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JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Reference: Review of security and counter-terrorism legislation

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JOINT STATUTORY COMMITTEE ON

INTELLIGENCE AND SECURITY

Tuesday, 1 August 2006

Members: Mr Jull *(Chair)*, Senators Faulkner, Ferguson, Nash and Robert Ray and Mr Byrne, Mr Ciobo, Mr Kerr and Mr McArthur

Members in attendance: Senators Faulkner, Ferguson, Nash and Robert Ray and Mr Byrne, Mr Jull and Mr Kerr

Terms of reference for the inquiry:

To inquire into and report on:

The operation, effectiveness and implications of the:

- Security Legislation Amendment (Terrorism) Act 2002
- Border Security Legislation Amendment Act 2002
- Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002; and
- Suppression of the Financing of Terrorism Act 2002

WITNESSES

Committee met at 9.32 am

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

McDONALD, Mr Geoff, Assistant Secretary, Security Law Branch, Attorney-General's Department

Witnesses were then sworn or affirmed—

CHAIR (Mr Jull)—Welcome. Do you wish to make some introductory remarks before we proceed to questions?

Mr McDonald—Yes. I think the fundamental findings of the Sheller review are found on page 3 of the executive summary, where it says that the review:

… is satisfied that, in addition to the general criminal law, separate security legislation is necessary. It is so satisfied on the basis that the current level of threat to Australia and Australian interests is of the type that has been publicly outlined from time to time by the Commonwealth Attorney-General.

Also on page 3, at the bottom of the page, it says:

The material available to the—

Sheller review—

did not indicate that to date there has been excessive or improper use of the provisions that fall within the scope of this review.

Finally, at the bottom of page 6, it says the Sheller review:

… noted that to date there has been very limited practical experience with how the provisions of Part 5.3 operate.

They acknowledge that our ongoing experience in the courts with these cases will be very informative.

Quite a few of the recommendations are about matters that were discussed in the parliamentary consideration of the legislation and, in some cases, were offences that were legislated fairly recently. So the comments and observations backing up some of those recommendations are based more on whether it is sufficiently proportionate or not as a response to terrorism rather than demonstrated problems with the legislation. That has got a lot to do with the fact that there are quite a few cases before the courts that have yet to be dealt with. For example, there has been quite a bit said in the report about the training and association offences.

The review has said that making these offences either more difficult to prove or even getting rid of them altogether would reduce a sense of fear and alienation by some members of the community. That was the type of rationale for it. The government thinks that conclusion is fundamentally wrong. In a sense, it is a deliberate policy of the offences to change behaviour

where people are dealing with terrorist organisations. When they are dealing with terrorist organisations, that is something they need to be very cautious about. It could be argued that a lot of the fear about the offences quite often stems from comments by commentators—and defence counsel included—where they are making comments in the context of cases that are before the courts. The truth is that you cannot prove the case in any of those offences without there being some awareness of the terrorism connection.

I think it is also quite arguable that the part of the community that has the most to fear from a terrorist attack in this country, the most to fear from the growth of terrorist organisations, is in fact the communities that they are concerned about, the Muslim and Arab communities. If there were a terrorist attack in Australia, you would have to think some alienation would flow from that.

The government response, which you have probably all read by now is very much one that suggests that it is too early to be rushing ahead with amendments, although there are some amendments recommended by the Sheller review which definitely have some substance behind them and are matters which we would support. At the same time, we need to be watching those cases. Even the Thomas case, which is one where there has been a sentence, is still before the appeal processes. And in the Lodhi case, which is another key case, we are at the sentencing stage. It may be that something will come out of those cases. We will have to see. That is about all I wanted to say in my opening address.

CHAIR—I want to follow on from there. Sheller had one recommendation about the need for education of the public and, in particular, sections of the Muslim community. Our last witnesses yesterday afternoon were from a division of the Muslim community who gave us some fairly graphic details of some of the concerns that that community allegedly had with some of this legislation. They were also particularly critical of the press and those to whom they referred as shock jocks. What has been done in terms of providing greater education about the ramifications of the legislation? Does A-G's have any concern with what is perceived to be biased reporting by sections of the press?

Mr McDonald—We always have concerns when reporting is inaccurate, and also where it might be prejudicial to proceedings that are before the courts. There have been examples of that on both sides of the argument, from my observation. I have been speaking at various seminars with representatives of the Islamic community and at various forums around the place and there certainly is evidence of people misunderstanding what the laws are about. We have put together some pamphlets that give basic questions and answers in several languages. We can table those today. Of course, where we are able to we will continue to participate in discussions about the laws. I have certainly found the discussions to be quite useful.

So we have questions and answers on the new terrorism laws. What we probably need next is the same sort of thing in relation to the terrorism laws generically—in particular, about listings of terrorist organisations. We accept and the government accepts that that is an area where we need to do ongoing work. There is now a forum with Islamic leaders, and I think that is referred to in our response. In any effort to do more, we would need to confer with that forum about what is appropriate. With these campaigns it is important that people do not feel they are being put upon, so the new laws certainly require some care in that regard.

CHAIR—As well as the issue of perceived bias against the Muslim community in sections of the press, there was also considerable objection raised about the leaking of an intention to raid and undertake a number of operations. I think we have all seen it—the police move in followed by news helicopters, press cars and goodness knows what else. Has A-G's turned its mind to that or is that something that is really not of your concern?

Mr McDonald—Where something like that has been done in a malicious manner, as I said earlier, it is always of concern to A-G's because we want to see fair trials. Some of this does not help the process at all, but, as to investigating particular incidents, that is something which the Ombudsman and the Inspector-General of Intelligence and Security have statutory responsibility for.

Mr BYRNE—The first part of your submission talks about a further review of the legislation, but you do not actually support the recommendation arising out of the Sheller report which calls for an independent review. Given that in your own submission you have agreed to a number of the recommendations that were made, can you explain why there should not be an independent review?

Mr McDonald—What you have received here is a government response. It represents the view of the government about whether there should be another review or not, and it certainly does not favour it. In terms of the issues that were identified by the Sheller review, I think there is no question that those issues could have been identified in an internal review or the sort of review that we had last year following the London bombing. They were not earth-shattering or new in terms of what they raised.

We are continually looking at these cases very carefully. We will obviously be reviewing those and, in the event that there are amendments coming out of those, we would probably move on those fairly quickly. And then of course we have our processes like this process where we would talk through the particular amendments and take advantage of the consultation mechanisms we have within our parliamentary committee system. We would also obviously use the summit of the Muslim leaders to talk through the issues as well—which is what happened last time.

The government's position is that it is not really necessary. In fact, what we found with the Sheller review was that it had fairly arbitrary time frames, so we were able to bend them a little bit. But there is a statutory time frame, and of course the time when we were supposed to be doing it was right slap-bang in the aftermath of the London bombings. That is one of the problems with these set time reviews. I know we have had debate about that before.

Mr BYRNE—So your department's position is that you would prefer there not to be independent reviews of this sort of legislation?

Mr McDonald—I think the emphasis is on 'independent' there. We think that there are independent mechanisms within the parliamentary process which enable all issues to be covered appropriately. In addition, for just about any amendment in this area we need to get a state referral of power. So we have to confer with the state governments as well.

Mr BYRNE—Did you confer with the state governments in preparing this submission?

Mr McDonald—For our submission, we did not confer with the state governments on the content—

Mr BYRNE—Is there any particular reason why you did not?

Mr McDonald—One of the difficulties is that we needed to have a whole-of-federal-government approach to it. Essentially we think that it is our job to put the federal government perspective. I was talking to the government of Western Australia yesterday, and they will be putting in, if they have not already, a written submission. We did discuss our submission with the states yesterday.

Mr BYRNE—In essence, what you are saying is that it is up to the government of the day, after passing these laws, to determine whether or not a review is appropriate and that the government's position is in effect that they will determine the manner in which this sort of legislation is reviewed, and the preference is that it not be a committee like the Sheller committee.

Mr McDonald—That is the essence of the government response to that recommendation.

Mr BYRNE—You can see how that creates some level of apprehension in the community about appropriate checks and balances, given the fairly strong nature of the legislation that has been put forward.

Mr McDonald—The government considers that the mechanisms that we have got are adequate to ensure that the community are properly consulted.

Senator FAULKNER—When is the next parliamentary review of this legislation, under your understanding?

Mr McDonald—There is no timetable set for when this legislation will be reviewed again although I expect that after some of the cases that are before the courts are concluded we would have an internal review of those cases.

Mr BYRNE—What is the triggering mechanism, though? Is it depending on court cases or on whether the weather changes as to when these amendments are going to be made? Is that what happens?

Mr McDonald—That is pretty well it—

Mr BYRNE—So when the weather changes is when we will have a review of this legislation or the amendments? Is that what happens?

Mr McDonald—It is not when the weather changes. But, for example, there could be a terrorist attack which reveals—

Mr BYRNE—So you will wait for a terrorist attack before you review the legislation? Is that what you are saying?

Mr McDonald—I am just saying there are many different circumstances that could affect the timing of the review of the legislation.

Senator FAULKNER—Mr McDonald, just so that you know: all members of the committee appreciate that these decisions in relation to review are not ones that you—or for that matter, the Attorney-General's Department—make. These are government decisions and of course we all acknowledge that and understand that you appear here as an officer of the Attorney-General's Department. But you did say in evidence a little earlier today—you expressed this view—that parliamentary review would be adequate, as opposed to any suggestion of any mechanism of an independent review or a non-independent review or a non-parliamentary review. The problem is, as you said in later evidence, that there is no suggestion that there will even be any parliamentary review.

Senator ROBERT RAY—Mr McDonald, with his vast legal experience, may be able to cite a case where 37 votes to 39 impose an inquiry on his department. Can you think of any precedent where a minority actually gets awarded victory?

Mr McDonald—I guess the position of the government is that we have this parliamentary joint committee mechanism, that it is overviewing basically all the relevant activities of the various agencies and that if there are any proposals to bring forward changes to the legislation we would be able to avail ourselves of the views of this committee and this committee could initiate something.

Senator FAULKNER—That is if the government so determines, isn't it, Mr McDonald? That is if the government so determines.

Mr McDonald—That is true.

Senator FAULKNER—The situation we have at the moment is no proposal for review of any nature. Is that a fair comment? If that is not a fair comment, can you say that there is any planned review?

Mr McDonald—There is no planned review. There is no statutory review. It is as simple as that.

Senator ROBERT RAY—We cannot self-initiate such a review from this committee. It has to be a reference of a minister of the parliament. But what we can do—and what I promise you we will do, just so you will sleep well tonight—is totally reorder estimates, and we will eliminate some of the other agencies and we will triple your time to look at this legislation. I am sure you will welcome that! But it will be reviewed. It will just be reviewed in a different forum and with a much bigger team, a much less sympathetic team than you are facing here today. That is the government's choice.

Senator FAULKNER—I do not want to interrupt Mr Byrne's questioning, but to inform committee questioning can I ask one or two process questions just so we are clear?

CHAIR—Yes.

Senator FAULKNER—We have a situation where Mr Davies was the Attorney-General's nominee on the Sheller committee. You can confirm that is correct, Mr McDonald?

Mr McDonald—Yes.

Senator FAULKNER—What association with the Attorney-General's Department does Mr Davies have or did Mr Davies have?

Mr McDonald—The Attorney-General is responsible for the Attorney-General's portfolio and included in the Attorney-General's portfolio is the Australian Federal Police and ASIO and various other agencies. Mr Davies's background is a policing one. I think that he was the chief of police in the ACT, for example, that he held other positions there and that he retired fairly recently. So he was thought to be someone who had practical law enforcement experience and consequently he was nominated.

Senator FAULKNER—Thanks for that. I am not being at all critical of Mr Davies; I am just trying to understand—

Mr McDonald—No, I was just explaining.

Senator FAULKNER—Yes, and I appreciate that. I am just trying to understand the situation we face, because he is the Attorney-General's nominee, and the recommendation of the Sheller committee on review is unanimous. So we have a situation where the Attorney-General's nominee supports these recommendations. All these recommendations, with one exception—and I will come back to that—are unanimous. Twenty recommendations and 13 findings are unanimous, but there is an exception to that in relation to the proscription area, where we know there are strongly held and quite divergent views on the committee. Apart from that, all recommendations and all findings are unanimous—including the Attorney-General's nominee and a range of others on the committee. Mr McDonald, I know that the Attorney-General's Department serviced the Sheller committee as it undertook its work, but did you have any interface with the recommendations as they were developed? Was Mr Davies reporting back and so forth?

Mr McDonald—No, he certainly was not reporting back. He was a nominee for this review, and we were very careful to try and keep a separation between the department and the review. Mr Davies was nominated because of his experience, and the department's submissions to the Sheller committee were all either in the transcript, particularly for their hearings, or in writing. There were occasions where, through the secretariat, the committee would ask for something, and we would provide it, but it was more in the nature of: 'Have you got the English laws on such and such?' We were quite careful to ensure that there was a separation between the review and the department.

Senator FAULKNER—So how do we have a situation where the Attorney-General's nominee and then the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security and the like, but specifically the Attorney-General's nominee, sign up to a range of recommendations and findings, and yet the Attorney-General's response in this instance, the government's response, is very different in its nature?

Mr McDonald—I think you will find that Mr Sheller was also appointed by the government.

Senator FAULKNER—Yes, he was, but Mr Davies was specifically there on the committee with a tag as the Attorney-General's nominee.

Mr McDonald—Yes. But a government looks at the recommendations, the reasons for the recommendations and then makes its decision. There are plenty of times when I have put up recommendations and had them rejected—even by someone in this room!

Mr KERR—I followed your advice always!

Senator FAULKNER—But is the Attorney-General's nominee briefed as to the view of the Attorney-General or the government?

Mr McDonald—No. That nominee was put on there by the Attorney-General from the point of view of his particular expertise, and I would expect that he was able to discuss issues from a practical law enforcement perspective. I do not know how that review operated internally. It might be that, like in politics, maybe there were some things that they agreed to have a unanimous position on. On the other hand, who knows? But there was absolutely no attitude on our part that he was sort of our mole on the review. He was put there for the purposes of his expertise.

Senator FAULKNER—Even though some of the findings and recommendations have been rejected by government, are you able to say whether the Attorney-General's Department's view—or more broadly; I do not know whether you can speak on behalf of the government, but you certainly represent the department here—is that the exercise of the Sheller review was a worthwhile exercise, a worthwhile review and a useful exercise or not?

Mr McDonald—We certainly considered the review to be a useful exercise, as is any exercise where you get intelligent people to look at issues and you have public consultation. I have never seen an incident where you do not get something useful and positive out of it. So we certainly considered it to be a useful exercise. That does not mean that it might not have been equally useful if it had been done in another way as well. But we certainly are of the view as a department and I personally am of the view that it was a useful exercise.

Senator FAULKNER—The issue here is how useful it was versus having no exercise at all. But I did not want to interrupt, Mr Byrne.

Mr BYRNE—It was a very valuable addition, Senator Faulkner. The United Kingdom, in addressing this particular issue, as I understand it, appointed an independent monitor—Lord Carlile. That was raised in evidence yesterday. I think the Western Australian government has adopted a three-yearly review. Are you saying that, in effect, unlike the UK and Western Australia, the Australian government's Attorney-General's Department does not need to have this sort of independent monitoring?

Mr McDonald—Clearly, the government's decision is that our system is better than theirs.

Mr BYRNE—Than the UK's?

Mr McDonald—We can point to mechanisms that we have here which are comprehensive and include the views of many people, not just individuals. In particular, we have mechanisms like this committee, where we have a broad range of experience being put into it but we also have our department and the other government agencies that we would have input into or obtain from as well as the states. There is a lot of expertise under our system that can input into these assessments. Then, as Senator Ray quite rightly pointed out, the Senate estimates is there if we do not do our job properly.

Senator ROBERT RAY—I did not say that at all. It was not if you do not do your job; it was whether you do your job or not. It was a double-barrelled promise.

Mr McDonald—Yes, I am sorry about that.

Mr BYRNE—With this legislation, when you first drafted the bills that we are reviewing and the subsequent amendments, did your department have any consultation with members of Islamic community?

Mr McDonald—In developing our response?

Mr BYRNE—No, not in developing your response; in developing the legislation and the amendments.

Mr McDonald—The amendments last year?

Mr BYRNE—Yes.

Mr McDonald—The legislation was discussed with the leadership forum. Mr Ruddock basically took the leadership group through what was being proposed. That was pretty well the main interface. There was not direct consultation between the department and the Islamic community.

Mr BYRNE—Prior to that forum was there any structured presentation by the department about the implications and ramifications of security legislation that was introduced into the parliament?

Mr McDonald—I will just go through my recollection on this. The Attorney-General circulated a short paper which went through what the proposals were.

Mr BYRNE—When was that?

Mr McDonald—I would have to take that on notice and get the exact date. It was during the time that we were developing the legislation.

Mr BYRNE—Can you tell me roughly what year that was?

Mr McDonald—I thought we were talking about last year.

Mr BYRNE—I am talking about prior to that.

Mr McDonald—I am not aware of any specific consultations about the 2002 legislation. That is something that goes before my time, so we will need to check our records.

Mr BYRNE—Could you please take that on notice.

Mr McDonald—Yes.

Mr BYRNE—One of the issues raised in evidence was some level of concern about the ramifications of the legislation, how it could be perceived by the community and its impact on the community. You are saying that there have been a number of seminars et cetera that were attended. Can you tell me how many?

Mr McDonald—Yes. On 19 April I attended a legislation and policy forum at Monash University with the Victoria Police. On 19 and 20 May there was a forum in Armidale, in northern New South Wales, which was organised by what I think is called Citizens for Democracy. On 19 July I was at the Northern Migrant Resource Centre migrant settlement conference in Melbourne. There were a few hundred people there. There were a lot of police, emergency services agencies and the like, so we have been taking the opportunity as it arises. I do not have it listed here, but there was also a Young Lawyers conference up at Windsor, which was a couple of months ago.

