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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Criminal Code Amendment (Espionage and Related Offences) Bill 2002

MONDAY, 8 APRIL 2002

SYDNEY

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WITNESSES

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Monday, 8 April 2002

Members: Senator Payne *(Chair)*, Senator McKiernan *(Deputy Chair)*, Senators Cooney, Greig, Mason and Scullion

Senators in attendance: Senators Bolkus, Cooney, Ludwig, Payne and Scullion

Terms of reference for the inquiry:

Criminal Code Amendment (Espionage and Related Offences) Bill 2002

Committee met at 10.07 a.m.

DOWD, The Hon. Justice John Robert, Commissioner; and President, Australian Section, and Member, International Executive Committee, International Commission of Jurists

CHAIR—On 20 March 2002, the Senate Legal and Constitutional Legislation Committee was referred the provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002. The committee is required to report on the provisions of the bill by 26 April 2002.

Welcome, Justice John Dowd from the International Commission of Jurists Australia. I invite you to make a brief opening statement and at the conclusion of that I will invite members of the committee to ask you questions. The committee has received a copy of the submission this morning from the International Commission of Jurists and hopefully has had time to read it briefly.

Justice Dowd—I did email it on Friday afternoon, and I am sorry that cyberspace or something else prevented it getting through. I do not know that I want to say a lot more than is contained within it. Can I ask about the related legislation dealing with power to detain and hold: should I make any comment on that?

CHAIR—Yes, if you would like to.

Justice Dowd—That legislation is not included within this bill—

CHAIR—No.

Justice Dowd—and I was not asked to comment on that.

CHAIR—I think that is included in a bill which has been referred to this committee and which has also been referred to the parliamentary joint committee for examination. The parliamentary joint committee is currently, as I understand it, proceeding with that examination. We are concentrating currently on the other load of bills referred to us and we will come to the second bill in due course. If you do wish to make comments on the record in relation to that, you may; it is not before us today, though.

Justice Dowd—Thank you, if I could without having seen the bills because I am concerned there may not be an opportunity for making submissions.

CHAIR—There certainly is to the parliamentary joint committee.

Justice Dowd—I do not know whether my day job would necessarily permit me to do that.

CHAIR—We do have a reference.

Justice Dowd—All right. We Australians—and I do not say that just to raise it emotionally—ought not lightly to give to people, since we do not give it to policemen, the power to detain, in effect, for questioning or because someone is a witness or may have information. It is very easy to make allegations that people have information. It is very easy, particularly as a practising lawyer, to unwittingly have information come into your hands and be subject to such a power. There is no justification because of what happened on September 11 or because of the events since then to give a spy organisation powers such as this. As I understand it, it does not deal with the hierarchy of persons in authority; it does not need someone of the level of a sergeant or an inspector—the sorts of rules you get when dealing with police—before people can be detained. Because court orders can be obtained very quickly, if someone is to be detained for some purpose, then it ought to be an application before a magistrate, state or federal, to deal with that and, in effect, have the provisions of the Bail Act apply. We do not ever want to have a situation where simply an allegation can be made maliciously or carelessly that subjects someone to the loss of their freedom. We are totally opposed to that provision.

In terms of this legislation, I have outlined here that the persons most vulnerable to this are members of parliament and journalists. We have a very impressive tradition—not that I have always enjoyed it—of responsible journalism within Australia. I remind you of the book *The Falcon and the Snowman* with respect to leaks going on from security services. We need to be very careful that we do not inhibit proper discussion. The very issues that are going on belatedly in relation to Balibo in East Timor underline the fact that sometimes journalists obtain information and the truth comes out only because of it. Sometimes members of parliament expose problems in the administration of government only because of information given to them and their responsible use of that power. Therefore, we ought not lightly to change and give powers to spy organisations. I have outlined the rest of the ICJ's thoughts in the submission, which you possibly have now had time to read. I am now ready to answer any questions.

CHAIR—Thank you very much. Is it the wish of the committee that the submission provided this morning by the ICJ be made public? There being no objection, that is so ordered.

I will go briefly to the points that you made in relation to division 91 and the points that are made in your submission about what the ICJ regards as some of the dangers of extending coverage to—as you referred to momentarily—journalists and members of parliament. Do you suggest then that the legislation be amended to directly exclude those groups?

Justice Dowd—It is very difficult because lawyers may also get information in advising somebody. But there is a general rule: if in doubt, leave it out. I would prefer to see members of parliament and journalists excluded, and cover the real espionage, than to have a danger of them being inhibited in the carrying out of their duties, particularly where you have got the word 'prejudice'. Just to underline the point, because of our security exchange with a friendly country—New Zealand, Canada, the UK and the USA—we in fact may be endeavouring to expose a glitch that is for the benefit of that country, yet we may be advantaging that country. There is an assumption in the drafting of this legislation that the country is a bad country, someone with interests inimical to Australia. That is not the case, and there needs to be some qualification of that.

Senator BOLKUS—Can we think of a better word than 'prejudice'? Also, I note there is a difference between 91.1(1) and 91.1(2) in that in the first one there is a prerequisite that a person does so 'intending to prejudice the Commonwealth's security or defence' and in the second one there is no such qualification—it is a much broader offence. I can imagine journalists being covered by 91.1(1) but, for instance, it does not take much imagination to anticipate 91.1(2) would cover just about any reporting of inside information on Indonesia's state of military preparedness with respect to East Timor.

Justice Dowd—I would not separate the two offences; I would have the same qualifications, requirements, in both. I would rather have a word which meant harm rather than prejudice, something which imports conscious damage rather than prejudice, which is a very nebulous term. Prejudice actually does not mean that—'prejudice' here is a misuse of that word anyway in this statute; prejudice means forming a view about something as to not properly judge something. So 'prejudice' is a vernacular usage here and therefore is ambiguous and ought to be 'harm'. I think 'harm' is probably the best I can do.

Senator COONEY—I will start with the same sort of question as I was asking before; I think you have answered it, but I just want to take it up with you again. I understand that it is very hard to draft legislation so as to get exactly what you want and therefore you have to decide how to frame it, but there must come a point where the framing is so wide that it does allow too great a power to the authorities to limit what we would like to see a citizen in a free and open society have. I was wondering whether you think this legislation is at least approaching that point.

Justice Dowd—This legislation, as against the previous bill, does not, without spending time thinking through it—and, frankly, more time ought to be provided. Again, that is not a criticism of this committee. As someone who has spent a lot of my parliamentary time investigating organised crime and getting information from criminals as well as people related to them, I think you are changing the nature of Australian society if you inhibit people doing what is lawful—that is, criticising government and criticising the competence or incompetence of government organisations. I think you need to be very careful in setting up offences because people just do not know whether they are committing an offence or not. Our law says you are presumed to know what the law is; it is made more and more absurd if you have wide offences. If you take 91.1(4), for instance, you can commit an offence in relation to information that 'has been' or is 'in the ... control' of the Commonwealth. How do you know, if you have got a piece of information, whether it was or was not in the control of the Commonwealth? Of course there are other qualifications. But you do not lightly change the sort of free society which Australians enjoy and continue to enjoy by putting in such legislation.

Senator COONEY—Under clause 93.2, 'Hearing in camera etc', you can have a hearing in camera, which I suppose you can in other areas. Nevertheless, in this context, that seems again to create a climate that may well be a climate of fear in the end.

Justice Dowd—If a magistrate is working with the same police all the time, it is very easy for a police officer you respect to say, 'Well, there are very serious questions,' and you are asked in court to have it in camera. As I have said, you can limit publication and in special or exceptional circumstances do it. But to have a general power makes it very easy for police to say, 'There are consequences.' I have had people appear before me and I have appeared in courts at times when 'grave secrecy' is alleged, and you tend not to explore it because the public are listening to what the grave secrecy is. There is a tendency for that application to be

acceded to. You do not lightly take away the supervision of the courts, but the compromise that I have proposed is to have exceptional or special circumstances.

Senator COONEY—Espionage and similar activities—you can understand it where that is directed against the Commonwealth's interests. But here you can do up to 25 years in jail for doing something that concerns the security or defence of another country. It does say:

... without lawful authority; and ... intending to give an advantage to another country's security or defence ...

I will perhaps withdraw that. I think that is fair enough. That is where you get information that would help another country that I suppose is at war with the Commonwealth, or what?

Justice Dowd—If you wanted to help the United States by pointing out to them that our security organisation was leaking, you would be prevented from doing so.

Senator COONEY—But there is other legislation which says that nevertheless that information can be given to other countries at the instance of the commissioner of police, I think.

Justice Dowd—It is proposed that there be a power to give from police to police on 'appropriate undertakings'. What an inappropriate undertaking is and whether that undertaking will be carried out are two different matters, something that I found in relation to East Timor: I want to give information to assist prosecutions in East Timor—this is on behalf of the ICJ—but I am not sure that they will not provide that information to Indonesia.

Senator COONEY—As I am presently thinking—although my mind may well change on this—you have to look at all this legislation together. It can create a false impression just looking at one. But if you look at it altogether, what it does is create a regime where there are certain people who are named who can give as much information as they like and other people who, as soon as they try to reveal information, are up for 25 years in jail. You are going to get a revelation of information that might well be loaded in one way. If you hear that there is somebody giving out a version of an event and you say, 'I want another, different version of an event,' you have to start thinking as to how you are going to get around that. It seems to me to limit what we have already got in this society, which is, I think, a fairly open and free and vigorous debate. The whole legislation together seems to put a damper on that.

Justice Dowd—I do not think you need me to comment on that. I think the question answers itself.

Senator COONEY—Yes.

Senator BOLKUS—Just one question: this concept of 'the Commonwealth security or defence'—does that stretch further than the protection of the Australian physical nation to include, for instance, any alliance, treaty or defence arrangement we might have with western partners or any other country?

Justice Dowd—Yes.

Senator BOLKUS—I notice in subsection 4 that once again there is no prerequisite of the intention to prejudice Commonwealth security or defence. But it is a pretty broad provision and when you take into account those defence and other treaties that we might be engaged in, essentially you could be trampling on free discussion—

Justice Dowd—It is extremely wide and the ultimate ramifications of this are very dangerous.

Senator BOLKUS—Thank you.

Senator LUDWIG—Your view in relation to the new term 'security or defence': in your submission, as I understand it, you prefer that—the word 'security'—instead of 'safety'. But you take issue with the definition provided in 90.1—'Definitions'—of 'security or defence'. Do you have a view about what it should or should not include? You have stated that because it means 'and includes', effectively, it adopts the common law.

