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LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Anti-Terrorism Laws Reform Bill 2009

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SYDNEY

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Tuesday, 22 September 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Marshall

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, Feeney, Fisher and Ludlam.

Terms of reference for the inquiry:

To inquire into and report on:

Anti-Terrorism Laws Reform Bill 2009

WITNESSES

Committee met at 9.00 am

EMERTON, Dr Patrick, Member, Anti-Terrorism Laws Working Group, Federation of Community Legal Centres (Victoria)

Evidence was taken via teleconference—

CHAIR (Senator Crossin)—I declare this hearing of the Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee inquiry into the Anti-Terrorism Laws Reform Bill 2009. This inquiry was referred to the committee by the Senate on 25 June for report on 28 October 2009. This is a private senator's bill which seeks to amend a number of acts, including the Criminal Code Act 1995, the Crimes Act 1914 and the Australian Security Information Organisation Act 1979. The bill also repeals the National Security Information Act 2004.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. Also if a witness objects to answering a question then the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. Such a request of course may be made at any other time.

I welcome Dr Patrick Emerton as a representative of the Federation of Community Legal Centres (Victoria), who is appearing via teleconference. We have received your submission, which we have labelled No. 19. Before I invite you to make an opening statement did you want to amend or change that submission in any way?

Dr Emerton—No.

CHAIR—I invite you to make an opening statement. At the end of that we will go to questions.

Dr Emerton—I do not want to say a great deal in my opening statement. As our submission indicates, we are on the whole in strong support of the bill. In certain respects we take the view that the bill perhaps does not go far enough. For example, the bill repeals one offence created under section 101.4 of the Criminal Code—that is, the offence of possessing a thing connected to terrorist acts—but we take the view that there are other offences in section 101 which are objectionable on the same sort of grounds as the offence created by section 101.4 and so it would be good if they were also repealed; although repealing one is better than repealing none.

The federation maintains its strong objection to the listing regime under section 102 of the Criminal Code on the grounds that the operation and effect of this listing regime has a discriminatory impact upon certain members of the Australian community. We know that the changes the bill will make to that regime would certainly improve that, in particular by creating an advisory committee to oversee a process of legislatively mandated engagement with the community and potentially with a listed organisation as part of the listing process. Again, although the federation favours repeal of that whole regime certainly the sorts of changes mooted by the bill would be a strong improvement. In relation to the ASIO Act our submission notes a number of respects in which we think, again, that certain objectionable features of that regime could be further repealed, such as issues to do with the confiscation of passports under certain circumstances. We do strongly support the provisions in the bill as going in the right direction towards eliminating some of the objectionable features of the ASIO Act.

The other feature of the bill I want to comment on is the redefinition that the bill would give to the notion of a terrorist act defined in section 100 of the Criminal Code. It is the federation's view, which has been articulated over a long period of time now engaging with this area of law, that the definition of terrorist act in the Criminal Code is overly broad and that that breadth of definition creates a number of objectionable features in the operation of the law--in particular it confers an excessive investigatory and prosecutorial discretion, the exercise of which results in the impact of these laws being felt in a discriminatory fashion in relation to their impact upon various members of the Australian community.

It is the federation's view that the redefinition of the notion of terrorist act put forward in the bill would go a significant way to eliminating some of those objections with the definition of terrorist acts. In particular we strongly support the exclusion of actions taking place in the context of an armed conflict from the definition of a terrorist act because this would then remove what is currently an objectionable feature of the way Australia's

antiterrorism laws work in that it would end the current practice of the investigative and prosecutorial agencies in effect taking sides in long-running civil conflicts and deciding which side is criminal and which side is not.

We also strongly support the removal of political, religious or ideological motivation as an element of a terrorist act. At the moment the inclusion of those notions in the concept of a terrorist act produces a situation in practice where investigatory agencies place a great deal of attention and emphasis on the political, religious or ideological convictions of various people subject to investigation and this has the effect of policing people's politics in a way which is objectionable in a pluralist democracy. So the removal of that element, we think, would be a strong improvement in the definition of a terrorist act in the Criminal Code. We think that a sufficient notion of terrorism or terrorist violence as opposed to purely private violence would still be created by the requirement in the notion of a terrorist act that there be an intention in undertaking the terrorist act to coerce or intimidate a government or the public.

As our submission indicates, we have some concerns that some of the elements in the exception to the notion of a terrorist act created by section 100.1(3) create a number of exclusions from the notion of a terrorist act for certain cases of advocacy, industrial action and dissent. As our submission indicates at the bottom of page 6, we are still concerned that those exclusions are not as broad as they perhaps might be. But certainly the increased breadth of the exclusions that the bill would bring about is, again, a very strong move in the right direction. So, I guess to sum up, as I hope I have indicated and as our submission indicates we are on balance very strongly in support of the bill.

Senator BARNETT—Thank you very much. You are in Melbourne, aren't you?

Dr Emerton—Yes, I am.

Senator BARNETT—I understand that you represent the Federation of Community Legal Centres in Victoria not nationally—it is just the Victorian Federation of Community Legal Centres. Is that correct?

Dr Emerton—Yes, there is a national body in which the federation is a participating member. We are at the state level. That is right.

Senator BARNETT—Okay, so one question is: has this been to the National Association of Community Legal Centres and what is their view, or do they not have a view?

Dr Emerton—This is coming purely from the federation. In the past the National Association of Community Legal Centres, or NACLC, has put in submissions in this area of law which in a sense ran in very much the same way as this submission. In New South Wales the Public Interest Advocacy Centre made submissions on the very large anti-terrorism bill that went through the parliament towards the end of 2005, and they ran in the same direction as this submission. But on this occasion this particular submission speaks for the Victorian federation.

Senator BARNETT—Do you know the view of the national federation? We had them at a different inquiry, the access to justice inquiry, not so long ago. I am happy to check with the secretary about whether we have received a submission from them, but do you know whether they have put in a submission and have the same views as you?

It **Dr Emerton**—To the best of my knowledge they have not put in a submission to this inquiry. I am looking through a written document rather than at the committee's webpage when I say that—I do not have the committee's webpage in front of me—so I do not know their view on this bill. But I do know that, on other bills with the same subject matter, they have put in submissions that run in the same direction as our submission. For example, they are in favour of narrowing the definition of 'terrorist act' and repealing some of the overly broad offences and so on. But on this particular occasion this submission represents the view of the Victorian Federation of Community Legal Centres and I do not believe that NACLC or any of the Sydney centres have put in a submission.

Senator BARNETT—We will get some advice on that. If you want to take it on notice and check on what their position is, that would be of interest. I understand that you do not provide legal representation to people charged with terrorist related offences. Is that correct?

Dr Emerton—The federation itself is a coordinating and policy development body and does not provide legal advice. Individual member centres have practising solicitors in them, and those solicitors provide legal advice on various matters. For example, the Western Suburbs Legal Service in Newport and the Fitzroy Legal Service have individual solicitors working there who have provided advice in relation to anti-terrorism matters. But in terms of representation of people actually charged with terrorism matters, to the best of my

knowledge no community legal centre solicitor has run a case of that sort. The context in which to understand that is that running a defence in an anti-terrorism prosecution is very expensive and takes a commitment of three or more years. These are very large cases that run for a very long period of time. That is not the sort of case work that community legal services are staffed or funded to deal with. The defence in matters that have gone to trial has been run primarily by private lawyers funded through legal aid.

Senator BARNETT—I am not putting views one way or the other at the moment, but I am a little quizzical as to why the Victorian Federation of Community Legal Centres is expressing strong views with respect to this legislation. You say that you are part of the anti-terrorism laws working group. Frankly, there is a huge demand on community legal centre services around Australia for pretty much the basic requirements. You are obviously spending time, effort and, I presume, taxpayers' money to prepare this submission. Is that a fair assessment?

Dr Emerton—Time and money has been put into preparing this submission. Maybe I did not draw a clear distinction in a previous answer. I said advice is given to people in relation to anti-terrorism matters but defences are not run. That is a distinction that I want to elaborate on. It is the experience of the community legal sector in Melbourne, and it is my impression that it is also true in New South Wales, that the effect of anti-terrorism law on communities is not best understood by focusing on matters charged and defended. The effect is felt by communities primarily in relation to the investigations that are undertaken by the various investigatory agencies such as ASIO, the Australian Federal Police and, here in Victoria, Victoria Police.

In that respect, it is in fact community legal centres which typically are the first line of contact for communities that are contacted by those investigatory agencies or members of those communities who are then seeking advice on how they should respond and what their legal position is. The context for understanding that is that those investigations in Melbourne take place particularly in the northern and western suburbs of Melbourne. If one looks at census data, one sees that those are areas where average income levels are at the lower rather than the higher end, so people's capacity to afford private lawyers to give advice is limited. Community legal centres also provide very extensive community legal education in relation to antiterrorism law and the implications of that law for members of various sorts of communities. So it would be an error to infer that antiterrorism law is not a significant part of community legal practice from the fact that community lawyers are not representing accused persons as defence lawyers. In fact, in Melbourne today antiterrorism law is a significant part of community legal practice. To that end the Federation of Community Legal Centres in Victoria last year produced a practice manual called *Anti-Terrorism Laws: A Guide for Community Lawyers*, precisely because there was a perceived need by the practising solicitors in community legal centres for a practice guide, because here was an area of law in which increasing demands were being put upon them to provide advice. It being a very technical area of law, there was a felt need for a practice guide.

Senator BARNETT—Dr Emerton, thank you for that. Would you be happy to forward a copy of that practical guide or a link to it to the committee?

Dr Emerton—I can certainly do that, yes.

Senator BARNETT—Thank you very much, and thanks for explaining the position. That does inform me further, and I appreciate your feedback.

Dr Emerton—No worries at all.

Senator BARNETT—I have two questions. The first is about the sedition offences and your support for the repeal of them. I am just seeking to gather from you how strongly you feel about this and the main reasons why you see the need to repeal those sedition offences. Is it more the breach of free speech, the suppression of political dissent and opposition or a combination of the two?

Dr Emerton—In relation first to the question of degree of strength, if I had to rank the federation's concerns in relation to each of the pieces of legislation in play, I think our strongest concern is probably the changes to the Criminal Code—sections 100, 101 and 102 of the Criminal Code, which cover the 'terrorist act' definition and the offences that flow from that. Then I think it is the investigatory matters in schedules 2 and 3, for the Crimes Act and the ASIO Act. I think sedition, in terms of our priorities, would not be unimportant but is not, perhaps, the first-rank priority; it is more of a second-rank priority.

Senator BARNETT—Yes, so it ranks below section 100 and schedules 2 and 3.

Dr Emerton—Yes. The reason for that ranking is that there is a certain sense, in our estimation, in which sedition is slightly more symbolic than real. It is a very complex offence which, we take the view, in practice is unlikely to be charged because of the difficulty of running a matter under such a complex offence. The reason

that we nevertheless support repeal is that our belief is that the presence on the statute book of that offence can have a chilling effect in relation to both free speech and political dissent, as your question flagged. Indeed, a community lawyer who used to work at the Western Suburbs Legal Service and was one of those giving the advice I mentioned before did have a client who, not long after the sedition law was enacted, was directed by Victorian police to remove a piece of artwork from public display on the grounds that it was potentially seditious. Her advice to her client was that in her legal opinion it probably was not a seditious work. But nevertheless, in a practical sense, there can be a certain sense in which, if the police ask one to remove a work from public display, one's life is easier if one does so.

The point of that little anecdote is to show that, when we say that the presence of the offence can have a chilling effect, we are not referring simply to individual citizens' understanding of their rights under the offence but also to police officers' understanding, in their day-to-day practice, of the powers they enjoy as a result of the offence. If a police officer overestimates his or her power, of course, remedies are available, but the issue of seeking out and prosecuting those remedies is itself a serious matter which an individual person would not engage in lightly. So we think the lives of those who are potentially affected would be much easier if the offence, which does play a primarily symbolic role and is unlikely actually to be prosecuted, were therefore just removed altogether.

Senator BARNETT—Would you care to comment, if possible—and if not that is fine—as to how closely linked and how similar our laws would be to those of the UK and any other overseas examples you would like to share with us if this bill passes? How similar would Australia's laws be?

Dr Emerton—In relation to sedition, I am not in a position to say anything too profound. I do not know much about British sedition law. I am sure our sedition offence is more expansive than any such offence in the United States, because the United States has a strong constitutional guarantee of free speech in its first amendment, and that puts a serious limit on sedition type offences.

With respect to the investigatory powers, the amendments this bill makes to ASIO's investigatory powers would bring the Australian legal situation more closely into line with those in other major liberal democracies, although we would still be unusual in giving what is an intelligence agency rather than a police force coercive investigatory powers. So these amendments would take us in the direction of greater compliance with mainstream liberal democratic norms but would still leave us slightly out of compliance, because we would still have an intelligence agency with coercive investigatory powers—and quite robust coercive investigatory powers.

As to the amendments to the Crimes Act, particularly in respect of investigative dead time of the Dr Haneef style: the practice in various countries is really quite varied in that respect. Again, the United States is in a framework with strong constitutional guarantees in respect of due process. Britain has a more expansive period of what we would think of as investigatory dead time but, on the other hand, the offences in Britain which trigger that investigatory dead time are much narrower than our offences. We have a situation where our actual terrorism offences are quite broad, for example, compared to those in Britain. So, although our investigatory dead time is probably less, it is potentially triggered more often.

As to the changes to the offences in the Criminal Code itself: again, because our terrorism laws are very broad compared to those of countries like Britain and the United States, by narrowing the scope of those laws we have probably come closer to an international norm—although, again, each jurisdiction can be really quite different. For example, in Britain, terrorism offences are focused almost entirely around organisations rather than particular acts, whereas our terrorism offences are focused predominantly on the notion of a terrorist act and then various sorts of behaviours and organisations that dangle off that definition. So, because of the different legislative structure, it is a little bit hard to make comparisons.

To sum up: on the whole, because of our legal framework, the offences it creates and then the coercive investigatory powers that hang off that are, on the whole, quite expansive compared to, at least, English-speaking liberal democracies. I have found it harder to have good information about European countries because I do not speak European languages. But, again, their criminal procedures are very different from ours as well, because they have quite a different tradition from ours. But I would certainly say that, comparing us to English-speaking liberal democracies, the effect of this bill, on the whole, would be to bring us closer to a norm where the offences are more narrowly defined and some of the investigatory powers which hang from them are slightly more circumscribed.

Senator BARNETT—Thanks, Dr Emerton.

Senator LUDLAM—Thanks very much for coming online for this hearing and for your submission. I will carry on from where Senator Barnett was. As to the main sense in which 'terrorist act' is defined—which I think you ranked close to the top of your list of concerns—is it just the case that our definition is far broader than those of countries that we would normally compare ourselves to? Is that the key difference?

Dr Emerton—I think there are features of our act that are distinctive. I am by no means an expert, but I do have some sense of comparative law in this area. My understanding is that, on the whole, the terrorism sentences in Britain tend to be triggered by either connections to proscribed organisations or perhaps a more narrowly circumscribed category of acts. In section 102 of our act we have a very broad category of offences in relation to organisations. It is an offence to have various sorts of involvements with any organisation, whether or not it has ever been proscribed by the government, which is engaged in preparing, planning, assisting or fostering directly or indirectly the doing of a terrorist act. So we have a very broad statutory notion of 'an organisation', which hangs on a very broad statutory notion of 'terrorist act'. Our notion of a 'terrorist act' does not distinguish between civilian violence and military violence; it does not distinguish between internal conflicts and international conflicts; it does not distinguish between actions that take place in the context of an ongoing armed conflict and acts that take place in a purely civilian context—for example, a suicide bombing in a cafe in Tel Aviv. We do not draw a distinction between that and violence in a military conflict situation. There are a number of distinctions and different international instruments. Various other jurisdictions often tend to be sensitive to one or more those distinctions in the way frame their laws in this area. I think the Australian position is peculiar in that it is sensitive to none of the relevant distinctions. It is about the failure of sensitivity to any of the relevant distinctions. And hanging on that very broad notion of 'terrorist act' is a whole range of broader offences, including our very broad 'organisation' offences, that operate very expansively compared to other comparable countries.

Senator LUDLAM—About one-third of the way down page 6 of your submission you say that the way the legislation is currently drafted effectively creates offences that amount to 'thought crimes'. Could you elaborate on that? It is quite a striking phrase.

Dr Emerton—The current definition of 'terrorist act' includes threats of actions which have certain consequences. Section 101.5 makes it an offence to possess documents that are connected in various ways to terrorist acts. What if a person possessed the Constitution or the programmatic statement of a certain insurrectionary movement engaged in some sort of liberation struggle? Let us take a simple example that is not so controversial now. The Communist Manifesto, written by Marx and Engels, calls upon the working men of the world to unite. It says, 'You have nothing to lose but your chains,' and so on. That documents contains threats of action which, if carried out, would have the sorts of consequences for property and people that the current definition of 'terrorist act' talks about. Possessing a document with connections to threats of various sorts of violence is potentially a crime under section 101.5.

Section 101.5 does establish a defence whereby an accused person can lead evidence that their possession of a document was not part of a program of engaging in terrorist acts. But at that point you already have something going wrong, because the offence creates a broad assumption of guilt and then the burden shifts to the accused to adduce contrary evidence. In practice that can be quite difficult. In particular it can require a suspect to waive their right to silence, so they must testify on their own behalf. That is just one example of an offence that creates a thought crime.

Section 101.6 is another that we have in mind. Preparatory conduct is conduct preparatory to the issuing of threats. What sorts of conduct does one engage in preparatory to issuing a threat or thinking about the sorts of threats one might issue? We have extremely pre-emptive interventions. It is a combination of the structure of the offences in section 101 and with the broad definition of 'terrorist act' and its inclusion of the notion of threat. Do those examples give you a flavour of what we have in mind?

Senator LUDLAM—They do. This is also one of the areas of the bill which you have suggested do not go far enough. You have nominated a number of other sections whose repeal you would seek as well.

Dr Emerton—It would be in particular 101.5 and 101.6. In relation to 101.6 we have the peculiar situation that there have been charges laid in Australia of conspiracy to commit the offence in 101.6, which means we are talking about charges of a conspiracy to prepare to issue a threat. In terms of traditional criminalisation notions that operate in a Westminster style liberal democracy of our sort, that is a very grave expansion of criminal liability. The suggestion is sometimes put that, but for such expansions of criminal liability, the police would lack the power to investigate and pre-empt. But the federation takes the view that that is simply to disregard the existence of a whole range of other pertinent offences which can come into play in situations

which do create a genuine emergency. For example, if there is a concern that someone is stockpiling various components for building an explosive, there is a whole raft both of regulatory and more serious offences in Australia relating to possession of explosives without a licence, manufacture of explosives without a licence, acquiring material for a certain intent and so on and so forth. So there are a whole range of more prosaic but also better understood and more traditionally grounded offences that can be used in those sorts of contexts, in much the same way that similar drug type offences operate in relation to the production of prohibited substances. Like I was saying in relation to radiological weapons, there is a whole host of regulatory and other offences relating to the way radioactive material is handled in Australia.

Our contention is that, to the extent that pre-emption of genuine threats is an important policy goal, there are existing frameworks which operate to let that work without needing to create these very expansive offences, which of course can pick up some of the genuine preparatory but also have the overreach of criminalising a whole raft of other conduct as well. Once you get that overreach it then becomes a question of investigatory or prosecutory discretion as to whether or not conduct within the area of overreach is investigated and prosecuted. It is our contention, based on the sort of casework I was describing to Senator Barnett, that in practice those discussions are being applied in a way which may fly unnecessarily hard for certain fairly identifiable members of the Australian community.