Mr BYRNE—In terms of direct interface with members of the Islamic community, can you tell me how many seminars you attended or that your department sponsored or hosted that had members of the Islamic community there and where you were explaining the consequences of the legislation introduced?

Mr McDonald—Every one of those forums that I mentioned had members of the Islamic community at them, including quite influential people. Even at the Young Lawyers one, there were young Islamic lawyers. For that one, I do not have specific details of who was there. I can check that. But I can supply you with details of who were at the other seminars. I am certain I would be able to get a list of the people.

Senator NASH—The difficulty in defining formal and informal membership of terrorist organisations was raised yesterday. How do you define formal and informal membership?

Mr McDonald—I should probably refer to the actual definition that we have. Clearly, the legislation needs to be broad enough to recognise that terrorist organisations do not necessarily operate like a corporation, where you have shares in it or you have membership tickets. To establish informal membership, you would need evidence proved to the level of beyond reasonable doubt in the case of a prosecution that—notwithstanding the fact that the person was not listed on the agenda of their meetings or did not have a membership ticket—the person participated in the activities of the organisation as if they were a member. Given that it has to be proven beyond reasonable doubt, there would need to be very solid evidence of that. The reason it is worded that way is to recognise that these organisations are not always set up with the sort of formality that we would have with a club, corporation or something like that.

You are right in saying that it is not enormously precise, but it is one of those things where it would be very hard to be much more precise than what we have there. The idea is to reflect the

fact that, on the one hand, you have to show that it is an organisation but, on the other hand, given that it is serious criminal legislation, if we started talking about membership being read down to someone having to be on a membership list, a shareholder or something like that, that would be very difficult to prove.

Senator NASH—As I understand it, the burden of proof is on the individual to prove that they have taken all reasonable steps to cease being an informal member. Given the imprecise nature of the informality, is it then difficult for an individual to prove that they have ceased being an informal member?

Mr McDonald—The position is that it is an evidential burden. That is a reasonably easy burden to discharge. You have to be able to refer to the possibility of that proposition, then it goes back onto the prosecution. Given that the individual has personal knowledge of their dealings or otherwise, that is not an unreasonable requirement. It is consistent with criminal law policy on such matters.

Senator NASH—So you are comfortable that it would not be too difficult to do that.

Mr McDonald—The attitude of the prosecution to an evidential burden is that they make sure they can prove beyond a reasonable doubt the proposition that the individual is an informal member, even if—excuse me, I am just checking something.

Senator NASH—It has just been raised that the defendant actually bears a legal burden.

Mr McDonald—It was just suggested to me that it was.

Senator NASH—Does that affect the way that you would like to give an answer?

Mr McDonald—It affects it in that the evidential burden is certainly much easier to discharge. The legal burden is imposed where it is within the personal capacity of the person to establish one way or the other. Of course, the person can point to what they were doing at the time it was alleged that they were supposed to have had communications with whomever it was. That is something that is much easier for the person to establish. I am sorry about that. I temporarily misled you there. I was thinking about another provision.

Senator NASH—That is fine.

Mr KERR—To clarify that: where the legal burden is on an individual, the burden does not shift back to the prosecution once a matter is put?

Mr McDonald—No, it does shift back. The legal burden is found in section 13.4 of the Criminal Code Act, which states:

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or

(b) requires the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

The position is that if there is a discharge of that legal burden then it is for the prosecution to prove otherwise. There is no question about that. They have to prove it beyond a reasonable doubt.

Mr KERR—The difference between legal and evidential burden is that if a person bears the legal burden of proof, unless they establish that fact positively and affirmatively—albeit, on the balance of probabilities, not the criminal burden of proof—to the satisfaction of a jury or a judge, depending on the circumstances, then it is presumed that the alternative stands. In other words, there is never a situation where the burden goes back to the prosecution.

Mr McDonald—The legal burden in relation to a matter is the burden of proving the existence of the matter, so if they establish that legal burden then it is for the prosecution to establish beyond reasonable doubt that that is not correct, so it does go back to the prosecution once they discharge it. There is no question about that.

Mr KERR—If you prove you are innocent, you are innocent.

Mr McDonald—The evidential burden is obviously a lower burden. In relation to a matter, evidential burden means:

... the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The other is that you have to prove that it exists, so there is no question that a legal burden is more onerous, and that is probably why some people would prefer to have the evidential burden in this area. However, the Criminal Code certainly contemplates that you can have a legal burden in matters like this.

Mr KERR—But you, the expert in this area, thought it was an evidential burden. I am not trying to be finicky here; I am just trying to say that this is a very complex area of law. In an area of law where the Sheller report recommends that that be changed, we are surely entitled to look at what is essentially a reversal of the normal criminal justice system, which is an extraordinary proposition limited to very narrow circumstances, usually in statutory offences relating to pollutions, strict liability offences and the like. It is an area where criminal law penalties involve up to life imprisonment or 25 years. The Sheller report—an independent inquiry—has said that this might engender unfairness. The leading witness for the Attorney's department has a view that suggests that it was an evidential burden all along. I am not entirely thrilled by the strength of the case that the government has put for retaining it.

Mr McDonald—My recollection failed, so I apologise for that.

Mr KERR—I am not blaming you.

Mr McDonald—What I can do is provide you with a list of examples in other legislation where a legal burden has been used. I think you will find that, in similar circumstances where a

person has personal knowledge or capacity to establish alibis, it has been used before. We will give you a list of other offences, because it is actually not unusual.

Senator NASH—Coming back to my original statement and following on from Mr Kerr, that legal burden married up with the very imprecise nature of the definition of 'informal' could potentially make it very difficult for somebody to prove they had tried to cease. That was the point we were making there.

Mr McDonald—I understand where you are coming from.

Senator NASH—If I could just briefly ask a question about the association offence. You said there is no justification for repealing the association offence. Can you expand on that?

Mr McDonald—The association offence was introduced into the Criminal Code in 2004. It contains quite precise fault elements to do with the element of the association assisting the organisation. It has carefully crafted exemptions from it. It carries a relatively low penalty compared to other terrorism offences and there has basically been no evidence before the Sheller committee of there being any misuse of that offence or any problems with it. In fact, the offence, as far as I understand it, has not been prosecuted to date. So when that offence was enacted many claimed that the offence would be misused and that they would be charging a large number of people with that offence. That has not happened. So there is really nothing that has happened which suggests it should be repealed.

Senator NASH—Do you believe that the ability to investigate would be hindered if that offence were removed?

Mr McDonald—The police are telling us that the offence is something they consider as an option that is still useful to them. Investigations very much depend on the facts of the particular case.

Senator ROBERT RAY—I have a couple of questions. First of all, Mr McDonald, you indicated before you produced a leaflet explaining terrorism offences. Do you think that is comprehensive enough? Is it a full enough explanation? We have had complaints from people saying that all this separate legislation that interrelates is very hard to follow. The inspector-general yesterday gave us a helpful chart, but it was a very complex helpful chart.

Mr McDonald—The difficulty with leaflets is to try and make sure you have the essential elements covered, and clearly we get advice from our public affairs people about the best way to communicate the information. If there is something in this pamphlet that concerns people, obviously we can take that into account when we design the next one.

Senator ROBERT RAY—Where do you distribute this? Have you got a target audience?

Mr McDonald—Examples are those forums that we have had. We have provided copies to the Islamic forum people. We have been distributing them whenever we get an opportunity.

Senator FAULKNER—How many have been printed, do you know?

Mr McDonald—I would have to take that on notice. I do not have the exact figure on that, but it is a sizeable number.

Senator FERGUSON—What about at mosques? That would be the most likely place you would get everybody.

Mr McDonald—We obviously need to be very careful about how we go about this, and I certainly think distributing them to people who work in the community is one of the best ways to do it.

Senator ROBERT RAY—The question has come up of psychological harm being one of the factors. What is A-G's assessment of that, and how difficult do you think that is to deal with in a legal sense?

Mr McDonald—When it is a serious assault or the like, the general principle in the Criminal Code is that harm includes physical and psychological, and that comes from the Model Criminal Code project. So it would seem that that is an appropriate recommendation.

Senator ROBERT RAY—The one other issue that has come up is the question of hoaxes. I think that you can prosecute a hoax. I assume this has come up because one of the defences for planning a potential terrorist act is, 'Oh, it was all a hoax.' I assume that is why it has come on the radar now, but I do not know. Could you explain it?

Mr McDonald—I do not think it has come to my attention in the context of a specific offence, but it may have. Certainly the police and the DPP thought there was some scope to have this offence. There are of course state hoax offences, and in discussions with the states yesterday this was obviously pointed out—and of course I was aware that there are state hoax offences. That would be another way of dealing with it. However, if we have threat offences and we have hoax offences in the context of post and telecommunications, it probably completes the scheme in offences to include it in relation to terrorist acts. The policy has been to have a comprehensive set of terrorism offences.

Mr KERR—I have three specific points I want to raise. Yesterday, Judge Sheller raised the issue of verbal support, which I understand is an issue the government has rejected the recommendations for. Judge Sheller's argument to us was that it would conceivably be an offence under the laws as they presently stand for a person in a pub, for example, getting involved in a heated argument about the rights and wrongs of the current Middle East conflict to say: 'I support Hezbollah. They're only doing what anybody would do if their country was invaded.' I am not arguing the moral side of this, but Judge Sheller's view was that to prevent robust debate and to make a criminal offence of assertions of that nature was a bridge too far and an infringement of civil liberties. Therefore, that was the basis for the committee's recommendation that verbal support, as part of the normal contest of ideas that we permit in our society, be excluded from the criminal law. What is the rationale behind the government's view that verbal support should remain a criminal offence, given the nature of the contest of ideas and the very real sense of aggrievement that persons on all sides of these kinds of contests and debates will have in our society, and the fact that we normally allow this to be robust but we say we draw a line—that you take no action that could bring harm to others, particularly to your fellow Australians?

Mr McDonald—We have always taken the view that that was a fairly fanciful interpretation, because it is a very serious offence. It is in section 102.7. The association offence that the government enacted in 2004 was essentially in response to the view that you just would not be able to prosecute someone under section 102.74 simply for oral support for someone. It says that you have to prove that the person intentionally provides an organisation with support or resources that would help the organisation engage in an activity, in the terrorist act definition, and that the person knows that the organisation is a terrorist organisation. We have never been of the view that the offence would extend that far and so we consider that proposal to be unnecessary. Obviously, depending on the statements—clearly, if they actually urge violence—we have the sedition offence.

Mr KERR—I take you back. I accept the points you make about the sedition offence and urging violence, which is a different matter. Given that you say that in your mind it is a fanciful prospect that it would occur, that we have Judge Sheller's recognition given to us yesterday on the record that he regards it as within the terms of the statute that it might be prosecuted and that it does carry such a serious offence, and that at the moment we have a heightened community concern about these issues—they are very live in the minds of many Australians—wouldn't we be far better off removing something that might stand as a sort of Damocles over persons who would feel that their ordinary right to participate in robust debate is in some way at threat? You might say that it is not likely to be prosecuted, but if Judge Sheller, a serious and eminent legal expert, comes to us and says that it is within the scope of the legislation, wouldn't they be well advised to stay clear of that risk? And, if they are so well advised as to stay clear of the risk, aren't their civil rights being inhibited?

Mr McDonald—We have been talking to the office of the Director of Public Prosecutions and they are certainly of the view that there is no way in the world that they would be able—

Mr KERR—So why would the government resist the change that Sheller has proposed?

Mr McDonald—The government has concluded that it is unnecessary.

Mr BYRNE—Therefore, why has the American government defined 'support' specifically as meaning 'material support'? Was that taken into account when you were framing the legislation?

Mr McDonald—In proving support, you would need to establish that it was real support, which is what you are talking about when you are talking about material support.

Mr BYRNE—So what is your definition of real support?

Mr McDonald—You have to prove beyond reasonable doubt that a person intentionally provided to the organisation support that would help the organisation engage in the activity. That in itself talks about helping them engage in the activity. When you talk about the activity, you go back to the terrorist act definition and that gives a fairly concrete form of support.

Mr BYRNE—So why do you think the Americans define it as 'material support'?

Mr McDonald—American statutes are not always well drafted so the fact that it is in American legislation does not automatically mean that we expect it to be better. They have put in

'material support'. We think it is unnecessary to express it that way given the context of the provision.

Mr BYRNE—Has your department sought independent advice on this particular terminology?

Mr McDonald—The person who makes the decision on prosecution is the Director of Public Prosecutions, so the most expert person in terms of determining what is necessary to launch a prosecution has advised us that way. The Director of Public Prosecution's office is independent from government.

Mr BYRNE—But you have said in your submission that you are awaiting the outcome of court cases, so consequently you are not 100 per cent sure about what you have just said, I take it, if you are awaiting the outcomes?

Mr McDonald—That was a general comment about court cases and, whether it is a constitutional issue or another issue, it is always the case of making judgments about what you think the courts are likely to conclude. I do not think anyone can ever say they are 100 per cent certain with many issues, but here we have an issue where the Director of Public Prosecutions will not touch it, so we can be quite confident that nothing will happen with this sort of offence in that direction.

Mr BYRNE—Considering it has been raised in evidence do you think, in terms of assuaging community concern, that it could be helpful to actually define what 'support' is in a more meaningful way? If this is a key point of concern within the community—certainly some of the evidence that we have taken indicates that—would you think that if you actually define what 'support' was that that could actually allay community concern?

Mr McDonald—It is asserted that this is causing community concern but my view is that this change alone probably would not make up for the other misinformation that is out there about the legislation. Certainly Sheller's conclusion is that it might assist, but the reality is that there are other offences which define more precisely what we are talking about in terms of what the government might want to criminalise in this area. Of course the 'urging of violence' type offence which defines sedition is probably the main example.

Mr KERR—I raised these issues the other day with Judge Sheller and then with Professor George Williams. I raised the breadth of section 101.2—providing or receiving training connected with terrorist acts—and in that context many other countries have excluded armed conflict covered by the laws of war between state and non-state actors, non-state and other non-state actors, or states and states. It is not a course we have followed and our legislation is neutral as to those elements.

I raised whether there was either an intended or unintended consequence that a person who is training—and I gave the example because it is simply current at the moment with the IDF, not meaning to turn it into a political contest about that particular theatre of conflict—would be covered under section 101.2, particularly given the very broad definition of 'terrorist act' which would seem, clearly, to cover the circumstances in which that occurs, in that a person under

101.2 commits an act if they receive training in preparation for conduct that is covered by the definition of a terrorist act.

The definition of a terrorist act speaks of actions which cause serious harm to physical property or persons, infrastructure and the like. It would not be covered by subsection 3. It speaks of actions done with the intention of advancing a political cause, a condition that I understand the government wishes to remove, and coercing a government—in this instance it is the coercion of a foreign government, that is, Lebanon, to insert its own armed forces into the border region and to displace Hezbollah—or intimidating the public or a section of the public. Again, that is a geographical consideration and it applies to coercing the public of southern Lebanon to remove themselves from their present habitation.

It seems to me that it would apply, simply as a direct application of the law, to any Australian who volunteers and serves in the IDF, as they would have in the former Yugoslavia conflicts, the civil war that occurred there. We do not have retrospective application. I am not suggesting that it would apply backwards to that or that Australians who volunteered to fight in the civil war in Spain, either on the republican side or on Franco's side, would be caught by this.

In other countries they deal with these issues as laws of war issues. You are permitted to be a combatant but you are subject to international law and, to an extent, domestic law if you commit a war crime. But mere training participation is not itself an act of criminal conduct. This seems to make it a terrorism offence carrying a penalty of 25 years and it appears to me an unlikely intended consequence, although it may have been intended to prevent Australians doing such things. It may have been the intention of the government, though not an express one, to in a sense say the only terms in which an Australian can engage in armed conflict is as a member of the Australian Defence Force, which is covered by its own statute. If that is so, we have very remarkably changed the legal status and standing of many Australians. I understand there are numbers who are engaged in like circumstances in various armed conflicts who may be the subject of these very extensive criminal penalties. I do not expect you to respond immediately to such a complex set of propositions but I would appreciate a note in relation to that.

Mr McDonald—I will point out that chapter 8 of the Criminal Code has specific offences to do with war crimes and that, in exercising discretion as a prosecutor, you use the most specific offences. In relation to the specifics of the terrorist act definition and the interface with those offences, there are a lot of factors that would go into that, including the application of defences that are in the Criminal Code. So there is quite a deal there in a hypothetical case—

Mr KERR—These are not hypothetical cases.

Mr McDonald—to consider before you would conclude that a person would come under that provision. The reality is that there are in division 268 of the Criminal Code specific war crime offences, and they cover a huge range of, something like 60, offences specifically with various aspects of war crimes. You are right—the law of war is what you look to if there are concerns about the activities in a state.

Mr KERR—Can you excuse me for a moment because we have time limits. I would appreciate a note, but I make the point that what we are speaking of here is the training in relation to a force, not the individual conduct of a person in participation in any war crime or

otherwise. There is no specific alternative offence that relates to that. I am raising a question about which, no doubt, the Australian public will say, 'If you cast these laws so widely'—which has always been a concern of mine—'and then you leave it to prosecutorial and policing decisions about charges, or prosecutorial decisions as to who to prosecute, and then you create a debate about whether some people come within the laws and are being prosecuted but others come within the laws and are not, you're acting in a way that privileges'—the law does not privilege it but the administration of it does—'certain kinds of conduct.'

I think that that is not the way our law normally operates. Our law normally tries to make as specifically as possible the conduct that is prohibited. The point I am raising is that this appears to go to an area that is very live at the moment. It appears to create very serious criminal offences in circumstances in which there may not have been an intention—or there may have been but it certainly has not been debated or discussed.

Mr McDonald—Also relevant is the foreign incursions act, but we will give a written response and we will go through the issues.

CHAIR—Thank you very much for your evidence. If the committee has any further questions, they will be sent to you in writing by the secretariat, and a copy of the transcript of your evidence will be sent to you for any correction of statement or fact.