Justice Dowd—The use of the word 'includes' is a very dangerous drafting technique because it does not define at all; it simply expands. If you are doing something as clearly important as this, you should define it. You have not defined 'defence', you have not defined 'security' and therefore there are three concepts: security undefined, defence undefined and an expansion of both. That is no way to draft legislation for serious offences such as this; you should in fact define it.

Senator LUDWIG—And provide an exhaustive list of what it might otherwise mean?

Justice Dowd—Yes.

Senator LUDWIG—I do not know whether you have had an opportunity to look at this—and this struck me while I was reading the provision—but perhaps you might have a view about it. In relation to division 92, Offence relating to soundings, it appears to exclude navigational undertakings.

Justice Dowd—If you prove it.

Senator LUDWIG—Yes, you have a reverse onus in respect of that. But it occurred to me the likes of the now deceased Jacques Cousteau and the oceanographers of the world take soundings in relation to oceanographic surveys and then look for sunken treasure and the like within our territorial waters; those who are looking for fish also use soundings as a means of finding schools and then some of them take recordings of those because they can then go back to the same location; and even domestic fishers do the same, as I understand it, although I am not that familiar with the sport.

Justice Dowd—The only objection I have to this is not that it is an offence, but that it reverses onus. We are opposed to any reverse onus. The prosecution should be proved. I have no problems with it otherwise.

CHAIR—As there are no other questions, Justice Dowd, I thank you very much for your time on both pieces of legislation. The committee is very grateful for your assistance and for the submissions of the International Commission of Jurists, and we will draw the attention of the parliamentary Joint Committee on Intelligence Services to the remarks you made in relation to the other piece of legislation. We appreciate your time this morning, particularly given we know that you have a very busy schedule.

Justice Dowd—Thank you, Chair and members of the committee. I am here, of course, only in my capacity as President of the Australian Section of the International Commission of Jurists and not in my judicial capacity, because in that capacity I do not make public comments. I thank you for the time and courtesy you have extended to me.

[10.28 a.m.]

BERNIE, Mr David Michael, Vice President, New South Wales Council for Civil Liberties

MURPHY, Mr Cameron Lionel, President, New South Wales Council for Civil Liberties

CHAIR—Welcome. At the outside, Mr Murphy and Mr Bernie, I apologise for the delay in coming to your evidence this morning. I know that the secretariat checked with you, so I am very grateful for your assistance in allowing the committee to take evidence for a longer period from His Honour. The New South Wales Council for Civil Liberties has lodged a submission with the committee, which we have numbered 3. Are there any amendments or alterations that you wish to make to that submission?

Mr Murphy—No.

CHAIR—I will invite you to make a brief opening statement and, at the conclusion of that, ask members of the committee to ask questions.

Mr Murphy—I will make some brief remarks and then pass over to my colleague David as part of our opening statement. We were very concerned that, originally, the government's intention was to put in place legislation that specifically targeted whistleblowers and others who would release or publish information. We are very pleased that those specific provisions have been dropped from the proposed legislation. But we are concerned that the government has not ruled that out and that, at some later stage, that could come back on the agenda, depending on events that arise.

To do with this legislation, we are concerned that the way in which these antiterrorism and associated pieces of legislation have been dealt with is probably a poor response to September 11. The government has had more than six months to come up with the legislation, but we feel it has given inadequate time for public hearing, debate and analysis from the community about what is the correct response to September 11. We think this espionage bill is far too wide in its net—it is casting the widest of possible nets and, because of that, it still has the potential to trap activists, dissidents and whistleblowers in its application. It is not clear either that the legislation is targeted towards acts of espionage that involve our enemies. It seems to us that it is poorly drafted in that it could prevent our spies from carrying out their duties and could also be used against them.

We believe that the definitions in the act need to be significantly tightened up and constrained from the way they are at the moment, and we think that there has to be a system in place where any trial based on an offence of espionage should be open. Far too often we see that government authorities and others claim that a matter is a matter of national security, and these events are then hidden from public view. There should be a regime in place where that only occurs when the circumstances are exceptional or extraordinary. We also need to need to make sure that that is proven and not just claimed or alleged. We have represented several people over the last couple of years in matters that could involve national security, and on each of those occasions those matters have been held from public view without any proof that they do in fact damage national security. I will now pass over to my colleague David Bernie.

Mr Bernie—I suppose this legislation—at least the major part of the legislation dealing with espionage offences—has been brought about by a problem shown up by the prosecution

of Mr Wispelaere in the United States. It was considered that our security legislation, whether rightly or wrongly, would not have given rise to a prosecution. I am not sure about that. We have not had enough time to go through the entirety of the criminal code or the existing Crimes Act. But certainly we are concerned that these proposed amendments go far beyond the problem that the Wispelaere incident would show up. In particular, first of all, is the definition in the bill of 'information'. It means information—and I am reading from section 90.1 subsection 1—of any kind whether true or false, and whether in a material form or not, and includes an opinion and a report of a conversation. It is an extremely broad definition of information and—I think that is a very important aspect—it is not limited to classified information. I understand there is a system of classification in relation to information. I think if we are going to be dealing with information we should be dealing with classified information. We should not be dealing with information that deals with the amount of tea and biscuits that might be consumed by the Department of Defence or ASIO. It should be about classified information because we are talking about offences here which will have a penalty of imprisonment for 25 years.

Also there is a broader definition of 'security or defence'. This goes beyond the old definition of 'safety or defence'. It says that security or the defence of a country includes the operations, capabilities, technologies and methods and sources used by the country's intelligence or security agencies. Does that mean methods would possibly mean—in relation to some countries—torture? So disclosure of torture by some countries could be caught when you come to the actual offences that are referred to in 90.1—particularly where we get into 90.1 subsection 2, where we are dealing with information about another country, dealing with another country's security or defence.

Unfortunately, the legislation makes no distinction about protecting information, whether it is coming from democratic countries like the United States or the western European democracies—countries that we like to align ourselves with—or from dictatorships, be it communist dictatorships like the People's Republic of China or military dictatorships like Burma. This gives exactly the same protection to information originating from those dictatorships as it does to information from the democratic countries. That is a major problem here. The way it is drafted, it could actually catch our security officers giving information to the United States about the security operations of communist China. I think we refer to that in one of the examples we have given: example B on page 3 of our submission. The security officer's only defence would be lawful authority. The drafter would say, 'He has the lawful authority for that.' Unfortunately, because of the time frame with regard to giving submissions on this legislation, we have not had time to go through it and see where all the lawful authority might be.

A very strong flavour running through all the drafting here is the reversal of the onus of proof. It means that a person can be prima facie caught up in this matter, charged, brought before a court in relation to an offence, and face a 25-year period of imprisonment—and the onus will be on them to prove their innocence. The way that this is drafted is to in fact reverse the onus of proof. That could even be for an agent who is giving information to the Americans about the Chinese security forces. He would then be in a position where he has to prove he had lawful authority.

Similarly, example A in our submission is in relation to somebody making information public. We use the example of an organisation or people supporting the National League for Democracy in Burma. You have a situation in that country where the democratically elected

leader is under house arrest by the military dictatorship. In division 91 of the bill, which deals with offences, clause 91.1(3) states:

> (3) A person commits an offence if:
>
> (a) the person makes, obtains or copies a record (in any form) of:
>
> (i) information concerning the Commonwealth's security or defence; or
>
> (ii) information concerning the security or defence of another country, being information that is, or has been, in the possession or control of the Commonwealth ...

So they might be publicly releasing information on which the foreign minister might be getting a briefing at that time. Suddenly the information that they are releasing to the public is coming within the auspices of this legislation. Again, the drafters would say, 'They have not done it with the requisite intention,' but the requisite intention is very unclear in relation to this. Clause 91.1(3) says, 'intending to prejudice the Commonwealth's security or defence' in one case or 'intending to give an advantage to another country's security or defence'. Is releasing that information—for instance, releasing information about the activities of the Burmese security organisation—giving an advantage to the United States security or defence? It may well be. You would find that you had actually committed an offence under subclause (4) of clause 91.1 and would face imprisonment, possibly for 25 years. It really does show that, while there might be a problem that is disclosed by the Wispelaere matter, this legislation—because of the extremely broad definitions and because of trying to protect all other countries and all other information—goes way beyond that sort of problem. We appreciate there may be a problem that needs to be addressed in that regard, but the legislation as drafted really goes way beyond that.

CHAIR—Thank you very much, Mr Bernie. We will start with questions from Senator Ludwig.

Senator LUDWIG—You say that you object to the inclusion of that broad definition in the provision that you mentioned in relation to information. Under the current Criminal Code, the definition of information under part 7, section 77, on my brief reading appears to be exactly the same. Do you say that your view is that in the current Crimes Act 1914, section 77, the definition of information is too broad?

Mr Murphy—It probably is too broad. We have not had a chance to go through everything.

Senator LUDWIG—No. I understand that. That is why I thought I would give you the opportunity to perhaps make a comment in relation to that point. It reads:

information means information of any kind whatsoever, whether true or false and whether in a material form or not, and includes:

(a) an opinion; and

(b) a report of a conversation.

So it appears on my reading to be exactly the same.

Mr Bernie—But I do not think that the present legislation—I do not have a copy of it, so you have an advantage on me there—

Senator LUDWIG—I had to borrow it from Senator Cooney.

Mr Bernie—goes quite so far. Obviously, it does not protect the interests of other countries. I might stand to be corrected on this, but I understood that the level of requisite

intention in the present legislation may be higher. I am not sure of that, but in the small time frame we have had to give submissions on this and look at the whole matter, we have not had a chance to go back and check every cross-reference against existing legislation.

Senator LUDWIG—I understand that. I was not trying to surprise you. I was aware of the need to make sure the record was clear about your position in relation to that definition. In relation to your view of the definition of security of defence, I understand that you had the opportunity to hear Justice Dowd. Do you have a view about that?

Mr Bernie—Yes. I think it is too wide. As I said in my opening statement, I thought that methods in particular would be something that might generally be of public interest, particularly when you read it with the proposed offences which, again, are going to cover other countries. But even if we go back about 30 years to the early 1970s, there was considerable concern then about the methods that were being used by the CIA at that time; for instance, the fact that the CIA was in breach of its own act: spying on American citizens and conducting tests with illegal drugs. You would see a situation where the definition is so broad that people who had legitimate interests in disclosing information about the methods of security organisations could find themselves prima facie caught in relation to this. One way which I did not mention in the opening, but I think we do mention in the submission, is having a general whistleblower's or activist's defence. I believe something along these lines was recommended by the Gibbs committee.

