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COMMITTEE

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Related Bills**

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SENATE
LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
Wednesday, 17 April 2002

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

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

Committee met at 1.20 p.m.

CHAIR—Good afternoon, ladies and gentlemen. On 20 March 2002 the Senate referred the [Security Legislation Amendment \(Terrorism\) Bill 2002 \[No. 2\]](#) and related bills to the Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. Witnesses have addressed these bills as well as the so-called ASIO bills in submissions lodged with the committee, and should note that evidence today should be confined to the security legislation. That is the subject matter of this inquiry. This is the second public hearing of the committee in relation to this bill, and the committee has received over 230 submissions.

Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute contempt of the Senate. Witnesses are also reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of that document are available from the secretariat. I also wish to note at this hearing—as I did at the previous hearing—for the record that in the preparation of these committee hearings and in the advertising of the inquiries there has been some public concern about the time frame in which these matters are being handled. I emphasise both for the benefit of the committee and for the record that the timetable under which this committee works is one that is set down by the Senate and that the committee was provided in the last sitting week of the Senate with a program of almost 10 bills to inquire into and report on by early May.

The most significant in terms of number—and, some would also say, in terms of interest—is the package of bills known as the security legislation amendment bills. I understand that there has been considerable concern expressed by members of the public and various organisations about those time frames. I do want to say however that the committee has undertaken, as it always does, to inquire into and report on matters referred to it by the Senate in the most comprehensive and considered way possible within the guidelines that are provided to us by the Senate. The committee has held a hearing in Sydney. We will hold two hearings in Melbourne and a hearing in Canberra on Friday. We are also considering in great detail every submission that is made to the committee on this legislation. I do hope that those assurances expressed by me as chair allay those concerns to some degree.

To proceed with this afternoon's hearing, I call the committee to order and welcome representatives of the Australian Council of Trade Unions.

[1.22 p.m.]

BOWTELL, Ms Catharine Mary, Australian Council of Trade Unions

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

DURBRIDGE, Mr Robert Stuart, Executive Member, Australian Council of Trade Unions

CHAIR—The committee have before it the submission of the ACTU, which we have numbered 147. Are there any amendments or alterations or additions that you wish to make to that submission at this stage?

Ms Burrow—No.

CHAIR—Thank you very much. Ms Burrow, are you speaking on behalf of the ACTU or does everybody wish to make a submission this afternoon?

Ms Burrow—What I would like to do is address an overview of our submissions. Rob Durbridge we have asked along as an executive member, but also as an indication of our concerns about specific members who may be caught up in this or indeed, in the particular case we will address, the issue of their work. So Rob would like to make a short subsequent statement, and then Cath, as our legal expert, will answer any legal questions that are too hard for me.

CHAIR—All right. You understand the time frame under which the committee is working this afternoon. All I would seek is that you make each of your statements as brief as possible so that as many members of the committee as possible can then ask you questions.

Ms Burrow—Thank you. We will try to keep it brief. What I would like to do is just walk you through the submission in summary. The first set of issues goes to process issues. Senator Payne has already raised our concern around the question of the time frame, so I know it is not the committee's fault and I respect that, but I think for the record we need to make that point. It is difficult to address all five bills in such a short time frame, therefore we have limited our written submission to the [Security Legislation Amendment \(Terrorism\) Bill 2002 \[No. 2\]](#) and have not commented on the suppression of terrorist bombing bill, the suppression of financing of terrorism bill, the telecommunications interception bill or the broader security legislation amendment bill. But we wish to put on record that, to the extent that all of these bills hang off the definitions and subsequent parts of the bill that we will address, we have some concerns.

Further, a difficulty for us is that these five bills are being considered separately to the new powers under consideration for ASIO. While parts of the bills are objectionable in their own right, the potential damage from these bills is compounded when the new ASIO powers are considered. We have made a short submission in relation to that bill, but we will take the opportunity to say more when this committee calls for submissions.

There are five substantive issues for us. First of all, the laws are bad laws. They have the capacity to suppress dissent and political debate—that is a very serious issue for a democracy that prides itself on respect for human rights, civil liberties and freedom of speech, in particular. The new terrorism offences are confused in their objectives. We believe they are poorly drafted and unlikely to deter terrorism. The new terrorism offences include actions that should not be unlawful and should not attract criminal sanctions, especially 25 years to life imprisonment. The safeguards which purport to protect civil, political and industrial activism are inadequate. The creation of absolute liability offences is abhorrent in the criminal

jurisdiction, particularly where the offences are as broad as ownership of a ‘thing’ not defined—unheard of in an act—or the collection of a document. The banning of organisations and the limited opportunity to have such a ban reviewed offends freedom of association.

Most of what we say is directed towards the failure of the safeguards and the banning of organisations, but we welcome questions on our other points. We also note that there are elements of these laws that we have not had time to address that have an impact upon union members, such as increased intrusion into the privacy of airport security personnel, and we have some concerns for other members, including TAFE teachers, which Rob will address. While such intrusion may be warranted in some circumstances, we urge that consultation take place as to the implementation and the detail of any subsequent deliberations.

I will not go into the detail of our concerns about these issues, but we welcome your questions. In general terms, it is very hard for us to understand why we would see these laws tabled in the Australian parliament. The definition itself is far too broad and causes us concern, as I have said. We have an absolute abhorrence to the notion that the separation of powers would be held in such disrespect that the laws would potentially give one member of the parliament—a politically elected person—really extraordinary rights over the banning of organisations and the subsequent potential that has for members, unwittingly perhaps in many cases. We are concerned about the dictation, if you like, of a person—not a judicial representative—of the AAT whom ASIO would be directed to for a warrant to then detain people for 48 hours and, more broadly, about the differential penalties by comparison with the crimes acts that exist in this nation. It seems to us just incredible.

Using a popular thought that concerns people today, a letter written by Liz Curran in today’s *Age* actually points out that the impact is that potential or alleged murderers in Australia could have more rights than people unwittingly caught up in the nature of this legislation. We are very concerned about it. We believe that the bills should be rejected. There is no call, from our perspective, for this kind of legislation, which is antidemocratic and goes to the very heart of human rights, civil liberties and democratic values, to be passed in an Australian parliament.

Mr Durbridge—I would like to take up a specific aspect of the [Security Legislation Amendment \(Terrorism\) Bill 2002](#). In our view, achieving security for this nation will not be addressed by these measures. Reversing the onus of proof, instituting strict liability, penalties, extra powers and banning organisations are not going to address the causes of terrorism and will not have the effect of deterring terrorism. They have gone too far towards upsetting the balance between security and liberty. I would like to give an example which is a very practical one from my own union and knowledge. The bill states terrorism as an offence of a very serious nature. Part of the definition under section 101.2, is the provision of training to terrorists. Absolute liability is said to apply only to the connection with a terrorist act. But a teacher who unknowingly provides training which is connected to the subsequent preparation for an act, which either occurred or did not occur, could attract a penalty, unless they could prove they were not reckless in providing the training.

I will put that into a practical situation. TAFE teachers teach the staff of mining operations in various parts of Australia—the north west, in Queensland and other places—how to use explosives. How do they know that any of the people that they have trained will use that knowledge in ways other than intended? They could be completely unaware that a trainee later intended to use that knowledge at some time in the future to blow up something in Australia or somewhere else in the world. They would have to prove that they were not

reckless in not knowing that the training could be used or was being undertaken with a terrorist act in mind—or later formed—to avoid conviction and imprisonment for life. I think that shows how overblown the provisions are that are being drafted. How do you show that you were not reckless in the provision of training? TAFE colleges do not conduct security checks on their students. They have no idea what students are going to be doing in five years time, yet the legislation discredits itself and the laws of this country by making itself open to a situation like that. The union and the ACTU will campaign against these measures which will bring the law into disrepute and will not deter terrorism.

CHAIR—Thank you, Mr Durbridge. Ms Bowtell do you wish to add anything?

Ms Bowtell—No, I am just available to answer questions.

Senator LUDWIG—I see one of the areas you have an interest in is in relation to the proscription powers. I was wondering about your comments in relation to those proscription powers and whether you have a view about the appeal mechanism that is currently proposed, which is the ADJR provision. Do you believe it is adequate or should there be a broader appeal mechanism put in place?

Ms Burrow—We clearly believe it is so narrow that it is definitely inadequate. Kath might give you a fuller answer.

Ms Bowtell—I think the ACTU's view is that the ADJR only provides a review as to the process of decision making that the Attorney-General or his delegate undertook and does not provide for a review on the merits so to that extent it is inadequate. But if we were to accept that there is a case for the banning of organisations, and I do not say that we do, you would want that to be dealt with up front—that is, before an organisation was proscribed, there would be an opportunity for the parties to be heard, and before a judicial officer rather than an administrative or executive body. If you were to introduce the banning of organisations, you would not do it before the parties had had a right to be heard by the judiciary.

Ms Burrow—Senator Ludwig, our overriding concern is that no political representative should have this power. If there is to be any debate about powers in Australia for organisations to be so-called 'banned' then it should be, by right, a process before the courts, where people have the right to defend their views and, of course, natural justice processes.

Senator LUDWIG—With the terrorist definition, what are your comments about the adequacy of the definition in relation to its exclusion for industrial action?

Ms Burrow—That is actually quite complex, and I will ask Kath to address that because it is literally shifting sands for us in terms of the current legislative provisions around what might be industrial action and what might not be.

Ms Bowtell—The definition of industrial action, as I think we point out in our submission, is commonly dealt with by the Industrial Relations Commission and the courts in relation to the Workplace Relations Act and its predecessors. Those definitions arise in the context of preventing and settling industrial disputations. They do not arise in the context of determining whether someone is criminally liable to life imprisonment. As such, the definitions include and exclude certain activities from time to time, based around whether or not the parliament sees it appropriate to attach a particular penalty, such as a fine, to a certain type of activity or to attach protection to certain activity—for example, protection against the industrial torts.

When those considerations are taken into account, you will get a different definition of industrial action than you might get in relation to this legislation. However, because industrial

action is not defined here, you would see the courts look to those sorts of considerations in determining whether something fell within or outside industrial action. The other point is that, in relation to some forms of industrial action, such as picketing, the Federal Court has found—

Senator LUDWIG—Yes, I was going to come to that. Just before we go into that, there is something I am curious about. Do you say that there should be a definition of industrial action and, if so, what do you say it should be and how should it be applied in there?

Ms Bowtell—It would be very difficult to define industrial action for the purposes of this legislation. We certainly agree that industrial activity should be outside the scope of it. But the second prong of the protection here would also not protect the type of industrial activity—whether it is industrial action or industrial activity—that our members commonly engage in, because quite often the activity is not based around a protest about an employer’s actions but perhaps the actions of government. So we say the second prong—the prong that protects lawful protest, dissent or advocacy—is inadequate as well because it does not actually protect most of the active types of political activism that people engage in, such as marches, rallies and vigils.

Senator LUDWIG—I see. I took you off the point about picketing, if you would like to come back to that.

Ms Bowtell—Picketing has been the subject of the courts’ considerations for a long time. Picketing would fall outside the definition of industrial action as the courts currently see it—at least, a picket that is an information picket or a picket that is persuading people not to enter a workplace. If the picket actually impedes people entering the workplace, it may come within the definition of industrial action and therefore would attract the protection of this act. But if it just persuades people not to enter a workplace, it would fall outside the protection of this act. On the other hand, a picket conducted for a political, religious or ideological purpose but not for an industrial purpose is nearly always unlawful and would therefore fall outside the protections of this act. Depending on what you are actually doing on your picket line and the purposes of your picket, you may from time to time move in and out of the protections of this act—sometimes you will be engaged in industrial action and be protected, sometimes you will be engaged in unlawful political activity and therefore not be protected.

Senator LUDWIG—So that I can understand that a little better, do you say that operates in conjunction with division 100.1(2), which says:

Action falls within this subsection if it:

And then there is a list of points—(a), (b), (c), (d) and (e). Do you have that provision there? It is in the definition of ‘terrorist act’. It does not include lawful advocacy, protest or dissent, as you have said, but says:

Action falls within this subsection if it:

Do you say—I want to understand your picketing submission—that there is the potential for it to involve, perhaps, (d), which says:

creates a serious risk to the health or safety of the public ...

and then otherwise attract the attention of the legislation?

Ms Bowtell—I think the way the provision is supposed to work is that you would have to satisfy (d) or (e), which would be the most likely types of activity that union activity would commonly attract. Then you would look to the protections to see whether they protected it.

The history of the courts' and the commission's interpretation of section 170MW of the Workplace Relations Act shows us that quite a lot of union activity could potentially fall particularly within (d), which says:

creates a serious risk to the health or safety of the public ...

because a very similar term is used in that section of the Workplace Relations Act.

Senator LUDWIG—And it would not only be union activity; it could be a farmer or a farmers association protesting. It is not—

Ms Bowtell—It could be blockades; it could be outside an abortion clinic; it could be any form of political, religious or ideological activity.

Ms Burrow—A very real debate for us this week is to respond to a request from our European Union colleagues about the Middle East situation and the debate going on, not just within the union ranks but also in the European Union parliament, about sanctions. So it has very practical considerations as we speak.

CHAIR—I just note that we do have a significant number of people attending this afternoon's public hearing as observers. The committee is constituted as a public hearing to enable people to do just that. Those people who are invited to appear as witnesses before the committee and who have taken the trouble to make a submission are doing that, as you see right now, and will continue to do that this afternoon and all day tomorrow. But it is contrary to standing orders of the Senate for people who are observers to participate in the hearing process. You are able to make submissions. As just indicated, over 230 individuals and organisations have made submissions, but it is not possible to participate in this hearing in that manner from the floor.

I note there is a gentleman standing with his arm raised. It is not possible, sir, for us to include you in this process because it is contrary to standing orders and because we do have witnesses invited to appear before the hearing. If you wish to make a submission of any length, the committee is more than happy to accept that and take that into account.

Interjector—I have actually made a submission to your process on exactly the point that I want to raise now because it is time that—

CHAIR—It is not possible to do that now.

Interjector—The assumption is unacceptable that terrorism is—

CHAIR—I understand, sir. If you have made a submission I can assure you that it will be taken into account. Thank you very much.

Interjector—Great democracy—this inquiry gave two weeks to make a submission. That is disgraceful.

Interjector—Shame! Where is the public inquiry? We are the public, not you.

CHAIR—Unfortunately, behaviour such as this simply takes the time of those people who have made the trouble to come, in whose support I assume many of you appear here. I would like to hear more from the witnesses this afternoon. I hope that they have an opportunity. I will call on Senator Scullion to continue with questions to the witnesses.

Interjector—This inquiry is a sham.

CHAIR—I ask for order please. If we are not able to achieve order then the committee will have to adjourn for the purposes of doing that and reconvene.

Senator SCULLION—Ms Burrow, perhaps you could help me. I heard evidence when we were in Sydney last and with some of the issues that came up we were able to use examples to get to the bottom of some of the questions. I put to Attorney-General's a couple of circumstances where people may think that under this legislation they would be considered a terrorist where in fact they were not. It dealt substantively with the issues of a public affray. We used the examples of Woomera. People went out reasonably and things got carried away—people were hurt and property was damaged. Would this actually come under this act? I think that is the sort of thing we need to get to. I certainly have an understanding in my own mind, as do so many of the people I know, about what we think is an act of terrorism. We would not think the invasions of Parliament House and Woomera to be acts of terrorism but perhaps to be unfortunate affrays and things one would not normally condone. They certainly would not go to an act of terrorism. I have an answer here on notice but it is not sufficiently comprehensive. I have only just received it. When we have those answers on notice those issues you have touched on may become clearer.

Ms Burrow, in regard to the opposition, you are opposed to the actual banning of organisations. In many contexts, I can understand how this is seen to cut across the interests of democracy.

Interjector—I would like to be afforded 15 days for free speech.

CHAIR—Order, ladies and gentleman. I do wish to conduct this inquiry so that as many questions and answers as possible can be dealt with this afternoon. It is not possible to do that if the hearing degenerates.

Interjector—That is the problem—this afternoon an issue of national importance is being discussed—

CHAIR—I have made those points and I am not going to pursue that any further. I call Senator Scullion.

Interjector—Millions of people die and you give two weeks notice for submissions. That is a sham.

Senator SCULLION—Ms Burrow, I would like you to help me specifically on the topic of the banning of organisations. Obviously, fairly lay people such as I have gone through the whole process between September 11 and now, and we understand very clearly why everybody is very concerned about these issues. I understand that the sorts of organisations we are talking about are clearly different from Al-Qaeda. The nature of the government's intent, I understand, is to ensure that terrorist organisations of the nature of those involved in the bombing of the twin towers do not have succour within Australia. I guess the challenge is to attempt to differentiate between those two types of organisations. You say in your submission that you are opposed to the banning of organisations. Would Al-Qaeda fall within that scope? Would you be opposed to the banning of Al-Qaeda?

Ms Burrow—There are two answers to your question. The first is that we have heard from the Attorney-General's Department. They say that the DPP would have to decide who to prosecute, that they are broad but the judiciary would have to impose the penalty and would not do so unless the offence was serious. I have to say to law-makers—and that is what each of you are—that this is an inadequate response. The parliament should not be in the business of passing laws that are poorly conceived, that allow for misinterpretation—and are therefore poorly drafted—knowing that we think they will have unintended consequences. Even if they do not, with the best will in the world, when you are not there and they are a law of this

country, other governments, other law-makers, may indeed use them for exploitation. You cannot accept responsibility—and this is our plea to you—for laws that would stand as Australian legal foundations and that, whether or not they have the intended consequence, have every capacity to be interpreted by others as such. We would ask you not to ask the citizens to rely on the executive or judiciary to protect them from the worst consequences but to make sure that, where laws are passed—and we do not accept these laws as being genuine or just—they do not do these things.

Regarding the second issue about banned organisations, it seems to me that, again, the government has to ask itself whether or not it has respect for the separation of powers. If you have a parliamentary representative who has the power to determine whether an organisation is proscribed or otherwise, what are we saying about our courts? What are we saying about the judicial processes that are supposed to be the framework for upholding justice and therefore interpreting laws?

The other thing we say to you is: organisations do not commit offences; people do. If there is an issue around crimes people commit, then our criminal laws should deal with that. On the question of organisations being banned, think back to our history. All of those people and all of those organisations who did not like apartheid in South Africa, who understood the laws that existed in South Africa, who fought in this country against those laws—and there were many organisations and many activities going to the previous senator's point—with a different government here in Australia could have been picked up in that context, and many others—I just use that as an example—in our history under this legislation. I can only plead with each of you as law-makers not to do this to a democratic country where civil rights are currently respected.

Senator SCULLION—In response to other evidence that has been given to us, I have heard similar sorts of questions. The answers from the Attorney-General's Department and others have been that the nature of this legislation is necessarily associated with attempting to deal with organisations rather than with individuals, because, in many aspects, terrorism has been a very organised process and needs to be dealt with in those terms.

It also goes on to say that, in an operational sense, planning to ensure that terrorist acts do not take place necessitates placing legislative amendments before the parliament to ensure that we can take those steps. That has been clearly the intent. Before I get your response, the other aspect of it is that, in an operational sense, the nature of the judiciary generally—notwithstanding your comment on that—means that it may take a certain amount of time before an executive decision can be made, in an operational sense. In other words, we may need something to happen very swiftly, but that may be out of the capacity of the judiciary. Perhaps you could extend your response to suggest how that balance can be found—because that is certainly the intent of where we are going.

