



COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Anti-terrorism Bill (No. 2) 2004**

MONDAY, 26 JULY 2004

SYDNEY

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Monday, 27 September 2004

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**SENATE**  
**ECONOMICS LEGISLATION COMMITTEE**

**Monday, 26 July 2004**

**Members:** Senator Brandis (*Chair*) Senator Stephens (*Deputy Chair*), Senators Chapman, Murray, Watson and Webber

**Participating members:** Senators Abetz, Boswell, Brown, Buckland, George Campbell, Carr, Cherry, Conroy, Cook, Coonan, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fifeld, Forshaw, Harradine, Harris, Kirk, Knowles, Lees, Lightfoot, Ludwig, Lundy, Mackay, Marshall, Mason, McGauran, Murphy, O'Brien, Payne, Ridgeway, Sherry, Stott Despoja, Tchen, Tierney and Wong

**Senators in attendance:** Senators Bolkus, Brandis, Ludwig, Mason and Payne

**Terms of reference for the inquiry:**

Anti-terrorism Bill (No. 2) 2004.

**Committee met at 9.01 a.m.**

**WALKER, Mr Bret William, Past President, Law Council of Australia; Past President of New South Wales Bar Association**

**CHAIR**—Good morning, ladies and gentlemen. This hearing is in relation to the inquiry by the Senate Legal and Constitutional Legislation Committee into the provisions of the [Anti-terrorism Bill \(No. 2\) 2004](#). The inquiry was referred to the committee by the Senate on 23 June 2004 for report by 5 August 2004. The explanatory memorandum advises that the bill seeks to improve Australia's counter-terrorism legal framework. The committee has received 93 submissions to this inquiry and those submissions are available on the committee's website. Witnesses are reminded of the notes that they received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat.

Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I welcome our first witness, Mr Bret Walker, SC, from the Law Council of Australia. The Law Council has lodged with the committee submission No. 93. Do you wish to make any amendments or alterations to that submission?

**Mr Walker**—No, although I should foreshadow that, in relation to the passport provisions in particular, we would like to put in a supplement.

**CHAIR**—Thank you very much, Mr Walker. I invite you to make a short opening statement. At the conclusion of your statement we will go to questions. We thank you again for appearing before the committee so soon after our last meeting.

**Mr Walker**—Not at all. The one point that I would like to emphasise on behalf of the Law Council could be described as the dubious necessity of the proposed provisions for the criminalising of what I will call supportive association for terrorist organisations. That is a rather odd opening description of the Law Council's position bearing in mind that the Law Council is emphatically an antiterrorist organisation. It is very difficult to assemble a lot of intellectual enthusiasm for the cause of supportive association for terrorist organisations. We have no such enthusiasm. We have a real fear of a civil libertarian kind and of a technical legal kind to do with the efficiency of criminal proceedings caused by a consideration of the details of these provisions.

I make it clear at the outset that the ones I would like to emphasise come from what in the drafting of these provisions seems to have been a commendable, express attempt to balance civil liberties and the fairness of the criminal process against what the houses of parliament clearly perceive to be a continuing and rather nebulous threat. I used the word 'nebulous' to indicate that grasping at terrorist organisations notoriously is a very difficult thing to achieve. Technically, the provisions in question impose what is called strict liability with respect to what I will call the status of the supported or associated organisation as a terrorist organisation. Having done so, of course, as members of the committee are well aware, the provisions then set about alleviating the burden that that would ordinarily impose on a criminal accused.

It has to be said that that has been done with some seriousness and ingenuity which the Law Council greatly appreciates. But there will be technically some oddities here. The definitions of terrorist organisations that apply to the status of the organisation that the accused is said to have supportively associated with might be called the prescribed organisations—the ones that have been specified in regulations. It may be that in the world of legislation and law it is reasonable, perhaps even necessary, to proceed on the basis that everybody knows, or ought to be treated as though they know, the law. It is simply not true. Regulations are even more obscure to find than statutes. Statutes are not easy to read and regulations can be even harder to read.

Amidst all the advertising about government and official matters that one sees in cyclical waves year after year I cannot ever recall truly mass media or accurately informative advertisements—for example, I have never heard of them in the ethnic press—that point out from time to time what the list is in relation to prescribed organisations. So there is strict liability and then it is said that that will not apply, that the offence will not have been committed unless the accused was reckless as to the prescribed terrorist status of the organisation in question. I confess that I do not know what it means to be reckless about a matter in the public law of the country, but I do know what it means to be reckless about a fact out there in the universe. I can be reckless about whether or not my car was parked in a garage but, with respect, I do not think I can be reckless about whether it needs to be registered.

As a matter of psychology, I may be reckless about registering it, but the need for it to be registered is something that is just a matter of law. One could, of course, criminalise this only against people who know the law, who have had the law read to them, or who have been exposed to advertisements of the kind that I have suggested but that, to my knowledge, have never been done. However, that sounds like an extremely odd law, not least because it gives a zone of immunity to people who do not know the law or who have not read about the law. That would be a rather interesting reward for the ignorant. Technically, we see problems arising of a kind that could well be more embarrassing for the prosecution than for the defence and thus it would be retrograde for the organised legal attack on, or defence against, terrorist organisations in these provisions about recklessness.

The next thing that we observe that has a similar scope for complicating prosecutions, thus prosecutorial discretions, about whether or not to charge and in particular that has great potential for rendering relatively small players into cause celebre in court, is the provision that disapplies these criminal provisions to the extent, if any, that they would infringe any constitutional doctrine of an implied freedom of political communication. I pause simply to note, with some amusement, that parliament talks in terms of any constitutional doctrine of implied freedom of political communication. Assuming that the High Court thinks there is at least some smidgin of some such doctrine, it is clear it seems to me that, notwithstanding the important roots of that doctrine in its modern understanding in a case about a New Zealand prime minister suing for defamation, there is something to be said about the fact that New Zealand and Australia are not quite the same as America and Australia, France and Australia, Germany and Australia and Russia and Australia, to take some obvious examples, without going to the Middle East.

It may well be that the effect of the so-called globalisation of news and politics means that implied freedom of political communication will include free discussion of Australia's place in the world, or Australia's support for other players in other parts of the world. I must say that I am not quite so confident about that bearing in mind what is likely to be the requisite nexus with parliamentary representation and elections for our houses of parliament. However, it raises quite a difficult question and one which I predict will be relatively ugly in a court as to whether supportive association, as I have called it, would be made out by somebody who, speaking to an audience that they know includes people who are members of an organisation that has been prescribed, or speaking to an audience the membership of which they did not control, which is true, for example, with a public meeting, says, 'I abominate personal violence and terrorism, but I think there is too much'—and you would then include your epithet of choice—'French, German, American or Russian influence in the world or in a particular part of the world.'

If one were historically minded, one might go on to say, 'And history teaches that great powers do not withdraw unless they are confronted with something in the nature of force. Persuasion does not suffice.' It seems to me that we are right on the cusp of what I would call a particularly ugly restriction on social intercourse, of a kind that this country can bear, I would have thought, without suffering one iota of danger to its internal or external security. Obviously, that last point includes civil libertarian and idealistic aspects which I hope you see inform the written submission on behalf of the Law Council. But it also has concern for the spectacle that could be created by the way in which the issues have been enlivened in these provisions.

Leaving aside the difficulties that I have just addressed, the last point that I want to refer to is the kind of supportive association that you get out of the careful sequence of requirements for the committing of this offence. They describe a person who is certainly indulging in what I would regard as wrong conduct in social terms. Whether you really have described somebody who is not well and truly caught by laws already on the books to the extent that it could be shown that this law usefully goes beyond present laws in relation to, for example, incitement and conspiracy, to name only the two most obvious, it seems to me a case starts to be made out for the appropriateness of such a law.

When you put that together with the difficulty of what I would call merely verbal support—encouragement by what I would call ratbag statements—then one has to wonder whether the conditions presently obtaining such as we are able to appreciate them really justify having such a charge. Putting myself briefly and notionally in the shoes of a prosecutor with papers in relation to such a supposed offence on my desk, I must say that it strikes me as one of the least attractive of the offences that I would be minded to consider charging. The final point is that this is plainly not the top of the criminal calendar in relation to terrorism. Look at the penalties. So I wonder whether any of this is really worthwhile at all. That concludes what I wanted to say by way of amplification of the Law Council's written position.

**CHAIR**—Thank you very much. We appreciate that.

**Senator LUDWIG**—You indicated on page 2 of your submission:

... the Law Council wishes only to comment upon aspects of Bill No. 2 as it stands after the amendments.

You then clarified that by indicating that you might make a supplementary submission. Do you know which sections you intended to make a supplementary submission in respect of?

**Mr Walker**—It was schedule—

**Senator LUDWIG**—Was it the remainder—that is, those that were not considered by the House and put into a separate bill?

**Mr Walker**—I do not have executive authority. They shackle me very tightly on such occasions. All I can say is that they would like me to talk about the passport provisions.

**Senator LUDWIG**—All right. Are you in a position to comment on any of those now?

**Mr Walker**—No.

**Senator LUDWIG**—So you can comment only on those matters that you raised in your submission?

**Mr Walker**—Yes. Just to make that crystal clear, I certainly cannot do it on behalf of the Law Council.

**Senator LUDWIG**—I wanted to make that clear as well. In respect of the association provisions, have you considered whether the exemptions for religious worship sufficiently encapsulate those issues which might arise? I think there are also submissions by the Australian Muslim Civil Rights Advocacy Network that raise the types of worship that might not be captured by them. Are you concerned about the narrowness of the exemptions, or do you think they are suitable for the particular writs issues that have been raised in this bill?

**Mr Walker**—I confess that I am quite admiring of the draughtsmanship. Let me explain why. 'Worship' only appears in describing a building. The key phrase is: 'takes place in the course of practising a religion'. This was a lower order issue, which is why I did not mention it in my opening remarks. But it is very similar to the matters that I addressed as my first two points this morning. It falls out as follows.

First, the general comment is that this is another example of what I noted in my opening comments—namely, one should appreciate the real effort that has been displayed in this bill to accommodate the kinds of concerns that have been voiced around the world and in this country concerning such legislation, civil liberties and personal freedoms. It needs to be made clear that this is a serious balancing attempt. Second, every time you confront it relatively plainly—as do the two issues that I referred to earlier, plus the religious one that you raised, Senator—in the imagination of a practising advocate you give rise to some future possibilities at a trial which would be pretty ugly. I think a genuine and legitimate concern is: ugly from the point of view of the prosecution and the community on whose behalf the prosecution has been made.

Take in the course of practising a religion. That will require a court to establish what constitutes a religion and practising it. By and large, civil courts—by which I mean the courts of civil society, including its criminal courts—try to avoid deciding matters of religious doctrine and certainly try to avoid deciding matters about whether something is heretical, whether something is forbidden and what is liturgically appropriate. Occasionally they have to do it. It comes up in property cases. If I leave all my money to be devoted to the

Roman Catholic faith then my trustees are bound to that, and a court will obviously have to determine whether the way they are spending the money can be described as falling under the Roman Catholic faith. But the protestations of unwillingness that courts often express on such occasions are genuinely sincere. Cases which require the civil authority to get into matters which obviously involve individual and communal relations with a higher being are difficult and unpleasant. They are very awkward for a civil court in a secular country, by means of logic and evidence, to deal with.

However, we have to do that for these offences. Let us take an obvious example. Someone is going to have to say, 'Is preaching jihad'—and I confess that I do not really know what that means, and I am sure it covers a huge variety of possibilities, some literal and some metaphorical, presumably in relation to the conflict of good and evil—'practising religion?' Some people, of whom I may be one, may say, 'It is a mark of religion to be intolerant. Perhaps that is practising religion, therefore it is an offence.' Other people may say, 'No, God is love. You cannot practise religion by preaching hatred and conflict, in which case that is not practising religion.' But presumably that will involve conflicting evidence. I would have thought that the slogan 'God is love' would bear a deal of interesting exegesis against the Old Testament.

**Senator LUDWIG**—The other area was the exemption for lawyers. Do you have any comment in relation to civil procedures? The TI warrants come to mind, as does the surveillance bill, which may become an act in the not too distant future.

**Mr Walker**—You have seen in our written submission that we respectfully put forward the possibility that the definition of the excluded legal assistance may be too narrow.

**Senator LUDWIG**—Yes.

**Mr Walker**—Plainly enough, it covers the crown jewels, which is criminal proceedings. I need to repeat that we think a very serious effort has been made to do things properly. It covers the question of the legal status of the terrorist organisation. The two examples that you have brought up are excellent examples of other areas that should be included. On behalf of a lawyers association I am a little chary of concentrating on problems for lawyers, because the giving of professional assistance to people who may be members of an association is not special to lawyers. Jumping into another category for a moment, it is not clear that everything that one does, particularly for reward for a client or a customer—you not being a lawyer—could possibly fall within the scope of humanitarian activities. Although I think the lawyers need more thoroughgoing protection for legitimate things that ought to be possible to be done, so I think other professions and occupations may also need it.

**Senator MASON**—You made an interesting point about support for an organisation. You gave the example of going to a public meeting and so forth and perhaps even speaking against violence, but perhaps being supportive of other aspects of a terrorist organisation's activities. I suppose that it is culturally difficult for some of us to grasp Hezbollah, Hamas and other Islamic organisations. Let us talk for a minute about the IRA.

**Mr Walker**—Which IRA?

**Senator MASON**—Is it right that a lot of terrorist organisations are so embedded within the community that you see people who you may know are members of a terrorist organisation and you may deal with them in a religious, social or even economic context? Indeed, you may even support some of the aims of the organisation, but you may be opposed to the violence in which those organisations partake. During the troubles in Northern Ireland even I can remember a lot of people saying, 'I am against violence, but I live in a community where I know certain people are members of the IRA. I am against violence, but I support other goals of the IRA.'

**Mr Walker**—If that means a united Ireland, that is one level of generality. But if we are talking about buckets of cash in Boston bars, which is the classic example, for my part I would be delighted if a neat, clean law could be devised to criminalise that. I cannot understand why it is morally sound to give a dime to gun-runners and murderers—for the purpose of running guns and murdering, that is. If you are talking about looking after the widows of so-called soldiers, that is a totally different thing, but I think that is humanitarian. Obviously those who drew up this bill take the same view.

**Senator MASON**—I refer to associating with terrorist organisations. The bill states:

- (1) A person commits an offence if:
- (a) on 2 or more occasions:

... ..

(iii) the association provides support to the organisation ...

There has been a lot of debate about what ‘support’ means. Is it your understanding that the statement ‘the association provides support to the organisation’ means support to the organisation for the purposes of its terrorist activities, or is it simply for the organisation? Is that not necessarily the same thing?

**Mr Walker**—No, absolutely not. The next provision states:

(iv) the person intends that the support assist the organisation to expand or to continue to exist ...

I must say that, technically, I quite admire this drafting. It is clear. That is telling you: ‘Do not get hooked on needing to show that the support’—abstract noun—‘provided by the association’—abstract noun—‘has to be so solid as putting guns in arms et cetera.’ We are told by this draft that the support will lead to criminal liability, even if all it does is to help the organisation to continue to exist. Let me give you the example that immediately sprang to my mind on reading this bill when it was in draft some time ago. That is, it being known around the traps that so and so—an esteemed member of a community or even of society at large—thinks highly of other people who are themselves well and truly flagged as members of a terrorist organisation. In my view, that clearly assists the organisation to continue to exist in terms of morale and acceptability within a group, without whose generalised support the organisation would wither and die.

The IRA is an excellent example of that. But for what might be called, in my view, the childish habit of singing rebel songs at 11 o’clock at night, a lot of the romance of the IRA’s approach would have disappeared. I do not want to criminalise the singing of rebel songs, because the watch-houses in Sydney are not numerous or large enough to deal with next weekend. The fact is, when we are talking about the two abstract nouns ‘association’ and ‘support’ and we know that that is not to do with what is well and truly already criminalised—that is, actually taking part in the organisation of terrorist acts—then I think that it casts a wide net. That is cause for concern, but the concern is as much aimed at the fuzziness of the law in terms of being able to prosecute and prosecute successfully.

This may sound odd coming from the Law Council, which from time to time, like all legal organisations, can be travestied as having an illegitimate bias in favour of criminal defence work. It is a common perception and, quite often, it is a fair perception. I strongly deprecate any such bias if and when it exists. In this case it seems to me that there is a genuine, important social interest to make sure that we devise laws, particularly for lower order involvement which might be thought to be more abundant than that of the kingpins, where the prosecutions succeed and you can get a conviction. The more fuzziness we have, obviously the more scope there will be for powerful, legitimate arguments in defence giving the benefit of doubt to the accused.

**Senator BOLKUS**—Page 5 of the council’s submission, which refers to the transfer of prisoners, states:

... any transfer based on “security grounds” may in itself jeopardise a remand prisoner’s right to a fair trial unless news of the transfer is in some way suppressed ...

Could you elaborate on that? Also, in that context it has been put to us by state and territory corrective services ministers that there be a loosening up or a broadening of what has been proposed by the Commonwealth. The states recommend that the definition of ‘security’ be amended to include ‘matters significant to the operational security of correctional facilities’. They also want a removal of the written approval of the Commonwealth Attorney-General in respect of the process. How would those sorts of initiatives handle the issues that you raise of a fair trial?

**Mr Walker**—As to a suggestion that one should not need the signed manual, as it were, of the Attorney-General, I am not aware that any Attorney-General in living memory attended at the office so rarely that there would be a genuine problem of backlog for something like the security-driven transfers of prisoners.

**Senator BOLKUS**—Senator Durack?

**Mr Walker**—I have a very bad hearing problem. It seems to me that as a safeguard and as an intended mark of the solemnity of what is being done, there can be no real objection to that. As to including within the definition of ‘security’ references to the operational security of penal establishments, it has to be said that that is a totally different concept from the definition of ‘security’ as it presently appears in these provisions. Perhaps it is the repetition of the word ‘security’ that is unfortunate. I must say that I would have thought that some operational matters were precisely the kinds of things that the states and the Commonwealth, I presume, have had a cooperative dialogue on for as long as Commonwealth prisoners have been in state prisons, which is a very long time indeed.

If it were to assist in using these particular transfer provisions, especially as experience, including in Northern Ireland, shows that there can be very difficult, highly special problems arising within prisons from

such offenders, then why not? It seems to be quite an interesting practical suggestion. I just would not put it in the notion of security as it presently appears. I should say about the notion of security that the definition of security in the provisions seems, with respect to the draftsmen, to be a very good one—about as good as I have seen, I must say. Perhaps it could be imitated in other contexts in this general area.

Finally, in relation to the fair trial, our concern—and I know you will all be shocked to hear it—is that some members of the press and the broadcasting industries do not much mind the spectacle of people in manacles or shackles being walked into the courtrooms even though they are still only at the stage of having being charged and not a word of evidence has been heard against them. In particular they are not troubled at all by the notion that that may prejudice that person's prospects of finding in the future a jury that does not retain some recollections, subliminal or otherwise, of that position. Very few people in shackles strike other people looking at them as being respectable, innocent members of society.

It is the same thing here. We are concerned that, under a process that would be carried out by an administrative act, something would happen that would be reflected in the location of where somebody was then found—for example, either in a personal or electronic presence for a court hearing—and, before you knew it, we would have another exciting piece of news about somebody not yet convicted; namely, they were considered so dangerous that they would have to be transferred from X to Y. One response to that is, 'Oh well, let's just keep such things secret.' But as soon as you say that you realise there is scope for other real concern as well. I think there has been an attempt at balance here, but I do not think, with great respect, that fair trial values have been fully thought out. I do not suggest that this is an easy one. It seems to me crazy for the Commonwealth to have, as it were, a choice of prisons and not to be able to make use of that choice.

**Senator BOLKUS**—It is also hard in the context of the last paragraph in which the council suggests that we should maintain judicial review. If there is judicial review would that tend to jeopardise the process in any way in that more information will come out?

**Mr Walker**—No. Judicial review improves process, or at least that has been the experience, one would think, very powerfully since the Second World War as well. There is judicial review and judicial review. We are talking in that last paragraph about statutory judicial review. It leaves constitutional judicial review. As somebody with more than a passing interest in the lists of the High Court I can tell you that the notion of moving out of the era of refugee lists into transferred prisoner lists does not hold out a very happy prospect. Of course, that is a facetious comment. What I mean is that in this country you cannot eliminate judicial review. It is just that you can restrict it to the High Court which then, of course, uses its remitter power unless and until parliament decides to do something about that. At the end of the day it seems to me that judicial review of matters of this kind ought to be seen as a relatively low-key and efficient equivalent of habeas corpus. Because judicial review does not go into merits any more than does a habeas corpus return it seems to me that it is a very slight trade-off in the direction of legal scrutiny and should be preserved.

**Senator BOLKUS**—Following on from that, it may not be facetious if you are looking at the proposals relating to false passports. It is quite possible that a group that would be primarily concerned with those proposals would be people claiming asylum status in Australia—people who come into this country with passports, without passports and with false passports.

**Mr Walker**—It has to be understood—and I know that members of both houses do understand—that whenever you do not extend Australia's rather excellent statutory judicial review processes to any new system of administrative action against individuals then you are leaving it to the High Court. In my view, that is rarely good policy.

**Senator BRANDIS**—I would like to go back to proposed section 102.8, give you a hypothetical case and invite you to comment on it. Let us say that an organisation is declared to be a terrorist organisation, whether it is a particular madrassa, for argument's sake, or some cultural or religious body which on one contestable view is associated with radical Islamic extremism and a member of that organisation wants to protest about that. He says: 'We are not a terrorist organisation. We are a religious or cultural organisation. It is just wrong to say that we are a terrorist organisation.' So he goes to a member of parliament, to a talkback radio show host, or to somebody he wants to persuade to his point of view to encourage that person to advocate on his behalf the view that the characterisation of his organisation as a terrorist organisation is erroneous.

As I read proposed section 102.8, the member of parliament, the talkback radio show host, or whoever is the recipient of the application of that member, commits an offence because he is intentionally associating with that person. 'Associate' is defined as to mean only 'meet' or 'communicate' with a person. He knows that the organisation is a terrorist organisation because it has been so declared. The association provides support to

it because the member of parliament, the talkback radio show host, or whoever it is, is trying to clear the name of that organisation and reverse its classification. So he does intend that a purpose of the association be for the organisation to continue to exist. He knows that the person who has approached him is a member of that organisation. Am I missing something? In the hypothetical case that I have given you, would the member of parliament or the other public advocate, by agreeing to meet with and sympathetically prosecute the first person's views that the organisation is not and should not be treated as a terrorist organisation, not committing the offence?