Mr Murphy—If there was a defence in place that included acts of activism in some cases or a public interest test, I think that would ameliorate many of the concerns that we have about this. At the moment it is too broad, in the sense that almost anything that one does about a classified document could be considered to be interfering with the methods or operation of security services. There is nothing about the merit of that disclosure. You could be doing it for public interest reasons, to expose an issue where there has been a security bungle or an agency has been working outside its lawful authority, but the way in which this is constructed means that you could still be guilty of an offence. The defences are inadequate.

Senator LUDWIG—Have you had the opportunity to look at the provision for soundings?

Mr Bernie—We did have an opportunity to look at that.

Senator LUDWIG—Sounding, as I understand it, is determining the floor of the sea.

Mr Bernie—With my limited sailing and navigational experience, I knew what it meant.

Senator LUDWIG—I suspect you have more than I. It says 'or any other lawful activity', which begs the question if, unfortunately, a fisher might have been found with an illegal catch—

Mr Murphy—They could, it seems, be trapped in this. We gave an example in our submission, and it was a surprise to us that there was an offence of conducting a sounding. Presumably a lot of this geographical information is on the public record in any event. It is obviously there because there is some problem in relation to soundings, but we think the penalties are very severe for conducting an act of sounding and it is reversing the onus of proof. Someone who might be in charge of a ship could be ordered to conduct a sounding and be committing an offence, and they cannot prove, on the burden of proof, that they were doing it for lawful reasons.

Mr Bernie—I read the explanatory memorandum relating to this, as well as the Attorney-General's speech. They said it was necessary, but I could not actually see the reasons why

such an offence was necessary. As Cameron has mentioned, most of this is publicly available information, so I am not even sure of the basis. It seems like an old offence—it is already in the existing legislation—that I think might go back to World War II when there was not general information about the navigable waters around Australia. What concerns me about that, even if there is a need for such an offence, is the reverse of onus of proof. There seems to be an exemption for navigational reasons—without going into that in detail—but not possibly for other reasons such as scientific. Justice Dowd or somebody gave the example of Mr Cousteau or somebody like that. I suppose the answer is that they could get permission but, even without getting permission, it did strike us as an odd sort of offence. I would have thought it should be redrafted as 'somebody taking soundings with a view to providing them to a foreign government or organisation against the interests of the Commonwealth'—something along those lines. The way it is drafted at present is so broad and it reverses the onus.

Senator BOLKUS—One of the big tuna boat operators in Port Lincoln, for instance, has been taken over by a Swedish company. It seems to me that 92.1(1) would cover that company sending information back to its parent company in Sweden.

Mr Murphy—It seems to us that any boat that was sending any information back to a parent company overseas could be caught in this legislation because of the way it is drafted. It does not seem that taking a sounding in that way is what anyone in the community would consider to be an act of espionage. It is a mystery as to why it is here.

Senator BOLKUS—They probably have organisations of government that have as one of their functions the sharing of soundings.

Mr Bernie—We did not have a chance to consider that because we had to have the submission in by Tuesday of last week and Easter intervened, and we were more concerned about the espionage matter, but my understanding is that a lot of this information is already available publicly these days. As I said, I think this whole offence goes back to World War II days, when maybe it was not so publicly available and we were worried about German raiders and Japanese submarines.

Senator BOLKUS—Submarines in Sydney Harbour.

CHAIR—You are painting a fascinating picture, Mr Bernie.

Mr Bernie—I know, but it does seem like a quaint offence now, particularly—

CHAIR—I do not think there is a lot quaint about this, but if you can see quaint then be my guest.

Senator COONEY—There are provisions in the present Crimes Act against soundings but they talk about unlawful soundings. Have you got any thoughts as to why they have taken the word 'unlawful' out of this?

Mr Bernie—I do not know because I am not sure of the actual reason behind the offence.

Mr Murphy—The only reason I can presume is the entire intent of the bill seems to cast the widest possible net—

CHAIR—So to speak.

Mr Murphy—Yes, sorry for that pun—to prevent acts of espionage no matter how they should occur, and try to cover all bases. That may be the reason it has been constructed in that way.

Senator COONEY—Under the present act, if you take unlawful soundings you get two years. Here you still get two years but they take out the word 'unlawful' for some reason. Section 83 of the Crimes Act at the moment talks about:

(1) Any person who in the Commonwealth or in any Territory:

(a) takes any unlawful soundings;

(b) makes any record of any unlawful soundings;

But here it goes to 'takes any sounding or makes any record of any sounding'.

Mr Bernie—We have now been provided with a copy of section 83 of the Crimes Act. Reading this as a lawyer, I think it has the effect, again, of providing for a reverse onus. In section 83(1), despite the fact that it has a deeming provision in subsection (2), that it is not lawful unless soundings are made with an authority of the government, normally—and it is a matter of interpretation if you are reading subsection (1) alone—you would still have to have a requisite intention, at least, to do it unlawfully. There is a reverse onus in subsection (3), it would appear.

Senator COONEY—I think you are right. At least it throws a colour on the whole thing.

Mr Bernie—Yes, it does.

Senator COONEY—You say, 'Look, we're talking about unlawful soundings here,' whereas here what you are talking about are 'soundings'.

Mr Bernie—Certainly, Senator, you are right to say that it strengthens the reverse onus of proof. It further strengthens the presumption of guilt in relation to the offence.

Senator COONEY—I am asking this as a lawyer now. If you go right over to schedule 2, consequential amendments, amending the Crimes Act, it says:

Repeal the subsection, substitute:

(7) This section does not apply to an offence against:

(a) section 24, 24AA, 24AB or subsection 79(2) or (5) of this Act; or

(b) section 91.1 of the *Criminal Code*.

Mr Bernie—Which item, Senator?

Senator COONEY—Have you got that bit?

Mr Bernie—Yes. Page 26.

Senator COONEY—I am looking at stuff I got off the Internet but it is schedule 2, consequential amendments, part 1, Crimes Act 1914.

Mr Bernie—Yes, I have that.

Senator COONEY—You have there:

1 Subsection 4J(7)

Repeal the subsection, substitute:

(7) This section does not apply to an offence against:

(a) section 24, 24AA, 24AB or subsection 79(2) or (5) of this Act; or

(b) section 91.1 of the *Criminal Code*.

2 Subsection 4J(7)

Repeal the subsection, substitute:

(7) This section does not apply to an offence against:

(a) section 24AA or 24AB or subsection 79(2) or (5) of this Act; or

(b) section 80.1 or 91.1 of the *Criminal Code*.

Do you know what that is all about? If you look at the first repeal and the first substitution, it puts in subsection 24, which is treason. I think what it says is that you cannot have a summary hearing. But then when you go down to the next subsection repeal, which is repealing what has just passed, they do not have 24 in there. One interpretation of that is that you can have summary hearings of treason.

Mr Bernie—An incredible result. I do not think anybody would have intended that.

Senator COONEY—I am just wondering what that is all about. There must be some reason for that. But it says the same, doesn't it? Subsection 4J(7) repeals the subsection and then repeals it again as soon as you have made it.

Mr Bernie—I noticed this in relation to quite a few of the proposed pieces of legislation. As I understand it—and I will not speak for the drafter of the legislation—it may well be that certain pieces of legislation go forward before other pieces of legislation. I noted that provision, not in this but in the other legislation we will be talking about this afternoon.

CHAIR—Fortuitously, we will be able to clarify some of these points with witnesses from the Attorney-General's Department, who will be appearing later this morning. I am sure they are looking forward to it.

Senator COONEY—I think you have spoken to this but I would just like to take you through it again. Section 91.1(3)(a), information concerning the security or defence of another country, really does, within the context of the whole legislation, put quite restrictive boundaries on what we are able to talk about. We might not be able to meet in the corridor and talk about what we have discovered from the Country Information Service that the immigration department uses, and things like that.

Mr Murphy—What it seems to do is make it such a severe application, if I can put it that way, that anything that is in the control of the government cannot be discussed by someone or be released, because making it public is an offence, and that is so wide to interpret. Talking about it or publishing it could make it public, so a lot of acts of activists, where they might disclose something that has happened in another country that goes to the methods or operation of their security forces, would now become an offence under this section.

Senator COONEY—Say that you were doing an immigration matter and the department was relying on information from the Country Information Service and you said, 'I think this is wrong. This is what I have discovered and I want to put that in.' They might well say, 'Hold on. If you reveal that, you are in contravention of this legislation.'

Mr Murphy—That is exactly what it seems to be doing.

Senator COONEY—So you cannot really put a proper case for the refugee or even for a migrant.

Mr Murphy—That is right. I think one of the problems is that the act tries to make a blanket provision covering every other country's security and defence. As we have outlined, the way the public or the community would view it is that certain countries are enemies and certain countries are friends. What the act is trying to do is put the same provisions in place for every country. Whether it is a military dictatorship or a friendly foreign nation, it is an offence to disclose what they do.

Senator COONEY—What do you do about Kashmir? Who do you support, India or Pakistan? It is a bit like the cricket.

Mr Murphy—Yes. It is highly subjective, and it depends on the view of the government of the time, one presumes. It is very difficult to construct an offence where you cover those bases.

Senator COONEY—You have raised another point which I almost overlooked, which I would like to comment on, and that is 93.1:

A prosecution under this Part may be instituted only by, or with consent of, the Attorney-General or a person acting under the Attorney-General's direction.

Following on from what you have just said, whether a country is good or bad will depend pretty much on what the Attorney-General wants to say, because, if you say, 'This person ought to be prosecuted for what he has done in respect of country A,' the Attorney-General can say, 'No. I am not going to give you a fiat, but I will prosecute someone who has done something to prejudice country B.'

Mr Murphy—That is exactly what makes it subjective, and you will find that in certain cases, because of the publicity or the nature of the alleged offence, there will be much more public pressure to prosecute certain people. If someone is accused of leaking information that may, say, damage the interests of the United States, they may be much more likely to be prosecuted than someone that publishes information that causes damage to another nation. So it is subjective, and it really means that there will be a decision made on a political basis about who should be prosecuted and who should not, rather than—

Senator COONEY—So Zimbabwe is going to be treated differently to the United Kingdom?

Mr Murphy—I would imagine so, and that is the danger in it.

Senator COONEY—And the person who decides is the government, in effect, so that the whole of the espionage regime—the regime that is there to make sure espionage is punished—will be run by the government of the day, without any objective process at all.

