen. I declare this public hearing closed.

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

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

Evidence was then taken in camera—

Committee adjourned at 5.03 p.m.