Ms Burrow—On the first matter, we would have a response that says that laws concerning conspiracy and incitement deal with the issues that you raised. In our submission we particularly go to some of the provisions around criminal issues in the Victorian context and others. You can ask Cath in more detail about that.

On the second issue, I think that you have to consider very carefully the role of a democratic government. You may feel comfortable that you are going to give one member of a parliamentary group what are really extraordinary powers over civil liberties, and you may be able to live with that as a democratically elected person and, indeed, as a law-maker. But that is not my view, and it is not the union's view, of what a democracy is. If you are saying

that you want to debate changes to criminal law and that you want to debate issues around legal processes, that is your job: go right ahead. But this is not what this is about. This is a very ill-thought-through, knee-jerk reaction that puts powers in place—potentially, if it were passed—that outdo what Menzies wanted to do and was defeated by the people on.

Senator SCULLION—Just one last question, Ms Burrow. In your submission you stated that, in effect, Australia has no terrorist threat at the moment. One of the issues that a number of people have spoken to me about is that Australia clearly has issues overseas, and the difference is that in the domestic sense there is no apparent terrorist threat. The United States embassies around the world, outside the United States, have clearly been under threat; and there have been several monumental attacks on the United States embassies around the world. As a consequence of those attacks—this is an example—many civilians living in those countries have been killed. That is just an example that cuts across that. Can you help me understand how, in view of Australia's increased involvement in these issues overseas at the moment, this threat, whilst it does not exist at the moment, is not going to change that situation?

Ms Burrow—Again I would say to you: why are we making laws based on fear and paranoia and a view that something might happen? I am not aware of any terrorist acts in Australia. We are certainly not aware of terrorist acts—either here or, indeed, on our own embassies internationally—that have generated any government or legal response. If you think our laws are inadequate then have the debate about our laws but do not go to the point of giving executive government—and it is not even executive government; it is one parliamentary representative—extraordinary powers that change the very nature of our democracy with respect to both the rights of politicians and what amounts to the total overthrow of the separation of powers.

This is probably some of the most serious legislation that each of you will ever deal with. You have to ask yourselves this: what is it that we see as the foundation for our democracy? What kind of country are we? Are we a nation where people have fled from the sorts of oppressive regimes that you have alluded to, in order to be able to raise their children in security with civil liberties and with human rights guaranteed? Or are you as elected representatives going to take that away because somebody in your leadership has decided that something might happen in the future and so we need laws that are akin to a level of dictatorship put in place, just in case?

We cannot accept that under any circumstances. That does not mean we do not believe that terrorism is very serious. We are absolutely open to debate issues around work that our members might be involved in and laws more broadly with the community that should be amended. But these laws are a very threat to the foundations of our nation and its democratic foundations. We ask you—and I say it passionately—not to do this.

CHAIR—Thank you, Ms Burrow.

Senator GREIG—Firstly, I have more of a comment than a question to Mr Durbridge, who I think spoke of the scenario where explosives training was provided by TAFE staff and the possibility of a student then going on to use explosives experience for sinister reasons. I was struck with the imagery, the flashback, I had of the media coverage following the attack on the twin towers where there were interviews with the training pilots who trained the suicide pilots in the US. Is that the kind of thing you are trying to articulate with your concern about training and the provisions under proposed section 102.4?

Mr Durbridge—Proposed section 102.4 is one of the provisions, but it illustrates some of the most repugnant aspects of the proposed legislation. The teacher concerned would have to prove themselves that they were not reckless. The training itself never would have to be used, but just to be thought about being used. It is all very well to say that the discretion lies with the prosecution about whether action is taken or not, but that is to leave that sort of discretion hanging in the air. It is far better not to enact a piece of legislation which, on a strict and fair reading which I think I gave you, does lay a completely innocent person who could not have known about how that training was to be used—like perhaps the people who trained those pilots—open to life imprisonment—not just a charge, but life imprisonment. How does one prove that one's training is not provided recklessly or not? I think that is a symptom of deep problems with this legislation which really should be taken away and thought about all over again.

Senator GREIG—Are you aware of any legal precedents that give some kind of reasonable definition of 'recklessness'?

Mr Durbridge—No, I am not. I also add that, if a person does provide training and should have known that the training they were providing could be used by a person for an improper purpose, the existing provisions of the Crimes Act are absolutely adequate and provide very serious penalties for those things. All the sorts of conceptual pieces about undermining governments that we may not want undermined or overthrown are all there in the Crimes Act. We do not need any further repressive legislation. The Crimes Act for many years has been considered to be a very potentially repressive piece of legislation. It is there, it is adequate, and we do not need any of these new laws to address issues like that.

Ms Bowtell—If I could just add there, in relation to your question about the definition of 'recklessness', it is included, of course, in the Criminal Code, but the normal position in relation to particularly offences which attract imprisonment by way of penalty is that the prosecution bears the onus of proving that the defendant was acting either intentionally, recklessly or negligently. In this case the defendant bears the onus of proving on the balance of probabilities—not beyond reasonable doubt, but on the balance of probabilities—that they were not acting recklessly. That is a major shift in relation to the prosecution of criminal offences in this country and an enormous change in the balance of power in relation to criminal activity in this country.

Senator GREIG—Ms Bowtell talked about, and Ms Burrow mentioned, the definitions of what does and does not constitute industrial action being shifting sands. I am wondering, post the Workplace Relations Act 1996, where the question of secondary boycotts rests within this legislation.

Ms Bowtell—I have not looked at that in a lot of detail recently, but I would expect that you would have secondary boycott activity which fell outside the definition in the Industrial Relations Act but may well fall within the definition in the Trade Practices Act.

Senator GREIG—So we are looking at the human rights and environmental aspects of it?

Ms Bowtell—That is right, in which case, even if the DPP were never to act and even if the courts if a case came before them were to impose a very low penalty or no penalty at all, the fact that people engaged in political or industrial activity have—in the context within which they are operating in their social environment in a sort of political fabric—these laws sitting out there, maybe unimplemented, changes the balance of power within which that type of ac-

tivity takes place and changes the social fabric within which it takes place. Eva Cox made that point in her submissions to you on the 8th.

Senator GREIG—I have one last question for Ms Burrow. You have argued passionately against giving the attorneys—or for that matter the judiciary, in terms of definitions—singular power. Are you suggesting that power, if it must rest anywhere, ought be with the parliament?

Ms Burrow—We do not believe that the power to prescribe organisations should rest with the parliament at all. We can only repeat that people, not organisations, commit crimes, and they should be treated as crimes. But the worst aspect of this legislation, as you point out, Senator, is that you have a single person effectively given incredible powers not only in conflict with both respect for the role of the judiciary and the separation of powers but also in conflict, we would argue, with the International Covenant on Civil and Political Rights, international laws that go to the question of human rights. My passion is that I find this unbelievable in our country.

Senator McKIERNAN—Your point about our role as legislators is well made, and it is a timely reminder of our responsibilities here. That is why it is important that we consider all of the evidence that is presented to us both in written form and by oral presentation this afternoon. You make the point about the organisation not committing the crime, that it is the individual that does so. But with terrorism, September 11 in particular, isn't it also the case that such crimes might not have been able to be committed had the individuals not had large and very well organised organisations behind them to enable them to commit those acts of terrorism?

Ms Burrow—Nobody can condone what happened on September 11 or any forms of terrorism that seek to undermine people's rights, freedoms or, in our broader concept, democracy as we would see providing the foundations of a civilised society. But you have to ask yourself about this, and you have to make this judgment. Al-Qaeda is a network that has existed for a very long time. People have known about it, and a whole lot of spy agencies around the world have known about it for a very long time. Would the US, we—that would get a laugh because I do not think we would have had any real influence—or indeed any other country with these powers necessarily have taken it on themselves, prior to September 11, to do anything about that under these powers? Our argument would be that other laws existed and other measures existed for governments, receiving reports from their various agencies who might have been concerned, to do something.

September 11 was a terrible tragedy. There have been many others in the world and we could go to them, and we are looking right now at a few of them in the Middle East and elsewhere. You cannot as law-makers say, 'Well, we have to engage in a sense of conspiracy that enables us or gives us the right to undermine civil liberties just in case or maybe so we could have done it better.' Frankly, I would not want to be in your shoes right now. I make the point seriously about you being law-makers. You are elected representatives of the people and you have to ask yourselves if these laws will stop terrorism, and our submission is that they will not. If they will not stop terrorism anyway, given that we are not yet aware of any acts of terrorism in Australia then you have two strikes against them. But the third is: are they really the legal foundations for the future of our democracy, ones that should respect human rights and civil liberties? We do not think so, and we are asking you to uphold, irrespective of party affiliation, what we believe would be what the Australian people would say to you about their future.

Senator McKIERNAN—You make the point very well in your submission—which I have read—on page 10, paragraph 2.9, about the banning of organisations. In proffering an argument against the banning of organisations and against giving these new powers, you do not mention the Al-Qaeda network. The events of September 11 have occurred. There is regret around the world because of that. We have, we would hope, learned from that experience of September 11. Is there any way now that we can move—

Members of the audience interjecting—

Senator McKIERNAN—Can I make a plea to the audience? We are wasting some time here. We have a responsibility as senators to inquire into this legislation and we will do it. We will do that inquiry. We have ways and means of progressing the inquiry further. We would prefer not to use them.

Ms Burrow—Senator, I understand the point you are making.

Senator McKIERNAN—I have not actually asked the question yet, Ms Burrow, which is: is there any way we can meet on this? Were an organisation such as the United Nations Security Council to make a decision on the banning of an organisation such as Al-Qaeda, would the ACTU then agree with the parliament of Australia also banning such an organisation?

Ms Burrow—We would say to you, ‘Explain to us where the laws of conspiracy do not give you the necessary powers.’ My understanding of the law in this country, and indeed in other countries, is that you have powers to deal with this. My point in answer to your previous question was: the US did not act; other countries have not acted. Let us see what the laws available to us would allow us to do if parliamentarians were seriously concerned—and they have all their agency reports at their disposal—about the activities of individuals within organisations. It did not take laws for the US to act. The US decided that they would destroy this network in its entirety. They sent bombs to make that happen, and included us and our defence forces in that process.

To the extent that an organisation like Al-Qaeda would cause legal deliberations, you have to think about the extremes you are talking about here and what would be the responses of parliaments right around the world. To the extent that an organisation or individuals within it might be targeted—I think that is what you are asking—then you have laws to deal with that. Any debate we would engage in with you—and we would be absolutely willing to engage in debate—would be on the basis of challenging you to say where the laws on criminal acts and conspiracy are inadequate at this point in time and what you would do about that first, rather than taking this approach, which is an attack on civil liberties.

Senator McKIERNAN—Thank you. I think that is a very useful comment, which we can take into consideration. The difficulty that we have is that we are limited to the brief that is in front of us, which is bills that are before the Senate chamber at the moment. That is what we have to concentrate on. We cannot, in that context, make a comparison between ourselves and the United States or any other parliament in the world. We have got to do the job that we have to do, and that is to inquire into these particular bills.

The last question I would like to direct to you, Ms Burrow, is in regard to judicial power. I note the strength of the argument contained in your submission, but I ask the question nonetheless, for the benefit of the committee, and me in particular. Has the ACTU given any consideration to any form of extension to judicial powers to override, examine or review the

extension of powers that are proposed in this particular section of the bill—that is, the banning powers?

Ms Bowtell—Are you asking the question of whether, rather than the ADJR review being the process of review—

Senator McKIERNAN—That or any other judicial power, and I asked that in the earlier comments about the separation of powers as well.

Ms Bowtell—I think we stated earlier that our opposition to the banning of organisations is opposition per se, but if there were to be the banning of organisations then that should be done with the organisation having the right to have its say before a judicial power and not before the executive arm of government or the parliament.

Senator McKIERNAN—Thank you.

Senator COONEY—Can I just ask about the definition of terrorist activity—have you looked at that? This goes to what you, Mr Durbridge, were talking about as well. It says that it is a terrorist act if it is done for a ‘political, religious or ideological cause’, but not for industrial action and not just out of spite—you might just feel pretty unhappy about things and do something which involves serious damage to property. Go down to subsection 2, which begins:

(2) Action falls within this subsection if it:

(a) involves serious harm to a person; or

Do you know what sorts of penalties they bring at the moment?

Ms Bowtell—I took the opportunity to check the Victorian Crimes Act—which is only one act—this morning. Causing an explosion likely to endanger life or injure property has a five- to 15-year maximum penalty, depending on the circumstances; reckless conduct endangering life has a 10-year maximum penalty; interference with railway equipment with an intent to damage the engine has a 10-year maximum penalty and intentionally causing serious injury has a 20-year maximum penalty. So a criminal act conducted for the purposes of revenge, for greed, for fun, in the context of domestic disputes or whatever, attracts a lesser penalty than one conducted for a motive which is political, ideological or religious.

I think you can see in our submission we do oppose, in fact, the whole criminalisation of motive. Motive in the criminal law perhaps has a place when it comes to penalty but not when it comes to proving the elements of the crime. When the judge is taking into account mitigating factors and so on, then motive may have a role but normally motive is not a part of the proof. The proof, in the mental element, is intention, recklessness or negligence, not motive.

Senator COONEY—If you look at (1)(c) it says: ‘Lawful advocacy, protest or dissent.’ Can you think of a protest or a dissent that would not include a political, religious or ideological cause?

Ms Bowtell—No, nor can I think of anything much more than writing letters and making submissions that is lawful. Most active protest attracts some element of unlawfulness whether that is a tort, obstruction of a public highway or something.

Senator COONEY—Mr Durbridge, can we just go over to section 101.5 and consider your teaching illustration. It says:

(1) A person commits an offence if:

(a) the person collects or makes a document—

and there is absolute liability. Would you or the people that you represent have occasion to collect a document, either through a fax or for some other way, or to make a document which might be connected to that?

Mr Durbridge—They certainly do. I suppose, although I had not really thought about this, making documents is sort of what we do. Helping people to make documents—

Senator COONEY—That is an absolute liability?

Mr Durbridge—is an absolute liability offence and could be committed by somebody doing their ordinary job of work, which is teaching people to read and write. It is possible that you could attract a vindictive prosecution for imprisonment for life on the basis of that, unlikely as it may be.

Senator COONEY—Right. The only other issue I want to talk about is the creation of a climate in society where we get a real change in the way we go about the matter. Ms Burrow, I think you were talking about the way we go about freedom and rights and what have you. Are you worried about what this legislation and a whole series of other legislation on law and order might do to the climate in society? I used to talk about this back in the 1970s with friends of mine, Joan Coxsedge, Brian Smiddy and Dave Kerin and what have you. I am wondering whether we are getting back to that sort of period.

Ms Burrow—It goes to the very heart of our concerns. Apart from the fact that, as we have submitted, we think they are bad laws—they do not respect the separation of powers; they take far too much upon executive government in a democracy—these potential laws are being presented in the context of whipping up a campaign of fear. Without being alarmist, I am sure you have all heard the stories of vilification and abuse of a racial nature going on in our society. They take us back to the heart of many of the struggles for respect, civil liberties, tolerance and all of those things that really are bound up in the fabric and the climate, as you say, Senator, of what we consider should be the framework of our civilised nation. That is why we plead with you and ask you to look at the laws of the land that are available to you, to take seriously the separation of powers and to consider the role of the judiciary. Have a debate by all means about the seriousness of terrorism—we can support that—and whether the laws of the land are adequate to deal with 21st century society, but do not whip up a climate of fear and then on the basis of a climate of fear put in place legislation that will do who knows what to the very nature of our society.

I know that it is seen to be sensational for people to talk about the creation of ASIO powers, not before you today, that are equivalent to the powers of secret police in other nations. I put this to you: do not think of it as sensationalism; think of it as a worse case scenario that could be an intended or unintended consequence of the linking of these sorts of bills, and then ask yourselves, as senators, whether you can really respond—and I take Senator McKiernan's point that your role here is to actually report on a brief—beyond your role here because you have a vote as members of our parliament. That is the issue, in response to your question, that I would ask you to consider. What future are you framing, what are you doing to our traditions of parliament versus the judiciary and what are you really prepared to stand up and argue about in terms of the sense of freedom, the climate of freedom, that is as every bit important as the nature of the law we have to protect it?

Senator COONEY—I named three people but I see lots of other people down there in the audience who have fought valiantly over the years.

Interjector—We are still fighting.

Interjector—We haven't given up hope.

CHAIR—Thank you, Senator Cooney. Ms Burrow, I note our earlier discussion in relation to the matters pertaining to the ASIO legislation. Whilst this committee is currently considering this package of legislation, the Parliamentary Joint Committee on ASIO, ASIS and DSD is conducting a substantive inquiry under the chairmanship of Mr Jull. I am not sure whether the ACTU has made a submission to that inquiry.

Ms Burrow—We have, yes.

CHAIR—Thank you. I thank the witnesses for their submission and for their assistance with the committee's inquiry this afternoon. We appreciate you attending and answering the questions put to you by senators.

[2.20 p.m.]

GRAHAM, Ms Irene Joy, Executive Director, Electronic Frontiers Australia

CHAIR—Welcome. I remind the witness that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind you of the notes that were received relating to parliamentary privilege and the protection of official witnesses.

The committee has before it your submission, which has been numbered 134. Are there any additions or alterations you wish to make to that submission?

Ms Graham—We do not actually have anything written to add, but we would like to make an addition very briefly now.

CHAIR—Certainly. But in relation to the written document you have no changes?

Ms Graham—In relation to the written document, yes.

CHAIR—All right. I note for the record that the submission made by Electronic Frontiers Australia goes to one of the pieces of legislation in this legislative package—that is, the [Telecommunications Interception Legislation Amendment Bill 2002](#). Is that the direction your remarks will be taking?

Ms Graham—Yes. It is a slight alteration to our recommendations on that.

CHAIR—I invite you to make that brief opening statement and at the conclusion of that I am sure senators here will ask you questions.

Ms Graham—The aspect of our submission that we feel we need to slightly amend is the actual recommendations that we made. As the committee would be aware, we recommended some specific rephrasing of some of the clauses of the interception bill. Since we lodged that submission we have had more time to look into existing law, in particular the Telecommunications Act itself and also the Telecommunications (Interception) Act. As a result of having time to look in detail into the provisions of those acts, we now feel that the amendments we originally proposed in our submission to the committee are not actually going to achieve very much at all because they are basically going to put the law back to exactly where it already is. As a result of definitions, we feel that those particular clauses in the bill have the potential to have a much wider effect than we had originally understood from comments that had been made in the explanatory memorandum to the bill. So basically our position now is that both of the clauses in the interception bill that refer to delayed access message systems and to stored communications should be deleted completely until such time as there is a proper investigation of what those particular clauses are supposed to achieve and to ascertain what the breadth of effect is. That is the summary of what we feel needs to be put on record about our revised views about our submission.

In terms of a brief opening statement on the whole issue, the basic problem we see with the amendments in the interception bill is that the explanation memorandum to the interception bill says that one of the purposes of the amendments is to:

- legislatively clarify the application of the Act to telecommunications services involving a delay between the initiation of the communication and its access by the recipient ...