Mr Murphy—That is right. There needs to be an objective process in place so that it is not interfered with by the political process, but there also needs to be a standard and clear defence for people who are acting in a capacity as an activist or in the public interest, because something may be in the public interest when it is raised but it may not be in the interest of the government of the day. That is how it becomes subjective. Giving the Attorney-General, or their delegate, the power to choose who is prosecuted makes it a political situation rather than something that is done independently and objectively and that deals with real offences of espionage.

CHAIR—If there are no further questions, I thank Mr Murphy and Mr Bernie for your assistance to the committee this morning, both for your submission and your provision of oral evidence in response to questions. Again, I apologise for the delay in commencing your appearance.

[11.00 a.m.]

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

CHAIR—Welcome. The Law Institute of Victoria has lodged a submission with the committee which is the committee's submission No. 4. Are there any amendments or alterations you wish to make to that submission?

Mr Rodan—Firstly, I did not partake in the drawing up of that submission. Secondly, in regard to the issue of mandatory sentencing, we do not wish to proceed with that matter. We note that the explanatory memorandum says it is a maximum sentence, so we do not wish to continue with that particular issue.

CHAIR—Thank you for clarifying that.

Mr Rodan—In regard to the issue of security and defence, we believe this is a large issue but it has probably already been addressed by the New South Wales Council for Civil Liberties and the Hon. Justice Dowd.

CHAIR—I indicated to witnesses this morning in my opening statement that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Firstly, I would like to apologise for the brief delay in coming to you this morning, Mr Rodan. We were detained with longer evidence from Justice Dowd. Secondly, I want to indicate to you those members of the committee who are present so that you are aware of who is on this side of the telephone link. Present today are Senator Ludwig, who is deputy chair of the committee, Senator Cooney, Senator Scullion and Senator Bolkus. Mr Rodan, I invite you to make a brief opening statement and at the conclusion of that we will go to questions from senators.

Mr Rodan—Thank you for making this telephone link available. One of the worries that I have, and the Law Institute has, relates to the extra powers being sought in peacetime. We are concerned about the extension of penalty in peacetime when the government states there is no terrorist threat to Australia. I realise that this does not relate so much to terrorism but relates to espionage, but there is a very strong link. In some ways the extension of the maximum penalty from seven years to 25 years appears to be a sledgehammer approach and we are concerned about that. We realise the parliament has a very onerous task of ceding more powers to organisations that are not necessarily accountable to parliament in all their actions, and this is the case in these particular amendments to this bill before the committee.

We are concerned about the definition of the word 'information' in this particular section where it says 'information of any kind, whether it is true or false'. I want to go further and talk about that in a few moments. We are also concerned about there being probably no protection for whistleblowers who disclose or wish to disclose misfeasance in government, especially in security. For instance, one always remembers the Sheraton break in. In that particular case, the disclosure of that kind of break-in would probably not be available and if a journalist wanted to disclose that kind of break-in then the journalist could suffer and be penalised for a number of years in prison. In situations where there is an opportunity for whistleblowers to do well-meaning and correct things, they have to have a public interest defence.

In respect of the hearings being in camera, I bring to your attention article 14 of the International Covenant on Civil and Political Rights, which states:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public—

except in juvenile matters. These are the guidelines that should be used if any guidelines are provided to the court; but no other guidelines should be provided to the court. We are concerned that, if the hearing is in camera, other issues may affect the court's discretion, so we want to ensure that the court would have total and full discretion without any kind of hindrance at all.

The other issue is that the penalty does not fit the crime. Say, for instance, you have a whistleblower psychiatrist who has just been to the Woomera Detention Centre and is very concerned about what he has seen—he is dismayed at alleged actions taken by the staff. Presuming that the detention of illegals relates to security—and I understand that the minister for immigration thinks that way and I imagine that the government could think that way—then the Woomera Detention Centre would come under the definition of security or defence. That would mean that the psychiatrist has this information and has an intention to prejudice Commonwealth security by disclosing these alleged actions by the staff. So the psychiatrist, who wants to make sure that what he saw is made public, tells the lawyers or tells the media. He then also goes and tells the UNHCR in Canberra, and so he has told a foreign organisation and he has told somebody else, and it is to the detriment of Commonwealth. He would therefore be subject to a penalty of up to 25 years. That is just one issue. You have got to be concerned about those matters. I think that is all I want to say right now. There are a number of other issues, which I am sure have been canvassed by the others, so I am ready for questions.

CHAIR—Thank you very much, Mr Rodan. I do understand that it can be difficult to do these things by telephone link when you have not had the opportunity to listen to other witnesses, so we are very grateful for your assistance.

Senator COONEY—I want to ask you about the issue of the discretion of the Attorney-General as to whether or not prosecutions are brought. It is in the present act already and it is continued in this one but, given the fact that things are becoming more and more political and that people who perhaps ought to be prosecuted are not and that those to whom some sympathy might be extended are prosecuted, have you got any thoughts on that? This is 93.1, and in the present act it is section 85.

Mr Rodan—I have not got 93.1 with me, unfortunately.

Senator COONEY—I hope I have got the right act.

Mr Rodan—I understand. I do not have 93.1 but I do have explanatory memorandum of 93.1 and what you are saying there is that—

Senator COONEY—It does not change the law greatly, but it might be an occasion for us to put in an amendment here.

Mr Rodan—If we are going to do that, then we could have an amendment on public interest grounds. Is that what you are after?

Senator LUDWIG—I understand that you do not actually have the provision before you, so it may be helpful if I paraphrase it to an extent. It relates to the institution of a prosecution. Currently under the Crimes Act, and what is also proposed under 93.1, a prosecution under

this part may be instituted only by, or with the consent of, the Attorney-General or a person acting under the Attorney-General's discretion. Justice Dowd this morning made some comments in relation to another bill but they are apposite here in that he indicated more broadly—not actually verbatim—that the ability of the Attorney-General to then delegate that power to a junior minister might not be appropriate in all circumstances. The Director of Public Prosecutions may be a better person to make those decisions for a prosecution. That would also mean changes to the current Crimes Act. I was wondering if you had a view about that.

Mr Rodan—I am sorry. I got lost in cyberspace—or telephone space. Can you just repeat what you said after you said that Justice Dowd said that power should go to the DPP?

Senator LUDWIG—He inferred that the power of the Attorney-General could be, if you look at the provision more closely, delegated to a junior minister to exercise, which may not in all the circumstances be appropriate. I recall that his view may be that the Director of Public Prosecutions may be perceived as more independent—although that is not to reflect on the current Attorney-General—and a safer place for an independent power to rest to decide on whether a prosecution should or should not be instituted.

Mr Rodan—Does that mean that the Director of Public Prosecutions, according to Justice Dowd, would be the only person that would prosecute or would it mean also the Attorney-General? What are you suggesting?

Senator LUDWIG—I do not know whether he went that far. He did indicate, though, that the Director of Public Prosecutions may be an appropriate person to decide these issues, rather than the Attorney-General. But I would not like to say that is what he said. Perhaps I can say that is my view, on an interim basis for the purposes of this morning.

Mr Rodan—That view is probably a very good view. I accept that view, because that means that any action taken would be an independent action. If the power were just with the DPP, we would know that it would be taken independently of politicians—I am sorry for saying this, but the politicians have got the executive power. It would be more transparent if the Director of Public Prosecutions had that power in total but, that being a security matter, I believe that the Attorney-General would still want to have a great say in whether that particular prosecution should take place. So it may be the case that the Attorney-General refers matters to the Director of Public Prosecutions, and then the Director of Public Prosecutions may want to discuss the matter further with the Attorney-General. The thing is that, if the Attorney-General does not do anything himself personally, then it must go directly to the DPP. I am thinking aloud about this. It must go directly to the DPP, because that would be the most transparent way to do it. It would be an independent legal officer instead of a person who has that direct, delegated power in the executive government. Yes, I accept what Justice Dowd said. Does that answer your question, Senator Cooney?

Senator COONEY—Yes. I know you do not have the bill there—

Mr Rodan—I have it in my head now.

Senator COONEY—You have got the bill in your head?

Mr Rodan—I have that part of the bill that Senator Ludwig has given to me in my head.

Senator COONEY—Following on from that than, 93.1(2) says that a person can be arrested and held for a 'reasonable time'—whatever that is; that is not defined—even though

the prosecution does not take place. Does the Law Institute of Victoria have any problems with that?

Mr Rodan—I do not think anyone should be detained without trial. You are basically saying that he or she can be remanded for an indefinite time.

Senator COONEY—A 'reasonable time'—whatever that is. So, yes, that is indefinite.

Mr Rodan—Yes, that is an indefinite time. I believe that is against our obligations as set down by the International Covenant on Civil and Political Rights. I do not think that should be available. I think if they want to remand someone, they must charge the person immediately—within, say, 48 hours. If they are going to remand someone, they must realise that the person has committed a chargeable offence. If they do not give the person bail and they remand them indefinitely, there must be a chargeable offence there at the beginning. That is how I see it.

CHAIR—Senator Cooney, it does say 'or on bail'.

Senator COONEY—Whether he is locked up or on bail, he is still in jeopardy of having his liberty affected—

CHAIR—Yes, if we do not have a definition of 'reasonable time'; that is correct.

Senator COONEY—I might be teasing out more than is in the provisions, but I want to get your views. With respect to espionage and similar activities, have you looked at these provisions in terms of what you might be able to say or do about the Country Information Service?

Mr Rodan—Do you mean DFAT information?

Senator COONEY—For immigration. I think you have some familiarity with immigration.

Mr Rodan—Yes. So, if someone from the Department of Foreign Affairs and Trade says—

Senator COONEY—Yes, that is right.

Mr Rodan—I am probably not answering your question here, but if someone from Foreign Affairs gets on his desk an article or a letter that says that Indonesia is going to invade East Timor tomorrow, and he thinks he must do something about that and he realises that it may prejudice a foreign country—in other words, Indonesia—or he may want to give an advantage to another country, which is East Timor, and he goes along to a member of parliament and says, 'This is the information,' and the member of parliament says, 'I must tell the media or someone immediately,' the public servant would have committed an offence there. That is not your country information issue, but he has committed the offence; and maybe the member of parliament has committed an offence because he might be likely to provide that information to somebody else.

Senator COONEY—But what I am interested in is where you are running a refugee application, where you depend solidly on the Country Information Service. Do you see any problems arising in that area?

Mr Rodan—I have not really looked at it from that point of view.