**Mr Walker**—I am sure you have not missed anything. Dancing between prosecution and defence, as it were, these are the thoughts that come to my mind. First, something would need to be said about parliamentary privilege in relation to the member of parliament.

**Senator BRANDIS**—Let us forget about the member of parliament. Let us go to the journalist, the talkback radio show host, or the television interviewer—somebody who will publicly advocate a position.

**Mr Walker**—The usefulness, however, of hanging on just for a moment to the issue of the parliamentarian is that it really brings up for the others the implied freedom of political communication exception. Because just as it must be, I hope, still safely within a parliamentarian's role to receive representations from constituents and others concerning matters of public administration that the person protests, so one would think that if the subject matter is appropriate—and the one you have raised in your example clearly is—then there will be political communication about that matter as well.

**Senator BRANDIS**—Let us change the hypothetical case. Let us say that it is not somebody in the public arena. Let us say that the person just goes along to one of his best friends and says: 'This is terrible. This madrasa with which I am involved has nothing to do with terrorism. A mistake has been made. I want you to come to the pub, to the shopping centre, or to the local community centre with me and explain to community leaders that we are not a terrorist organisation.'

**Mr Walker**—Along the lines of: 'I know that the message I want to put out is unpopular. I think I need your support by being there.'

**Senator BRANDIS**—Yes.

**Mr Walker**—I think the short answer is that if the message by the putative member is that the government has got it wrong by prescribing the organisation then the prosecution of the associating supporter will need to focus quite hard on the requirement that the accused intended that the support assist the organisation to 'expand' or 'continue to exist'. That may be quite difficult, certainly with 'expand' or 'continue to exist'. I cannot imagine why a prosecution would ever choose 'expand' because it would be harder than 'continue to exist'. It would be quite difficult if all you are doing is sticking up for your mates' freedom to communicate a dissentient view.

On the other side it has to be said that at the point that public advocacy in favour of an organisation can be seen to be attempting to either render it respectable—which is one way of helping it to continue to exist—or putting pressure on government authorities not to prosecute people who have illegal connections with it, then if, and it is a big if, it is a dangerous terrorist organisation I think quite a few people, myself included, would not be unhappy at the notion of that being illegal conduct. Where I get unhappy is exactly in relation to the kind of thing that your example brings up. It all gets a bit ragged on the edges; it all gets terribly fuzzy.

I am wondering whether all this is worth the trouble. Real support for terrorist organisations is already well and truly effectively criminalised. This sort of hanger on, ragtag, come along for the ride stuff really does not seem to me to be worth it. I think there might be some spectacular defeats for prosecutions of a kind that we could really do without.

**Senator BRANDIS**—Mr Walker, I agree with you. It seems to me that this is a generalisation. The laws that we have written in the last couple of years in relation to terrorism and the breadth of the definition of 'terrorist organisation', quite apart from the existing parties provisions and the ordinary law of conspiracy and accessorial liability and so forth, are so widely cast now that if you cannot successfully prosecute a real terrorist under the existing laws, widely cast as they are, then there is something wrong with you.

**Mr Walker**—I agree with you completely. That is why I introduced our position about this by saying that it is a matter of devious necessity.

**Senator BRANDIS**—Just going back to the hypothetical case that I gave you, it occurs to me—and tell me if you agree—that perhaps the problem could be redressed if subclause 1(a)(iii) had an additional qualification with words to the effect, ‘for the purposes of engaging in terrorist acts’.

**Mr Walker**—Yes. I think what we would have then done is create a lower level offence for conduct which is already well and truly criminalised at the higher level. Personally, I see merit in resisting the creation of too many graded steps of criminalising support for terrorist organisations. Leave that to the sentencing discretion. Some will be 20-year cases and others will be two-year or five-year cases. Let that emerge from the facts of a particular case rather than, as it were, accidentally start introducing charges of wildly different seriousness for very similar conduct expressed in conceptual terms, not least because I do not think it is a good idea to give prosecutors too much capacity to undercharge or overcharge, that being an important part of a prosecutor’s professional conduct.

**CHAIR**—Mr Walker, thank you, as always, for your assistance and the assistance of the Law Council to the committee.

[9.49 a.m.]

**EMERTON, Mr Patrick, Assistant Lecturer, Faculty of Law, Monash University, and Member, Castan Centre for Human Rights Law**

**CHAIR**—Welcome to the committee. The Castan Centre has lodged a submission which the committee has numbered 73. Do you wish to make any amendments or alterations to that submission?

**Mr Emerton**—No.

**CHAIR**—Thank you. You know the drill. We will ask you to make a short opening statement and then we will go to questions.

**Mr Emerton**—My submission dealt with the first three schedules to the bill. Because the first two have been excised I will not say anything about those matters.

**CHAIR**—You are welcome to do so, if you wish.

**Mr Emerton**—I reiterate that the ASIO Act amendments contained in the second schedule that was excised would radically expand the scope for executive interference with individual freedom of movement under a regime that already gives a great deal of executive power to interfere in the lives of people who have not committed or been charged with any criminal act. The threat of arbitrary executive power is also opposed by the original third and fourth schedules—the two that remain. My submission did not comment on the fourth schedule, mostly because of time constraints rather than any lack of concern about some of those provisions.

I would just like to express general agreement with those submissions which have objected to elements of that schedule on the grounds that it confers on the Attorney-General an unreviewable power to control the appearances of prisoners at court hearings. This can both affect the right to a fair trial and it can also have the potential to lead to those accused who are convicted of terrorist offences being detained away from the support of family and community members. The rest of my remarks will be confined to the third schedule which is the association offence. Some of the same themes about arbitrary executive power and interference in family and community life recur in relation to those amendments.

A person would commit the association offence if he or she intentionally met or communicated with another person who is a member of or who promotes or directs activities of an organisation which has been prescribed under the Criminal Code which association provides support to the organisation in question and which association is intended to assist that organisation to expand or to continue to exist. A person will commit an offence only if he or she knows of that other person's relationship with the organisation and he or she knows that the organisation is a terrorist organisation. In addition, if you can point to evidence that you were not reckless as to the status of the organisation as a prescribed organisation then it will be necessary for the prosecution to prove beyond reasonable doubt that the accused was reckless. So this attempted brief statement of defence shows that it is quite complex in its elements.

Contrary to the suggestions that were made in some of the second reading speeches in support of the bill, I do not think it follows from this complexity that the offence is limited, nor is it justified in the incidence of criminal liability to which it will give rise. So it is complex but it still has a broad application. This flows from a couple of facts. The statutory power to prescribe organisations as terrorist organisations is very broad, extending far beyond criminal gangs plotting bombings or hijackings. An organisation may be prescribed on the basis of a reasonable belief that it is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not that act occurs. This stands on a statutory definition of 'terrorist act' which is also very broad, extending well beyond such obvious terrorist conduct as participating in a bombing or a hijacking.

Furthermore, there is no requirement that the terrorist activity or the activity of fostering et cetera be the principal activity of a banned organisation. Furthermore, it is possible for an organisation to be banned regardless of its actual activities because all that is required is a reasonable belief on the part of the minister that it is fostering, planning et cetera, directly or indirectly. When you think about the breadth of the various statutory definitions which will be precludes to this offence you can see that there is no reason to suppose that organisations engaged in what is technically terrorist activity are necessarily criminal. In the past that included organisations such as the African National Congress, Fretilin and elements of such social movements as the United States Civil Rights Movement.

But an organisation need not even be engaged in that sort of political activity in order to be prescribed. So a predominantly charitable organisation which offered relief to activists engaged in active political demonstration provoking confrontation with police or security forces would be liable to be listed on the basis that it is indirectly fostering the doing of terrorist acts. So the suggestion by the Attorney-General that it is fundamentally unacceptable for individuals to associate with members of terrorist organisations is, in my view, mistaken—some perhaps, but by no means all. I think it is no defence of the bill to point out that the offence would apply only to an organisation that has been prescribed because this would only highlight the arbitrary character of any criminal liability that hangs upon executive discretion. In the present context, where every banned organisation is an Islamic organisation the arbitrary character of the offence would be further compounded by a manifestly discriminatory impact upon the Muslim community.

In addition to these general objections to the offence on grounds of its breadth and its liability to arbitrary and discriminatory application, there can also be added a number of more technical objections. Firstly, I think the offence is poorly defined. Under division 102 of the Criminal Code ‘member’ is defined to include an informal member, whatever that is, and a person who has taken steps to become a member of an organisation. The vagueness of the concepts ‘member’, ‘informal member’ and ‘the taking of steps to become a member’ make it extremely difficult for an individual to know whether or not he or she is committing an offence. One possible consequence of this vagueness could be a general undermining of the community among Muslim Australians. If the bill is passed it is probably more likely that Muslims will go about their business as usual but the vagueness of the offence would then be used as the basis for selective arrests and for prosecution of selected individuals which would be a further example of the arbitrary character of the offence.

Secondly, the word ‘communication’ is not defined. One example which was offered in a second reading speech by the member for Kooyong raised the possibility that publication in a newspaper of a letter of support could be construed as communication with an individual. In addition to that possibility one wonders about posting a reply, for example, on a public Internet message board where replies are public but hang in response to another posted message. So there is the general question of when a public message of sympathy or solidarity becomes communication and therefore criminal communication with another person.

Thirdly, as many submissions, including my submission, have emphasised, the definition of ‘close family member’ is far too narrow. I also add that the confinement of permitted association in a domestic context is too narrow and, once again, far too vague. One wonders, for example, about the status of things such as name day or birthday parties, weddings and other sorts of semi-public festivals.

Fourthly, the exception in relation to the provision of legal services is too narrow. It does not include legal advice outside the context of legal proceedings; it does not include representation in matters under the charter of the United Nations act or the ASIO Act; it does not include a suit for false imprisonment; and it does not deal with advice in relation to overseas matters. One could think of any number of legitimate civil or administrative suits that an individual who is a member of a prescribed organisation might wish to bring or which they might need to defend.

Fifthly, adding a new terrorism offence under part 5.3 of the Criminal Code increases the scope and application of a number of other areas of related law which hang upon the concept of a terrorism offence, such as liability for detention under an ASIO warrant or liability for a greater period of detention before charge under the newly amended Crimes Act. Conviction under this offence would attract the more punitive bail provisions which were recently introduced. There are a number of consequences of introducing a new offence under part 5.3 of the Criminal Code.

To conclude, I wish to respond to some remarks made in the Federal Police submission to this inquiry which states:

Disrupting support networks in turn may disrupt planning and preparation for terrorist attacks.

In the context of the proposed offence ‘disrupting support networks’ seems to me to mean convicting, in many cases, fundamentally innocent people of an offence that would make them liable for three years imprisonment. I just note that collective punishment and also the fighting of crime by disruption of the community to which the alleged criminals belong are both, so far as I can see, quite contrary to the rule of the law. The AFP also argues:

...because membership of such organisations is illegal, activity supporting the existence or expansion of an illegal organisation should also be a crime.

That strikes me as being a non sequitur. It would exclude any attempts to reform an organisation, to persuade the government to delist it, or simply to express sympathy for the circumstances in which one's friends or family have found themselves. It seems to me that a free country does not need this sort of illiberal or even totalitarian law.

**Senator LUDWIG**—I refer to passport offences. Have you considered how that would interact with the refugee convention and our requirement to meet those obligations, including the protocol?

**Mr Emerton**—Are you referring to the amendments to the passport act?

**Senator LUDWIG**—Yes.

**Mr Emerton**—Not to a great degree. I reflect on those amendments and existing provisions, for example, under the Criminal Code relating to people-smuggling and so on. In some ways they may not have that great an effect, depending on whether or not money is being paid in relation to the provision or the use of the false papers. If false papers are provided or used to procure a benefit to get someone into Australia an offence is already committed under the people smuggling division of the Criminal Code. If someone were in possession of papers which they procured off their own bat without paying any money and so on then I think that would enliven the new offences.

**Senator LUDWIG**—In those instances where people are claiming asylum they may produce their own documents or they may substantiate some measure of identity as to a claim for asylum in supporting documents or travel documents that may not be entirely accurate. In your view would they be caught by these provisions?

**Mr Emerton**—It seems to me it would depend on the meaning of 'reasonable excuse'. If they can make out a reasonable excuse under new sections 21 and 22 then they would have a defence.

**Senator LUDWIG**—What might be a reasonable excuse?

**Mr Emerton**—I must confess, Senator, that I am not an expert in passport law. I do not know what counts as a reasonable excuse. Intuition suggests that perhaps fleeing a—

**Senator LUDWIG**—Perhaps a reasonable excuse is to claim asylum.

**Mr Emerton**—To claim asylum on fleeing a vicious regime might count as a reasonable excuse. I imagine what is contemplated is, for example, you are in possession of papers belonging to your child or you are in possession of papers which are false but you might be ignorant of the circumstances of your own birth. Birth records are often not very accurate in countries from which people may be fleeing and seeking asylum. Those would have been the sorts of things that I would have thought would have been immediately in the drafters' minds in relation to reasonable excuse. Is forging papers to facilitate fleeing a reasonable excuse? I am sorry, I do not know enough about passport law.

**Senator LUDWIG**—I refer to the transfer of prisoners and to the role of the Attorney-General. Have you had an opportunity to look at the New South Wales submission?

**Mr Emerton**—I did see that, yes.

**Senator LUDWIG**—Have you considered whether or not their proposal is amenable in your view, or whether the role of the Attorney-General, as indicated in the bill, is acceptable?

**Mr Emerton**—I confess that I was not that surprised to see the New South Wales submission as similar sorts of thoughts had occurred to me after looking at the provisions. In particular, when one looked at some of the second reading speeches the concept of security there seemed to have been used in the rhetoric of operational security. When one looks at the legislation one sees that the law that is being proposed relates to the ASIO Act definition of national security. So there seems to be a bit of a gap between the purposes for which the law seems to have been passed. The operational needs seem to give the political momentum to the speeches in support in the house.

When the New South Wales justice ministry said, 'What about operational security?', which was probably a more relevant matter at the time, that seemed to be quite a reasonable thing for them to say. I think their concern about any sort of movement that would require the imprimatur of the Attorney-General's Department does seem legitimate. I do not know exactly what exigencies they are operating under and how quickly they might have to move prisoners, but it did not surprise me that they would have those concerns.

**Senator LUDWIG**—You also mentioned in your submission the issue of exemptions for lawyers in relation to association offences that are provided for in this bill. One could also consider the ASIO questioning

regime which is provided for now in the ASIO Act as that seeks to have a legal adviser during that questioning regime. Is that one of the issues that you believe will be caught by the exemption, or do you think it will be outside the exemptions that are provided?

**Mr Emerton**—I think he would be outside the exemption, which is to say that he would be committing a criminal act. It would depend on more details, but potentially he would be committing a criminal act.

**Senator LUDWIG**—In a questioning regime under the ASIO Act the legal adviser who has been called to assist may be caught by these provisions.

**Mr Emerton**—You could imagine a number of possibilities. For example, a questioning warrant but not a detention warrant is issued. The questioning warrant authorises the presence of a lawyer, which I should note is not required by the bill, but let us suppose that it is. Firstly, the individual who has had the warrant issued against them might go and speak to their lawyer in advance of attending to answer questions and to get some general advice. That is not protected. That lawyer might then appear with them and speak to them at the permitted times between the asking of questions. That is not permitted. That lawyer might then bring a habeas corpus suit or other sorts of administrative law relief or assist them in the drafting of an application to the inspector general of intelligence or any of the various areas there. None of that is protected. The person might be charged with an offence of falsely answering, or refusing to answer, a question or refusing to hand over an article and that lawyer might defend them against those charges and so on. None of that is protected.

**Senator LUDWIG**—Is it your view that that has the potential of undermining that questioning regime for the provision of legal advice to a person?

**Mr Emerton**—I would say it would radically undermine it, yes.

**Senator MASON**—You state at page 9 of your submission:

The second reason for opposing the creation of this offence is that it would unduly infringe individual's rights to freedom of association, a right which Australia is bound to protect, pursuant to article 22 of the International Covenant on Civil and Political Rights.

**Mr Emerton**—Yes.

**Senator MASON**—In a sense, that makes a point that seems to me to be the underlying problem with proposed section 102.8. Tell me if you agree. In proposed section 102.8 (1)(a)(iii)—I mentioned this earlier to Mr Walker—the legislation states:

the association provides support to the organisation ...

You might have heard Mr Walker's earlier evidence that that support does not have to be support for the terrorist aims of an organisation; it can merely be political support. Let me give you an example. I remember, sadly, in the 1970s, Yasser Arafat addressing the United Nations. The PLO would certainly fit within the definition of a terrorist organisation. Far be it for me to defend the PLO, nonetheless it would certainly fit within the definition of a terrorist organisation. Many people, in particular of the Left in this country and elsewhere, defended and associated with Yasser Arafat and they certainly provided support for his organisation. They did not believe that killing Israelis and so forth was a good thing but they thought it was appropriate to ask Israelis to leave the borders of Palestine. The point is not whether or not you agree with that; the point is whether this legislation will inhibit democratic political discourse. Do you think it will?

**Mr Emerton**—I would say yes. I think it certainly has that potential. Will it inhibit that discourse? My personal intuition is that it will not so much inhibit that discourse as much as it will create an opportunity to prosecute on a selective, and I think probably discriminatory, basis particular individuals who engage in that discourse.

**Senator MASON**—That is a very good point. Mr Walker's point was that, technically, there might be a breach. I well remember plenty of people saying that what Mr Arafat said was quite right. They supported him and they associated with him. While technically that might be seen to be a breach of this legislation—and we will hear later from the department and from the Australian Federal Police—Mr Walker made the point that this sort of provision may in fact weaken our fight against terrorism because it is such a loose, broad offence. Do you think that is right? In other words, this does not help in the fight against terrorism; it actually makes the prosecution of the case against terrorism weaker because it is so loose and broad.

**Mr Emerton**—To my mind, there is already a significant body of thought in the community that regards some of the laws that have been enacted to prosecute the fight against terrorism as perhaps being on the draconian side and perhaps being a little too expansive in their reach and so on. I identify myself and, more

generally, the Castan centre, as among those who think that probably the tendency has been towards the excessively draconian rather than the excessively civil libertarian. I think that this would certainly continue in that direction at least in so far as it undercuts issues like the moral foundations or the political consensus on the legitimacy of the legislative regime. I think it could have that effect if it also in prosecution is seen to be discriminatory or arbitrary in its application. That also, naturally enough, undermines the political legitimacy on which a legislative regime rests.

**Senator MASON**—I am just concerned that it is more draconian than it is arbitrary. People do not mind, to be honest, severe laws being passed in the fight against terrorism. Most people accept that. But where those laws are, as you say, uncertain or they could upset the democratic dialogue, then there is a real concern.

**Mr Emerton**—I wish to add to that. This might be a controversial claim but it seems to me that not every organisation engaged in politically motivated violence intending to intimidate a government is necessarily a criminal organisation. I mention again that it does not seem to me that the African National Congress was a criminal organisation. When I was a schoolboy in the 1980s from time to time I sent money to support that organisation.

**Senator MASON**—Which organisation was that?

**Mr Emerton**—The African National Congress, Nelson Mandela's organisation—the organisation that is now the legitimate and universally recognised government of South Africa.

**Senator MASON**—In my day they sent it to the PLO.

**CHAIR**—It is generational, I think, Senator.

**Senator MASON**—It is, but it makes the point.

**Mr Emerton**—Suppose someone thinks they are sending money to a non-criminalised Palestinian organisation which they believe is only fighting Israeli soldiers and not Israeli civilians and they therefore think it is a legitimate military organisation. That is still under new paragraph (a) of the definition of a terrorist organisation, so they have the mens rea. Suppose that, contrary to their honest belief, that organisation is a wing of Hamas, let us say, which is a banned organisation. They have committed the offence because the mens rea of the offence is not knowledge of the prescribed status; it is only knowledge of it. I agree with your remarks about stifling democratic debate. I would go so far as to say that, in my view, it also criminalises conduct which is not necessarily criminal. It does not seem to me that the support of every military organisation abroad is a criminal act.

**Senator MASON**—I cannot let the occasion go by without stating that that means that in the early 1980s the Australian Union of Students would have been criminal. That would suit me very well.

**Mr Emerton**—One can imagine that there must have been branches of the Australian Labor Party or branches of the Greens that likewise would have sent money to the Fretilin.

**Senator MASON**—Sure.

**Mr Emerton**—Everything about the ANC or the PLO applies to Fretilin. Perhaps less than the PLO, Fretilin I do not think had a policy of targeting civilians. They tended to attack the Indonesian military structures. I think it is a very far-reaching provision which I do agree stifles democracy and legitimate debate and legitimate participation in the political process in all sorts of ways. That is the reason that I oppose it.

**Senator BRANDIS**—It seems to me that this is a little beyond the association provisions that we are looking at. Part of the problem in this is regarding terrorist organisations as if they were legal entities. You do not join a terrorist organisation as you would the local branch of the leagues club or the local branch of the Liberal Party, as no doubt would be the case in relation to you, Mr Emerton. These terrorist organisations are political movements. They are deliberately impalpable networks. The whole jurisdictional foundation upon which this rests seems to me to be a misconception. Would you like to comment on that?

**Mr Emerton**—It is a very perceptive comment, Senator. To my mind it pushes in two different directions. To return to my opening remarks, 'member' in the act is defined to include 'informal member'. I think that has been used, having in mind the remarks that you have made.

**Senator BRANDIS**—I am sure that not even the radical clerics behind Jemiah Islamyah actually pay their annual subscription and get a receipt.

**Mr Emerton**—I think that is right. I think 'informal member' has been used to try to get around this problem. But from the point of view of technically drafting a law, in my view, it just creates intolerable

vagueness as to the instance of what are really rather serious criminal laws. Looking at it from the point of view of those who are more sympathetic to the aims of this sort of legislation than I am, there is a genuine drafting difficulty. There might be people out there that somehow you want to net and it can be hard to see how to do it. Given the brief that the Attorney-General's Department and the draftsmen have been given, it is perhaps not surprising that they end up producing such vague legislation because it is very hard to find a better way to net the people they have been told to net. It seems to me that in the end you have to err on the side of innocence.

**Senator BRANDIS**—Is that not a fundamental assumption of criminal law?

**Mr Emerton**—It is a fundamental assumption of criminal law and it is also a fundamental assumption of any system of law in a liberal democracy. We are a liberal democracy.