[10.47 am]

LAWLER, Federal Agent John Adrian, Deputy Commissioner, Australian Federal Police

PRENDERGAST, Federal Agent Frank, National Manager, Counter Terrorism, Australian Federal Police

WHOWELL, Mr Peter Jon, Manager, Legislation Program, Australian Federal Police

Witnesses were then sworn or affirmed—

CHAIR—Do you wish to make some introductory remarks before we proceed to questions?

Federal Agent Lawler—Yes, I wish to make a short opening statement. Firstly, I thank the committee for the invitation to appear at this public hearing into the review of security and counter-terrorism legislation. The AFP welcomes the opportunity to assist you. As the committee would appreciate, the AFP has a significant and continuing national and international role in investigating and, importantly, preventing terrorist activity. The legislation that is the subject of this review and the independent review by the Security Legislation Review Committee is critical to the protection of the Australian community from terrorist attacks. This legislation enables the effective prevention, detection and response to terrorist activity by law enforcement and security agencies.

The AFP—in partnership with security, intelligence, law enforcement and other agencies—has been able to enhance its strategies for preventing terrorism and investigating terrorist activities through these laws. The AFP's operational experience is that those involved in suspected terrorist offences are often very different to other groups that the AFP deals with, such as organised crime groups. The unpredictable nature of the activities involved and the potentially catastrophic effect on the community requires legislation to enable the proactive targeting of terrorist threats and early intervention.

Given the relatively short time frame since the introduction of the security and counter-terrorism legislation, it is difficult for the AFP to comprehensively identify all the issues or implications of the legislation under review. Our written submissions to the Security Legislation Review Committee addressed the implications of the legislation from the current operational perspective of the AFP. I recognise that full effectiveness of this legislation in terms of enabling law enforcement to investigate and prevent terrorist activity will become apparent during and on completion of ongoing trials and in the light of evolving terrorist activity.

The AFP's view is that the security and counter-terrorism legislation introduced in 2002 and 2003 continues to be appropriate in dealing with terrorist related criminal activities. Counter-terrorism laws have been enhanced and strengthened with the introduction of additional measures since 2002 and 2003. The heightened security environment in which this legislation was introduced has not abated, as evidenced by global terrorist events in 2005 and 2006. The AFP strongly believes that the security and counter-terrorism legislation under review remains

relevant and necessary. My colleagues and I are happy to address any specific questions the committee may have.

CHAIR—To update our records, since July 2002 you have undertaken 450 counter-terrorism related investigations, resulting in 24 people being charged. Is that correct?

Federal Agent Lawler—Those figures are a little bit out of date. The current figures as at the end of July is 479 counter-terrorism related investigations, resulting in 24 persons being charged with terrorist offences under the security legislation.

CHAIR—Much of the work that you do is in conjunction with state police forces. In a broad sense, are there any aspects of the current terrorism laws that you have found to be detrimental to you operationally?

Federal Agent Lawler—The current suite of legislation has provided us with the capacity, as you correctly say, in partnership with state and territory law enforcement agencies, but additionally and importantly with security agencies and other agencies that play a part in a whole-of-government response, particularly the Commonwealth Director of Public Prosecutions and others in the judicial process. As I indicated in my opening remarks, in a relative context, the legislation is still in its infancy. It will be shaped and formed through the prosecutorial process, through the judicial process, as a way of guiding agencies that are tasked with investigating and responding to breaches of the legislation and also the prosecutorial authorities as to whether in fact there are impediments that manifest themselves that were not known.

There were and have been a couple of instances where we believe that the legislation currently before us and able to be utilised by the agencies requires further amendment and adjustment. We have been working closely with the Attorney-General's Department and the Commonwealth Director of Public Prosecutions to ensure that those adjustments are made in the appropriate time.

CHAIR—Sometimes is it difficult to determine what is terrorist activity and what might be defined as criminal activity. Have you got any set formula that you can use?

Federal Agent Lawler—We have not experienced that, I have to advise the committee. I might defer to the National Manager, Counter Terrorism as to whether he has any specific examples of that. We find that the intelligence and information that is presented to law enforcement and security agencies normally in its early genesis indicates a potential terrorist activity and, as such, we investigate it. It is distinct in a lot of ways from the organised criminal activity that the AFP might normally investigate.

Federal Agent Prendergast—The first point I would like to make is that we regard terrorist activity as criminal activity, so our approach to it is very much along the lines of how we would approach any criminal activity. When we are assessing the activity, we view it as criminal activity not as a specific ideology or as belonging to any particular group. The second point is that I think there are submissions before the committee in relation to hoax type offences and the possibility of having those included or a specific sort of terrorist hoax offence. At the moment in dealing with hoax offences we are generally in the Commonwealth sphere restricted to charging in relation to the mode of transmission of the hoax, if you like.

For example, a hoax may be transmitted over the telephone lines and there are offences relating to that type of transmission or a hoax device might be posted through the mail and there are offences relating to that type of transmission. We think there is scope to include a specific hoax offence, picking up on where those modes of transmission are not used, but also reflecting the necessary response to that type of threat, the way it ties up valuable law enforcement, emergency service and other resources in responding to that threat and the impact that those types of threats may have on the community as a whole. That is probably one instance where we would see some utility in differentiating between various types of hoaxes.

Senator FERGUSON—I want to follow up on the chair's question. Are there any recommendations from the Sheller report which you think, if they were accepted, would hinder your work or make it more difficult?

Federal Agent Prendergast—Yes is the short answer to that. I will go to the recommendation about altering the definition of a terrorist organisation, for example, to simply a proscription regime. While we support the proscription regime, our experience is that these types of organisations are extremely dynamic and hard to detect. At the time you detect them you may need to take action to prevent something occurring. Our approach to terrorism investigations on the whole is based on early detection and early prevention proactivity. We are not in the position to allow these types of offences to run to their conclusion, as we may, for example, in a drug importation to maximise the collection of evidence. So it is important in that instance that we are able to use a flexible definition to identify a terrorist organisation and move to disrupt through prosecution.

Federal Agent Lawler—In a much broader context, the AFP was consulted and it contributed to the submission that the committee has before it. With those areas where the recommendations were not supported, in large part the AFP was able to demonstrate where that would and could make operational activity more difficult by increasing the level and nature of the proof that is required to make offences out.

Senator FERGUSON—The one that came to mind was I think under the advocacy section where, if a section was not to be removed, the Sheller committee recommended that the definition of 'risk' be changed to 'substantial risk'. I have been wondering just how you can determine when you cross the line between a risk and a substantial risk. I thought a risk would be a risk regardless.

Federal Agent Lawler—That is right. That was recommendation 9 as I understand it. The AFP is opposed to that recommendation. That was one example where, as you correctly point out, to be able to differentiate there is difficult and, of course, it makes the prosecution more difficult in the longer term.

Senator FERGUSON—Was your contribution to the Sheller review by appearance or was it written?

Federal Agent Lawler—We provided both a written submission and appeared on two occasions, one in the early stages of Judge Sheller's deliberations in an informal context to set the scene and provide our experiences. I understand that might have been an in camera

appearance. Subsequently we appeared publicly and my colleagues and I were the members that appeared before the Sheller committee on both those occasions.

Senator FERGUSON—Was the issue of things such as risk and substantial risk discussed there or is this something that has come out as a result of your submissions rather than something that was talked about while you were before the review?

Federal Agent Lawler—I will have to reference the transcript. I am being told that we do not believe it was but I would like to double-check. It could have been mentioned in the margins or in a transient discussion.

Senator FAULKNER—Deputy Commissioner, does the AFP have a view as to the usefulness, benefit—or, for that matter, lack of benefit—if that is the view, in relation to ongoing review either in a parliamentary sense or by a non-parliamentary or an independent reviewer of terrorism legislation? Does the AFP have a view as to the value of review of legislation?

Federal Agent Lawler—Matters of review by parliament are a matter for government and a matter of government policy.

Senator ROBERT RAY—I want to ask a question that has troubled me for some time. In this raft of legislation on terrorist and security matters, a fair bit of trust has been invested in ASIO, AFP and indeed state police forces. Yet the one jarring note I see, and I am not ascribing blame to your organisation, is that, when a lot of these search warrants are executed, five seconds behind the police, ASIO and state police are whirring cameras from news organisations and there is only one way they are there—someone has tipped them off. That comes back to a question therefore of trust. We are asked in this legislation to place trust in ASIO, trust in the AFP and by inference, even though we do not control them, trust in the state police. I believe this is a breach of trust. I personally have a view on who is responsible but what is your reaction to that scenario where the media seem to turn up and on many occasions we see prejudicial reports of some poor bloke being pulled out for questioning or a search warrant et cetera in a full blaze of publicity with all the prejudice that follows?

Federal Agent Lawler—I agree with you absolutely. Not only is it a breach of trust but it is a breach of the criminal law. There are specific provisions that guide the unlawful release of information. As a senior member of the Australian Federal Police, I can tell the committee that, as an organisation, we take it very seriously indeed. As you know, we are tasked to investigate unlawful releases of information in a much broader context. For allegations and instances attributed either directly to the AFP or to a conglomerate of agencies where information appears to have been unlawfully disclosed then we take a very robust response to that in the context of investigations and action against those where we believe there is sufficient evidence to sustain either criminal prosecution and/or other actions which lead to discipline or dismissal from the organisation. We have seen in recent times media reporting in New South Wales where Commissioner Moroney has also reported along a similar line. That is my response to that.

There is, in a much broader context, a need to properly inform the community, through the media, of events and activities. It is a legitimate and appropriate activity by law enforcement for that to occur, but it needs to occur, as you quite rightly indicated, particularly when people are charged and a presumption of innocence is maintained. We do everything within our power to

ensure that they receive a fair hearing and a fair trial, if one were to go that far through the judicial process.

Senator FAULKNER—That is a very strong statement, Deputy Commissioner. I am sure it is appreciated by the committee. Can you tell the committee whether there has been any follow-through investigation since this legislation has come into effect in relation to any of those cases where there appears to have been unexpected media presence at the time of a police operation?

Federal Agent Lawler—Yes, there has.

Senator FAULKNER—Can you provide the committee with a status report of where that is up to? I do not want to go into the specific details. You can let us know what you are able to in relation to the status of those ongoing investigations.

Senator FERGUSON—I know we should not deal in hypotheticals but, say, for instance, the suspected leak of information to the media came from state police, who would be responsible for investigating that alleged breach?

Federal Agent Lawler—Where we had information that suggested state police or others, for that matter, may have been involved—but let's take your hypothetical of the state police—that would be referred to the internal investigation area within that state police force. In all likelihood, it would be through the Commissioner of Police in that particular jurisdiction or, depending on the circumstances of the specific matter, there may have been cases or examples where it has been referred to other bodies set up within state jurisdictions to deal with such matters, such as the Police Integrity Commission Committee, the Crime and Misconduct Commission in Queensland, the Office of Police Integrity in Victoria or like bodies around the state and territory jurisdictions.

Senator FAULKNER—Has this happened in any instance that you are aware of? I think you have indicated to us that it has.

Federal Agent Lawler—I think the question to me was: has there been action and follow-up? My response was yes. The follow-on question was: has it been referred to other agencies? Whilst there have been other agencies involved in those investigations, I could not say with absolute certainty which agencies matters might have been referred to and when.

Senator FERGUSON—So what you are really saying, if I understand you correctly, is that when it comes to possible breaches, where information may have been leaked to the media where it otherwise should not have been, the AFP can only really investigate possible breaches from within the AFP. The others—for instance, state police or any other organisations—are responsible for investigating their breaches.

Federal Agent Lawler—That is right.

Senator FAULKNER—So you could say, for example, whether a matter ended up before the Commonwealth DPP or there had been any further action taken by the AFP. We should be clear about this: I think you are indicating that that has not been the case and that any follow-up action

has been taken by agencies in another jurisdiction—in other words, at the state or territory level. Is that correct?

Federal Agent Lawler—No. I think it is important that we do clarify this because I think you took it an extra step beyond what I was saying. I would need to take advice and look at the files to see just what has happened in relation to investigations. What I have been able to confirm to the committee is that we have pursued, in an internal context, those allegations.

Senator ROBERT RAY—In answer to Senator Ferguson you seemed to imply that you can investigate any issue of leaking within the AFP and not the state police—we agree on that. But you could also have the capacity, couldn't you, to investigate on behalf of ASIO at any Commonwealth agency? I am just trying to round out your answer so I understand it.

Federal Agent Lawler—My understanding is, yes, the authority would be there for allegations of potential breaches of Commonwealth law in relation to unlawful disclosure by a member of a security agency.

Senator ROBERT RAY—I am asking this question for completeness. There is no allegation or otherwise to be implied by my question; I just wanted it completely on the record of where your boundaries go.

CHAIR—Perhaps I could move it along a little. This was all raised yesterday by one of the Muslim community groups, who were concerned at the activities of the press and those specific areas that we mentioned. They also expressed concerns about how their community viewed interaction with state and federal police and the other instrumentalities. Do you have formal procedure or any practice in place where you undertake some sort of liaison with Muslim community organisations? How well does that work and, in your opinion, is it enough?

Federal Agent Lawler—For a number of years now, we have had a very strong, comprehensive and far-reaching outreach program with the Islamic community in particular. I will defer to Federal Agent Prendergast shortly to give some detail of what that involves. Particularly where we have high-profile arrests that are likely to generate a lot of media activity, we have a coordinated and sustained interaction with the Islamic community in all of the jurisdictions of Australia to explain what the police are doing and why we are required to do so, and to put what might be sensational media reporting into context and make sure that there is ongoing dialogue to explain as best we can what is occurring. This enables those community leaders to go back into their communities and provide solid, factual advice around police operational activity.

Can I just say that the interaction extends beyond an operational interface into a proactive activity where we have developed a cultural and language centre within the Australian Federal Police to foster a culture of understanding others' cultures. In this context our workforce is more receptive, open to different points of view and broad in its understanding of others. Importantly, we have also involved key people, particularly of the Islamic community, to present on programs that we run, particularly our advanced counter-terrorism program and, more recently, an AFP program around radicalisation in prisons. I would like to hand over to Federal Agent Prendergast to give the committee some more detail because I believe the AFP has shown a lot of leadership and initiative and been very proactive in engaging the Islamic community.

CHAIR—Just before you start on that: is it specifically AFP, or do you do this in conjunction with state forces and other agencies?

Federal Agent Prendergast—I will address that question first. All our activity in relation to counter-terrorism domestically is done in conjunction with the various state and territory jurisdictions. For example, where we are running our advanced counter-terrorism program—which is, if you like, our flagship counter-terrorism training program—that involves people from both the state and territory jurisdictions and the AFP and also people from overseas countries such as Indonesia, Pakistan et cetera. That course contains a component in relation to understanding Islam. It also has speakers: prominent members of the Islamic community come in and give an Islamic perspective on these issues as well.

The point we need to make, though—and we are very careful in our public statements on this issue—is that we do not equate terrorism with Islam in particular. This is an unfortunate by-product of the world situation we find ourselves in. One of the key messages we attempt to get out to the community through our various programs is to emphasise the fact that we are looking at criminal activity; we are not looking at specific ethnic or religious groups. I think it is very important that that is on the record and people understand that.

We have other programs in place. We have currently developed an AFP language and culture centre which is delivering language training and cultural awareness training. We are also rolling out programs—they will be daylong programs—of cultural awareness where we will be having people from various cultures come in and give formal training in relation to those issues. This is building on work that we have been doing for a number of years. Most people in the AFP now would have been exposed to cultural awareness training in one form or another, with a particular focus on our counter-terrorism teams.

We also engage on an informal and a formal basis through our various area offices, where the area office manager is the focal point. They are tasked with engaging with the Islamic community, if you like, in their various jurisdictions and with building links to open up lines of communication and be able to address issues that arise in a fairly dynamic way. So I think in all jurisdictions our office managers are accessible to members of the Islamic community. Speaking as the manager of our Melbourne office, I know the managers receive calls on a regular basis asking for issues to be explained et cetera. The other factor that is important to understand here in terms of the AFP's broader understanding of the Islamic cultures is to recognise the exposure that the AFP has had in South-East Asia and the number of members in the AFP now who have actually worked—and worked quite successfully—in South-East Asia in a predominantly Islamic country such as Indonesia.

That is not to say that we are not aware of the concerns in the Islamic community in Australia. We are aware that they do have concerns with the antiterrorism legislation and they do have concerns with the activity that the AFP undertakes in the necessary pursuit of its duty. We are very focused on ensuring that we continue to try and build bridges and promote understanding of our activities. I am happy to elaborate on any of that if it is required.

Mr KERR—This is a bit of a side wind to many of the questions that have been directed, but an underlying theme that came through in submissions to us from the representative of the Islamic community that spoke to us last night was a concern about the conditions on which

persons who are on remand are held. I have heard the same concern from other sources, and we have raised it in private hearings of this committee, so it is not the first time it has been addressed.

I am given to understand—subject to correction—that there is a national scheme of prisoner classification which operates so that any person who is charged with a terrorism related offence, no matter where it comes in terms of the subsequent risk to the community or the possibility of that person presenting a subsequent threat, is held in conditions which used to be called solitary confinement. I understand that the language now being used is 'managed individually', but that essentially means that they are held in conditions which used to be regarded as severe punishment for the least tractable of prisoners—and that before they are subject to the criminal trial process. Given that we are experiencing very long periods between arrest and trial and that bail is only available in exceptional circumstances, specifically and deliberately so, we have a number of persons who are subject to these charges, albeit entitled to the presumption of innocence, held for periods of years in circumstances which used to be limited to the most violent and dangerous of convicted prisoners, and then usually only for disciplinary offences.

I am wondering whether the AFP has played any part in the framework of holding persons subject to these terrorism charges and whether or not any advice has been offered about having a review of the classifications so that any unnecessary infliction of what is quasi punishment while awaiting trial is removed. The normal system, particularly given the length of these protracted detentions, would be that persons are held in the least punitive form of detention consistent with the obligation of holding those persons for their trial. I am wondering what role, if any, the AFP has played in relation to those matters.