Senator COONEY—Can you take that on notice?

Mr Rodan—Yes, I will.

Senator LUDWIG—I want to clarify your view in relation to the inclusion of the protection for misfeasance in relation to a public interest defence. You say that included in the bill should be something to protect the public from what occurred in relation to the ASIS and Sheraton issue and that, in addition, there should be a public interest defence. Would you expand on that.

Mr Rodan—I think there has to be an opportunity for whistleblowers to obtain protection against poor administration of security issues, poor governance and poor policy implementation given by any of those security organisations listed in section 85ZL. This is a situation where those kinds of people would at present be caught by these particular provisions. I think I have already talked to you about the psychiatrist at Woomera, the public servant who finds out something that is happening with East Timor—or you could change it to somebody who says that water levels at Kirribati are so high they are going to disappear into the ocean within five years not 50 years and so they pass that information over to Greenpeace; of course, that is a foreign organisation and, that person having done that, he or she is subject to penalty or imprisonment.

The other part is that, if you have a situation where you have documents already exempted under freedom of information, for instance—under various acts—and you can get documents exempted and so forth, there is going to be a clash between that information that is not exempted and the information that would be exempted from disclosure under these provisions. It is going to be difficult for a whistleblower to determine which ones of those particular documents should or should not be exempt at all. I am finding it difficult to provide any further answer than that.

Senator LUDWIG—That is fine, thank you, Mr Roden.

CHAIR—Mr Roden, there are no further questions in this area. Thank you very much for assisting the committee with our deliberations this morning. I know that the optimal arrangement is not one that is done by telephone link, but we are very grateful for your submission and for your oral evidence this morning.

Mr Rodan—I appreciate that. I have found it rather difficult, because I generally like eye contact and I generally like to be sitting down there talking with the members. It is much easier that way, and sometimes it makes it difficult to concentrate when you are just on the phone. Thank you for asking me.

[11.28 a.m.]

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

FORD, Mr Peter Malcolm, First Assistant Secretary, Information and Security Law Division, Attorney-General's Department

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

CHAIR—I welcome officers of the Attorney-General's Department. Departmental officers should note that they will not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to the minister. Officers are also reminded of the government guidelines for official witnesses before parliamentary committees and related matters published by the Department of the Prime Minister and Cabinet. Mr Ford, I invite you to make a short opening statement. At the conclusion of that I will ask members of the committee to direct questions to you. You will not be asked your views on matters of policy or reasons for policy decisions.

Mr Ford—Thank you, Senator. This bill is not part of the counter-terrorism package; it was introduced into the parliament in September. The provisions which were included in that bill relating to official secrets were directed towards a re-enactment of provisions in the Crimes Act. Because of the concern that was given rise to by those provisions in the media, those provisions have been deleted to avoid any confusion because they are not essential to the espionage provisions. However, the legislation on official secrets is still on the agenda.

This review was a separate review, the purpose of which was to update and broaden espionage law taking account of the Wispelaere case and other matters—Wispelaere in the sense of ensuring that had the trial taken place in Australia were future such facts to arise then our law would be effective in enabling a prosecution, and also with regard to the nature of espionage now as compared with 40 years ago but within the framework of defence and security, noting that the vast majority of government information is not picked up in this legislation.

With respect to the previous witnesses, some of the applications of this legislation are not accurate. It is intended to apply in certain situations—for example, where a person is suspected of wanting to sell information to other countries, whether or not there is any particular damage to Australia.

Senator BOLKUS—It doesn't say that, does it?

Mr Ford—I think, Senator, it is said in it. The review was carried out with reference to the laws of the US, United Kingdom and Canada. We think that it does fit fairly squarely within the general concepts of counterespionage laws.

May I make a few comments on issues that arose this morning because it might assist the committee. The reference to methods is intended to cover such things as capabilities and so on of intelligence agencies. It is not intended to give any support or recognition of torture, which of course is against Australian law. Were any Australian government employee to countenance it in any way it would be a matter that could be reported to the Inspector-General of Intelligence and Security and appropriate action taken.

Senator COONEY—Are there any decisions on that, do you know?

CHAIR—Could we just let Mr Ford conclude his opening comments and then we will go to questions.

Mr Ford—Very briefly, just to finish off, the penalty of 25 years is one that has been arrived at in comparison with other penalties in relation to serious crime recognising that espionage can cause enormous damage. The soundings provision is really a re-enactment of an existing law as has been noted by senators. The policy on this is really with the Department of Defence rather than with Attorney-Generals. There are certain technical aspects in relation to these re-enactments where senators may feel concerned that there are elements of the offence missing. I can ask Mr Alderson to explain in answer to any questions you may have. Similar comments can be made in relation to the in camera provision which is a re-enactment and leaves it to the courts' discretion.

Finally on the issue of consent, it is important to state that this is a re-enactment of an existing provision. The initiative is with the DPP already. It is not a case of supplanting the DPP. This kind of provision is common in counter-terrorism legislation and in legislation relating to national security. The prosecution is only brought where the DPP is of the view that it should be brought. The DPP then writes to the Attorney-General who considers it from the point of view of national security. I can illustrate the point. There may be cases where although a prosecution may be thought to have a good chance of success to go ahead with the prosecution, it might cause damage to national security by alerting those to wish to do further damage to the nation. I conclude my remarks there. Thank you, Senator.

CHAIR—Thank you, Mr Ford. We already had a couple of questions raised by senators. Senator Bolkus, did you wish to pursue your first question.

Senator BOLKUS—You intended to cover situations where information was sold or for a benefit. Where is that reflected in the legislation?

Mr Ford—Section 91.1(2).

Senator BOLKUS—It is not in 91.1(1), that is an offence provision.

Mr Ford—Subsection 91.1(1) lists the offences a person could commit and one of the elements there is that the action must be seen to damage the security or defence of the Commonwealth.

Senator BOLKUS—So where does doing it for a benefit or a sale come in?

Mr Ford—In 91.1(2), a separate offence.

Senator BOLKUS—It is not in 91.1(1), so that does not have to be the motivating factor for 91.1(1).

Mr Ford—No.

Senator BOLKUS—Why did you tell us it was when it is not?

Mr Ford—I did not. I was directing my remarks to 91.1(2). I thought you asked a question about 91.1(1).

Senator BOLKUS—Where is it in 91.1(2)?

Mr Ford—'A person commits an offence if:—' and then you will see the words in paragraph (a). Then in paragraph (b), it says:

> (b) the person does so:
>
> (i) without lawful authority; and

(ii) intending to give an advantage to another country's security or defence ...

Senator BOLKUS—So where does a person have to be motivated by benefit?

Mr Ford—I did not intend to suggest that they had to be motivated by benefit.

Senator BOLKUS—I am sorry, go back and check the *Hansard*.

Mr Ford—If I said that, I apologise and withdraw it. I did not intend to make that point. I intended to give the example of the kind of things that need to be covered.

CHAIR—Mr Ford, I think what you said was that its application was meant to go to persons suspected of wanting to do something like sell information to another country, to paraphrase without the benefit of the *Hansard*. I think the point that Senator Bolkus is making is that, on the face of the legislation, that is not clear. Is that an accurate reflection?

Senator BOLKUS—On the face of the legislation, it is clear that that is not the sole motivating factor—in fact, you do not have to have that motivating factor. Innocent transmission of information can be covered; it does not have to be a malevolent intention.

Mr Ford—I was trying to give an example of the kind of situation that the legislation is intended to cover.

Senator BOLKUS—Sure, but our concern is what the legislation actually says. We are very nervous about giving a tick to what, for you, may be an unintended consequence.

Mr Ford—I understand.

Senator BOLKUS—It would help our discussions if, for instance, you actually reflected what was in the legislation rather than going to the best possible scenario for your side of the argument with respect to this, acknowledging that that might be one of the instances caught but the legislation is much broader than that. For instance, to move to another one, you said the in camera provisions were a re-enactment of previous provisions. Are they a re-enactment in their totality or has there been some qualification made to them?

Mr Ford—It is a re-enactment in its totality.

Senator BOLKUS—No qualifications imposed?

Mr Ford—Not as far as I am aware.

Senator BOLKUS—No broadening?

Ms Lowe—It is intended to be a substantive re-enactment.

Senator BOLKUS—Yes, but my understanding is that there are some differences. I cannot put my finger on them right now, but we will have a look at those later on. That is another example of the concern I have. We really need to focus on the actual words and what this legislation does rather than on one interpretation of it, and not a full interpretation. I will stop for now and come back later.

Senator LUDWIG—I want to take you to the word 'prejudice'. In your opening remarks you used the word 'damage', but in 91.1(1)(b) the word used there is 'prejudice'. Do you have a view on what 'prejudice' means? It is not defined, as I understand it, in this division or anywhere else in the act.

Mr Ford—It is a word that is used in the existing provision, and it was thought by the drafter better to use that language than to change it, bearing in mind that we are not seeking to narrow the existing provision in any way but in fact to broaden it.

Senator LUDWIG—In relation to the definition of 'information' in 90.1, there is an 'and' between (a) and (b) which is also in the previous Crimes Act. Is that read as an 'or' or is it a method of drafting that has carried through?

Mr Alderson—I think the word 'includes' before the colon is the key there. It means it has the same effect as 'or'.

Senator LUDWIG—Similarly, where you say in the soundings provision that it is a re-enactment, do you say that it is a re-enactment of the existing provision, similar to the hearing in camera, or do you say that substantively it is the same, or do you say that it has changed?

Mr Ford—It is intended to not change the meaning.

Senator LUDWIG—Was the reversal of onus of proof in the previous act?

Mr Alderson—It was, and I can possibly explain that. Whenever you translate a provision drafted a number of years ago, there is always a tension between wanting to keep the words the same so that there is no doubt you have kept it the same and fitting in with contemporary drafting styles. With regard to the reversal of onus of proof, since these old provisions were enacted, new provisions dealing with the way defences work have been put in the Criminal Code and the wording has been modernised. If you go back to the Crimes Act provision on the statute book at the moment, section 83(2) says that soundings shall be deemed to be unlawful unless they were made under government authority or for a navigational purpose—in effect. That word 'unless', both at common law and under the Crimes Act, is taken to create a defence. That is by virtue of common law principles and section 15D of the Crimes Act, and then, in particular, subsection (3) of the Crimes Act provision says:

> In any prosecution under this section, proof that any soundings were not unlawfully taken shall lie upon the defendant.

That provides that the defendant has to prove those defences in the previous subsection. So the combination of those words has the same effect as the new provision.