**Senator BRANDIS**—Quite, but there is another dimension to this. It goes back to the distinction Senator Mason drew between draconian laws and arbitrary ones. There is no lack of enthusiasm, particularly on the part of bloodthirsty right-wingers like Senator Mason and me, to prosecute terrorists to the extremities of the law. If the laws are badly written that will defeat or thwart the war against terrorism. You will run into several problems. As Mr Walker said before, you are at the ragged edges of this. You trivialise the problem by introducing steps with a relative benign element in laws that should not exist. Then you dress them up in language so vague that it is almost inconceivable that a properly instructed jury could be satisfied beyond reasonable doubt that every element of the offence had been demonstrated by the prosecution.

**Mr Emerton**—I can agree with that. A number of the criticisms that I have been making, in particular those to do with political discourse and political legitimacy more generally, would be met if at some point in Australia's antiterrorism laws the concept of an attack upon the civilian population was invoked. The laws do not make any reference to attacks upon civilian populations or attacks upon civilians. That seems to me to be the true nexus of terrorist activity. When you look at the philosophical literature on terrorism—by people such as Tony Coady, a professor at Melbourne University, and others—the idea of an attack upon civilians is identified as the nexus of what might otherwise be military action because it is illegitimate when you attack civilians. An attempt to draft laws that disregard that component and that capture all political violence naturally starts to pick up what look to various members of the community as being legitimate acts of political violence, such as the ANC in the past. That is the point when you then get this freezing effect and you get ratbags such as me worrying that we are freezing legitimate discourse.

**Senator BRANDIS**—I do not necessarily agree with the distinction that you draw between legitimate and illegitimate acts of political violence. I understand your point but I do not necessarily share it. In a sense my point is a more conceptual one—that is, you can say from the point of view of a liberal democracy a certain law is obnoxious and that is a normative judgment. But you can also say whether or not you accept that normative judgment from a technical or a process point of view. A law may be written in such a way as to be so ineffective as to thwart perhaps even the arguably illiberal purpose of it. That is a different ground of objection which seems to me to go to a point that you made in your opening remarks. It attacks the very notion of the rule of law which, if it means anything, means that laws can certainly be known.

**Mr Emerton**—I take your point, Senator. I agree that it does—particularly through the vagueness of membership: the far too narrow definition of 'family member'—run the risk of creating a cause celebre and very difficult prosecutions. I agree with some of Mr Walker's remarks. I would define religion as well. They are all on that sort of technical side.

**Senator LUDWIG**—I would like to encapsulate whether, from the discourse you had with Senator Brandis relating to associating with terrorist organisations, proposed section 2(6) provides any protection from some of that discourse. It states:

This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

I have no understanding of what that might mean.

**Mr Emerton**—I find that provision slightly curious, for a couple of reasons. First, if this section infringed the constitutional doctrine of implied freedom of political communication it would be outside the legislative powers of the parliament and it would not apply in any event. So in some senses the provision seems slightly excessive, unless it is intended merely to make the interpretive point that parliament is not intending to legislate in terms of constitutionality. To describe it, as it does in the note, as an evidential burden is curious. I

do not understand how one discharges an evidential burden in relation to a point of constitutional law as a concept, as I understand it, relating to matters of fact in criminal law.

So there are some oddities in the drafting of it. Putting those technical points to one side and looking at the substance, it would depend on the nexus, if any, between the political communication which we were talking about before and the communication as protected in order to ensure that it is Australian electors and, in the case of the Senate, state electors who are directly electing their members of parliament, because that is the touchstone on which the political communication doctrine hangs. So if the political debate is getting more involved with, for example, Australians with sympathies for overseas political activity or political movements talking about those matters—whether or not they might be involved in those matters—it becomes greatly removed from elections in Australia.

If the matters under discussion were connected to Australian politics, for example, or were the government to proscribe an organisation or were the government to go to war in relation to a certain organisation's activities or against a certain country, or were Australia to send peacekeepers to a certain area, as you got a nexus to Australian political debate the political communication doctrine would come into play to offer protection. As you get more removed from the Australian debate it is less clear that it will come into play.

There is also the question of proportionality. Unlike in the United States, there is not blanket political free speech in Australia that can be restricted under the *Theophanous* and *Lange* doctrine if the restriction is proportionate. And I am not sure whether this would count as proportionate. At least the High Court might think that if parliament has chosen to limit certain communication in order to protect the community against acts of terrorism or the threat of terrorism, some such constraints might be counted as proportionate. It is a little hard to know, until you are actually in the court and you see what they say, whether this will go too far to be counted with that doctrine, as some have commented. It is a little hard to project forward.

**Senator LUDWIG**—I was really only looking for your general view about that provision and whether or not it is effective.

**Mr Emerton**—Sorry, I may have answered at excessive length.

**Senator LUDWIG**—You answered that question, in any event. My only other question related to the four ASIO powers you commented on, saying they were highly objectionable. Could you point to how they could be misused in any way?

**Mr Emerton**—I guess my worry is in the scenario that I gave. Knowing that there is a warrant saying, 'You must attend at ASIO at 2 p.m. this afternoon,' at 12 you ring up your lawyer and speak to him or her. That is your first communication. Then that person comes with you and advises you at your questioning. That is your second communication. Let us suppose that you are an informal member of a proscribed organisation and your lawyer is aware of that. Their advice is intended to keep you out of ASIO detention so that you can turn up at the Federal Court tomorrow in order to argue a case for delisting. But they are not advising you on that; they are advising you in relation to your ASIO hearing, or they are giving you advice that is intended to support your organisation and let it continue to exist because they want to keep you out now, so you can go ahead and run the delisting argument tomorrow. But that communication is not protected, so that lawyer has committed an offence. Am I answering your question?

**Senator LUDWIG**—My question related more to those provisions and to the amendments to the Australian Security Intelligence Organisation Act.

**Mr Emerton**—I misunderstood your question. I apologise.

**Senator LUDWIG**—I understand where the confusion came in. I was reading from your submission. Why did you say that those ASIO provisions were highly objectionable? You indicated that they were highly objectionable. I was interested in why you said that they were highly objectionable.

**Mr Emerton**—Okay. I apologise for my irrelevant comment.

**Senator LUDWIG**—It was helpful in any event.

**Mr Emerton**—I said that they were highly objectionable because when the ASIO legislation amendments went through, which allowed for the detention of non-criminal people who were suspected of having intelligence relevant to investigating terrorism offences et cetera, there was a lot of debate about that and about safeguards, and safeguards of all sorts were implemented. The subsequent amendments which then dealt with the issue of passports and leaving Australia were passed I think in about December last year. They were

annexed to those safeguards because they came into play upon the issuing of a warrant. If this proposal went through, all those safeguards would be circumvented.

In my submission I give a list of things that have to happen before a warrant can be issued. You have to give information about previous warrants; you have to give information about times of detention and you have to be satisfied on reasonable grounds that the person can provide the intelligence. The issuing authority as well as the minister has to be satisfied of those matters and so on. If the schedule 2 amendments were passed all those issues would be circumvented in relation to confiscating a passport. All that the director-general of intelligence has to do to activate those provisions is to write a request to the minister for the issuing of a warrant. The issuing of the request is the first step in the process so it is not subject to any of the safeguards. So that could be done and then the passport would have to be forfeited, even if the matter were—‘frivolous’ seems the wrong word. If there were no genuine intention to detain and interrogate the person but, for example, ASIO wanted to keep them under surveillance and therefore wanted to have their things confiscated so that it could keep them under surveillance, even though it had no grounds for thinking that a warrant would be issued—

**Senator LUDWIG**—Can you see where that might potentially be misused?

**Mr Emerton**—Let us suppose that ASIO has an individual under surveillance but that person is not a criminal so he or she cannot be charged with any offence which could then lead perhaps to the forfeiting of a passport. They are not reasonably suspected of having intelligence relevant to a terrorism offence, so there is no prospect of a warrant being effectively issued against them, which would trigger confiscation. If, nevertheless, for its own purposes, ASIO wants to keep them under surveillance as it is concerned that they are going to leave Australia under a foreign passport, a request can be issued that has the effect of locking down their passport.

A subsequent request can be issued when that one runs out which can lock down their passport and so on, without at any stage a criminal offence having been committed and without at any point even the rather broad grounds for the issuing of an ASIO warrant actually being satisfied. It would be purely within the discretion of the director-general of intelligence to issue these requests, which would then trigger confiscation, forbidding them to leave Australia. If it is the intention of parliament to give the director-general of ASIO the power to prevent people from leaving Australia on his or her own discretion, it would do much better to enact a provision which stated that outright and made it clear what was being done—that is, vesting what I would think is a quite excessive power in the head of a covert security agency. In effect, it would be vesting that power almost under stealth because it seems to annex it to those safeguards. As I tried to argue in my submission, it circumvents all the safeguards because it would trigger the first step in the process and the last step in the process once all the safeguards have been gone through.

**Senator LUDWIG**—Thank you, that is helpful.

**CHAIR**—Thank you, Mr Emerton, for appearing before the committee today, and thank you for your submission.

**Mr Emerton**—Thank you very much, Senator.

[10.29 a.m.]

**THAM, Mr Joo-Cheong, Associate Lecturer, School of Law and Legal Studies, La Trobe University**

**CHAIR**—You have lodged a submission with the committee which we have numbered 50. Do you wish to make any amendments or alterations to that submission?

**Mr Tham**—My opening statement amplifies on my submission. I have not had an opportunity to reduce it to writing so I would like an opportunity today to do so and to lodge a supplementary submission.

**CHAIR**—I ask you to make that opening statement. At the conclusion of your statement we will go to questions.

**Mr Tham**—Thank you for the opportunity to appear before this committee. I note at the outset that my submission and comments are confined to the proposed association offence. In his second reading speech on the bill the federal Attorney-General said:

We do not assume that protecting national security is opposed to protecting civil rights, particularly the most fundamental right of all—the right to human security.

I wholeheartedly agree with that statement, but abstract statements such as these have very limited utility. With anti-terrorism laws it is the specifics that are decisive. When the specifics of this proposed association offence are appreciated it is clear, in my view, that it should be rejected. There are at least four reasons for this. How this proposed offence promotes human security is far from obvious. Indeed, it is actually productive of insecurity by conferring broad executive discretion.

More than this, there is a serious risk that this insecurity will be selectively applied to Muslim sections of the Australian community. Lastly, this proposed association offence stands on insecure constitutional foundations. Underlying all four grounds is the breadth of this proposed offence. Various examples can be given, such as those given by Senator Mason, Senator Brandis and Petro Georgiou. Let me add another which will elucidate some of the constitutional issues. Let us assume that the offence applied prior to East Timor gaining independence and it was very probable at the time that there would have been ALP local branches openly supporting Fretilin's armed struggle. Some might even have been financing this armed struggle.

**Senator BRANDIS**—There might have been Liberal Party branches doing that sort of thing.

**Mr Tham**—That is right; it might have been across the board. This support would have made these local branches—ALP, Liberals and Greens—terrorist organisations under the Criminal Code Act. At the very least they would be fostering a terrorist act. This would also mean that the Attorney-General could legally proscribe those organisations. If proscribed it would then be illegal for those who knew of the branches' support for Fretilin's armed struggle to associate with members of those branches. In these circumstances, most campaign and party meetings of those branches would be illegal. The breadth of this proposed offence which extends to criminalisation of some electoral activity identifies a key reason why this offence should be rejected.

The necessity on the basis of preventing extreme acts of political violence is far from obvious. Those who have justified or tried to advocate this offence have said that it will cut off support to so-called terrorist organisations. In response I have made two comments. First, this argument fails to recognise the breadth of the statutory notion of a terrorist organisation which embraces in some circumstances local party branches. Second, it evinces a fundamentalism that is increasingly apparent with proponents of anti-terrorism laws and that is an attitude that all conduct remotely conducted as acts labelled as terrorism should be criminalised even though such conduct bears no nexus or no links to acts of physical violence.

The breadth of this offence also means that broad executive discretion will be conferred in terms of who is investigated and who is prosecuted. This discretion is laid upon the significant discretion conferred upon the Attorney-General in terms of which organisation is proscribed as a terrorist organisation. The danger with such discretion has always been selective and arbitrary application. There is no good evidence that this danger has been realised. The parliamentary joint committee on ASIO, ASIS and DSD, in its review of the listing of Palestinian Islamic Jihad urged 'a more considered process in the prescription of terrorist organisations.'

The Parliamentary Library recently released an excellent research note entitled, 'The Politics of Proscription in Australia'. Its key thesis is that the proscription power to date has been exercised on an inconsistent basis. Some organisations with links to Australia have not been proscribed, whereas some organisations without links to Australia have been proscribed, for example, the Palestinian Islamic Jihad. Importantly, all organisations currently proscribed under the Criminal Code Act have all been Muslim groups and all persons charged with terrorism offences to date have been Muslim. So there are good grounds to

suspect that if this offence is enacted it would be directed at Muslim individuals and groups. If so it would undermine a key tenet of the rule of law, equality before the law, and it would clearly erode the multicultural fabric of our society.

Lastly, let me address the constitutional aspects of this offence. I refer, first, to the implied freedom of political association. While the High Court is yet to accept such a freedom, there are, as I argued in my submission, cogent grounds for such an implication. Assuming such a freedom it is seriously arguable that this proposed offence would infringe on this implied freedom of political association. The example that I gave at the beginning of my opening statement clearly demonstrates that this offence burdens political association. While the extent of the burden is somewhat tempered by the exception in favour of political communication, the burden is still quite significant. It is all the more significant, as Senator Brandis pointed out, because most political parties have at one stage or another openly supported armed struggle.

The question then is whether this offence is reasonably appropriate or able to be adapted to the aim of preventing extreme acts of political violence. The answer is likely to be no. It criminalises conduct that is only peripherally connected to such acts. More than that it criminalises conduct that lies at the heart of the implied freedom of political association, that is, association for electoral purposes. Not only is this proposed offence constitutionally suspect; it is built upon a proscription regime that is likely to be constitutionally invalid. That is because the proscription regime can be said to usurp judicial power by giving rise to bills of tender.

Let me approach this by using an analogy. Let us say that we had a law that stated explicitly that Mohammed was guilty of an offence and Mohammed was sentenced to 10 years gaol. That law clearly would be a bill of tender. Let us pick a different law that did not directly convict Mohammed or punish Mohammed but made various forms of association with Mohammed illegal. It is seriously arguable that that law would still, in substance, be a bill of tender because it usurped the judgment and punishment of criminal guilt. Substitute Mohammed for Mohammed and his friends and you have the basic outline of the criminal court proscription regime. You have groups of persons being directly punished for being members of a group and they are indirectly punished by the other terrorist organisation offences.

It is a fact that if such persons are being punished for their status, who they are and not their conduct and what they have done, that taints the proscription regime of constitutional invalidity. There is, of course, the invalidity of the judicial review but, as I argued in my submission, the validity of such a review is unlikely to save the proscription regime. For those reasons I urge the committee to reject this offence.

**CHAIR**—Thank you Mr Tham and thank you for your submission on these issues.

**Senator LUDWIG**—I understand that your comments relate only to this provision in the bill. You did not want to comment on any other aspects of the bill, is that right?

**Mr Tham**—That is right.

**Senator LUDWIG**—In respect of this provision I understand you state in your submission that this provision should be rejected outright. Is there any saving grace at all? You state that there are a number of reasons. First, you state that it is constitutionally uncertain and, second, it confers too broad a discretion on the executive and it is built upon a proscription regime that is constitutionally shaky. Is anything salvageable out of this provision, or do you say that it should be rejected outright?

**Mr Tham**—There is some sense of *deja vu*, Senator Ludwig in relation to the bill. My view, which is the view I have taken to a number of laws, is that it should be rejected outright. We can propose numerous amendments to it, we can say that there should be strict liability, we should broaden our exemptions and we should increase the number of occasions. It is not beyond our ingenuity to propose numerous amendments. In my view we will just prevent a bad law from being a worse law. It will not redeem its status from being a bad law. My view might be seen as unduly recalcitrant but I am not in the business of proposing amendments to this type of law.

**Senator LUDWIG**—In respect of the provisions I think you have had an opportunity of hearing other submissions. Have you had an opportunity to consider the provision that relates to the implied constitutional power and whether that exemption does or does not do what it sets out to achieve?

**Mr Tham**—It is unclear what it sets out to achieve. Let me answer in terms of what legal effect I think it will have. At first, as I pointed out in my submission, it will not affect the law in terms of being a political association. The general effect will be an uncertain effect. It will be uncertain because the question will turn on the question of proportionality. It is quite clear that this offence would burden political communication. Then the question is whether this offence is proportionate to the aim of preventing extreme acts of political violence.

Even though this provision has a legal effect, it will be a real matter of careful judgment for any person who approaches this offence. They will think, 'Is this particular communication reasonably proportionate or is this offence such and such?' In general I think the provision will have legal effect but it is one of uncertain effect. Again that answers the arbitrariness of offences like these. As an element of uncertainty therefore there is an element of arbitrary power.

**Senator LUDWIG**—In respect of the argument that it provides arbitrariness in respect of the application of this power, have you had a closer look at the exemption? This provision does not apply under 4(b) 'the association is in a place being used for public religious worship and takes place in the course of practising a religion'. Is that provision wide or narrow in its scope or should it be wider?

**Mr Tham**—I come back to my earlier comments. I think that this whole offence should be rejected. I add to that that I share the concerns expressed in various submissions that the policing of this exemption will clearly mean quite severe invasions in the private affairs of people. The same applies with the close family member exemption and the policing of what is a domestic and family matter for discussion. How these exemptions apply will definitely mean severe incursions in the private sphere.

**Senator LUDWIG**—I refer more broadly to the position that you are arguing. How broadly will the power, if granted, be? You have indicated that it has broad reach. Do you have in mind any examples as to how it could be used and the extent to which it might reach?

**Mr Tham**—Are you referring to the offence?

**Senator LUDWIG**—Yes.

**Mr Tham**—The example I gave was Fretilin.

**Senator LUDWIG**—Do you say that that is the limit to which the breadth might reach?

**Mr Tham**—That is one example. I agree with the examples given by Senator Mason and Senator Brandis. I agree with the examples given by Petro Georgiou in the second reading debate. All of them indicate the breadth of this offence.

**Senator BRANDIS**—I was struck by your remark in which you put it succinctly that most political parties in Australia at one time or another have supported movements that advocated armed struggle. Would you regard a war to liberate an enslaved people as an action done for the purpose of advancing a political cause?

**Mr Tham**—Yes, I would. I suspect that what you are getting at, Senator Brandis, is using some military force in your argument.

**Senator BRANDIS**—No. They are purely examples.

**Mr Tham**—They are purely examples. The support political parties have for armed struggle is one example. It is quite clear in Australian political life that various parties have supported the use of violence for political purposes.

**Senator BRANDIS**—The ultimate form of political violence is war, is it not?

**Mr Tham**—That is right, yes. It is quite clear that the use of military force in Iraq, if you look at the terrorism offences, would clearly be a terrorist act under the Criminal Code Act. By implication, what follows from that? If we just look at the Criminal Code Act and its provisions we see that the Australian government is a terrorist organisation under the Criminal Code Act.

**Senator BRANDIS**—I do not read in the exclusions in section 100.1 of the Criminal Code that a just war is an exception.

**Mr Tham**—That is quite true. Other parts of the Criminal Code Act make legal acts that are authorised under law. So the argument would be that an executive decision to authorise war is authorised either by statutes or by the Constitution and are therefore exemptions to these offences. Looking at the terms and sections in isolation, you are quite right.

**Senator BRANDIS**—So I should stop associating with people who share my view that the liberation of the Iraqi people is a good thing? It might be that I am violating these association provisions?

**Mr Tham**—Dare I say that if we looked again at these terrorism offences in isolation I would say that you were guilty of an offence. The Liberal Party supports the use of military force in Iraq. It is fostering a terrorist act as a result. Therefore it is a terrorist organisation under the Criminal Code Act. You are, therefore, a

member of this organisation which is a terrorist organisation. You are knowingly a member of a terrorist organisation. I would think that there would be a maximum 25-year jail term ahead of you.

**Senator MASON**—We think it is a just law. We have St Augustine and others.

**CHAIR**—If there are no further questions, I thank you, as always, for your comprehensive submission. If the committee has any further issues that it wishes to raise with you we may be in contact with you.

[10.49 a.m.]

**CHONG, Ms Agnes Hoi-Shan, Co-convenor, Australian Muslim Civil Rights Advocacy Network**

**KADOUS, Dr Mohammed Waleed, Co-convenor, Australian Muslim Civil Rights Advocacy Network**

**CHAIR**—Welcome to the committee. The Australian Muslim Civil Rights Advocacy Network has lodged a submission with the committee which we have numbered 84. Do you need to make any amendments or alterations to that submission?

**Dr Kadous**—Yes, I do. We have a couple of additional recommendations that the committee may wish to consider. I will discuss them in my opening statement.

**CHAIR**—We will move to that opening statement. At the conclusion of your statement we will go to questions from members of the committee.

**Dr Kadous**—Thank you very much. First, we express our deep appreciation to the committee for inviting us to appear. At the same time we ask for the committee's understanding if there are any shortcomings because barely two weeks were available for written submissions and barely four days ago the timetable for today was confirmed. We would like to confirm that, as schedules 1, 2 and 5 have been moved to bill No. 3, today you are considering schedules 3 and 4.

**CHAIR**—We are considering the entire bill as it was originally referred to the committee in the Senate, notwithstanding some confusion over the division of the bill in the house. Make any remarks in relation to whatever you want to contribute today. If we wish to pursue other matters with you we will take them up. If you refer to issues as broadly as possible that is fine with us.

**Dr Kadous**—Thank you very much. We would like to focus our discussion on bill No. 2 in two main areas—first, certain legal concerns with the legislation and, second, certain impacts on the Muslim community who have borne the immediate effects of Australia's past antiterrorism legislation, in particular the ASIO Anti-terrorism Bill 2002. We look forward to your questions. This is a brief outline of our submission which contains more details. As with the previous presenter, Mr Tham, our main submission is in relation to schedule 3 of the amendments.

We note that we have had the benefit of looking at other people's submissions and we note the white community and organisational position to this part of the legislation. Of the 93 submissions the only submission that we found was in support of this schedule was the submission of the Australian Federal Police who, in my opinion, failed to give concrete reasons as to why the legislation is necessary, particularly given the existing provisions for crimes of providing support under section 102.7 of the existing Criminal Code.

We have five legal concerns about the legislation, in particular the association offence. The explanatory memorandum explains that the association offence is based on consorting laws used in states like the one that we are in right now. However, such consorting laws have been shown to have numerous problems that we detail in our submission. Furthermore, in states that have such legislation—for example, Western Australia, Victoria and New South Wales—they have been recommended for repeal or replaced by legislation that is far less discretionary and far more specific, such as New South Wales non-association laws.