Senator LUDLAM—That is what I was going to pick up on: whether your concerns are abstract or whether you are seeing these sort of offences invoked day to day in your work in the CLCs. Is that actually the case?

Dr Emerton—Yes, and that is part of what I was trying to say in my answer to Senator Barnett about why we rank the terrorist act issues higher than sedition. In a sense the concerns with sedition are not entirely abstract. I gave an anecdote to Senator Barnett that shows there is a story there, but to the best of my knowledge that is close to a one-off. Our concerns with the definition of 'terrorist act' are not abstract at all. They are based on the actual experience of working with members of affected communities. I am thinking here particularly of the Muslim community of northern and western Melbourne, the Tamil community of south-eastern Melbourne, the Somali community, who live in various communities in inner Melbourne, and the Kurdish community of northern Melbourne. We have certain communities in mind with whom we work and many of them live in those geographic areas which are particular catchments areas for CLC work. If we hold community education meetings we get significant numbers of members of these communities attending with concerns such as, 'What are my rights in relation to remission of members of my family who live in an area where conflict is entrenched and where I know that the Australian government has taken one side in that conflict?' With that one we are talking about current cases in the courts, and you may not be surprised that the Somali community have that sort of concern.

We had a case in 2006 when, you may recall, there was a very bloody war between Israel and Lebanon, and there was an interesting juxtaposition. One member of the federal government—I think it was the then foreign minister, Mr Downer, was sending condolences to Australians whose son had been killed fighting with the Israelis in that war. At the same time, another member of the federal government—I think it was the then Attorney-General, Mr Ruddock—was issuing public warnings to Australians with sympathy for Lebanon not to go and serve in the conflict because they could be committing serious offences. The effect of that sort of remark, as far as the statutory situation in Australia is concerned, was that there is no distinguishable difference between the criminality of serving with the IDF, the Israeli Defence Forces, and the criminality of serving with the Lebanese army—or, indeed, the criminality of serving with the Hezbollah militia. Those sorts of remarks would suggest that, in the exercise of due discretion in what I have described as the area of overreach, certain sorts of political or social orientation are to be regarded as criminal and others not. It then creates a sense of disempowerment, a sense of less than full participation in Australian community, cultural, social and political life. From the point of view of those who are affected, that is not an abstract experience; that is a real experience which then flows through into, for example, how they are treated by their fellow Australians, how they are treated in an institutional context, the sorts of options open to them in their lives and so on. Our views about this are not purely abstract. In that sense it is not sort of abstract civil libertarian concerns but practical, social concerns based upon the sorts of engagement with these communities that I have just tried to describe.

Senator LUDLAM—We are getting a little short of time. I will ask one more quick question. In the Attorney-General's discussion paper on antiterrorism they have not gone for a full repeal of sedition as this bill proposes, but they have replaced the term with 'urging violence' and they have clarified the offence somewhat.

Would that go some way toward meeting the concerns that you raised at the outset around the sedition offences?

Dr Emerton—It would. I think they would require that there be an intention that the violence takes place. It still would not go far enough, in our view, because, for example, impossible or impractical urgings would still be criminalised. So if I urge intending violence to take place but there is no practical possibility that violence will take place—because, for example, there is no evidence that anyone was listening to my urgings or that my urgings had any public currency—I could still be prosecuted. We still take the view that that is overreach and again is apt to criminalise what is in fact a sort of harmless conduct, or conduct insufficiently connected to harm to merit criminalisation, given the very high priority the liberal democracy has to place on freedom of speech and political engagement, given that these are the raison d'etre, in a sense, of liberal democracy.

In relation to the discussion paper, another point where the bills overlap is in the treatment of section 102.7, which is a supporting offence. The current bill deals with that much more successfully, in my view, than the discussion paper. Without going into all the technical minutia, the drafting of the discussion paper in relation to section 102.7 actually in some ways expands the operation of section 102.7 while removing the requirement of the physical element that the support provided would help the organisation engage in activity of a certain sort or requires that there is an ulterior intention on the part of the accused that they intend the behaviour to provide that support. My feeling is that that is probably a drafting error in the discussion paper rather than a deliberate policy choice.

Senator LUDLAM—I guess we will find out.

Dr Emerton—I think the drafting for that in this bill is far superior.

Senator CROSSIN—Dr Emerton, I have got just one question I wanted to ask you. Your submission says you remain opposed to division 3 of the ASIO Act and, of course, this bill proposes to amend division 3. There are a number of areas in this act—and the changes to the ASIO Act is one of them—where the Parliamentary Joint Committee on Intelligence and Security, when it undertook a review of these laws, came up with the view that the changes to the ASIO Act were not warranted. In fact, when the original sunset period of July 2006 came about, this was extended for 10 years. I am wondering whether you have any comments about where your views about particular sections of this act vary from what the Parliamentary joint committee actually determined and why you have a different view to that committee.

Dr Emerton—In some respects our views do not depart from those of the committee. For example, the parliamentary joint committee recommended significant changes to the secrecy provisions. In a sense the change to the secrecy provisions mooted in item 10 of the current bill would actually bring the ASIO Act more into compliance with what was recommended by the parliamentary joint committee. To some extent the current bill does not reflect all the recommendations that came out of that report. Having made that point, I certainly agree that in some respects we are running a line which is at odds with the recommendations of that committee.

In particular, we do not think that that part of the ASIO Act should remain in place. The reason is that the parliamentary joint committee, in making its recommendation that that aspect of the ASIO Act remain in place, took the view that the powers in the ASIO Act are intelligence gathering powers and an investigative function connected to criminal prosecution, which is the role in our constitutional system that the police undertake. Based on that distinction they then said for those who were concerned that what in effect we had here were extremely broad coercive investigatory powers that that concern was not warranted because it disregarded the distinction between intelligence gathering on the one hand and criminal investigation on the other hand.

The view of the Federation of Community Legal Centres at the time was that that distinction is in practice not a genuine one. Our experience in the sorts of case work and engagement with the community that I have been talking about is, in the intervening four years since that inquiry was undertaken, that the distinction between intelligence gathering and investigatory activity is a spurious one. Our view that there is a spurious distinction has only strengthened in that in practice when one looks from the agency's point of view there is a very high degree of cooperation between agencies. What seems to be the clear use of ASIO's powers to collect information connected to a criminal investigation is also, from the experience and the point of view of affected community members, that there is a unified investigatory endeavour here being undertaken by a number of agencies in a close interagency cooperation. This has reinforced our view that that distinction which ultimately the parliamentary joint committee endorsed with these ongoing powers is not a real one.

I am talking about our casework and that is a reference to something to which the committee does not have immediate access, but I could point to a decided judgment which is the judgment of Justice Adams in the New South Wales Supreme Court in the ul-Haque case. It discusses a case of interagency cooperation in which ASIO's investigatory activities were intimately connected to an unfolding criminal investigation. The experience of the Federation of Community Legal Centres through the work we do is that the picture that one gets from the ul-Haque case as described in that judgment of the way the agencies worked together is not confined to a few cases—it is very much the norm.

The rejection of that distinction between intelligence gathering and criminal investigation then makes us say that the vesting of coercive investigatory powers in a body that is not a police force is at odds with some of the fundamentals of our constitutional tradition. It has consequences that then play out on the ground in an adverse way in respect of community members. They get policed by ASIO, but ASIO is not a body that conducts itself with the norms of a police force. They do not have the same rights in relation to ASIO officers that they have in relation to police officers and there are not the same constraints of publicity and accountability on ASIO that operate on police officers both as a matter of law and the long tradition of the constabulary. For those reasons we remain opposed to the vesting in ASIO of coercive powers of the sort that that part of the ASIO Act gives them.

CHAIR—Did your organisation submit comments or are you submitting comments on the discussion paper?

Dr Emerton—I believe they are not yet submitted. We are in the process of trying to get them ready for submission and have been anticipating doing that. We have been working for some time to get comments ready.

CHAIR—The closing date for that is Friday, isn't it?

Dr Emerton—I think that is right.

CHAIR—But it is your intention to put something in by then?

Dr Emerton—It is, yes.

CHAIR—On behalf of the committee, thank you very much for your evidence this morning. We certainly appreciate your submission and your time.

Dr Emerton—We very much appreciate the chance to appear, so thank you.

[9.45 am]

DONOVAN, Ms Helen, Co-Director, Criminal Law and Human Rights, Law Council of Australia

CHAIR—Welcome. The Law Council has lodged a submission which the committee has labelled No. 14. Do you need to amend or change that in any way?

Ms Donovan—No.

CHAIR—I now invite you to make some comments for a few minutes and then we will go to questions.

Ms Donovan—The Law Council is grateful for the opportunity to appear before the committee today. With this bill, the release of the national security legislation discussion paper and the likely appointment in the near future of a national security legislation monitor, the review of Australia's anti-terror laws is firmly on the national agenda. This in itself is a positive development welcomed by the Law Council. These laws were introduced in haste and purportedly to deal with emergency circumstances and therefore the appropriateness and necessity of these laws ought to be part of an ongoing national dialogue.

As for the provisions of the bill itself, the Law Council submits that the bill correctly identifies a number of areas in need of fairly urgent attention. Some of the provisions the Law Council supports—for example, the proposal to repeal the sedition offences or the proposal to repeal the offence of possession of a thing connected with a terrorist act; some of the provisions go further than the Law Council has previously urged—for example, the repeal of section 23CA(8)(m); and some of the provisions perhaps do not go as far as the Law Council would like—for example, the bill proposes the repeal of fostering the doing of a terrorist act as part of the definition of a terrorist organisation but does not propose the repeal of advocacy as a grounds for listing.

CHAIR—Thank you. No doubt the Law Council will be putting in a submission to the Attorney-General's discussion paper.

Ms Donovan—That is right. The Law Council is preparing a submission now and, in fact, this evening is hosting with the Attorney-General's Department a public forum on that discussion paper. Hopefully, we will get a lot of feedback from members of the profession at that forum about their views on the discussion paper.

CHAIR—Do you see that there is some sort of crossover between the process the Attorney-General has undertaken and this piece of legislation? What is your view about where some of the issues will collide or might intersect quite nicely?

Ms Donovan—Certainly there is crossover. The bill deals with some matters which are addressed in the national security legislation discussion paper. There are other provisions which are not addressed in the paper. So there is definitely some crossover and of course we will take the opportunity to discuss these laws in whichever forum is available to us. We do not know what course the discussion paper will take. The government will receive submissions and it may be a matter of months or years before there is a response to that or any amending legislation emerges from that process. So this bill offers an excellent opportunity to discuss the laws in the here and now.

CHAIR—I will ask you the same question I asked Dr Emerton. This bill does propose amending division 3 of the ASIO Act. The Joint Parliamentary Committee on Intelligence and Security suggested that these powers have been used within the bounds of the law and administered in a professional way, and in 2006 that section of the act was further extended for another 10 years. It is not in our discussion paper, but do you think there is a need to amend the ASIO Act or should we just leave that as it is for this period of time?

Ms Donovan—The Law Council thinks there is a need to amend the ASIO Act. In fact, we recommend the repeal of division 3 but offer some suggestions about amendment in the alternative. The Law Council made similar submissions to the parliamentary joint committee. The Law Council does acknowledge that there is a need for intelligence-gathering powers in this area but suggests alternative means by which ASIO may be able to question people. The Law Council takes the view that just because laws are not used—for example, the detention and questioning power—and just because they have not been utilised does not mean that, therefore, they present no risk. In fact, often we would submit that the fact that laws have not been used demonstrates that they were not necessary in the first place. Certainly we do not think it is an argument in favour of their retention that, to date, the laws have not been abused or misused.

Senator LUDLAM—Thank you for coming in and for your detailed submission. Can we go to the urgency in your submission and also just now in your opening statement, where you mentioned the National Security

Legislation Monitor and the discussion paper and so on. Can you outline for us why you believe there is an urgent need for legislative reform?

Ms Donovan—A number of these provisions have already been subject to review, and recommendations have been made for the reform of certain provisions. Some of those recommendations have been available for a period of years now and I think that is where the sense of urgency emerges from. A number of these laws, when they were first introduced, were opposed by the Law Council, were very controversial and were said to be required to deal with the particular circumstances of the times, and the need for a lot of those laws has not been borne out. I think that is where, again, the sense of urgency comes from.

Senator LUDLAM—There have been a number of high-profile prosecutions though in the years since these laws were enacted. How do you think we are doing, in an overarching sense, in the prosecution of terrorism offences in Australia?

Ms Donovan—What do you mean in the sense of, 'How do you think we are doing?'

Senator LUDLAM—Should we be tweaking at the margins or is there something structurally wrong? I am just thinking back to the actual prosecutions of terrorist offences under the various acts and so on that are described here. We do not seem to have a very good record of actually bringing cases to successful prosecution. I am wondering whether, in the evaluation of the Law Council, there is a structural need for reform or whether there is a need for tweaking and marginal reforms.

Ms Donovan—I think there is certainly more than a need just for tweaking. The cases that have been brought really do not deal with the full spectrum of terrorism laws. They generally deal with a fairly narrow subset of offences. We can learn from them, certainly, but there is a limit to the lessons that can be drawn from the prosecutions to date. I look at the Dr Mohamed Haneef case, which of course did not continue to charge and prosecution. But I think it would be a shame if we can only learn lessons through cases such as that. This bill recommends the reform of the provision under which Dr Haneef was charged, but there are many offence provisions which have similar flaws in the Criminal Code and I think it would be a great shame if we need a case to pre-empt the reform of each and every offence provision.

I should say as well that one of the things that have been learnt from the prosecutions to date is that the national security information act needs review and reform. That has probably received the most attention in the discussion paper, and I think that is appropriate. That is a matter on which we are really consulting or attempting to consult closely with our members who have been involved in terror trials to learn how it is working, how it is not working and how it can be improved. I think practice has perhaps diverged a little bit from how we thought that act would work, diverged in many respects in a positive sense, in the sense that there has been a degree of cooperation and undertakings have governed how proceedings have progressed.

Senator LUDLAM—This bill propose the wholesale repeal of that act. The Law Council does not go that far. You have made a number of recommendations for amendments. It has been put to me personally that that act actually has a chilling effect, not necessarily that it is being invoked all the time but that it can actually have a chilling effect on the way that cases are run. Can you talk us through what your proposed amendments are to the act?

Ms Donovan—Yes, the Law Council's proposed amendments deal with two specific issues. One is security clearances for lawyers, which is an issue that the Law Council opposes. The Law Council does not believe that legal representatives should be subject to security clearances, that the fact that somebody is admitted to practice and has experience in dealing with the court and dealing with confidential information and making undertakings where appropriate means that it is not appropriate to subject them to security clearances and that having a pool of security cleared lawyers in fact impacts on the ability of people to have counsel of their choosing and on the independence of counsel. If the security clearance regime is to remain, the Law Council proposes some amendments to that, first and foremost being that the Attorney-General would have to seek the leave of the court before requiring somebody to obtain a security clearance and also by setting out in the act specific appeal provisions. The other amendment that the Law Council seeks is to change the weight, perhaps, that is given to the importance of ensuring that information that might prejudice national security is disclosed as balanced against the defendant's fair trial rights. The Law Council submits that at the moment that balance is not properly achieved in the act and that primacy should be given to fair trial rights.

Senator LUDLAM—My last question goes to what we were asking Dr Emerton before. The Attorney-General's discussion paper proposes replacing the term 'sedition' with 'urging violence'. I think you have

supported the repeal of sedition, as proposed in this bill, but how happy are you with the Attorney-General's proposals?

Ms Donovan—The Law Council still seeks the repeal of those provisions but I think the proposed amendments do go a long way towards addressing concerns about those provisions, particularly to the extent that they require a much closer nexus between the urging and the commission of a violent act. They certainly clarify the intent required.

Senator BARNETT—Thank you, Ms Donovan, for being here today. How do you compare this bill with the government's exposure draft bill? Have you had a chance to have a look at it? I know it has only been out for about a month.

Ms Donovan—In which particular respect? They do not deal with exactly the same subject matter, obviously.

Senator BARNETT—I have not had a look at the government's exposure draft bill and have not perused it. What are the main similarities and the main differences between the two?

Ms Donovan—A large part of the national security legislation discussion paper deals with the National Security Information (Criminal and Civil Proceedings) Act and this bill proposes its wholesale repeal, whereas the discussion paper is really concerned with tweaking the everyday operation of that act. It is concerned with giving the Attorney-General a more direct role in negotiations and agreements which are made under that act about how national security information will be handled. So obviously there is a dramatic divergence in relation to that. This bill recommends the repeal of the sedition offences whereas the discussion paper recommends amendments to those offences—significant amendments, it must be acknowledged. The discussion paper deals with the definition of 'terrorist act' and they take a quite different approach to how that definition should be changed. The discussion paper retains reference to a threat of action. The discussion paper recommends that the limitation of 'harm' to 'physical harm' should be removed so that it would also include psychological harm.

Senator BARNETT—Just going to a few of the specifics, what are your views with respect to sedition? I know the Law Council has had a long-expressed view of the need to protect freedom of speech and opposition to sedition laws generally. The government has put forward a proposal to replace that with the words 'urging violence'. Would you like to respond with your views on the government's proposal?

Ms Donovan—The proposal to change the word 'sedition' to 'urging violence' is perhaps not the most significant change that the government has put forward. It is much more to do with the changes about the intent element of the offence. I think what is proposed is in line with recommendations which were made by the Australian Law Reform Commission. The Law Council supports those recommendations, but as only as an alternative to the wholesale repeal of the sedition offences. I should note that the government is proposing the amendment of certain subsections of the sedition offences. The Law Council's view is that the offences are unnecessary, that there is already provision in the Criminal Code for incitement to a criminal act to be prosecuted and this is sufficient, and that that draws the appropriate boundary around the sort of conduct that ought to be subject to criminal sanction and the sort of conduct which ought not. It is dangerous to make these predictions, but it is perhaps likely that these offences will remain in an unamended form in the statute book but will perhaps never or very, very rarely be used.

Senator BARNETT—They have not been used yet.

Ms Donovan—They have not been used to date. They have not been used for many years. But the Law Council thinks there is a danger in having these types of offences remain on the statute book even if they are not used. That is partly because—and I think Dr Emerton explained this much more eloquently—the law enforcement agencies sometimes as a result have a misunderstanding about the extent of their powers or about what sort of activity may be subject to criminal investigation and criminal prosecution. We have to remember—and this relates not only to the sedition offences but also to a number of the other offences which are covered by the discussion paper and by this bill—that, even though they might not be invoked and nobody may ever be charged or prosecuted for those offences, they provide a hook for the use of law enforcement powers and they allow police to obtain telephone interception warrants, for example, along with warrants to use a number of other intrusive powers. So, having them remain on the statute book is in itself a risk, notwithstanding that they may not be invoked in prosecution.

Senator BARNETT—I am not sure if you are familiar with the legislation. What does it say about sedition or otherwise?

Ms Donovan—I am afraid I cannot answer that off hand.

Senator BARNETT—That is not a problem. I want to move to the issue of the 'dead time' provisions in part 1C and your concerns about them. In terms of the Haneef case, you quote Mr Clarke as saying, 'I believe the concept of uncapped detention time is unacceptable,' and then you make a reference to judicial oversight and you say:

Instead the Law Council recommends the following changes to the relevant provisions:

• … impose a maximum cap on the amount of dead time allowed to be disregarded from the investigation period pursuant to subparagraph 23CA(8)(m).

And I think you mentioned that in your introductory remarks as well. What are your specific views in terms of this dead time and what is and what should be the maximum cap in terms of time?