Having investigated fairly fully the existing legislation, we do not think there is anything in that regard at all that needs to be clarified. The legislation that stands now is abundantly

clear, in that the content of an email message or an SMS message or voice mail is protected by the interception act and cannot be accessed without an interception warrant. What this bill is now going to do is not 'clarify' the application of the interception act to email, SMS and voice mail; what it is going to do is change the circumstances under which law enforcement authorities are able to access people's personal communications before those people have even received the message.

The effect of the legislation—let us take an old technology example and look at Australia Post—is the same as saying that while a letter is coming to you in the postman's van, Australia Post van or on the plane being flown interstate to be delivered or on the postman's motorbike, it is protected and it cannot be intercepted without an interception warrant. But, while it is stored in an Australia Post office waiting to be put on the postman's bike or while it is sitting in physical premises, police, various public revenue protection authorities and so forth will be able to access that letter that has not been delivered to you. Of course, the [Telecommunications \(Interception\) Legislation Amendment Bill 2000](#) has nothing to do with Australia Post. I am just using that as an example of what the effect of the bill is. It says: while your message is in an Australia Post van, it is protected; but, while it is at the post office or sitting in the post office box or whatever, it can be intercepted without an interception warrant because it is stored there.

We do not understand what the purpose of this change is. We have also looked back to the Attorney-General's Department review of the Telecommunications Interception Act 1999. The Attorney-General's Department released a public document as a result of that review, and the policy position put in that—certainly as far as I can understand it in a section called 'Access to stored data'—was that stored data, before it had been received by the recipient, going across a telecommunications system should have the same kind of protection as data that is physically moving at a particular time. So we do not understand why there has been a change in the policy approach. Already, police forces in any state have the power with an interception warrant to access stored email or SMS messages at the provider's premises. As we understand it, they can already get an interception warrant to access that information. There are some exceptions where particular state governments do not have legislation that mirrors the Commonwealth Interception Act. But that is an issue for the state governments who have chosen not to introduce relevant legislation; it is not an issue for the Commonwealth parliament.

That said, the effect from the changes being made in this bill will be that whatever law enforcement authority we happen to be talking about will not need an interception warrant. All of the protections that come with the interception legislation go out the door in relation to messages in transit. Instead of, in effect, a warrant only able to be issued by the AAT, you are going to have a situation where police officers can get a search warrant to go into ISP premises and check what emails are being sent to you, before you have even received them, and so on.

I can go further into the effects of it later, if any of the senators have questions about that. It is basically that there are all these protections in the interception act. As soon as this change is made, those interception warrant requirements will no longer apply, and so a vast range of different authorities for different reasons will be able to access this information. One of the major things is that the Telecommunications Interception Act only allows a warrant to be issued basically if it is in relation to an offence that has seven years imprisonment. That will not be the case anymore. They will be able to get a warrant to go into ISPs premises for any kind of offence. In the absence of any evidence of why there needs to be a change to the

legislation, we believe these aspects of the bill should be just deleted until there is a real chance to understand what the point is and to allow time for public debate about it. That concludes my opening statement.

CHAIR—Thank you, Ms Graham. Why wouldn't EFA just recommend that all of the concerns which it raised be addressed by the requirement for an interception warrant?

Ms Graham—That is basically our recommendation.

CHAIR—I thought you just told us that your recommendation is to delete the provisions and come back to it.

Ms Graham—Sorry. I probably did not make myself particularly clear. In terms of saying 'delete those provisions', my understanding at the moment is that if you deleted those provisions it would already be subject to an interception warrant. So the deletion of the provisions will leave it in exactly the same situation it is now—that an interception warrant is required and available to get access to these kinds of communications. When I said come back to it at a later time, I meant only if there is some unobvious reason why the Attorney-General or whoever feels that these changes are needed. It is our view that that needs to be publicly explained because we cannot see any benefit to these changes. The benefit we see is to infringe people's privacy. That is what we believe these amendments are doing: giving law enforcement authorities vastly more power to intercept people's private communications and secretly surveil them. That is what we think the intent is.

We are saying that if you take those two clauses—or however many there are—out of this bill, we are back to the sensible pre-established balance between law enforcement powers and civil liberties. These communications cannot be intercepted without an interception warrant. So my only point in saying, 'Perhaps look at it again later,' is that there needs to be an explanation of what the reason is for the changes. If there is really a reason that we cannot identify at the moment, maybe it is appropriate to have a further debate about why it needs to be changed. At the moment it is not going to achieve anything that cannot be done already.

CHAIR—So the question really is, from your perspective, whether this is a drafting issue or a policy issue. If it is a drafting issue, it can be addressed in that manner; if it is a policy issue, it needs further examination.

Ms Graham—Yes, basically. We are not even sure, if it is a drafting error, it can be addressed by the proposed changes that we put in there because we have realised that there is a further issue about the definition of a stored communication. We did not address that in our submission; we had not woken up to some of the issues because there was insufficient time to go into great detail with the legislation.

There is a problem with the fact that a stored communication is not really being defined. We feel that there is the potential either now or in the future for this undefined stored communication to basically affect all Internet traffic over IP. While trying not to go into too much of the technical detail, there is new technology being used for telephone calls, which is called voiceover IP. It is a completely different kind of technology from that used for a normal telephone call. With a normal telephone call, the transmission is instantaneous. Somebody speaks and it is received at the other end. Telephone calls can now be sent by voiceover IP. I understand that a lot of organisations—I do not know which organisations are using it; I will not try to say whom I think might be, particularly since we are on the public record—are either using this voiceover IP now or bringing it in because there are a lot of advantages to it.

The thing with voiceover IP—and it is the same for any Internet traffic—is that in order for the conversation to get from A to B it is converted to data and it is stored in little packets. Every stored packet travels across the Internet protocol or whichever other IP protocol is relevant. So you have this voice conversation being converted to data and stored in little packets. Then it runs across the telephone lines, the satellites or wherever it goes to get to the other end and then it gets basically put back together again. Then you can hear it or you can read it.

At the moment it is not all that easy to intercept all of these packets as they are being stored travelling across the Internet because they are stored for a very brief period of time. But they do get buffered in Internet service providers' routers that are transporting the traffic across the Internet. Getting from A to B, the communication can go through all sorts of different ISPs' servers; it just does not go from here to there, it goes through a whole lot. And it can be buffered—it often is buffered all the way along the line. We believe it is fairly difficult at the moment to actually intercept these packets as they are stored for these tiny periods of time, in order to grab hold of a voice call. However, technology changes and we feel that bringing in this concept of stored communication without defining really what 'stored' means has the potential to result, in a few years time, in all voice calls being able to be intercepted, because technology gets better and it is easier for police and so forth to use software to intercept these travelling little stored packets of information.

When I talk about these stored packets I should add that this goes back to the definition of communication in the Telecommunications (Interception) Act. It does not say communication is a whole message or a whole conversation; it says 'any part' of a message or conversation. So if you have technology that is dividing up a conversation into little pieces of data that it stores and sends along, then each one of those is a communication for the purposes of the Telecommunications (Interception) Act. So there are all of these issues around trying to legislate over technology without really considering what it is that you are trying to achieve and what the effect of the wording of the law is going to be. It seems to us that the existing wording has an even wider potential than it might seem at first glance.

Senator LUDWIG—I am trying to understand your submission in relation to a couple of points. I am sorry to have to cover the same territory; perhaps I can package it in a way that I can utilise it. You say that you no longer hold with the recommendations that you have made. So they are no longer recommendations that you make?

Ms Graham—I am sorry, it is a little difficult to be clear. Basically what we are saying is we would rather see the amendments we have proposed be included than the bill be passed unamended.

Senator LUDWIG—Right, I understand that point.

Ms Graham—We have still made those recommendations—we are not actually withdrawing the proposed amendments we made. We are now saying that is our second preference because we certainly do not believe the bill should pass as it is. If the amendments we proposed in our submission were made, that would eliminate some of the concerns we have. It is only that now we have had time to look at it more fully, we think there are more problems with it than our proposed amendments actually address. Does that make it clearer?

Senator LUDWIG—Yes. In relation to the issue of the interception of the telecommunication packages, as you call them, do you say that that should or should not be allowed? Or do you say that there is a definitional problem with it—

Ms Graham—With the interception legislation overall?

Senator LUDWIG—No, in relation to the amendments that are being proposed. You say that it would include or it may include VoiceOver? Do you say that they should be subject to telecommunications interception or not?

Ms Graham—We are saying that there is a legitimate need for law enforcement authorities to have interception powers, and the powers that they have should apply to all forms of communication, irrespective of the technology being used. The Attorney-General has said on numerous occasions—or at least his department has, in publicly issued documents—that the Telecommunications (Interception) Act is supposed to be ‘technology neutral’. This is a very popular term that gets constantly used by government every time they wish to introduce a new law.

This time, we are seeing it being used to find a reason in order not to bring in a new law but to treat some types of communications differently from other types. The bill is not technology neutral. It says that, if the technology being used to send a communication automatically results in a delay before the telecommunication is received at the other end, it is treated differently from one where there is no delay. As far as VoiceOver IP is concerned, all we are saying is that that kind of telephone conversation should be treated in exactly the same way as is a telephone conversation that is carried out using old telephoning technology. We are saying that, with the changes that are in the bill, if it goes through as it is, it is likely to result in VoiceOver IP conversations and ordinary telephone conversations, such as have been around for years and years, being treated differently under the interception law.

We are not saying definitely that that will happen with regard to VoiceOver IP, because we do not understand exactly what is meant by ‘stored communication’ and there are issues about intercepting—how, technically, you can do it. But we are saying that as technology continues to advance, whereas it may not be particularly easy or practical now to intercept VoiceOver IP as it is being stored during transit, it may well become so. It may even be quite feasible now. We believe it actually can be done now, but the amount of effort and difficulty and so forth is such that we do not expect it would be very likely to be used. But that does not mean that it will not be, in 12 months time.

Senator LUDWIG—And your concern is that they would then be treated differentially?

Ms Graham—Absolutely.

Senator LUDWIG—And that the safeguards would not apply across the board?

Ms Graham—Exactly.

Senator LUDWIG—And the view that you have in relation to interception search warrants for ISP premises would then not apply uniformly—

Ms Graham—To the content.

Senator LUDWIG—across both ISP premises and stored messages?

Ms Graham—Sorry; could you repeat that?

Senator LUDWIG—Well, you can obtain a letter in a house by utilising a search warrant and you can obtain a telecommunications interception warrant to go to an ISP premises and obtain stored messages. So there is no differentiation there.

Ms Graham—Yes, that is fine.

Senator LUDWIG—So your complaint is only in relation to where they store it?

Ms Graham—I think yes. It is that this is going to enable police without an interception warrant to go into an ISP's premises or Telstra's office to check Telstra's voice message bank—

Senator LUDWIG—Yes.

Ms Graham—or anywhere that anything is stored. The problem in this area arises because the legislation says that this applies to any message that is stored on equipment and does not need the use of a line to access it. Of course, anywhere that a message is stored in transit over a telecommunications system, it is going to be possible to access it without the use of a line at the service provider's premises—be that Optus, AAPT, Telstra, an ISP or whoever. If a message is stored so that the end user can retrieve it the next time they check their mailbox, then there is somewhere physically that that can be accessed without using a line. At the moment, an interception warrant is necessary to get access to those stored messages, and this bill will remove that requirement.

Senator GREIG—I am wondering, Ms Graham, if we need additional laws. If we are going to get to that point where people know, because that information is there, that if they are using a particular technology the communication that they are making is stored. Perhaps this is not a good example but, as with letting people know whether food contains genetically modified ingredients, should we be telling people whether the technologies that are evolving and becoming more popular do or do not contain stored information? Is that a direction that you see us heading in, or not heading in?

Ms Graham—I am sorry, but I do not think I really understand the question.

Senator GREIG—You are saying in your submission today that the opportunity will increase for authorities to retrieve and access stored information, but I would suspect most people are unaware that the information is not being stored in the first instance. Is that something that consumers should be being told?

Ms Graham—I am sorry, but the information is already being stored.

Senator GREIG—Yes, but do the consumers really understand that—the users?

Ms Graham—Yes, it would certainly depend on the user. Certainly a very large number of users would be aware, because you turn on your computer and your email is not sitting there. Depending on which kind of package and technology you are using, by and large you turn on your computer, your email is not in your email box and you have to click something that says 'download my email'. So I think the largest number of people would be aware that it is being stored.

Privacy issues have long been one of the biggest barriers the industry identifies to the advancement of e-commerce and so forth. Internet users have huge worries about privacy. You are opening a door here to people being fearful about their private communications. We must bear in mind that when you are looking at accessing a message that is in someone's mail box that they have not downloaded, you are not looking at what the target has said. You are giving the police and whoever else the power to read the messages that everybody else is sending to the target. So there is this huge potential for massive infringement of people's privacy because it is not even addressing the target of the investigation. Everybody else's messages are the ones that are being read. I think that is probably more of an aspect that a lot of people, a lot of Internet users, probably have not thought about. When we are talking about stored messages, whose messages are we really talking about?

Of course, this would also catch the situation where people use the kind of email package where a copy of their sent message might end up getting stored on the ISP server as well. The way the explanatory memorandum is written—I think it is in the explanatory memorandum or it might be in the A-G's media release of December but somewhere it specifically says that it is directed to messages that have not been downloaded. So it is your incoming mail.

In terms of what people do not know, the other problem is that if police or somebody get a search warrant to come into my home to check my email on my computer they can do that. If they do, at least I know that has happened. If that power to search people's premises is being abused, you know about it. If you know you are completely innocent and you know that six of your friends have also had their premises searched, at least you have the opportunity to raise a noise about it. This legislation lets them go into an ISP's premises and search your email without you even knowing it is being done. The ISPs are not going to tell you and they are not going to advertise it because they know that will affect use of their services. People will be afraid to use email because they will not know who is reading their email, who is checking it, and whether there is any prevention of abuse of police powers.

It is completely different to say that it is okay for someone to go into an ISP's premises without your knowledge and read your email. That is a completely different issue to saying they can get a search warrant to come into your home and read what is on your computer. In the case of where it is your home or your office, there is some control over what police can do. They obviously are not going to warrant a huge amount of publicity about abuse of power but they can do it on an ISP's premise because the ISPs will not care about their customers' rights.

If the police come in and say, 'Here's a warrant; we want to check someone's email box,' the ISP will say, 'Fine; go for your life.' They will have to under the law, anyway—they will be required to—but they are not going to tell anyone else about it. They will not want it known how often people's email is being accessed. We think it is creating a whole secret surveillance society where there is absolutely no chance of review of any abuse of power.

Senator GREIG—You have reminded me of legislation that passed the parliament about a year ago, which gives ASIO under some circumstances the right to not only access people's computers to look at the information on them but change the data on those computers without the owners' consent. In relation to VoiceOver IP, would you see that technology evolving rapidly in the way that email has overtaken fax? Is it going to become a popular personalised accessory?

Ms Graham—I think it is more a question of how quickly organisations like Telstra and Optus decide to implement it. I say Telstra and Optus but the same goes for any other telecommunications provider. You can already use it; you can already get software that you can use on your own computer to talk over the Internet to somebody at the other end. But in terms of it becoming more widely used, my understanding is that it is an issue in terms of the big service providers changing over their technology to use it.

My understanding is that there may also be an issue with it at the moment because telecommunication service providers are required under the interception act to ensure that all new technologies introduced are interception capable. There may presently be some issues with just how interception capable VoiceOver IP is in terms of the practicalities of actually intercepting particular messages without breaching the Telecommunications (Interception) Act by accessing other messages that did not have anything to do with the target of the investigation. We are not sure, but we have heard some indications that at the moment this

might be affecting how quickly VoiceOver IP is being used by telecommunications providers, because there may be some issues about whether they can actually make the services interception capable to the sufficient satisfaction of the Australian Communications Authority or whomever it is that they have to satisfy.

Senator GREIG—What is your understanding of the legislation in terms of jurisdiction if an Australian citizen's ISP is offshore?

Ms Graham—We often have questions about how Australian law applies in exactly those circumstances, where the ISP is overseas. More often than not, including in this situation, we really could not comment. If this bill goes through as it is, as far as we can understand it means state police can get a search warrant. Under section 280 of the Telecommunications Act that will let them access an ISP's premises. But it is very unlikely that ISPs on the other side of the world are going to accept a state police—or even an Australian Federal Police—warrant that says: 'You have to intercept this Australian's communications'. Unless eventually we get some court cases or something where the extraterritoriality of the legislation is addressed, I have to say that it would be very unlikely that, if a person is using an overseas service, it can really be addressed currently or under this legislation.

It can be addressed—whatever the offence is that is being investigated—where those other countries have similar laws and will cooperate with Australian police. That has certainly happened on numerous occasions relative to child pornography and so forth, where many countries have the same laws. It boils down to the extent to which a search warrant or whatever, issued in Australia, would be honoured in another country, relative to communications between police forces in Australia and internationally.

Senator BOLKUS—Technically speaking, is it possible to access my, or anyone else's, email messages without going to the ISP provider? Is someone able technically to find out what is in store for me when I access my emails, without going to ozemail premises or whatever?

Ms Graham—Basically, they would have to intercept the telephone line. But that is also extremely difficult, because when an email message is passing across telephone lines to get to your mailbox, it is not a point-to-point connection where a phone number dials another phone number and traffic goes across there, so you can intercept the middle of that. When you have email going to your mailbox at your ISP, it is travelling over the telecommunications line but, as I said before, it is in little packets that eventually all end up getting joined back together. If the police try to intercept a telephone line to catch email messages getting sent to you, it is next to impossible. I am not saying that it is impossible, but they are just not going to want to do that because it is too hard, too difficult and too likely to get other stuff. If they go to the ISP, they can access it on the ISP's equipment.

Senator BOLKUS—If I had my computer working and messages were coming to me or I had deleted messages, and those deleted messages were kept in storage for a while in most instances, if not in all of them, why wouldn't they just be able to access my line and get access to what is in store and to what has been deleted? They would not have to get the person from whom it is coming, but I would have thought that there was some capacity for them to access that information.

Ms Graham—I do not know enough about actual police technological capabilities. But while you were actually connected to your service provider, your mailbox or whatever, it would appear—

Senator BOLKUS—Couldn't they activate access even if I am not connected?

Ms Graham—Perhaps I am not understanding the question. Are you asking: can they get access to your email messages at your ISP or on your own computer?

Senator BOLKUS—I am just wondering whether they need to go back to the ISP.

Ms Graham—That is another issue.

Senator BOLKUS—That is the issue I am trying to pursue. It is not another issue; it is the one I am trying to get to. If they can actually access what is in store for me, what I have got current and what I have deleted, by accessing my line, why do they need to go to the ISP?

Ms Graham—We do not understand that either, because the police can already get a search warrant to go into any person's home to access their mail on their computer.

Senator BOLKUS—So, to get into my message flow, they would need to have a warrant under existing legislation. You are saying that these new bills allow them to access that message flow without a warrant, if they were to go to the ISP. Can they at the moment get access to my message flow without a warrant?