Also, to suggest that this legislation is modelled on consorting legislation is akin to saying that a machine gun is modelled on a knife. The punishment has been magnified by a factor of six. State consorting laws only apply to people who are convicted of criminal offences and they require habitual contact rather than just two incidents of contact.

So we see that the consorting laws are already shaky. This is combined with the shakiness of the definition of a terrorist act—on which Mr Tham has already elaborated and on which I am sure Mr Emerton also elaborated—that could include, for example, not just supportive organisations like Fretilin but also trade union offences, such as nurses picketing a hospital. This then feeds into the shaky definition of a terrorist organisation which was outlined by Mr Tham. It is within the field of the Attorney-General and his decision is not open to judicial review, only the validity of his decision. In other words, when we say that it is subject to judicial review they can see whether it was correct to say that the Attorney-General had the right to make that decision, not whether or not the decision itself was correct.

That is then combined with the shaky definition of 'membership' that exists in the Criminal Code, which includes such notions as informal membership, which is not defined, or a person who has taken particular steps to become a member, which is also not defined. The bill, in its suggestions, introduces additional

shakiness by not providing definitions of terms like ‘promotion’. The second problem is the common law principle of proportionality, one of the oldest traditions of common law, which states that, roughly speaking, equal punishment should be given for equal crime, yet we find that the state consorting laws have a punishment of six months while this particular offence has a punishment of three years.

Third, we believe that the legislation may be in violation of Australia’s international treaties, in particular the International Covenant on Civil and Political Rights, to which Australia is a signatory. Article 22 specifically allows freedom of association on which this legislation impinges. It provides an exception for legislation that is necessary in a democratic society in the interests of national security. However, the test here is necessity. What has not been made clear is why this legislation is necessary, given the existing provisions.

Fourth, as has been mentioned, there are already existing provisions especially under section 102.7 of the Criminal Code which provide an offence for providing support for a terrorist organisation. If the intention is to support those who are supporting a terrorist organisation, why is that legislation not sufficient? This point was also raised by others—for example, in the submission of HREOC and Amnesty International, among others.

Fifth, we believe that the legislation has unintended consequences through its interaction with existing legislation. In the short time available, we were able to pick up two such interactions which may be unintended or intended. First, someone charged with this relatively minor offence is granted bail only under exceptional circumstances because it is one of the terrorism offences. We can discuss that issue later. Second, this seems to have an unintentional effect of broadening the powers of ASIO and the AFP to monitor and carry out surveillance of people who are accused of such an act or who they are suspicious of committing such an act—an issue that is also raised by the privacy commissioner.

Having covered the legal issues, we would like to address some of the issues that particularly affect the Muslim community. You may ask why this legislation has an effect on the Muslim community, and I will give you some reasons for that. Currently, all the 17 prescribed terrorist organisations in Australia—and this is only the case in Australia—are related or linked to Muslims. In the United States I believe that the statistics are 22 out of 37. As outlined before in a parliamentary note referred to by Joo-Cheong Tham, it is shown to be a fairly arbitrary and subjective political process as to why some terrorist organisations are listed.

Effectively, because the current prescribed organisations are all Muslim, this offence of association relates only to Muslims. It applies exclusively to Muslims at the current time. One of the main effects of this bill is that it will further isolate the Muslim community at a time when both Muslim and non-Muslim Australians need to work together closely to prevent terrorism. The Muslim community is suffering. Some of you may have had a look at the HREOC report called ‘Ismağ’, which looks at the situation in which the Muslim community finds itself and makes recommendations to government offices to ensure that, by their actions, they do not incidentally increase this marginalisation of Muslims.

We see two main problems with the legislation. First, there is the uncertainty surrounding the legislation. Because of the definitions of these terms on which I elaborated there is a lack of clarity as to exactly what constitutes a crime under this legislation. This effectively leads to every interaction being questionable and uncertain. I can give you real-world examples of that to illustrate this problem. It will have a huge impact on what I believe to be quite legitimate activities of Muslim organisations. The second problem relates to the defences. Ironically, the breadth of the association crime is matched only by the narrowness of the defences which are, by and large, very strictly defined.

Two particular defences are overly specific in relation to the Muslim community. I outlined why we need to have a look in particular at the impact on the Muslim community. As pointed out in many other submissions, the first is in respect to families. Australians generally, but Muslims particularly, tend to live in extended families. We have evidence of studies that suggest populations in Germany of Turkish minorities. Our belief is that that exemption, if necessary, should be extended to include extended families, which includes cousins, aunts, uncles, nieces, in-laws and nephews.

The second relates to religious events. Events that are celebrated in the Muslim community frequently do not take place in the mosque. Those of you who have an understanding of Islam would know that it is a whole life religion. For example, things that Australians may see as cultural also come into the fold of what is considered Islam. So the cultural and religious are very closely aligned in Islamic societies. For example, things like events to celebrate the birth of children or marriages frequently take place outside the mosque.

To give another example of something that is uncertain in the legislation, what if Muslims have Eid prayers, which happen twice a year, roughly the equivalent of Christmas and Easter? The tradition is that they be held

outdoors, not in a place that would usually be used for public worship. In 2002 a prayer was held at Bicentennial Park in Homebush which 2,000 people attended. It is a time for celebration so you literally go and greet hundreds of people in the space of 10 minutes. It is an opportunity for the Muslim community to interact.

We must also discuss the impact of the provisions to move around people on remand, granted under the legislation. We believe that this takes away a person's rights to contact with both their family and their legal counsel. As I have already elaborated, family is particularly important for the Muslim community. I do not see the justification for why the Attorney-General need not explain his decision or why he should not be amenable to judicial review.

Finally, you can find our detailed recommendations in our submission, but I would like to add two recommendations which are the subject of the additional submission that I have given to you. Because of the shortness of time we only thought of it afterwards. I make it clear that we object to the provisions especially of the association offence, as did Mr Joo-Cheong Tham, but we understand that committees such as this one often are not in a position to recommend total repeal of particular clauses in the legislation. So we make these recommendations in that spirit. We totally oppose those particular provisions but we wish to make suggestions anyway.

The first additional recommendation is that, given the broadness of the uncertainty of the legislation and the apparently unintended interactions with existing legislation and the existing demonstrated problems with consorting offences, we are strongly of the opinion that a sunset clause should be inserted into the legislation.

**Senator BRANDIS**—Why? If it is no good, what will a sunset clause do? It will not fix it.

**Dr Kadous**—I totally agree with you. It would be our preference—

**CHAIR**—Dr Kadous, do not respond to my colleagues; just complete your opening statement.

**Senator BRANDIS**—I am sorry, Dr Kadous; I often make these helpful statements.

**Dr Kadous**—I very much appreciate it, Senator Brandis. The ASIO Anti-Terrorism Bill had provisions under which there is a sunset clause. So it would be logical if this legislation, on which it is based, had a sunset clause. The second additional recommendation, which was also made in line with Senator Brandis's comments, is that the definitions used in the legislation should be tightened and refined to provide clarity. In particular, the amendments should clearly define the notions of promotion, the concept of support and the concepts of humanitarian aid and they should further clarify the original 2002 bill with regard to the definition of 'membership'.

To summarise and build on the other recommendations, they build on our previous submissions and the comments that we have made, in particular that the provisions inserted after the Senate committee's review of the previous bill—the ASIO Anti-Terrorism Bill (No. 1) 2004—with regard to bail being granted only under exceptional circumstances, we believe that this offence should be exempted from that. I would be happy to go through those recommendations, if you would prefer.

**CHAIR**—Thank you, Dr Kadous, for your comprehensive opening statement. I think this is my first encounter with the Australian Muslim Civil Rights Advocacy Network. Would you outline the nature of your organisation for us?

**Dr Kadous**—We appeared before the Senate committee in 2002, but as individuals. In the meantime we formed the Australian Muslim Civil Rights Advocacy Network.

**CHAIR**—So that was subsequent to the bills that we considered in 2002?

**Dr Kadous**—That is correct. We were doing it as individuals then.

**CHAIR**—Was that with Ali Roude?

**Dr Kadous**—We appeared with Ali Roude. I believe that Senator Bolkus was the chair at that time. Islam is a religion that enshrines and protects civil rights. As part of our belief as Muslims, we believe that we should do what we can to protect civil rights in Australia for all Australians. It is also a particular interest of ours because at this time the legislation is having an impact on the civil rights of Muslims. We are an organisation that is basically involved in advocacy. We meet with politicians. We try to organise things such as open letters and so on.

**CHAIR**—Thank you very much. Having been to an Edith Fairfield showground I am familiar with the matter that you drew to our attention.

**Senator LUDWIG**—I particularly want to hear more of your view in respect of the presumption in favour of bail that you outlined. I think you indicated that you might want to make a further submission in respect of that.

**Dr Kadous**—As you may recall, under the Anti-Terrorism Bill (No. 1) 2004, a provision was added by the Senate committee at the last minute that basically means that bail is provided for terrorism offences only under exceptional circumstances. This is an offence that carries a maximum sentence of three years. You would expect that the reversal of bail would usually occur only for offences that have a maximum sentence of at least 25 years. So it is a ridiculous situation to have an offence that carries a penalty of only three years, yet there is a presumption against bail. There is not just a presumption against bail; it is to be granted only under exceptional circumstances.

As you may recall, the New South Wales parliament changed the presumption of bail and then the Attorney-General basically outdid Mr Carr. So you have a situation where, by the time the court case is heard and so on, a person could be in gaol for 18 months to two years before his case is even resolved, and then he could be found to be innocent of a crime for which he could have served a lesser sentence. It is a ridiculous situation. I cannot believe that such an effect was intentional. I believe that it must be an unintentional oversight of the legislation. It would then effectively become more of a police power—a threat that the police could use against people. It would be very easy to present some mild prima facie evidence before a judge and a judge would have no freedom. He would have to grant bail because, under this legislation, bail can only be granted under exceptional circumstances. I think that is extremely objectionable. Actually it goes so far as to effectively reverse the concept of guilt until proven innocent, rather than the other way around.

**Senator LUDWIG**—I refer to that part of the section that does not apply. Your view of (b) is that the association is in a place that is being used for public religious worship and it takes place in the course of practising religion. Do you have a view about what that means? Do you think it is too narrow in its application?

**Dr Kadous**—A lot of legitimate activities are conducted by Muslims that would not be adequately covered by that definition. Muslim activities are not confined to mosques. In its application to Muslims it is based on a misunderstanding of exactly how broad Islam is in terms of its cultural scope and where Muslims meet Muslims for religious purposes. For example, I attend a class about religious discussions that occurs in someone's house and at which maybe 10 people attend. That is kind of normal for some communities. There are events that occur at schools. We might hire a school hall to have a social or religious event or to pray to Eid. Although we understand that the definition is subject to interpretation and that it is not clear, we believe that it should effectively be broadened basically to include other legitimate activities which are cultural and religious in nature.

**Senator LUDWIG**—I refer to your concerns relating to the surrender of passports under this bill. One of the earlier witnesses gave evidence about this issue. Were you present when that witness gave evidence?

**Dr Kadous**—Yes.

**Senator LUDWIG**—Do you have anything to add in relation to that, or do you share his view?

**Dr Kadous**—Unfortunately, I was not a party to the entire conversation. However, our view is that it may be necessary under certain circumstances if ASIO is questioning someone for their Australian and foreign passports to be taken. What we object to is that they do not even need a warrant to do that. In our suggested recommendations we believe that a reasonable compromise is that, once a warrant is granted basically to speak to someone when someone comes from ASIO, it is appropriate for that person to hand over their passports. We understand that that is a reasonable compromise. However, for them not even to need a warrant to restrict people's freedoms to travel is kind of ridiculous in our opinion. We do not understand the reasoning behind it.

**Senator LUDWIG**—I refer to the exemption relating to the use of legal advice or legal representation in conjunction with the two items that are listed. Do you also have a view as to whether that is too broad or too narrow?

**Dr Kadous**—I would argue that that is too narrow. If the committee will allow me, I will give two real-world examples of things that would happen to us as an organisation working with the Muslim community. We have prepared a booklet entitled 'Terrorism laws: ASIO, the police and you' which we are launching today which goes through people's rights and responsibilities with respect to the legislation. As you know, there have been a total of 18 bills and it has been very hard for members of the community to keep up with the changes to the legislation, whether they be Muslim or non-Muslim.

Here is a scenario, and the second example will relate directly to your question. Let us say that we go to a social event and someone at the social event says something like, ‘I support Lashkar-e-Tayyiba and the fight for freedom in Kashmir.’ It depends from which side you look at it. To many Muslims Lashkar-e-Tayyiba is no different from Fretilin. There are accusations that it is involved in terrorist acts, but this is something that someone might say. I might feel obliged to say, ‘Look, you are stepping very close to the edge of the law here. Here is a booklet that explains what your rights and responsibilities are.’

If that person then calls me a week later and says, ‘Hi, I am not sure about something’, and I say, ‘Okay, just read the booklet because we do not know what your particular legal situation is and we do not want to get involved because we are not really qualified’, that is not covered by legal advice. In some sense it is possible that that person is definitely promoting terrorist activities. On the other hand you could argue that by me giving him this guidance I am actually supporting him and Lashkar-e-Tayyiba’s ability to exist by providing them with quite common legal information that might tell them, for example, how to dodge the laws. It is not up to me how that legislation is used, but it could be interpreted that I was actually intending to support Lashkar-e-Tayyiba’s ability to exist. That is one scenario.

**Senator LUDWIG**—That is under the view that 2 (e) would include ‘continue to exist’?

**Dr Kadous**—That is correct. Is that the current state?

**Senator LUDWIG**—Yes, that is what the bill says.

**Dr Kadous**—You could argue that even without that right to continue to exist it could continue to expand. There are various ways of doing that, even with that constraint. The second example is that recently an organisation called the Islamic Legal Fund has been established in Sydney. Basically it is a legal fighting fund to support Muslims who have been arrested, not specifically on terrorist issues, but it may embrace terrorist issues. One of its objectives is also to support the families of people who have been arrested. For example, we know that some of these people who have been arrested so far have extensive families and several children and it is not clear exactly how these people are being supported. The Muslim community feels that they should be supported.

Legal fundraising is not covered, for example, by that exemption. It is quite possible that the administrators of the Islamic Legal Fund could be charged under this offence. To give another example, if we do support the family and provide material support for the family in terms of food, gifts or letters, clearly one could argue that in doing that we are supporting someone who could be a member of a terrorist organisation. There is no exemption for this. Humanitarian aid to the family could also be exempt. The thing excuses humanitarian aid to the particular person but not, for example, to that person’s family. So these two examples illustrate frontline situations that we as Muslim organisations could face and we could be pulled before a court for these offences under these association crimes. I would argue that both those activities would be legitimate and should not be illegal.

**Senator MASON**—I do not have a question; rather I have a comment in relation to this set of provisions. I am not certain in my own mind yet whether it is simply a matter that they might affect democratic dialogue and support, which is where I tend to be at the moment, or whether it is Senator Brandis’s and Mr Tham’s view that we are all terrorists now. In a sense I am still not certain how broadly these provisions are cast. I note that my friends from the federal police and the department are here and I will ask them some questions about that in a minute. Do you think that these provisions simply inhibit democratic dialogue and support in terms of money, or do you take the even broader view that they are so broadly cast that they could criminalise government activity?

**Dr Kadous**—My opinion is that it would, were it not for section 10 of the Criminal Code that provides authorisation. Approximately four months ago I wrote an article asking whether the Australian government was a terrorist organisation. On the legal issue my personal opinion is that, were it not for the section 10 exemptions, definitely. It meets all the criteria. Even quite legitimate activities like the involvement in East Timor would qualify. It was clearly done with a political or ideological aim, which is basically to install a democratic government in East Timor. It was clearly intended to harm people. You cannot have a war without the intention to harm. It meets all the requirements under section 100.1 of the Criminal Code. Were it not for section 10 of the Criminal Code and certain provisions in the Constitution my opinion is that John Howard could be arrested for being the director of a terrorist organisation.

**Senator BRANDIS**—That follows, does it not, from the proposition that ‘terrorist act’ means, as defined, any form of political violence. Political violence includes war, including a just war.

**Dr Kadous**—Absolutely. I also subscribe to the concept of a just war, although I disagree with the concept that the war in Iraq was a just war. I do not have any problem with the concept of a just war, but the particulars of Iraq are another issue.

**Senator MASON**—It is a separate issue.

**Dr Kadous**—There is nothing in the existing legislation that mentions whether it is state sponsored or non-state sponsored. My personal opinion is that were it not for specific exemptions the Australian government would be a terrorist organisation and every university student would be training with a terrorist organisation because, clearly, universities are funded by the government. The implications would be very wide. That remains my opinion. Again we come back to the issue of discretion. Who enforces these laws? It is the AFP or the government at the direction of the AFP that enforces these laws. That is one of the problems with the legislation. It is extremely discretionary. It is basically within the power of the executive arm of government and not the judiciary to control how that takes place.

**Senator MASON**—If we as parliamentarians are not terrorists, or the Prime Minister is not, you would say that these provisions at least inhibit democratic discourse and so forth? They at least do that?

**Dr Kadous**—They at least do that, if not more.

**Senator BRANDIS**—When you pose a rhetorical question as to who enforces these laws I am reminded of the behaviour of the disgraced late Attorney-General Lionel Murphy, who used the powers of ASIO in order to persecute Australian citizens who were assisting in the attempt to liberate Yugoslavia from the jackboot of communism in the 1970s. Is that the sort of example that you have in mind?

**Dr Kadous**—I know that Senator Brandis asked that question in a rhetorical manner, but my personal opinion is that it could be used in such a way.

**Senator BRANDIS**—My point is that lesser powers have already been abused in Australian history by the disgraced late Lionel Murphy.

**Dr Kadous**—Amongst others. Abuses of powers are by no means limited to Lionel Murphy or to that particular side of politics.

**Senator LUDWIG**—I have one last question which is more of an inquiry. I wish you well in the launch of your book. Where might I obtain a copy of that from?

**Dr Kadous**—The booklet is available from the web site. I will ensure that your office and the committee are provided with a copy of it.

**CHAIR**—I thank both you, Dr Kadous, and Ms Chong for appearing before this committee and for your submission.

**Proceedings suspended from 11.18 a.m. to 11.31 a.m.**

**LENEHAN, Mr Craig, Acting Director, Legal Services, Human Rights and Equal Opportunity Commission**

**O'BRIEN, Ms Julie, Senior Legal Officer, Legal Services, Human Rights and Equal Opportunity Commission**

**CHAIR**—Welcome. HREOC has lodged a submission with the committee which we have numbered 71. Do you wish to make any amendments or alterations to that submission?

**Mr Lenehan**—Just one minor amendment to paragraph 10 of our submission. In the last line of our submission, we refer to the Commission on Human Rights. Embarrassingly, we have not capitalised Human Rights. The only other thing I should mention in relation to paragraph two is that there is actually a more recent resolution by the commission and we will be happy to make it available to the committee after the hearing.

**CHAIR**—Thank you, Mr Lenehan. That will be helpful. I invite you to make an opening statement. At the conclusion of that we will go to questions.

**Mr Lenehan**—The bill seeks to amend the Criminal Code Act 1995 and the Transfer of Prisoners Act 1983. We understand the aim of the bill is to improve Australia's counter-terrorism framework. The commission's overwhelming concern is to ensure that the new laws aimed at protecting national security do not of themselves reach human rights standards and do not allow for the breach of human rights standards.

Turning first to the Criminal Code Act amendments, the commission's primary concern about the proposed amendments to the Criminal Code Act is the width of the new offence of association and the lack of precision in certain of its terms. The commission is concerned that the new offence is wide ranging in terms of the types of activities or persons who might be subject to it. The proposed offence potentially infringes the rights prescribed in article 19 of the International Covenant on Civil and Political Rights—that is the right to freedom of expression—and article 22 of that covenant, which is the right to freedom of association. The commission submits that such infringements are permissible only if the proposed offence conforms to the principle of proportionality and is the least intrusive means of achieving that stated aim. The commission is concerned that, in view of the width of the offence and the lack of precision in its terms, those requirements are not met.

The essence of the commission's concern is with the width of the term 'assist' and the range of activities that may fall within it. That is, the amendment provides that the person's association must provide support to the terrorist organisation, and the person must intend that the support assist the organisation to expand or continue to exist. The commission's key submission is that in order to conform to the principle of proportionality, the term must be defined in order to identify the nature of the risk that the offence is intended to address.

The commission submits that the term could be defined by reference to specific examples, as has been done, for example, in the United States of America. The commission's concern in relation to proportionality is not allayed by the exemptions. The commission submits that the exemptions as presently drafted do not contain adequate carve-outs for lawyers, journalists and family members. The exemptions for legal advisers require the proceedings to be on foot. Accordingly, for example, once a terrorist organisation has been proscribed, a lawyer providing advice to the organisation could have his declaration revoked in the absence of any proceedings, would fall outside the exemptions and would be guilty of an offence of association under the Criminal Code.

The scope and the meaning of the exemption that applies to political communications are not, in the commission's submission, at all clear. The commission submits that this exemption does not provide any certainty for journalists as to whether their opinion pieces on proscribed organisations would fall within the ambit of implied freedom of political communication. Finally, the commission notes with concern the heavily qualified exemption for close family members. The exemption applies only to specific family members listed in the bill and accordingly any cousins, aunts, uncles, nieces and nephews are provided with no protection. Further, it applies only when the association relates to a matter that could reasonably be regarded as a matter of family or domestic concern. The commission submits that the exemption should be extended both in relation to family members that are afforded protection and in relation to the types of association that are protected.

Turning quickly to the proposed amendments to the Transfer of Prisoners Act, the commission also has concerns, which it expressed in its written submission, in relation to those amendments. That part of the bill seeks to introduce a new part 4 into the Transfer of Prisoners Act to allow the Attorney-General to transfer prisoners between states or territories in the interests of national security. Such orders are described as security transfer orders. The commission's principal concern in relation to this issue is that the security transfer orders create the possibility for delay in bringing a remand prisoner to trial and, accordingly, the possibility for prolonged pretrial detention which may contravene article 9 of the International Covenant on Civil and Political Rights. The commission submits that issues of national security should not be decisive in determining the length of time a person charged with a criminal offence must await trial. Rather, a person should be brought to trial as soon as is reasonably practicable, having regard to the criteria set out by the European Court of Human Rights. We have referred to those criteria in our submission.

The proposed amendments to this act create the risk that security transfer orders could operate so as to delay trial in a manner that would breach international standards. The commission also submits that the power to order a prisoner or a remand prisoner to be brought before the court should remain with the judiciary. The bill seeks to transfer that power to the executive. The commission acknowledges that some measure of judicial control is retained in the act in respect of remand prisoners. However, the procedure by which judicial input is received is not at all clear. For example, it is not at all clear whether the court would seek submissions from the remand prisoner. One might also expect that there may be some degree of judicial difference when the court is informed that the Attorney considers that it is essential, in the interests of national security, that a remand prisoner remain in custody.