Federal Agent Lawler—The AFP does not have a responsibility for the incarceration of prisoners or their management whilst they are within the prison or custodial facilities. That is a matter for the state and territory jurisdictional correctional services. That having been said, I did mention just briefly the leadership that was shown by the AFP in bringing together a group of stakeholders about radicalisation within the prison system. That included representatives—a senior member—from every state and territory correctional service. The discussion that ensued during that seminar was an opportunity for there to be an understanding of the different regimes that apply to prisoners who have been charged with terrorism offences and of how prisoners are being managed. It is fair to say that, from that, there was a much greater understanding of the various regimes and, hopefully, issues of consistency as to how persons in custody, persons on remand, are treated. But it is a matter for the correctional services personnel and leadership in the jurisdictions.

Mr KERR—I am not disputing the legal responsibility for the corrective service, because the Commonwealth does not operate its own prisons.

Federal Agent Lawler—Indeed.

Mr KERR—The constitutional arrangements are that the states are obliged to provide facilities for the incarceration of Commonwealth prisoners and do so. But, as I understand the national agreement that was entered into between the Commonwealth and the states in relation to the security classification of prisoners, there is a capacity for consultation, and it exists with the law enforcement authorities of Australia to make recommendations in relation to security

classification—the circumstances in which risk is assessed in relation to these matters. I suppose I am exploring the degree to which that mechanism has been used.

Plainly, this committee cannot go to state administration, but we can ask you the degree to which your advice has been sought in relation to these matters, given the testimony that has been put to us to suggest that there is a blanket treatment of all persons who are the subject of antiterrorism offences, wherever they fall within the degree of severity, whatever the possible penal consequences and whatever their risk of flight or the danger that they might pose, so they are all treated as if they are the most dangerous of persons who might be held within the prison system. That may be true in some instances but is certainly not likely to be so in relation to all. So I am just wondering what, if any, involvement has been sought of you in terms of those classifications.

Federal Agent Prendergast—In terms of the classification scheme that you are describing, we are not aware of that and have not played a role in that. We would need to seek advice on that, and I am happy to do so. In terms of the particular conditions of prisoners or people on remand, we have had an involvement inasmuch as we agreed to provide computers to prisoners in Victoria to enable them to read the briefs of evidence which were supplied and which were quite voluminous. That is the type of interaction we have had in relation to those matters. The manner in which the prisoners are held is essentially a matter, as the deputy commissioner has said, for the relevant jurisdiction. I believe it is very much impacted upon by the nature of the available facilities and the normal practices.

Federal Agent Lawler—I would like to add that, through the judicial process, such matters have been raised in the courts around the conditions and other matters attached thereto. One case that was in the public arena was that of a particular person in Melbourne who faced the pending death of a family member. The AFP was able to work with the correctional facilities and the court and in that circumstance—notwithstanding the fact that in our judgment that person posed a very significant risk to the community—balanced the need of that particular person to attend the bedside of their sick relative. In the context of the judicial process we have also been involved. To the point of strict classification, I am aware of interaction between our joint teams and the state police in discussions with the correctional services but I do not know the extent or detail of that.

Mr KERR—You might come back to us on the degree to which your advice has been sought. The proposition which has been put to us is that persons are being held in punitive conditions pending their trial, in circumstances where the risk assessment would not warrant that were it applied in any circumstance other than the definitional nature of the offence that they are facing. That is coming back to us as a concern from the community.

Federal Agent Lawler—I am happy to look at that. I just do not know how much additional information might be available for the AFP to provide, so I am not hopeful that we will be able to assist you much further than what we have.

CHAIR—We will leave that with you then.

Senator NASH—I would like to briefly return to the question that was raised earlier about whether you believe any of the recommendations in the report might hinder your ability to

investigate. Does the recommendation to repeal the association offence fall into that category? We heard from a witness yesterday representing the Muslim community. That offence is obviously creating some unease within the community. If it is the case that it falls within that category, I am keen to hear the value of that to the AFP.

Federal Agent Lawler—I was privy to the response by Mr McDonald to a similar question asked of him. The AFP's position is that it does not support the recommendation to change the association offence. The AFP considers that there is no justification for removing the offence and nor is there evidence—as we heard from Mr McDonald—that the offence has been misused in any way. My understanding is that, in actual fact, there have been no charges to date laid around that specific offence.

But the nature of the offence is such that it goes back to broad principles, which is why terrorism is different in a lot of ways. Terrorism is, albeit as we have heard, serious criminal activity but different in the way it manifests itself—that is, there is a much heavier responsibility on security, intelligence and law enforcement agencies to prevent terrorist attacks occurring. What that means is that the police, rather than waiting for a criminal offence to occur, or indeed investigating an offence once it has occurred, are very much working in the preventative space.

So we may very well have intelligence around activity that gives us serious cause for concern about the community's safety and the need to intervene at an early period of time, when the full planning and scope of what might be afoot is not fully exposed. Of course, in that context we have a situation where all the evidence may not be available and where we need to rely on those offences around association, planning and all the predicate offences that go to the sort of activity that we are here talking about. So my strong view is that there are circumstances where such activity would be necessarily captured by the provisions that we are discussing under 102.8.

Senator ROBERT RAY—In your dialogue with the Sheller committee, did you raise any problems with jury trials associated with some of these offences inasmuch as it is hard to leave national security information in front of juries? Or is that a separate issue?

Federal Agent Lawler—I am aware of those issues. I do not believe we raised them specifically before Judge Sheller's committee, but I am aware of there being a considerable dialogue as to how that might be affected in the trial process.

CHAIR—I thank you very much indeed for your evidence. If the committee does have any further questions, they will be sent to you in writing by the secretariat.

Federal Agent Lawler—Thank you, Mr Chair, and thank you, committee members.

[11.33 am]

BUGG, Mr Damian, AM, QC, Director of Public Prosecutions, Office of the Commonwealth Director of Public Prosecutions

CARTER, Mr James Edwin, Senior Assistant Director, Legal and Practice Management Branch, Office of the Commonwealth Director of Public Prosecutions

CORDINA, Ms Stefanie, Principal Legal Officer, Commercial, International and Counter Terrorism Branch, Office of the Commonwealth Director of Public Prosecutions

Witnesses were then sworn or affirmed—

CHAIR—Do you wish to make any introductory remarks before we proceed to questions?

Mr Bugg—We thank you for the opportunity to appear before the committee. I appeared with members of my office before the security legislation review committee at a background briefing and then we later provided a written submission. Then later I attended before the committee at a public hearing with other officers in Sydney to give evidence and assist the committee further. Basically we submitted that we considered that the counter-terrorism legislation, the subject of the review, was appropriate and necessary. We also submitted that it was crucial to recognise terrorism as a separate offence or form of offending and it was a distinct criminal activity that should be addressed by specific provisions.

We suggested that there were some drafting issues which were of no great significance. We also suggested some amendments which were outside the scope of the committee's purport, but one of those was picked up by the committee, and that was the one in relation to hoax threats. So we felt some satisfaction in that. We have not submitted a separate written submission to this committee because we saw the government response and our views were incorporated within that response. But we are obviously happy to answer any questions that the committee may ask, if we can.

CHAIR—I am interested—this is a general question—in Ms Cordina's position as Principal Legal Officer, Commercial, International and Counter Terrorism Branch of the DPP. No doubt you would take a general interest in what is happening in other similar administrations around the world. Could you give us an overview, do you think, as to how you see us going in Australia and how our legislation and our administration would compare with those in places such as Canada, the US, South Africa or Great Britain?

Mr Bugg—I could not make such a broad comparison. I have had discussions with my counterparts from Canada and the UK particularly. Obviously we did not have the prior experience of the UK in relation to its earlier involvement with terrorism matters involving the IRA, so we started from a standing start, so to speak. But, looking at what has happened in Australia to date, and without commenting about the matters that are before the court or the matters that have been dealt with, I think first of all that in a general sense the legislation appears to be working. It is providing a separate basis to look at conduct of this type. Comment on the

investigation and detection processes is probably better left to others, but certainly I do not see any cause for criticism or complaint in that regard.

Mr BYRNE—I have a quick question with respect to providing support for a terrorist organisation. I asked the Attorney-General's office about 102.7, about a person providing an organisation support or resources. Is your view that the word 'support' would be sufficient to hold up in a court of law if someone actually challenged that—if they were providing verbal support, for example?

Mr Bugg—Yes, I think it would. I know there is some concern that it is too broad and it may pick up open public debate where there is some sympathy or expression of feeling of understanding of what is occurring. I would not see the section as extending that far and certainly from my point of view I do not see it as picking up conduct of that type. But it is capable, in my view, of dealing with the more critical end of what we are looking at in terms of support.

Mr BYRNE—Would it assist your purposes if that were a little more clearly defined so that there was no perception of ambiguity?

Mr Bugg—It may. I just look at it and say, 'It doesn't apply to that conduct, therefore the ambiguity doesn't need to be clarified because I don't see it as ambiguous in that sense.' But in terms of saying, 'We want to define it in more detail so that it deals with a specific type of support but excludes what some people may have a fear or concern about,' then that may be an issue. But I do not see it as an issue.

Mr BYRNE—So if it was put forward for the purposes of public clarification that the term 'support' be more clearly defined then from your perspective you would not have an objection to that?

Mr Bugg—I would have no objection to it, but, as I said, I have not seen it as an issue.

Senator FERGUSON—You made a number of recommendations to the Sheller report, of which not many seem to have been taken up in the Sheller recommendations, for some reason or other. For instance, they did not take up the recommendation about part 1C of the Crimes Act allowing:

> ... the admissibility of evidence obtained overseas in circumstances where AFP officers had done 'all that they could reasonably be expected to do to comply' with that Part.

I see they did not accept that.

Mr Bugg—That comes under the heading of those matters I mentioned, where we suggested some amendments but they were outside the jurisdiction or certainly the brief of the committee, and we thought we would take advantage of the opportunity.

Senator FERGUSON—Perhaps you are hoping we might make those recommendations instead.

Mr Bugg—I cannot criticise the committee for not picking it up because, quite frankly, I accept that the committee would have been stepping outside its boundaries. It is there and it is on the record in that sense, so we hope that it will have some effect in due course.

Senator FERGUSON—What is the status of ASIO officers who give evidence in counter-terrorism prosecutions now? They do not retain anonymity—is that right?

Mr Bugg—The particular case we drew to the attention of the Sheller committee was a matter here in Canberra, where a request or submission was made to the court regarding the prosecution of a letter threat which came through ASIO's hands. The person responsible for the threat came from another state, but the letter finished up here in Canberra and two of the ASIO operatives who handled the correspondence were necessary witnesses in the prosecution. We made application to the trial judge that they both give evidence using a pseudonym and from behind a screen or in a remote location and blacked out. The trial judge declined to accept those submissions and ruled against us, saying that the jury was entitled to observe the expressions of the witnesses as they were cross-examined. We were disappointed with that ruling. I then had some discussions with the then Director-General of ASIO and, as a consequence, we discontinued the prosecution. We could not go on with it. We have had examples in other jurisdictions where evidence has been given from a remote location, where the person's facial recognition has been in some way dealt with. So we thought it might be useful to try and overcome the problem if it arose again in the future, bearing in mind the precedent value of Justice Crispin's decision in the matter I am talking about.

Senator FERGUSON—So they did not take up that recommendation. Was it outside of their bailiwick too?

Mr Bugg—Yes, it was.

Senator FERGUSON—That was the reason they did not take that up.

Mr Bugg—Yes.

Senator ROBERT RAY—In those circumstances the media could not have reported their names through the legislation. It still would have remained banned. It is just that their names would have been recognisable by anyone attending the court.

Mr Bugg—Yes. The other difficulty was that in any community there might be someone on the jury who says, 'Oh, that's the lady who works in the tuckshop.' She may not work in the tuckshop; she might pick up the kids after school or something like that. That was the problem with the screen in front of the witnesses. It is a facility that is available in state offences—that is, in some of the sex crimes and what have you—to try and enhance the quality of the evidence from particularly child victims. Yes, that was outside the scope of the committee's—

Senator ROBERT RAY—Putting stuff outside the scope of the committee is a very good idea, from the evidence we have heard today, because there is not going to be another review! Just write directly to the Attorney-General's Department in future, will you?

Senator FERGUSON—The other one I was curious about was the express right to appeal a decision to grant bail on the grounds of exceptional circumstances in terrorism cases. Is there no right to appeal the decision now?

Mr Bugg—There is a right to appeal the decision but it is subject to state legislation. The bail acts in each of the states govern the terms on which you can appeal a decision to grant bail, looking at it from the prosecution's perspective. But the exceptional circumstance provision is a provision in Commonwealth legislation and therefore it is not identified or recognised in the bail acts, which are state acts, which govern the basis upon which you can appeal. It was to identify that shortcoming.

Senator FERGUSON—How could—

Mr Bugg—We could still appeal the decision, but it would be confined to the grounds that you can appeal under the state legislation. You would say it was an error of law, that it failed to take into account other matters and what have you.

Senator FERGUSON—How could we change the law so that it overrode the state legislation?

Mr Bugg—You would probably have to have a Commonwealth bail act or, alternatively, at SCAG level convince the attorneys-general to incorporate a one-liner into each of the bail acts, which looking at it from my point of view is probably an easier way to go about it. All the jurisprudence in each of the states on bail appeals has really developed separately and, shall we say, subject to the legislation in each of the states. To bring in a new Commonwealth bail act I think would mean all sorts of problems. I do not think I would like to be the first person to appear before a state judicial officer with a new piece of Commonwealth legislation which created problems for them.

Senator FERGUSON—I can also understand why Sheller kept clear of it.

Senator ROBERT RAY—The one thing that you did get up, and which you have already noted today, was a win on hoaxes.

Mr Bugg—Yes.

Senator ROBERT RAY—But I am not quite sure where your office stands as to where that should go in the legislation. For instance, if it went in the legislation under the section engaging in a terrorist act, whoever got convicted would be subject to life imprisonment and 23 years before parole. It would be viewed by the community and the parliament as a very disproportionate punishment for a hoax, as compared with a terrorist act. Precisely where do you want to stick it in? Do you have a penalty in mind to attach to it?

Mr Bugg—We certainly do not have a penalty in mind, to answer the last question first. I would see that as a matter of policy. Our concern with hoax was around the fact that you are looking at a threat of a terrorist act. A hoax is not joined at the hip to a terrorist act at all, because there is just nothing in the nature of a terrorist act in the contemplation of the person who has made the hoax call, written the hoax letter or whatever. It would be separate from a terrorist act

and therefore you would expect that it did not incur anything like the penalty that a terrorist act obviously has in the legislation. We would have it separate from it and down from it in seriousness.

Senator ROBERT RAY—You do not think it would have the effect of Mr X planning a terrorist act, getting caught and then constructing a schema and a defence that it was all just hoax anyway, to take a lesser penalty? Hoaxes are in people's minds more than anything else, and it is hard to prove what is in people's minds.

Mr Bugg—Yes. That is a challenge for the prosecutor. I guess you are going to be confronted with that likely defence, and hoax would pick it up. It is almost like the alternative verdict provision. If someone says, 'Well, I really didn't intend it; it was all a hoax,' and if the jury entertained a reasonable doubt about it, in spite of the fact that people have shut down airports and what have you, they will walk away. It at least provides that option. I would expect that we would be prosecuting for the more serious offence if we had the evidence and there were reasonable prospects.

Senator ROBERT RAY—We did not hear from Commissioner Keelty today—I presume he is on leave—but it was argued—

Mr Bugg—He is overseas. I was trying to have a meeting with him, but he comes in tomorrow morning.

Senator ROBERT RAY—I think he did flag the difficulty of jury trials where national security information could not be led before, although this was not, we believe, raised with Sheller. What is your view on that?

Mr Bugg—We did not see the actual process of the jury trial as an issue we should raise with Sheller. It is more for the NSI Act. The operation of that act is obviously a work in progress. It is the subject of debate in a matter that is before the court in Melbourne at the moment. The difficulty that gave raise to the NSI Act was an espionage prosecution in this jurisdiction about four years ago where part of the documentary material that the member of the intelligence organisation had tried to dispose of was not an Australian intelligence document. It belonged to another intelligence organisation. The availability of that document to the Australian intelligence organisation had so many conditions around it that, if the trial risked exposure of that document to someone or an environment that did not have top-secret security classification on it, we could not tender or provide the document. That is precisely what happened when we had to abandon that aspect of the prosecution.

As a result of that, the government looked at ways and means of trying to massage into the trial process, if I can use that term, a facility which avoided first of all the risk of inappropriate or sudden disclosure but, secondly, tried to step back from the trial process, look at the security sensitive position and work that into the trial as comfortably as possible. It is therefore fairly novel legislation and it is also outside the scope of Sheller. We saw that as something that probably has to be looked at as a work in progress as we go along with that legislation.

Senator ROBERT RAY—It is more about—I do not want to put words in your mouth—espionage and counterintelligence matters than terrorist matters. There could be some flow-over into terrorist matters but it would generally be more on that former category.

Mr Bugg—That is perfectly correct, and the interesting distinction we see with terrorism matters—which, obviously, we have already had to look at and are coming through the system—is that you are dependent not only on what you would call traditional evidence gathering processes but also you are using security intelligence organisations to assist in not only backgrounding but also gathering evidence. So what used to be classified—

Senator ROBERT RAY—I beg your pardon. You are saying that intelligence agencies are gathering evidence? Not in the legislation I have.

Mr Bugg—No. The information that they have may be used and sought to be used in the prosecution process. For instance, they may have access through their sources to—let us put it in a simple explanation—a person who is in custody in another jurisdiction who is assisting the authorities in that jurisdiction having been sentenced to a term of imprisonment and that person's cooperation throws up evidence relevant to a prosecution we are conducting in this country.