Ms Donovan—In reviewing our past submissions, I do not think the Law Council has ever offered a finite period but has suggested that the cap should not be more than is required to deal with investigations in different time zones, which was initially the reason put forward for this unusual allowance for dead time in terrorism cases. So I think with that understanding that it would be no more than is required to deal with time zone differences, the Law Council would submit that 48 hours is probably an appropriate cap. The discussion paper recommends seven days effectively, which the Law Council submits is too long—although it is acknowledged that it is an improvement on an uncapped period of time.

Senator BARNETT—But putting it bluntly, someone has to come up with a maximum time period. Correct?

Ms Donovan—That is right. What occurred in the Haneef case was as a result of not coming up with a maximum time period. Initially the legislation proposed that there be sufficient dead time to allow for investigation across time zones, and groups such as the Law Council took issue with this because it was, we thought, subject to abuse and not sufficiently precise. The introduction of the judicial oversight into section 20CA was a response to those concerns but it came at the expense of any limiting time frame, whether it by reference to allowing for time differences or an expressed period of time. We saw in the Dr Mohamed Haneef case what the consequences of that were—that dead time extended much longer than initially ever envisaged.

Senator BARNETT—I asked Dr Emerton earlier about priorities in terms of reforms. Would you care to share your views? If you wanted to prioritise the reforms, which ones would be at the top of your list and second and third?

Ms Donovan—I would rather not, actually. The Law Council raises these matters because they are of concern to its members. The views that the Law Council expresses are those which come from our various committee members who have experience in this, and I am not sure how they would prioritise these different proposals and I do not want to offer a personal view.

Senator BARNETT—That is fine. We discussed the National Security Legislation Monitor Bill, and you mentioned that in your introductory remarks and it is in your introductory comments in your submission. Do you express a view that you in general support such a bill and the need for an independent monitor?

Ms Donovan—Yes, and the Law Council has made submissions to the committee which has reviewed that bill. The Law Council made a number of recommendations which have been picked up in the report of that committee and, hopefully, will be reflected in government amendments to the bill. In general, the Law Council has been supportive of that proposed measure and has in fact called for an independent reviewer for a number of years now.

Senator BARNETT—And you say that you are meeting with, I think, the Attorney-General or his officers regarding the discussion paper today?

Ms Donovan—This evening, the Law Council, together with the New South Wales Bar, is hosting a public forum on the national security legislation discussion paper. Somebody from the Attorney-General's Department will speak to the discussion paper. A member of the Law Council's Criminal Law Committee who has experience in terror trials will then offer some insights and his initial views on the paper. There will be an opportunity for people, including members of the profession, to ask questions and offer views.

Senator BARNETT—I think there is another week or so in terms of the deadline for the discussion paper, but I understand the Law Council will be putting in a submission.

Ms Donovan—Submissions are due this Friday. The Law Council are hopeful of obtaining an extension of a further week so that we can take account of what views might be expressed this evening.

Senator BARNETT—That was my supplementary question. Are you having other forums around the country, or is this pretty much it and then you are getting the feedback from the forum and presumably inject at least some of it into your response submission to the discussion paper?

Ms Donovan—This is it in terms of public forum for the Law Council. I cannot speak for the Attorney-General's Department, who may have arranged similar events with other organisations.

Senator BARNETT—No, I am talking about the Law Council.

Ms Donovan—But it is not the avenue for us to receive the views of the profession, obviously. As soon as the discussion paper was released, we sent out a request to each of our constituent bodies, which are the law societies and bar associations of each state and territory, asking for their views and input. Our Criminal Law Committee, which has representation from every state and territory, is responsible for generating the submission.

Senator BARNETT—Have they met and talked about it?

Ms Donovan—No, we have not met face to face to discuss it. Communication has been by email.

Senator BARNETT—Have you had enough time to review the discussion paper? I understand it is hundreds of pages long.

Ms Donovan—It is very long. Perhaps my greatest concern at this stage is on obtaining feedback about the National Security Information (Criminal and Civil Proceedings) Act 2004 and the reforms that that proposes and that act in itself. It is a very practical matter. It is about how court cases have actually proceeded to date. I think that there is valuable input that we can provide on that from the solicitors and barristers who have been involved in these cases, and of course it takes some time to obtain their views.

Senator BARNETT—Are you concerned, at least at this time, about having adequate response time to put forward a comprehensive and well thought through submission?

Ms Donovan—The Attorney-General's Department has indicated that there is some flexibility about the closure date. So that has ameliorated my concerns.

Senator BARNETT—Thank you for your feedback.

CHAIR—What are the Law Council's thoughts on the proposal to establish the advisory committee when it comes to listing terrorist organisations?

Ms Donovan—I should state from the outset that the Law Council's preference is that the executive not be able to issue this power without first having a court order, so this would in fact be a judicially supervised process. Accepting that that is unlikely to be the case, the Law Council supports the proposal to establish an advisory committee that would assist the Attorney-General in exercising his proscription function. I think the benefit of the advisory committee is that it would add greater transparency to the process. At the moment, it is very difficult to obtain information or understand why particular organisations are or are not chosen for listing, or the order in which they are chosen for listing. The lack of transparency creates the risk that people will see the proscription process as essentially a political process, a process that may be used to make a statement rather than a process that is actually used with any law enforcement imperative. I think that the inclusion of an advisory committee which would be able to consult more closely with the community and advise the Attorney-General would assist in addressing some of those concerns.

CHAIR—Is that proposal to have an advisory committee in the discussion paper?

Ms Donovan—The discussion paper does not deal with the proscription process. The discussion paper deals with the definition of a terrorist organisation offence; more specifically, it deals with one of the grounds for listing an organisation as a terrorist organisation. At the moment, as the senators would be aware, advocacy is a basis for listing an organisation and advocacy is defined to include praise for a terrorist organisation in circumstances where there is a risk that—

CHAIR—But it assumes that the status quo exists—that is, the disallowance in the parliament.

Ms Donovan—It does. The discussion paper does not propose any change to the proscription process.

CHAIR—Would it be your view that, if the Attorney-General were to have an advisory committee, once the Attorney-General has made his or her mind up, it should still be a disallowable instrument?

Ms Donovan—Yes, I think there is definitely value in the parliamentary joint committee review process. I think we state in our submission, and we have certainly submitted in other forums, that there is value in that

parliamentary joint committee review function. However, it is an inadequate oversight mechanism, partly because at the moment the parliamentary joint committee does not have to conduct a review; although, I think in almost all cases it has conducted such a review. Although it has been very robust in its questioning of government agencies, to date the parliamentary joint committee has not succeeded in getting the government to commit to a fixed and transparent set of criteria for listing a terrorist organisation. It is difficult to see how the committee can fulfil its function without having a set of criteria to judge the listing against.

CHAIR—I see.

Senator LUDLAM—Has there ever been a disallowance of an attempted listing?

CHAIR—I do not think there has ever been a disallowance of a terrorist organisation.

Ms Donovan—Not that I am aware of. I should say that there have been some dissenting views on the committee on some listings. But there has never been a disallowance.

Senator LUDLAM—I will just come back to the definition. In your submission you note that the definition of terrorism in the Criminal Code is broader than what is internationally accepted. Can you comment on the proposal that we have put forward here on the definition of what constitutes a terrorist act and why it is important to have that discussion?

Ms Donovan—The Law Council supports the proposal in the bill to remove 'threat of action' from the definition of terrorist act and the Law Council submits that the inclusion of threat of action to date has made the definition somewhat unintelligible because of the way that paragraphs 1 and 2 interact. The Law Council would support the proposal to have threat of action as a separate offence. Some of the other matters which are proposed by the bill, which include, for example, removing part of the intent element from the definition of terrorist act are not matters on which the Law Council has previously expressed a concluded view, and that is why they are not addressed in detail in our submission. There are very compelling arguments made both for the inclusion of that intent element and for its removal. It is a matter that would require further attention from our members before we expressed a view.

Senator LUDLAM—Okay.

Ms Donovan—With respect to the inclusion of 'taking hostages', again that is not a matter which we have addressed, but I do not think that that would be controversial; I think the Law Council would support the inclusion of 'taking hostages'. The Law Council certainly has advocated in the past and supports the proposal in this bill to remove reference to property damage and interference with telecommunication systems, particularly where there is no requirement that damage or interference have any nexus with harm to the individual.

Senator LUDLAM—And that is on the basis that in existing criminal law there are plenty of protections and plenty of ways of prosecuting those sorts of crimes without being defined as 'terrorist'.

Ms Donovan—That is a very important statement. Excluding those matters from the 'terrorist act' definition does not mean that they are not subject to criminal sanction. It simply means that they are not part of this gateway provision on which the definition of 'terrorist organisation' rests and on which all the other terrorist act offences rest. What the Law Council has argued in the past with respect to the definition of 'terrorist act' is that it is very important that it is possible to understand the precise scope of this definition, the precise scope of the sort of conduct which it captures, because of how significant it is for the operation of the terrorist organisation offences and general terrorist offences in the Criminal Code—and all of the law enforcement powers which rest on this definition.

Senator LUDLAM—Do you have a view then as to whether the proposed I would argue 'expansions' of the definition of terrorism to include psychological harm, for example, in the discussion paper is helping or hurting that?

Ms Donovan—I do have a view personally, but the Law Council has not concluded its submission yet. It is not for me to pre-empt the consideration of our committee. I do not mean to be deliberately unhelpful.

Senator LUDLAM—That is all right. It sounds like we will see your submission before too much longer.

Ms Donovan—Yes, certainly.

Senator LUDLAM—I am going to throw a completely random question at you. The horse has clearly bolted, but do we need a separate body of law dealing with terrorist offences, or is this taking us down an

unnecessary path? Do we need whole categories of separate offences and separate bodies of law relating to terrorism, or do we have everything we already need in existing criminal law?

Ms Donovan—When these provisions were initially introduced, it was certainly the Law Council's submission that the existing body of criminal law was sufficient, although the Law Council was open to the possibility that there was a need for specific offences or specific law enforcement powers to deal with these emergencies in unusual circumstances. The Law Council's position was, and it has not changed, that a cogent case was never made for why that existing body of laws was inadequate. The case that was put for the introduction of these new provisions was never made by reference to what offences and powers were already available in the criminal law and why they were inadequate—although I note that there have been several reviews of the law since, including that undertaken by the Security Legislation Review Committee, or the Sheller committee. The conclusion of that committee, and others, has consistently been that there was and is a need for this dedicated body of law.

Senator LUDLAM—Okay, I will leave it there. Thanks very much for your evidence.

Senator FISHER—Ms Donovan, you said in your comments earlier in your submission, in relation to the sedition provisions, that the provisions have not been used, or no-one has been prosecuted, and so therefore they serve no useful purpose, but at the same time you go on to say, 'They may have a chilling effect'—I know Senator Ludlum asked about chilling effect, but I think more generally than I am about to—'in respect of legitimate political comment'. Could 'legitimate political comment' have been successfully prosecuted under the existing provisions?

Ms Donovan—That is certainly possible because the requirement that the conduct was intended to cause violence is not clearly enough set out in the existing provisions. That certainly was the view of the Australian Law Reform Commission and why they recommended—not the repeal of the provisions, although they did recommend the repeal of certain of the provisions—that at the very least that intent element had to be spelt out. It is worth noting that there is a good faith defence to the provisions, which may have allowed somebody who is engaged in legitimate political dissent to have successfully defended an action, but the very fact that that defence was included in the provisions illustrates the breadth of the conduct which they may capture. With the amendments that are proposed in the discussion paper, it is certainly less likely that a successful prosecution could in fact take place in those circumstances, but I am not sure that the chilling effect therefore disappears.

Senator FISHER—Is warmed or neutered. I want to explore a bit more how you can suggest on the one hand that provisions that have not been used could have a chilling effect on conduct that should not be illegal in appropriate free speech, but at the same time you are not seeming to go so far as to say that it could have had a chilling effect on behaviour that should be illegal and is the beginnings of the very sort of behaviour that the legislation wants to stop. Do you understand what I am saying?

Ms Donovan—I think I do.

Senator FISHER—I note you have other arguments against the retention of the sedition provisions, but tackling your argument that the provisions have not been used, therefore they serve no useful purpose, at the same time you are saying, 'And PS, chilling effect quelling what should be legal behaviour'. How do you reconcile those two things?

Ms Donovan—I think I understand. In terms of the sort of behaviour which ought legitimately be subject to criminal sanction, there is already sufficient provision for that in the Criminal Code, and so these offences are not required to deter that sort of behaviour because there are already provisions which address that. The problem with these offences is that the exact scope of the sort of conduct that they capture is difficult to determine, and that is why it is difficult for people to know for certain whether they fall foul of the provisions or not, and therefore they may take a more cautious approach just to ensure that they do not fall foul of these provisions.

Senator FISHER—All right then, following that through, are you saying that these provisions have not been used because they do not need to be used because there are other provisions that can be used and have been used?

Ms Donovan—There are other provisions that could be used. Whether they have or not, I cannot say, but they are provisions which reflect long-standing principles of criminal law—for example, the idea that if somebody incites another to commit a criminal act, that they ought to be subject to sanction. Sorry, if I have not answered your question.

Senator FISHER—No, thank you.

CHAIR—We do not have any other questions, Ms Donovan, so I thank you very much for your attendance today. I want to place on record again our thanks to the Law Council for its energies and efforts in responding to our inquiries time and time again, and for your evidence today. It has been very informative and most insightful.

Ms Donovan—Thank you.

Proceedings suspended from 10.25 am to 10.48 am

HERMAN, Mr Jack Richard, Executive Secretary, Australian Press Council

McKINNON, Professor Ken, Chairman, Australian Press Council

CHAIR—Welcome. The Press Council has lodged a submission with the committee which we have labelled submission No. 5 for our purposes. Do you wish to make any changes or amendments to that submission?

Prof. McKinnon—No.

CHAIR—In that case I invite you to make an opening statement, after which we will go to questions.

Prof. McKinnon—Thank you for the opportunity. The view of the Press Council is that the proposed bill is very timely. Whatever might have been the case in the heat of the moment when the original antiterrorism laws were passed, we think they were a bit over the top and now is the time to review them and bring them back into balance with the normal civil rights of citizens.

We do not take issue with any part of the bill. We simply want to underline the fact that certain parts of the bill are very important from the point of view of the role of the press and the possibility, under the present act, of contravention by the simple carrying out of the duties of a journalist, where it is possible that you are in receipt of information that you can be held liable for through no fault of your own. We are very anxious that laws do not blame the messenger. It is their duty, and I think all of us, including members of parliament, would be much the worse if our press could not carry the words of various participants in the democratic life of the country. We are very pleased to see this proposed rebalancing, though I would make comment about a few aspects.

We think sedition laws are not only misjudged in the antiterrorism law; they have been misjudged for a generation, and it is time they were stricken from the legislative books. However, we want to stress that there is a fallback position for us. If you cannot get everything through, we would think it important that those that have a chilling effect on public life be at least removed. If some of those that were recommended by the ALRC are not able to be removed, we think that a media exemption should be introduced as a rebalancing to make sure that there is not unintentional sedition when the media reports what is said.

We agree that the word 'support' in the present act be amended to mean 'material support'. When Tony Jones was interviewing someone, it was suggested by some observers that his line of questioning was said to be giving material support by allowing the informant to air views, and that surely is an extension that our democratic society would not wish to have.

As I indicated, the term 'possession of a thing' opens the possibility that reckless possession of a thing could be interpreted as information received by a journalist, who does not know that it is in contravention until they have received it anyway—and even then they are just the messenger.

We also support the amendment of the definition of 'terrorist organisation' and in particular the proposed introduction of proper steps before proscription is envisaged. We think that is very much something that was missing in the existing legislation.

Finally, we think that the present capability of holding a suspect for such a long period is absolutely at odds with the kind of approach to justice that we think is important. As part of that, the protection of secrecy, which forbids the announcement of anybody being held or whatever, is surely one of the over-the-top provisions that ought to go. Justice should not only be done but be seen to be done. I cannot see what additional benefit there is in being able to hold a suspect without a capacity to refer to lawyers and in holding them indefinitely in the hope of, as it were, breaking them and getting them to spill the beans. Unless we are going to reintroduce torture in the American fashion, it would be surely out of whack with what we think is reasonable. Those are the main things I wanted to raise, but I will ask Jack Herman if he wants to add anything.

Mr Herman—No.

CHAIR—Since the current laws have been in place, has there been any feedback from members of the Press Council about the impact it has had on their day-to-day reporting of events? Are there any examples you could give us?

Prof. McKinnon—We have had discussions about it, but they pointed out to us that it is against the law for them to tell us anyway. Talk about a catch 22.

Mr Herman—It is a question that has been asked a couple of times when the Senate committee has previously reviewed this legislation. We said then, and say again, it is difficult for journalists to sometimes even tell their editors that there are areas they cannot go into. By and large, the real problem with this sort of legislation is not that it involves censorship, but that it involves self-censorship. Often journalists have had information available but have not been able to publish it. We would think more likely what has happened is what happened in the case of the *Australian* and the terrorist raids a month or two ago—that is, consistent with the requests from the Attorney, the paper held off reporting until such time as the police had completed their investigation and the raids were taking place. By and large, the newspapers have cooperated with authorities in these sorts of situations.

CHAIR—Isn't that the issue, really? A balance between having full and frank disclosure in a piece of legislation, but also being able to protect the story or the source of a story so that police can continue their investigations and other people are not tipped off or put onto the scent of what is happening. How is that balanced in a journalist's mind though?

Mr Herman—In most cases, in most journalists' minds, the scoop is more important than protection of police integrity, but that is balanced by the fact that every story that a journalist wants to put in the paper is legalled within the newspaper office before it is put in. That is often the step at which the story is changed, information is removed or the story is stopped completely because the newspaper's lawyers are more cognisant of the legal implication on the publication perhaps than the journalist is. What concerns us is not necessarily the impact that this has had on particular reporting in the past few years, because there have only been a small number of incidents that link to terror—only three or four arrests or groups of arrests. The trials have been held, and the media's reporting of both the arrests and the trials have been responsible. We certainly have not received complaints either from the authorities or anyone else about irresponsible reporting in those instances.

What concerns us is the potential effect of some of the legislation as it exists at the moment, which this bill seeks to amend—that is, there is a potential there in the sedition laws and in the support for a proscribed organisation laws of the media being unable to report matters of public interest and concern because they themselves might be accused of either sedition or support for a proscribed organisation.

Prof. McKinnon—There are two allied points that need to be made. We disagreed vehemently with Philip Ruddock when he prevented a senior academic from accessing books to study terrorist organisations. It is often the case that when the government runs into trouble about something and wants more detailed expert knowledge, it turns to some academic who has been labouring away in obscurity who happens to know such a lot about it that it is right on the ball, and it is very important that they can keep studying these things and not be accused of joining the terrorist when they simply are pursuing a scholarly exercise.

The second thing that I had exchanges on quite often with Philip Ruddock, whom I knew quite well, was the protection of sources. The proposal by the Labor government has still got it wrong. It is much too soft. The proposal is to go with the Evidence Act of New South Wales, which says a judge may take into account the possible need to protect sources. It does not make it the default operation or the mandatory requirement. As we saw with Harvey and McManus, in the end it gets down to the fact that the pride of the court means that they will haul up the journalists if the prosecution says so, and feel they have to put them on the stump if they refuse to answer. Better that the judge has the option not to call them up on the grounds that the journalist can get information and put it into the public domain before even, often, some of the spooks get it themselves and that is very important. While it is not part of this consideration, the underlying theme that we are pressing is that from the point of view of antiterrorism, a lively, well informed journalistic tradition is very important and helpful to the country.

CHAIR—In the reporting of events, do you often get your members saying to you, 'I have reported on terrorist incidents and the terrorist laws now for three or four years, and I think there are aspects of the legislation that are unfair or need to be changed'—not in relation to their work, but generally in relation to the operation of the act? There are particular reporters out there who report on legal matters, for example; that is their expertise. Does your council play a role in providing that feedback, or is it mainly in relation to the way the laws react and relate to them as a journalist?