Finally, the commission submits that the decisions of the Attorney-General under the new part 4 of the act should be subject to judicial review through means other than through review by the High Court under section 75(5). The individual must be able to challenge the executive's assertion that national security is at stake in the more simple procedures provided for under the Administrative Decisions (Judicial Review) Act. Courts must be able to react in cases where invoking that concept has no reasonable basis or reveals an interpretation of national security that is unlawful or arbitrary. The commission would also like to thank the committee for the opportunity to make written and oral submissions.

**CHAIR**—Thank you very much. Ms O'Brien, do you have anything to add?

**Ms O'Brien**—No.

**CHAIR**—All right. We will move on to questions.

**Senator BOLKUS**—We will start by going to your suggestion that exemptions in respect of close family members should be extended. I wonder if you will elaborate on how you think they can be extended, whether that extension actually makes much of a difference, and tell us what sorts of association you think should be protected.

**Mr Lenehan**—Without wanting to be prescriptive in relation to that issue, the commission has noted the submission of the Australian Muslim Civil Rights Advocacy Network and the fact that in that submission a number of the broader family relationships are suggested as being worthy of inclusion in such an exemption. The commission has expressed similar concerns in its own submission which states that perhaps cousins, aunts, uncles and those broader family relationships that are not currently covered might be added.

**Senator BOLKUS**—My other question is in respect to the subject of judicial review. How practical is it, really, in these circumstances when security is, in a sense, quite critical to remove someone for safety and security reasons? When do you anticipate that judicial review process taking place? In those circumstances, would that have any meaningful effect?

**Mr Lenehan**—Courts are quite adept at dealing with situations of urgency. If your question also relates to the issue of confidentiality and secrecy, courts have had considerable experience in making orders for, say, closing courts or putting parties under obligations of confidentiality. The concern that we have in respect of judicial review is that you are really talking about, as we suggested, maybe extended periods of pretrial detention which may amount to a form of punishment. In those circumstances, the commission considers that it is appropriate to have that degree of court scrutiny of what is going on.

**Senator LUDWIG**—The area that you are referring to in respect of the entitlement to a trial within a reasonable period of detention and the right to judicial review—not in respect of the transfer of prisoners in the sense that I think the Minister for Justice indicated that it might be, such as for national security reasons or for security reasons or operational reasons, where one or two hours might be the period or the window through which a person might be transferred. You are not saying that judicial review should be in the act in that tight a scenario, are you?

**Mr Lenehan**—No. The concerns that the commission is raising are longer periods of pretrial detention and how that may affect a person's ability to prepare for, say, their trial.

**Senator LUDWIG**—That is more in relation to paragraph 17 under the heading 'Entitlement to a trial within a reasonable period of time'. Is that the part you are referring to?

**Mr Lenehan**—I am sorry: are you referring to our submission?

**Senator LUDWIG**—Yes.

**Mr Lenehan**—Yes.

**Senator LUDWIG**—I am just trying to identify the particular area. In respect of the other amendments, I missed your opening remarks but I will catch up with them in the transcript. You made comments in respect of all the schedules in the bill, or limited comment?

**Mr Lenehan**—We have made submissions in respect of the amendments to the Transfer of Prisoners Act and the amendments in respect of the Criminal Code.

**Senator LUDWIG**—Yes, I read those in your submission, but what I am interested in is whether or not you confine yourself only to those by dint of the issues that you have an interest in, or have you confined yourself for other reasons?

**Mr Lenehan**—We understood that these were the issues that would be before the committee, but we had at an earlier stage considered whether to make submissions on the other provisions of the bill. I would have to take it on notice but my understanding is that the commission had determined not to make submissions on those other aspects.

**Senator LUDWIG**—That is the point I was curious about. Of course, the whole bill is before the committee and we can take submissions in respect of that. It is a question of whether you want to add a supplementary submission in respect of those provisions that you would have otherwise commented on, were you not under a view that only certain provisions were before the committee.

**Mr Lenehan**—Perhaps the best thing for me to do will be to take that on notice and seek the commission's views on that issue.

**Senator LUDWIG**—All right. If you did want to make a supplementary submission on any other matter, I am sure the Chair would welcome that.

**CHAIR**—We did have some confusion in relation to the division in the House on the bill and the status of the reference to the committee, so all comments are welcome.

**Mr Lenehan**—Thank you, Chair.

**CHAIR**—On the comments you made in relation to association in particular, Mr Lenehan, and the provision of legal advice, this has been raised by a number of other witnesses, but I would be interested in HREOC's elaboration on that point whether the provision that is within the bill for access to legal advice is adequate or whether HREOC has certain concerns about that.

**Mr Lenehan**—We have said in our submission that we think it is unduly narrow and we are particularly concerned by the requirement that there be proceedings on foot. In our submission we have suggested that, for example, there may be cases where an organisation wants to obtain legal advice for the purposes under section 102.1(17) in the Criminal Code, making an application to the Attorney for the de-listing of an organisation. I suppose that is analogous to a wide range of other administrative decisions. You can take, for example, the section 417 discretion under the Migration Act. People regularly do obtain legal advice when attempting to have those sorts of decisions made in their favour and, from its submission, it will be apparent that the commission thinks that that is a legitimate course. We are aware that other groups have also expressed concerns about the narrowness of the exemption and we support those concerns.

**CHAIR**—To encapsulate that, you see the provision as it is currently drafted as an unnecessary restriction, or in fact an inappropriate restriction, upon access to legal advice?

**Mr Lenehan**—We do.

**CHAIR**—How would you suggest that it might be amended to improve it?

**Mr Lenehan**—I probably would have to take the views of the commission on precise drafting issues, but one obvious matter that emerges from our submission is the notion that perhaps the requirement for proceedings be deleted from the provision.

**CHAIR**—Would that give you the breadth of access, do you think, that is necessary?

**Mr Lenehan**—I imagine that there may also be some question as to whether, looking at the provisions, (i) and (ii) encapsulate all of the legitimate sorts of advice that an organisation may seek and receive. It is possible to imagine other circumstances in which that kind of professional advice might be sought. We would also note comments made by Mr Walker as to the possibility of other professions being able to provide advice to an organisation. I do not have the commission's views on that point but it is something that I will raise internally.

**CHAIR**—Will you come back to the committee on that?

**Mr Lenehan**—Yes, Senator.

**CHAIR**—Thank you very much. The question of the meaning of the words 'support' and 'assist' has been raised with the committee. Your submission adverts to those issues, but it is not clear to me what you think might be helpful in addressing the doubt in that regard. As you say, these things need to be defined with precision, so what suggestions would you may give in relation to those?

**Mr Lenehan**—We have noted one observation which is not particularly original: in fact it came from this commission in its report on one of the preceding bills. It was suggested that 'assist' could be defined inclusively, analogously with the Patriot Act in the USA. That would be one approach. I imagine that whether

or not that sufficiently clarified the provision would be something that people would have differing views on, and the commission would, before expressing its own view, probably want to see the provision as drafted to consider whether it addressed its concerns as to precision. But that is one possibility. I imagine there may be others. The other matter we have raised in this submission is that there are already in the Criminal Code a wide range of offences which cover many of the harms that perhaps might otherwise be brought under the existing provision.

**CHAIR**—They are the observations that you make in paragraph 35?

**Mr Lenehan**—That is correct.

**Senator LUDWIG**—I refer to a matter I raised earlier with a witness in relation to whether or not the passport offences would, or could conceivably, conflict or interact with the Refugee Convention—an area that I know you take a great interest in. Have you formed a view about that at all?

**Mr Lenehan**—We have not, but I am happy to take that on notice.

**Senator LUDWIG**—If you would not mind, given the interaction of people who are claiming asylum or who are seeking to claim asylum and whether or not these provisions might inadvertently or deliberately cause them some difficulty. It would be helpful for the committee to understand whether or not, for example, the refugee convention is undermined by those provisions as well.

**Mr Lenehan**—Certainly, Senator.

**CHAIR**—I want to go back to the ICCPR questions in relation to the freedom of expression and the freedom of association which your submission addresses. I wonder whether there are any suggestions (a) as to how you think they might specifically be infringed by the bill as it is drafted, and (b) how we might contemplate amending it to address those concerns.

**Mr Lenehan**—The rights that we have discussed as potentially being infringed by the bill are rights which have built into them certain exceptions, and one of those exceptions is when a restriction that would otherwise offend a prescription is carried out for national security. That does not give a state party carte blanche to enact whatever law it likes in the interests of national security. The jurisprudence is quite clear in saying that any response carried out for that purpose needs to be a proportionate one. That is the nub of our concern with the bill. The kinds of amendments that we have in mind that might rectify the potential infringements that we have identified are those that perhaps clarify the term ‘assist’ and give it more breadth, as appropriate to the exemptions.

**Senator MASON**—Just as an observation, Mr Lenehan, I notice in paragraph 32 of your submission you state:

Although it is an offence under the Criminal Code to be a member of, or to direct the activities of, a terrorist organisation—it is not an offence in itself to ‘promote’ the activities of a terrorist organisation.

You relate that to new section 102.8 where, if you associate with someone who promotes, that can be an offence, as long as there are those other factors as well. It is an interesting observation.

**Mr Lenehan**—It is, and I should concede again that it is not particularly original on our part. Mr Georgiou identified it in the second reading debate in the House.

**Senator MASON**—I see.

**CHAIR**—It must be an eminent observation, then. Thank you very much, Mr Lenehan and Ms O’Brien. Mr Lenehan, there are a number of issues that you have taken on notice. If you could assist the committee by responding to those, we would be grateful.

**Mr Lenehan**—Certainly, Chair.

[11.53 a.m.]

**HATZISTERGOS, Hon. John, MLC, New South Wales Minister for Justice, representing state and territory corrective service ministers**

**WOODHAM, Commissioner Ron, New South Wales Corrective Services**

**CHAIR**—Welcome. The New South Wales government through you, Minister, has lodged a submission with the committee which is numbered 78 and a supplementary submission which we received on the weekend, I believe. Do you wish to make any amendments or alterations to those submissions?

**Mr Hatzistergos**—No.

**CHAIR**—I invite you to make an opening statement.

**Mr Hatzistergos**—Thank you very much for the opportunity to be able to speak to you about this important issue. As you would be aware, the states and the territories have been in discussions with the Commonwealth for some time over this particular issue. In fact, we initiated the matter last year by raising it at the corrective services ministers' conference. Letters have been forwarded, particularly by the Premier of this state, to the federal authorities, including the Prime Minister, requesting high-level engagement with the Commonwealth, and that resulted in a number of meetings that took place late last year.

The states and territories met at various stages and agreed on national guidelines. We have given you a copy of those so that you are aware of the mechanism we are putting forward by which the transfer of prisoners on security grounds should be conducted. We were a little bit surprised and, I have to say, disappointed that this bill was pushed through the parliament in the way it was last session, without the opportunity for us to have an input into it prior to its introduction. Therefore we welcome the opportunity to comment on it in the way that we have.

In summary, there are three concerns that we have with the arrangements. The first is that the definition of security grounds for the transfer of these inmates is essentially borrowed from the ASIO legislation and is based on national security. In our view, it does not encompass the operational security issues which may also require a transfer to take place. You would be aware that there are limited facilities in a country the size of Australia for the incarceration of extremely high risk terrorist inmates who may need to be moved. The grounds upon which they may need to be moved may encompass grounds broader than simply issues of national security. They may also include grounds of operational security. Therefore we question the scope of this bill, which seeks to be confined to national security grounds as opposed to the broader security issues that a correctional environment faces, including issues such as escape, threats to officers, threats to a correctional centre and matters of that nature.

The second issue is the mechanism by which these transfers are to take place. You would be aware that under the existing transfer legislation there are essentially two grounds upon which prisoners can be moved from state to state. One is welfare and the other one is on the grounds of trial. The ground of security transfer is different to those two because it may require very rapid movement of an inmate. If intelligence is received that requires an offender to be moved interstate, bearing in mind, as I have indicated, that there are limited facilities across Australia which may be appropriate to contain an inmate of that nature, there is a need to act swiftly.

What the legislation proposes is essentially that the decision is going to be made by the federal Attorney-General, who will then seek to obtain the concurrence of the state ministers—that is, the state minister to whose jurisdiction the prisoner is to go and the state minister in whose jurisdiction the inmate is presently incarcerated. In our view, that will slow the process up. There is nothing that I can see that is being added by the Commonwealth involvement at that level. At present a Commonwealth inmate can be transferred intrastate whether they are a federal or a state offender. If they are a federal offender, the Commonwealth will simply need to be notified of that move. There is no reason, in our view, why a similar arrangement cannot operate interstate in relation to this very small group of troublesome inmates. In other words, the state ministers would need to concur, the inmate would be transferred and the Commonwealth would be advised.

The legislation also sets up a process whereby this regime applies not just to Commonwealth offenders but also to purely state offenders who may be in a similar category. Again the Commonwealth is involved and the Commonwealth will need to give its approval for this transfer as well. All of this is, of course, backed up by a

process which requires writing. The decisions have to be documented in writing before they are activated, whereas the process that involves the chief executive officers allows for verbal approval which is recorded.

**CHAIR**—That is the current process?

**Mr Hatzistergos**—No. The process which the Commonwealth is proposing involves a written decision to transfer and written evidence of concurrence. Our proposal simply involves the states and would involve a verbal concurrence documented and then recorded in writing through an approval process, with notification to the Commonwealth. So they are essentially the three grounds upon which we take issue with the legislation as it is currently worded.

Speaking from the New South Wales perspective, although I do not believe there would be any disagreement from the other states, I should make the point that the level of cooperation we have had with the federal authorities, particularly the intelligence agencies, has been very good. They give us information and we take it seriously and we act on it as appropriate. But the appropriate decision-making level should really be with the states which have the day-to-day running of these correctional facilities. I really do not understand what the Commonwealth is seeking to do or add to the process by involving itself in the actual transfer arrangements which are essentially operational arrangements between the states and the territories.

Under this arrangement you could also have a process whereby two states, a state and a territory or two territories agree that it is appropriate to transfer one of these inmates but the Commonwealth could withhold its concurrence. In those circumstances, it cannot take place and therefore we are kept holding an inmate that we regard as a threat to the security of our system. They are the reasons why we feel as strongly as we do. I also make the point that, apart from information, I really do not what the Commonwealth is providing in terms of the decision-making process. The Commonwealth does not run a correctional system in this country and does not have the day-to-day operational obligations that a corrective services department has, so why the Commonwealth feels that it needs to involve itself at the level that it does of concurring to not only Commonwealth transfers but also state and territory prisoner transfers is, frankly, something that I do not understand.

**CHAIR**—Thank you very much, Minister. Commissioner, do you wish to add anything at this stage?

**Commissioner Woodham**—No.

**CHAIR**—In relation to the meeting of the state and territories corrective services ministers, which was referred to in your early correspondence to the committee, is there any relationship with one of the Commonwealth ministers in the security area of that committee?

**Mr Hatzistergos**—I am sorry: which one are you talking about?

**CHAIR**—Your letter of 8 July to the committee refers to a meeting of the corrective services ministers' conference, which was held in Hobart, I assume.

**Mr Hatzistergos**—The Minister for Justice, Senator Ellison, was present.

**CHAIR**—Present, but not voting, I assume, if the conference unanimously rejected the bill.

**Mr Hatzistergos**—I think he had an input to the terms of the resolution. He watered it down in a way that make it less offensive to him and his colleagues, and he encouraged us to make this submission to your committee—

**CHAIR**—That is good.

**Mr Hatzistergos**—And to take it up with the Attorney-General. He did write to me on 18 June and he said this in the second-last paragraph:

Unfortunately the short parliamentary time-frame has restricted the opportunity for consultation in relation to these amendments. However, it is my view that the amendments are necessary and will assist the States and Territories as they contribute to the security challenge currently faced by Australia.

It was unfortunate that we were not given an opportunity. Our preferred approach would not have been to raise it with this committee or to indeed go to the conference and express our view as strongly as we did. We had a good working relationship with the Commonwealth generally in terms of these matters, but we were forced into that by the approach that was taken, no doubt in some senses precipitated by election movements that might take place. That is the course that we have had to take. As I said, all the states and territories feel fairly strongly about that. We have got an arrangement. The CEOs have met. We think it is a workable arrangement.

No-one has been able to tell me exactly what it is that the Commonwealth is seeking to involve itself in as far as this decision is concerned. What is it that the Commonwealth is providing? It does not run a prison system. The security issues and the day-to-day challenges of security in a correctional environment are issues which are addressed by the states. The Commonwealth does provide us with information which is very important and valuable, and no doubt that will continue to be able to be provided. Why does the Commonwealth not allow the states and territories to affect these movements and notify the Commonwealth? As I said, it is only a small category of people that we are talking about.

**CHAIR**—In the debate in the House, the Attorney-General, in responding particularly to the member for Barton, who had raised a number of the states' and territories' concerns, indicated in the first instance that he was of the view that the states expressed to the Commonwealth:

... a desire about the need to transfer prisoners on security grounds, and it was on the basis that we wanted to be able to respond as quickly as possible to their urging that we brought this legislation forward.

He then goes on to speak briefly about the question of responsibility for security issues, but does not refer to the question you have raised about movement of state prisoners as opposed to Commonwealth prisoners. He then goes on to say:

I am confident that where urgent transfer orders are required it will be possible to deal with those issues quickly. Effective administrative procedures will be developed in consultation with the states and territories to achieve that outcome.

This is the Attorney's speech in response to the debate. Does that in any way address the concerns that you and your ministerial colleagues have raised in reference to administrative procedures?

**Mr Hatzistergos**—What is the detail of that? I mean, he is requiring an approval process. He is the only one who can initiate the transfer. It has to be done in writing. It has to be done in consultation with the states, and this may need to be done at any time of the day or night, effectively. No-one has been able to tell us how this process is going to operate with the speed that he is asserting. But, more specifically, why is it necessary? What is it that he is adding to this process? He has not been able to tell me or any of my colleagues what it is that the Commonwealth is contributing, apart from information, that necessitates this bureaucracy that he has set up. If he wants to tell us what it is, that would be something that we could take into account, but so far I have not heard from him or from Senator Ellison as to what it is that he is providing.

The day-to-day challenges of containing these individuals rests with the states and the territories. Obviously we have a very real concern if a security challenge existed that required a swift transfer and we want that done expeditiously. Within the existing system, where we have a security challenge relating to any other offender we are able to activate that pretty quickly across our system, bearing in mind that we do have a variety of institutions that are able to meet the challenge. What we are talking about here, however, is a level of challenge and there are limited facilities across Australia to be able to meet it. We are talking about very high security facilities to be able to accommodate and contain terrorist inmates. It will not be easy to move a person within a jurisdiction. We will have to examine the possibility of being able to move an individual to another jurisdiction. What is the Commonwealth's concern that requires it to be involved at the level that it is seeking? I do not understand what that is.

**CHAIR**—We will ask those questions of the department, which is appearing after you.

**Senator LUDWIG**—I think you have almost clarified this, but have you received a response to the letter you wrote to the Attorney-General on 23 June?

**Mr Hatzistergos**—No.

**Senator LUDWIG**—In relation to the more broad Hobart conference on 29 June, in respect of the draft document, I take it that that has been forwarded to the Attorney-General, or has it been conveyed through other means?

**Mr Hatzistergos**—Which document?

**Senator LUDWIG**—That is the draft document of the national guidelines on interstate transfers.

**Mr Hatzistergos**—Yes, that has been forward to the Commonwealth.

**Senator LUDWIG**—Have you received a response in relation to that?

**Commissioner Woodham**—I am not aware of it.

**Mr Hatzistergos**—We have not received any response to the proposals that we have put forward.

**Senator LUDWIG**—In relation to the involvement of Senator Ellison in the scheme of things, he has contributed a letter to you?

**Mr Hatzistergos**—He sent me a letter on 18 June. If you do not have the letter, we will make it available to you.

**CHAIR**—Thank you.

**Mr Hatzistergos**—That accompanied a copy of the legislation. I actually found out about the legislation before he sent me the letter. I found out about it after it has been introduced into the parliament. The letter arrived after the legislation had been introduced into the House. I found out about it through the normal monitoring methods by which one finds out about these things. I can put aside the discourtesy; I am not offended in the slightest by the way the senator has chosen to do business. I am more concerned with the substance of what is being proposed. I think it could have been addressed, if we had had the opportunity to have some input, in the way that I have identified. As I have indicated, up until this matter we have had pretty good relations with the Commonwealth agencies, particularly on issues of national security. It is just disappointing that circumstances have led it to be handled the way that it has been handled in relation to this issue.

**Senator LUDWIG**—My purpose was just to highlight the course of events but you have gone to the substance. In respect of the substance of the issue, you say the Commonwealth proposal is unworkable, and you say that for the reasons which you have outlined. Do you say that the Commonwealth Attorney-General would be inaccessible or unable to be obtained? I suspect that one of the answers from the Attorney-General's Department will be that the Attorney-General will be available on short notice to be advised of these matters and, with the means of communication that are available, will be in communication to expedite these sorts of transfers without any inconvenience. Do you say that procedures could not be obtained that would allow that to occur?

**Mr Hatzistergos**—I think it goes beyond that. You have to ask yourself, as I indicated earlier: what is it exactly that he is contributing? I do not know. The states and territories are managing the day-to-day challenges of correctional facilities. Information is received, as it is now, and the states have the real and direct interest to be able to deal with it. What is it that he is going to contribute to this process, apart from information? When I asked this question of Senator Ellison in Hobart, I was told that the Commonwealth has a real interest in national security and the public expects the Commonwealth to be involved. So what are we talking about—public face? I actually think that there are more important factors involved in decisions of this nature, and when they arise, they have to be acted on quickly.

The process that is involved in this legislation involves a whole heap of writing, and it involves not only the Commonwealth's consent but the consent of the states and territories. What we are proposing is a process of verbal approval which will allow an inmate to be transferred at very short notice, with the Commonwealth being notified. I cannot see what is objectionable about that and why all these extra procedures which the Commonwealth has put forward in this legislation are necessary, or what this does to add to the process.

**Senator BOLKUS**—What happens now? You obviously have Commonwealth prisoners now who may be involved in drug running or whatever. If you have a particular problem with them in a particular prison, security or safety problems, what do you do now?

**Mr Hatzistergos**—The offender can only be moved intrastate if there is a welfare ground or if there is a trial ground. Offenders cannot be moved on a security ground.