Ms Graham—If they want access to your messages on your computer at home, they need a warrant, or whatever state laws apply relative to issuing warrants, to get into your home to access your computer. At the moment, if they want to get detail on traffic data of emails—which is different to the content of emails—on the ISP server, they can find out the names of the people that you have been sending emails to and receiving emails from without a warrant. If they want to get access to the content of emails that is stored on the ISP's server, they need an interception warrant now. Under this new law, they will not need an interception warrant; they will need a less strict warrant.

Senator BOLKUS—I am trying to anticipate what their argument might be. The only one I can think they might offer is that the message flow is so quick, so rapid, that the time needed to get a warrant may prohibit them from getting access to critical information in some circumstances. If that were the argument they put to you for this particular proposal, how would you respond to that?

Ms Graham—My understanding is that they can already get a warrant to intercept at an ISP's premises all traffic coming to and from your home computer. They can already get an interception warrant to access everything that you are sending or receiving. We do not understand why, if they are investigating a person, there need to be separate rules about access to stored data that is coming to you.

Senator BOLKUS—I am trying to suggest to you that the only argument that I can anticipate from them is that, in some circumstances, the time needed for them to get a warrant has deprived them of critical time in getting access to the ISP. Would that be a defensible argument or has that got holes in it?

Ms Graham—I think you are right; I think that is a potential argument. The balance between privacy, freedom from interception, law enforcement and so forth would not be adequately struck because, in relation to the number of instances where that may be the case, there would be equally as many instances where, by using a search warrant to view stored messages, they would find that the stored messages were not there anyway because the person had already downloaded the messages and had their email package set to delete messages at that time. It would be very much legislation introduced on the basis of a sort of fishing trip:

we might be lucky enough that just occasionally we could grab something that we were not already able to grab.

EFA's view is that it is certainly a complete imbalance in the amount of probability of it actually helping law enforcement. In the last few days, I have been reading through last year's report of the Joint Standing Committee on the National Crime Authority that investigated law enforcement implications of new technology, and I have read the NCA's submission, the Attorney-General's submission and numerous other things. Nowhere is this issue of stored data even discussed. The NCA state that they do not have a problem with access to email because they can already use an interception warrant. Numerous other law enforcement authorities said to that joint parliamentary committee that there were issues about technology and their powers, but the issues they were discussing are not addressed in this bill—something entirely different is.

CHAIR—Thank you very much, Ms Graham. You have assisted the committee with both your written submission and your comments this afternoon. I am sure that you have raised issues which members of the committee will take up with agencies when they appear before the committee later this week. Thank you for assisting the committee this afternoon.

[3.00 p.m.]

HOCKING, Dr Jenny (Private capacity)

CHAIR—Welcome. Do you have any comments to make concerning the capacity in which you appear?

Dr Hocking—I am the head of the National Key Centre for Australian Studies, Monash University, but I am appearing in a private capacity.

CHAIR—I remind you that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute contempt of the Senate. I also remind you of the notes you have received relating to parliamentary privilege and the protection of official witnesses. The committee has before it your submission, which we have numbered 140. Are there any alterations or additions that you wish to make to that submission, Dr Hocking?

Dr Hocking—No.

CHAIR—Thank you. I invite you to make an opening statement at the conclusion of which members of the committee will direct questions to you.

Dr Hocking—First I would like to thank the committee for giving me the opportunity to appear before it today to discuss aspects of the [Security Legislation Amendment \(Terrorism\) Bill 2002 \[No. 2\]](#), which I think is a significant bill which requires significant discussion. I confine my remarks to the issues which are raised by part 5.3 of the bill, that is, the proposed new crimes of terrorism offences, the definition of terrorism upon which these crimes are based and, finally, the proscription powers which would allow the Attorney-General or other delegated minister to ban organisations and thereby criminalise support for, and other association with, such organisations.

I also further submit that these issues need to be understood in the context of the conjunctive workings of the detention and intelligence collection aspects of the ASIO amendment bill 2002. I realise that is not an issue this committee is looking at and I do understand the constraints of time placed on the committee and that those constraints are not of its making, so this is in no way a criticism of the committee but it is my strong view that the time frame that has been allowed for consideration of what is an extensive package of security legislation has been alarmingly inadequate and I repeat that I believe this bill requires further detailed consideration in conjunction with other aspects of the government's security proposals. I will say a couple of words about that in a minute.

My opening position is that to date the development of Australia's counterterrorism strategy has generally been measured, appropriate and without the dangers we have seen elsewhere with the introduction of what have been called 'special powers' to deal with acts of violence described as terrorism. But with the introduction of the bill under discussion today this appears set to change. Aspects of this bill remove established rights, in particular trial by jury and freedom of political association, which I would focus on today. The broad mandate of counterterrorism may put the core principles which distinguish liberal democratic regimes from authoritarian ones under great strain, and that has historically been the case and I think is continuing here today.

Justice Michael Kirby of the High Court of Australia called for the continued protection of our legal and political rights and an adherence to the great principles of justice, in the wake of

the September 11 attacks in America. In a speech soon after that, Justice Kirby argued that the countries that have done their best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes and adhered steadfastly to constitutionalism. This is a position that I would argue here today: that we need to work within the existing criminal justice framework to deal with political violence rather than adopt an exceptional approach to counterterrorism as this bill proposes.

The bill establishes new terrorism offences which carry a penalty of life imprisonment. The bill defines 'terrorist act' in terms of both action and threats of action and made with 'political, religious or ideological' intent. It is the imprecision of this definition and its clear focus on groups and individuals with a political, religious or ideological basis that leads to grave fears about the extent of the bill's operation and the potential reach of its provisions. The bill also provides the means for the Attorney-General to outlaw terrorist organisations and organisations that threaten the integrity of security or another country. Here we see the broadening out of what are ostensibly counterterrorism powers to cover notions such as the 'integrity' of a country, which is undefined anywhere in this bill. The elevation of executive power in this way has strong echoes of Prime Minister Robert Menzies' earlier attempts to pass the Communist Party Dissolution Bill in its banning of political organisations by executive decree.

I would argue that the introduction of a crime of terrorism as defined by reference to political, religious or ideological motivation brings with it implicit dangers of the criminalisation of organised political activity through its presumed connection to what has been termed terrorism. Such an imprecise and inappropriate definition can readily degenerate into a means of entrenching existing political order rather than combating serious crimes. The potential reach of the definition in the bill of 'terrorist acts' and its associated offences is expansive and carries for every possibility set out there a penalty of life imprisonment. My particular concern throughout this discussion is the impact of these proposed changes on established political and civil rights and on the freedom of political association which together constitute the essence of a healthy and dynamic democracy. Citizens who fear that their entirely proper and indeed desirable political agitations might be seen as terrorism or that they might face 25 years imprisonment for their continued support for a proscribed political position cannot engage freely in dissent and cannot engage freely in demonstration. We ought never forget that we owe a great deal of our progress to the work of political agitators.

I just want to say a few words about the safeguards of the bill which I consider to be, briefly, inadequate. The qualification that has often been referred to, I know, by the Attorney-General and others as a safeguard that 'terrorist act' does not include 'lawful advocacy, protest or dissent' in my view provides no relief from any of these concerns. This is because a range of other actions—and I heard the ACTU submission earlier this afternoon on this—such as property damage, damage to Commonwealth property that occurred at Woomera in the last few weeks for example, occurring during most protests would come within the strict definition. They would not be subject to the qualification that this definition provides. And this is the case even though ordinarily those sorts of actions, and indeed a range of actions which I am sure have been gone through already, would not normally be considered to be a 'terrorist act', whatever that problematic term is taken to mean.

But in my mind one of the most extraordinary aspects of the proposed offences is that terrorist offences may stand even if the terrorist act upon which they turn never actually occurs. This would appear to make the offence of committing a terrorist act unique in that it

may be committed even when the central ‘act’ aspect of terrorism itself has not occurred, and I find that a bizarre notion that is set out within the definitions there.

If I could say a few words about the proscription powers with which I am greatly concerned: the very description of a proposal to allow the Attorney-General or some other delegated minister to proscribe organisations in the absence of a trial is of course a major concern. The proposal breaches the notion of equality before the law in its specification of groups within the community for which the usual judicial process of charge and trial would not apply. Such an executive power is subversive of the rule of law and breaches absolutely the separation of powers, by allowing a member of the executive to determine, in effect, criminality. In this respect the bill appears to have forgotten that we have a criminal justice system. I always thought that that was what the courts were for. The reach of the proscription mechanism, moreover, is extraordinarily broad and goes beyond this. The bill suggests that an offence may be deemed to have occurred by an organisation or a member of an organisation even when they have not been charged and possibly, on my reading of the bill, even if they have been charged and acquitted. And it seems that in that section there are two different meanings of the term ‘offence’ used within the one sentence.

It is important to recall that a member of a proscribed organisation may also be what is called an ‘informal member’, which is again undefined, and that makes the reach of this section even more open ended. The devastating impact this has on freedom of political association and the ability of individuals to freely, openly and without fear engage in political discourse can be summed up by the Attorney-General’s comments in the explanatory memorandum. I quote from him here in relation to the charge that may follow in terms of support for a proscribed organisation, which of course then becomes a criminal offence. He states there what he refers to as:

... the fact that it is not legitimate to be a member of or have links to an organisation of a kind that could be proscribed.

An organisation that could be proscribed! So here we have a broadening out, yet again, from a central argument about the proscription of particular organisations, which in itself I find extremely disconcerting, to an even broader notion that an individual ought to have some understanding, ought to be able to get into the Attorney-General’s head and see what he might in the future proscribe. This is in relation to the strict liability issue.

Nor is there any specification within this proscription provision of the act that proscription cannot extend to political parties, to unions or to organised political movements. Indeed, the definition that is gone through there might suggest that particularly the latter, the organised political movements, might be the sorts of organisations that could well be proscribed under it. There is no exemption, therefore, of notions of existing political parties. The provision for review of the proscription process under the Administrative Decisions (Judicial Review) Act 1977 is, as many people have already submitted, too narrow in its focus to provide any means of review of the merits of the substantive decision to proscribe and it certainly cannot address the issues that I have raised here which address the fundamental concerns about this use of executive power. In my view, then, there can be no adequate safeguards against the dangers raised in this aspect of the bill. I want to be quite strong about this: that in my view the danger is the bill itself. The dangers to our civil liberties arise not from the minutiae of the bill’s operations, not from the minutiae of the bill’s interpretation, but from the very power which it would give the executive to act in this way.

Finally, I just want to reiterate what I opened with, which is that I do see it as crucial that parliament continue to scrutinise this bill and others and particularly this bill in conjunction with the power sought under the proposed amendments to the ASIO Act. This bill is one of a raft of new proposals which fundamentally restructure Australia's security laws. As the Attorney-General, Daryl Williams, has indicated, the proposed bill forms part of a package of security legislation. It is crucial, in my view, that parliament has the opportunity to consider the bills together and their implication as a whole for fundamental civil and political rights. There is one critical example I bring to your attention of the intersection of these bills. It is contained in the proposed new subsection 34G(9) of the ASIO amendment bill 2002.

CHAIR—Dr Hocking, the bill is not under consideration by the committee in these hearings.

Dr Hocking—I realise that, but it refers in turn to this bill. If I could point you to that, it states that information gathered whilst under detention would be allowed for use only in the case of a terrorism offence. That, to my mind, creates a nexus between the two bills, and I have made a submission to the parliamentary joint committee on this matter also. I am not sure which committee to bring it to, but I think it is important to note that material gained whilst an individual is under what I would call coercive detention, because there is a penalty of five years for failing to answer, is able to be used only in terrorism offences.

CHAIR—Okay. We make no comment on the ASIO bill. We note the point that you have raised.

Dr Hocking—Thank you. I would urge the committee to recommend further examination of the bill in conjunction with other bills, as I say, which together propose not only a fundamental alteration of the internal security arrangements in this country but a fundamental reworking of the relations between the arms of government. It is through this restructuring that this bill poses a grave danger to freedom of political association, to the democratic fabric of justice and to the continuation of Australian liberal democratic practice.

CHAIR—Thank you very much for your oral submission and for your written submission. There are a number of questions from senators, and I will ask Senator Ludwig to begin those.

Senator LUDWIG—I have had a look at your submission in relation to the proscribed organisations. Do you have the bill there with you?

Dr Hocking—I do.

Senator LUDWIG—In subclause 102.4(4), it says:

It is a defence to a prosecution of an offence against paragraph (1)(c) if the defendant proves that the defendant took all reasonable steps to cease to be a member of the organisation ...

I will tie that in with the definition of a member of an organisation in section 102.1, where it says that a member of an organisation includes a person who is an informal member of the organisation. Have you formed a view about how a person who might be an informal member of an organisation could take all reasonable steps to avoid being caught by that legislation?

Dr Hocking—The difficulty, as I think you are indicating, is that for one to be an informal member this in itself is not defined in the bill, so it is unclear what constitutes informal membership of an organisation. Again the resonances with the Communist Party Dissolution Act are pretty strong here, because there was provision within that for what were call affiliated associations.

Senator LUDWIG—Yes, I was going to ask you to expand on that a little; that is why I drew you to that. I note in your submission the analogy you are drawing, if it is an analogy, between the Communist Party Dissolution Act and those provisions. That is why I took you to this one, to see whether or not you thought there was a parallel to be drawn.

Dr Hocking—I think the parallel to be drawn is not necessarily a distinct one-to-one correspondence, because there are significant differences between them. I think the parallels lie in the concerns that both these bills are raising for us today in terms of the way in which we operate as a political community. Both of these proposed pieces of legislation really are at the heart of understanding how we allow dynamic political activity to be a successful part of a democratic community. What concerns me about the use of a term like ‘informal member’ is that it is through poorly defined or quite undefined terms like this that the already concerning nature of the bill is actually expanded yet further. What constitutes an informal membership: is it going along to a meeting like this and sitting in the back row but being interested in it? Is that an informal membership? Is it, as it was in the Communist Party Dissolution Act, agreeing with one of the policies held by the Communist Party? In other words, if you agree with some of the views held by proscribed organisations, does that mean that you are informally a member? It is nowhere defined.

I think they are the sorts of things that do lead to the concerns people have being exacerbated, if you like, by the poor definitions that are set out in the bill. Since removing oneself from that process of membership is allowable as a defence, it in effect is making it extremely difficult, if not impossible, to remove yourself as an informal member. Do you ring up and say, ‘I no longer wish to be an informal member’? A proscribed organisation is unlikely to have a sort of institutionalised authority anyway if it has been recently closed down. So, yes, there are immense difficulties with that. One of the other elements here that I would like to point out in terms of the proscribed organisation offences is paragraph 102.4(1)(e), assists the proscribed organisation. Rendering criminal an individual who assists a proscribed organisation I think highlights many of the concerns that have been expressed.

Senator LUDWIG—It is a matter I have raised before. Sorry to interrupt you. If you contemplate this—if a person was to be a lawyer and called on by a proscribed organisation to assist them in their defence of that—it is a question of whether or not they would come within the ambit of the actual bill itself. As I understand it, the response from the Attorney-General’s is that they have identified it as a potential flaw, although I am happy to be corrected in that statement by the Attorney-General’s Department. We have raised that matter, and they have then responded by saying that there may be a potential problem with it.

Dr Hocking—I absolutely agree. I actually read the *Hansard* on the hearings in Sydney and noted that also. It appeared that the representatives from Attorney-General’s were acknowledging that that was indeed not an unreasonable reading of this particular part of the act. I was a little bit surprised by that, I guess, but they did acknowledge that.

Senator COONEY—Shows you how frank and honest the people from the Attorney-General’s Department are.

Dr Hocking—That is right. That is to be applauded, of course. I would imagine that—from the point of view of people who write in this field or, like myself, who perhaps write opinion pieces on these matters—that also could come within the notion of assisting a proscribed organisation if somebody is to perhaps argue publicly against the proscription process itself or against the specific proscription of a particular organisation. Your intention, presumably, is to have the proscription lifted or revoked in some way. So there are grave concerns with this

notion. The fundamental concern for me, of course, is that to allow a member of the executive to step into what I see as a judicial realm in this way, rather than a realm ordinarily taken over by the executive, is a dire proposal and one that I hope is resisted strongly.

Senator LUDWIG—If the ADJR procedure for the proscription of an organisation or the appellate mechanism that would be utilised were to stand, I am just curious whether you have turned your mind to whether or not the courts, in reviewing that, would then use jurisdictional error as a mechanism for a merits review process. In other words, would they then effectively find jurisdictional error and use that to explore merits review? Have you turned your mind to that question at all? Obviously, if you could have only errors of law as a mechanism to review, would that cause the courts in unusual circumstances to expand jurisdictional error to incorporate effectively what would be a merits review process to deal with some of those additional matters that would otherwise not be within the jurisdictional error?

Dr Hocking—I cannot comment on that, I am sorry. But, in my own mind, the provision for review that exists does not actually address the substantial criticisms that have been raised about the bill. They cannot, in effect, address the substantive issue of the passing of an executive power in this way. My understanding—and it is not my field of expertise—of the judicial review process is that it cannot be a merit decision.

Senator LUDWIG—No, that was the point of the question but, if you have not dealt with it, I will move on. Do you then say that, as an alternative to the ADJR process, a court reviewable process should be entertained, such as what is under the Crimes Act now under a show cause provision?

Dr Hocking—Certainly my bottom line would be yes, there ought to be a court process, whether or not it is in the form set out in the current Crimes Act for declaring illegal organisations or unlawful organisations—I think that is the term in the legislation, which I actually have here. It is unclear to me why this provision that already exists in the Crimes Act is not being suggested for this particular process, which is a mechanism for declaring unlawful organisations. It is interesting, if you just have a brief comparison—

Senator LUDWIG—I am familiar with 30AA.

Dr Hocking—that the intentions of the bodies that are to be declared unlawful are far stronger than those provisions that are set out by this proposed law. These bodies have to be bodies that are actually advocating or encouraging the overthrow of the Constitution by revolution or sabotage and so on. So they are much stronger grounds for the rendering unlawful of organisations than those that are set out in much vaguer terms in the current proposed bill.

Senator LUDWIG—On page 6 of your submission, in the penultimate sentence of the last paragraph you say, ‘... after a terrorist act, even if the terrorist act does not occur.’ You then make the statement in the last sentence:

This would appear to make the offence of committing a ‘terrorist act’ unique in that it may be committed even when its central aspect has not occurred.

What about preparatory acts—are they excluded or included, although the offence may not have been committed?

Dr Hocking—They are clearly included in the generic term of ‘terrorist offences’.

Senator LUDWIG—I was just wondering if you were saying that was unique. I cannot imagine that being unique, in the sense that if someone was taking preparatory acts to commit

an offence it still is an offence. Where are you saying the uniqueness comes in? That is what I am trying to ascertain.

Dr Hocking—In relation to?

Senator LUDWIG—You say it ‘would appear to make the offence of committing a “terrorist act” unique in that it may be committed even when its central aspect has not occurred.’ As you may be aware, you do not actually have to commit the crime. You can do a series of preparatory acts and have the intent of committing a crime but fall short of doing so to still find yourself in trouble with the law. Do you say that is different from this?

Dr Hocking—No, I suppose that is a similar thing.

Senator LUDWIG—I am just trying to understand your point. You say it is unique—I am just trying to understand the uniqueness that you are trying to attach to it.