Prof. McKinnon—I am not sure how to answer that. We get some wry comments about the law and, as I said, how can we tell you even if we know when it is an offence for anyone to tell us? So by and large that is a chilling effect. We are not really sure. What we are clear about is that it certainly affects editors and the people in the office who every day go through everything that the paper is going to print and will cut out anything that

is possibly against the law. They do try to cut out everything they think is defamatory too, but do not always succeed. But the real tension point in the office of a newspaper is between publishing everything and not getting the newspaper into the defamation court every day.

Mr Herman—Can I answer that in a slightly different way that reflects—the council is not a publisher.

CHAIR—Yes, I understand that.

Mr Herman—The only time the council tends to have dealings with individual journalists is when those journalists' work has been called before the council in a complaint. The people from the publishers who are on the council tend to be at the upper levels, they are at the editorial end. But what the council represents is a view that combines the publishers with journalists and with members of the public to give a viewpoint that is not particularly the publishers' viewpoint but more a public interest viewpoint.

From the point of view of the question you have asked, the Media Entertainment and Arts Alliance, which does represent journalists, has published in each of the past four years a freedom of the press report in about May of each year, and each year for the past four years they have, through their membership, highlighted the restrictions involved in laws such as those that this bill seeks to reform as being legislative requirements that restrict their members' ability to comment. I direct the committee's attention to the MEAA's freedom of the press reports as providing some substantive examples of where their members have found concerns.

Prof. McKinnon—As a consequence of that, in the world listing of countries with a free press we are right near the bottom because of these restrictive laws.

Mr Herman—We are No. 35. We are behind Gambia but we are still ahead of Fiji!

Senator BARNETT—I was going to ask how we compared to Fiji.

Prof. McKinnon—'Slightly ahead of Fiji' is how we word it.

Mr Herman—We are well ahead of Fiji but Ghana has got ahead of us.

Senator BARNETT—No. 35 is a fair way down. I thought we would be doing better than that. You say that Gambia is better than us. Are free speech and freedom of the press the criteria?

Mr Herman—Two organisations do those listings—Freedom House and Reporters Sans Frontieres—and they both use a series of criteria. They get a series of rapporteurs within a country to do an analysis of that country's laws. It covers things like the number of journalists jailed and the number of journalists killed—which Australia does reasonably well on, because we do not do a lot of that—

Senator BARNETT—That is heartening!

Mr Herman—It also looks at restrictions on the ability of journalists to report; the availability of freedom of information as a way of journalists getting information; the restrictions on journalists through things like privacy law, defamation law, contempt of courts and suppression orders through the courts; and restrictions on reporting through things like secrecy laws. That is where Australia has gone down in the last five years. The other thing to note is that, unlike most comparable countries, we do not have any guarantee of free press or indeed free speech.

Senator BARNETT—In our Constitution.

Mr Herman—Even in law.

Prof. McKinnon—Even in an ordinary law.

Senator BARNETT—I am with you. Where were we on that list five years ago?

Mr Herman—We were in the top 12 in about 2002. Over the next five years we dropped to 18th, then 25th and 38the. We came back up to about 28th then dropped back down to 35th.

Senator BARNETT—If we get these laws right and undertake the reforms that you recommend, where do you think we will end up?

Mr Herman—Australia will be going up in the next year because of the reforms introduced in New South Wales, Queensland and federally, and now in the ACT and Tasmania, to reform FOI law and make it more usable.

Prof. McKinnon—If the government carries through with the second part after the removal of the conclusive certificate, which I understand is finalised now, if they go to the next level that was foreshadowed by Senator Faulkner, it will make a sizeable difference. That is just the law. We have said to Senator Faulkner that the biggest problem with freedom of information is changing the culture of the Public Service. They are

rightly very cautious about what the minister will say if they reveal things. So a cultural change must come with the law change. As far as international bodies are concerned, they will certainly report us as higher.

Mr Herman—In answer to your specific question: this sort of reform, together with the ALRC recommendation for a review of secrecy laws to get the 700-odd separate secrecy laws into one overriding secrecy law that actually codifies what can and cannot be kept secret, will help our ranking quite well.

Senator BARNETT—Let us go to the sedition laws for a minute. You have been a long-time opponent of these laws and you have strong views on the need for freedom of speech and freedom of the press. What do you think of replacing 'sedition' with 'words urging violence'—I think that is one of the options that is being considered by the government in their discussion paper.

Prof. McKinnon—You would have to see the final wording. If you replaced the present definition of 'sedition' with any other words—and, like us, you are all wordsmiths so you know it is capable of being done by the legal draftsmen—it would not be any good. It really has to remove the onus that, if you are not terribly careful, you are committing sedition. The default option should be that somebody has to establish a whole series of conditions before you are guilty of any act that is against the government. The longer ago the sedition laws were passed, the more likely it is that you can go to jail. Scotland still has a law against offending the monarch, which can get you into jail. We are not quite that bad, but there is a lot of history in our sedition laws too.

Senator BARNETT—Have you looked at the UK legislation? How do we compare with the UK experience? I do not know if you have had a chance to review that.

Prof. McKinnon—I do not have it at my fingertips.

Mr Herman—I do not have that at my fingertips either, I am sorry to say.

Senator BARNETT—That is okay. Let us move on. Have you had a chance to review the government's discussion paper on the security legislation and is the Press Council putting in a submission in response to it? The discussion paper is several hundred pages long. Responses to the discussion paper must be submitted by this Friday, or thereabouts. Apparently the Law Council is having a semi-public feedback and consultation on the review with the department in Sydney tonight. Have you read it?

Mr Herman—No. I am not familiar with that one. I will have a look at it.

Senator BARNETT—Have you had a chance to look at the government's exposure draft bill on the security legislation?

Mr Herman—No, we have not.

Senator BARNETT—As I understand it, much of what is in the proposed bill before us is similar to the government's exposure draft bill, which I assume will be coming to the Senate and indeed this committee in the not too distant future.

Prof. McKinnon—We are not experts on Senate process, so we do not know whether this would be superseded by that or whether this one will be considered and then that one would be amended.

Senator BARNETT—That is obviously a matter for the Senate. Senator Ludlum and no doubt other senators would have firm views on that. But I have the exposure draft here. It is a public document, and I would draw that to your attention. What about the issue of dead time? We have had the Haneef case. Do you have a view about the appropriate time—

Prof. McKinnon—To keep somebody before charges are laid?

Senator BARNETT—Yes.

Prof. McKinnon—We think it should be much less than the 168 hours, as was the case, and the rolling possibilities after the 168 hours. The Haneef case revealed all the flaws in that kind of exercise. It also revealed the absurdity of the AFP's position that nobody should have defended Haneef until they had actually finished proving that he was guilty. That was absurd.

Senator BARNETT—I am trying to nail you down in terms of the time limit. Do you have a view about that? Should it be seven days, three days, 48 hours or 24 hours?

Prof. McKinnon—Our view is that it should be 24 hours.

Senator BARNETT—Finally, I have a question about the proscription of an organisation. Senator Ludlum's bill, as I understand it, suggests that there should be a sunset clause. If it is determined by regulation

then it would apply for two years, and then obviously the government is at liberty to reintroduce such a regulation. Do you have a view about the merit of sunset clause? If so, how long should the period of time be for the proscription of a terrorist organisation?

Prof. McKinnon—I will preface my answer by saying that we think there ought to be a very firm process before there is proscription. If that is done well enough, we are not as concerned about how long it is for. Secondly, I think there ought to be a sunset clause on heaps of legislation, because it is characteristic of law-making that laws stay on the books long after they are needed. I innocently thought the Law Reform Commission was about getting rid of laws. But what law reform commissions both state and federal actually do is say there ought to be some more law. An exception is the secrecy law, on which I think they have done quite a good job. So I think the sunset clause probably should be longer than two years if you go to the trouble of having a proper process, but just how long it should be I do not know. Some people say that bin Laden is no longer a force and therefore we should not worry about al-Qaeda. But I do not really know enough about that.

Senator BARNETT—No problem. Thank you for that. Like many others, I am with you on the fact that we have too many laws and the merits of sunset clauses are generally underutilised in federal, state and local government. I have had that view for decades. I share that view with you. Again, thank you for your feedback.

Senator LUDLAM—I think most of my questions have been answered. But I would like to draw you back to the specific impact of the terrorism laws on journalists. You mentioned that, before you go to press, your legal people have a look at any given piece and decide whether you should print it or amend it. Do we have any way of knowing how much is set aside through defamation or other such things and how many times the terrorism laws are impacting on what goes to press and what does not?

Prof. McKinnon—There is not a surefire way. If we do hear about it, it is anecdotal. We do know that the laws have had an effect on the arts. I have been in the company of people who say it affects the way people write and perform and the statements they make. As you know, they are inclined to say rather wild things to get a bit of attention. But we cannot say with any certainty exactly how they have been affected. I doubt that it would affect defamation law, by the way.

Mr Herman—Defamation law separately does have an effect but, rather than a story being spiked, it usually results in self-censorship—matters being either removed or couched in a more guarded way. You can look at the reporting in the newspapers in Sydney following McGurk's death . There were allegations that the tapes he had may or may not have involved some ALP politicians or some state politicians. As a result of the legalling, that is couched in much less clear terms than the journalist might have originally written it in.

Senator LUDLAM—That is the distinction I am trying to draw, because I am sure it happens a fair bit. Can pull out any anecdotal or documented cases of where the specific provisions of the terror laws have led to changes in the way pieces have been reported, or are journalists self-censoring before we even get to that stage?

Prof. McKinnon—As a member of the Press Council, from my point of view one of the problems is the tendency of newspapers to hint at things—as in the McGurk thing, as Jack has said—without sufficient checking. The big change in the last few years has been that, comparative to America or the UK, our newspapers do not check as many sources. Utegate, Hanson and other exercises have established that they are prepared to publish on sometimes fairly flimsy evidence. You only have to read the Sunday newspapers and the Monday broadsheets on political matters to know that there is more rumour and unfounded gossip in what they write than there is checking of facts.

Senator LUDLAM—Some of it is about us—that is the ocean we swim in!

Mr Herman—Is it possible for me to get back to you on that?

Senator LUDLAM—If there is something specific, yes

Mr Herman—What I might do is send an email around this afternoon to a couple of editors and see if they can give me any instances of where that has occurred. I will email you if I find out anything. It will probably be anecdotal rather than evidentiary.

Senator LUDLAM—If you could forward that to the committee secretary, that would be appreciated.

Mr Herman—Okay, I will do that.

Senator FISHER—Mr Herman, to what extent are you saying that these laws, in particular the sedition laws, have a quelling effect, a total silencing effect, on what should be regarded as a free and legitimate political speech? You say that in the area of defamation the laws moderate the language that would otherwise

be used but the stories are still run. Are you saying sedition silences the story totally? If so, on what basis are you saying that? You say defamation moderates the story rather than stopping it altogether.

Mr Herman—I will say two things on it. Firstly, we are saying it is a potential effect. I do not know yet whether it has had an actual effect on journalists, but the potential for sedition laws to be used for what is a fair report of a third-party comment raises real questions for us. The second thing to note is that for the last decade the Press Council has been arguing that the fact that there were eight separate defamation laws—and some of them were not very good—had a potential chilling effect on free speech. The result of that was that the eight state and territory attorneys-general and the federal attorney-general got together and reformed defamation law. In 2005 a new harmonised defamation law was developed, which we think has a less chilling effect than the previous defamation law had and has in fact led to the potential for more stories to be published. So we think defamation is a good example of the way in which laws can be reformed to make them more usable both for the courts and for the ability of the public to get information.

Prof. McKinnon—Let me amplify that by saying the Press Council is not the defender of newspapers; the Press Council is the defender of the public as well as the newspapers so that they get it right. We do not limit what we said about defamation to suggestions that they still publish. There are many stories spiked every week because the legal people in the newspaper cannot let them go through because they know it would result in an action which they would lose. So every day the newspaper has to make up its mind how much risk it is going to take. In some cases it must ask itself whether it can cloak what it knows to be the truth but cannot prove and get the story out to the public. There are some aspects of that in some of the instances we have been talking about. But what used to be the case, and which we think is less chilling now, is that most of the defamation law said it had to be true and in the public interest. Public interest has gone now, so long as it is true. Judges made up there own idiosyncratic minds about what is in the public interest to know about.

The problem with the chilling effect was that you could not talk to anybody about anything, whether or not you are an editor or a journalist. As I pointed out at the beginning, anybody who spoke to us about it was contravening the law. So it was hard to find out the basis of facts. Going back to the raid, since that raid there have been several exchanges about whether there needs to be a new D-notice. McClelland is in favour of it and would like to see such a thing. We pointed out to him that it is not a goer. Things have changed so much. A D-notice rests upon the idea that the authorities would come together and agree, and if the government said to editors, 'Do not publish that,' they would automatically agree. That would not be the case now.

Senator FISHER—What is a D-notice?

Mr Herman—A D-notice is a Defence notice.

Prof. McKinnon—In the Second World War and immediately following, whenever the government felt that there was information which the newspapers were likely to publish but in the national interest should not publish, they put out a D-notice. It only went to editors and it worked all the time—because there was that kind of compact. In the recent case the *Australian* cooperated with the AFP because they knew, but the Victorian police were upset because they were not in the loop to the same extent. They said it should be better than that. McClelland said we that we have got to have something resembling the D-notices or our police actions will be compromised because they are at risk of leaks. All I am saying is that society has changed to the extent that D-notices are not likely to be agreed to by any editors these days. There is far too much competition and too much openness.

Senator BARNETT—As there is on the internet.

Prof. McKinnon—Yes. Even if the authorities agreed, some other individual would have it on their blog within two minutes and then it would be around the world in two minutes. That is the good part of openness of information. Of course, some of it is rubbish and we now need to check even more. What we are really saying is that a co-operative approach to reticence in publishing is not really a goer in this generation.

Senator LUDLAM—One of the issues you have addressed is the National Security Information (Criminal and Civil Proceedings) Act 2004. You said you support the proposed repeal of the act. We have not spoken much about that yet. Can you tell us how that act has directly or indirectly affected the workings of the press? Why have you taken issue specifically with this proposed repeal?

Mr Herman—Again, it is its potential. It has been fortunate that, in the trials that have taken place so far in the terrorism cases, the judges have been particularly anxious to keep their courts open. We think that is more a product of the particular judges that have been involved than a product of the legislation. But the legislation still has the potential to close courts. We have made only glancing references to that in our submission. But we

did not make detailed submissions from the very beginning when the bill was originally before the parliament, particularly about the overly broad definition of what 'national security' might entail and the potential that has to close off discussion of matters that are relevant to the public interest. I would draw the committee's attention to our original submissions. If you do not have access to those, I can certainly provide to you the detailed arguments that the council provided on that. Some of that led to some changes. The definition of national security was in fact changed—it was narrowed.

Prof. McKinnon—Surely it is offensive to members of the Senate that a person can be convicted without knowing what the evidence against him or her is and that the lawyer for the person charged is not able to be present when the evidence is led for the prosecution. It is mad.

Senator LUDLAM—'Offensive' is an entirely appropriate word. The submission would probably be very helpful in the context of the government's discussion paper, which closes for comment on Friday. Thank you very much.

CHAIR—Mr Herman and Professor McKinnon, I thank you both very much for your submission and for making yourselves available to appear before the committee today. It is much appreciated.

Prof. McKinnon—Thank you for hearing us.

[11.32 am]

HOWIE, Ms Emily, Senior Lawyer, Human Rights Law Resource Centre

NANDAGOPAL, Ms Prabha, Secondee Lawyer, Human Rights Law Resource Centre

Evidence was taken from Ms Howie via teleconference—

CHAIR—Good morning. I welcome representatives of the Human Rights Law Resource Centre. The centre has lodged a submission with the committee which we have labelled No. 21 for our purposes. Before I ask you to make an opening statement, do you wish to make any changes or amendments to that submission?

Ms Nandagopal—Yes, senator, we do. We would like to delete paragraphs 7 and 8 and recommendation 2 which appear on page 6 of our submission. These relate to our concern in relation to the removal of the motive elements in the definition of 'terrorist act'. Since preparing our submission we have had the opportunity to read the submission of AMCRAN who make some power arguments in relation to why the motive elements of the definition of 'terrorist act' should be removed. For example, they argue that having a motive element empowers law enforcement agencies to make judgments on which ideologies are acceptable resulting in discrimination and stigmatisation of Australian Muslims. There is certainly no international consensus whether terrorism necessitates a political, ideological or religious motive. The United Nations recognises that a terrorist act may exist irrespective of the motive element.

On one hand, requiring a motive element acts as a safeguard by narrowing the definition and limiting the scope of people that law enforcement officers can go after. But on the other hand, as has been discussed, it may also lead to racial profiling and discrimination of particular communities in the society. So it is an issue that has strong arguments both ways and it is one that we would like to give further consideration to. We are more than happy to put forward more information if the committee requires.

CHAIR—Do either of you have a broader opening statement you want to provide to us?

Ms Nandagopal—Yes.

CHAIR—Thank you very much.

Ms Nandagopal—Thank you for the opportunity to give evidence today in relation to the Anti-Terrorism Laws Reform Bill 2009. The Human Rights Law Resource Centre strongly supports this bill, which contains a number of positive reforms which will improve the counterterrorism legislative framework. The events of 11 September 2001 and the issue of global terrorism have precipitated the development of what Chief Justice Spigelman has referred to as 'a special, and in many ways unique, legislative regime'. This regime has developed in a rapid and, in some cases perhaps, an overly hasty way, and in the absence of a comprehensive human rights framework as may be achieved by a national human rights act. It may be argued that the regime has failed to strike a balance between human security and human rights.

Too often the debate on counterterrorism is stifled by the erroneous perception that human security and human rights are mutually exclusive, whereas the reality is that human security is fundamentally about protecting human rights. It is difficult to envisage a greater human rights violation than those perpetrated by terrorists. Therefore, it is imperative that in establishing a regime that seeks to protect human security the state does not legislate or exercise powers that necessarily or disproportionately infringe upon fundamental human rights. Laws that limit or interfere with human rights must be carefully scrutinised and closely monitored to ensure that they operate in a manner consistent with international human rights principles of necessity, proportionality and reasonableness.

The Human Rights Law Resource Centre has some key proposals. Firstly, aligning the definition of 'terrorist act' with the definition espoused by the United Nations. The definition of 'terrorist act' is the catalyst of the counterterrorism legislative framework. It is from this definition that 'terrorist organisations', 'terrorist offences' and administrative powers arise. Therefore it is crucial that the definition of 'terrorist act' is reasoned, proportionate and adapted to risks arising in Australia.

Secondly, we support the raft of amendments to the proscription process. Once an organisation is proscribed the consequences are serious and immediate. Proscription infringes upon freedom of association and freedom of expression. We are concerned about the broad power granted to the Attorney-General to proscribe terrorist organisations. Therefore, we strongly support the proposal to appoint an independent advisory committee which would advise the Attorney-General on prospective listings. We also support the proposal to provide

notification to those affected by proscription and the proposal to initiate a full independent merits review in the Administrative Appeals Tribunal.

Another safeguard that we consider would ensure greater legal certainty and would ensure that the process is not discriminatory would be to adopt a set of statutory criteria that the Attorney-General must have regard to when considering listing or delisting applications. Thirdly, a key amendment that we support is the removal of investigative dead time under the Crimes Act. We have seen the dangers of this unlimited power in the detention of Dr Haneef, who was detained for 12 days without charge. The length of pre-charge detention must be proportionate to avoid violation of the prohibition against arbitrary detention. Having a provision that can result in an indefinite period of detention violates the prohibition against arbitrary detention. Therefore, we strongly support repealing investigative dead time from the Crimes Act.