We therefore need the cooperation of the intelligence organisations in that country and in Australia to gain access to that evidentiary source—and in every sense of the words it is an evidentiary source. So therefore the international reach of terrorism is likely to bring up intelligence information which may lead to an available source of evidence. It is that what we call continuity to gather and establish the evidence that sometimes steps through the need to use intelligence officers.

Mr BYRNE—In your submission to Sheller, you argued for removing the element of intention to advance a political, religious or ideological course from the definition of a terrorist act. Can you explain why you argued that?

Mr Bugg—To us it seemed to be restrictive because you may have someone who, for purposes of revenge, hate or even greed, threatens a terrorist act. By confining it to just religious, ideological and political purposes—and when I say 'just' I do not mean it pejoratively—you may find that there is conduct which fits the classic definition of terrorism but it cannot be dealt with under this legislation. If you look at the principal purpose, in my view, of legislation such as this, it is to try and pre-emptively move before the conduct reaches the point under the old, traditional legal sense of being an attempt—and the catchcry of the courts used to be that mere acts of preparation are not sufficient to ground a prosecution for attempt; you must go further than being in the act of preparing.

But if you then have someone who is preparing for what is, in the other sense, an act of terrorism—that is, to intimidate a government, the community or a section of the community—but you do not have the religious, political or ideological precursor then you have some problems. You can move and stop the conduct, but you cannot prosecute it because it is merely an act of preparation and it does not go close enough to be an attempt if you are looking at charging that person under state legislation. That is why we felt that that should happen.

Certainly at the moment we have not been confronted with such a situation—other than, I suppose, in the Mallah case, where his position was that he felt wronged by the department of immigration and federal officials, so the focus of his anger and the conduct that he was speaking of effecting could be said to be either an act of terrorism in the strict sense of the word under this legislation or alternatively a threat to cause harm to someone.

Mr BYRNE—If that particular individual had said, 'I support Hezbollah,' in the event of carrying out his act, would you have prosecuted him under 'support of a terrorist organisation'?

Mr Bugg—If, in the process carrying out the terrorist act, he says, 'I support it'?

Mr BYRNE—Or if he was saying prior to that: 'I am really fed up with this. I support that.' Could you have prosecuted him under those provisions?

Mr Bugg—I suspect not. I would need to think about that little more carefully.

Mr BYRNE—Would you take that one on notice?

Mr Bugg—I will take it on notice. Let us say he makes a telephone call and he says: 'I am sick of the way you have treated me. I embrace the philosophy and the goals of Hezbollah and, by so embracing them, I now propose to support them in this country by the conduct I am about to embark on.' Or is that more than you would—

Mr BYRNE—No—a little bit more. Could you take that one on notice. The thing is: aren't you, in what you have argued before, starting to extend the definition of a terrorist act? Where it seems to have been fairly confined by the legislation in terms of the primal motivating forces which then lead to the commitment of an act, aren't you then starting to extend the reach of what is categorised as a terrorist act into something that could be a domestic dispute or that sort of thing?

Mr Bugg—If you go to the definition of terrorist act, our concern was with subparagraph (b), where 'the action is done or the threat is made with the intention of advancing a political, religious or ideological cause'. But you must also establish the action:

… is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or part of a State, Territory or foreign country; or

(ii) intimidating a public or a section of the public.

It has to have that component in it so that whilst, yes, I accept the fact that you are saying we are seeking an extension of it, what we were really trying to do was to overcome what we saw as a real problem of confining the conduct to conduct which had the intention of advancing a political, religious or ideological cause, because we could see that there were acts of terrorism—it does not take you long to stop and think about it—which fall outside that limiting subheading of 'religious, political or ideological'.

Mr BYRNE—But using that example, if you had someone who was involved in a domestic dispute that was being heard before the courts, if that person then threatened to blow up the Family Court, could that person, under your change if you took this out, not be charged with intention to commit a terrorist act according to what you are suggesting?

Mr Bugg—No; it has still got to meet the requirement that it is coercing or influencing by intimidation the government of the Commonwealth.

Mr BYRNE—Isn't it? What if he effectively says, 'If you don't change your mind, I'm going to blow up the Family Court'?

Mr Bugg—It is a judge in the Family Court that is being intimidated.

Mr BYRNE—I think you understand the general idea. You talk about coercion. This person says: 'I'm sick of this. I want a change to the judgment, otherwise I'm going to hurt a government instrumentality,' which happens to be a court. With your change of definition, that person would fall under the ambit of being able to be charged under the provisions.

Mr Bugg—You would probably be looking at prosecuting them for either contempt of court or attempting to pervert the course of justice, depending on how far they are—

Mr BYRNE—But the point that I am making—

Mr Bugg—But with the reassurance of subparagraph (c), I do not have a cause for concern. But then again, I am a prosecutor and I would make the decisions. It just appeared to us to have a problem about it if it did not extend beyond those three subheadings. Mr Carter has also pointed out that there are protections within the legislation for Commonwealth property and Commonwealth officials, and threatening to harm Commonwealth officials and what have you. There are provisions obviously in the circumstances that I mentioned.

Mr KERR—Mr Bugg, before I begin asking questions, I want to congratulate you on your recent appointment.

Mr Bugg—Thank you.

Mr KERR—My first question relates to the British and Queensland model of the public interest monitor or advocate, which is interposed to provide a mechanism to address some of the security related issues that will inevitably occur in trials where, for example, there is a question about public interest immunity, refusal to disclose certain material to defence and the like. I wonder whether you gave any consideration to the establishment of a process where you would have somebody with a high level of security clearance, but independent—in the same status and role as yourself, for example—to be the honest advocate for the contrary proposition. It would not be a fair trial, for example, were a certain document not to be disclosed et cetera—a whole range of issues that are inevitably inherent in these very difficult discretionary decisions about closed trials, and particularly material given wisely or unwisely. Certain defence lawyers are declining to seek and obtain security clearance. Have you given any thought to that proposition so that there would be this robust discourse, even if it was one in which the accused and the defence lawyers were immunised from or excluded from, to enable there at least to be a

contesting party to the propositions that are being advanced, legitimately of course, on behalf of the prosecution?

Mr Bugg—No, I have not, to be quite candid. I saw the facility of having the robust dialogue with the person who is representing the accused as the optimum and I was hopeful that the NSI act would facilitate that. I do not know just where this will all settle. It is new and it is obviously a matter that I am concerned about. We have obligations to disclose. If there is material that is relevant and we cannot disclose it, you may very well have the impasse that we reached with the Lappas case four years ago. We were hopeful that the NSI act would overcome that difficulty. So I have not thought about that. I may have to go back to the drawing board.

When the problem was being resolved we saw it as a process which obviously we would have some input into and we were obviously asked for our comment. But we did not look at that as an option at that time because it was seen, quite honestly, to bring in a stranger to represent the interests or at least having a look at the matter. We saw that as still a role for the court where the accused was being represented by his or her counsel.

Mr KERR—I am not suggesting that it is an ideal solution. But in an imperfect environment it does cross one's mind as at least a solution in part to a problem that may be insoluble otherwise. If you have any thoughts about that subsequently, I would appreciate it. The second point was not directly addressed by Sheller but has been the subject of a report by the Australian Law Reform Commission. It is in relation to treason offences. The recommendation there is that the treason offences be restricted to those who might in a broad sense be said to have some allegiance to Australia—that is, either Australian citizenship or a right of permanent residence—whereas at the moment the treason offence, quite contrary to what I expected, actually seems to apply in circumstances to persons who owe no allegiance to Australia. That is quite contrary to the notion of allegiance that I suppose underpinned that historically. I am wondering if there is any reason why we would wish to extend a treason offence as such to persons who levy war against the Commonwealth or engage or assist in various types of conduct that are defined in that sense. They may be committing other crimes, but why would we regard that as treasonous?

Mr Bugg—I suppose you try to put in place measures that protect the core representatives of government and therefore the country. That was always, I understood, one of the bases for the treason offences.

Mr KERR—Can I go back to the postwar trial in Britain of the Irishman Lord Haw-Haw. The core question at common law of treason was whether or not that person owed any allegiance to the Crown. Treason is not available at common law to a person who owes no allegiance to the Crown, otherwise the whole of the German forces that waged war would be subject to the treason offences. Lord Haw-Haw was hung on the presumption that the Crown accepted that he at one stage had had the protection of the Crown. But this offence, which is defined statutorily in 80.1, seems to extend the obligation of adherence to the Crown and loyalty to Australia to persons who are not Australians or who have no protection of the Australian government and no association with it.

Mr Bugg—Yes, and I think that it does. The offence or crime of treason has been refined in recent years, but about 20 years ago it was treason to have carnal connection with the wife of the heir to the throne.

Mr KERR—Not a likely prospect for any of us in this room.

Mr Bugg—You will see that that is no longer in the Crimes Act; nor is it in any of the state criminal codes or statutory offences. As we developed the crime of treason, it was seen fit in this country to legislate and recognise the broad sense, which you are adverting to, and now it is obviously narrowing. At the moment it is still open for the very situation that you are troubled about. That was not within the Sheller report and we did not make any—

Mr KERR—It was within the Sheller report, because it is part of the definition, and there were other recommendations in respect of these matters. I take you to 80.1(f) of the Criminal Code. In the definition of treason, it describes any person who:

engages in conduct that assists by any means whatever, with intent to assist:

… … …

(ii) an organisation;

that is engaged in armed hostilities against the Australian Defence Force ...

So, notionally, wherever the Australian Defence Force is engaged, any person in that country or place who opposes its intervention is guilty of treason. Those persons in Afghanistan who are wisely or unwisely—I would think unwisely—resisting the Australian Defence Force are guilty of treason and face imprisonment for life according to Australian law. What rhyme or reason does that have?

Mr Bugg—I do not know. I could duck under this and say it is really a policy issue and that it is not something that I have considered or have had to consider or, I would have thought, am likely to have to consider. That is a cop-out. I can see the point that you make, but, clearly, it is a provision that is there and it covers the very situation you specified.

Mr KERR—I am just wondering whether, in a mistake of modernisation, we have forgotten the origin of treason, which is that it is a breach of the obligations you owe to the place of which you are a citizen or to which you have been extended protection. It is a breach of your obligation to your country. You are treasonous if you do something that betrays your obligations. Hypothetically, if, for example, Mongolia decided to declare war against Australia—I use an absurd example—we would not treat the Mongolian armed forces as acting treasonously, but we would under the law.

Mr Bugg—We would. We do not operate under the common law as far as section 80.1 is concerned.

Mr KERR—Do we operate in an environment of absurdity, where we treat as treasonous—as a breach of your obligations to your national obligations—something which is plainly not?

Mr Bugg—The parliament of this country has seen fit to extend the term of treason to cover other conduct. With that being the case, that is the provision.

Mr KERR—I suspect it was done entirely unknowingly or thoughtlessly with respect to the extent. Anyway, we will return to that.

Mr Bugg—I think the section has been amended by the deletion of, shall I say, the provision I referred to a moment ago, so it has obviously been considered within the last two decades. I certainly know that it has been removed from the Tasmanian, Queensland and Western Australian criminal codes.

CHAIR—As there are no further questions and we have run right over time, I thank you very much indeed for your evidence. If the committee has any further questions, they will be sent to you in writing by the secretariat and a copy of the transcript of your evidence will be sent to you for any correction of statement or fact.

[12.14 pm]

BUCKPITT, Mr Jeffrey, National Director, Border Compliance and Enforcement, Australian Customs Service

DORRINGTON, Ms Jan, National Director, Border Intelligence and Passengers, Australian Customs Service

PRICE, Mr Terry, Director, Enforcement Development, Australian Customs Service

VALASTRO, Mr John, National Manager, Law Enforcement Strategy and Security, Australian Customs Service

Witnesses were then sworn or affirmed—

CHAIR—Welcome. Do you wish to make any introductory remarks before we proceed to questions?

Ms Dorrington—In the interests of time I will keep my opening remarks brief. Customs made a background briefing to the Sheller review. We then provided a written submission which was, in effect, the substance of that briefing. We then attended a public hearing and made a supplementary written submission to clarify some matters arising out of that hearing. Custom's response to the Sheller review was incorporated into the whole-of-government response made by the Attorney-General's Department. Customs did not make a separate submission to this committee but we thank you for our appearance today and we are happy to answer any questions you have.

CHAIR—I want to move straight on to the issue of the access that you have under the legislation to passenger name records and a development that seems to have come forward in the last couple of days from the EU. My understanding is that our provisions are based pretty well on the American requirements and the initial American agreement with the EU on access to their passenger records. I understand the EU has now given notice that that arrangement with the US is being terminated and it has actually cited Australia as one of those additional countries with which they want to negotiate any rearrangements. Could you bring us up to date on what that is all about, please?

Ms Dorrington—Yes. The European Court of Justice has determined that the original agreements made with the United States and Canada and the agreement that is currently being made with Australia were not made on the correct legal basis. That is that they were made on one pillar and not on the correct pillar. The agreements still stand in force until a different agreement takes over, but the agreements now, it seems, need to be made with each member of the European Union rather than with the European Commission acting on behalf of all the parties.

CHAIR—My understanding was that they want to get all this under way within a year.

Ms Dorrington—The agreement with the Americans is supposed to have been renegotiated by September this year which does not seem to be likely, given that all of the member states might have to agree to the subsequent agreement.

CHAIR—In the report I read they made some reference to a requirement to negotiate or to undertake discussions on a parliamentary level. Do you know what that meant?

Ms Dorrington—Do you mean discussions within Australia?

CHAIR—Yes.

Ms Dorrington—The Customs Service has discussions with the European Commission through their offices here in Canberra. We undertake those discussions with the Department of Foreign Affairs and Trade and the Attorney-General's Department. We have been in the process of those discussions for almost three years, trying to get a formal agreement. As negotiations have gone forward, the status of the negotiations has changed. At one stage the European Commission advised us that we would have to have a treaty with them. Now that the new decision has come down, we are not sure about the status of our negotiations. In fact, we have a video link-up with Brussels this evening in order to continue those discussions to see where Australia's negotiation status stands.

CHAIR—Thank you. Could I move on to access to the passenger lists. We have got something like 46 international airlines operating in and out of Australia, and you have access to—

Ms Dorrington—Thirty-two, which covers approximately 95 per cent of the passengers coming into the country.

CHAIR—Which are the remainder—small Pacific nation carriers?

Ms Dorrington—Yes.

CHAIR—How does that system work? Do you pay for that information? Are the airlines obliged to give it to you?

Ms Dorrington—They are obliged to give us access to their reservation data through the legislation. We pay for the way in which we access the data.

CHAIR—Can you tell them what data you want? Is it a fairly standard procedure for the passenger lists?

Ms Dorrington—Yes. We will undertake a risk assessment on the basis of certain factors for certain flights coming out of certain countries, and then we will access the reservation data according to the data that we want. That is, we do not access all of the reservation data. We only examine the pieces of data that we are interested in.

CHAIR—So it would not necessarily be on all the flights of those 34 airlines operating into Australia.

Ms Dorrington—That is correct.

CHAIR—So you are relying on your intelligence and I assume intelligence gathered from other Commonwealth organisations?

Ms Dorrington—Yes, that is right.

Senator FERGUSON—Have you got a list of the airlines that do not provide you with passenger lists? It seems as if there are too many for just Pacific nations.

Ms Dorrington—I can tell you that we currently do not have connections with Jetstar, Virgin Atlantic, Royal Tongan Airlines and Milne Bay Airlines. And we have on hold, on the basis of a technical review, access to data from China Eastern Airlines, Continental, Micronesia and Virgin Pacific Blue. I could also give you the proportion of passengers that that represents, which is pretty small.

CHAIR—A number of those are Australian based airlines anyway.

Ms Dorrington—Yes. In relation to, for example, the six biggest carriers into Australia, we certainly have access to all of that data.

Senator NASH—Were your recommendations 1 and 2 addressed in the Wheeler report? The first one says that certain legislation should be amended to define more closely who is authorised to access a Customs controlled area by virtue of holding an ASIC, and the second one says that the section should be to define who is entitled under the Customs Act to access a Customs controlled area when in possession of an ASIC.

Ms Dorrington—Certainly those matters were discussed in Wheeler, but the legislation that would give effect to recommendation 1, for example, is legislation that is titled the Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2006, which is currently before the parliament.

Senator NASH—Do you have a recollection of what the Wheeler report view of those was? Would you take that on notice and come back to us?

Ms Dorrington—Yes.

Senator NASH—On recommendation 2, the final part says, 'This might limit access to particular people with legitimate reasons for being in the area.' Does that indicate that there are people there with illegitimate reasons? Is it a security risk and is that why that point is there?

Ms Dorrington—There was a general view that, of those Customs controlled areas in airports, there was an issue arising out of the fact that you can hold a security identification card to be in those areas—locally called 234AA areas—but Customs does not have many powers to ask people to leave those areas. We do have powers to ask people to leave those areas, but our power did not extend to precluding people from coming into those areas. So it was an area that Wheeler thought was a little undefined in the legislation, in that Customs did not actually have whole control of their own Customs controlled areas.

The new legislation picks this up in the sense that the CEO of Customs can ask people or direct people not to be in that area. It is not a circumstance that we envisage would happen very often but we have had some numbers of people entering the area with no legitimate purpose to be there. If you understand the airport environment, you would know it is a fairly large area. People cross in and out of that area all the time for perfectly legitimate reasons. But there are also people who come into that area just to take a shortcut. For example, Customs might be in the process of entering people into the country, and conducting baggage examinations and so on, and some people with ASICs would then wander through the area to take a shortcut. We have found some people taking a route through the Customs controlled areas—I was going to say 'illegitimately'; that is probably the wrong term—unlawfully to see off relatives, welcome relatives and so on. So there are people who wander through those areas from time to time who really should not be there.