Dr Hocking—You are probably right there. But I think that in the construction of an offence, in the sense that the terrorist acts are set out here, the penalty of imprisonment for life is also an issue.

Senator LUDWIG—Yes, I was going to come to that.

Senator McKIERNAN—Before you go to that, in your oral presentation this afternoon, Dr Hocking, you went on to describe this particular element as being not only unique but also bizarre. Are you withdrawing that comment ‘bizarre’ in this context that relates to an offence which may not have occurred? It is at the bottom of page 6 in your submission. In your oral presentation this afternoon, I think you went on to describe it as being bizarre.

Dr Hocking—What I am getting at there is that all of these terms have the generic term ‘terrorist offence’ attached to them. I am not saying this is bizarre. Yet what we are describing here are a series of actions that vary greatly, from an actual terrorist act to preparation or possessing a thing in preparation for an act that did not actually take place. It seems to me there is a great breadth of actions there, which are all subsumed under the single notion of a terrorist act.

Senator COONEY—I suppose there is also the concept that the legislation creates the ability of government to just suck in a whole lot of people, whom they might never charge. In other words, you could make a declaration—even on the basis of what the United Nations says—and then just grab people from all over the place for all sorts of reasons. Have you thought about that?

Dr Hocking—The concern with the specification of ‘terrorist act’ and the definition contained there is, to me, that specification of ‘particular motive’. I accept that it may not be a unique component but I think it is an unusual component of a substantive act to allow the intent to determine whether an offence is considered a terrorist offence or not. I cite, in my longer submission, Sir Victor Windeyer’s comment to Justice Hope’s report in the late 1970s. It is interesting that he referred to the essential element of ulterior motive as something which he argued ought to be resisted as a basis for new types of criminal offences. I think it adds to the linguistic imprecision which does fuel the deep concerns that people have over the reach of the bill. By focusing on political, religious or ideological intent or motive, it also automatically suggests that—as I think you are indicating, Senator Cooney—there are particular types of organisations or individuals who will come within the purview of examining or placing under surveillance or keeping a check on possible causes of terrorism.

Senator COONEY—It is also very fluid in the sense that the Attorney-General can proscribe organisations, which makes you a criminal today, takes that away tomorrow, you become innocent again and so on. It is all very loose, I suppose.

Dr Hocking—That is common with national security terms that the notion of threat does change. The national security threat of the fifties is not the same as the national security threat of today. Part of the basis for the concern is that this sort of legislation cements notions that are contingent, shifting and do develop over time. It is at risk of, in effect, criminalising or setting in place existing structures of political activity rather than actually dealing with established criminal acts or acts of violence.

Senator COONEY—And leaving that decision to cabinet, the Attorney-General being a member of cabinet. He says, ‘You have to be realistic. I am a member of cabinet. I have to act accordingly.’ I understand your arguments that it then gives the executive this power to come down on people and withdraw the next day and come down on certain others.

Dr Hocking—I would query very strongly the use of the executive power in that way. I feel that it changes the balance of powers between the different arms of governments. It is not something I would have seen as part of our traditional structure of government and certainly of the role of the judiciary. I would argue strongly against it and I suppose I have made that clear in my submission.

Senator SCULLION—Dr Hocking, I very much appreciate the comprehensive nature of your submission. It certainly helped me get my head around some of the materials. I note that you have quoted the Attorney-General and others in your submission. One of the quotes notes that, ‘We started off here principally to outlaw terrorist organisations and organisations that threaten the integrity and the security of Australia or another country.’ That, just in itself, would not seem to be such a heinous approach. But, as you so articulately put it, you believe the nature of the legislation casts a net that may be inappropriately used. It gives greater power to the executive and in the future it may not be an appropriate approach. I accept that and I am not questioning that part of it.

I just want to understand the principle. If there was an opportunity to throw a net so it simply caught organisations like Al-Qaeda, would you have a problem in principle with that or is the net simply too wide or does it give inappropriate power to the executive? Do you have a problem with the actual proscription of terrorist organisations like Al-Qaeda?

Dr Hocking—I do have a problem with the proscriptive power as it is set out here. As we discussed earlier, there is already a section within the Crimes Act for dealing with declaration of unlawful associations. It is unclear to me why at least a method like that cannot be used in this particular case. I do think that allowing that power to rest with a member of the executive in a way that is proposed in the bill does have severe problems. Whilst clearly there is a perceived need to deal with the issues that have come out of a post September 11 situation, I do have grave concerns about the way in which this particular package—and I come back to it as a package of legislation—is being done.

The way in which this ought to be addressed is to argue strongly for further consideration of the series of interrelated legislative changes that are being proposed here. Yes, this is something that needs to be addressed. I cannot accept that, the way in which the proscription power is set out here, is the way in which this ought to be done. I suppose what I am saying is that it appears to me inevitable that, once that power is there, those concerns that go with it must be there also.

Senator SCULLION—You also note about the level of threat. We understand from your comprehensive submission why we perhaps do not need to deal with it to the extent that is suggested by the legislation. In your submission you quote the Attorney-General:

‘The profound shift in the international security environment has meant that Australia’s profile as a terrorist target has risen and our interests abroad face a higher level of terrorist threat.

He goes on to say:

There remains no specific threat of terrorism in Australia.’

In view of that, what level of threat do you think would trigger this sort of legislation? You make the point that we have gone along very differently from the fifties to now. What sorts of circumstances would you believe could trigger these types of powers rather than just having them out there? What sort of level of threat would you look for?

Dr Hocking—That is a very interesting question. I think what it suggests is that somehow these things are like a balancing act and that we take further legislative measures for security and we improve our security at a national level. I am actually not sure that it is a zero sum game in that way. I think one of the problems with this bill is that it treats democracy as infinitely divisible: that we can chip away at bits here, rights here, established protections for freedom of association et cetera there, and yet somehow we can retain the sense that this a democratic community and we can continue to have faith in our institutions as functioning democratically. I am actually not sure that that is the case. This is the key reason why I have very grave concerns, which clearly I feel very strongly about.

One of the things which we probably have not addressed, and which I have not heard much discussion about but which I think ought to be addressed, is what connection there might be between our clear and much commented upon low level of terrorist threat—and I think the Attorney-General is correct in his comment that we do not have a high level of threat and there is no known specific threat at this stage—and historically we have not had a high level of terrorist threat either. We need to ask why that is the case. Justice Hope addressed that briefly, I think it was in the royal commission rather than in the protective security review report in the early eighties, when he said that it is possible that in part a functioning democracy that protects the rule of law is one of the best protections against the use of political violence.

In other words, I think we need to ask what is more a political philosophical question about the way in which a marginalised political society is more likely to give rise to political violence than is a society in which all elements of society feel that they can have an avenue, through the political and parliamentary process, for some voice. What worries me about this particular package of bills is that it starts to chip away at that through the avenue that it allows for the criminalisation of support for political positions that are being proscribed and so on. So I think one of our great protections is in fact, as Justice Kirby said, to maintain our constitutionalism and adhere to the great principles of the rule of law.

Senator GREIG—I just have one question. I confess to having not read your book from 1993, *Beyond Terrorism: The Development of the Australian Security State*.

Dr Hocking—I have a copy with me, if you are interested.

Senator GREIG—I am wondering, not having read it, did it contain some recommendations to government on the way in which you would like to see Australia go, and in what way is that not being reflected in the current legislation?

Dr Hocking—It is probably almost 10 years ago that the basic structure of the book was completed.

Senator GREIG—Was there a political context in 1993 around terrorism which precipitated or was a part of the framework of your writing?

Dr Hocking—What it was doing really was setting a record of what had developed in the area of counter-terrorism. I would say that post 1976-77 was the point at which we, along with all Western countries, began to look at what was seen as the new security threat of terrorism and began to restructure security organisations around that threat. I did argue in the book that many Western countries had used what is called a counterinsurgent approach to counter-terrorism developments and strategy and, yes, I argued that I felt that approach was not appropriate for a democratic country that was not, essentially, on a civil war footing, which is where many of those strategies perhaps come from.

I feel, as I said in my opening submission, that we have been measured and I think that we have had an appropriate response. We have not gone down the path of having exceptional legislation, which has been the case elsewhere. In that book my major criticism of developments was probably one that this committee is not concerned with, and that was the adaptation of what might be seen as a militarised aspect to policing with the establishment of counter-terrorism squads within the state police forces. Other than some of the queries that have been raised over those sorts of developments, and they are largely operational issues as well, I think the strategy we have adopted here has been consistent with the level of threat and with the needs of us as a society living in a world where security threats do change and a society that has had to deal with what was seen as a new development in international security issues.

Where that has changed now is that we are moving, I think, towards the use of a more exceptional model. A lot of the literature suggests that there are two approaches to counter-terrorism. One has been to adopt what I have called the counterinsurgency approach, which is a more exceptional model, and the other is to work within the existing criminal justice system and to ensure that that is the means through which a new perceived threat is dealt with. That is what I would continue to advocate here.

Senator GREIG—Do you think that a part—not all—of Australia's low level of terrorist threat is geographical, in terms of Australia being so far from northern hemisphere capital and politics?

Dr Hocking—Yes, I think that is an element of it and I think also you cannot avoid a political context to this sort of security issue. I come back to the view that we have a democracy that is able to function across many different and diverse groupings here in Australia. It does not operate as a sort of 'tyranny of the majority', which is not tantamount to the standard democratic process. I think where we have avenue for lawful or legitimate dissent and where we have avenue for all people to have access to the consideration of political issues is also of extreme importance. I am not saying that we are perfect or that it is unflawed in some ways but I do think we do have it pretty right a lot of the time.

Senator GREIG—Do you think there is a risk, if Australia goes down the path of adopting legislation of this nature and joining with what you might call a British or US model towards counter-terrorism, that we reverse that minimisation of terrorist threat to ourselves? That we are buying into a bigger argument?

Dr Hocking—I think it is one of the grave concerns. I think that we have a very different political context here from the countries that you mention, very different needs in terms of our security, and I think there is a real issue about the way in which these things affect each other. It is a risk I would not want to be taking.

Senator McKIERNAN—Thank you very much for your submission and the answers you have provided to questions today. They have been most helpful. I want to develop one particular point—and part of it has been answered so I will not delay the committee very long. You make the point in your submission on page 6 that this is the first occasion that specific offences of terrorism are being proposed in Australian criminal law. You went on in your answers to other questions to say that really there is no need for this legislation, that it could be handled with a counterinsurgency approach. But wouldn't a counterinsurgency approach only address a domestic situation rather than a terrorist act which would have international implications or ramifications? Would the counterinsurgency approach be sufficient? I say that in the context of post September 11 and a number of other events that have occurred around the world. While we have been protected from them, nonetheless, we may at some time in the future be exposed to them.

Dr Hocking—You are right in the sense that I think a counterinsurgency approach to development of our counter-terrorism structure is predominantly a domestic strategy and one which is geared towards dealing with domestic issues of what you might call political violence or terrorism. Are you speaking of events that occur on Australian soil?

Senator McKIERNAN—Indeed, yes—a 747 aircraft could be used here as it has been used in other places around the world as a 'thing', as it were. I am not saying that in defence of the proposed legislation; I am merely trying to elicit information from you on your suggestion of a counterinsurgency approach.

Dr Hocking—Would that not come within the existing criminal code in some way?

Senator McKIERNAN—You made that point but you also went on to say that it could be addressed from a counterinsurgency point of view. I understood you to be saying in the absence of some terrorist legislation, which is the point you have made quite strongly in your submission.

Dr Hocking—There may be some misunderstanding there. I am suggesting that a counterinsurgency approach has been a common approach to developing counterterrorist strategy elsewhere, and I would see the movement that we have in this current legislation as a movement towards that. My preferred position is that the existing criminal justice method is used for dealing with crimes that otherwise would be called terrorist crimes. So I am not actually a strong supporter of the use of a counterinsurgency approach in that context within the domestic setting. Sorry if there has been some confusion.

Senator McKIERNAN—Thank you for that.

Senator COONEY—Talking about the Communist Party Dissolution Act 1950—you were not alive when that came in?

Dr Hocking—No, I was not—only just..

Senator COONEY—One of the problems about the fifties was that nobody was proceeded against but reputations were traduced just by the appearance of the legislation and the allegation. Under this legislation, proscribed organisations may attract opprobrium within the community, even though nobody is charged in respect of that declaration. Do you see any

problems there? In other words, an exercise by a cabinet, through the Attorney-General, would enable organisations to be declared, even though nobody is ever proceeded against. Nevertheless, the damage to that organisation and the people in it within the community could be very severe.

Dr Hocking—I think that is clearly the case and that is the crux of the concerns over that particular aspect of the bill. As you say, the proscription of a particular organisation—which can take several forms—by then criminalising continued support for the organisation, tarnishes the members of that organisation as well. It is interesting in that regard that, of the several forms through which the Attorney-General or delegated minister may decide that reasonable grounds exist to proscribe an organisation, one of them is that a member of the organisation—and that can also include the undefined informal member—has committed or is committing an offence on behalf of the organisation. That is whether or not the member has been charged with or convicted of the offence. So it is a way of proscribing an organisation in totality through what are perceived to be the activities of one member or informal member. That then has implications for others who are also members of the organisation or who may support the organisation.

Senator COONEY—On the opposite side of that, if you have legislation like this and it is controlled through the executive, then you might well say, ‘They are terrorist organisations.’ You may remember in the sixties and seventies this sort of allegation was made and organisations were not proscribed. So some are and some are not—you get to the cherry-picking stage. Whether that is consistent with a fair and just criminal justice system is an issue that you might like to comment on.

Dr Hocking—It seems to me that that is an issue. I think this gets back to the problems that we talked about before, about the definition of ‘terrorist act’ and the general use of the two-pronged approach to the notion of terrorism. That is, firstly, a substantive component and, secondly, the element of motive or intent. The determination as to which of those acts will be termed terrorist acts, in terms of the proscription power, is one that has the potential to be used in an arbitrary way, in that the final judgment is made through an executive decision on each case by case basis. That raises concerns about fundamental notions of like being treated as like before the law.

Senator COONEY—I understand that your submission is that you must look at the whole of this legislation, not just the legislation we are looking at, to get an idea of what is happening here.

Dr Hocking—I am concerned that there are aspects of this bill that ought to be considered in conjunction with the ASIO Amendment Act as well. But I have raised that and I have also made a submission, so I think they will be dealt with.

CHAIR—We have taken the point, Dr Hocking.

Dr Hocking—Yes, well, Senator Cooney raised it.

Senator COONEY—I did. Regarding the relevant publications, do you have other publications that are not particularly relevant to this? This is a formidable list of works you have done over the years.

Dr Hocking—I put down the ones that were relevant to the discussion of terrorism.

Senator COONEY—But there are others?

Dr Hocking—There are others. One of them is here.

Senator COONEY—And for a small fee—

CHAIR—Thank you, Senator Cooney.

Senator BOLKUS—We have been told that ‘informal member’ as a concept is intended to cover a situation where organisations do not keep membership lists—the guilt by informal association type mechanism. But my reading of the definition may include even more than that. Have you any view to express with respect to that?

Dr Hocking—You might ask whose list the notion of informal membership is going to be based on. I think this is the sort of thing that, if we could discuss another bill in another place, might have relevance here. You might ask: where does a claim of informal membership then come from? Is it through a naming process elsewhere? That is a real concern. There is a definition in this bill of ‘member’, but it seems to me that there is no closer specification of ‘informal member’ other than that a member of an organisation will include a person who is an informal member.

Senator BOLKUS—It could mean anything.

Dr Hocking—Yes. The Communist Party Dissolution Act notion of affiliation included people who ‘shared policy concerns’ with that proscribed organisation, who attended meetings or who are claimed by others ‘to have been associated with’. So, clearly it seems to me, it is one of the areas where both an open-ended aspect comes into the bill and where an element of arbitrary decision making can come in through the proscription power.

Senator BOLKUS—It does not take much imagination to link that, for instance, with 102.21D, ‘organisation that has endangered or is likely to endanger the security or integrity—I will get back to integrity later—of the Commonwealth or another country’. I would imagine that would include most of the Greek Australians living here who were members of PASOK at a time when there was a junta in Greece, those who opposed Milosevic, Ceausescu and Suharto, and the Kurds living in Australia now. All those organisations had formal membership, but in the case, I suppose, of PASOK half the Greek churches were part of the movement to knock over that government. A reading together of those two clauses would give you an enormous number of people in this country who would be, I suppose, legitimate targets under this legislation.

Dr Hocking—I think it is so broad that it could encompass that. It seems to me that it allows for a decision to be made, even in political disputes elsewhere where people would say there are clearly two sides to that particular case and yet this may come down on one side rather than another. In that context I think it may lead to a process of criminalising the continued support for that. The first step is the proscription, but let us not forget that the additional ramification of that is the criminalisation of continued political action in relation to those particular bodies. That is of grave concern when we look at the need for such organisations to exercise dissent and to organise and to have freedom of political association and so on.

Senator BOLKUS—I forgot the IRA. I suppose we could say that Senator Cooney is not entitled to be an agitator under this legislation.

Dr Hocking—I almost used that in my submission.

Senator BOLKUS—The term ‘integrity’. Do you have any idea as to what it is supposed to mean? I am sure John Howard doesn’t.

Dr Hocking—I believe Professor George Williams made some comments on this. I read through the earlier submissions that were given to the meetings in Sydney. No, it also does not appear to me to be defined in the act. No doubt the people who address you on specific legal issues would point to particular legal cases in that regard, but that is not my field.

Senator BOLKUS—The UN Security Council's decisions identify international tourist organisations. Is there an identifiable list? Do you know how we can discern what is recently identified as such?

Dr Hocking—My understanding is that there is a list in relation to bodies already gazetted under the 'funds to terrorist groups' legislation. I cannot remember the precise title of that.

CHAIR—'Finance and terrorism'.

Dr Hocking—I think there is a gazetting of a list that comes from the UN on that.

Senator BOLKUS—I suppose they are all sort of minor points in respect of prescription, but I think they add to the major point you are making that the concept of prescription is one that really is not manageable and not workable at the least and probably even more distasteful than that.

Dr Hocking—Yes. My fundamental concern is the broad structural one about having an executive power in this particular manner. That is my fundamental concern. You are right in the sense that, whilst this is clearly important because it indicates the breadth of it and perhaps even elements of intent of it, it does not address the fundamental question which is that this power is there at all. I do have grave concerns for that.

Senator BOLKUS—Could it work as a judicial type mechanism—a Justice Kerr, for instance, trying to make decisions as to what was proscribed and what was not is totally different from a Justice Murphy.

Dr Hocking—As I said earlier, I think that there is a long established provision for a similar use of declaration of unlawful organisations in the Crimes Act and that, at least, has a judicial process to it.

Senator BOLKUS—Thank you.

CHAIR—Thank you, Dr Hocking. You have been very generous with your time this afternoon and we are very grateful for your submission and comments and responses to our questions today. You have been extremely helpful.

[3.58 p.m.]