Senator LUDLAM—I would like to go to the paragraphs that you have struck from your submission today. Have you struck them out because you maintain some ambiguity about whether they are a good idea or not, or is it because you think the removal of paragraph (b) in the definition of 'terrorist act' is a good idea?

Ms Nandagopal—No, we have not come to a conclusion yet.

Senator LUDLAM—Can you flesh that out a bit more. In the submissions we have received on this bill there have been a couple of different views put. Could you talk a little more about your concerns and what sorts of clarifications you would need to come to one view or another.

Ms Nandagopal—Our central concern is that terrorism offences should be clearly distinguished from ordinary criminal conduct. This is because of the unique operation of the counter-terrorism regime, which imposes quite different restrictions on individual freedoms and rights compared to ordinary criminal process. At first we considered that a motive element would be the trigger to distinguish terrorism offences from ordinary criminal conduct. As I said, since then we have read submissions that make powerful arguments that perhaps an intention to coerce or intimidate the government or the public might be enough to distinguish a terrorism defence from ordinary criminal conduct. We really need to do more research into what distinguishes terrorists acts. What would be the consequences of removing the motive element? Would that have any substantive impact? To what extent will it help ameliorate discrimination against particular communities in society? It is these sorts of factors that we would like to give our further consideration to.

Senator LUDLAM—Are motive provisions included in international law?

Ms Nandagopal—Jurisdictions such as the United Kingdom and Canada contain a motive element but, as I said, the United Nations definition says it can be a terrorist act irrespective of motive. So there is no international consensus on whether there should be a motive element.

Senator LUDLAM—All right. More work needs to be done.

Ms Howie—I agree entirely with what Prabha has said. The real concern we have is that the counter-terrorism regime can be used as a tool for discrimination against certain sections of our society, in particular the Muslim community. The anecdotal evidence that we get, particularly in Melbourne, is that there is targeting of the Muslim community in terms of the enforcement of these provisions. One thing we are concerned about is to ensure that the people who are feeling the effects of these laws are being questioned not because of their religion or race but because they are legitimately involved in or suspected of criminal conduct. The concern that we have, which AMCRAN articulates very well, is that having this motive element could actually provide some sort of legislative sanction or impetus for the enforcement authorities to actually draw a connection which otherwise need not be there between a religion and criminal conduct.

Senator LUDLAM—To what degree do the terror laws that operate in Australia depart from Australia's obligations under international human rights law?

Ms Nandagopal—The Security Council has espoused characteristics of 'terrorist act'. We depart from those characteristics by including 'threat', 'property damage' and 'damage to infrastructure' but not including 'hostage-taking'. These three things are addressed in the proposed amendments.

Senator LUDLAM—That is in terms of the definition of 'terrorist act'. What about some of the other provisions that we have gone into—for example, ASIO's detention and questioning powers under the ASIO Act?

Ms Howie—In terms of the ASIO Act, we support the amendments in the bill before the committee, particularly because currently a person can be detained without charge under an ASIO warrant for up to 168 hours and a separate warrant can be issued at the end of that time if new material justifies it. This year the

United Nations Human Rights Committee has stated that these provisions affect people's rights to liberty and security of the person and that, to the extent that they can affect people's ability to communicate with counsel of their own choosing, they also impinge upon the right to a fair trial. The ASIO detention provisions have also being considered by the UN Committee Against Torture, which has said that, to the extent that these provisions infringe people's rights to take proceedings to court to determine the lawfulness of their detention, they are in breach of article 2 of the Convention Against Torture.

Also under the ASIO Act there are secrecy provisions. When we use those terms we are really talking about the provisions that allowed people to be questioned in the absence of a lawyer of their choice. There are also provisions that mean that a person's lawyer can be denied access to information regarding the reasons for the person's detention and that a person can be prohibited from disclosing information relating to their detention, for which there is a penalty of five years imprisonment. These kinds of laws impact on people's rights to liberty and the security of the person and a whole range of international human rights. At times, depending on how they are used, they can amount to incommunicado detention, and that is clearly contrary to international human rights law.

Senator LUDLAM—We had one witness who was prepared to prioritise and one witness who certainly was not. Do either of you have a view as to the most urgent reforms to the terror laws that should go ahead without delay?

Ms Nandagopal—That is an interesting question. Each of the reforms proposed addresses a different area requiring urgent reform. It is quite difficult to put one before another. Certainly the secrecy powers of ASIO are up there in terms of reforms that urgently need to be made. Another one potentially is the definition of 'terrorist act' because, as I said, that is the catalyst of the entire framework. Emily, do you have any other views?

Ms Howie—Yes. I would choose the ASIO Act detention as well, because I think they give extremely broad powers to organisations that are largely unchecked. I also agree on the definition of 'terrorist act'. It is so important to get the provision right and for it to cover only those acts that are clearly terrorist acts, because the consequences of conduct being characterised as a terrorist act lead to a range of procedures and laws that infringe upon people's human rights and liberties.

Senator BARNETT—Ms Nandagopal, you are a secondee lawyer. From where and for how long are you seconded?

Ms Nandagopal—I am from DLA Phillips Fox and I am fortunate enough to be seconded to the Human Rights Law Research Centre for eight months.

Senator BARNETT—Are you enjoying it?

Ms Nandagopal—I am loving it.

Senator BARNETT—Very good. The bill outlines the reforms with regard to the proscription of a terrorist organisation. You referred to this in your opening remarks. You are concerned about the need for reform and you have advised that it is important that notification be given to the organisation which the Attorney wishes to proscribe. How do you notify a terrorist organisation that is operating behind the scenes and in a covert manner?

Ms Howie—That question requires a consideration of the particular circumstances. Obviously if there is a covert organisation that has been proscribed then it may be difficult to provide notification. It is also, however, possible that organisations that are one day considered to be an aid organisation, or to have a legitimate existence in terms of being an incorporated associations or something like, that can be notified of the fact that they have been proscribed. That is really important for people to know because, of course, once an organisation is proscribed it becomes illegal for people to do a range of things in relation to that organisation. But perhaps the legislation should provide that, where possible, organisations be notified of the fact that they have been proscribed.

Ms Nandagopal—I think you will find that that is what the proposed amendment does. The proposal is to provide notification if it is practical to do so.

Senator BARNETT—So you would agree that in some cases, and perhaps many cases, it would not be practical to do so and to achieve that objective?

Ms Nandagopal—Yes, it may be the case in some circumstances it will not be practical to do so.

Senator BARNETT—You referred earlier to dead time and the Haneef case. I thought I heard you say that you would like to see that deleted altogether. Could you clarify for the record what your position is with respect to dead time where there is an investigation taking place, whether it be the AFP or whoever? Should it be deleted altogether, or should there be a maximum time period in which these inquiries can take place?

Ms Nandagopal—The bill proposes to repeal investigative dead time altogether, and our primary submission is that we would support this reform. The investigative framework already takes into consideration the complex nature of terrorism investigations. It enables suspects to be detained for up to 24 hours, as opposed to those suspected of ordinary Commonwealth offences, who can only be detained for up to 12 hours. So we consider that retaining investigative dead time would be disproportionate.

Senator BARNETT—Retaining it at 12 hours, or at 24 hours?

Ms Nandagopal—Retaining investigative dead time under section 23CA(8)(m) of the Crimes Act—which enables AFP officers to request further time to be specified and removed from the detention period. We support the repeal of that provision. However, we also support at a minimum a cap being placed on that particular specified time.

Senator BARNETT—A cap of how long?

Ms Nandagopal—A cap of no more than 24 hours.

Senator BARNETT—Do you have any understanding of the UK legislative regime as it applies to sedition and also dead time?

Ms Howie—I am not in a position to answer questions on sedition in the UK but I am happy to take the4 question on notice.

Senator BARNETT—I am happy for you to take it on notice. Even if you do not wish to answer, that is fine; we can make our own inquiries. I thought I would ask you the question in case you are familiar with the UK experience.

Ms Howie—I am not familiar with the UK experience.

Senator BARNETT—No problem at all. Ms Nandagopal, do you want to respond?

Ms Nandagopal—I am not sure about dead time, but I know that pre-charge detention in the UK is significantly greater than it is here. I would be happy to take that question on notice and provide the committee with further information. I know that the difference in the UK is that they have a Human Rights Act, which has enabled robust debate in parliament about the period of pre-charge detention. So whatever period they do have is a result of that process.

Senator BARNETT—Have you responded to the government's discussion paper?

Ms Nandagopal—We are in the process of responding.

Senator BARNETT—Do you wish to share any preliminary views with respect to that and/or the exposure draft bill which has been circulating for the last month—the National Security Legislation Amendment Bill 2009?

Ms Howie—The only view that we would share at this stage is that our submission to the Attorney-General's national security review will be an analysis of the proposed reforms in accordance with human rights principles and will take into account some of the experience from overseas jurisdictions.

Senator LUDLAM—I would like to come back to the degree to which what is on the books in Australia would be tempered by the introduction of a Human Rights Act here. Would a Human Rights Act here in Australia remove the need for some of these reforms, or do you think it would still be worth pressing ahead with them?

Ms Howie—The utility of a Human Rights Act when it comes to counter-terrorism laws would be that, when laws are introduced into parliament, there would be a requirement that the person introducing the bill provide a document that considers whether or not the bill is consistent with human rights. That would require a consideration of the extent to which the bill is consistent, and hopefully in that process the education of parliament and human rights consistent law-making. We do not know exactly what the terms of a Human Rights Act would be, but the biggest impact it would have is in process and in requiring the consideration of human rights at the introduction of bills. It would also to some extent give courts the ability to consider the consistency between a bill and human rights standards. It is still not known whether a court might have the ability to affect the validity of that legislation. That is certainly not the case in the UK.

Senator LUDLAM—I apologise if the question was too hypothetical. I have a further question. Do you think this bill goes far enough? There are 12 proposed substantive amendments here. Has anything been missed? Is there anything that you would advocate should have been in a bill of this kind?

Ms Nandagopal—I would make one comment. The term 'advocates' is used in the definition of 'terrorist organisation'. We would like to see part 102.1(1A)(c) of that definition removed. It refers to 'direct praise'. Section 102.1(1A)(c) of the Criminal Code states that an organisation advocates the doing of a terrorist act if 'the organisation directly praises the doing of a terrorist act'. We have concerns with that definition because it might result in criminal liability for innocent members of an organisation. Our concerns mirror the concerns of the security legislation committee, which also considered the definition in some detail and recommended that this paragraph be deleted from the definition.

CHAIR—Ms Howie and Ms Nandagopal, thank you very much for your evidence today. As always, we appreciate the efforts of the Human Rights Law Resource Centre. I am sure we will hear from you again when the next round of terrorism laws hits the deck. Thank you very much for your input today and for your submission.

Proceedings suspended from 12.04 pm to 1.23 pm

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

Evidence was taken via teleconference—

CHAIR—We will resume this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee inquiry into the Anti-Terrorism Laws Reform Bill 2009. I welcome Mr Wood as a representative of the Australian Muslim Civil Rights Advocacy Network, or AMCRAN. AMCRAN has lodged a submission with us, which we have labelled submission No. 15 for our purposes. Did you want to make any changes to that submission or amend it in any way?

Mr Wood—No, thank you.

CHAIR—I invite you to make an opening statement and at the conclusion of that we will go to questions.

Mr Wood—On behalf of AMCRAN I would like to thank the committee for inviting us to present our perspective on this bill. AMCRAN generally and broadly supports the amendments proposed in this bill. We think that, in our view, it would improve the overall operation and application of our anti-terror laws. We also note the release of the national security legislation discussion paper, which has received a lot of media coverage. Although this particular bill has received less media coverage, we are very grateful to you for carrying out this public consultation.

I would like to speak to the four schedules of the bill. In terms of schedule 1 we support items 1 and 2. We also support items 3 and 4, but this is an issue that is of particular concern to the Muslim community. The removal of the motive element is really welcome from our perspective, because we do not think it adds anything substantive to the law itself but the motive and how that is characterised in the public and in the media can have some serious repercussions for the Muslim community.

We support item No. 5. In terms of items 6, 7 and 8 we support them in principle but there are particular issues that I would like to raise. AMCRAN's position is that we are opposed to proscription in general and that we think it is draconian. Proscription allows for the criminalisation of individuals for their political associations whereas we believe that a criminal offence should be tied to a visible or clear nexus between an individual's actions and the offence in question. As I said, we support these particular amendments in principle, particularly the advisory committee, the notification aspects and the means to be heard.

On the issue of the review of listing, the provision is worded in the passive voice. I think our assumption was that the standing would be as per section 27 of the AAT Act-- the rule that an affected party would have standing to raise the issue. However as it is a fairness provision, and we really do support that, we think that there could be adverse effects on a particular individual who may not have standing to bring an action to have that decision reviewed. In terms of item 7, again we support that in full. We partially support item 10 and we are very grateful for the recognition and the removal of the strict liability. It is, in our view, a recognition that this is not a less serious offence; in other words, it is recognised that it is a serious offence. However the test of the fault element of recklessness is still there and we believe that this is still a bit problematic in the sense that the recognition that it is a serious offence has been made. So the issue of recklessness is a bit of an issue.

I think in the special intent in the ICTR case, and I realise that is a genocide case, there was a special discussion of an aggravated criminal intention, the dolus specialis, that could apply to these sorts of circumstances and we urge the committee to consider those possibilities. In terms of the training, we think that it should be limited to military training rather than a broader definition of training.

Items 11-15, again we partially support these provisions. We support in principle the proposed amendments and particularly we support changing 'support' to 'material support'. But again, because of the duty of Moslems by the covenant to tithe payment to charities, the tithing is a very common practice, and a lot of this money does go to humanitarian assistance. We are concerned that there might be an issue there that some of that support might leak through and not having the infrastructure to collect and distribute the tithe may be an issue in terms of humanitarian activities.

We do support item 16. Again from the Islamic community's perspective the offence captures legitimate associations and activities and social contact which are not exempt in the defences that are offered. Muslim communities have very close family membership associations and the extended family issues are quite strong within the community and therefore there might be an issue on that.

I will go on to schedule 2. We support item 1. Item 2 we support partially and we commend the attempt to provide more rights to detainees by entrenching the right to be informed. AMCRAN submits that this section

is still too vague, particularly subsection 2, in stating that 'it is sufficient if the person is informed of the substance of his rights and it is not necessary that this be done in a language of a precise or technical nature'. AMCRAN submits that there needs to be substantive laws similar to those specified in criminal law section 23F, I think. It is in our submission; I think that is correct. We support items 3-7 on the daytime issue. That is schedule 2.

As far as schedule 3 is concerned, we support items 1-4 and item 6. Items 5 and 7 we believe that there is an anomaly in the provision as we read it. We support the reduction of the maximum time from 168 to 24. We believe there is an anomaly where there is the use of an interpreter. It seems to us that detention can extend to 48 hours rather than the 24. So we support a total cap of 24 hours in all these relevant circumstances. We support items 8, 9 and 11.

In terms of the issue of communication between the person and their lawyer, we urge the repeal of section 34ZQ(2) where a person's conversations with their legal representatives can be monitored. In terms of item 10, we support that.

AMCRAN has also put in another section of amendments not covered in the bill, and this is the surrendering of his or her Australian passport. We think it goes too far in that the person is still not subject to the issue of a warrant, the only issue is that the warrant has been applied for. We have three grounds in support of our proposition, which is presented in a written submission. That is on page 26.

In terms of schedule 4, we support that in full. That is my summary of our position. Thank you.

CHAIR—Thank you, Mr Wood. The terrorist organisation proscription and establishment of the advisory committee, have I got it right in that AMCRAN's position is that they would prefer that the proscription was not in the bill or any bill at all?

Mr Wood—Yes, we are opposed to proscription. There are certain UN obligations that we have. Our concerns are that sometimes these organisations that are proscribed have no local representation in Australia and when charities and moneys go across they go to families or local organisations which are then distributed, and those organisations do not have the opportunity to challenge their proscription in Australia and are worried that individuals become caught in the trap.

CHAIR—Do you have an example of where that has happened?

Mr Wood—There was an example where an organisation that was in Australia, I am not sure of the exact details but as I understand it what happened was that money was sent from Australia to a third country in Europe and that money was distributed through their local agencies within the host countries which received the money, and somewhere along the line money had been sent to a proscribed organisation. The military wing was proscribed but the money was actually humanitarian, so there were a few people who were caught in this particular scenario. I am not quite sure how we get around these issues but innocent people tend to get caught up in this and the events are far beyond their control.

CHAIR—Is that a reason for actually abolishing the need to proscribe organisations or is that a reason to just better track and ensure the money goes to where it is supposed to go?

Mr Wood—I take your point, and we have obligations under the UN when the UN requires us to proscribe organisations as well. There is a balance that needs to be struck and we are raising the issues that have affected members of our community directly.

CHAIR—Nevertheless, you think the appointment of an independent advisory committee would better inform the minister of which organisations should be proscribed?

Mr Wood—I think so. I think that is a very useful mechanism. If there is a clear intention to breach the law, clearly if that intention is made out we have no problems with the prosecution. Having that independent committee to look at these unintended consequences perhaps would help mitigate some of these problems, we believe.

Senator LUDLAM—I have got a couple of questions. Thanks very much for your detailed submission. Can we come back to where we began, and it is an issue that we have heard a bit of discussion about earlier today, the motive element or the motive requirement in the definition of what is or is not a terrorist act. Can you describe for us if it is a case that what you are putting to us is that that has unfairly penalised or led law enforcers to unfairly target Muslim populations of Australia in particular?

Mr Wood—To look at it from a legal perspective, I think the DPP is the authority for the proposition that emotion gives rise to intention and it is the latter that converts the action into a criminal act. So there seems to

be a two-step process going from motive to intention. Intention is formed and then the actus res together form the criminal act. With motive, it is an added element that the prosecution has to make out.

Our perspective from the Muslim community would be that, when the motive or the emotion that creates these issues lead to a crime are somehow tied to a religious faith or some sort of action within the religious faith, it brings up issues and touches on a whole heap of other people who may have those particular religious beliefs but whose motives do not lead to the intention that leads to a criminal act. Does that make sense, senator?

Senator LUDLAM—Yes, go ahead.

Mr Wood—By taking out that extra step it becomes neater and does not have all the extra repercussions on people who have nothing to do with this and who strongly oppose what is done in the name of, for example, their faith or belief.

Senator LUDLAM—The counterargument, of course, is that leaving that in there helps narrow the definition of what constitutes a terrorist act—and that is partly what we should be seeking to do in my opinion. You do not consider that to be the case?

Mr Wood—I do recognise that it puts in the extra hurdle for the prosecution to prove the motive element. Yes, it narrows the scope of the crime, but at the same time it has the other effect as well. We do not have the motive element for other aspects of our criminal law. While I appreciate what you are saying, keeping our criminal law consistent including this provision would, in my view, be the better way to frame it.

Senator LUDLAM—I am just being the devil's advocate. I am in complete agreement. In relation to the sedition laws, in your submission you state that existing laws already cover speech that oversteps the bounds and causes harm. Can you describe why you support the complete repeal of the sedition provisions rather than tempering them a little bit, as the government has proposed to do in its discussion paper?

Mr Wood—We prefer the formulation here. I have gone through the discussion paper very briefly but I cannot remember it exactly as I have not read it in detail. I would rather not say something that is not fresh in my mind. In terms of the actual sedition offences, we believe that it is amply covered and to have an extra offence is perhaps unnecessary.