CHAIR—May I go back to the EU situation. The secretary has just bought to my attention a press release that was issued on 13 July this year by the European Parliament, who are now proposing a three-step strategy on the agreement. As for the points that they made, they wanted: the negotiation of a short-term international agreement to cover the period from 1 October 2006 to November 2007, a negotiation to which members of the European Parliament should be invited as observers; a review of the agreement with a view to developing a more coherent approach which better meets EU standards; and a parliamentary dialogue this year with the EU, the US, Canadian and Australian parliaments in preparation for the review. Are you aware of that?

Ms Dorrington—I would have to take that on notice and come back to you.

CHAIR—Thank you.

Senator ROBERT RAY—I wish to ask about new section 189 on the use of firearms. Who is training Customs officers? Secondly, I think you are under CEO's directions; are they a confidential document or not? If they are a confidential document, could we have one on the basis that it be kept in confidence? That is a three-barrelled question.

Mr Price—In answer to your questions: Customs instructors are assessed and trained by the AFP and then those instructors train Customs officers, so we are completely consistent with the AFP and, in fact, police services generally in our training. There are CEO's directions and they have been tabled as a disallowable instrument, so they are not confidential. The rules of engagement menus are a protected document, which is an appendix to CEO's order No. 2.

Senator ROBERT RAY—I would ask you for a copy of those if you believe it is proper to do so but we would keep that part in confidence.

Mr Price—Sure.

Mr BYRNE—In your submission to Sheller you spoke about wanting to ensure the disembarkation of crew firstly to remediate ports as reported to Customs. Does that actually happen now or is there a shortfall in that occurring now?

Ms Dorrington—There is certainly reporting of crew on passenger vessels, but I would hand over to my colleague Mr Buckpitt about reporting crew on cargo vessels.

Mr Buckpitt—I think it is the same situation: that it does happen from time to time that we do not find out until the last port of call.

Mr BYRNE—Therefore your preference would be that as soon as a crew gets into port—say, from a commercial vessel—they should report there, because there is obviously a security gap if they don't?

Mr Buckpitt—That is correct.

Mr BYRNE—I find it quite startling that that has not been taken up. So you would be suggesting that the government be strengthening legislation to ensure that that would happen under the Customs Act?

Mr Buckpitt—That is correct. The other development that is relevant here is the government's decision about the maritime crew visa. It may be that that arrangement will effectively prevent this situation from continuing.

Senator FERGUSON—I think the Law Council raised Customs seizure warrants as an issue, suggesting that the subject of the seizure warrants involving entry should be provided with a statement of rights and obligations and that the onus of proof should be on Customs to prove the basis of the seizure rather than on the owner during the application for a return of the goods. Then our information tells us that there is no discussion of this issue in the Sheller report. Did you appear before the committee, and was the issue of the Customs seizure warrants raised at all?

Mr Valastro—I can speak about that. That was not raised as part of what we covered. What we covered in the context of the Sheller review was looking at the border security amendment legislation, which actually did not cover the issue of seizure warrants. Even though that is now being addressed as part of our new border compliance bill, it is not something that was considered back in 2002 as part of those enhancements to our border security legislation, so that is a slightly separate issue.

Senator FERGUSON—I was just wondering, because the Law Council raised it, along with a lot of other things, but it just disappeared. It does not appear anywhere in the Sheller report as having been discussed.

Mr Valastro—No. As I said, we stuck very tightly to those schedules that were raised under the border security amendment legislation.

CHAIR—There being no further questions, I thank you very much indeed for your evidence. If the committee does have any further questions, they will be sent to you in writing by the secretariat. A copy of the transcript of your evidence will be sent to you for any correction of statement or fact.

Proceedings suspended from 12.31 pm to 2.01 pm

HEMINGWAY, Ms Joanna, Lawyer, Human Rights and Equal Opportunity Commission

Witness was then sworn or affirmed—

CHAIR—Welcome. Do you wish to make any introductory remarks before we proceed to questions?

Ms Hemingway—There are only a few opening remarks I would like to make on behalf of the commission. As we said in our submission, we urge this committee to recommend the implementation of the Sheller inquiry's recommendations. We support all of those recommendations, apart from recommendation 19, upon which we do not make any comment. We also support many of the Sheller inquiry's additional findings.

We strongly believe that the human rights approach that was taken by the Sheller inquiry to the review of the 2002 terrorism legislation is the right approach. That approach involves asking whether the counter-terrorism laws are proportionate to achieving national security. As the President of HREOC, John von Doussa, said in his evidence before that inquiry, human rights law requires states to enact counter-terrorism measures but only insofar as they do not disproportionately curtail the human rights of those who might get caught up in the exercise of those laws. As such, human rights law recognises that human rights are not antithetical to issues of national security but rather human security involves protecting both national security and human rights. In our view the Sheller report shows how human rights principles can be used by law makers to achieve national security without disproportionately limiting fundamental rights and liberties—those very rights that are essential to the maintenance of the rule of law and ultimately our sense of security. They are the only remarks I wanted to make by way of opening.

CHAIR—So loosely translated it could be said that, if we accept Sheller, we do have our obligations to all the international covenants and conventions covered.

Ms Hemingway—Insofar as the legislation that we are looking at is concerned, and I am excluding here the proscription recommendations.

CHAIR—We are having another look at those.

Ms Hemingway—Loosely in our view that is correct, yes.

CHAIR—Could I ask you, because it has been a feature of the last couple of days of hearing, what relationship the commission has with the Islamic community? How much contact is there?

Ms Hemingway—In the last few years the commission has undertaken a number of consultations with the Arabic and Muslim communities. In 2004 it conducted consultations in relation to discrimination against Arab and Muslim Australians in the wake of September 11 and the Bali bombings, and the report from that is called the *Isma* or *Listen* report. Four broad findings came out of that report. The first is that there is a climate of fear and suspicion between Muslim and non-Muslim communities and growing alienation of some from the wider community or from their wider communities. Participants also said that they had experienced an

increase in the level of discrimination and vilification following 11 September 2001 and the Bali bombings. There was a corresponding increase in fear and there was a distrust of authority. So, for those who said that they had experienced an increase in discrimination and vilification, that did not translate to people actually reporting those instances. One of the reasons posited in that report is this general distrust of authority.

The second thing that is currently ongoing is a set of consultations called 'Unlocking the Doors'. That is a series of forums which are aimed at bringing together Muslim community members. They have been targeted at different aspects of the community. So, for instance, there have been youth forums and forums involving Muslim women and men, and they are aimed at bringing together Muslim and Arab communities and the police. Everybody sits down in a forum, consults about issues and tries to come up with strategies, if you like, to deal with some of those issues and to start and maintain that dialogue. The other thing that is happening is that there are specific dialogues in relation to Muslim women to ascertain the issues that they are facing and the things that they consider important.

CHAIR—Can you give us examples of any indications of successes that may have been had as a result of that consultation and that formula, or is it just an ongoing process?

Ms Hemingway—A large part of it is an ongoing process. To be honest, I do not know off the top of my head what those successes are. I am happy to take that on notice and provide it to you if you like.

CHAIR—That could be handy. Thank you.

Senator FERGUSON—Could you tell us why HREOC opposes statutory protection for the anonymity of ASIO officers in counter-terrorism prosecutions?

Ms Hemingway—That finding came out of a proposal from, if my memory serves me correctly, the Commonwealth DPP, who, in relation to the Crown and Lee, suggested that that case illustrated the need for, as you say, statutory anonymity for ASIO officers. Our view is that that right is unnecessary, because the courts have adequate discretion to actually confer that anonymity should that be required in the interests of justice. Our view is that there is a well-developed jurisprudence in relation to when it will be in the interests of justice and when it will not be in the interests of justice. So really, in essence, it is not necessary given that. There has been a long history of undercover officers and informers seeking and getting anonymity by exercise of the discretion of the courts. So in our view it is unnecessary to carve out a statutory anonymity provision in relation to ASIO officers in counter-terrorism prosecutions.

Senator FERGUSON—Has HREOC been involved in evaluating the impact of terrorism laws on the Muslim community? Have you done work of your own in trying to assess or evaluate the impact of terrorism laws on the community?

Ms Hemingway—I am aware that there are projects in the pipeline. The only project that I am aware of to date is that project I mentioned earlier, the *Isma* consultations, which was really prior, if you like, to the full suite of terrorism laws that we have seen over the last couple of years.

Senator ROBERT RAY—Can I take up the issue that we have debated here a few times. It appears that the government has said, 'That's it; we're not going to review all these sets of legislation again, except internally,' whereas Sheller recommended the British model or, at the very minimum, every three years a Sheller type review. What is your organisation's viewpoint on that?

Ms Hemingway—Our view is that there does need to be an independent review. Whether that is done by a Sheller like body every three years that is comprised of practitioners regarding various aspects that are touched by terrorism laws—for instance, privacy issues, human rights, security and intelligence—we do need that independent review at least every three to five years.

Senator ROBERT RAY—Looking at who was on the previous review, it was definitely a case of 'round up the usual suspects'. You seem to want to broaden it by talking about maybe having some intelligence agencies represented and also community groups.

Ms Hemingway—I would have to take that on notice.

Senator ROBERT RAY—Thank you. What is the view of the human rights commission on strict liability as it applies to this legislation?

Ms Hemingway—In our view, strict liability is not appropriate in counter-terrorism legislation. Without going to the specific sections—I am happy to go to the specific sections, if you wish—there are a couple of issues. There is the issue of the confusion of the fault elements, which was identified in the Sheller report. There are a couple of provisions where it is unclear whether there is a recklessness or an intention needed or whether strict liability applies. But, in our view, given the penalties that apply, we do not think that strict liability is appropriate. The other thing is the problems with the proscription process, which is not part of this review. But if you are having strict liability in relation to whether an organisation is a terrorist organisation and you are saying that there are procedural fairness problems with the process by which you deem an organisation a terrorist organisation then, in our view, that makes strict liability even more inappropriate in those circumstances.

Senator ROBERT RAY—There is some dispute between some of the contributing agencies and Sheller about hoax provisions. Has your organisation looked at that and come to a view?

Ms Hemingway—Our submission to the Sheller inquiry was that we did not see a problem with having a hoax provision. There is a question about how that provision is drafted—whether it becomes a threat provision; the Sheller inquiry said that the threat of action should be taken out of the terrorist act definition and put into its own provision; whether you have a threat provision, with the ulterior motive so that you still have to intend to intimidate a section of the public et cetera or whether you have a hoax provision, whereby your intention is just to make a hoax. So there is a spectrum there. Our view was that, if a hoax provision or a non-genuine threat provision was enacted, it should be enacted along the lines of the UN draft convention in relation to terrorism—that is, that the threat has to be a credible and serious threat. So it would not encompass, for instance, a distasteful joke standing in the queue at the airport whilst having your luggage checked. Provisions in aviation security standards would deal with that sort of situation.

Senator ROBERT RAY—Have you seen the Attorney-General's Department pamphlet—I call it a pamphlet—on the Anti-Terrorism Act (No. 2) 2005?

Ms Hemingway—No.

Senator ROBERT RAY—We have had a raft of legislation since 2002. I have lost count—there are 15 or 17 pieces and a lot of overlapping. Have you seen a good summary that summarises for citizens of this country what is involved in this now—not only the new legislation but also what previously existed in the Criminal Code?

Ms Hemingway—I am not aware of any such summary. That is not to say that a summary does not exist.

Senator ROBERT RAY—Do you think it would be desirable?

Ms Hemingway—As you say, the more that the legislation rolls out the more that that summary becomes outdated. Yes, I do think it is desirable and our organisation has, as I said earlier, some projects in the pipeline to undertake the plain English guide to terrorism, if you like, for Muslim and Arab communities.

Mr KERR—That might not be the best way to express it.

Senator ROBERT RAY—But we know what you are getting at.

Ms Hemingway—That is right. I accept that.

Senator FAULKNER—Is it your intention to do that, or is that work now under way? It is more a plain English guide to the suite of antiterrorist laws. Is that what you mean?

Ms Hemingway—As far as I am aware, there is no project to create the plain English guide—I will go back to that expression. Our intention is that, in the process of carrying out those projects, that would be one aspect. I am not sure that it would result, for instance, in a stand-alone publication. I am not aware of that.

Senator FAULKNER—It is conceptual at this stage. Is it planned? It is a possible product of this activity. Is it any firmer than that?

Ms Hemingway—I think it is much less firm than that. I think it is more something that will happen on an internal basis in the course of carrying out a project or consultations.

Mr KERR—I will be the devil's advocate and raise with you your objection to an amendment to part 1(C) of the Crimes Act, which relates to the AFP's interviewing of a suspect overseas. I assume that the background to that is the kind of circumstance that arose in the Thomas trial, where that evidence was, under the existing law, ruled to be admissible. I am wondering where you are coming from there. By rejecting a statutory provision are you saying that you would wish us to go further and, in a sense, change the law such that such evidence would be inadmissible? Or are you simply saying that you are content with the existing outcome—that is, in ordinary circumstances where the AFP has done all it can to comply with a foreign law but

cannot that evidence is subject to a judicial discretion that would be exercised to permit it in cases where no unfairness would otherwise result? That, apparently, was the outcome in the Thomas case.

Ms Hemingway—Our view is that there is no need, if you like, for a statutory provision which would make evidence in those circumstances admissible. Similarly, we are not asking for a provision that such evidence be inadmissible. We are saying that as the law stands the courts have sufficient discretion to allow that evidence to be admitted should there be a basis in the interests of justice for doing so.

Mr KERR—Again, being the devil's advocate, what would be the objection to a provision which says—more or less codifying what we understand to be the outcome post Thomas—that evidence taken overseas in circumstances where technical and strict compliance with part 1(C) is impossible be admissible, provided the court is satisfied that no injustice would be caused by the admission of the evidence? That might be useful just so everybody knows what the rules are. I suppose that would be the only advantage I can see.

But, were we to suggest that kind of outcome, it does not seem to me to be particularly objectionable, given that is where the law seems to have arrived at, subject to Thomas's appeal. Thomas's appeal presumably will challenge the admissibility of that evidence and it may be, on appeal, that there is a live issue. If the Court of Appeal were, for example, to say that compliance with section IC was mandatory and therefore that evidence was not admissible and therefore Thomas's conviction is unsafe or what have you, then there would be a material question before us.

But, assuming that the Court of Appeal addresses it in the same way as the primary judge, what would be wrong with us in a sense, for an abundance of clarity, putting that kind of thing into the law? That would resolve the situation so far as the AFP is concerned. It would tell them that they must do everything they can to comply with part IC, so far as it is available to them. But, if they do and there is a technical impossibility, there still remains the discretion of the judge to disallow it if it is unfair in all the circumstances—for example, if a person had been the subject of torture immediately beforehand or something of that nature.

I am just puzzled about the resistance to this idea, given that in the Thomas case it was actually admitted. In other words, I am wondering whether we are arguing about a distinction without a difference in the end but which might more happily be resolved, so everybody knows exactly where they stand, by putting it into the code.

Ms Hemingway—I do not think we would have a problem with a provision that is drafted in those terms that sets up the primary obligation as being to comply with those obligations which are set out in whatever section it is of part IC of the Crimes Act. In the event of an impossibility, there is this residual discretion in circumstances where AFP have acted 'fairly and honestly' or whatever the words are. I do not think we would be against a provision like that, of which, as you say, the purpose is just to clarify things and make things very clear for everybody who is using the legislation or may be caught up in the legislation.

What we are perhaps resistant to is not having that two-tiered system, really allowing those obligations to be an either/or situation. We would be resistant to that. So it would be either/or in

the sense that it would not be because of an impossibility. That would be the criteria, if you like, for not complying.

Mr KERR—There is no suggestion of that. I do not want to stretch this out beyond what is reasonable, but your submission says that you still object to the provision being amended where the AFP had done 'all that they could reasonably be expected to do to comply with that part'. I would have thought—

Ms Hemingway—I agree. It is probably six of one, half-a-dozen of another. I do not think that a clarification provision—if I can use that phrase to describe the type of provision that you have outlined—departs from our position. It may be just a lawyer-centric view, if you like, that there is that residual discretion, so there is no need to change the law. But it may be, for the interests of clarity for those who actually use the legislation, that such a provision would be useful.

CHAIR—May I thank you very much indeed for your evidence. If the committee does have any further questions, these will be sent to you in writing by the secretariat.

[2.25 pm]

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

KADOUS, Dr Mohamed Waleed, Co-Convenor, Australian Muslim Civil Rights Advocacy Network

Witnesses were then sworn or affirmed—

CHAIR—I welcome representatives of the Australian Muslim Civil Rights Advocacy Network. Do you wish to make any introductory remarks before we proceed to questions?

Dr Kadous—Yes. I would like to thank the honourable chairman for inviting us to appear today. If the committee allows me to, I would like to look at three different issues—firstly, the SLRC report overall and then focusing on a particular aspect of that report; secondly, our difficulties with communicating the laws to the Muslim community; and, thirdly, wider issues in our nation's approach to preventing the scourge of terrorism in Australia.

CHAIR—Can I interrupt. We notice in your submission that you mentioned proscription, which is not part of this particular hearing.

Dr Kadous—Yes, we understand that. We are fully aware of that particular issue. I was not planning to address the issue of proscription except in the wider context of how the laws are perceived in the Muslim community. I would first of all like to commend the report to you. Anyone who reads the report cannot fail to be impressed by its rigour, meticulousness, comprehensiveness and balance. We think that implementing the recommendations of the SLRC report would help to make the antiterrorism laws more balanced. It would also help to create an environment where the Muslim community feels safer and less intimidated by the government and authorities, and where we can collectively as Australians cooperate to fight the scourge of terrorism.

I will select some of the most important recommendations that we would like to highlight. We agree with having a regular review process of legislation, in addition to inquiries such as this; refining the proscription regime—however, I understand that these measures are outside the scope of this inquiry; repealing the association offences which create great difficulty and suspicion of Muslims and also create difficulties for non-Muslims working with Muslims; modifying the offence of training with terrorist organisations so that the requirement is that the training be undertaken with the intention of involvement in a terrorist act; and, finally, communication with the Muslim community, which I will come back shortly.