CHAIR—So you just read to us the current provision?

Mr Alderson—Yes.

Senator LUDWIG—We have heard a view on 'or for any purpose in which the vessel from which they were taken was lawfully engaged', which is in subsection (2). Do you have a view about whether or not that would capture innocent vessels that may be using soundings for oceanographic or other purposes without state government approval or within the 12-mile limit that may be treasure hunting, for example? That activity, although obviously frowned upon, may not be lawful either and should be prosecuted. It is a different offence from this one, but they may inadvertently fall into this area as well.

Mr Ford—Senator, I think we should take that on notice. We will go to Defence and give you an appropriate answer.

Senator LUDWIG—All right.

Senator SCULLION—Mr Ford, further to Senator Ludwig's last question, perhaps I can relate a more modern circumstance that may make someone unlawful or otherwise. In the vernacular of the Navigation Act of 1912—and also in section 83 of the Crimes Act 1914 that I understand was the source of this new legislation—'soundings' refers to the distance between the hard substrate and the surface of the sea. In the more modern vernacular, 'soundings' refers to a number of soundings. It can refer to identifying and exploring

subsurface objects and treasures like oil and petroleum and geological information as well as to other soundings that usually relate to exploration for fish resources and those sorts of things. There are a number of regulations that I am aware of. For example, if we give somebody the capacity to explore for oil within Australia's Commonwealth waters, we can specifically provide that that exploration is just that and no more. So when people unlawfully put on their vessels 250-megahertz sounders with recording devices that are not going to give them any information about what they actually came there for but in fact will provide them with quite a vast amount of information on fish resources, the Commonwealth take a fairly dim view of that. I would have thought that this sort of potential espionage is not the sort of terrorist espionage that we are talking about but rather, if you like, industrial espionage. That is what I have assumed this comes from. Perhaps you could explore that.

My principal concern is that, if we are going to bring forward legislation that we would seem to give support to but that has absolutely no chance of a prosecution—I would have thought—perhaps we should just simply set the legislation aside. As a defence, section 83 of the Crimes Act 1914 states:

... or were reasonably necessary for the navigation of a vessel ...

Since the Navigation Act of 1912, we have come some way, and certainly AMSA and the international Association of Lighthouse Keepers have deemed that it is now a requirement for the safety of crews and ships that lie within Commonwealth waters to maintain an ongoing record of the sounding of that ship at all times—and there are a number of other issues associated with the distance from shore and the distance from other navigational objects and ships. It is a legal document that can be called upon in court.

Effectively, if we go down this line, it can be said that, if you have to take a sounding, you have to be in a ship. If you are in a ship in Commonwealth waters, then you are obliged to keep a record of those soundings and to provide those records to a number of jurisdictions, including international jurisdictions. There just seems to be a whole range of inconsistent jurisdictional requirements, and that would need some more exploration before we could give support to it in its current form.

Mr Ford—Thank you, Senator, I am happy to take that on notice and provide appropriate information to the committee.

CHAIR—Thank you very much, Mr Ford.

Senator LUDWIG—Going to section 93.1 on the institution of prosecution, I understand your explanation in relation to the Attorney-General and the DPP. However, the person can be remanded in custody or, effectively, on bail which shall not be continued within a reasonable time, in (3); but in 93.1(2)(b) a person can be remanded in custody or on bail, and the period of custody or bail in (3) can continue until discharged but it is not to be continued beyond a 'reasonable time'. What is a reasonable time, and who considers that? And is that appealable by the person in custody?

CHAIR—And are we to assume that 'or on bail' means 'or released on bail'?

Senator LUDWIG—Yes; because you can obviously still be in custody.

Mr Alderson—I can provide some information. Just to give you some background before answering your specific question, provisions of this kind are generally always coupled with consent to prosecute provisions. The rationale is that, to remove any doubt, before you can arrest the person you would have to obtain the consent of the Attorney—because you may in

fact need to arrest them immediately, once you have evidence of the offence. But the provision does not create any independent power to detain. If police are to detain a person for this offence, they have to make use of the general arrest and detention provisions in the Crimes Act, which allow in a normal situation four hours, in the first instance, which can be extended by a magistrate. So these provisions do not override that general framework. A 'reasonable time' would be, in essence, determined by a court. You would have a normal date when the court said that the matter was ready to be brought forward in a hearing in a court. If the prosecution attempted to say, 'No, we are not in a position to do that because we are waiting on the Attorney's consent,' then the court would be able essentially to terminate the proceedings.

Senator LUDWIG—Is that a provision that is reflected in other provisions of the Crimes Act in similar terms?

Mr Alderson—Yes, and in other acts: the Crimes at Sea Act is one that I am familiar with that has a similar regime.

Senator LUDWIG—Do you have an example of that?

Mr Alderson—We could certainly provide you with examples, yes.

Senator LUDWIG—I would be happy for you to take that on notice and provide a couple of examples from both the Crimes Act and other pieces of legislation.

Mr Alderson—Yes.

Ms Lowe—One example I can cite is the Crimes (Foreign Incursions and Recruitment) Act, which contains almost exactly the same provision in relation to the Attorney-General's consent. I have a copy of that available, if you would like to see it.

Senator LUDWIG—That would be nice, thank you. In respect of a matter raised by the Law Institute of Victoria—and I am not sure whether you can assist me with this—was any consideration given when you were developing the Criminal Code Amendment (Espionage and Related Offences) Bill to protection for misfeasance or whistleblower protection or public interest defence provisions to be included in it? We have heard from the Law Institute of Victoria about the ASIS issue that occurred at the Sheraton some time ago, about the sorts of related problems that might occur and, of course, about the difficulty that whistleblowers may face and about whether or not a public interest defence should be included.

Mr Ford—No concern was given to that issue, the reason being that this review really focused pretty tightly on the effectiveness of espionage provisions themselves. Those issues that the Victorian Law Institute raised were really seen as part of the general whistleblowing and official secrets regime, to which I made reference earlier.

CHAIR—Mr Alderson, did you answer the question in relation to 'released on bail', or did I not hear that?

Mr Alderson—I am sorry, I was addressing the question of whether there is an aspect of—

CHAIR—Whether, in 93.1(2)(b), 'such person may be remanded in custody or on bail' means 'or released on bail'—or is that only taking remand into account?

Mr Alderson—No, that is allowing for release on bail; that provision encompasses release on bail.

Senator BOLKUS—Going to 91.1, 91.1(1), 91.1(2) and so on, it appears that in 91.1(1) there is this prerequisite that the person take action intending to prejudice the

Commonwealth's security or defence. That does not appear in subsection (2), nor does it appear in subsection (4), but it appears in subsection (3). Is this a deliberate inconsistency?

Mr Ford—It is deliberate, yes.

Senator BOLKUS—What was the policy reason behind that?

Mr Ford—The policy is to broaden the scope of 'espionage' to cover situations where there may be difficulties in proving that the person intended to damage Australia's security or defence but nevertheless wished to engage in conduct which is regarded as espionage—such as selling classified information to another country which may or may not have reasonably friendly relations with Australia.

Senator BOLKUS—So it is to broaden the net?

Mr Ford—To broaden the scope of the espionage offence, yes.

Senator BOLKUS—Subsection (2) then is seen as an extension of subsection (1) in some respects? Are we talking about the same form of activity: communicating, making available?

Mr Ford—Yes, it would be a separate offence in the sense that, were a person to be charged under it, no reference would be made in the charge to 91.1(1) but only to 91.1(2).

Senator BOLKUS—So with 91.1(1) there needs to be an intention of prejudice to Commonwealth security; with 91.1(2) you do not need to have any intention to do that at all, just so long as you give advantage to another country's security or defence—

Mr Ford—That is right.

Senator BOLKUS—which is also, I suppose, implicit in 91.1(1). When we say 'prejudice to the Commonwealth's security', we do anticipate the Commonwealth's security encompassing its relationships with allied partners. Do they have to be triggered off by any act to be brought in within the ambit of 91.1(b), or is it the mere fact that we do have a security relationship with, for instance, the US or with Commonwealth countries? Is that sufficient?

Mr Ford—I am not sure that I understand the question. Correct me if I am wrong, but if it is something relating to the relationship with a country such as the United States then that may come within the definition of 'security' or 'defence', yes.

Senator BOLKUS—It does?

Mr Ford—Certain information may and certain information may not. For example, information that might be shared by one country with Australia but that is regarded by that country as top secret would be intended to be covered by these provisions.

Senator BOLKUS—But, in the aftermath of September 11, we invoked article 5. From then on, I would imagine that any prejudice to the US as a nation would have been encompassed by the fact that we took that action.

Mr Ford—You would need to track it through the provisions. For example, if your question relates to classified US information relevant to the agreement with Australia, then the relevant provision would be subsection (4).

Senator BOLKUS—I suppose my argument is that it does not have to be so constrained in its definition. With information concerning the Commonwealth's security or defence, the fact that we invoked article 5 does not give a broader range of activities within the definition, anticipating this legislation. In essence, I suppose I am saying that those treaties, once

invoked, would ensure that the Commonwealth's security or defence has a broader definition than just information held by Australia.

Mr Ford—I do not think that is so. It may be a relevant factor in any particular case, I suppose.

Senator BOLKUS—Why would it not be so? We are talking about the Commonwealth's security. The government takes a decision that says that we are invoking article 5, that an attack on the US as an allied partner is an attack on the Western alliance and that it is fundamental to our security.

Mr Ford—Yes, perhaps; but the information still needs to relate. The fundamental point—I am just not sure—

Senator BOLKUS—Going back to that point about the information needing to relate: needing to relate to what? What does the legislation state?

Mr Ford—In subsection (4) paragraph (ii), it needs to relate to the security or defence of the other country, and so it would need to relate to the security or defence of the United States.

Senator BOLKUS—Subsection (i)?

Mr Ford—Subsection (i), information concerning Australia's security or defence? Yes.

Senator BOLKUS—It would come in under that, wouldn't it? It would fall within that?

Mr Ford—It could, yes.

Senator BOLKUS—Do we have any similar relationships with the UK? I am sure we do—and probably under the same mechanism.

Mr Ford—The arrangements that we have with other countries I do not think I am at liberty to go into the detail of.

Senator BOLKUS—Some of them are public, though.

Mr Ford—Some are public, yes; I am just not sure what is public and what is not.

Senator BOLKUS—From recollection I thought the UK was also party to the same multilateral arrangement. There I am getting to the point of people who have close affiliation with the IRA in this country. They would be covered, wouldn't they?