ABOUKHATER, Mr Laurence, Deputy Chair, Ethnic Communities Council of Victoria

BORG, Mr Victor, Member of Executive Council and Past Chairman, Ethnic Communities Council of Victoria

KLEPNER, Ms Judith, Policy and Regional Officer, Ethnic Communities Council of Victoria

CLELAND, Mr Bilal, Secretary, Islamic Council of Victoria

CHAIR—Thank you. The two councils, although sharing this session, appear in separate capacities. I note also that the committee is running later than the scheduled program but you will be aware that is because we have endeavoured to hear from previous witnesses at length and question them at some length also. I indicate to both organisations appearing this afternoon that I am sure the committee will extend the same examination to your submissions and oral evidence to ensure that you both have the opportunity to put all the remarks you wish to make on the record and to respond to questions accordingly.

I remind witnesses that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute contempt of the Senate. I also remind witnesses of the notes they have received relating to parliamentary privilege and the protection of official witnesses. The committee has before it a submission from the Islamic Council which we have numbered 138. Are there any additions or alterations that you wish to make to that document lodged with the committee?

Mr Cleland—No.

CHAIR—The committee have before them a submission from the Ethnic Communities Council of Victoria, which we have numbered 135. Mr Borg, are there any additions or alterations you wish to make to that document lodged with the committee?

Mr Borg—We will add verbally to that submission. Is that what is proposed?

CHAIR—That is fine. I would like to invite each organisation to make a brief opening statement, at the conclusion of which we will move to questions from members of the committee. We will begin with Mr Cleland and then move to the ECC.

Mr Cleland—The concern of the Muslim community here in Victoria and throughout most of Australia, as I understand it, is over the turn that the definition of terrorism has taken since the atrocities of September 11. Most of the Third World has been acquainted with this sort of assault, not quite on as large a scale but for a long time. Two-thirds of our Muslim population come from overseas, and one-third is now Australian born. Those who come from overseas are really concerned by the drift in public opinion and by some of the media attacks that are occurring. They are also concerned that the atmosphere here will become as poisoned as it has become in the United States for many Muslims. We are concerned that the definition of terrorism will take on a religious, bigoted tone, and it could mean that the Muslim community here will become unjustified targets of interference and hostility from the state authorities.

The definition of terrorism is very broad; it has been changed over the years and it has been referred to by one of the senators. Almost all dissident groups at one time have been called terrorists by their enemies, their opponents. From the viewpoint of Islam, the coercion of a civilian population and the deliberate killing of civilians is terrorism. It is forbidden. It is a

crime against God and against humanity. But it is very important that terrorism not be used and interpreted in a politically, religious or racially bigoted context. We are very concerned about the anti-Arab and anti-Muslim opinion being reflected in many of the outlets of the media, including newspapers and talkback radio, and, unfortunately, in some comments of politicians—that there could be a situation of persecution here. In the United States at the moment there is religious and racial profiling of individuals, which is very much centred on the Arab and Muslim population of that country, and we do not want to see this sort of legislation occur here.

In the Third World, terrorism has been used to tighten people's liberties and take away many human rights. On page 4 of our submission I included an example of a primary school teacher in Turkey who put a Kurdish poem on his wedding invitation and was accused of spreading terrorist propaganda. This sort of emotional use of terrorism can be very dangerous. I do not want to take up the time of the committee. I think that the written submission has made our points fairly clearly, but I would ask that, whatever happens, the deliberate targeting of people based on their religious or ethnic group be not permitted in Australia. This is the most basic right of citizens of this country, and it will cause alienation of a large section of the people if it occurs.

CHAIR—Thank you for those submissions, Mr Cleland. Who is to speak on behalf of the ECCV? Mr Borg, please proceed.

Mr Borg—Il-kunsill tieghi jizzi hajr lill-kumitat ta' l-opportunita li taghna biex juri t-thassib tieghu dwar il-ligi proposta. I opened in Maltese by thanking the committee for giving us the opportunity of expressing our views on matters of concern. The reason I opened in Maltese will hopefully have some relevance by the time we finish what we have to put up.

Senator COONEY—What about the gender balance in these representations?

Mr Borg—There is always gender balance in my presentations. In relation to the legislation, council expresses great concern. It believes that the legislation runs roughshod over established principles of criminal law. It runs roughshod over civil liberties and, basically, an Australian way of life. The people that we represent are people who have in many instances fled their countries of origin simply because of fairly similar measures to those which are proposed in this legislation. We are very concerned at the width and breadth of the new offences to be created, a new chapter 5 of the Criminal Code, related to many of these subsections dealing with knowledge of proposed treason and other instances, failing to report, the questions about associations, and the questions about having to not assist organisations overseas.

The people that we represent all belong to associations in their country of origin. People are encouraged in this country to pick up their obligations as Australian citizens but at the same time have a means of identifying their background and maintaining the culture and language of their countries of origin. Many people have for many years provided funds overseas to assist those of the community who are in need and in fact believe it is their obligation to do so. Our concerns are that, unwittingly, if this law happened to go through, many of them may well be breaching the law if they are assisting financially in providing comfort and support to people who may be a victim of a conflict overseas, be it widows, orphans and so on and so forth. So there are tremendous concerns within our community.

The second matter is we are very concerned about the onus of proof. We are basically running roughshod over principles of law that have existed from time immemorial: the

business of proving a criminal case beyond reasonable doubt. In this instance we are setting it aside and actually placing an obligation on someone who is suspected of a charge of proving that he is innocent. Let me make one position clear in relation to the people that we represent. Legal appeals are only appeals on paper as far as our constituents are concerned. We have a legal system that many members of our community cannot access. We have a legal system where many members of our community plead guilty to minor criminal charges because they cannot afford the process. Our only comfort in this regard is of course Dietrich's case in the High Court, which says that where someone is charged with a serious legal offence he must have legal representation.

If you look to the whole tenor of these changes, it gets into a situation where it may well be that someone who is, for example, called in for interrogation or is charged with an offence will actually lose the whole of the family assets in trying to defend himself against one of these charges that have been raised. Now is that our sort of Australian community? We cannot say to people, 'If you choose Australia as a country to live in, there are some fundamental rights that on occasions we set aside.' We are concerned that this legislation will impact greatly on the Australian community, particularly on Australians born overseas. To deprive those people and the Australian community generally of basic rights, to deprive them of representation and to deprive them of assistance that they have come to respect and enjoy I think places the whole of the Australian community quite often at great risk.

The proscribed associations sections concern us. We believe that it should not be up to the Attorney-General to proscribe an association. I think the Attorney-General should on application to a judicial officer make application that it be so proscribed. We believe that members of that association should be able at that instance to challenge the intention of the Attorney-General. It is of great concern to us, when you read the proposed legislation, that all that the Attorney-General has to do is to publish that in the *Gazette* or an Australian newspaper. You would wonder whether the Attorney-General is aware of the proportion of people living in this country who do not read the government *Gazette* or the *Australian*, who do not read any daily newspapers and who rely for their information on either ethnic community broadcasts or the ethnic press.

It seems to me if this is going to be all-inclusive then there should be a prerequisite that notices are given to ensure that all members of the community are fully advised of the intention. It seems to us that politicians have a great responsibilities in this regard. It is no good passing a law and expecting the community to rely on appeal processes, when community members cannot afford to access those appeal processes. That is the big danger that we see as far as our communities are concerned.

Our other concern is: where is the source of information being obtained by the authorities? Are we going to give credence to overseas governments, some of which have notoriously over the years been trying to oppress people who have fled their regimes. What do we do? Do we pay informers? Do we start dividing the communities by paid informers? What do we do? Do we try and let communities use this legislation by making it uncomfortable for members of their own community by passing on information? As I said, defence and appeals are of no consequence because in reality they do not exist.

In relation to ASIO, there are a couple of matter we wanted to raise.

CHAIR—Mr Borg, is that in relation to the bill concerning ASIO?

Mr Borg—Yes.

CHAIR—That is not under consideration by this committee in this package at this time, and I have asked other witnesses this afternoon to not make reference to that because of that. I have applied that consistently to all witnesses.

Mr Borg—Okay. We are very concerned, therefore, that the application of this legislation if it were to be passed in its present form would be extremely repressive to the people that we represent. We believe that it will bring them into a situation where they will no longer feel comfortable, knowing that processes could be on the way that would very much challenge the very security they have come here to expect. We are very concerned, therefore, that the whole impact of this legislation put together will detract from their intentions of settling, becoming worthwhile citizens and knowing that they get a fair go in this country.

CHAIR—Thank you. Ms Klepner and Mr Aboukhater, did you wish to add anything at this stage?

Mr Aboukhater—I would like to just add one thing. Although I represent the Ethnic Communities Council, I am an Australian-born Australian of Middle Eastern appearance. For five generations my family has been here. I have a grandfather who was a group captain in the Air Force and yet I am perceived, with a name like Aboukhater, as a migrant and a potential terrorist. We have got to look at the situation where Hollywood movies have added to our thought process within this bill. Can I give you an analogy which will be familiar to you of the Balibo Five, five Australian journalists who were killed in East Timor. There is a journalist who is a brother of one of those people who spent a lot of time and effort setting up orphanages in East Timor. He would have been targeted by this bill—would he not?—because at the time it was not in the Australian interest.

So we have to look at what is in the Australian interest and we have got to look at our trade with Asia and with the Middle East. There is a big market out there. This bill will detract from our trade. At the moment we have tariffs which have affected our wheat trade with Indonesia. There is our leather trade. There are a number of areas of trade where we should be looking towards these countries. That is all I wish to say.

CHAIR—Thank you. Ms Klepner, do you have any statement you wish to make at this stage, briefly?

Ms Klepner—Yes.

Senator COONEY—It is called a gender balance.

CHAIR—The committee is hardly in a position to comment in relation to gender balance, Senator Cooney. Please proceed, Ms Klepner.

Ms Klepner—We appreciate the introductory remarks you made about trying to slot in as many submissions as you could in the time available. We note also the remarks in *Hansard* made at the earlier hearings in Sydney about the constraints on the committee as far as the timetable of report-back is concerned—

CHAIR—and made again earlier today.

Ms Klepner—Unfortunately, we were not present at that time. We would like to make a remark though not only about the time available for the committee to consider these bills but also about the time available for the wider community to consider them. There has been fairly minimal information circulated in the public domain about what is proposed in this legislation, not necessarily through any fault of this committee. The time frame for consideration of this legislation has been extremely constrained, let alone, as Mr Borg has

pointed out, considering the difficulties of communication with some of our constituent members as to the detail of what is proposed and how it may affect them. So it is of extreme concern to us that this legislation looks as though it is being pretty well rushed through, subject to what this committee decides to recommend, of course.

In addition to the remarks that are made in the submission, we are also concerned about the declaration of organisations, and we note the concerns about the constitutionality of some of the proposals as far as banning organisations, particularly when we are not formally at war. We are also particularly concerned about the possibility, given the scope of the ability to propose powers not only in the ASIO legislation but also in the amendments proposed in the other security legislation, to enhance discretionary powers on the part of a range of authorities and the impact that that might have.

We were concerned to note too that very few community organisations are actually making presentations here over these two days. Of course, we are not yet familiar with the range of submissions that have been made on the legislation, but it is notable that the only two organisations that represent community organisations, notwithstanding the submissions by the ACTU, are jammed into one session, one time slot, to represent the views of a huge cross-section of the community. If we see ever-so-slight discrimination against our communities in this way, what sort of scope is there for further discrimination under the guise of this legislation? I think references have already been made to the potential for abuse as to who is to name informal members of organisations and on what criteria organisations might be banned.

CHAIR—Could I clarify, Ms Klepner, whether you just accused the committee of discrimination?

Ms Klepner—I am not accusing the committee of discrimination; I am suggesting that there is not a lot of scope in this process for community input and that, particularly with the lack of ethnic voice in this process, there is subtle institutionalised racism in this society that we do not wish to see exacerbated by an expansion of informal powers and a lack of accountability that seems to go with this legislation.

CHAIR—In relation to the process of this committee, do you doubt the committee's commitment to consider, with considerable attention, every submission that it has received and to hear from as many organisations as it is able?

Ms Klepner—No, I do not doubt that—

CHAIR—Thank you.

Ms Klepner—not for one moment. But, as you have already noted, the time constraints imposed on you are extremely severe, and the opportunity for the community to make proper input has been very constrained.

CHAIR—And I believe we, on both sides of the table, are all trying to do our best within that process.

Ms Klepner—Senator, what I am suggesting is that there has been very limited publicity about this legislation available through the ethnic media and through the broader community to facilitate the making of submissions within the tight time constraints which have been imposed upon all of us.

CHAIR—I am very pleased that the ECCV and the Islamic Council are here today, and I hope that does assist in that process.

Ms Klepner—So do we, indeed.

CHAIR—If you have nothing further, we will go to questions and begin with Senator McKiernan.

Senator McKIERNAN—I have some questions of clarification for each of the witnesses from the comments that were made. To support a gender balance, I will probably do the last first. I will address one question to you, Ms Klepner, regarding your comment about us not being formally at war while this legislation is actually being brought in. What did you mean by that comment?

Ms Klepner—I am not a constitutional lawyer, Senator McKiernan, but I do note in *Hansard* that the submissions made at the hearings in Sydney suggest that there may be constitutional issues raised as to how we decide who is actually the enemy and whether an Attorney-General, when we are not in a war situation, can be making decisions. Whether the Attorney-General, the government or a minister—

Senator COONEY—I think it is the Communist Party Dissolution Bill.

Senator McKIERNAN—I was asking that in the context that, one week after the happenings on September 11, the ANZUS treaty was invoked—that is the treaty between New Zealand, Australia and the United States—and it was deemed that, under that treaty, an act of terrorism against one of the partners of the treaty was an act of terrorism against all of the parties. From that, Australia then made a commitment to send our troops on active duty to fight those terrorist activities. Indeed, as we speak, we have got Australian troops in Afghanistan and other places doing exactly that. So it may be a technicality that indeed we are at war on this, but that is a matter for other constitutional—

Ms Klepner—Can I ask a question in reply. Does that mean that we are at war indefinitely and with what range of countries around the world? It seems to be a fairly open-ended set of possibilities as far as declaration is concerned and so on.

Senator McKIERNAN—I am not in a position to answer your questions. Mr Borg, you made a comment in your presentation here in opposition to the proscription powers that are included in the bill, and you put up an argument that the Attorney-General should not have those powers, but I did not catch whom you said should have those powers to proscribe an organisation.

Mr Borg—What I suggested is that the process could be that the Attorney-General makes an application to a judge—be it in the Federal Court or otherwise—and for that judge, on hearing the application of the Attorney-General, to make that declaration. But members of that organisation should be given an opportunity to present their views and other matters they wish to bring before the judge before the declaration is made.

Senator McKIERNAN—So is your organisation accepting that there is some need for some antiterrorist legislation in this country and for some proscription powers that flow from that?

Mr Borg—We believe that anything that is done basically to protect the Australian community, particularly in matters relating to terrorism, could be justified. But we do not believe that you should really use a sledgehammer that is going to impact so greatly on the lives of so many Australians. We feel that the legislation is too wide, too broad, and in many ways quite punitive to people who could well be innocent.

Senator McKIERNAN—Can I now return to the question that I have just addressed to you: do you feel that there is any need for some form of antiterrorism legislation in this country and, included in that legislation, some form of proscription powers, be they with a judge or whomever?

Mr Borg—If the current legislation does not cover it, yes. I think though that before we start making declarations we should be very concerned about the process—what sort of information will the Attorney-General or his office be relying upon in proceeding with an application? This is why I think it is very important for the community to have an opportunity of testing it, rather than having the process that is suggested in the bill, where the Attorney-General makes his declaration, the organisation or its members having a right to appeal but, at the same time as the processes of appeal are running, feeling they will still be committing offences all over the place. What we are saying is let us have it tested before the declaration is made and not put people in the invidious position of breaching the law for that period before the declaration is tested before the courts.

Senator McKIERNAN—Point taken; thank you for the clarification. The next question is addressed to Mr Cleland, and I think that because of your comments, Mr Borg, you may also want to respond to it. On pages 3 and 4 of the submission from the Islamic Council of Victoria a number of countries and organisations are mentioned on the way through: Israel, Palestine, China, Russia, Chechnya, Turkey and Mugabe. You do not mention East Timor and there are a number of other bodies that are not mentioned in regard to that. You also, importantly, do not mention the Taliban or Al-Qaeda as an organisation.

Mr Cleland—I did not try to make an encyclopedia; I just wrote down the ones I thought of.

Senator McKIERNAN—Right.

Mr Cleland—But in the Afghan situation, the Taliban were supported by the United States until 1996 and then there was a change in policy after that, which appears to be related very much to the Unocal contracts. The Taliban were put in power, as far as we understand, by the United States.

Senator McKIERNAN—In regard to the submission that you put in on 15 April—it is dated the 15th here as to when we received it—you do not mention the Taliban. Your organisation do not mention the Taliban or Al-Qaeda.

Mr Cleland—I did not mention every organisation. Taliban and Al-Qaeda have been covered quite a lot in the media; some of these have not.

Senator McKIERNAN—Is there a particular reason why your organisation—

Mr Cleland—No. I am not a supporter of the Taliban, I am not a supporter of Al-Qaeda, and I do not think you should try to make that link. I think they are terrorists.

Senator McKIERNAN—I am entitled to ask questions, and that is all I am doing.

Mr Cleland—You are, but I am sick of this trying to associate the name of Islam with terrorists like Al-Qaeda.

Senator McKIERNAN—There is nobody doing that at all, and the *Hansard* record will prove that. I have asked a direct question. Of all the organisations the committee is hearing from during this series of inquiries, I think you may be—I am not so sure, but you may be—the best qualified organisation to respond to a question such as that.

Mr Cleland—We do not know anything about Al-Qaeda; we only know what we read in the press. But we do know that Taliban was an extreme organisation that is certainly not representative of Islam in any way.

Senator McKIERNAN—Thank you. Mr Borg, in regard to your comments about fundraising that goes on within Australia, do I take it that you and the organisation that you represent here this afternoon would not be supportive of any form of fundraising for the organisations which Mr Cleland and I have just been talking about—Al-Qaeda and Taliban?

Mr Borg—We would not support any fundraising for terrorist organisations.

Senator McKIERNAN—Thank you.

Mr Borg—But, certainly, the point that I made was that it might well be that funds could be raised by people for victims of war or to help welfare. How many widows and orphanages are they running? Do people really get caught under this legislation if the very organisations exist for the purpose of supporting those who are under such extreme circumstances—not having a roof over their head, children to feed and that sort of thing? Certainly we would not support any fundraising to assist any of the terrorist organisations.

Senator McKIERNAN—Thank you, Mr Borg, for the qualification. It is an important qualification coming from an organisation such as yours. Thank you for the answers that you just gave me, Mr Cleland.

Senator GREIG—Ms Klepner, I thought a point you raised earlier was valid in that we live in a world of sometimes subtle discrimination. I acknowledge the chuckles in the audience. I am aware of rampant discrimination. I want to specifically address subtle discrimination. You made the point that perhaps the committee—and not necessarily this committee, but more broadly the parliament—could better communicate to some communities through the ethnic press. It is something that perhaps we should take on board.

I am wondering if in this instance that might have worked in the reverse where suddenly—for the first time it seems—we might have gone to the ethnic press and said, ‘Oh, by the way, we are having an inquiry into terrorism and now we want to talk to you.’ Do you think that might have backfired in some way if we had taken that path?