**Senator BOLKUS**—Do you get approval from the Attorney-General in those circumstances?

**Mr Hatzistergos**—Not if they are being moved intrastate. We can move them around within New South Wales and we notify the Commonwealth that we have done that. If we are going to move them on welfare grounds or on trial grounds, the Commonwealth has to approve it but the same issues do not arise. The issue of security does not arise in the way it does with these offenders. They are not actually being moved on security grounds; they are being moved for reasons of either welfare or to facilitate a trial, so there is no reason why the Commonwealth cannot be involved.

**Senator BOLKUS**—Are they transferred interstate with any frequency these days?

**Mr Hatzistergos**—On welfare grounds, instances arise from time to time. The only other ground is that we have had transfers on witness protection into New South Wales. Essentially they have been done on the grounds of the welfare of the prisoner.

**Senator BOLKUS**—Is that within New South Wales?

**Mr Hatzistergos**—We transferred prisoners from other states into New South Wales on that ground.

**Senator BOLKUS**—And that is the extent of the so-called security problems you have these days? You can reclassify those as welfare grounds?

**Mr Hatzistergos**—Those particular ones are where there is a threat to the individual's welfare and we get a request from another state. They can be transferred on the ground of welfare.

**Senator BOLKUS**—Do you get the Commonwealth Attorney-General's approval for that transfer?

**Mr Hatzistergos**—Not if the offender is a state or territory offender.

**Senator BOLKUS**—But if they are Commonwealth offenders?

**Mr Hatzistergos**—The Commonwealth has to approve it.

**Senator BOLKUS**—And if they are mixed offenders, both state and Commonwealth?

**Mr Hatzistergos**—If they are still serving a Commonwealth sentence, they would need the Commonwealth's approval.

**Senator BOLKUS**—How does that work now? How quickly do you get the approvals now?

**Mr Hatzistergos**—I cannot remember the last one. They certainly do not occur overnight. They usually take some months. I have to indicate to you that a welfare ground involves some research to ensure that the welfare ground has a basis. In the case of a welfare ground, you also have to appreciate that the inmate is generally making the application. What we are talking about in these cases are circumstances in which a person will be transferred in circumstances what may be against their will.

**Senator BOLKUS**—Under the current system, when it is not at the request of the inmate, is there an obligation to inform the representatives?

**Mr Hatzistergos**—I am not aware of what we do for their representatives.

**Senator BOLKUS**—I do not know whether this has come into your discussions, but has the idea of notification, say within 24 hours after the event, been discussed with the Commonwealth as an alternative to the seeking of approval?

**Mr Hatzistergos**—I do not understand.

**Senator BOLKUS**—At the moment, the proposal is that the one that gets the approval, agreement, of the Attorney-General. What you said was that a system of notification was one that you had been discussing at least with the state and territory ministers. What is the resistance, if you know and have been informed, from the Commonwealth to a system of notification in, for instance, urgent circumstances in which a person has to be moved?

**Mr Hatzistergos**—I am not aware of what the reason for the resistance is. All I have been told is that the Commonwealth is interested in national security. We are all interested in national security. In fact, we are interested in more than just national security; we are interested in security, and that is why we feel that circumstances may arise in which we may need to act very, very quickly without this bureaucratic approach. There have been circumstances in which we have moved inmates within New South Wales on security grounds at a moment's notice, but we have got the facilities to be able to cope with that level of security risk. What we are talking about in the case of these particular inmates are inmates who we tend to classify at a different level, that is, at a higher security level, for which the facilities around the country are sparse. I do not wish to go through the states, but some of the states have approached us and have indicated that they may have difficulties being able to detain a terrorist offender in their own institutions and they would be seeking to have them transferred to another jurisdiction if they came into custody. What we want is an arrangement that will facilitate that quickly, if it is required.

**Senator BOLKUS**—You may wish to take this on notice, but earlier you mentioned that it sometimes takes a fair amount of time to get a Commonwealth AG's approval.

**Mr Hatzistergos**—A welfare case does take some time, generally.

**Senator BOLKUS**—What is the proportion of knock-backs? How frequently does the Commonwealth Attorney-General say no?

**Mr Hatzistergos**—I am not aware of the number of times that the Commonwealth has said no.

**Senator BOLKUS**—Can you take that on notice?

**Mr Hatzistergos**—I would have to find out from my colleagues.

**Senator BOLKUS**—I meant in respect to your jurisdiction, because I am just wondering to what extent we are arguing over something that is not a real problem.

**Mr Hatzistergos**—You see, they would not come to the states. The way the welfare legislation is drafted, as I understand it, is that the application is made to the Commonwealth Attorney-General. If it is refused by the Commonwealth Attorney-General, there is no point in its coming to the states. You would have to ask the Commonwealth.

**Senator BOLKUS**—Sure. Thank you.

**CHAIR**—Minister, in your submission you refer to federal constitutional power in paragraphs 3.37 and following. Has the government taken any legal advice on the particular matter?

**Mr Hatzistergos**—I am not looking at grounds of constitutional challenge.

**CHAIR**—No, but you have raised a constitutional concern.

**Mr Hatzistergos**—What I am saying is that you may have a situation where a state or territory offender is transferred against their will in relation to a purely state or territory offence and their legal advisers may take a constitutional challenge over the fact that they are transferred. That creates a dilemma, if it is ultimately successful. I do not want to be in a position of going down that path and finding out ultimately that an illegal course has been adopted. So you will have to ask the Commonwealth whether it has obtained legal advice indicating that what it has put forward is appropriate, but it is an issue that has been identified as one that we would need some reassurance on.

**CHAIR**—I think I could confidently predict the response of the Commonwealth department, but I will not do so. If there are no further questions, I thank you, Minister and Commissioner, very much for your time and submission. The committee appreciates your putting forward your views on behalf of your colleagues and for taking the time to appear before the committee today.

[12.20 p.m.]

**KOBUS, Ms Kirsten, Acting Principal Legal Officer, Security Law Branch, Attorney-General's Department**

**MCDONALD, Mr Geoff, Assistant Secretary, Criminal Law Branch, Attorney-General's Department**

**WILLIAMS, Ms Kelly, Acting Assistant Secretary, National Law Enforcement Branch, Attorney-General's Department**

**NEELY, Mr Jim, Legal Adviser, Australian Security Intelligence Organisation**

**CHAIR**—Welcome. The committee has not received submissions from either the Attorney-General's Department or ASIO, which I understand is normally the case, but I invite Mr Neely and Mr McDonald to make opening statements if they wish to, and then we will ask questions.

**Mr McDonald**—I will make an opening statement on behalf of the department. The Anti-Terrorism Bill (No. 2) contains an association with terrorist organisations offence, which would involve an amendment to the Criminal Code, and the procedure for the transfer of prisoners for national security reasons would need an amendment to the Transfer of Prisoners Act. The Anti-Terrorism Bill (No. 3) focuses on the surrender of foreign passports, which would involve an amendment to the Passports Act, and victim identification measures in the event of a domestic terrorist attack or a mass casualty disaster in Australia.

These measures have been developed to deal with weaknesses in our law and procedures that could cause difficulties in the short term. They are introduced in circumstances where there are not a lot of sitting days left to put in place measures that could make a real and practical difference in dealing with attempts to attack Australia this year. While it is unfortunate that the bills have generated some alarm, which is evident from some of the submissions, I want to assure everyone that the proposals are necessary and that they contain limitations that have been carefully thought through—limitations that are designed to minimise misuse or problems with the provisions.

It is not my intention to try to cover all the submissions now. Sometimes I have attempted to do that but on this occasion I am overwhelmed. There are so many that it will require a detailed written submission on the specific issues. But I would like to mention that we reject in the strongest terms the sorts of suggestions which you find on paragraph 4 on page 4 of the Law Council's submission: that the laws 'will unfairly target members of minority groups, especially those of the Islamic faith'. We do not think those comments are justified. Having read the *Isma—listen* report launched by Dr William Jonas, which basically calls on every public figure to be very careful about such statements, it would be better if such things were not said, because the reality is that this law does not target those groups. It is inaccurate to say that.

However the legislation is targeting terrorists and their organisations. The aim of the legislation is basically to suffocate those organisations by making recruitment more difficult, by making travel through the use of false foreign passports more difficult through better control of the present system and, finally, minimising the grief caused by such an attack. The targeting of terrorist groups is based on their violence not their ethnic or religious origins. I look forward to your questions on the provisions of the bill.

**CHAIR**—Mr Neely, did you have anything to add?

**Mr Neely**—I just have some brief comments in relation to what Mr McDonald had to say. In relation to those provisions of the legislation which concern ASIO, the first of those is extending the power under existing passports legislation to cancel an Australian passport on security grounds to foreign passports. So on the same grounds that a person's Australian passport can be cancelled the legislation will provide a power for someone to be directed to surrender a foreign passport. We are saying that this just fills a clear gap in the law. The situation could very well arise where someone's Australian passport has been cancelled on the basis that if they were to travel overseas they may engage in conduct that is prejudicial to security yet under the current law they could still leave the country under a foreign passport unless prevented from travelling by some other means.

The second part of the amendments that concern ASIO were those that confer on the director-general the power which in effect would require someone to surrender their passport where the director-general has requested the Attorney-General to consent to the issuing of a questioning warrant but either the Attorney has not consented or the warrant has not been issued. Again this provision is designed to deal with an emergency situation which could very well arise. That situation is where the process for requesting a questioning warrant

has been put in train and the director-general has requested the issuing of a warrant and it is necessary to take immediate action to prevent someone—that is, a person who would be required for questioning—leaving the country. There are ample checks and balances in the legislation or in the whole regime that we can take you to, if necessary, but we would simply stress that the power would operate for a very short time where the request has been made but the warrant has not yet been issued.

**CHAIR**—Let me start with a general question and then I will pass the questioning to my colleagues. A number of submissions, but perhaps most cogently the Law Council's submission, put forward the proposition that in the raft of changes that this committee has observed and in some cases commented on in recent years in relation to law in this area there are a number of provisions under the Criminal Code Act 1995—which include providing support to a terrorist organisation, giving funds to or getting funds from a terrorist organisation, receiving training with a terrorist organisation and so on—which one would imagine would deal with most instances that would arise in this context. Why are those laws not adequate to deal with the contingencies that are referred to?

**Mr McDonald**—This offence does not require proof of some connection to engaging in a terrorist act, so the offence is wider than the existing offences. As the Law Council said, there has been a considerable effort to circumscribe the offence.

**CHAIR**—I thought you would enjoy Mr Walker's observations on those matters.

**Mr McDonald**—Yes. It was very interesting. However, obviously we are also very interested in everyone else's comments on this and I hope it is understood that we have attempted to circumscribe this very carefully. Later on we will talk about some of the operational side of law enforcement, but where we think this will make a difference will be in early intervention in the spread of support for the organisations and in early intervention when people are making their first steps towards greater involvement in the organisations. I think mention was made of some of the ancillary offences, but they do require a greater level of proof than does this offence.

**Senator LUDWIG**—I refer to the submission put forward by the Castan Centre for Human Rights Law, particularly its view of schedule 2, which are amendments to the Australian Security Intelligence Organisation Act. Mr Neely, I guess my comments are directed at you. It suggests, as I discern, that the current provisions applying to the issuance of an ASIO warrant set out a number of steps and those steps are important for a whole range of civil libertarian reasons as well as operational reasons. But it appears that this provision will cut across that and, in short, the surrender of passports and orders not to leave Australia will be under the control of the director-general of security. Is that right? In other words, is the intention of the legislation to bring about a situation where the provisions that were set forward in the ASIO Act to provide a method to obtain a warrant will be overcome by these provisions, and in short the director-general of security will be the man on the street who will determine whether someone can leave Australia or not, or surrender a passport?

**Mr McDonald**—It has that effect, but of course it does not occur until the director-general has set off on a course of requesting that warrant. So, if he uses this power, then he has activated a system which will provide for accountability; a system that has been carefully developed by the parliament and is, by any standard, subject to a very large set of accountability mechanisms. He has set forth on a course of action wherein that is the case. As Mr Neely mentioned earlier, we are only envisaging that it would be only a fairly short period of time before there would be a deliberation on whether a warrant should be issued or not. If it were decided that a warrant would not be issued, of course the passport would be returned. The idea is essentially to make sure that someone is not able to avoid the processes by leaving the country quickly. The processes just are not able to do that quickly, and a lot of that has to do with the fact that very careful consideration is given to the issue of the questioning warrants. Warrants, of course, impact directly on a person's liberty for set periods of time. This deals with taking the passport, which is of course a lesser issue than those issues associated with questioning warrants.

**Mr Neely**—As I indicated earlier, this provision is designed to deal with the situation where ASIO receives information which leads the director-general to conclude that a request should be made for the issuing of a questioning warrant but then receives information before the warrant can be issued that someone with vital information about a terrorist offence is set on fleeing the country in a hurry. In that circumstance, we consider that it is very important that the director-general should be able to trigger the tool required to prevent the person leaving the country for enough time as is needed to get the warrant up, which would be a very short space of time given the request that would have to be made to the Attorney for him to consent to the issuing of the warrant. But it is to deal with the situation when someone could be set on leaving the country, and if they

were to leave the country then the whole questioning regime and the other passport provisions that would kick in once the warrant had been issued would be completely undermined in relation to that person. The person would be out of the country, and it would be too late.

**Senator LUDWIG**—I wonder whether you can point out to me the provision that says that it is for a very short period of time whilst your questioning warrant is up and running.

**Mr Neely**—There is nothing in the legislation that says it can only be for a short period of time, but as a matter of practical reality it would be. The power kicks in only once the director-general has requested the issuing of a warrant, and as a matter of practical reality, once that request is made, the Attorney in the ordinary course would consent to the issuing of a warrant very quickly, normally within the space of a day. Then, if the Attorney consents, that would be communicated to the issuing authority equally as quickly.

**Senator LUDWIG**—Can you point out to me where in the legislation is the request that the warrant has to be completed—in other words, that they have to go through the whole process and there is no ability for them to withdraw or change their mind after they have got the passport?

**Mr Neely**—Could you repeat that?

**Senator LUDWIG**—What you are saying is that they only have to make a request; they do not actually have to complete the process. If the object is to obtain the passport, and you make a request, what is to stop the authority, ASIO, from saying that it withdraws the request at a certain point before it is issued?

**Mr McDonald**—In here it talks about the director having sought the minister's consent to request the issuing of a warrant.

**Senator LUDWIG**—Yes, it is only sought. I am happy for you to take the question on notice. It is a reasonable question to ask. At that point, you are only seeking the issuing of a warrant. If you decide that, having obtained the passport, that was the object anyway and you achieved your purpose, you may not then wish to continue with seeking the warrant. Therefore you would cease at that point and you would withdraw. You have the ability to do that, if you have not already done so, or if you change your mind.

**Mr McDonald**—Are you suggesting that we should make it specific so that, in the event that the passport were withdrawn, the passport is automatically withdrawn?

**Senator LUDWIG**—I am not making any suggestion. I am merely asking you the question.

**Mr McDonald**—Yes.

**Senator LUDWIG**—What is exercising my mind is: at the point of making a series of requests, what is there to stop that?

**Mr Neely**—I will just deal with those scenarios. The important point that has to be made is that the director-general can only request the minister's consent to the issuing of a warrant if satisfied that the statutory criteria in section 34C of the act have been met—that is, 'that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. He must have formed that state of satisfaction to have made the request and 'that relying on other methods of collecting that intelligence would be ineffective'—that is, it is a measure of last resort. He would have to have that state of mind. In no circumstance could the director-general request the minister's consent to the issuing of a warrant and then, based on the fact of the person then surrendering his or her passport, consider that the warrant is no longer required.

**Senator LUDWIG**—Or other travel documents. It might hinge on the person leaving the country. I do not know what might be in the minds of the investigators. But I suppose there could be circumstances in which the person might be going to commit an offence overseas, and therefore the travel itself is the purpose upon which it might turn.

**Mr Neely**—But the warrant could only be issued if it is believed that that person can substantially assist the collection of intelligence.

**Senator LUDWIG**—It may very well do so, but that still does not mean that the investigating authority, ASIO, cannot withdraw that upon obtaining the passport.

**Mr Neely**—It is possible that in the short space of time between the director-general making his request— notifying the person, which would then trigger the requirement that the person is required to hand up his or her passports—and the warrant being issued further information, in a hypothetical sense, may come to the organisation. It is possible.

**Senator LUDWIG**—It might mean that the person is the wrong person or that they are not the threat that was originally in the mind of the director-general. I do not know, but those circumstances—

**Mr Neely**—It is possible but very unlikely. The other scenario you raised was the possibility of serial requests being made. It is just not conceivable—

**Senator LUDWIG**—If, for argument's sake, the warrant application was unsuccessful, and you did not obtain the warrant for the questioning, but you had the travel documents, which I imagine you would then have to give up, you could have simply formed a view on obtaining more information. I do not know. I cannot put myself in the mind of the director-general. But there does not seem to be anything that would stop or disavow the director-general from having that opinion in the first place. He might have been unsuccessful in obtaining the warrant but be convinced of particular circumstances and then would be seeking the travel documents again.

**Mr McDonald**—You might have a situation where there is more information, but the reality is that if there was any suggestion of abuse of this power, you have the Inspector-General of Intelligence and Security and you have so many oversight bodies that it is unbelievable. For any misuse of these powers in the ways that you are describing there would be accountability, believe me.

**Mr Neely**—Which means that it would only be where additional information has been obtained that the director-general could consider making a further request for the issuing of a warrant. In the absence of any further information, it is just not conceivable that a further request would be made, particularly given that oversight that has been mentioned.

**Senator BRANDIS**—Mr McDonald, I think you were in the hearing room when I was putting some hypothetical cases to earlier witnesses about the association provisions. Let me give you the opportunity to address the issue. Let me run you through a hypothetical case of the possible operation of section 102.8, which troubles me. What do you say to the proposition that an organisation has been proscribed as a terrorist organisation under 102.1(2) and let us say that a member of that organisation wants to protest that determination and let us assume he is acting in good faith and has nothing to do with terrorism but this organisation has been, as he would have it, erroneously proscribed. Say he goes along to one of his friends or colleagues and says that he wants them to help him make representations to government, to the police, to ASIO or whoever to persuade them that a mistake has been made and the second person, the friend or colleague, agrees to help. Tell me why, by agreeing to help, that person is not committing an offence under section 102.8. I do not want to take up the time of the committee by running through all the elements, but it seems to me that on that hypothetical case each of them would be satisfied.

**Mr McDonald**—I think the fundamental thing to keep in mind here is that the DPP has to prosecute this offence and it has to be proved beyond a reasonable doubt, and sitting in the offence we have the exception concerning the implied freedom of political communication.

**Senator BRANDIS**—Can I stop you there, Mr MacDonald, because it seems to me that you have already made three errors. Firstly, you do not need the exception in 102.8(5) because if that is the overriding law as the courts would interpret it that is the way the section would be construed anyway. In other words, the High Court's decisions about the implied freedom of political communication and the statute would be read down, subject to those provisions, without the need for subsection (5). Secondly, an appeal to prosecutorial discretion, particularly in a statute like this where you have members of the community and minority groups in the community expressing concerns about the potential use of the statute for arbitrary reasons—

**Mr Neely**—Politically sensitive cases too.

**Senator BRANDIS**—Yes, an appeal to prosecutorial discretion is the last ground on which you would support the statute. Thirdly, if I may say so, if you say that all elements have to be proved beyond reasonable doubt, as indeed they do, it is not the strongest argument for upholding a statute expressed in these vague and general words because I cannot imagine how a prosecution like this is ever going to succeed. I am sorry to jump on you straightaway, but it seems to me that this provision fails both tests: it fails the test on utility because you are never likely to get a prosecution, but it also fails the test of principle.

**Mr McDonald**—Before you jumped in, I probably had ordered my answer in the wrong way. Of course, the first thing you have to show is that the person intended that the support would assist the organisation to expand or continue to exist, so you would have to prove that that was what the intention was.

**Senator BRANDIS**—Let me make it clear that the second person agrees with the first person that it is not a terrorist organisation and it should not have been listed, so that is exactly what he wants to do. He wants this organisation, which he considers exists for an innocent purpose, to be able to continue to exist.

**Mr McDonald**—I was just setting the order right. I just do not believe that there would be any situation in which a prosecutor would prosecute in those circumstances. I think that obviously the reason we put the political communication exception in there was to make sure that that was foremost in everyone's minds when looking at this.

**Senator BRANDIS**—But it is otiose.

**Mr McDonald**—Legislation is educative as well as having a role in terms of its legal effect. There are some other exemptions there that I think have proved to be quite useful, even though there would be many circumstances where the sort of conduct that is described would not be caught by the offence if the exceptions were not there. For example, clearly in most situations where people were involved in religious worship there would be no question that that would really be about providing support to a terrorist organisation and intending that the support assists the organisation to expand or continue to exist. However, as we have seen, having those exceptions has provided some people with some comfort that the legislation is not intended to affect them. One of the things that I hope I can walk away from here saying is that this legislation is not aimed at interfering with people's family lives, religion or political communication—any of those matters that are just in the normal course. The aim of this legislation is to deal with terrorist organisations.

**Senator BRANDIS**—There is no question that your good faith and the government's good faith in this is a given. I am not concerned about that, but it does alarm me that your answer to my question is that ultimately you rely on prosecutorial discretion, so that a case that should never be prosecuted will not be prosecuted. I am rather reminded—and there are legal scholars in the back of the hearing room who will correct me if I am wrong—of the American realist legal philosopher, Roscoe Pound, who made the famous remark that all laws should be judged from the perspective of the 'bad man' of Chicago. In other words, you test a law according to whether it may be abused. Now here we are in the heart of the most central city in Australia—in this city, there have been crooked judges and there have been crooked magistrates—

**CHAIR**—And this is being said by a man from Queensland!

**Senator BRANDIS**—Mr McDonald, it does not give me a lot of confidence that you say that this law is benign because we can always be sure that the prosecutorial discretion will never be exercised improperly.

**Mr McDonald**—Ultimately with this, we have given a very clear statutory indication in that exemption to the prosecutor about what might be appropriate and what might not be. There are some rather sad comparisons between this offence and the consorting offences that exist in this state—but probably the ones in Victoria are even worse—where there was nothing like the requirements of proof that are contained in this offence in terms of the knowledge that is required and the element that this association must actually provide support to an organisation and also that it might assist the organisation to expand or continue to exist. So this legislation is pretty specific. You can go on and on and on with definitions.