Senator LUDLAM—Another thing that your submission does is point out the need for this bill to not necessarily be overshadowed by the Attorney-General's discussion paper. Do you have any thoughts that you would like to share with us on that discussion paper while we are here?

Mr Wood—On the minister's discussion paper, no. Our group has still not gone through that in detail, so I would rather not say anything until we have formulated our views on it.

Senator LUDLAM—In evidence that AMCRAN gave in the hearings on the national security legislation monitor you indicated your support for that office. Do you think that the provisions in this bill, in particular the ones that are seeking to repeal or amend, should go ahead or should we wait for the reviewer's office to be put into place?

Mr Wood—Our position on several of the provisions to repeal is that we are quite happy for it to go ahead, as I stated previously.

Senator LUDLAM—Thank you very much.

Senator FEENEY—Mr Wood, if I might start with items 3 and 4, definition of a terrorist act. Just to help me understand your submission, do you believe that threats to commit a terrorist act should be criminalised?

Mr Wood—The mere threat itself—just the voicing of an opinion? There should be a clear intention and a clear act. If the two elements are made out, then, yes, we support that, but if the elements of the claim have not been satisfied then we think it should fail.

Senator FEENEY—Just to understand your proposition, you would say that the mere advocacy of terrorism, without the conduct of terrorism, should not be criminalised?

Mr Wood—It is a spectrum. People say things. I would question the wisdom of mouthing off in the way some people do. Sometimes people in anger say, 'I'm going to kill you.' While we would caution the use of such words—

Senator FEENEY—The threat to kill is of course a criminal offence.

Mr Wood—Yes, I realise that, but I am talking about a person just saying it in a fit of anger, for example, as opposed to making a clear statement of intent. As our criminal law distinguishes between the two, a similar test should apply where a kid is just saying something because he—generally it is a he—is angry about something, as opposed to someone who has very clearly formulated in their mind that they will do damage to a community or the people in our society. It is a spectrum. There is a point at which we should not condone such activity. It is a principle of our faith that a strong person is a person who can control their environment, but a truly strong person can control himself or herself. Coming from that tradition, I find it difficult to condone any outburst. It is not proper and it is not the right way to behave, as the Muslim covenant requires us to behave, but of course not everybody adheres to those principles in practice, even though they might say they do. A Muslim should not make such statements even in jest, because it can cause hurt and harm. I do not think the statement should be made. As to criminalising it, there is a point in the spectrum in which we should criminalise it, but exactly where that point is is something that we should perhaps leave to judicial discretion.

Senator FEENEY—I look to items 11 to 15 on providing support to a terrorist organisation. I am interested in talking to you about two matters. The first is the flow of money. There is your point about the proscription of organisations. Perhaps you could better articulate your position for me. As I understand it, you are opposed to the proscription of any organisation. Is that correct?

Mr Wood—Unless required by the Security Council, in which case we are obliged to do it. Proscribing—

Senator FEENEY—Do you mean the Security Council of the United Nations?

Mr Wood—Yes. We are legally obliged to do that. I strongly support Australia carrying out its requirements under international law.

Senator FEENEY—But you made the point in your opening remarks that you believe the onus should be on the state to demonstrate terrorism with respect to every individual rather than to allege the existence of terrorist organisations. Have I paraphrased you accurately?

Mr Wood—What you are saying fits within what I said, so, yes, it is correct. Perhaps what I was trying to get across is that in proscribing organisations that do not have a presence in Australia, it is not practical for them to challenge that proscription.

Senator FEENEY—Can you provide for me an example of an organisation that does not have a presence in Australia? An example of the phenomena you are describing?

Mr Wood—I am not sure if this is entirely accurate, but from what I heard in the press, the Somali community says al-Shabab do not have a presence here in Australia, but they are present in Somalia. I am not condoning it, and it should not go, but if somehow some money that was given in charity ended up in one of these organisations then the person—who should have perhaps been more careful, I guess—who sent it, as I understand it, would have no standing to challenge either the proscription or the money arriving at the other end at a proscribed organisation. Does that make sense?

Senator FEENEY—It does, but let us persist with your example. The Somali community says al-Shabab does not operate in Australia—

Mr Wood—That is what I understand.

Senator FEENEY—but it is a matter of fact that Australian Somalis have been recruited in Australia and have fought and are fighting in Somalia with al-Shabab forces.

Mr Wood—Yes, I believe that is correct.

Senator FEENEY—So one might wonder how that is possible in the absence of al-Shabab existing in Australia. One might also wonder whether the flow of moneys from Australia to al-Shabab humanitarian causes in Somalia can be or should be completely immune from the investigations and the questionings of Australian authorities.

Mr Wood—The way you frame it, I would say they should not be immune. Nobody should be immune. The circumstance that I was raising was the inadvertent flow of money.

Senator FEENEY—Let us talk about the 'inadvertent flow of money', as you put it. Everyone in this debate comprehends the sophistication and the complexity of money flows, and obviously that represents a significant challenge for security forces. The flow of moneys—you have made a distinction in your submission between humanitarian and charitable work, and military support. Obviously, when one looks at this area and one looks at, for instance, the support of Wahabi institutions in Pakistan or Chechnya or wherever

else anyone wants to look, it could be argued that from time to time the distinctions between charitable and humanitarian work and military work is not always clear. Are you in a position to clarify that for us?

Mr Wood—I agree that it is not clear, and we are perhaps coming at the same question from two different sides and we are seeing the difficulties at the barrier. While I clearly appreciate what you are saying, and it is correct, if states with all of their resources find it difficult to find the intersection of these two groups or the demarcation lines which appear to be fluid, it becomes almost impossible for an individual, particularly an individual who has very poor command of our language and law, to not fall foul sometimes of these very difficult issues. I do appreciate absolutely what you are saying. I guess we see the other side of it, where people, particularly at the end of Ramadan, feel fortunate they are living in a country where their financial resources are—they have some kind of surplus which they can share with people in their home countries and are trying to not only satisfy a religious obligation, but perhaps they also feel a moral obligation.

Senator FEENEY—Australia has a long tradition of comprehending that example. Irish immigrants sent money home to Ireland, Italians home to Italy, and so on and so forth. I do not think anyone is interested in preventing the Islamic community in Australia from supporting friends and family or from doing charitable works.

Mr Wood—No, absolutely—

Senator FEENEY—But if you are a counter insurgency commander in Afghanistan, you may ask the question of how useful is it that the Taliban conducts a humanitarian program in a province where Australian forces are serving. For instance, that might be part of a broader insurgency rather than simply charitable works to be regarded in isolation.

Mr Wood—I see the difficulties. I am not sure what I can add to what you are saying because these are complex issues and the barriers are very difficult things for people to clearly demark. I guess that is the point I am trying to make.

Senator FEENEY—I have one last question for you, Mr Wood, and that is with respect to the presumption against bail.

Mr Wood—Sorry, which point is that?

Senator FEENEY—'Repeal presumption against bail', schedule 2, item 1. You have indicated here that AMCRAN is in full support of the repeal of the presumption against bail. I wanted to ask you the question: do you believe there are any terrorist offences that would qualify for a presumption against bail?

Mr Wood—I am quite satisfied in myself that the courts are clearly able to handle this decision and that the judges will make the right decision on the information that is available to them. It is only the presumption that we are talking about, so it is clearly a rebuttal of presumption. I would like to stick with the common law presumptions.

CHAIR—Mr Wood, we have no further questions for you today, so I thank you very much your submission and for making yourself available for our committee's deliberations today.

Mr Wood—Thank you very much for giving us the opportunity to present our perspective.

[2.00 pm]

LYNCH, Dr Andrew, Director, Gilbert and Tobin Centre of Public Law

McGARRITY, Ms Nicola, Director, Terrorism and Law Project, Gilbert and Tobin Centre of Public Law

WILLIAMS, Professor George, Private capacity

CHAIR—We are running a little bit early but we thought we would press on anyway. I now formally welcome representatives of the Gilbert and Tobin Centre of Public Law. We have your submission, which we have labelled No. 1 for our purposes. Before I ask you to make an opening statement do you have any amendments or changes you want to make to that submission?

Dr Lynch—There is a very small one in the second last line of the second last paragraph on page 14. It is in section D under recommendation 17. The paragraph begins 'Section 15AA …' and in the second last line it mentions section 102.2. That should be section 102.3.

CHAIR—I invite you now to make an opening statement and then we will go to questioning.

Dr Lynch—We only wish to make a very brief opening statement, which is to recognise the context in which this bill is before the parliament and this committee—that is, in the context of the recent passage of the National Security Legislation Monitor Act. We see the creation of that office as integral to the ongoing review of antiterrorism laws in Australia, as is the government's own recently released discussion paper on proposed amendments to the national security laws of the country.

Clearly, we view the bill as being quite timely. It reflects the need to revisit these laws and examine possible changes and enhancements to them. We also acknowledge the remark of former Attorney-General Philip Ruddock, who said upon release of the government's paper that his intention had always been that the terrorism laws were an unfinished canvas and further refinement was possible. In that spirit we certainly do not think that this bill is supplanted by the government's release of the discussion paper. We think there are differences, both in emphasis and in the detail, between that document and this bill. We see consideration and discussion of this bill to be useful, not just inherently about whether this legislation should be passed but in opening up for consideration areas which are largely left untouched by that discussion paper—namely, changes to the questioning and detention warrant system of ASIO, and also to proscription. Those matters are dealt with in this bill but are not really featured in the discussion paper. Those are our opening thoughts on the legislation and we are quite happy to take questions on the bill.

CHAIR—Thanks.

Senator LUDLAM—Thanks very much for your detailed submission. I might just work through a couple of things in order. In your submission you recommend that a review of all the proprietary offences in division 101 of the Criminal Code be conducted. So you do not directly support the proposition in the bill but you are proposing a further review. If such a review were to be conducted, what do you think it would turn up?

Dr Lynch—One of the elements that we have identified as problematic—in relation to section 101.4 but also other provisions such as 101.5—is the connection of the possession of the thing or the collection or the making of the documents with preparation for a terrorist act. At the moment, as earlier committees of inquiry have found, that connection is far too loose. There is also the breadth of those particular terms, though it may seem to be difficult to provide a more detailed content to terms such as 'thing' or 'document'. But the element of connection, which we address in the second paragraph, under the topic, 'offence of possessing a thing connected with a terrorist act' would seem to be the area that we are most keen on seeing enhanced across the range of those offence provisions.

Senator LUDLAM—Okay, that is helpful. In your submission you also note the lack of procedural fairness as it stands at the moment as far as notification of proscription goes, which the bill also attempts to address. Can you outline your understanding of the significance of notification in this context?

Ms McGarrity—We consider procedural fairness to be a fundamental guarantee of the rights of all persons who are affected by a decision, and that procedural fairness should only be absent in relation to a decision where there is some compelling justification for its absence. So we really start from the premise that procedural fairness should exist in relation to all persons or organisations that are affected by a decision. We take from that point the Attorney-General's statements as to why procedural fairness should not exist in relation to proscription decisions. That is in its effect on operational effectiveness and its risk to national

security. We do not find these explanations compelling for two reasons and these are outlined in our submission. The first one is that when we are talking about operational effectiveness presumably what the Attorney-General was suggesting—I am talking about the former Attorney-General in that context—in making that statement was that there is some need for urgency in the proscription of an organisation. In fact proscription does not have any effect in and of itself. Unlike previous proscription regimes, such as proscription of the Communist Party for example which immediately dissolved that organisation, proscription really just facilitates prosecutions of individuals.

Because proscription does not have this immediate affect we do not see really that there are any circumstances in which there would be such an urgent need for proscription that there is simply no time for notification and for hearing submissions from an individual or an organisation. In terms of risk to or prejudice to national security it is clear that, in preparing a statement of reasons in relation to a proscription decision, it is generally based on publicly available information. In our opinion there is no reason why that statement of reasons could not be provided to an organisation or an individual for them to comment on. Of course, that is assuming that it is possible to contact an organisation or that individual members of that organisation are known, and we of course acknowledge that that is an element of this particular bill that prior notification of an individual and an organisation would only be to the extent that it is practical to do so.

Prof. Williams—Can I add another reason that is important that supports procedural fairness, notification and public dissemination of information about proscribed organisations, and that is that the proscription regime correctly not only is directed at people who might be now engaged with those organisations but is designed to send a very strong signal to members of the community that these are organisations about which they should be extremely wary. That is particularly important for Australians who might, for example, consider funding organisations overseas in a home country or in an area that is racked by conflict. If we do not have much better public dissemination and notification than we have now, Australians run a grave risk of being involved in organisations they should not be because of the system not working correctly.

Senator LUDLAM—Thank you. Your submission does offer some support for the idea of a listing advisory committee that would maybe take some of the political string out of this process. Can you outline for us whether you think a committee of that kind would help address some of those concerns that you raised?

Ms McGarrity—We are very strongly in favour of the idea of an advisory listing committee. We believe that in relation to the bill there are really two options in terms of an independent body reviewing, or at least looking at, the making of proscription regulations, which are merits review by the AAT afterwards or some sort of listing advisory committee that would look at the regulation or the proposed listing of an organisation. We think that it would be most effective to build a safeguard onto the front of the process, that is to have an independent organisation made up of people who are experts in the security fields, who may be retired judges or community leaders who might be able to advise on the affect of this particular regulation on community groups. We believe that it would be very important for the community's perception of the independence of the process that it does not involve politically motivated and arbitrary considerations for an independent body to at least have the opportunity of looking at a proposed listing, to consider objections to that proposed listing and to make recommendations to the minister.

Senator LUDLAM—You have not supported the proposal for the complete repeal of the NSI Act, but you have pointed out some pretty serious concerns. You have also acknowledged that there has not been a review of the act. Have you got some proposals, if there is not a complete repeal, then where we should go with that piece of legislation?

Ms McGarrity—We certainly do. We acknowledge that there is a need for some piece of legislation setting out clear procedures as to how national security information is to be dealt with in court proceedings. That was a very strong recommendation of the Australian Law Reform Commission in 2004, and we endorsed that. There are some areas of particular concern to us. One of these is the weighting of the court's discretion in section 31(8) of the National Security Information (Criminal and Civil Proceedings) Act. We would prefer a return to the weighting as it exists under the common law and also under the Evidence Act, where the discretion remains in the hands of the court to decide what weight it will give to prejudice to national security as against the right to a fair trial. We believe that is a discretion that the court should have.

We also believe that there is a necessity for a greater protection of the principle of open justice to be built into the national security information act. We believe that the court should have the discretion to decide whether to have a closed hearing to consider what orders it will make under section 31. There are, of course, other alternatives that the court could adopt. For example, if a party claims that a document should not be

disclosed, the court could hand out that document and then make references to parts of it. There are alternatives that the court could adopt to ensure that potential national security information is protected.

We would also like to see that, in making orders under section 31, the court is required to take into account the principle of open justice so that that becomes of equal importance to the risk to national security and also the right to a fair trial. Those are some of our areas of concern.

Senator LUDLAM—Okay. I have probably got about a hundred questions, but I will make do with one more for the moment. You have not supported the proposal here for a wholesale repeal of the sedition offences. Do you have a view as to whether the government has gone far enough with the proposals that have been circulated in the A-G's discussion paper?

Ms McGarrity—We believe that, for the most part, the proposals in the discussion paper do reflect the recommendations of the Australian Law Reform Commission, and we are starting from that premise. One point we would note about the discussion paper and the sedition offences is that the Australian Law Reform Commission recommended that the good faith defence be repealed and replaced by an alternative process, and we have outlined that process in our submission. That is really the one area in the discussion paper about which we have major concerns—that it rejects that approach set out by the Australian Law Reform Commission and would instead retain the good faith defence for sedition offences.

Senator LUDLAM—With the will of the chair, I will ask one supplementary question.

CHAIR—Yes.

Senator LUDLAM—A number of other witnesses have argued, and have for a long period of time, that Australian criminal law quite adequately covers the sorts of offences that the sedition offences are trying to catch and that we do not need this whole extra category of offence at all. You are obviously not of that view. I am not aware of these laws ever been invoked in anger. What benefit do you think they actually bring?

Ms McGarrity—I think the greatest area of benefit in the unfortunately-named sedition offences rests in the government's proposal to create a new offence. I think that the most beneficial of the so-called sedition offences are these intergroup violence offences and the proposal to create a new offence that would protect not only groups but also members of groups. We have some concerns about the placement of those offences within the Criminal Code, particularly about their discussion in the context of terrorism offences. To our minds, these intergroup violence offences are more closely related to antivilification offences and would probably be best placed either in a completely separate section of the Criminal Code—and classified as antivilification offences—or, alternatively, within the Racial Discrimination Act.

Senator LUDLAM—Yes.

Prof. Williams—We certainly do not support sedition offences. We ought to make that clear: we do not support the provisions currently in the statute book. Indeed, the centre has argued strongly against those provisions for a long time, exactly on the bases that not only are they an inappropriate infringement of free speech but they may well be counterproductive in seeking to deter terrorism.

What we would say it is that, if the Australian Law Reform Commission recommendations were fully implemented, we in fact would not have sedition offences on the book. The word would disappear. The provisions themselves would be so substantially rewritten that they could not be fairly compared to what is on the books now. The group and other violence offences take the law in a different direction, which we believe is far more supportable in serving a legitimate purpose.

Senator LUDLAM—Thank you, Professor. That is helpful.

CHAIR—I want to clarify something. Regarding your recommendation 3, that you support item 4 of the bill, in the sense that we should have a definition that more reflects the approach in the Canadian and New Zealand legislation, what happens in the case of property damage or infrastructure, if a power plant is blown up, for example? Where would that fit into this legislation if you actually support item 4 of the bill?

Prof. Lynch—It is hard to imagine the destruction of property, particularly in an example like that, not posing a serious risk to public health. The philosophical focus of removing damage to property per se or at least adding the qualification that you see in the Canadian legislation, where property damage is included where it is likely to result in harm or death to others, or where it endangers public health, keeps the focus on the extreme nature of terrorism as a danger to the community and to persons in the community rather than having it as an ever-broadening scope of possible culpable action, which might simply be property offences per se. There are still the wilful destruction of property offences. The destruction of a power plant does not

depend upon terrorism offences. It would be caught under other criminal laws. Given the exceptional nature of the laws in part 5.3, we believe the focus should very much be on harm to persons in the community.

Prof. Williams—We would also say that one of the great dangers with the definition is that, if it is over-inclusive you have extraordinary powers potentially being used in circumstances that we would not fairly describe as terrorism. It is better to be under-inclusive for that reason if there is any doubt. That also applies to not just property offences but disrupting electronic systems. The fact that a terrorist act might be triggered under the law by hacking into a website for an environmental or other protest that causes no significant personal damage is, I think, another example of where the definition of terrorism is too broad. We would simply rely upon the authorities to not prosecute. These types of matters should not be subjected to that type of discretion.

CHAIR—I just wanted to clarify that in my mind. I was unsure about where some of those offences would fit if you supported item 4 essentially.

Senator FEENEY—I will ask some questions about proscription. Firstly, I congratulate you on your submission. It is a terrific submission. I think you heard me cross-examine the previous witnesses, so you probably have some insight into where I am coming from. In terms of the proscribing of organisations, as I understand your submission, notwithstanding the fact that you would like to see the formation of an advisory listing committee, you generally accept and support the fact that organisations are proscribed in the way that they are?

Ms McGarrity—We think that it is acceptable to proscribe organisations. That can fulfil a legitimate function in the prevention of terrorist acts. We have tended to place our emphasis on how best the proscription process can be improved—to tighten it up sufficiently such that it becomes a transparent process which is free from at least the perception of arbitrary and politically motivated decision making. That has tended to be our focus: the manner in which proscription decisions are made and by whom.