Mr Ford—If you took that as an example, if such information were in the possession or control of the Commonwealth and were regarded by the UK as highly classified—

Senator BOLKUS—Does it have to be in the possession or control of the Commonwealth? Under 91.1 it does not, does it?

Mr Ford—In that case, though, the relevant paragraph would be subparagraph (ii) rather than (i).

Senator BOLKUS—But why is (1)(i) not relevant?

Mr Ford—Because it would not necessarily have a bearing on the Commonwealth's security or defence. That would have to be shown by the prosecution, if that line were to be taken. But that would be quite an uphill job.

Senator BOLKUS—But if it is integral to our relationship with the UK, though, it would be.

Mr Ford—I would think that there would be a number of obstacles in any prosecution establishing that connection merely on that basis.

Senator BOLKUS—But it could be argued, I would imagine, under 91.1(1)(a)(i). Going back to one of your previous answers, if it would be in respect of the USA, why wouldn't it be in respect of the UK?

Mr Ford—This is the difficulty in answering some of these questions in the absence of specific examples. Now that it is clearer with the example you gave of the IRA, I myself do not believe that that would come under subparagraph (i); I believe it would come under subparagraph (ii).

Senator BOLKUS—Going to the example that was given to us by the New South Wales civil liberties group in respect of Burma, would you say that their example is not accurate?

Mr Ford—I was not in the room for all of that; I am just trying to think my way back into what they did say.

Senator BOLKUS—They gave us the example of a Sydney based pro-democracy group obtaining information from Burma about the practices of the security agencies in Burma. There is no need for an intention to damage the Commonwealth because that is not a prerequisite in a couple of these offences.

Mr Ford—Unless I have missed something, that example does not include the element of information in the possession or control of the Commonwealth.

Senator BOLKUS—Does that information have to be?

Mr Ford—Under subparagraph (ii)—and it is my firm view that subparagraph (ii) would be the provision that would need to be established in the case of another country.

CHAIR—The example also included a suggestion that, if the information was being briefed, for example, to the foreign minister in the normal course of his or her duties at the same time as it was being passed on in the example already given to you by Senator Bolkus—and referred to by the Council of Civil Liberties—would such an individual find themselves on the receiving end of 25 years imprisonment?

Mr Ford—The answer is no. You have to go through the various elements in subparagraph (b) as well, of course. I do recall some reference being made to the 'without lawful authority' provision, and I recall criticism being made of that. It is quite an important provision.

CHAIR—The lawful authority provision?

Mr Ford—Yes.

CHAIR—It would be helpful to the committee if you would have a look at the concerns that were raised in relation to that and provide us with your response.

Mr Ford—Yes, we will do that.

CHAIR—I am sorry, Senator Bolkus, I did not mean to intervene.

Senator BOLKUS—Going back to the earlier point about the definition of 'security or defence' including 'methods', you said torture would be excluded because we have treaty obligations. How are those treaty obligations protected in this legislation?

Mr Ford—I was intending to refer to our own law—for example the Crimes (Torture) Act, which gives effect to the convention on torture. It is easy to read any piece of legislation in isolation and say that does not cover one particular thing and therefore that is permitted. That

is an invalid way of reading the legislation. You have to have regard to other requirements, of course, as well as that piece of legislation.

Senator BOLKUS—That is why I am asking you how that is protected by this legislation. My understanding is that this legislation, being passed at a later date than all the other legislation, would override pre-existing legislation. Where, for instance, do we allow, through this legislation, transmission of information on forms of torture that might be used?

Mr Ford—It would be quite wrong to read this legislation as repealing or overruling in any way the crimes torture legislation, because that is specifically on the crime of torture.

Senator BOLKUS—But where there is a direct inconsistency any judge in the country will overrule it.

Mr Ford—My answer to you, Senator, is that there is no direct inconsistency and that this is dealing with another topic. I think that is clear from the definition of security, where the 'methods' there is part of that definition—'operations, capabilities and technologies of, and methods and sources used by'. I am quoting from the definition of 'security or defence' in 90.1(1).

Senator BOLKUS—My point is still relevant. I just do not know how, by using that broad definition of methods and sources, you actually provide any defence for anyone who might want to expose torture methods and sources.

Ms Lowe—If I can use your example to illustrate how this would work, the legislation is not intended to provide any kind of coverage or any kind of defence for those kind of activities you have suggested—using torture, for example, as an intelligence gathering method. If a public servant or an intelligence officer had concerns that a service was, for example, using torture as a method of gathering intelligence and wanted to disclose that kind of information, they obviously would not be doing so for the purpose of intending to prejudice the security or defence of the Commonwealth so they would not necessarily be captured under the espionage provisions. But there are mechanisms in place for public servants, particularly members of the intelligence and security agencies, to make representations to the Inspector-General of Intelligence and Security.

Senator BOLKUS—Sure.

Ms Lowe—If their purpose was purely to reveal the fact that a security service was acting in contravention of the criminal law or their own statute, that would be a mechanism by which they could make representations. It would not be inconsistent with the espionage provisions.

Senator BOLKUS—That presumes we have not read 91.1(2), which does not require 'intending to prejudice the Commonwealth security'.

Ms Lowe—There is still that intention, though, to give an advantage.

Senator BOLKUS—An intention to do what? An intention to give an advantage to another country's security or defence? A country that exercises a form of torture is being protected against some another country that might be wanting to put pressure on it in respect to torture. You do not have to have that intention to prejudice the Commonwealth security for half the offences in 91.

Ms Lowe—No. That is quite correct.

Senator BOLKUS—As the consequence, I still cannot see where we protect anyone who wants to expose torture.

Ms Lowe—I actually interpreted your question as meaning torture committed by Australian agencies, I guess. In terms of torture committed by other agencies—

Senator BOLKUS—Only Senate committees do that!

Ms Lowe—I will not comment on that one.

Senator BOLKUS—It is a point that I am not satisfied about and we can pursue it at a different time, but if you can come back to us with any further information, that would be good.

Mr Ford—We will take it on notice.

Senator BOLKUS—That is all.

CHAIR—Thank you, Senator Bolkus. There has been a suggestion in evidence given this morning that the bill would be advantaged by the conclusion of a whistleblower's defence. What would be the effect of the bill with the inclusion of a defence like that?

Mr Ford—I think it would open up the whole issue of protection of official information that was part of the bill that was introduced in September. There are some other difficult issues that need to be worked through in relation to including a whistleblower's defence, so I think it would complicate this bill quite significantly, and I do not think it would be consistent with the Attorney-General's decision to excise those matters from the bill following the publicity that was given to the first bill.

CHAIR—I understand the division between this bill and the excision of the previous provisions but there has been quite considerable strength in the submissions provided today on that issue, both from the ICJ and the Council for Civil Liberties, and I think it would be helpful if you would have a look at those and see what your response is to that. In both those submissions, and in the oral evidence given by Mr Justice Dowd, there was a series of specific examples—some of which have been adverted to in this discussion, primarily by Senator Bolkus—where there were concerns raised about Australian citizens falling within the provisions of this bill in perhaps a way that you have indicated is not supposed to be the case. I think it would also be helpful if you could respond to those examples given to us in written submissions and evidence.

In the Attorney-General's second reading speech, he made the statement that:

... the proposed offences are consistent with equivalent provisions in the United States, the United Kingdom, New Zealand and Canada.

This committee does not have any information available to us which indicates that that is the case. If the department does, we would be very grateful to receive what you can give us.

Mr Ford—Yes. We can take all those issues on notice.

Senator BOLKUS—A couple of submissions have identified discrepancies between this legislation and the UK legislation. We would like your comment on that. We can get those pointed out to you.

Mr Ford—Certainly.

Senator COONEY—I am just a bit worried—I do not think this legislation would affect it, but it may—about the Country Information Service within the context of how it is used by the immigration department. I just want your comments on that. Looking, for example, at 91.1(4), you get up to 25 years, if you 'obtain a copy of a record of information concerning the security or defence of another country, being information that is, or has been, in the

possession or control of the Commonwealth'. You get that from the Country Information Service, and you might even do that unlawfully. That is passed on through another country for checking as to whether it is right or wrong, and you come pretty close to being within the provisions of 91.1(4), don't you?

You might say, 'Look, I didn't intend to give advantage to another country's security or defence.' But, even if you say, 'Look, we've sent this over to confirm whether you do use torture'—and some people use torture as an instrument of state—you will get some problems. Have you thought about that? If you are running a case, trying to prove that somebody is a refugee, and the tribunal or the department is using the Country Information Service to run your client out of the country, it is a bit of a worry, isn't it, if you want to put a full-scale defence to the issue?

Mr Ford—This is something that we obviously should take on notice in the context of the other questions we have taken on notice. Just so that I make sure that we do understand the concern, could I just ask is this a situation where such information is passed on without lawful authority?

Senator COONEY—The problem is that people get up and say, 'I did not do this in the context of doing it unlawfully,' but it could be argued that they did. It is not what happens, but you could have somebody who is concerned about having his or her client or constituent sent back to some war-torn country: whether or not that happens depends a lot on the Country Information Service, which is within the control and possession of the Commonwealth. You are taking information out of that and sending it over there. That might be to the advantage of the other country—which might not have been your intention but, if somebody were to allege that it was, then you would be in some difficulty. It is the potential problem. Can you follow this?

Say that you had an overenthusiastic DPP or Attorney-General who says, 'Right, I am going to hit you with this.' You might get out of the problem in the end because you might say, 'Look, I didn't take it out of the Country Information Service with any intention of helping the other country. I was just sending it over there to check whether this was in fact so.' But it could be alleged that you were. Can you follow that? The trouble with a lot of this stuff is that the Commonwealth has got tons and tons of money to prosecute but a lot of people do not have tons and tons of money to defend themselves. In particular, with the way in which things are happening in the immigration department with the talk about refugees, it could become a problem.

Mr Ford—That does clarify it, Senator. We will take that on notice.

Senator COONEY—You have been asked about 93.1. I think this is almost a rewrite of the present situation. But what has now changed, since the provision in the Crimes Act was put in there, is that the Attorney-General himself has now declared in a different context—that of whether or not he should be standing up for judges—'Look, you have to understand that I am part of a cabinet, and that gives me a political obligation to go along with what cabinet does.' So it well may have been that, when what is equivalent to 93.1 was originally put into the act, it was seen that the Attorney-General would stand above politics and make a decision accordingly. But now that declaration has been made, there might be a need to revisit that. If the Attorney-General is going to act according to cabinet in a political context—and you cannot comment on whether that is so or not, but it is an issue for us to look at—can we now have a provision where the Attorney-General will decide who will or will not be prosecuted?