**Senator MASON**—I am sorry to interject here, but you mentioned prosecutorial discretion. As I think you know, I used to be a prosecutor, and that can work well in cases of violence and certain cases of criminal offences, but there are two problems here, and one is the vagueness. People have spoken to me about the vagueness of this legislation, but the concern is more than that: it is the exercise of prosecutorial discretion in effectively political cases, or cases of a potentially political character, and that is the problem. When you have prosecutorial discretion linked with potentially political matters, that is extremely difficult for a democracy, and that is the problem, more so even than the vagueness of the legislation itself. Really, that is the problem: when you start deciding what is a legitimate violent group and what is an illegitimate violent group.

**Mr McDonald**—The issue of what is legitimate politically and what is not comes up quite often in the criminal law. The area that comes to mind the most is the area of corruption cases. Over the years there have been plenty of debates about whether something is a bribe or something that is part of the normal political process in terms of influencing people to represent their constituents properly, so it is not unusual in the criminal law where you will get situations where there are overlaps. However, here the fundamental elements that are spelled out in the offence relate back to these organisations and their continued existence and expansion.

**Senator BRANDIS**—With these organisations, one assumes that it is not a contestable proposition that the organisations are properly characterised as terrorist organisations. The whole point of my question is: how can

the premise on which section 102.8 operates ever be contested without the disputant finding himself automatically in breach of section 102.8?

**Mr McDonald**—I said that I think there is no way you would be able to prosecute someone in those circumstances. If this committee were disposed towards recommending that that exemption be made more specific, that is something that the government can consider. But I am saying to you that I think that it just would not happen.

**Senator BRANDIS**—Why can't we have another element in section 102.8 requiring that it be the purpose of the 'accessory', if I may use that word, to 'assist the organisation in engaging in terrorist acts'? That would be as clear as day and I do not think anybody could object to that, but then you probably would not need it because it would be covered by other offences.

**Senator MASON**—Then you would not need the provision—that is right.

**Mr McDonald**—That is why I explained at the beginning that we already have offences that relate to the terrorist acts, including section 102.7. That would destroy the utility of this offence. This offence carries a much lower penalty than that offence does. The other offence carries 25 years imprisonment; this carries three.

**Senator BRANDIS**—I know that you are here as a public servant and it is not fair to ask you to comment on policy.

**CHAIR**—Correct!

**Mr McDonald**—I am easily tempted!

**CHAIR**—That is true.

**Senator BRANDIS**—However, with the very extensive additional powers to deal with terrorism and the new offences that have been created—with bipartisan support for the act as it is currently worded, I might say—and then the additional powers about surveillance devices and information gathering so as to apprehend potential terrorist conduct, I just wonder, not from a policy point of view but from a philosophical point of view, why we need this offence.

**Mr McDonald**—In the case of this offence, the needs will be explained by the Australian Federal Police. I could also be tempted to get into operational comment but I certainly have received assurances from not only the Federal Police but the Office of the Director of Public Prosecutions that this offence will make a big difference in terms of dealing with the preliminary situation I described earlier. Mr Walker's argument was almost that this offence is quite specific, and I think he was suggesting that it might in fact be reasonably difficult to establish and was questioning its use on that basis. The situation is that this offence is balanced between not making it too easy and not making it too hard. The DPP and the Federal Police have indicated to me that this offence will be quite useful. I have come to my own conclusion that that is likely to be the case.

**Senator BRANDIS**—Mr McDonald, while I have the greatest respect for Mr Keelty and the Australian Federal Police, when was the last time you heard a policing authority ask for less police power?

**CHAIR**—Do not try too hard, Mr McDonald, because we do not have that long.

**Mr McDonald**—I can honestly say that I have seen that in the context of police accountability mechanisms in terms of complaints mechanisms and things like that, so I suppose I can honestly say that I have seen circumstances in which police have been in favour of more accountability.

**Senator BRANDIS**—I did not say 'less accountability'; I said 'less power'.

**Mr McDonald**—Accountability usually provides a limitation on power. Clearly in this situation with terrorist organisations we have seen increases in police powers in recent years, but I can say, having been involved in that, that the approach in Australia has been very careful, very targeted and very focused compared to other countries that have been dealing with these issues.

**Senator BRANDIS**—I will finish my point on this with this comment, and I invite you to respond to it, Mr McDonald. It seems to me that at a time like this there is a very high demand placed upon parliamentarians to make sure that we do not respond automatically in a Pavlovian sort of fashion to absolutist claims. We must be deeply sceptical of absolutist claims by civil libertarians who say that any change of the law is, *ex hypothesi*, a bad thing because it affects civil liberties, not acknowledging the changed circumstances and the new challenges which exist. But correspondingly I think we have to be equally sceptical of legislative over-reach by those who say that, because there is a new security threat of different and unknown dimensions, we can in

effect let the police and enforcement agencies write their own cheque. I think it is basically the same mind-set on either side of the argument and we ought be to deeply sceptical of both.

**Mr McDonald**—I can assure you they do not write their own cheque. There is a lot of discussion and a lot of development that goes into these proposals. There have been many occasions when we have been able to work out different ways of doing things as we developed the legislation. However, at the same time, there are clearly reactions against the police and security and also possibly my own department in the event that someone who should have been dealt with is not. Clearly these offences are developed while keeping in mind all the considerations. With this offence, we think it is something that will restrict these terrorist organisations. If you look at much of the writing about these organisations the best way to deal with them—you may have heard this quite a lot so you would be aware that quite a lot has been done—is by tracking financial transactions of these organisations. That is aimed at the organisation and, in a sense, this offence is too.

**Senator BOLKUS**—You realise of course that had this proposed section 102.8 applied in the sixties and seventies, a good 40 to 50 per cent of Australia's Greek community would have been covered by it. The organisations that would have been the subject of this legislation could very easily have been seen to be terrorist organisations in that they were running a campaign against the junta in Greece and were quite often violent. People congregated in coffee shops that were quite often run by focal groups of those organisations in Australia that would have known of those activities. As I say, some 40 or 50 per cent of that massive population would have been covered by this. Does Senator Brandis not have a point? The longer it goes on, the more legislation we get, the broader it gets, and more innocent people are covered by it.

**Mr McDonald**—Indeed, my own relatives in dealing with the Campbells in Scotland would have had the same problem. The situation with this is that it applies only to listed organisations.

**Senator BOLKUS**—It does not only apply to listed organisations. How does it apply the definition of 'terrorist organisation'? You are saying that it applies to somebody in that definition if it is listed, but it is a bit broader than that, is it not?

**Mr McDonald**—No, it is not. This offence applies only to listed organisations and you find that on page four of the bill in section 102.8(1)(b). The organisation is a terrorist organisation because of paragraph (b), (c), (d) or (e) of 'the definition of terrorist organisation in this Division'. What probably may have caused you to conclude otherwise is that at the beginning you have to know that the organisation is a terrorist organisation in the general sense of the definition. That is what you have to know.

**Senator BOLKUS**—How will you know that?

**Mr McDonald**—However it has to be listed.

**Senator BOLKUS**—In my example, you would have known that. Moving away from the Greeks to more recent organisations, they do rely on presences in Australia.

**Mr McDonald**—What I was driving at there is that the examples that you mentioned in terms of the Greeks, and one could go on and on, are not organisations that would have been likely to have been listed.

**Senator BOLKUS**—Was it not a known fact though that people innocently engaged with others, as Senator Brandis has pointed out, could be covered by this?

**Mr McDonald**—Not innocently.

**Senator BOLKUS**—Then if it is as grave as what you say it is, who should be sacked? This is how many years is it after September 11—two and a half? Who got this wrong in the first instance? Why did we not get this legislation up in the first instance? I guess if this was *Groundhog Day*, we could run terrorist legislation all the way to the election.

**Senator BRANDIS**—There is that sort of accretion effect, Senator Bolkus. We have so many new laws now which impose limitations on traditional rights and liberties, most of which, as I said before, have been passed with bipartisan support. Where does it end? At what point do we say that we are changing the legal culture away from certain strong presumptions in favour of traditional liberal democracy?

**Mr McDonald**—Let me say that much has happened since September 11, and of course one of the most significant events for this country was what happened a year after September 11.

**Senator BOLKUS**—It might have been another event but the perpetrators, the organisations, the terrorist networks are all very much part of the same pattern. Why did we not get it right three years ago?

**Mr McDonald**—I am obviously limited in what I can say in response to this, but essentially we have had ongoing efforts—and this is with the law enforcement agencies as well as us—to try to renew the law and improve it where that is necessary. A lot of that is drawn from experience and much has happened since then. In relation to the Bali incident, that was very important in terms of what we thought was appropriate because prior to the Bali incident many people did not appreciate just how close to home this threat might manifest itself. I am not—

**Senator BOLKUS**—Just a second.

**CHAIR**—Let Mr McDonald finish.

**Senator BOLKUS**—I digress for a moment because I listened to his response. Government knew; government was telling people. The political leaders were telling people that this is closer to home. Those who were making policy or were drafting policy knew how serious it was. Why did they not get this legislation right two and a half years ago.

**Mr McDonald**—What I was going on to say was that truly in developing policy, we have given some thought to what the parliament might consider will be acceptable and it may have been the case that few years ago the parliament may not have considered this was acceptable. However, with the effluxion of time, the parliament sometimes takes a different view.

**Senator BOLKUS**—That is strange logic. You would have thought that in the wake of September 11 and Bali, parliament would have been probably more amenable to picking up this sort of legislation rather than finding a couple of years down the track that we should run on alert, but a lot of things have happened since those two events.

**Mr McDonald**—Some things have happened. Actually we have had people tried for terrorism offences, so that is something that has happened. I cannot really give you a complete review. Obviously we would have—

**Senator BOLKUS**—Let us move to something else—the transfer of prisoners. You heard the state corrective services minister earlier today.

**Mr McDonald**—Yes.

**Senator BOLKUS**—Why does the Attorney-General need to give consent?

**Mr McDonald**—The state minister was very keen to emphasise his responsibility for running the prisons system. The Commonwealth Attorney-General has a very significant responsibility in relation to national security. There will be circumstances when the Commonwealth Attorney-General will be aware of matters in terms of the international as well as local aspects of national security where there is the potential of he or she having a different view to the states or territories on what is necessary for the security of this country. I will not give an exact historical example, but there have been occasions in the past where state governments and federal governments have had different views about national security issues and clearly the Commonwealth Government has responsibility for that. The minister has made the comment that there would be a community expectation that the Commonwealth Government would take an interest in these matters.

**Senator BOLKUS**—You might be right when you say they have taken different stands on international security issues, but what we are talking about here are on the ground operational issues.

**Mr McDonald**—I am talking about the potential for there to be a disagreement about an on the ground operational issue.

**Senator BOLKUS**—That is what I want you to address. If for instance there are prisoners in any prison in this country with security type aspects related to them, then my understanding is that what ASIO knows, the state authorities know in respect of those prisoners.

**Mr McDonald**—You might have a situation where the state government has taken into account the ASIO information and has concluded that the person should be transferred, but the federal Attorney-General has looked at the same information and come to a different view. You might have a situation where the state government would place different weight on different issues raised in it. By the way, the example I was talking about was 60 or 70 years old, so do not think it was recent.

**Senator BOLKUS**—So at 11 o'clock on a Saturday night when the state authorities discover that something is about to happen to one of their prisoners in a prison in New South Wales—and I am working on the basis that not every state has the level of security that is necessary to handle security type prisoners—what

is wrong with a system whereby they make a very quick move, move the prisoner out, take him somewhere else and the Commonwealth is notified within 24 hours?

**Mr McDonald**—What I could not understand was: how was it going to be any slower for the Commonwealth minister to be consulted than the minister from the other state?

**Senator BOLKUS**—What is your understanding of the degree of consultation? Does there have to be a written response and approval?

**Mr McDonald**—There are things called fax machines. He did not mention the fax machine. Essentially, that is how we do it. There was talk about recording it in writing. What is the difference between recording your decision or discussion over the phone in writing and putting in a written form?

**Senator BOLKUS**—If it is as simple as a simple fax, without a requirement of briefing and documentation and information, where is the value added in the system if you are the Attorney-General and you are woken up at midnight and told, ‘This is going to happen; all we need is a fax’? On the other hand, if what you are talking about is a full-blown assessment of the situation, that will take some time.

**Mr McDonald**—It is a simple fax in terms of the paperwork. Clearly, the Attorney-General will get the advice of ASIO, the Federal Police and other people such as foreign affairs. Depending on the factual situation, it may be something reasonably straightforward that he already knows about, or it might be something new.

**Senator BOLKUS**—But you are the organisation that comes to us day after day, bill after bill and committee after committee saying: ‘This has to be done very quickly, and there is no time for a consultative process, no time for judicial review and no time for the courts.’ In this particular case, where we can actually see that there might be a crisis situation at unpredictable times of the day, why do you need to go through all those processes?

**Mr McDonald**—As I said, and as the minister said at that conference with the corrective services ministers, the Commonwealth has a real interest in national security issues.

**Senator BOLKUS**—Yes, but they are not the only ones, are they?

**Mr McDonald**—That is it, and that is why the states have been put as well.

**CHAIR**—But the state ministers do not even have the ability to initiate a transfer.

**Ms Williams**—In practice, that might very well be how it happens—that the state initiates it or that information comes from a federal agency.

**CHAIR**—This committee cannot deal with ‘in practice’. This committee has to deal with what is in front of it in legislation. I think the minister from New South Wales made a cogent case for some of his concerns. For example, what is the objection to the draft national guidelines that the territory and state ministers have put together?

**Mr McDonald**—The story of the draft national guidelines is an interesting one as well. He has just provided those guidelines to this committee. We have not seen the guidelines. Maybe they are in the mail or something like that.

**Senator BOLKUS**—It is probably the same post office as—

**Mr McDonald**—Yes, that is right. The guidelines have been developed. A draft that we saw—hopefully it was not an earlier draft—suggested that the Commonwealth Attorney-General would have a role.

**CHAIR**—I do not think there is any suggestion that there is no role, but from the evidence that the minister gave this morning, which I have no reason not to take at face value, the conference of the ministers has not had responses to its correspondence to the Attorney-General and its submission of the draft national guidelines. So the committee is left with a set of draft national guidelines that were apparently agreed at a meeting in which a Commonwealth minister participated, and, according to the minister who appeared before us this morning, a Commonwealth minister assisted in the drafting of the resolution that led to Minister Hatzistergos’s appearance before this committee today. And we come to a meeting like this with no response to the ministers.

**Mr McDonald**—The situation is that the minister discussed these issues at the last meeting and that New South Wales has been coordinating the preparation of those guidelines. They are called the national custodial management guidelines.

**CHAIR**—Happily I have a copy, so I know what they are called.

**Mr McDonald**—It just occurred to me that I had better make sure that we had the right name. Essentially, the decision was that work would be done to formulate those guidelines. Those guidelines have been an ongoing work which is only reaching its final stages now. Any impression that those guidelines were settled earlier is not a correct one.

**CHAIR**—But we are still left with the quite correct impression that the legislation was drafted with no consultation with the states and territories, who are ultimately responsible for the administration of corrective services facilities in this country.

**Mr McDonald**—Certainly advance copies of that legislation were not given to the state governments. As soon as the legislation was introduced, we gave the state governments the legislation, and our intention was that the consultation process would start at that stage. There are reasons for that. The days that are left on the parliamentary legislative program are very limited—

**CHAIR**—Don't we know it.

**Mr McDonald**—and at that time we were very uncertain about how many days there were. Clearly, there are people who are in the prison system, and we did not want to have a situation where the government's hands were tied in relation to an incident. The discussion with the states has been going on since late last year. We contacted them on four or five occasions in the months following the end of last year. New South Wales was the jurisdiction that was coordinating all this for feedback and information. There were a number of occasions when we did not get any information. However, in the end, when it came to developing this Anti-Terrorism Bill, we said that one option was to try and address this issue in the antiterrorism bills. We do not lightly make decisions about not consulting, and in fact I have pointed to occasions in the past when we have used exposure drafts, model criminal code discussion papers and goodness knows what. Whenever we have the time to consult, we certainly try and do that. In this case, it was a situation where there was a lot of concern that we just would not have enough time to get this legislation through.

**CHAIR**—What about the matter of operational security issues that the minister raises?

**Mr McDonald**—The concern that the federal government has is in relation to the national security issues. It is very important to have a law which would enable that to be dealt with. It is fairly hard to completely separate the two anyway. Clearly there is an operational connection to national security in any case. The other thing I should add is that we are all assuming that this transfer might only occur where the person is going to do something bad in prison—break out or be broken out. In fact, in some cases the transfer might actually be for the purpose of the safety of the person as well.

**CHAIR**—I do not think we are making any assumptions along those lines. What about the matter of federal constitutional power that the minister raises?

**Mr McDonald**—As with all our bills, we are careful to ensure that the bills are within the constitutional power and great care was taken with this bill. Obviously we are always open to suggestions on something that we might not have taken into account, but I can tell you that with this bill there was very, very careful consideration of the issues.

**CHAIR**—Yes, but there was not very, very careful consultation, and that is what frustrates this committee. We would have fewer witnesses, fewer discussions and fewer debates if there was.

**Senator LUDWIG**—In the spirit of consultation that you normally adopt, Mr McDonald, can you detail the number of meetings that you have had since the introduction of the legislation, given that you said it was a limited timetable and given that you said that you do not know how many sitting days may or may not be available. Presumably you want the legislation to pass in that number of sitting days. How many times have you met with the New South Wales Minister for Justice to hammer out some of the detail?

**Mr McDonald**—The ministers met at that conference.

**Senator LUDWIG**—Yes, I know that. I am talking about the Attorney-General meeting with the New South Wales Minister for Justice or his representative to talk about the transfer of prisoners provision in this bill.

**Mr McDonald**—There have been no meetings since.

**Senator LUDWIG**—None?

**Mr McDonald**—No official-level meetings since the conference.

**Senator LUDWIG**—So you are trying to tell the committee that it is important in the number of sitting days available to get it through without much consultation really going on.

**Mr McDonald**—We are obviously going to be taking into account the deliberations of this committee. We will be looking at the recommendations of this committee and then making decisions about what might happen next. Clearly any sort of process in response to that will involve the states, but essentially it might be a pointless exercise for us to start negotiating and discussing this with the states without the benefit of the views of the committee, which are very important to the federal government.

**Senator LUDWIG**—I do not open a new tactic, but would not a shrewd example be to hammer out details with all the states and present it as a *fait accompli*—that you have agreement from all the states and this is the best way to deal with and that every witness appearing before the committee is saying that? Far be it from me, though—

**Mr McDonald**—I think you saw that the New South Wales minister was fairly adamant about the role of the Commonwealth Attorney-General in this, so that seems to be a fairly fundamental point.

**Senator LUDWIG**—But he was waiting for an explanation of why. Perhaps you could have been able to convince him in the time that you had available, but you chose not to. And I am still waiting to hear a reasonable explanation of why as well. If I can reiterate that request on behalf of the New South Wales Minister for Justice, perhaps you could detail why.

**Mr McDonald**—I have detailed why.

**Senator LUDWIG**—That escapes me; it really does.

**Mr McDonald**—The Commonwealth is responsible for national security issues. There might be a situation where the national interest, which is the responsibility of the Commonwealth minister, conflicts with what the state minister considers to be necessary, in which case the Commonwealth minister has a very important role. The Commonwealth minister may well be aware of something—

**Senator BOLKUS**—You are telling us that, if on a Saturday night the Commonwealth minister is advised that there is going to be a security problem in a jail in New South Wales, he is going to say, ‘Hold on. I want to think about this. I want to call in Foreign Affairs, ASIO and A-Gs and have a long talk with Mr McDonald, and I will come back to you and let you know what I think.’

**Mr McDonald**—I have premised that—

**Senator BOLKUS**—Is that what you are telling us?

**Mr McDonald**—No. I have premised that on the basis that it would depend very much on the circumstances of the case, but I can tell you that Commonwealth ministers deal with issues that might not be well known perhaps to state ministers. The Commonwealth ministers do regularly deal with things quickly and they have to.

**Senator LUDWIG**—But you have had more than a month to be able to convince the New South Wales Minister for Justice—

**Senator BOLKUS**—Or in fact to reply to them.

**Senator LUDWIG**—yes; do any of those things—but you have chosen not to. Your explanation to us is that you will tell us why, and we will be persuaded. I have not actually yet heard why. I have heard a lot about you having information that is important, but no reasons why.

**Mr McDonald**—I have explained the reasons why, and they are to do with the Commonwealth’s role in relation to national security. I just cannot add to that.

**Senator BOLKUS**—But the Commonwealth has conscripted the states and the states are joint partners, and there have been press statements from the ministers—the Attorney-General and the Prime Minister—about how it is a cooperative approach and how we get industry and business together, and that we all have cooperative responsibility. Why can we not have a cooperative scheme here? Why can we not just say, ‘Righto, if that happens we are notified within 24 hours. If there is a problem then there is a system to address that’? Why do you not sit down and talk to the governments?

**Mr McDonald**—We have been talking to them.

**Senator BOLKUS**—You have not been; you have not been answering their letters.

**Mr McDonald**—The minister answered that letter at the commissioners meeting—he had a meeting straight after, or during. I cannot add anymore to it. Clearly there is a weighing-up process between trying to get appropriate legislation in place and at the same time trying to get the agreement.

**Senator LUDWIG**—All right. Let us see if we can get some joy on another issue. Did the bail provision come from the way that it is now going to work in terms of this provision? Did that come from the department, and what was it aligned to?

**Mr McDonald**—The bail provisions were prepared slightly before these provisions and they were included in the first anti-terrorism bill as an amendment because of concern about bail issues. Clearly with these things there were quite a few issues being dealt with at the same time. I do not think the bail issue was an issue, in the context of this offence, that was in the forefront of our minds. However, it is an issue that clearly needs to be considered very carefully in the context of this offence.

**Senator LUDWIG**—What do you mean by that? The submission by the Australian Muslim Civil Rights Advocacy Network said that the Anti-Terrorism Bill 2004 recently inserted a new section 15AA into the Criminal Code which provides that a person charged with or convicted of a terrorist offence under part 5.3 of the code will only be granted bail in exceptional circumstances. Is that a matter you then considered relevant to include in these lesser offences?

**Mr MacDonald**—When we put those bail provisions together, we were thinking about more serious offences; there is no question of that. That was our main focus and the parliament has accepted that in the context of those more serious offences. I think it is a fair point to make that we need to be considering that issue. Those bail provisions were put to the parliament on the basis of the offences that were in 5.3. There was no question of any design by us to pass those bail provisions and then slip this in.