Senator FEENEY—Your submission is eloquent on that point. Are you able to identify for me an occasion where an organisation was proscribed and that gave rise to broad criticism about the decision to proscribe that organisation? Is there a contentious proscription?

Prof. Lynch—I do not know how broad the criticism was, but I think the contentious one was the listing of the Kurdistan Workers Party. I think that was the only review that the parliamentary joint committee conducted where there was a dissenting report. The timing of that decision was significant, given the visit of the Turkish Prime Minister to Australia. That highlighted some of the unease that many in the community have about proscription—that it is a very powerful tool. As our submission makes clear, it is one we believe should reside in the hands of the executive. It is clearly a political decision that needs to be made, but it is very important that it is not perceived to be abused. That is the instance which most of the studies would point to as being a worrying application of those provisions.

Prof. Williams—There is also the more general perception that the pattern of proscription has led to a bias. A committee has identified concerns within the Muslim community in particular. That arises partly from the fact that at that time there were 19 organisations proscribed and only one of those did not have any links to the Muslim faith or related faiths. That meant the view could be reached that the government was in some way targeting Muslim people when obviously there are a very large number of terrorist organisations with no such Muslim links, yet they had not been proscribed. I think that has given rise to significant concerns in the Muslim community and it is very important that they are rebutted by having a process that not only ensures greater transparency but ensures that terrorist organisations of whatever kind are proscribed if appropriate.

Senator LUDLAM—The example that springs to mind when Professor Williams says that is some sort of far right-wing white supremacy groups which, in particular in Western Australia in 2004 made threats to the life of the state Attorney-General. It is difficult for some in the community to see why a group like that is not on the list when others, as George said, that are largely reflective of the Muslim faith are included. The trouble with a list is that it is always going to be selective. I suppose that gives rise to concerns when that selection is seen to be skewed.

Ms McGarrity—I would like to make a final point. That is where it becomes, we think, incredibly important that a more detailed list of criteria is entrenched in the legislation. It is clear that a vast number of organisations would fall within this very broad definition of a terrorist organisation, yet in total only 20 have been listed, including, Al-Shabab. We believe that there needs to be some explanation by way of a detailed list

of criteria set out in the legislation to explain how the Attorney-General decides which of those organisations that fall within the definition should be proscribed and which should not.

Senator FEENEY—As I understand it, proscription basically facilitates prosecution of individuals. Does it follow that proscription has generally been followed by prosecutions?

Prof. Lynch—No. My colleagues will swoop to correct me if I am wrong, but I am pretty certain that no-one who has been charged with a division 102 offence has been so in relation to a proscribed organisation. It has been an organisation that has been proved in evidence before the court.

Prof. Williams—The Tamil Tigers case is a good example where the organisation has not been proscribed, yet charges were brought on the basis that the court found it to be a terrorist organisation.

Senator FEENEY—Wasn't there a case where a Victorian was accused of being—

Prof. Williams—I have been corrected. Mr Jack Thomas was charged under 102.7, and that was in relation to al-Qaeda. I have been corrected.

Senator FEENEY—Is that it?

Ms McGarrity—That is the only one. All the other terrorism trials that we have had—notably the Benbrika trial in Melbourne and, more recently, the charges that were laid and then dropped against the three Tamil men in Melbourne—were on the basis of organisations that had not yet been proscribed by regulation.

Senator FEENEY—So there was no allegation that the Benbrika group, if I can characterise them in that way, were affiliated to a larger terrorist organisation? Is that right?

Ms McGarrity—No. Their link with a terrorist organisation was solely based on their connection with a Melbourne based organisation whose intention was to wage a holy jihad. That was the nature of the organisation—messages it may have obtained from persons connected with terrorist organisations in other countries. I am not sure whether that came into the trial, but certainly the organisation, as it was framed before the court, was a Melbourne based organisation.

Senator FEENEY—My last question is to do with the United Kingdom and the learnings we might get from the United Kingdom. There has obviously been the phenomena there of so-called home-grown terrorism. I am particularly talking about citizens of the United Kingdom who are motivated to jihadist or suicide acts but do not necessarily have a direct link to what we might describe as an international terrorist organisation. In the legal prosecution of individuals associated with those kinds of plannings and/or acts, how does the United Kingdom proceed in terms of proscription?

Dr Lynch—It does have a proscription regime but it is interesting that it does not have what are referred to as 'status offences'—for example, section 102.3, which is the membership offence, which received quite a lot of deliberation by the Parliamentary Joint Committee on Intelligence and Security, as to whether it was a valuable offence to have. Over in the United Kingdom the focus would be much more on the participation in a group—there is an active element to those kinds of offences—which means that prosecution of individuals who have been operating as an organisation can at least focus upon what their conduct has been rather than simply to say, 'This organisation has been proscribed and you are charged simply because you are a member of it.' We have not had anyone charged with being a member of a proscribed terrorist organisation in Australia, although people have been successfully prosecuted on being a member of an organisation, which has been established in evidence. That seems to be a distinction worth noting.

I think there are problems with the executive declaring an organisation to be proscribed and then all those individuals who are members of it. As was asked by the parliamentary joint committee: what does that actually mean in relation to some of these groups? Membership is an offence which we have inherited from attempts to dissolve the Communist Party, where people carried cards. The inclusion of informal membership in this setting is really quite problematic. I think a prosecution based on that is something that is not available in other countries, to pursue.

Senator FEENEY—But there is a fair bit of precedent, isn't there, in anti-racketeering and RICO laws about membership and association? Obviously, the Gambino crime family does not issue cards either, but people can be prosecuted for being part of a criminal complex that is so defined and named.

Dr Lynch—That is right. I suppose the distinction here though is because of the fact that the organisation will, even though its methods will tip it into the category of being a terrorist organisation, have concerns that are not simply criminal activity per se—they are a political, religious or ideological cause. And that is the great

concern about the use of proscription proceedings and charging people simply with membership, given the inevitable closeness—once you try to criminalise terrorism—to political organisations.

Prof. Williams—Can I add that one of the real problems is that we are dealing, here, with organisations that are banned not merely because they might intend to carry out terrorist acts but because they might support those acts of other organisations through speech. The fact that advocacy is the basis for proscription is a real concern. As we say in our submission, it is far too broad and it does lead to concerns that we have an offence where you can be a member of an organisation where another member has said something that leads to the organisation being banned without the person who is a member even supporting those comments. It leads to far too tenuous a connection that goes to the heart of why status based offences are far inferior to offences that go to participation and involvement, as does the UK.

Senator FEENEY—That is a good point, but at the same time, I do not imagine that we want to have a situation where our protections of free speech are such that people can openly advocate war against Australian forces deployed overseas.

Prof. Williams—I accept that there are certain limits to that. Hence, in our submission even when it comes to some of the speech offences which will replace the sedition offences, we can see a rationale for those. It is about balance, though, and what we have here are advocacy offences which are far too over-inclusive: the fact that an organisation could be banned because of its praise of the actions of Nelson Mandela in supporting the fight against apartheid I think is a clear indication of how they are too broad. If you add in there other conflicts such as in East Timor and elsewhere, and you get far beyond advocating attacking Australian troops or advocating the use of violence, you get into grey areas that should never be entered. I would also say that a real problem we have, when compared to the UK, is that we go into these areas with over-inclusive coverage and without proper protection for free speech in the first place. Free speech is certainly not mentioned in the Constitution, and we do not have anything like the UK's Human Rights Act. It means that we do not have any check and balance to ensure that too-broad definitions or coverage are wound back to a justifiable limit.

Senator FEENEY—Hear, hear!

Prof. Lynch—Can I just clarify on the issue of advocacy and Professor Williams has referred to praise. In recommendation 9 we have been quite specific. We are actually not submitting that advocacy in total be removed as a ground of proscription of a terrorist organisation. There are three components to advocacy: one is incitement to commit terrorist violence; another is instruction to do so; and the third, at paragraph (c), is praise. That is where we see the potentially expansive and open-ended operation of advocacy. That is the element that we have focused on and which earlier inquiries have also suggested should be removed.

Senator FEENEY—Thank you very much.

Senator BARNETT—I just wanted to ask you about proscription of the terrorist organisations and I have asked this of a number of other witnesses in terms of the process. How do you proscribe a terror organisation and, more specifically, how do you notify them of the proscription or the proposed proscription that the Attorney is about to undertake particularly if they are a covert entity?

Ms McGarrity—One of the factors that we know is taken into account, by ASIO for example, by the Attorney-General and also by the Parliamentary Joint Committee on Intelligence and Security in deciding when to proscribe an organisation is known links that that organisation has with Australia. That is one of the factors that we take into account. Where there are, for example, known cells in Australia or persons who have been under surveillance, those may be the circumstances in which you are able to notify the organisation or some of its members. We accept that probably in 90 per cent of cases you will not be able to notify the organisation and that is particularly so because almost all of the organisations that have been proscribed in Australia have no links with or cells in Australia. In those circumstances you would not be able to afford the organisation or its members procedural fairness. We are talking here about establishing a base level of what should be done. Whether it can or cannot be done in the particular circumstances is a separate question, I believe. We have a responsibility to set up as a fundamental right that all people have when they are affected by a decision that, in most circumstances unless there is some reason why they cannot be informed, they have a right to be notified and to be heard as to whether that decision should be made.

Senator BARNETT—Thank you.

Prof. Lynch—Could I just add to that. We noted that Dr Patrick Emerton gave evidence before the committee this morning and our understanding is that Patrick works very closely with the community legal centre groups and community groups in Victoria. I know his views on this, and he has made submissions to the

various PJCIS reviews of listing, that there are some recognised organisations in the Australian community that have concerns and could easily be contacted. A firsthand example that we have had of that was when the PJCIS reviewed the proscription process they received a submission from an Australian group which supported the Tamil Tiger movement. It said that they had not been a proscribed organisation but had concerns about the process because they feared that it may well have been something that they could be involved in at some point. So there are some organisations and, as Ms McGarrity has said, it is a baseline and obviously for some it does not work out in the way that the legislation nicely plots it.

Senator BARNETT—Thank you.

Senator FISHER—Can I ask a question on that?

Senator BARNETT—Of course.

Senator FISHER—Your submission talks about a mandatory notification process, yet at the same time you are saying that for many of the organisations that you would really want to proscribe, you would not be able to contact them anyway. So how do you mean 'mandatory', because mandatory is mandatory? I noticed Ms McGarrity earlier on said 'wherever practicable' so how do those two sit together given your submission proposes mandatory?

Ms McGarrity—We support what is actually stated in this bill which is that there is a requirement to notify, as far as practical, the organisation and its members of a decision to list that organisation. That would be the type of approach that we would support. We would see it as being something like the process that exists in the courts for service of documents where you are required to make attempts to serve documents on parties. Then, if you cannot serve documents on the parties, you bring back evidence to the court as to what steps you have actually undertaken to notify that particular party, such as you have contacted known addresses of the organisation, you have contacted, for example as Andrew said, a community organisation that supports the Tamils and forwarded it through that process. The Attorney-General would be basically required to publicise what attempts have been made to contact the organisation to prove that some processes have actually been gone through.

Senator FISHER—It is a nice gesture if it has the practical effect that you are seeking. You said earlier that the process of notification and whether it is reasonable et cetera is a separate question. Won't that become a separate procedural question, part and parcel of the process, and run the risk of defeating the very process itself—indeed, the reason why arguably the current legislation cuts the losses in terms of cutting out some of the niceties in order to target the bigger picture?

Ms McGarrity—One of the alternative ways of approaching this would be to require, as stated in this bill, that there be mandatory notification after a regulation is made—that there simply be publication beforehand of a statement of reasons, in a national newspaper, for example, so that we are not just limiting it to organisations or its members but we have got notification of anyone who might be interested in responding. That would certainly seem to be an easier way of approaching it—certainly a procedurally easier way of approaching it—whereby community organisations that exist in Australia could make a submission. That is, those who might have an interest in making submissions to the Attorney-General because they support the Tamil Tigers, for example.

Senator FISHER—That pretty neatly takes me to my final question around this issue. Earlier you said that it is not an offence in itself to be a member. There are further steps to be taken. That is one of the reasons why the provision should be amended. Professor Lynch, you said no-one has been prosecuted simply for being a member of a proscribed organisation. If the current provisions, undesirable as they may be in the general fabric, are not doing any tangible damage, then is your submission based on anything other than: we should afford natural justice because it is not a good look to not do so in the general law?

Prof. Williams—Could I start answering that and say that I think it does do damage. I think it does damage to the framework of the law. A very basic aspect of the rule of law is that it is not acceptable to have provisions on the books that go too far—that go beyond what can be justified, particularly severe criminal offences. If in the end our defence of those laws is simply that they are not used due to prosecutorial discretion or the like, that is an inadequate reason. In fact, I think it is the obligation of parliament to wind back especially criminal provisions to their justified ambit and make sure they are no broader, otherwise the rule of law principle is undermined.

Also, with regard to the previous question, it is not just about the niceties of the situation. It is critically important in dealing with proscription that the process is fair and is seen to be fair, because, if we want to

prevent home-grown terrorism and other types of threats, people need to feel that the system is operating in an equitable manner. We must not do anything that gives people any cause for arguing against the system on the basis of it being unfair, otherwise we do ourselves damage. Also, notification serves one of the key objects of proscription, which is to ensure that people know about the proscription. If they do not, then the signals are not being sent and the provision is not operating as it should. It is simply not as effective as a proscription regime ought to aim to be.

Senator FISHER—Thank you, Professor.

ACTING CHAIR—I have a final question regarding sedition. If these reforms are enacted and implemented, are you aware of how different our laws would be to the laws in the UK? Have you had any experience of the UK legislation and how it works?

Prof. Lynch—Unless Professor Williams has an insight into sedition law in the United Kingdom, we are unable to help.

Prof. Williams—My understanding is that Australia is unique in a couple of respects in its response to acts of terrorism. One is that, in even going down the path of having modern sedition laws, it is a discredited path elsewhere. I do not think there is any suggestion that the UK would go down that path. I am certainly not aware of it. Another area that this bill deals with, which is again unique to Australia, is our having laws that enable a secret intelligence service to have non-suspect citizens detained for questioning for up to a week. They are both things that I do not think you will find elsewhere. Partly they relate to the inadequacies of the protection of human rights in Australia, but they also relate to a different environment in which the laws were made.

ACTING CHAIR—Thank you.

Senator LUDLAM—That is where I was heading next. We have not had much discussion with you so far about the provisions relating to ASIO's questioning and detention powers. There is some pretty strong language in your submission. On what grounds do you wrest the proposition that ASIO should not be able to detain people for that period of time? What period of time would you find appropriate?

Prof. Williams—In answering that we would look to the equivalent provisions that apply to, for example, terrorist suspects. It is quite notable that the seven-day detention period is considerably longer for what we believe ought to be the maximum for terrorist suspect detention, even including the dead time, where we say there should be a cap of 48-hours. We would say it is simply hard to justify why an intelligence service should be able to deny people their liberties, deny them full and proper access to legal advice, deny their lawyers the ability to have confidential conversations with the person, in the name of gathering intelligence, where if they do not answer the question they can be jailed for five years. If operational aspects of that detention are reported, even in circumstances that might reveal that mistakes were made or in fact that the law might not have been followed, the journalists can be jailed. It is a regime that might have been justified in that form at an earlier point in this debate, but we would say these laws must be calibrated very carefully to the threat level and calibrated carefully to how things develop. Given developments in Australia and overseas, we cannot see that the law can be justified in its current form. We would however recognise that ASIO should have a questioning power, which has been used extensively by ASIO. Their detention power has not, according to their annual reports. We would say that it should now be wound back to that questioning power. That is sufficient, given comparable powers elsewhere.

Senator LUDLAM—So your proposal is for a 24-hour cap on questioning—as in no detention powers whatsoever?

Prof. Williams—Apart from the situation of people needing interpreters. In fact, there is already a 24-hour cap on questioning. What happens is that you can be questioned for 24 hours, but in some circumstances you can be detained for a week while you are questioned for that 24-hour period. We would say: let's keep the 24 hours of questioning, which is basically the same period of questioning for terrorist suspects by the police, but do not allow non-suspect Australians to be detained for a full week in circumstances that go beyond what you would expect even for suspects.

Senator LUDLAM—Thank you.

CHAIR—We have come to the end of our time for questioning. We do not have any other questions for you, so I thank the three of you for the submission you have provided to the committee and for your attendance this afternoon. It certainly assists in our deliberations of the proposed legislation.

[2.46 pm]

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

WILLING, Ms Annette Maree, Assistant Secretary, Security Law Branch, National Security Law and Policy Division, Attorney-General's Department

CHAIR—Welcome. The Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or the minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were developed. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for that claim. Thank you very much for providing us with your submission, which we have numbered 18. Before I ask you to make an opening statement, do you have any amendments or alterations to that submission?

Mr McDonald—No.

CHAIR—If you want to make a short opening statement, we will go to questions when you have finished.

Mr McDonald—First of all, I would like to thank you for inviting our department to the committee hearings. As the committee is aware, some of the measures in this bill relate to reforms to the national security legislation that the government is currently progressing. The government has indicated that it is committed to developing these legislative measures in close consultation with the community. On 12 August 2009, the Attorney-General announced the release of a discussion paper, which included exposure draft legislation, to amend the national security legislation. This was the first time a discussion paper had been developed to facilitate greater consultation in relation to this area of the law. The discussion paper is available on our website. This afternoon, after I finish here, I will be going to a seminar put on here in Sydney by the Law Council.

CHAIR—Yes, they told us that this morning.

Mr McDonald—We will also be having seminars in Melbourne and possibly Brisbane in the near future. That will give us an opportunity to talk to some of the people who have an interest in this area of work.

The discussion paper outlines the government's ideas about where it feels the national security legislation could be improved, so whatever I say has to be seen against that backdrop. The government will, once the consultation period has finished—and of course we will be looking very carefully at the submissions and what comes out of the work of this committee—pool everything together and then make some decisions about the final form of the legislation. The amendments in the discussion paper are certainly not set in stone.

There are some areas on which people have quite different views than those in the proposed bill that you are looking at. One such area is in section 80.2, which is the provision on urging violence. Of course, this bill proposes a repeal of those offences. Also the government has indicated in the discussion paper that it is not disposed towards repealing the National Security Information (Criminal and Civil Proceedings) Act 2004 but does have some amendments that would streamline some of the procedures.

Finally, the discussion paper does not deal with the ASIO Act. The Attorney has said it is certainly not proposing amendments to that act as part of the national security legislation package. That act was reviewed in 2005 by the Parliamentary Joint Committee on Intelligence and Security—I think at that time it had a different name—and I think the previous government responded to amendments then.

That is just a bit of an overview to get on the record the framework in which we need to operate. Thank you.

Senator BARNETT—Thanks very much for that, and thank you for being here and for your submission. Can we go back a step and look at the consultation that has been undertaken with respect to your discussion paper. We are aware of the seminar tonight with the Law Council. I was not aware of any seminars in Melbourne or Brisbane, so can you provide further and better particulars regarding Melbourne and Brisbane and regarding your consultation process generally for the discussion paper?

Mr McDonald—We do not have a precise date yet for the Melbourne and Brisbane seminars; we are still conferring on those. I expect we will have a date on those consultations fairly soon.

Senator BARNETT—Is that with or without the Law Council?

Mr McDonald—This is with the bar association in both those states. We are talking to them about it. The Law Council were kind enough to facilitate and assist us in organising this seminar. They spoke to the New South Wales Bar Association about assisting them with the consultation later today in Sydney. So there has been a very good response from the profession in those states.

Senator BARNETT—And further and better particulars regarding the consultation process more generally?