You will say, 'The Attorney-General only does that after the DPP has seen whether there is a prima facie case.' But that is not in the legislation. The legislation specifically talks about the Attorney-General, or a person acting under the Attorney-General's direction. That could be anyone, as the legislation reads. You will say—and I agree with this—that there has got to be some sort of commonsense brought to this, and we have got to look at this legislation on the basis that you cannot be so prescriptive that the legislation becomes like a judge. On the other hand, you have got to look at the context in which all this is done. There have been some changes. There has also been a greater concentration on the idea of spying, terrorism and what have you than there was previously. And there has been a change in the declared position of the Attorney-General, I think; and that might make a difference.

Mr Alderson—Senator Cooney, I think I can give some information that may assist you in your consideration of this issue. In terms of the role of the consent to prosecute in this kind of case, you could see it almost as equivalent to the fact that an assault or a theft charge will not be prosecuted if the victim chooses not to press the complaint, if they say they do not want charges taken forward. The rationale for consent to prosecute, for this kind of offence, is not the seriousness of the offence. For example, murder is an extremely serious offence but there is not an Attorney-General consent to prosecute provision. At least part of the rationale is that offences like treason and espionage have a special quality, because they are offences not against an individual but against the state. So the Attorney-General, in a sense, is properly acting on behalf of the government and on behalf of the nation in saying whether a prosecution should go forward.

The second phase, though, is that the decision of the DPP as to whether to prosecute is entirely unimpaired. The independence in the role of the DPP is legislatively enshrined in the Director of Public Prosecutions Act 1983. That full process of deciding whether a prosecution is appropriate and in the public interest still occurs in the same way that if a victim of an assault says, 'Yes, I want to press charges,' there is still an independent decision about whether it is in the public interest for it to go forward. That is unimpaired by this legislation. I have had personal experience in working for the government on consent to prosecute decisions, and when the matter went on to the DPP for them to make their final decision as to whether to take it forward, I, as an officer of the department advising the Attorney-General, was in no way consulted. It was not as though they felt that because the Attorney-General's decision was part of the process it was fettering their independent role. They just went ahead and made the kind of assessment that they normally make.

Senator COONEY—A couple of things about that: crimes are prosecuted even though the victim might not consent, because the idea of criminal law is that this is an insult to the community. So prosecutions are taken, even though a victim might not want them to be. I follow what you say; nevertheless it remains that the Attorney-General—and this is traditional; I understand that—can say either yea or nay to a prosecution. Where that is made by somebody who stands above the political system, I would understand that. But for someone who declares, 'The function of the Attorney-General is to go along with the political climate in cabinet,' I think that changes a situation to some extent. You might want to take that on notice and have a look at that.

Mr Ford—We will do that, Senator.

Senator COONEY—The Attorney might well say, 'No, the senator has taken that out of context,' but that is as it appears now. It is a matter to give you some concern. It follows on from the concern that has already been expressed about taking somebody into custody and

what have you. It just seems a very capricious way. It is already in the act, and I understand that, but this might be time for us to look at it and perhaps change the approach we take in all this. On schedule 2 'Consequential amendments', you heard me ask a question. I have looked at the commencement provisions in schedule 2, but could you explain to me why you have 1 and 2 there? What is that all about? Why in schedule 2, part 1, item 1 is (24) included but it is not included in schedule 2, part 1, item 2—(24) being the issue of treason? Just on the face of it, it looks as if you could do treason by summary hearing.

Mr Alderson—Again I hope I can assist on this. By way of background, what subsection 4J(7) says, in effect, is that there is a limited number of offences that you cannot prosecute summarily. Basically subsection 4J says that if the defendant is happy to go without a jury then they can go without a jury, but (7) then says that certain offences must go on indictment. Two of those are espionage and treason. With having bills before parliament that modernise and move both the espionage and treason offences, there is just this technical problem of not knowing which might be enacted first. So both the espionage and the treason provisions have alternatives, depending on which goes first or second. The end result will be that whichever goes in second will include in subsection 4J(7) a provision reference to both the new espionage provision and the new treason provision, so that rule about not being able to prosecute summarily will be maintained.

Senator COONEY—So are we going to drop section 24 as the section that covers treason?

Mr Alderson—That is right.

Senator COONEY—What would that then become—80.1 or 91.1 or what?

Mr Alderson—The section 24 treason offence becomes section 80.1 of the Criminal Code.

Senator COONEY—What is the idea of putting 80.1 in the Criminal Code and leaving the rest which are comparable offences in the Crimes Act? Is there any thought behind that?

Mr Alderson—Always when you are modernising legislation—and there is this ongoing process, of course, of moving serious Commonwealth offences into the Criminal Code—there is a question of prioritising. The treason offence is able to operate separately and it would be fair to say it is probably envisaged that the other provisions will go into the Criminal Code at a future date but this is just where the line has been drawn in this ongoing process at the moment.

Senator LUDWIG—In relation to something in the order of civil disobedience or a peaceful sit-in at a defence facility, could they be charged with espionage under these new provisions?

Mr Ford—No.

Senator LUDWIG—Why do you say that?

Mr Ford—I say that because I do not see how a peaceful sit-in would come within any of the provisions of section 91.1.

Senator LUDWIG—They were under 78(1)(c)?

Ms Lowe—That is right. The reference to 'prohibited place' has now been removed from the espionage provisions so it would not normally be captured under the new espionage provisions.

Senator LUDWIG—Are you saying it is now captured under the new provisions or there is no longer an offence?

Ms Lowe—No. I do not think there is any longer a question about whether it would be captured under the new provisions now that we have removed that 'prohibited place' reference.

Senator LUDWIG—All right. As I understand it, the explanatory memorandum to the bill comments that this is in respect of the Attorney-General's consent. As I understand the provision, the Attorney-General consents to the prosecution but you can be remanded in custody or on bail—effectively arrested—without the Attorney-General's consent. The explanatory memorandum details the reasoning why consent is required by the Attorney-General to launch a prosecution—as I understand it, without reading it to you—that is, if the matter is sensitive for reasons of national security. But hasn't the horse bolted if they have already arrested the person? Doesn't the reason become a little bit out of date if you, once you have arrested someone and charged them, then decide in that instance whether or not you should consent to the prosecution if it is about, as the reason is given, a national security issue?

Mr Ford—Yes.

Senator LUDWIG—The sensitivity of it, I suspect, is in the chained and manacled approach being taken as they get dragged off to the police station, rather than what prosecution may follow.

Mr Ford—I understand, Senator. I did refer to that in pretty much that language myself. There may be other reasons though, in particular cases, for the Attorney's consent. Sometimes it may be the protection of documents which would need to be produced in court in order to prove the case. If the damage to national security is going to be too great by producing those documents, then the prosecution will be abandoned.

Senator COONEY—The more sensitive the document, the less likely you are to be prosecuted.

Mr Ford—There is that concern and that is a real concern with our legislation, one which we are also conscious of in surveying the law in the UK, Canada and the US.

Senator LUDWIG—I am wondering if you had an opportunity to hear Mr Justice Dowd in respect of the definition of 'security' being a 'means' that includes, rather than being an exhaustive list. Do you have a view about whether or not that new definition of 'security' adopts a very broad approach and includes the common law definition of security, which means it is proposed to have a very broad application? Whereas, paraphrasing Mr Justice Dowd, his view was that it should be more restrictive in the sense of being an exhaustive list. I think that is a fair paraphrasing of his view.

Mr Ford—It is intended to be broader than the existing provision which refers to safety or defence, and I think a court would have regard to the legislative history of the provisions. It is certainly intended, as that makes clear, to cover those matters there. If the word 'means' were used there, the concern would be that we should capture everything that might need to be foreseen in any future case.

Senator LUDWIG—So you would agree that the *Oxford Dictionary* becomes the decider of what 'security' means?

Mr Ford—I think dictionary definitions are taken into account by courts but are not necessarily conclusive.

Senator LUDWIG—You don't think that is too broad?

Mr Ford—I do not have it in front of me—

Senator LUDWIG—That is the point though, isn't it? You do not know the length and breadth of it.

Mr Ford—Well, if your point though is about dictionary definitions, my answer is that dictionary definitions are not necessarily adopted by courts as the final word.

Senator COONEY—Are there are no decisions in Australia on this that we can look at?

Mr Ford—No, I do not think so.

Senator COONEY—What is the thinking behind the penalties going up in a sort of inflationary way from seven years to 25? Is there any reason for that?

Mr Ford—Yes, the most serious cases of espionage do great damage to a country's security interests, and when regard is had to penalties for other offences, such as people-smuggling and so on, 25 years is regarded as the appropriate maximum penalty for this kind of offence.

Senator COONEY—I am not sure whether you will be able to answer this because it might be a matter of policy. You have anticipated the question I am going to ask. There seems to be a general uplift in penalties in the crimes coming through. For example, the people-smuggling legislation was passed in a situation where there was a lot of public outrage and public concern about it. That legislation is brought in, these high penalties are given and then they are used as a precedent—it is the old ratchet effect that you have heard about so much over the years. Is there a general policy to increase penalties within the criminal provisions of the Commonwealth?

Mr Ford—No, Senator. I have only been concerned with this particular policy in relation to espionage. We did look at the penalties in comparable legislation: in the United States the maximum penalty is death and in the UK, Canada and New Zealand it is 14 years. But in each of those cases there are other factors that need to be taken into account, such as the age of the legislation, the fact that some of it is under review and so on.

Senator LUDWIG—On page 5 of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 *Bills Digest*, there is a controversy raised in the second paragraph about 91.1(1) and 91.1(2). Could you have a look at that and resolve that for me? I am happy for you to take that on notice.

Mr Ford—We will take it on notice.

CHAIR—I do not think there are any further questions on this piece of legislation. Thank you, Mr Alderson, Mr Ford and Ms Lowe. You have taken a number of questions on notice and we are grateful for that. As you know, we have an extremely tight time frame in which to report and the committee have, as does the department I am sure, an extremely heavy work-load in regard to a range of pieces of legislation at the moment so we would appreciate your assistance in responding to those questions on notice as soon as possible. I want to thank all of the witnesses who have given evidence to the committee today, and I declare this meeting of the Senate Legal and Constitutional Legislation Committee closed.

Committee adjourned at 12.32 p.m.