There is only one issue on which we respectfully differ with the SLRC report. That relates to the issue of informal membership of a terrorist organisation. The committee did not recommend changes to the informal membership other than changing the legal burden to an evidentiary burden. However, we would suggest that informal membership needs to be more specifically

defined—for example, by specifying that the person is involved in the activities associated with membership, such as regularly attending meetings, organising events et cetera.

However, at the same time, it must be recognised that the SLRC report was legally limited in its scope. It did not examine some of the newer measures within the legislation that we have found to be the most problematic—namely, the control orders, preventive detention and sedition offences. It also did not examine the ASIO Act and provisions related to secrecy in detention. I believe this committee also investigated that, however. It also did not make recommendations on several issues because they were before the courts—things such as the 'the' to 'a' change brought in by the Antiterrorism Act (No. 1) 2005 and the issues surrounding the definition of a terrorist organisation. While we accept the recommendations as a positive step, more and continuing work needs to be done on examining the remainder of the legislation.

In working with the Muslim community on these anti-terror laws through seminars, workshops, surveys, and booklets, as well as information stalls, we have seen two main patterns emerge in conveying the information to the community. This information comes from questions people have asked and the stories they tell us, and through interacting with various community organisations. Ironically, we find ourselves, in many cases, defending the anti-terror laws and explaining some of the protections that people may not be aware of.

The first concern people have is that the laws are selectively applied to Muslims. In a survey we conducted of 150 members of the Muslim community at the end of 2005 and the beginning of 2006, through public events like the multicultural Eid festival and fair, which occurs every year—it is roughly equivalent to Christmas—we found that approximately two thirds of the respondents felt that the Muslim community was targeted. These perceptions, although they are perceptions, have some basis in fact.

We have already discussed proscription, and again I am highlighting this simply as an example of the more general question. Of the 18 proscribed organisations in Australia, seven identify themselves as Muslim, and our community asks us: why aren't other recognised terrorist organisations, such as the Tamil Tigers or Aum Shinrikyo or Kach listed, because it seems as if there is a focus here on Muslim groups? If one looks at the United States or the European Union or other, similar nations one does not find the predominance of Islamic groups that one finds here in Australia. As a consequence, offences like the association offence apply almost exclusively to Muslims at the current time.

They also ask us difficult questions, like: why was it that the advocating terrorism offence was introduced shortly after the Attorney-General made inquiries about the listing of a particular organisation and found that the measures were inadequate? It makes them feel as if they are targeted and that the laws are being tailored to cover particular situations that affect the Muslim community.

The second concern people have is that the laws are complex and continually changing. As I mentioned before, we have put out a booklet. Unfortunately, we have run out of copies of the first edition. But as we completed the first edition, new offences were included, almost immediately after—particularly, the association offence. So then we began working on a second edition which tried to include the new offences such as the association offence. And just as we had finished the new second edition the new Anti-Terrorism Bill (No. 2) 2005 came out. And so

we are now working on a third edition and we are not sure whether we can finish that edition before new legislation is introduced.

I will give another example of the current complexity—and this is only one example. People are talking to us about wishing to make donations to help people whom they see as their brothers and sisters in Palestine and Lebanon. And we have to tell them that it is very difficult to give advice on that because there are difficulties to do with a government in Palestine, one wing of which is on the proscribed list of terrorist organisations. And this has had an impact in a number of ways. Firstly, people self-limit their behaviour. In other words, they overestimate the reach of the laws and they are unnecessarily cautious. For example, we have seen people not wanting to go to normal Islamic classes, or similar things, because they fear that ASIO may be watching. We have heard people telling their children not to go to protests because they would be just exposing themselves once again. Secondly, donations to worthwhile charities—and I have noticed this through my work with the Muslim community, outside of AMCRAN—even to ones with no link to terrorism, have been dropping. And that is very unfortunate.

Finally, I would like to address the wider question of our approach to fighting terrorism, and I think that that is consistent with the change in the name of this committee from one looking solely at ASIO, ASIS and DSD to one looking at broader issues related to intelligence and security. As HREOC has observed, there are three phenomena relevant to the Muslim community: firstly, an increase in fear and insecurity; secondly, the alienation of members of that community; and, thirdly, a growing distrust of authority. This is a pattern we have observed ourselves. And it is somewhat surprising that two-thirds of people surveyed felt that the anti-terror laws made them feel less safe.

Also surprising—and I am not suggesting that the number is anywhere near as high as two-thirds, but it does show the perceptions that exist within the Muslim community—is that more than one-third of people surveyed felt that they were being monitored through their phone, email, mail or movements. Some of these feelings are based on perception but, again, there are some grounds for this belief. Some of these extend beyond legal issues. If we are really interested in combating terrorism then we must look beyond mere legal approaches to the problem.

I want to highlight a few aspects quickly and then I leave it to the committee to choose what it thinks is appropriate. There are the actions and words of certain politicians who say things that create an ‘us and them’ mentality. There is the treatment of people on remand, and it seems that those being charged with terrorism are being treated differently from other prisoners. There is an unbalanced power between what people who have been charged with terrorism can say and what the Attorney-General and other officers of Australia can say.

The Muslim community wants to prevent terrorism as much as other Australians, if not more. However, there seem to be some obstacles to fruitful collaboration in this effort that extend beyond legal issues. I urge the committee once again to accept the recommendations in the Sheller report. It would be a huge step in improving that relationship. However, the work of the committee should not be limited to accepting the recommendations of the Sheller report.

CHAIR—I understand that something like $4 million has been allocated to assist AMCRAN develop an educational program between the Muslim community and the authorities. Can you

give me a bit of background on that? How far has that progressed? What are you looking at doing with that funding?

Dr Kadous—The AMCRAN has not received any funding from the government.

CHAIR—I am sorry—

Dr Kadous—The only funding we have received has been through the Law and Justice Foundation and that was for the printing of the second edition of the antiterrorism booklet.

CHAIR—I realise that. It is HREOC, isn't it?

Dr Kadous—Yes, so I cannot comment on the funds given to HREOC.

Mr BYRNE—Therefore the updates you give to your community with respect to antiterrorist legislation you are doing predominantly at your own expense, with the exception of the program that you mentioned?

Dr Kadous—Yes, and through funds that we raise and some community support. So it is independent of the government.

Mr BYRNE—Have you approached the government to seek their support in terms of disseminating information to the community about—

Dr Kadous—No, we have not. We are still looking at that issue. One of the concerns we have is that we need to be perceived to be independent of the government. So we are still considering the ramifications of accepting funding from the government. We have communicated with the Attorney-General's Department. For example, we sent a copy of the first edition of the antiterrorism booklet to the Attorney-General and he sent back his corrections or what he thought were issues with that. As far as we know, they were mostly minor. There were things like: 'You say three months when really it is 90 days,' and that type of thing. We have corresponded with Attorney-General's but we have not really pursued funding. That is an issue that we have to think about in terms of our perceived independence.

Senator FAULKNER—You have said you are up to the preparation of the third edition of the booklet.

Dr Kadous—That is correct.

Senator FAULKNER—What is the actual target audience for the booklet? Who is it actually going to?

Dr Kadous—We distribute the booklet at Islamic events. We make it available on our website. Basically, our goal is to provide it to Muslims and non-Muslims who have an interest in the area or those who might be facing difficulties with some of the authorities. According to our survey—and I acknowledge that the survey is limited; there were only 150 people and they were all Muslims—in the order of six per cent of the people that we surveyed were approached by ASIO. A lot of them must be thinking about what they can say and what their rights are. Another

pattern that we discerned, especially in informal meetings, was that people were not always advised of their rights.

Senator FAULKNER—Just to give the committee a picture, are you able to say to us approximately how many of these booklets might have been printed in the first and second editions, for example?

Dr Kadous—For the first edition, we printed 4,000 copies and we distributed those. For that particular booklet, our website gets in the order of 100 hits a week. Whether that is return people, we have not analysed our web logs that carefully. After the preventive detention control orders and sedition offences were introduced, we thought it would be useless to issue the second edition of the booklet. Therefore, we spoke to the law and justice commission, and we agreed with them that we would postpone it to the third edition, because some of the most difficult aspects, without a doubt, are those introduced in the Anti-Terrorism Bill (No. 2) 2005. We felt that to issue a booklet without those provisions would have been misleading.

Senator FAULKNER—Have you been able to assess the effectiveness of the distribution of the booklet and having the information on your website? From your evidence, it is clear that you are trying to measure other reactions in the community.

Dr Kadous—We measure that in two ways. We tried to ask people how many of them knew about AMCRAN's activities. We felt that there was a higher chance that if they knew about our activities, they knew about our booklet, because it is one of our largest activities. Again these are very preliminary results, approximately 40 per cent of the community knew about us. Another measure was people's ideas of what they felt their rights were, and on that measure we could not detect a difference. It was generally even across the board; there were people who felt they had a good understanding and people who felt they did not have a good understanding. But people's perception of their understanding and people's actual understanding with relation to these antiterrorism laws are not necessarily the same. It is very difficult to measure that.

Senator FAULKNER—You said to us a little earlier, in your opening statement, that there was a view that the antiterrorism laws were selectively applied to Muslims. You made that point to us clearly. I ask you directly: do you think the laws are selectively applied to Muslims?

Dr Kadous—I think there is prima facie case for it. It is difficult to know. When you look at things like the fact that in Australia almost all of the organisations are self-identified as Muslim groups, when you look at situations where someone who went to defend Lebanon could very well be charged with terrorism offences and it is not necessarily symmetrical, when you look at the association offence that essentially has the opportunity to almost exclusively target Muslims, you can see where people are coming from. Personally, I can see people's arguments, but I am a little bit undecided. I would probably fall on the side of I do not think so, but I could not be sure. You guys would be able to tell me better—

Senator FAULKNER—No—

Dr Kadous—and give some reassurance to the community in doing so.

Senator FAULKNER—I suppose individuals may have their own views about it, but I ask you deliberately because there is a big difference between perception and reality as a starting point. As community leaders yourselves, I thought it might be valuable for you to inform this committee as to your own views. In other words: on this crucial issue, are the laws selectively applied to Muslims? Do you actually share that view? You have answered that question. In a way, I think your answer evolved, and I appreciate that. You have answered that question. Ms Chong, I ask whether you might have any views on this. Do you have a view on this perception that AMCRAN has informed us about selectively applying our antiterrorism laws to Muslims, and whether you think that is just a perception or a reality?

Ms Chong—On the face of it, the antiterrorism laws are drafted in a very general way, so they apply generally to all Australians, but I think the perception is justified because of the reasons outlined by Dr Kadous. It is not just in the legal sense though, it is also in the way that government makes policy. For example, the white paper on terrorism that was released in 2004 exclusively talked about Islamic terrorism to the exclusion of any other type of terrorism in Australia.

Dr Kadous—There is very little doubt that, regardless of whether it is deliberate or not, there has been a disproportionate impact of the antiterrorism laws on the Muslim community. It seems it is the Muslim community's civil rights that are being taken away more than the rest of the community's civil rights.

Senator FAULKNER—I suppose the logical follow-through issue for people in parliament and government to consider is how we deal with that perception. Do you change the laws or do you try and deal with some of the other root causes? What is your view on how to deal with it? You have talked about increasing fear, growing alienation and mistrust of authority in the Muslim community. I accept that evidence that you have given. I think all of those things ought to be concerning for members of this committee and members of parliament and senators. I think those are matters of great concern. How would you advise this committee or parliament or government to deal with that growing fear of, mistrust in and alienation of the Muslim community?

Dr Kadous—Let us break it up into legal, political and social. Legally, I think accepting the recommendations of the Sheller report would restore balance regarding some of these issues, particularly proscription—I know that is outside of the scope today. I think implementing the recommendations of the Sheller report would show that the government is open to independent review of these antiterrorism laws. It would communicate to the community that they still have significant rights and that the government is not necessarily going one way on the laws. They are not pressing hard; they are adjusting the laws to ensure that they have a lesser impact on the Muslim community. I also think, strategically, from what we have seen in the last few days, and also with the sedition legislation, that trying to squash particular points of view is counterproductive—whether it be the censorship of books or the introduction of sedition offences, it is likely to backfire for a number of reasons.

We have already observed in the community people telling us that the reason they are introducing these sedition laws is that they cannot combat the arguments logically, so they are resorting to legal protections to entrench the message that they want to put out. Of course, I am not including in that incitement to violence. Incitement to violence should always be met with

the full force of the law. I am talking about other things that may be said. I think censorship is counterproductive because all it effectively does is to work as an imprimatur for people who might be susceptible to thinking, 'This is a book worth reading,' or 'This is an idea that's worthy of further attention.' Attempts to censor arguments are counterproductive.

On a political level, sometimes politicians forget about the impact of what they say. For example, when a politician says that the freedom to wear hijab is not the kind of freedom we want in Australia, that it is like the freedom that existed in Nazi Germany, that has ramifications on a very real basis for people on the street. After every terrorist attack we see a spike in attacks on women. After comments like that, you talk to your family and friends and they tell you that they have been attacked verbally. Another comment is that people who want to implement sharia law—and I am not trying to single out a particular party or person; I am simply giving examples—should go back home. This is ignorant on two fronts. Firstly, it shows a misunderstanding of what sharia is. Sharia law to Muslims in just how they do things. It covers business transactions, bioethics, inheritance law and family law. It is not just what is depicted in the media. That shows ignorance from that aspect.

It also shows ignorance of the demographics of the Muslim community. In the order of 40 per cent of the Muslim community is born in Australia. If you tell them to go home, they go, 'Where? Back to Sydney?' That is the issue. Politically, I think politicians need to be more careful about what they say. Socially, a recommendation that the Sheller report put forward is that there needs to be education of the Muslim community about the laws. We have done as much as we can within our limited resources, but I think it needs to be taken to the next level. Simplifying the laws and reducing their discretionary nature would also help. But those are also some of the recommendations within the Sheller report.

Senator FAULKNER—Without judging the response that you have given or the suggestions that you have made, let me just ask this: is there more, in your view, that the leadership of the Muslim community can do also? You have made suggestions—fair enough—about what parliamentarians can do and what other authorities can do, and I accept that it is reasonable for you to put that case. Let me just ask you: is there more that the leadership of the Muslim communities can do?

Dr Kadous—Let me be perfectly frank. I do not think that there is such a thing as the Muslim community leadership in Australia. We are a developing community and our structures, in terms of leadership and representation, are as yet underdeveloped. But of course there is more that we as Muslims should do, and we are trying to do that. I believe Mr Kocak spoke to you yesterday about some of the activities that he is doing—we are aware of that—with the Islamic Information and Support Centre of Australia. We are also aware of other groups that are doing similar things and trying to prevent susceptible youth from being affected before it gets out of hand. So the first thing to say is that there is already stuff being done, but I think we need to do more, and I would be the first to acknowledge that. In some sense, the Muslim community has a long way to go in getting its own house in order before—I think I will just leave it at that. We have to do a bit more work in getting our house in order.

Senator FERGUSON—In your letter, you talk about accepting the findings of the Sheller committee, and you list four things particularly. One of those is the modification of the training offence so that intention to support terror activities is a prerequisite. I guess it would be

reasonable for someone to ask: if a person is going to receive training from a terrorist organisation, for what reason would they be receiving that training other than for terrorism activities?

Dr Kadous—These organisations do not always make it clear that they are terrorist organisations. I also think that there are people who are susceptible to ideas, who sometimes find themselves in the wrong place at the wrong time and, as a result, make a mistake of judgment, but they do not deserve to be placed in prison for 15 years as a result of that.

Also, if I understand the offence correctly, it is not only accepting or receiving training from a terrorist organisation but also giving training to a terrorist organisation. To give you an example, we hold public forums. We might have someone who comes to our forum who is a member of a terrorist organisation. We do not vet the list of people who can attend the seminars. We might inadvertently give training to terrorist organisations and, in so doing, we would be open to a suggestion, at least, that we were guilty of an offence.

Senator FERGUSON—It would be very hard to prove, I would think.

Dr Kadous—Given that we were training on the subject of—

Senator FERGUSON—If you were conducting a training session or an information session and a member of a terrorist organisation was there, I think it would be very hard to find yourself being charged.

Dr Kadous—Yes. The other issue is that many of these organisations are compound organisations. Let me give the example of Hamas. Hamas is now essentially the democratically elected government of the Palestinian territories. It provides all kinds of welfare services. It provides social services, education services and medical services. According to the list of proscribed organisations, Hamas itself is not listed as a terrorist organisation, but Hamas as the Izz al-Din al-Qassam Brigades is listed as a terrorist organisation.

However, it could be argued in some cases that there is confusion. How do you know? What if someone from Hamas or the Izz al-Din al-Qassam Brigades comes and gives a lecture about emergency medical treatment or something like that? Because many of the organisations on the proscribed list that could be considered terrorist organisations are compound organisations, it is not always clear when you receive education at a school in Palestine or in the Palestinian Territories that you are not receiving training from a terrorist organisation. I know it sounds like a remote point, but these are issues that the Muslim community faces. Having a bit more certainty in that regard to clarify this issue, especially with compound organisations, would assist.

Senator FERGUSON—But it is true that a person can receive training in all those things that you talk about like medical emergencies and education of other sorts from bodies other than a terrorist organisation if they choose to.

Dr Kadous—It is a bit difficult if you are, say, in the Palestinian Territories and you are trying to get a tertiary education. I am not sure about some specific situations but I can mention that

there are many possible situations where it becomes extremely difficult or there is a question of unawareness where someone gets one's education from.

Senator FERGUSON—If you are talking of an Australian citizen who goes to another country to receive training from a terrorist organisation, it is pretty hard for anyone to accept the fact that that training is going to be for medical emergencies or a whole range of other things which they could get training for in Australia. It would be pretty hard to convince the average person that they were not doing it for the purpose of being trained in acts of terrorism.

Dr Kadous—If that is the case then why not make the amendment? Because in all of the cases that you can conceive of—

Senator FERGUSON—It is an extra hurdle.