Ms Klepner—No, I do not. In my view, if you are proposing to put forward legislation that is going to affect the whole community, there should be an obligation to communicate with the whole community. In fact, there is a high degree of likelihood that it will be members of communities we represent who will be particularly targeted for surveillance to a much greater extent than perhaps Mr Aboukhater would have been if he had taken his maternal grandmother’s name and had a different complexion.

The outcomes for the community of this legislation are likely to be uneven because there is a lack of transparency about how it is going to be applied. Even the appeal processes that are proposed—which Mr Borg has commented on—appear from the explanatory memorandum and the bill that we have seen to be appeals based on process rather than on the nature of the actual decision, the reasons for the decision having been made. That is really a matter of concern to us as well.

Senator COONEY—You are not suggesting that we would not be seeking claims against the Melbourne Club by a well-informed policing authority.

Ms Klepner—I am not suggesting that there would not be proceedings taken if any surveillance was done that turned up evidence that required some issues or matters to be

pursued. However, what I am suggesting is that Australians of foreign and non-English speaking background are more likely to be tracked and monitored and put under surveillance and so on.

Senator GREIG—As I understand it, you are not in any way saying that the legislation is racist or has a racist intent. But you seem to be saying that it may be used in a biased way. Is that the message we are hearing from you today?

Ms Klepner—That is exactly what we are saying. Thank you.

Senator COONEY—I think the evidence you are giving is important because terrorism is an issue that we have to address, but there are always balances, as you know. If this legislation has the effect—as distinct from the purpose—of putting Australians of particular background under strain, then we have to put that into the balance. I am not sure that we are doing that enough. Is the evidence you are giving us that there is a significant impact on the ethnic communities and a particular impact on those of Arabic ethnic background?

Mr Aboukhater—Look at the situation in Sydney, for instance. A third of the population of Sydney is of migrant background or of parents of migrant background. That is quite a strong demographic. I am very interested to see the census that is coming out. Look at the demographic in Canberra. I know there have been constraints on this committee and the hearings and everything. Looking at the demographics of the people who are giving evidence, there are a lot of groups, but there is a timeslot of three-quarters of an hour. In that timeslot we have the Islamic Council and the Ethnic Communities Council speaking on the issue of our communities, who are definitely going to be the targets of this legislation.

Senator COONEY—What is the perception in the community—is there worry and concern? I ask this because when the Communist Party Dissolution Act was passed there were certain groups who had associations or were alleged to have had associations with the Communist Party who were very worried and concerned—nobody might have come down even, but they were very worried. For the purposes of trying to assess the use and the worth of this legislation, I just want to get an idea of how it is going to impact on the community or find out whether you can give us evidence that it has impacted in terms of people becoming very concerned about it.

Mr Borg—It is clear to us that from the incidents of September 11 there was a tremendous impact on the community, particularly in Sydney and in this state. There are problems within the schoolyards, in employment and so forth. Our concern is that, at any particular time, this legislation will focus directly on one or more communities.

Senator COONEY—What you are saying is if the Attorney declared a particular group, that is likely to have ethnic connections and that would lead to greater problems in the workplace and in the schoolyards?

Mr Borg—We believe so. Obviously the background of the organisation will become public knowledge. Obviously the community will then label many people of that background as in some way being partly responsible for what has happened and we will probably have a repeat of what is reported to us from time to time about our people, Australian people, becoming victims of a process.

Mr Aboukhater—Can I suggest also that, although the media and the police and the department of education are not reporting on it, there are still attacks on the Arabic community and the Islamic community. In fact, on 8 March I had to help a young Lebanese girl who had

been threatened with a knife. She had been to the police twice and they had said, 'Don't worry about it.' She lost 55 days of school last year.

Senator COONEY—How old is she?

Mr Aboukhater—Fifteen. This particular girl had been doing well—I looked at her reports. I had to speak to the principal about her attendance rates and the principal found out when I questioned them. She had lost 55 days of school. She was doing well in her subjects, getting 60 or 70 per cent, and now she is failing because she is scared to go to school. She wants to be a nurse. And our Premier Bracks wants his 90 per cent retention rate.

Senator COONEY—I understand that you are going to talk about the schools, but I just want to get your picture of the impact on the groups. During the First World War—and I purport not to have been alive then!—there was a fairly savage attack on Germans. It was the same in the Second World War, and Italians were locked up—not Maltese, may I say, Mr Borg. But is that the sort of thing that is beginning again now or becoming more emphasised, or what? I will just explain what I mean. If this legislation is going to impact on genuine terrorists and that is it—no problems. That is one thing. But if this legislation is going to have the effect of making people insecure—and even that I think is very bad—simply because they are of a particular ethnic background, political inclination or religious faith, then that is very bad. We have to put that in the balance, so I am just trying to get from you a picture of it all.

Mr Aboukhater—This is an important point—it is affecting the diversity of Australia, it is affecting multiculturalism and it is affecting our community. The first failing of this bill is that it is attacking a portion of the community. What do we want in Australia? What do we want out of multiculturalism? We have got a knee-jerk reaction to the twin towers bombing—and I condemn that bombing; as an Arab I condemn it and as an Australian I condemn it. What we have is a situation where there is a knee-jerk reaction and the Australian community suffers because of something that happened in another part of the world for other political reasons. Has there been a convicted Arab terrorist in Australia? And yet we are still looking for one. Every three or four months there is a news report of a suspected terrorist, but to this date there has never been a convicted Arab terrorist in Australia.

Senator COONEY—Has there been anyone charged?

Mr Aboukhater—Not to my knowledge has anyone of Arab origin been charged.

Mr Borg—Or possibly of any other origin.

Senator COONEY—That is right—of any origin.

Mr Cleland—There was an incident on 1 January 1915 at Broken Hill that you probably all remember, and that was denounced by the Muslim community then.

Senator COONEY—I do remember.

Mr Cleland—Two silly old men shot up a train.

Senator COONEY—They had been here for a while; they had looked after our camels. I hope everybody remembers that. This is a test of your Australianness: who can remember that? I think only you and me, Mr Cleland.

CHAIR—I was not here in 1915. Mr Cleland, in relation to the submission from the Islamic Council, on page 2 you refer to the notion of 'intent to coerce or intimidate a civilian population' with regard to the definition. Could you expand on that for the committee, please?

Mr Cleland—I was reading a discussion of terrorism in one of the Middle Eastern newspapers in English, and it talked about the component of terrorism as being that plus the deliberate targeting of civilians. These were seen as the core of terrorism. I thought that, if we were going to define terrorism, there should be that sort of clear definition: where you use military force or some sort of armed force to coerce a civilian population—it could include hostage taking—and also the deliberate targeting of civilians in a violent act, and that these are evil, criminal acts. But they are already covered, as I understand, in our legislation.

CHAIR—Is it possible that you might be able to define for the committee the reference that you were reading? It does not have to be tomorrow—it is not a matter of urgency—but it would assist the committee to have a look at the article.

Mr Cleland—I can find it; I think I printed it off. I can send it to you.

CHAIR—That would be helpful, thank you. As there are no further questions at this stage, I thank both organisations. I also want to say on my own behalf, because obviously the committee has not had a chance to discuss the issue as yet, that I do note the points you have raised about how the Senate and its committees, let alone government—and we are not responsible for the communications of government on this committee; far from it, in fact—communicate information about Senate inquiries and such matters. The Senate routinely holds meetings of chairs of committees. These are matters it is possible for me to take back to those meetings, and I am more than happy to undertake this afternoon, in response to your concerns, to do just that. I see Mr Cleland has another point.

Mr Cleland—I got an email from the Arab Women's Network. An immigrant lady had written it from Lebanon, it is called *The immigrant's lament* and I would like the committee to be able to read it.

CHAIR—You will provide us with a copy, Mr Cleland?

Mr Cleland—Can I give it to you?

CHAIR—Yes, if you hand it to our secretary and table it that would be helpful. Thank you very much. We will take that as a tabled document. I thank the Ethnic Communities Council of Victoria and all your representatives and the Islamic Council of Victoria and Mr Cleland for appearing today. We are very grateful for both your written submissions and for assisting the committee with your oral statements this afternoon.

[4.45 p.m.]

BURNSIDE, Mr Julian, Committee Member, Liberty Victoria

O'ROURKE, Ms Anne, Assistant Secretary, Liberty Victoria

CHAIR—Welcome, representatives of Liberty Victoria. The committee has before it your submission, which we have numbered 149. Are there any additions, amendments or alterations that you wish to make to that submission?

Mr Burnside—Apart from what we are going to be saying, no.

Ms O'Rourke—Can I just clarify something. We actually put in two submissions.

CHAIR—Does the second submission pertain to the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill?

Ms O'Rourke—No. There is submission No. 1. When I spoke on the phone to the secretary, I said that we would be putting in a supplementary submission at the end of the week, and we were given permission to do that.

CHAIR—That is fine. Ms O'Rourke, we note that we have accepted the second of those submissions as the total package. Thank you very much for clarifying that. I apologise that we have been delayed in reaching Liberty Victoria's opportunity to give evidence this afternoon. You would be aware that the committee has placed on the record matters pertaining to the constrained time frame in which we operate. In endeavouring to hear as many people as we could this afternoon, we have been delayed in reaching your scheduled time for appearance and we are grateful for your assistance in waiting that time. Mr Burnside, do you have an opening statement?

Mr Burnside—Yes, thank you. Can I start by echoing what Ms Klepner said about the shortness of time. It is obviously a problem. We have said something about it in our written submission. Our principal point is that there is simply no need for legislation of this sort. What this legislation does is to travel far beyond anything for which there is a demonstrated need, and it creates very serious threats to the democratic freedoms which, in our society, we have come to enjoy. The substantive criminal law is plainly able to deal with events such as September 11. When you take into account the range of substantive criminal offences and the scope for ancillary liability of accessories before and after the fact, it is difficult to conceive of any aspect of the events of September 11 that would not be amenable to the existing law. It seems to us that, because of the serious encroachment on freedoms which the bill presents, it is highly undesirable that it should be passed unless a positive need is made out. In fact, in one sense, all of this is upside down. It should be for the proponents of the bill to explain why it is necessary rather than for the opponents of it to say why it is wrong.

I was trying to think of circumstances which might require this legislation. Australia, fortunately, has been pretty much free in the past of anything that could be regarded as terrorism, although the Hilton bombing comes to mind. It might conceivably fall within this legislation, but it was plainly able to be dealt with by existing law. The Eureka Stockade, although now viewed benevolently, could at the time have been regarded as a terrorist act. It would undoubtedly have been caught by this legislation. But it was also the subject of prosecutions under orthodox 19th century criminal law, all the elements of which survive.

I turned my mind further back and thought of the famous observation of Dick to Jack Cade in *Henry VI* Part 1 where he said, 'The first thing we will do is kill all the lawyers'—a

favourite observation made by non-lawyers. That would now be a terrorist act. That statement would be a terrorist act under this legislation. That is a startling proposition, and it illustrates the extent to which the reach of this legislation, if it passes. It is the reach which is our second principal concern. The first principal concern is that it just is not necessary and no case is made out for it.

Then, going down one layer to the difficulties with it, the difficulties arise in two ways. First is the vagueness of the definition of ‘terrorist act’ and the possible ways in which that definition might be applied. Second is the mere fact of making allowance for proscribing organisations, and I will develop that separately. First of all, the difficulty with the definition. The committee no doubt is familiar with the terms of the definition, and the structure of it is acts or threats of acts of a particular identified range and those acts or threats are made with the relevant intention, namely, advancing a political, religious or ideological cause. Then there is an exclusion of lawful advocacy, protest or dissent or industrial action.

The scope of the exclusion is entirely vague. It is really difficult to know what that exclusion means, especially if you start with the proposition that the relevant criminal intention is the advancing of a political, religious or ideological cause. That will almost always involve something in the nature of advocacy and protest and certainly something in the nature of dissent, and it might or might not involve industrial action, depending on what is meant by ‘industrial action’. To take an example, if the Workplace Relations Act is the source of the meaning of ‘industrial action’ then picketing is not included. So if a picket, which is almost invariably to advance a political or ideological cause, were to cause any of the range of harms dealt with in subsection (2) then it would be punishable with life imprisonment. Even a threat to picket would be punishable with life imprisonment. That is the startling development in Australian law.

I dare say that it is not what is intended, but the way the law is applied will depend very much upon the political climate in which it is applied. What Mr Aboukhater said before is exactly right. At the moment there is one group in our society who are automatically the object of suspicion and hostility. It is grossly unfair that it should be so, but it is easy to see that legislation like this is likely to be applied harshly against that group precisely because they are politically unpopular at the moment.

If that needs any justification, let me tell you something has happened yesterday. A friend of mine lives in one of Melbourne’s pleasant, rich, leafy suburbs in a small Victorian house. He is good-hearted enough to be accommodating to people who hold temporary protection visas who have fled persecution in Iran. He was raided yesterday morning by eight officials of the immigration department carrying a search warrant. The search warrant was granted to them because an anonymous neighbour had reported the presence of Middle Eastern people near the house. That is the political climate in which we presently exist. I hope it will pass, but in that political climate—in a climate that makes that even thinkable—the possible application of this act is quite terrifying. It will undoubtedly bear hardest on groups who are unpopular and groups who are least able to defend themselves.

I started off talking about the uncertainty of the definition. Let us consider for a moment how a lawyer might go about advising in connection with proposed action a group which is proposing to picket, for example, for political purposes. It is known that the picket will have an effect, for example, on the operation of the government department by trying to stop people from entering the government offices at the top of Lonsdale Street. Or it may have an effect on the operation of the power plant at Yallourn; power workers do go on strike. Or it

might, for example, affect the docks. It is only a couple of years ago that surprising things happened on the docks which had consequences which are comfortably within the definition in subsection (2). How would a lawyer advise that group of people about whether they could safely pursue their proposed action? If it was a picket, they would not be saved by the exception. The purposes are clearly within the first part of the definition. They would have to say, 'Well, is it likely that this will be understood as lawful advocacy, protest or dissent?' How is that to be understood if the exception of industrial action does not fit? Who is to determine what is lawful advocacy, protest or dissent? In a poisonous political climate it is very likely that that exception will be read down, and that will operate harshly on any group that is unpopular.

That is the difficulty, it seems to us. In a country where almost nothing is unthinkable these days, it is easy to imagine this legislation being applied very harshly against unpopular groups and in relation to activities which either are already unlawful and therefore are able to be dealt with under existing laws or else are part of our ordinary democratic processes and would be regarded as appropriate, proper, and part of the price of being in a democratic society.

The second problem with it is the proscribing of organisations. Although this is not part of the written submission, because of the shortness of time, can I make the observation that, leaving aside constitutional problems, proscribing organisations is a very different thing from proscribing acts. Generally speaking, acts are the object of criminal laws; organisations are not. Proscribing an organisation is tantamount to proscribing modes of thought—because what makes an organisation, generally speaking, is a community of ideas or beliefs. To proscribe an organisation where there is no act done by individual members of that organisation is, with respect, nothing more than an assault on freedom of thought. If, on the other hand, members of organisations do engage in acts which contravene the criminal law then the law is able to deal with them.

There is a subsidiary difficulty with the provisions relating to proscribing organisations, and that is the very wide definition of 'membership', which includes people who are informal members or who are trying to become members; and those people can not only cause the organisation to become a proscribed organisation but can also be caught up inadvertently in the conduct of other people who are, properly speaking, members of the organisation. The measure that allows anyone—a judge, the Attorney-General or anyone at all—to proscribe an organisation is profoundly dangerous and, we would say, profoundly undemocratic. It amounts to nothing more than restraining freedom of thought.

We would finish by challenging the proponents of the bill to identify anything that constitutes a terrorist act which cannot be punished now. Until they can identify that, there is no cause for this legislation and the dangers it brings.

CHAIR—Thank you very much, Mr Burnside.

Senator McKIERNAN—Can I get a clarification on the search warrant issue that you told the committee about? I am not familiar with how a department of immigration or an immigration act search warrant is issued. Would they include on it the reasons for the search?

Mr Burnside—No, they do not. The warrant is signed by the secretary or the delegate of the secretary of the department and is handed to an officer, and it recites nothing more than having 'reasonable grounds to suspect the presence of an unauthorised person' et cetera.

Senator McKIERNAN—How then do you know what the reasons were as to why that particular warrant was issued?

Mr Burnside—We made inquiries.

Senator McKIERNAN—Of the secretary?

Mr Burnside—The person who executed the warrant said that there had been an anonymous tip-off to a politician's office, and that that had led to the issue of the warrant

Senator COONEY—'To a politician's office': so it went to a politician.

Senator McKIERNAN—I see.

Mr Burnside—The bottom line is that there was absolutely nothing in it except that the citizens of one suburb did not expect to see people of Middle Eastern appearance in their suburb. May I point out also the fact that we have detention centres that are almost entirely occupied by people from the Middle East—for the very good reason that that is where all the trouble is—and that the existence of those centres and the complexion of the people in those centres also brings with it a real danger of prejudice against people from the same origins, notwithstanding that they are there because they are fleeing the terrors that we are concerned with.

Senator McKIERNAN—I will probably save that argument, or questions on that subject matter, for another day from you.

Mr Burnside—I understand that; but it is part of the climate and, I think, a very important part—because you have to think what the climate is in which these laws will be interpreted.

Senator McKIERNAN—Indeed. But I also recall that during a visit to the Villawood Detention Centre last year with the human rights subcommittee of the foreign affairs committee, the advocate of one of the groups that was speaking to the subcommittee was of Irish origin and had an accent which was much broader than mine.

Mr Burnside—There are not that many Irishmen inside Villawood or Maribyrnong, I can tell you.

Senator McKIERNAN—But they are there, and it was indeed Villawood. I want to address some questions to you in regard to the submission. You state at the bottom of page 3 that the Attorney-General's proposed power to proscribe organisations—this is in your words—'clearly contravenes the doctrine of the separation of powers'. That is a very strong statement. In making that statement, is it the argument of Liberty Victoria that this provision may, at some future time, be declared unconstitutional?

Mr Burnside—I have to duck the question in part. I have not researched that aspect of the question, although obviously the Communist Party dissolution bill gives some guidance to the answer. I think there is a risk of it. If it is unconstitutional, well so much the better. The question is not whether it is unconstitutional, but whether it should be passed.

Ms O'Rourke—It is also the fact that the Attorney-General under this act in some sense plays the role of both prosecutor and judge in terms of proscribed organisations. So there is a merging here of two roles that are normally kept separate. As was pointed out before, the Attorney-General should make an application to the court and then, via evidence, the court makes the judgment as to whether that group fits within this. The Attorney-General should not be playing a double role in relation to this.

Senator McKIERNAN—The question I am addressing relates to the statement that the Attorney-General's proposed power to proscribe organisations—it is highlighted; it is bolded, and I state it again—'clearly contravenes the doctrine of the separation of powers'. Are you or

the organisation—and you are the signatory of the submission—joining with Mr Burnside in reserving a view on that very strong viewpoint that is put in the submission?

Ms O'Rourke—Yes. We are not saying that it is unconstitutional in that we clearly think that you could go to the High Court and challenge this. We are saying that in terms of the conventions and the principles that underpin our society, which is to keep those two functions separate, this act does not respect that separation. There is a dual role here that is normally kept separate. We are concerned about the fact that the Attorney-General has the sole power in terms of both these roles under this act.