Mr McDonald—We have mailed out many copies of the discussion paper but I do not know whether we have a figure on exactly how many. We have had quite a few inquiries as well. We have sent it out to many of the groups that have shown an interest in this legislation when it has come before Senate committees and the like in the past. We have also sent it out to all the organisations that you would expect such as the Law Society, the Civil Liberties Union and community groups that have shown an interest in this sort of legislation. It is on the internet. We have received some written submissions, but not many at this stage.

Senator BARNETT—How many have you received to date?

Ms Willing—About four or five. They should be on our website shortly as well. We have had indications that we will be getting some from other groups.

Mr McDonald—I notice that you have had a fairly good response for your inquiry.

CHAIR—Yes. Quite a few people have indicated that they are trying to meet the deadline on Friday. If not it will be a week or so.

Mr McDonald—There is some flexibility on the deadline.

Senator BARNETT—That is what I am interested to know about. You have a deadline of this Friday and obviously that was set for a reason. I am interested to know what timetable the government is intending to follow with respect to (1) its response to the discussion paper, and (2) its response to the feedback on the exposure draft for the National Security Legislation Amendment Bill.

Mr McDonald—We do not have an exact timetable from the government on it except we can say that the length of extensions we would be able to provide would be more in the line of a couple of weeks. From Friday we will prepare a matrix which will outline the outcome of the consultation and start the process of working through the issues. Then we will report to government at the end of the consultation period for which people have been given extensions. We will then produce a package for the Attorney to start examining. The Attorney has indicated on several occasions that it is his intention to introduce the bill this year but, of course, he would be taking the final package back to government. I do not think anyone can be completely precise about when that process will be completed.

Senator BARNETT—You did say that the Attorney's intention is to introduce the bill this year?

Mr McDonald—Yes.

Senator BARNETT—And pass it this year or just introduce it?

Mr McDonald—No. We would only look at introduction this year. That is essentially our understanding of it. The bill has a category A bid on the program which means introduction this year and passage in the next session. There is no intention to rush at this bill; the intention is that there would be a usual approach.

Senator BARNETT—The Senate Standing Committee on Finance and Public Administration has responded to the review and its inquiry into the antiterrorism monitor bill. When does the department expect that bill to be proceeded with?

Mr McDonald—I suppose all I can say is that the Attorney has indicated on several occasions that he would like to see that bill passed as quickly as possible. Then he would like the person who is to be the monitor to be appointed as quickly as possible. He would look forward to having that person's input on this process. But of course there is a whole program of legislation so I do not have a precise idea of when that bill will be passed. It is not administered by our department.

Senator BARNETT—Who is administering that section?

Mr McDonald—That bill was administered by the Prime Minister's department, and Senator Ludwig is the minister who is responsible for it.

Senator BARNETT—It would seem logical that the whole purpose of establishing an independent monitor is to provide an independent monitoring service to the government of the day and in so doing to provide a review of issues such as those we are discussing and debating today and those in the discussion paper. Can you see that logic in it?

Mr McDonald—There is a logic in it and I think that what is being attempted to be done here is to progress the responses to the various outstanding reviews and still have the capacity to get the view of the monitor. There has been an attempt. Clearly, there has been a couple of policy imperatives. No. 1 is to respond to the many outstanding reviews on terrorism laws and the Law Reform Commission report. At the same time there is a commitment to set up the independent legislation monitor. We are attempting to facilitate both policies in the very best way we can and we will be in a position, when the other process is completed, to provide access to the input that we have received on these proposals as well as the input that comes from this committee. Hopefully, that gives us the best of both worlds.

Senator BARNETT—Mr McDonald, I hope you can understand that some people might suggest that you are putting the cart before the horse. We have not established as yet, nor appointed, an independent monitor, yet here we are debating and discussing the merits of the various aspects of the bill before us, not to mention that we have an exposure draft bill, the National Security Legislation Amendment Bill and a discussion paper, comments upon which are open until this Friday. So why would you not wish to establish the independent monitor, get him or her up and running, provide advice to the government and then perhaps put out an exposure draft based on their advice and recommendations or on what the government determines to be the appropriate way to go rather than rushing headlong into what some might suggest is a quagmire of legislation, proposals and discussion papers, before you establish and appoint an independent monitor?

Mr McDonald—I think I have answered that in the best way I can. I cannot really add anything to it. It is an attempt to respond to these reviews and it does not preclude the monitor from being able to look at the legislation.

Senator BARNETT—In terms of the bill before us would the government countenance debate and/or consideration of any part of it prior to the introduction and debate on the exposure draft of the National Security Legislation Amendment Bill 2009?

Mr McDonald—I do not think the government has made a decision about what its position is with the debate on this bill. I do not know.

Senator BARNETT—Can you explicitly explain to the committee what objectives the government would have if this bill was implemented in its current form?

Mr McDonald—I think the best way I can answer that is to say that the government has made a decision to put out the discussion paper which outlines the sorts of amendments which the government thinks, prior to consultation, that it might like to pass; and quite a few of those amendments vary from this bill. It might be that, as a result of consultation, the government comes back and takes aspects of this bill; or it could abandon parts of the other bill or could change it.

Senator BARNETT—I guess my question is: if you are going to have an exposure draft, which will presumably become the bill in due course once you have got feedback on your discussion paper, and then you put it forward then you would presumably believe that would be comprehensive in all its aspects and that would supersede the bill we are currently considering.

Mr McDonald—It might. It might be that there is something in this bill that the government likes and chooses to add to the bill—say, for example, if you have some amendments in relation to the ASIO Act and the current discussion paper does not have those then the government can always look at the report from this committee and add those amendments if it wants to. I am sort of in a position where I cannot predict some of these things.

Senator BARNETT—That is fine. I just want to ask about the sedition laws. You have indicated in your submission to the committee that the ALRC have put forward recommendations on that, including replacing the term 'sedition' with 'urging violence' and clarifying and modernising the offences. What is your view as to the merit of that?

Mr McDonald—The government has decided that that is a good idea. I cannot express an opinion about whether it is a good idea to call it one thing or another but I can explain, I guess, the rationale for it--that is, sedition is largely about urging violence against the parliament and officials and, of course, with the Gibbs committee recommendations, urging violence against racial groups and so on. The law reform commission,

and I think the government agrees from its position on the discussion paper, thinks that there are a lot of connotations with the word 'sedition' that go back to the days of Charles I and the like.

Senator FEENEY—Charles I might say that is for good reason.

Mr McDonald—There has been a misunderstanding of what the offences are about. The interesting thing about this is that, and although we have developed the model criminal code, sometimes the traditional name for the offence is helpful. I will give you some examples of that: in the model criminal code provisions murder was one example and manslaughter was another one. The other one I thought of was blackmail. We decided to call it blackmail, but some people wanted to call it 'unwarranted demands'. In fact in the federal bill we call it 'unwarranted demands' not blackmail because it was felt that blackmail was more personal rather than just being against the government.

You had the same discussion when it came to sedition, and the decision was made to go with the traditional name, but there are a lot of people who disagree with that. Another one is with sexual offences. Some states called the offence rape because the community know what that means, while in other jurisdictions it is unlawful sexual penetration.

Senator FEENEY—So the word 'sedition' will remain.

Mr McDonald—No, the word 'sedition' will go. What I was saying is, even with the Model Criminal Code, we have a mix of traditional and non-traditional names, depending on whether we thought it was helpful. This government has decided that they do not think the word 'sedition' is helpful. There is a history of offences with that name being misused.

Senator LUDLAM—People certainly have invoked that rather mediaeval charge of sedition as being part of the problem but also the fact that there are plenty of other ways of prosecuting that kind of speech. Why do we need that category of offences at all, whatever we may call it?

Mr McDonald—The offence has always basically been on our statute book in one form or another for the whole Australian period. It was in state offences and then eventually it was put in the federal. The main reason for it is that with incitement itself, which would be the alternative that you would use, you do actually have to prove that the person intended to commit the original offence. If you incite to commit the offence of assault, you would have to prove all the elements of that. However, with this modified sedition that has been developed by the Law Reform Commission, you have to prove intention to do something violent. So in terms of proof there is an easier threshold in that sense. The other reason it is a specific offence is because of the target; the target is going to the very fabric of society. The interesting thing about the Gibbs committee, a normally very conservative committee, is that they took the view that in our society urging violence against a specific racial group was something that would tear at the fabric of our society. Obviously we have seen a little bit of that and we have certainly seen it in other countries, which is why that is an element in it as well. In simple terms, that is the reason why.

There were a few other aspects to it. All the criminal law is about influencing behaviour and sometimes you will go for a specific offence to send a signal that a particular type of behaviour is particularly harmful. So we have general fraud offences but they also have been developing special cartel offences, we have insider trading offence. Quite often you will get an overlap between those offences. It is the same with the terrorism offences generally. Depending on the conduct, there will be occasions where there is overlap.

Senator LUDLAM—Yes, to the degree that some witnesses have said that there has never been a successful or even an attempted prosecution under the sedition laws as they stand.

Mr McDonald—There certainly have been some prosecutions going back.

Senator LUDLAM—I meant in the modern era.

Mr McDonald—Yes, it was about 1960 or something like that. I think there was one in Papua New Guinea or somewhere like that as well. I can take it on notice to give you a couple of examples. Generally speaking, it is not an offence that is prosecuted very often. Of course, it has not been prosecuted since the amendments that put the latest version in place.

Senator LUDLAM—We just took some interesting evidence from the Gilbert and Tobin Centre of Public Law who talked about the definition of what constitutes a terrorist act and putting the proposition, which I think others have put, that we are enlarging the definition of terrorism to such a great degree that we are actually trespassing into the area of racial vilification, for example. My reading of the discussion paper was that sending text messages in advance of Cronulla riots would constitute an offence of terrorism, but that

would more properly belong elsewhere. Is the government wedded to the package that you are putting forward remaining as part of the terror laws package or is there still a possibility of maybe placing them a bit more in context?

Mr McDonald—I think what is happening is that the people who have been talking to you are getting a little bit confused between the sedition offence and the terrorist act offences. The Cronulla matter—and I have to be very careful because quite often I know a bit about the operational stuff and sometimes I do not know anything about the operational stuff, so I say this on the basis that I do not know about the operational stuff of Cronulla in any great detail—I understand, was not politically motivated. It was more of a sort of macho boys versus macho boys type—

Senator FEENEY—With a sectarian quality.

Mr McDonald—Yes, that is right. So it would not in any way come near the terrorist act offences. However, people are probably thinking about sedition. Obviously the federal prosecutors are going to be focused on what is going to have a national impact. Cronulla is one where it probably falls on the side of something that the state authorities would be more interested in than the federal authorities. However, if we had people on the internet, or in the media or the like urging violence against Indian students, for example—we have seen in the last few months how that could have a national impact—

Senator LUDLAM—Does that make it terrorism?

Mr McDonald—No, I am talking about the urging violence offence, not the terrorism offence. That is where it is relevant in the urging violence offence or the offence that used to be called sedition. I used to have to explain this a few years ago before the Cronulla riot and talked a little bit about what the rationale was for putting the stirring-up racial groups element. The interesting thing is that it is more well demonstrated now than it actually was when we originally put the laws together. That is why the Attorney has paid a bit of attention to those provisions.

Senator LUDLAM—Senator Barnett referred to the agendas that cut across this—the proposed bills, discussion papers and so on—to which I would add an alleged counter-terrorism white paper. Does that really exist, and when might we see that?

Mr McDonald—It is a shame Senator Barnett is not here, because I know he is really interested in this.

Senator LUDLAM—He did refer to it as a quagmire, so I am wondering whether you can help get us out of it!

Mr McDonald—It is not a quagmire. Everyone is fighting to get on the legislative program—the various departments and the like—so you can be forgiven for getting that impression. But there was a commitment to respond to these various reviews. Some of the reviews have been outstanding for a few years. The Attorney was very strong, when he came in, about us properly addressing all the various reviews that had been conducted up until then. He was also cognisant that it had been a couple of years since we addressed these laws and that there could be issues that had come up in the courts or as a result of operational experience, so he wanted to make progress with that. But, at the same time, realising how controversial this area of law is, he wanted to have an orderly process where they were carefully thought through and there was proper consultation. So that is why we have gone through this discussion paper process. It has an altogether different purpose and is a different document. It is a detailed legal document. The counter-terrorism white paper is a policy document, so it obviously would not have the level of detail on the legislation that we have here. However, it is consistent with the sorts of things that are being developed for the counter-terrorism white paper. We had a counter-terrorism white paper from the coalition in 2006, and the other one was in 2004, I think. If you want to get an idea of the type of document we are talking about, that is the type of document that is being developed. What it does is pull together all the various strands. The legal aspect is only a small aspect. It looks at the resources that are being brought to bear and what we are doing structurally. It will obviously have something about the National Security Legislation Monitor. It will talk about those sorts of issues. That is being developed at the moment and it is being progressed.

Senator LUDLAM—Should we see the discussion paper as being a bit of a down-payment on the law reform side? Otherwise it looks as though we are going to get the law reform and then the policy and then maybe the monitor, which to me seems completely backwards.

Mr McDonald—I think it is actually going to work out in the order that Senator Barnett hoped it would. I expect that the monitor legislation is going to be in place and then the monitoring will be in place the earliest and the rest will follow. But I said earlier that I am in no position to be precise.

Senator LUDLAM—That is all right. The monitor is going to be a very busy little office when we finally get it. What was the decision-making around what made it into the discussion paper and what did not? For example, ASIO has been left out. Those provisions have been severely criticised in recent years. Why are there gaps such as this bill seeks to address?

Mr McDonald—The interesting thing about the ASIO provisions is that, while they might have been criticised quite a deal, they have not used for some time, if you look at the annual reports.

Senator LUDLAM—That is one of the bases for the criticism.

Mr McDonald—Yes. I guess the government worked out its priorities. We had the Clarke inquiry. Some of this addresses that. In a sense, the government has focused on the stuff that gets used quite a bit. You will be able to point to sedition as an example of one that does not get used much. However, there was a Law Reform Commission report on it, and there was a lot of concern in the community about its effect, while the ASIO provisions have not been used that much in the last little period.

Senator LUDLAM—Another thing in this bill that has received a degree of comment today and, I think, almost universal support is that there is some process around proscription of terrorist organisations. The discussion paper is completely silent on that. Why would that be?

Mr McDonald—The real concern there, I think, lies with the variety of groups that you might want to proscribe. Some groups are like international corporations; they almost operate like international corporations. They are multinationals. They might be suited to a consultation process.

Senator FEENEY—Can you give us an example?

Senator LUDLAM—Yes. I am not sure whether you are referring to multinational corporations behaving like organised crime groups or the other way round.

Mr McDonald—No, no! I will be very careful here. I can just see myself being quoted in the wrong way! I had better be careful here about which one I choose, but some are long established and would almost have a registered office; some are small groups where it might be that a listing would tip them off that we were onto them. I think that that gets demonstrated from time to time. The government of course makes its own decisions, but that is the sort of advice that certainly I would have given: that we would not really want to lock ourselves into that. However, one thing that has been contemplated is that, depending on the operational situation, there might be occasions where we do not actually bring the regulations into effect until the parliament has had a chance to disallow them. That would then enable the sort of consultation you want without having the other problem.

Senator LUDLAM—Yes, but in a very partisan fashion, if it were a disallowance. I have some more questions, but I will come back later, Chair, if there is time.

CHAIR—Senator Feeney does not have any questions, so you can keep going.

Senator LUDLAM—Mr McDonald, is the door closed, in your mind, to a review of that position, that—if I am hearing you correctly—you do not want to go into any form of due process around proscription in case you give the bad guys too much of a tip-off?

Mr McDonald—According to the Attorney-General, the door is not closed on any issues within our consultation process. If I were to say the door was closed on an issue that would not be appropriate.

Senator LUDLAM—We have heard a bit of evidence, firstly from the Federation of CLCs and also from AMCRAN today, that particular ethnic communities in Australia—we have heard from Melbourne and Sydney—feel themselves targeted by these laws. Firstly, is that a view that you are willing to accommodate; and, secondly, in the consultation rounds that you are doing, maybe as a part of this discussion paper, are you directly engaging with those communities?

Mr McDonald—First of all, the laws are not discriminatory, at all. If people feel that they are, then they are under a misapprehension, because they are just not discriminatory. The second thing is that there is absolutely no question that communities feel sensitive about seeing people who are their countrymen—I was going to say 'former countrymen'—and from similar backgrounds, not so much being arrested but being the subject of a lot of discussion in the media. The feeling is that it hurts people. I am about a hundredth generation Australian. If I was living in America and an Australian committed a really bad crime the community would react to the fact that the person who committed the crime was Australian, sometimes publicly and sometimes not. I personally have a great understanding of the concern of the community and I think there is every indication that there is concern about those issues by whomever is in government in Australia. There are some things that we can do

and with the recent arrests in Melbourne, for example, there was very solid community engagement between the Victorian police and the AFP with—

Senator FEENEY—With the *Australian* newspaper!

Mr McDonald—No, with the community from whom—

Senator FEENEY—We gave everybody fair warning we were coming.

Mr McDonald—Yes, I will just leave that one. So there was good engagement there, from what I can work out, and there was a great consciousness of that. There were efforts made to contact the relevant community leaders and the like. Now, it is never going to be perfect. It is just one of these areas where it is very difficult. The other thing that we have done is to translate our material that explains the terrorism laws and how they work. It reassures people that the laws are not going to apply to people who do something inadvertently. We have that material translated into quite a number of languages and we will try to get those distributed as well as we can through the community.

Senator LUDLAM—The second part of the question, though, was about consultation. You did say that people were under a misapprehension. Is that the message that we are taking back to groups like AMCRAN?

Mr McDonald—They are under a misapprehension if they feel that they are being discriminated against by these laws. There is no discrimination on the basis of where a person comes from or their religion. In fact, the people that have been arrested under these laws have been people from different parts of the world and of different religions too. The majority of the people that have been arrested were Islamist, but other people who were arrested were not.

Senator LUDLAM—Just to quote some earlier evidence back at you, what proportion, in your understanding, of proscribed organisations in Australia are of Islamic background?

Mr McDonald—I think most of them would be not so much Islamic but rather Islamist. I think in the case of the PKK it is usually described as a nationalist one. I think we have 18 and most of them are Islamist.

Senator LUDLAM—Are there any white supremacist groups on the list?

Mr McDonald—No. There is no question that ASIO are looking out for any people who are interested in politically motivated violence. They will make their assessment of whether there is a listing and will take into account the security interests of the country. They are quiet sparing in terms of who is listed. It is only done after quite a lot of consideration. So with this recent listing of al-Shabab there has been some comment about when did the Americans list that group, why didn't we list them straight away et cetera. We do not list organisations because the Americans list them.

Senator FEENEY—Or delist them.

Mr McDonald—Or delist them. It is about taking into account what works here. If we had a white supremacist organisation in the way that the Nazi party was in the 1920s then I have absolutely no doubt that that sort of organisation would have a very high chance of being listed. If that listing had happened in the 1920s then it might have actually done some good. But we have not reached that point with one of these groups at this stage.

Senator LUDLAM—At this stage.

Mr McDonald—I think there is probably a pretty accurate comment too—and at this stage.

Senator LUDLAM—I will try to pin you down one last time. Will there be any community consultations as part of what you are conducting with the communities that are under the misapprehension that they are being targeted or singled out?

Mr McDonald—There is quite a deal of work being done to try and improve the interface with the communities. I think you will find that this is something that is going to be given a little bit more prominence.

CHAIR—Mr McDonald and Ms Willing, thank you very much for your submission and your appearance this afternoon. We appreciate the submission. I would like to place on record my thanks to all the witnesses who have given evidence to the committee today in relation to this bill.

Committee adjourned at 3.39 pm