Dr Kadous—It is an extra hurdle but if it is likely to happen in all conceivable situations then there is no problem with making the amendments.

Senator ROBERT RAY—You made mention earlier on—and just mention—of the differential rights and attitudes of people on remand and prosecutors in public statements. Would you like to expand on that first of all?

Dr Kadous—We have seen several instances where because of the restrictions within section 34 of the ASIO Act, people who have been detained cannot speak about their detention. As a result, there is an additional layer of self-limiting behaviour because people want to be cautious. However, there are no such limits about what the Attorney-General or commissioners of police can say, so after the raids that occurred recently, police commissioners were saying, 'We have averted a major terrorist attack.' The people who were alleged to be involved in those terrorist attacks were not in a position to respond to that without either endangering their case or possibly being in violation of the ASIO Act.

Senator ROBERT RAY—I do not accept the latter, because you are entitled to defend yourself outside that without referring to what happened inside the ASIO questioning regime. I do not accept that half but the other half I do accept, but it is virtually true of every Australian citizen that gets arrested. They often get verballed by prosecutions and cannot respond. We are not actually targeting in that instance the Muslim community; this is standard operating procedure by prosecutors. It is not acceptable on any standard.

Dr Kadous—It is a bit different. I accept the criticism but I still say that people will feel that anything that was mentioned in the process of questioning while they were detained is still something that is out of bounds, off limits, that they cannot talk about.

Senator ROBERT RAY—It certainly is not. They just cannot refer to what happened during that questioning regime. The material is not banned. Anyway, that is something that when you go into your fourth edition, let us hope you can explain, your fifth or your sixth. Believe you me, I have full sympathy with the ever-changing pattern. I want to ask you about the criticism that has come up, not just yesterday but at other times, when warrants are issued either in one of three circumstances: a search warrant, a warrant where someone is going to be arrested and charged and, less likely, a warrant that detains someone for questioning. In two of those three cases the

criticism is that there is a cultural insensitivity when that is executed by the federal or state police: sort of bash down the door, rush in, do not allow for the normal cultural adjustments that your community have—women to be veiled and all those sorts of things. Would you like to expand on that and explain to us exactly what those problems are?

Dr Kadous—First, to go back to something you said earlier so I can finish my answer to that, it is different when the commissioner of police says, 'We have averted a major terrorist incident.' Saying something like that biases the case. If someone was charged with murder, they would say, 'We think he is the perpetrator.' For them to say they have definitely, without doubt, done this, is extraordinary and outside of the loop.

With respect to the execution of search warrants, from our feedback from the community, my meetings with state police groups and talking about the changes in process, this is actually an aspect that has improved over time. In the first groups of raids, from our understanding, the police used what are called hard-entry techniques—knocking down the door and going in. As a result of consultation with the community, which I wish to commend, that has actually improved, from what we have heard. Again, you would have to talk to the people who are actually affected, but at least what is being reported and what we are hearing in the community is that they are using soft-entry techniques. Where it is safe, they are giving time for women to cover up. It is not so in all cases, but at least there is an improving awareness of the cultural sensitivities that we are seeing in the application of search and other warrants. We, as does the Muslim community, appreciate that, but we would at the same time like to see that formalised or protected in other ways. There are already some protections within the ASIO Act with respect to that. For example, who does strip searches and similar things.

Senator ROBERT RAY—The third problem this committee has raised consistently is the apparent tipping-off of media organisations that a warrant is going to be executed. I do commend to you the statement by the acting AFP commissioner today, which is as strong as statement as I have ever heard on the subject, which pleased us all and I am sure it will please you. This obviously is a problem for your community and the people you represent.

Dr Kadous—Yes, it is. Again, it is about the power imbalance. I can understand the authorities' desire to show that they are doing something about terrorism, but sometimes I fear that the leaks have an adverse impact, because they again reinforce people's stereotypes. These gestures by the head of the AFP and also in New South Wales comments by the commissioner of police along similar lines are some consolation to the Muslim community. Whether when the next series of raids happens that will be taken into account is yet to be seen. I really hope that they follow up on what they have said at this stage.

Mr BYRNE—I want to know whether or not your group was a part of the Muslim reference group?

Dr Kadous—No, we were not invited to be part of that reference group.

Mr BYRNE—Do you understand why you would not have been invited to be part of the Muslim reference group?

Dr Kadous—We work through other organisations to establish grass-roots connections with people. We are not a representative group. But, to be honest, it does not seem that representative nature was part of the criteria anyway. It is a bit of a mystery to us. One of our objections to the process of the creation of the Muslim Community Reference Group was that it was not open and transparent—nor was it representative. I think there could have been a much better process for selecting the representatives as part of the Muslim Community Reference Group.

Mr BYRNE—What do you understand was the process of selection for this particular group?

Dr Kadous—My understanding of the process was that the Department of Immigration and Multicultural and Indigenous Affairs suggested a list to the Prime Minister, who then looked at the list himself in consultation with the Minister for Citizenship and Multicultural Affairs, John Cobb, and they collectively came up with a list. That is my understanding. I do not mean this to criticise the Muslim reference group, but just to bolster that point of view. Since the Muslim Community Reference Group formed there have not been many instances where they have gone back and consulted their communities. The one exception is the Islamic Council of Victoria, which has had two consultative forums on issues relating, for example, to the training and/or accreditation of imams. We were not selected for that group.

Mr BYRNE—Do you feel, therefore, that that dissemination process of the impact of the legislation and the consultation is very imperfect because of the people who are on that body and, as a consequence, the information is not trickling through to the community?

Dr Kadous—I think that that is a fair comment. Much as it hurts me to criticise fellow Muslims, I must accept that there has not been much in the way of promulgation of information about what is happening in those forums with the Muslim Community Reference Group. There has been a national youth summit, but that seems to be somewhat disconnected from the actions of the Muslim Community Reference Group as a whole and the more complex decisions that are deeply troubling to the Muslim community—for example, the training of imams, which brings with it, at least to some Muslim eyes, a concern about government interference in the practice of religion. From the people I have spoken to in the community—and if you look at the Islamic Council of Victoria's submission and the way that the people in Victoria reacted to that—they were very unhappy about that prospect, although the committee itself seemed to be in support of it.

Mr BYRNE—Was your organisation ever consulted prior to the introduction of the latest suite of legislation, dealing with control laws? Was your organisation actually consulted in any way, shape or form?

Dr Kadous—No. As far as I know, there was just the standard process that we go through with the Senate Legal and Constitutional Committee. That is the way that we provide input. Other than that, as far as I know or recall, I cannot remember an attempt being made to contact us.

Mr BYRNE—How would your organisation and the people who are associated with you feel if you were consulted by government or government agencies prior to legislation being tabled in parliament? Would that assist your community to feel as though there is some consultation occurring?

Dr Kadous—To be honest, I would say that it should not just exclusively be AMCRAN. It should be wider than that. We are just one representative organisation. However, I would agree with the idea that having a chance to be consulted—even if it is confidential, and we understand the need for antiterrorism legislation to be confidential at times—would be a great step forward. We could go to our communities and say, 'Look, we have been consulted.' However, the question is not just, 'Have we been consulted?' but, 'Have our consultations and considerations been taken into account?' For example, I consider that this process here today is us being consulted. Whether our considerations and the issues that we have put forward are taken into account is another question.

Obviously, the more suggestions that we can show the community that we said and show which modifications were made after consulting with us, the better. They would show that the Muslim community is having input into the legislation. For example, with respect to the association offence, originally the bail provisions that allowed bail only in exceptional circumstances applied to an offence that only had a three-year sentence, which we thought was ridiculous. When we took it to the SLRC we explained this to them, and we were very happy to report that our recommendations had been accepted and that the exceptional bail provisions would not apply to the association offence. Sure enough, when we go and talk to the community, one of the questions that people ask when they hear that we have been involved in this kind of work is, 'What impact have you really had?' We can hold up this apparently minor change as a symbol to say: 'Look, they have listened to us. There is a process in place.'

Mr BYRNE—Thank you. That is very useful. How do you feel about the ongoing independent assessment of the impact of the terrorism laws? Do you believe that is a process that should continue post the Sheller review?

Dr Kadous—I definitely feel that that is the case, and everyone I know in the Muslim community I have spoken to about it has also felt that way, because the committee itself is one step away from government. Unfortunately, with the way that terrorism is now, it is a very emotive subject, and it puts politicians in a very difficult position in terms of having to show that they are doing something about terrorism while simultaneously trying to protect civil rights—but there are not many votes in civil rights. Perhaps I am simplifying it a little bit, but the point I am making is that to have something at one level of separation from the government to look at the antiterrorism laws, to look at their compliance with human rights obligations and to look at issues of natural justice and administrative law is something that I would deeply encourage, and, again, it would help to alleviate the concerns of the Muslim community.

CHAIR—I go back to your introductory remarks. You made a comment that the amount of money that was being donated to Muslim charities declined. How does that system work? In another submission I think the same claim was made, and it gave us an example of a levy that goes through the mosques—I think it was zakat?

Dr Kadous—There is a requirement that, on any accumulated savings that a person has—above a certain minimum, of course—they must give 2.5 per cent to charity. That is called zakat. Zakat is compulsory, so I guess what I am talking about is another term that is used in Islamic charity, which is called sadaqa, which is the discretionary part. You can give as much or as little sadaqa as you want. There are issues in distributing zakat because you cannot always distribute them to those most needy—for example, those in Lebanon and Palestine. But when I said that

donations had decreased or plummeted, I was really talking about the discretionary part of donation, which is called sadaqa, above and beyond the minimum that every Muslim is expected to donate.

CHAIR—Is it correct that when you make those donations you have no idea where it is going, or can you direct to which charities they should go?

Dr Kadous—With respect to zakat—to both of them—there is discretion about where they go. However, it can be difficult. The usual process is that it is given to the local mosque or the local Islamic organisation with which a person is associated. So mosques would typically have separate boxes for the compulsory zakat and the discretionary sadaqa. A lot of members of the Muslim community would just put an envelope into that box. That would be done because that is the way it is done. Not everyone has internet. Not everyone can find charities online and select and control where that money goes.

Mr KERR—Could we come to a point that was the subject of earlier discussion about the Sheller recommendation to remove that part of the offences which relate only to verbal support. It was suggested by, I think, the Attorney-General's and the DPP that in practice, whilst the offence might extend as far as that, there would be no likelihood of prosecution. I think that is a paraphrase—I am not pretending to be accurate. Nonetheless, Judge Sheller did say that he thought the law did extend as far as to potentially criminalise advocacy, that we would normally say is part of a pretty robust debate, about the rights and wrongs of events in the Middle East—for example, a sort of pub room conversation saying: 'Dammit. I support Hezbollah. I don't understand why people who are being bombed don't have a right to fight back,' or something of that kind, maybe put in stronger terms. As I understand it, the Commonwealth government's position is that they still want to keep the reach of the law as it stands, but they do not expect it to be utilised. In terms of our thinking, how important is it in dealing with the fears of the community that you represent that the Sheller recommendation actually be adopted?

Dr Kadous—There are two points to make. First of all, as I mentioned earlier, one thing that the Muslim community, at least through our experiences, would like is greater clarity about the laws. To say that verbal comments cannot be regarded as a particular offence would be a step in providing that clarity. Also, if it were allowed, or it became known that it was allowed, to charge someone for something that they said, that would again lead to an increase in distrust of authority because it would be seen as hypocritical. Other people are allowed to say what they say. People supporting the state of Israel can say that Israel has a right to defend itself, but we cannot say Hezbollah has a right to defend itself, or the Palestinians have a right to defend themselves. So they would see it as duplicitous and hypocritical. That again would lead again to this increased perception that the laws are designed to limit the free speech of Muslims and not the free speech of others. So on the basis of clarity, and again if you are going to have freedom of speech, give everyone freedom of speech. So it is perceived as being just, those would be the two principles I would use to encourage that particular point of view.

Mr KERR—One of the interesting points—and I think it illustrates the complexity of some of the legal and political discourse here—we discussed earlier and I have raised with various witnesses before is the extent of the offence of providing or receiving training in respect of terrorist acts. Senator Ferguson referred to receiving training from a terrorist organisation. The offence that carries a 25-year imprisonment has nothing to do with training with a terrorist

organisation. It is receiving or providing training associated with engagement or assistance in a terrorist act. That is then defined in terms which would appear, at least on their face, to apply equally to those Australians who volunteered to serve with the Israeli defence forces or any other body. Obviously if they went to serve with the armed wing of Hezbollah they would be committing another offence because that is a proscribed organisation.

I have raised the provisions that go to the definition of that offence of training on three occasions and I am open to an answer that may come back from the Attorney's department or any other person saying: 'Look, you've misconceived the law. You've misunderstood. There is a defence that would apply in those instances.' But thus far I have not had that answer. I suppose it might be an interesting exercise in the balance that you seem to say was not being struck. I think you said in an earlier stage that there was no synchronicity in the relationship between persons who went to either side of those offences. In fact, the law of terrorism may be so broad—unintentionally, I assume—as to have that synchronicity that you said was not apparent in the way in which the law has been perceived by the community so far.

Dr Kadous—I think it goes back to the point I raised earlier about the perception that the laws are not just targeted at Muslims but also being applied in a way that is specific to Muslims. As I am sure the committee knows, with most offences—for example, murder or any of those kinds of offences—the idea is that everyone who commits them should be charged. However, the problem with the antiterrorism laws as we see it is that they are not universally applied. According to some statements that have been made by—if I remember correctly, and I can get back to the committee on this—Joo-Cheong Tham, the Australian Defence Force meets all of the criteria of being a terrorist organisation, for example, in its interventions in East Timor. There is nothing in the act itself which mentions state or non-state actors.

Mr KERR—There is specific statutory provision for the ADF to undertake certain services. Non-state actors might include other governments. I accept that, and in fact I have raised that point. But I do not want to have the least suggestion in terms of my appreciation of the law that anybody who serves in the ADF might be the subject of those laws. In my view, plainly, any person who is listed with the ADF and serving Australia as a member of the ADF is not subject to these laws.

Dr Kadous—I do apologise. It was a faulty recollection. The example, I believe, that Joo-Cheong Tham gave was the Liberal Party. I can take that question on notice and provide that evidence to the committee. He made the case that members of the Liberal Party, for supporting the acts in East Timor, which were clearly designed to achieve political, ideological or religious causes, would now be liable to be members of a terrorist organisation. Of course, no-one is ever going to enforce that, nor does anyone expect that, but it shows you the discretionary nature of the legislation. I will take that question on notice to provide to the committee. Joo-Cheong Tham is a lecturer—

Mr KERR—I am aware of the submission. I did not think that particular hypothesis was particularly plausible. There is a specific training offence, with very broad definition, and a very lively debate has emerged in the course of these hearings as to its applicability in circumstances where most countries have carved out from terrorism related offences conduct that relates to the laws of war, and we have not. It may have inadvertently, or perhaps advertently—but it was certainly not the subject of any debate or discussion—placed Australians who serve not only in

non-state overseas forces but also in circumstances where they enlist with armies of foreign governments under the possibility that their training, in those circumstances as defined, would bring them within the reach of these laws.

Dr Kadous—Yes. That is a concern for us. But again it comes down to the selective application of the law. We have argued in the past that the definition of a terrorist act within the legislation is overly broad and we see this as a consequence of that overly broad definition.

Mr KERR—I am not making a case specifically to exempt those Australians who serve in the IDF but I do not think it was ever intended that the laws would extend to persons who volunteered in those circumstances. It may be that it was intended, but it was not in my mind that it might. It is just that, when you look at the breadth of the definition, it does seem to extend to that reach. Is there a case in your view to carve out—in relation to overseas conduct—a law of war exception that would accept that sometimes Australians will go overseas to serve, as they did in the former Yugoslavian conflict? That was a civil war. They chose their sides. I would have much preferred that they did not go overseas to fight for the former Serbia or Croatia or any other part of that disintegrating country. We have some offences that deal with overreach, even in times of war, where you have a war crime, or a breach of humanitarian law. That is already provided for. So Australians who go overseas are not immune from prosecution if they engage in war crimes. But I wonder whether you think we should have a terrorism law that reaches into those circumstances. And I appreciate you would say there is an imbalance at the moment where if you enlist with Hezbollah you are immediately the subject of a criminal action in Australia because that is a proscribed organisation. You say that is an imbalance, as against someone who has enlisted with the IDF. But, taking it outside of that contentious area, I wonder whether you take the view that the reach of these laws is so great that we should not try and treat as terrorism all those instances where Australians might, for whatever motivation, engage in conflict situations as either a state or a non-state organisation.

Dr Kadous—Sure. But the first thing to remark is that there is already the foreign incursions and recruitment act. I checked it a few days ago and there is an exemption within the foreign incursions and recruitment act for people who are acting as part of a state. So it seems that there is one part of the law that says that it is legal and another part of the law that says that it is not legal.

As to the provisions that you mention, it would really depend very much on the drafting. Unfortunately, Muslims are involved in resistance movements all over the world and resistance means being part of a non-government group. Resistance movements have been around for a long time, whether it be Fretilin or the African National Congress or any of those in the Muslim world. In such situations I would like to ensure that no preference is given to state or non-state actors. And that is going to be difficult, because the line between resistance movement and terrorism in the law is blurred. No distinction is drawn in the legislation as to what exactly is resistance and what exactly is terrorism. But, at the same time, we as Australians understand that sometimes there has to be resistance against a state that is acting in a way that is not in the best interests of its citizens, and there is a long history of us supporting such resistance movements. So, in drafting such legislation, I would suggest that it is important to maintain that balance and to ensure that state actors are not given preference over non-state actors.

CHAIR—Thank you very much indeed for your evidence today. If the committee has any further questions, they will be sent to you in writing by the secretariat. A copy of the transcript of your evidence will be sent to you for any corrections of statement or fact.

Dr Kadous—Thank you very much for allowing us to appear today.

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

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 3.25 pm