**Senator LUDWIG**—Were the exceptional circumstances bail provisions put up by your department—

**Mr MacDonald**—Yes. Our department, my area, we put it up.

**Senator LUDWIG**—Or were they matters that the Attorney-General decided might apply?

**Mr MacDonald**—We put these provisions up.

**Senator LUDWIG**—Why should they apply to minor offences—meaning less serious or significantly less serious than those provided for in part 5.3?

**Mr MacDonald**—A reason for it may well be the connection to terrorism. However, the other terrorism offences are much more serious offences. Of course the seriousness of the offences was one of the reasons for which the bail presumption was justified. It really is an issue that has to be looked at carefully.

**Senator LUDWIG**—So you are going to look at that issue, because the submission by the Australian Muslim Civil Rights Advocacy Network says that it effectively means that a person could be incarcerated for up to 18 months before potentially being found innocent. I do not know the veracity of that but there is certainly in terms of the maximum term of imprisonment of three years for some of the offences, it might take, depending on the process, some time to get to court and to hear the matter. Of course if sentencing is a quarter or a fifth of the maximum, they certainly may have been in gaol for longer.

**Mr MacDonald**—You will appreciate that on this issue it is a matter for a government decision in the end, not my decision. Clearly it is an issue that needs to be considered carefully.

**Senator LUDWIG**—In relation to the issue they raised, again under the hearing of ‘surveillance’—I am not sure whether you have had the opportunity of looking at that, but I think you might have heard it this morning—

**Senator MASON**—May I just jump in? I am listening to your examination of Mr MacDonald on the issue of the presumption of bail. Particularly, Mr MacDonald, you have to remember that there is a presumption of bail even in cases of treason. When you say that there is not a presumption of bail in matters like this, there is such a discordant note struck that you must admit that Senator Ludwig has a legitimate point.

**Mr MacDonald**—I have heard you.

**Senator MASON**—It is true, is it not? And there is a discordant note.

**Senator LUDWIG**—I think I detected that discordant note also and being responded to. In relation to the telecommunications interception warrant, they say, ‘In deciding whether or not to grant a TI warrant, the issuing authority is to take into account certain criteria.’ It falls into a class 1 or class 2 offence. It seems to be

that you have aligned these offences with the more serious ones, and so the same class 1 issue arises. But when you look at it, it is not of that order.

**Mr MacDonald**—The interesting thing about this aspect is that under the Surveillance Devices Bill, clearly it is a three-year offence and it is caught by that. Clearly the surveillance devices can be of great assistance in verifying or exonerating someone who is suspected of committing this offence. I think there is a good argument that telecommunications interception in the context of the terrorist nature of this offence should apply in this situation. There are connections between this offence and some of the other offences in the legislation and I think there is a fairly strong case for extending it.

**Senator LUDWIG**—As the Australian Muslim network highlights, there is enormous potential to be treated differently as a consequence of being a class 1 as distinct from a class 2, and that you lose certain protections that otherwise would accrue to you if they were class 2. The warrant can be issued against them without the issuing authority having to consider such factors as the privacy of any person or persons likely to be interfered with, the gravity of the conduct and how much this information would be likely to assist. This is for something that is in the order of a maximum of three years imprisonment as a punishment where these are more serious offences. I do not know why you have aligned them to the class 1 which has that lowering of the protections that would otherwise be accorded to them. It seems discordant to me and quite unfair in its operation. I do not know whether I have heard the justification for that in these particular examples.

**Mr MacDonald**—It is an offence connected to the other offence. I think that is the main justification. It is a precursor type of offence.

**Senator LUDWIG**—But that does not mean that protection should be lowered as a consequence, though, because it is only a precursor, in your words. I might call it something different. But in that instance, why should they have those protections lowered because it is not the terrorist that you are targeting, is it? It is not the person who is associating; it is the person who is at least once removed.

**Mr MacDonald**—True.

**Senator LUDWIG**—Because we are short of time, it might be advisable to put some of the questions on notice and deal with it in that way.

**CHAIR**—I have a number of questions as well. Senator Mason, do you also have questions that we can put on notice?

**Senator MASON**—I was going to ask Mr MacDonald about PLO and what it was like at the university in the seventies and the eighties giving money to them and being caught up in section 102.8. But anyway we can discuss that privately later, perhaps.

**Mr MacDonald**—I was fairly stingy with my money.

**CHAIR**—That will result in a number of questions being placed on notice. A number of matters have been raised by HREOC in their submission, such as questions in relation to the definition of a family and the exceptions under those definitions. We have previously canvassed elsewhere the questions of definitions of ‘support’ and ‘assist’ but I suspect we will need to have a look at some written answers on those. There are also a number of matters that I know Senator Ludwig has just indicated he has. I thank all the witnesses very much for their assistance to this point on these issues and we shall pursue them further on notice.

[1.42 p.m.]

**ASHTON, Federal Agent Graham, National Manager for Counter-Terrorism, Australian Federal Police**

**KEELTY, Commissioner Michael Joseph, Australian Federal Police**

**WEBB, Federal Agent Darryl, Principal Legislation Officer, Australian Federal Police**

**CHAIR**—I now welcome representatives of the Australian Federal Police—Commissioner Mick Keelty, Federal Agent Darryl Webb and Federal Agent Graham Ashton. The Australian Federal Police has lodged a submission with the committee which we have numbered 81. Do you need to make any amendments or alterations to that submission?

**Commissioner Keelty**—No, chair.

**CHAIR**—I invite you to make a very short opening statement, Commissioner, and at the conclusion of that we will go to questions.

**Commissioner Keelty**—Thank you for the opportunity to appear before the committee. I am not sure whether I am on the losing side here, but the AFP supports the initiatives set out in schedules 3 and 4 of the bill. Schedule 3 proposes a new offence, as we know, which targets the association with a terrorist organisation. In response to developments over recent years a number of measures have been introduced. This has allowed terrorist organisations to be proscribed. There is a range of offences in the Criminal Code Act 1995 to enable the investigation and prosecution of criminal activity that relates to membership, financing and training of proscribed terrorist organisations. Our experience in the AFP with current and past investigations has enabled us to witness the rapid adaption to new methods of operating and also ways that have enabled terrorists to expand their reach and evade capture.

Terrorist organisations rely on support and assistance from outside their membership structures to exist. Importantly, our experience has shown that their capacity to use modern and emerging technologies is frightening. The proposed offence will help close the gap through which listed terrorist organisations use people outside their membership structure as a means of support and assistance. Many states and territories have consorting offences that are intended to inhibit organised crime. The Commonwealth does not have a similar offence which can be applied to prevent terrorist organisations securing their ongoing support. Without an appropriate provision, law enforcement's capacity to prevent the provision of support to listed terrorist organisations is limited. The gap allows people to knowingly assist terrorist organisations without the risk of prosecution. The proposed new offence will complement existing offences in the Criminal Code.

Membership, financing and training offences in section 101 are intended to prohibit direct involvement with listed terrorist organisations. To be effective in preventing terrorism, it is important that law enforcement is able to take action against terrorist organisations, and the people who support them, at the earliest opportunities. The earliest opportunity may be the basic support level or even before the planning of a specific terrorist act. Our aim is to prevent crime and my personal view is that the community has high expectations in this regard when it comes to the crime of terrorism. Ordinary and unintentional associations are protected through exemptions that are framed to respect family relationships and religious worship. There are also exemptions to ensure humanitarian aid and legal representation.

The proposed exemptions are extensive and potentially leave a loophole that the terrorist organisations could exploit—for example, by encouraging the association with family members to increase membership or for the purpose of obtaining support for members or their activities. Although the exemptions mean that the proposed provisions will not be comprehensive, the Australian Federal Police respects the need for certain exemptions where the relationships are not criminal. The proposed exemptions represent a balanced approach, in our view. The AFP would like to reiterate the law enforcement considerations that underpin the need for the proposed offence of association and terrorist organisations.

The proposed offence would make it more difficult for listed terrorist organisations to exploit the existing provisions. The important point, I think, is that membership is often philosophical rather than something that is more tangible. The provisions will also assist the AFP to counter the financing of terrorism and disrupt preliminary activities such as the training of terrorists. An inchoate crime may not necessarily have a link to a substantive crime.

Terrorism relies on fear and of an act taking place, as well as crimes such as murder. I have noticed in the submissions to the committee suggestions that offences such as conspiracy to commit murder cover the kinds

of activities that the proposed provisions are intended to address. However, the new offence would allow law enforcement agencies to address terrorism activity before substantive crimes are committed, and I think that that is the nub of the problem. I close by saying that we do support the bill.

**CHAIR**—Thank you very much, and thank you for your submission. The context in which your submission puts the association amendments, at the bottom of the first page and at the top of the second page, at least gives the committee some context within which to work, Commissioner, so we are grateful for that. The bulk of the committee's concern relates to things such as the breadth of definition, what 'support' means and what 'assist' means, and things like that. Either you or your agents can enlighten the committee from the perspective of the AFP as to your view on those issues. I will ask that question to start with, and then go to my colleagues.

**Federal Agent Webb**—In relation to 'assist', the question is whether it should be specifically defined. Changes in modus operandi are used by terrorist organisations. Changes in electronic communication and other ways that they go about committing offences really mean that you need to be able to adapt. Defining the assistance will allow terrorist organisations to actually work around the definition. It is really hard to say 'Define it this way', because they will work around it.

**CHAIR**—So you make that point from an operational perspective?

**Federal Agent Webb**—Yes.

**CHAIR**—You have existing provisions which allow you to deal with an organisation's substantive activities, but it is what happens around that that you want to address.

**Federal Agent Webb**—That is right. The substantive offences are linked to terrorism acts. It has become obvious through operations that the AFP is involved in that there is a lot of activity that is not necessarily linked to a particular terrorist act, so we need to be able to undermine—to use a word—the associations that allow that activity to go on to support and expand terrorist organisations.

**Senator LUDWIG**—I do know that you have one other known associate who agrees with you in support of the legislation, and that is the Attorney-General. That aside, you indicated in your submission that there is a proposal to effectively close the gap. Could you provide a hypothetical example of what that gap is, just to give it some substance?

**Commissioner Keelty**—I will ask Federal Agent Ashton to give you a practical example. We are trying to do it in a way that means we do not have to go in camera. We have talked about it.

**Senator LUDWIG**—Yes. That is what I was trying to avoid. We did have your assistance in camera once before, which was very helpful. If we can avoid that, it will be good. That is why I asked for a hypothetical explanation of what that gap might be.

**Federal Agent Ashton**—Certainly, Senator. I was looking to start off perhaps a bit more generally and then home in on something more tangible towards the finish. I think the example that we have been provided with by the Indonesian national police is a useful one to reflect on here. The way that the Indonesian national police are presently tackling Jemaah Islamiah within the Indonesian context has been to continually keep pressure on the organisation to prevent it from developing and executing plots. To do that, they need to—and do—focus on people who perhaps may not consider themselves to be members of the organisation but who do provide assistance in different ways and shapes—be it in providing a lodging or location where a meeting might take place. It is keeping the pressure on those people particularly that makes it more difficult for the core members of the cells to meet, organise and develop the plots and that they feel are necessary.

I think that people who provide those lodgings and other aid and assistance certainly under normal circumstances are not aware of the specific terrorist act that is being anticipated. They do not know what it is that the meeting may be focusing on in terms of targeting. Provisions that we might ordinarily rely on here in Australia presently are not yet reached.

If the groups then have those meetings, they are able to develop the plots quickly whilst maybe not selecting the target until the last moment. So it has been through tackling that area around the outside of the yolk, if you like, that relates to particular plots in which the Indonesian police are proving to be quite successful in keeping the group off balance and preventing it from developing cohesive plots that they might choose to execute. Another practical example of this is also the providers of web sites. We saw in the media this morning and over the weekend claims made on particular web sites that have provoked fear in the community in Australia. We have some practical examples in Australia of individuals who have placed material on web sites. Providers of those web sites in some cases, we believe, are aware of the assistance that they are providing to individuals

that are placing the material on there. I think that those individuals are not aware of specific terrorist acts that are being committed, but they do provide an example of where they know they are assisting, and the nature of the material suggests that they would know that they are assisting, in providing the ongoing assistance to an organisation and that the assistance is to someone who is very much promoting that. I think that is another example. We have actually got two of those that we are looking at at the moment, not just the example that we presently would not be able to progress to police action on. This legislation in the future may give us the opportunity to do so.

**Senator LUDWIG**—Do you say that also captures the concept of the person who intends that the support assist the organisation not only in the sense of the noun ‘assist’ but to expand or to continue to exist?

**Federal Agent Ashton**—I believe so, yes.

**Senator LUDWIG**—There has been criticism expressed today that the reach of that provision might be too broad in its application in that it might capture a whole raft of what would otherwise be usual political discourse in this country. Do you have a view about that?

**Commissioner Keelty**—Yes. I was at the back when that was being explored. I am of the view that that would not be captured by the section. I think the scenario that was put forward was somebody who was of the belief that the organisation should be proscribed, as I recall it. I think section 102.8(1)(a)(iv) provides ‘the person intends that the support assist the organisation to expand or to continue to exist’ as a terrorist organisation. I think in that scenario the person’s intention is not that the organisation exist as a terrorist organisation. The definition of ‘organisation’ is a proscribed organisation or one that undertakes terrorist activities.

**Senator MASON**—I am not sure that that is right. Section 102.8(1)(a)(iii) states ‘the association provides support to the organisation’ even if support for the organisation is not related to its terrorist activities. If you relate it to its terrorist activities, you might have a stronger point, but it does not relate to that necessarily.

**Commissioner Keelty**—As I said, I rely on subsection (iv) which states:

(iv) the person intends that the support assist the organisation to expand or to continue to exist ...

The organisation there is defined as a proscribed organisation or one which is engaged in terrorist acts.

**Senator MASON**—It is support for the organisation—not support of its terrorist activities necessarily. That is a different thing.

**Commissioner Keelty**—Yes. I am certainly relying there on my view. If you asked for my opinion, then in my opinion that would not be picked up in this section.

**Senator MASON**—That might be your opinion but others differ.

**Commissioner Keelty**—Exactly, and that is all—

**Senator MASON**—But that is not good enough. It is not that your opinion is not good enough: I did not mean that. I mean that you cannot have legislation as important as this, which potentially impacts on democratic discourse, that is open to interpretation like that. That is why it is not good enough. It is not your fault, but it is not good enough.

**Commissioner Keelty**—No. I am just giving you my thoughts on the matter. I know you addressed the matter to the department and that is probably where it was best addressed.

**Senator MASON**—I will give you some more examples in a minute. That was Senator Brandis’s example. I will give you another one in a minute. There are other examples. I mentioned one earlier today to Mr Walker from the Law Council and others. When I was at the university in the early eighties, I can remember well students giving money to the PLO. Somebody would remember that. The Australian National University Students Association were run by the left, of course, and they used to give money to the PLO. Section 102.8 states:

(1) A person commits an offence if:

(a) on 2 or more occasions:

(i) the person intentionally associated with another person who is a member of, or a person who promotes ... the activities of ...

for example, the PLO—

(ii) the person knows that the organisation is a terrorist organisation; and

many people knew that—

(iii) the association provides support to the organisation; and

It did—it could be moral support; in the ANU in those days it was financial support.

(iv) the person intends that the support assist the organisation to expand or to continue to exist ; and

yes—

(v) the person knows that the other person is a member of, or a person who promotes ... the activities of the organisation;

Is that the sort of outcome we want?

**Commissioner Keelty**—I think knowledge is the issue here and obviously we would have to prove knowledge.

**Senator MASON**—I hate to interrupt, but let me cut to the chase. The question then becomes political. I think there were examples about Fretlin, the African National Congress and the PLO.

**Commissioner Keelty**—You could use Jemaah Islamiah.

**Senator MASON**—Sure.

**Commissioner Keelty**—There are elements of Jemaah Islamiah that are promoted by moderate Islam rather than radical—

**Senator MASON**—Humanitarian and so forth.

**Commissioner Keelty**—Yes.

**Senator MASON**—I do not want you to have to make decisions, or indeed the DPP to make decisions, on whether we think the African National Congress is a terrorist organisation or not. You understand: that is a dreadful situation for you or the DPP to be in.

**Commissioner Keelty**—The safety net here, in my view, is the fact that it is proscribed. We are dealing with two issues here. One is that the proscription of the organisation then gives us a remit in terms of the legislation. The second part is the part I raised in the opening statement, that is, the membership issue is a philosophical one not a card-carrying one. That makes it difficult as well.

**Senator MASON**—That makes it more difficult, doesn't it?

**Commissioner Keelty**—I totally understand the difficulty and the complexity of it, but I guess from our perspective we have to say that we need to overcome those difficulties and complexities for the community's benefit.

**Senator MASON**—Mr Walker put it more eloquently this morning than I can. I do not think that this committee wants to be obstructive; it does not. Mr Walker argued, and I understand the point, that this legislation might in fact hinder the fight against terrorism because the laws are vague. As I said this morning, I do not mind if they are draconian, but I do not like it if they are vague. In other words, we have to have something that is certain and that we can enforce. I am not so concerned when it comes to terrorism about the length of time that people spend in prison. No-one is too soft here on that, but we are concerned about the breadth and the fact that this could capture all sorts of people that were not intended to be captured, and, secondly, that the DPP could be involved in exercising its discretion on political grounds. I just do not think that is a good look for democracy.

**Commissioner Keelty**—I have enormous regard for Mr Walker's position as well, and for him professionally, in putting that view forward. I think the reality is that I do not think this bill goes far enough, to be honest with you. The reality is that it comes back to inchoate crimes and that it comes back to the very embryonic stage of a crime being committed. As Mr Ashton said, often at that point the substantive crime is going to be unknown. It really is taking a shift in our criminal justice system to understand this, but I have to say that this is the nature of terrorism. There are safety nets in the sense that we have not got the resources to investigate each and every person in the community who may be a member of something for an innocent reason. Hopefully, our resources are being placed at the critical level, based on intelligence received from the intelligence community and from our own operations. That is the first safety net.

The second one is that we are not about to investigate innocent people, the same as applies to any offence. People can innocently be drawn into any crime, whether it be murder or armed robbery. The role of the police is to establish whether an innocent bystander had an intention to be there. Fraud is an example. Often people can unwittingly be tied up into fraudulent activity because they were simply part of the process of being part

of a company or part of a board—although that is probably not the right example because there would be statutory obligations for a board. People can unwittingly be brought into crime. I would say that the safety net of police discretion there is a strong one. The second one is the Commonwealth DPP who has a prosecution policy. I would like to think that the Commonwealth Director of Public Prosecutions, like me, operates independently of the government of the day and operates in favour of the criminal justice system.

**Senator MASON**—I think you have indicated that in the past.

**Commissioner Keelty**—The next safety net is the court itself—if the court is not satisfied that the intent is a criminal intent or that the involvement, the association or the promotion is of a criminal nature. That is the last safety net. We have to rely on our court, our prosecution and our defence counsel to elicit the veracity of the evidence that is before them and decide the issue as a matter of fact and as a matter of law.

**Senator MASON**—I will not labour the point and I will hand back to Senator Ludwig in a minute. I have little doubt that in the 1970s there would have been a major political push to have the PLO listed as a terrorist organisation—it was in many ways, let us be quite frank—there would have been pressure for it to be proscribed, and the university students would have carried on as they did. The issue of proscription could become political, and I suppose that is my point. As soon as that happens and people say, ‘Bugger it! I believe in the PLO’s aims’—you might believe that—then they may fall within the umbrella of this, and that is what worries me. I am no supporter of the PLO. I opposed them at university and I still do in many ways, but I am just making that point.

**Commissioner Keelty**—I understand the point. I can give you another example that is not related to terrorism. Often in policing we are asked to police demonstrations in public places. We have seen in the past, particularly in our parliament in Canberra, some very active demonstrations—some more violent than others. It may well be that the police believe in the issue that is being demonstrated for and against but that becomes irrelevant to the conduct of their duty. The issue of proscription is an issue. If we put our minds to it, we could think of a number of organisations that may have been proscribed in this new environment that might not have been proscribed in the past. It becomes an issue of: how current is the proscription? For example, what if Jemaah Islamiah moves on to be more of a middle level body with an ideology that is more framed around the non-radical area and a branch opens that is more radical? That is conceivable. You see that with many of the Middle Eastern organisations that change. There has to be a dynamic about proscription. I concede that point. But in terms of the legislation around proscription, I understand the point because there are some responses by governments, not necessarily in this context that we are discussing today, that make a law against an activity that has been complained of. When you think about the practicalities of policing that law, oftentimes it is not practical at all. Terrorism is such a dynamic.

We are only now really getting our heads around a lot of it. In the previous questioning by Madam Chair, a witness was trying to describe why things had changed. I do not want to speak on behalf of another witness but I have to say that from 2001 to 2004, where we find ourselves today, the people in whom we have had an interest have altered their behaviour considerably. In fact—I mentioned this or alluded to it in my opening statement—the reason the Indonesian police have not captured the last of the terrorists in Indonesia is the swiftness in which they adapt to new methods of operation. The Internet itself provides enormous opportunity for promotion, for communication and for other people to enlist their support. Sometimes the organisation itself is not even going to know that someone else in the world is motivated or has picked up on their ideology or their philosophy and may even commit an act in its name. That is the difficulty and the complexity of the issue that we are dealing with.

**CHAIR**—Commissioner, I think there will be a number of questions that we need to supply to you or to your organisation on notice. One of the challenges that the committee faces, as I am sure everyone contemplating this legislation faces, is the accretion of legislation in the last relatively short period of time. The difficulty we have—I can only speak for myself but perhaps my colleagues may agree on this point—is in fitting these additional suggested provisions in the context of those that have already been developed. Your evidence goes some way towards addressing some of that. At the end of the process you say that we have to rely on the court, the prosecution and the defence counsel—and one assumes the police as well—in that process, but I am not persuaded that we are taking the best avenue. I would rather that we had clear legislation that does not end up as far down the road and that happens in the short term rather than in the medium or long term through a series of amendments.

But we will put some questions on notice that address some of those concerns and see if we cannot get more information in that manner, as we will with the Attorney-General’s Department. A number of issues have been

raised during the hearing this morning. A number of your officers were present and were able to listen to it. If there are spontaneous issues which the AFP wishes to turn its attention to and that you think may assist the committee, we would also be grateful for that. It might help you and the Attorney-General's Department to know that the reporting date for this legislation is Thursday, 5 August, which is next week. We will need the assistance of both the department, the AFP and ASIO in turning around those answers as soon as possible, and in turn we will get the questions to you as soon as possible. I thank all of those who have assisted the committee today. I apologise for any delays that witnesses have experienced. I declare this meeting of the Senate Legal and Constitutional Legislation Committee closed.

**Committee adjourned at 2.11 p.m.**