Senator LUDWIG—Do you think that, although it might be permissible by legislation, you should not contravene the doctrine in any event?

Ms O'Rourke—That's right.

Senator LUDWIG—Even if it were permissible and not unconstitutional; is that the point?

Ms O'Rourke—Yes.

Mr Burnside—I think it might be undesirable. We use the expression 'separation of powers', which has clear constitutional implications, but it does involve a combination of the role of prosecutor and judge, if you like.

Senator LUDWIG—I can understand that.

Mr Burnside—And especially since matters like this will be highly charged politically, the government of the day should not have that dual function in something as contentious as banning an organisation.

Senator LUDWIG—Thank you very much. That is very helpful.

Senator McKIERNAN—Would the proposed proscription powers of the Attorney-General be more acceptable to Liberty Victoria if some mechanisms for review of his decision, such as it being disallowable by parliament or by appeal to the Federal Court, were included in the act? Would those safeguards go some way to meeting your concerns?

Mr Burnside—I do not think so. It would be a marginal improvement, but the difficulties for any organisation pending the uncertain processes of parliament would be untenable. When you think about the consequences for an organisation and its members of suddenly being proscribed and the consequences, you could effectively destroy an organisation by having it proscribed regardless of the fact that that proscription was later undone by parliament. At the risk of repetition, it is highly undesirable to be able to proscribe organisations at all. You might just as well proscribe their thinking.

Senator McKIERNAN—My colleague has just whispered, 'How do we deal with the decisions of the UN Security Council on, particularly and specifically, the Al-Qaeda organisation?'

Mr Burnside—What precisely is the concern? Is it thought that a member of Al-Qaeda who had not committed any offence of any sort anywhere in the world would in some way be treated differently in Australia than any other person?

Senator LUDWIG—No, more specifically the UN Security Council resolution requires at least that if there is an organisation proscribed by them that we follow suit. That is the general tenor of the request. Is your submission that we do not follow suit, or we ignore it?

Mr Burnside—It depends on what is meant by 'following suit'.

Senator LUDWIG—Proscribe the organisation.

Mr Burnside—It depends on the government's attitude to adhering to its international obligations generally.

Senator LUDWIG—Yes, I understand your organisation has always been a strong supporter of Australia following its international obligations, so if that is one of the international obligations then I would like to know your view about that.

Mr Burnside—I would allow that exception—speaking for myself: you can proscribe an organisation if it is necessary in order to follow a UN Security Council resolution. But of course that is a very different proposition from what is in 102.

Senator LUDWIG—It is also very different as to what the appeal mechanisms might be. In this instance, ADJR has only been suggested. I was wondering what your view was in relation to only ADJR or whether merits review or whether a different process similar to, say, 30AA under the Crimes Act, which is to show cause to a court, would be a preferable method rather than an ADJR decision maker of the Attorney-General.

Mr Burnside—It is difficult, because if the only occasion for proscribing an organisation is to follow suit with the UN Security Council then a domestic appeal seems rather uncomfortable.

Senator LUDWIG—Yes. You end up in a very circular argument, I suspect.

Mr Burnside—Yes. I do not know, as I said here, whether there are provisions for people to challenge a UN Security Council resolution proscribing an organisation. If there were, then either they can be invoked or they can be mirrored domestically. But I do not have a difficulty with giving effect to UN Security Council decisions.

Senator LUDWIG—I think a general power at large to proscribe organisations outside of that is what you object to; is that the submission you make—

Mr Burnside—Absolutely.

Senator LUDWIG—And then you can go on to comment about the ADJR process from there.

Mr Burnside—Yes.

Senator LUDWIG—The difficulty with proscription is once you proscribe the organisation it has an immediate effect—that is, people have to take certain actions. They have to decide whether they should or should not be a member of that organisation. It takes, then, some time, I suspect, in the normal judicial processes for a person to appeal that and to otherwise undo the harm that may have been caused if it was wrongly taken.

Mr Burnside—Yes. An available middle course would be to give notice of the passing of a UN Security Council resolution and allow the organisation to show cause why that should not be implemented domestically.

Senator LUDWIG—Yes.

Mr Burnside—But of course the big difference is that it is hard to imagine that the UN Security Council is going to proscribe the Maritime Union of Australia or the CFMEU—

Senator LUDWIG—Or the Toorak Knitting Club.

Mr Burnside—whereas those organisations—

Senator COONEY—Or Liberty Victoria.

Mr Burnside—at least might be at risk on hypothetical scenarios that you could invent by reference to section 101.

Senator LUDWIG—Thanks.

Senator McKIERNAN—You make the point in your submission that the definition of terrorism is very similar to the UK Terrorism Act of 2000, and you elaborate on that act which caused the Guilford Four, the Birmingham Six and the McGuire Seven incidents to happen in the United Kingdom over a period of years. You also draw the point that the precursor to that act was the Prevention of Terrorism Act. Is it your contention in those arguments—and I do not want to develop the Irish issue here—that incidents like the Guilford Four, the Birmingham Six and the McGuire Seven could happen under the Terrorism Act of 2000? I ask that in the context that you argued the Australian act is mirroring the Terrorism Act of 2000 of the United Kingdom.

Mr Burnside—Yes. I think those cases are a reflection of two things. One is the breadth and uncertainty of the definition of terrorism. The second is the climate in which legislation like this falls to be implemented. It is pretty clear in relation to the Guilford Four, about which I know a little bit, that the police practices in that case fell far short of what we would expect. You cannot blame that on the definition of terrorism, but it does reflect the climate and it reflects the way an uncertain definition will be understood in that climate.

Senator McKIERNAN—It was not only the police practices that fell short. The judicial practices also fell short and the judiciary process as a whole was felt to be lacking.

Mr Burnside—I must say I have great faith in the Australian judiciary.

Senator McKIERNAN—Well, that was something that I personally followed through at the time but I am not arguing an Irish issue here. You made the point in your response about the climate in which the laws were changed. The laws in Britain were changed in 2000, which of course was before the happenings in New York and Washington in September last year. Yet you go on to detail, and I quote from 3.3, that ‘under the new act this list has been up-dated to include almost exclusively Islamic organisations,’ whereas the point that has been made in the substance of the submission today was that those acts that were in existence in the United Kingdom were targeted against pro-Republicans and pro-loyalists, particularly in Northern Ireland.

Mr Burnside—The point we are making is not so much the climate in which the legislation is passed but the climate in which the legislation will be applied. It is good, I guess, if the spotlight is moved away from the Irish for a time, but it is an uncomfortable observation that the spotlight for terrorism seems to follow today’s most unpopular groups. If you find that individuals are committing offences, either separately or in a conspiracy, the law deals with that. Defining something called ‘terrorism’ and linking it to ideological intention is bound to operate most harshly against those groups who are most politically unpopular, for whatever reason. It is just inescapable, and I think that the history in England with the Irish Republican Army prosecutions illustrate that and commonsense, I think, also suggests it. In the past they were witch-hunts. In the future it will be terrorist prosecutions.

CHAIR—Mr Burnside, in your written remarks in relation to proscribed organisations, one of the points that you make is in relation to the reversal of the burden of proof, strict liability offence. Over the page at 3.2 you also refer to your view that there should be some form of

compensatory damages due to a wrongful listing or if due to a wrongful listing the organisation suffers damage to its reputation or suffers financial loss.

I understand the points you are making there, but you do not actually deal with the question of an individual who is a member who might find themselves in a similar situation. If there is more than one Marise Payne—the world would probably hope not—and there is confusion in the proscription process and I am wrongly named and it is the other Marise Payne who is apparently the terrorist, what form of compensatory damages or redress do you believe an individual should have in that regard?

Mr Burnside—By reference to the orthodoxies of defamation law the innocent, the uninvolved with the same name, would have the same rights because, plainly enough, they will have suffered loss of their reputation because of what has happened. But may I say that it is an argument of desperation to be looking at having to get damages for wrongful proscription of an organisation and the consequences of that. It perhaps illustrates in a small way part of the vice of such a provision. Liberty Victoria would certainly not be happy if the legislation went through but was coupled with provisions of that sort; it would not relieve our concerns in the least.

CHAIR—I understand that it would not relieve your concerns, but it is an issue which is of concern to me and therefore I seek your view. Did you wish to go further on the question of the reversal of the burden of proof and your view in relation to that?

Mr Burnside—The reversal of the burden of proof, in any circumstances, is undesirable because it is inconsistent with the presumption of innocence upon which our democratic and legal systems are founded; it really is as basic as that. Certainly the English parliament has found out by European Community rulings that reversing the onus of proof is incompatible with those freedoms. Really it is something that should only ever be done in the most extreme circumstances.

CHAIR—In relation to the case that you make in paragraph 2.2, an example that you use is the nurses union and strike activity. Would it be a correct interpretation to say that you use a basic example—an example with which we would all be familiar—and you say in your submission that you believe that would fall within the current drafting of the legislation; I think you refer to section 101.1(2)(d). That would be an extreme application of the legislation as it is expressed. Do you agree?

Mr Burnside—'Extreme' is a loaded word.

CHAIR—I do not mean to use a loaded word. I mean that it would be at one end of a spectrum.

Mr Burnside—It is at the outer edges of its application, I agree with that. But that is enough cause for concern because it is not too difficult to think of other examples that are also at the outer edges but which would also be caught up. I come back to what I suggested earlier: test it in practical application. How would a lawyer of ordinary competence advise a client planning to do things like this?

This is where one comes across a very genuine concern about our basic democratic freedoms. If a competent lawyer cannot confidently advise you that, for example, nurses picketing would not be an act of terrorism, then in the sort of political climate in which legislation like this might be applied you will have people self-censoring, restraining their own conduct and preventing themselves from exercising their ordinary democratic rights—as we understand them at the moment—out of fear of being sent to jail for life. Self-censorship

is not necessarily a good thing, and restraint by fear is exactly what democracy is meant to avoid.

CHAIR—As an eminent legal practitioner, one of the issues in this legislation which you have taken up in your submission concerns a lack of precision in definitions and in drafting that means you can advance an example which, on the face of it, looks to be at the outer edges of application but which could quite easily fall within the bill the way it is currently described.

Mr Burnside—Yes, and may I remind you of what happened in April 1998. The change of the guard at the waterfront led to mass public demonstrations at Victoria Dock and other docks around the country as people protested against the arrival of attack dogs and men in balaclavas taking over the jobs of the union members. Those acts, which undoubtedly affected Australia's international trade in quite a significant way for a month or so, would have been caught squarely within this definition. It is an astonishing thing to think that conduct that was viewed at the time as a rightful protest in public against conduct that was regarded as un-Australian would be punishable by life imprisonment.

It is not a far-fetched example; it is a fact which happened in Australia in very recent memory and which would be caught. That is a very alarming prospect. In the course of demonstrations like that some criminal offences are caused—damage to property and so on. Those consequences are readily dealt with under the law as it exists. But, if the effect of passing legislation with as vague a definition as this is that everyone will have to look over their shoulder to see whether their ordinary democratic expression will now be regarded as an act of terrorism, it seems to me to take us to the point where in order to preserve democracy we kill it off.

CHAIR—I imagine that goes to the point that you make at 2.4, where you point out that 'debate and protest are not antithetical to democracy but are an essential element of a thriving democracy'.

Mr Burnside—Absolutely.

Senator GREIG—You have made reference to the UK act of 2000. I appreciate it has been a very short period of time since its coming into power, but are there any key things we can learn from its use or its not being used, or from threats of it being used? How does it or does it not operate in the UK?

Ms O'Rourke—It came in in 2000. I have not done any research to see how that operates, other than looking at doing a submission for this bill. I looked at its history and also at who had been proscribed under that bill. In February this year, from memory, there were 21 organisations proscribed. The majority—16 or 17, around that figure—were Muslim organisations and the others were a Sri Lankan group and a couple of other groups like that. I was looking at it more to see how it worked and if indeed it depended on the context. As Julian said before, the context matters, and that is clear from the fact that those organisations have been listed recently and that the majority of them are Muslim organisations. It does demonstrate that, in an atmosphere of fear after September 11, the act does concentrate on particular groups of people. It is proscribe first, think later.

Senator GREIG—I was wondering, for example, in an American context if certain Christian based organisations, like the Branch Davidian and others, might be listed amongst American groups. I wonder if that is or is not the case.

Ms O'Rourke—I have not looked at the American act. I have a copy of it. As you would be aware, the UK terrorism act is about 200 pages, the Patriot Act in America is also about 200 pages and, having been given just over two weeks to do a submission, you have not got time to compare them all. So I do not know how they actually work.

Senator GREIG—I was reading through some of my notes earlier about some responses from the Attorney-General's Department. The question was put to it: why are we rushing with this legislation? The answer was 'because it's very important', and I felt that perhaps the reverse ought to have been the case.

Mr Burnside, you argued principally in your opening statement that there was no need for legislation of this kind because the status quo, the existing legal framework, could address the issues which the government was bringing forth with this legislation. We heard earlier from some groups, such as Electronic Frontiers, who were arguing that this actually brings in some new aspects of criminal law—for example, the rights of authorities to access telecommunications at ISPs—Internet service providers—without a warrant, whereas they cannot do that currently. So I am wondering if perhaps a broader summary would be that it is not just the status quo; in fact it takes some further steps in winding back civil liberties which are currently protected.

Mr Burnside—I think there are two aspects to that, if I understand the question. I was trying to say that things which people would now understand as being terrorist acts are already caught by the criminal law. What this does is to catch a lot of things which most people would not regard as criminal acts or terrorist acts or acts appropriate to be the subject of a term of life imprisonment. It simply reaches too far and across territory that is already covered, and then it goes further into territory where the parliament had never thought it appropriate to proscribe conduct or, for that matter, organisations.

The fact that the associated legislation gives wider powers in relation to search warrants, detention, interrogation and so on, in connection with wide offences of this sort, is obviously a matter for very serious concern because it means that you can predicate all sorts of perfectly ordinary conduct which will allow people to be dragged off the street, held incommunicado, interrogated without lawyers and maybe banged up for 25 years or life. It is a pretty astonishing consequence and something that I suspect most Australians are simply not aware of. Terrorism conjures up the idea of the twin towers. Who needs legislation to deal with that? It is self-evident that that is already covered by the ordinary criminal law and ancillary liability provisions.

Senator GREIG—I read somewhere recently that it was suggested that the most sophisticated piece of equipment used by Al-Qaeda in bringing down the Twin Towers was Stanley trimmers. They used box cutters and not highly sophisticated electronic equipment, which are being targeted in part by this legislation. Have you had any opportunity—I realise the brevity of time to deal with this issue—to look at similar jurisdictions, perhaps France or Germany or other countries of that nature, which may have gone down this legislative path, along the lines of the American and British models? I am unaware of any other countries.

Mr Burnside—Unfortunately, no. I have not had the chance.

Ms O'Rourke—Canada has based their legislation on the British model as well. I have read some of the submissions that went into the Canadian government, and they are raising exactly the same sorts of concerns that we heard prior and that we are raising.

Senator GREIG—What about conventions?

Ms O'Rourke—They are very broad. They are actually based on that same definition. The European Convention on the Suppression of Terrorism, for instance, takes it out of the political and actually names things such as 'offences involving the hijacking of an aircraft'. Most people would see that as terrorism. The convention includes in its definition:

a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

an offence involving kidnapping, the taking of a hostage or serious unlawful detention; an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

... ..

a serious offence involving an act of violence ... against the life, physical integrity or liberty of a person.

... a serious offence involving an act against property ... if the act created a collective danger for persons.

So they are actually more precise. Most of people would understand most of those definitions as being terrorist acts, whereas the problem with this is that there is no fence around the definition—what falls in and what falls out. I think it is that lack of precise definition that makes this a fairly dangerous piece of legislation.

Senator GREIG—At the core of what Liberty Victoria is saying—if I can summarise it simply—is that we need distinction between behaviour and identity in terms of the structure of the legislation?

Ms O'Rourke—We are saying two things. The first thing is that we do not think this legislation is needed at all. That is our foremost position. Should it go through, we do not think the prescribed organisations to be in it all. But in terms of the definition of terrorism, it needs to be something that clearly says the hijacking of an aircraft. Most people would agree with that. It needs to be stated, to be precise, so as people do know what a terrorist act is and it is not just left to legal interpretation in political climates that may not be entirely healthy political climates.

Senator GREIG—Are you aware of any examples where counter-terrorism, antiterrorism or terrorism acts and laws have been effective in prevention. Do you know of potential terrorist cases that have been prevented or effectively prosecuted once they have happened? I am thinking of the hijackings in the seventies with the planes.

Ms O'Rourke—I do not know enough about them. I am not aware of any. I know nothing about how those cases were prosecuted.

Mr Burnside—But there is specific legislation in most countries that makes it an offence to hijack a plane.

Senator GREIG—Sure. I guess where I am coming from is that no amount of legislation is going to stop a suicide bomber.

Ms O'Rourke—That is right.

Mr Burnside—I want to focus the problem on this: at the heart of the definition of 'terrorist act'—and this then takes you across into the sorts of organisations that might be proscribed—are two sets of normative words; namely, the reference to advancing political,

religious or ideological causes on the one hand and the exemptions law for advocacy, protest or dissent. They are all value laden expressions. I think you will find that, in circumstances that call for this legislation to be applied, the first group—the ideological words—will mean ‘unpopular’ political, religious or ideological causes’ and the exceptions will be understood as ‘popular’ lawful advocacy, protest or dissent. Unless human beings have changed rapidly in the recent past, that is an almost inevitable consequence.

Senator GREIG—And dissent, presumably, is anyone who disagrees with the government or popular orthodox.

Mr Burnside—Absolutely; it is self-evident. There are plenty of examples of that in history—unpopular causes. It is a truism that one person’s terrorist is another person’s freedom fighter, and we have seen people’s definitions of other groups change over the course of the last decade.

Senator GREIG—It is the difference between a warplane and a jet fighter.

Mr Burnside—Quite, but bear in mind the history of South American politics, where sometimes a certain group will be regarded as terrorists and other times they are freedom fighters supported by the US government.

Senator McKIERNAN—Do you agree with Senator Greig’s contention that the most sophisticated weapon available to Al-Qaeda in the attacks on New York was a box cutter?

Mr Burnside—No, I nodded in acknowledgment. I frankly have not the slightest idea. I assumed that they might have used mobile phones as well, but that is hardly high tech these days.

Senator McKIERNAN—I actually thought they used an aircraft, which is a very sophisticated piece of equipment—a number of aircraft, not just one.

Mr Burnside—Yes.

Senator GREIG—I should clarify for Senator McKiernan’s benefit: I was reporting what I had read; it was not my personal opinion.

Senator McKIERNAN—And I was questioning what the witness was agreeing to.

CHAIR—Are we all clear now?

Senator GREIG—I guess I was trying to make the point, coming back to my analogy about the suicide bomber, that the kinds of terrorism that we have seen in the last few years—and appallingly in Israel currently—is really simplistic stuff, and it is not the kind of stuff that can be prevented by legislation. What I hear from Liberty and others today is the concern about where we are going with legislation dealing with civil liberties and freedoms in terms of trying to be serious about addressing very difficult situations.

Mr Burnside—Yes, and to deal with Senator McKiernan’s observation, which at one level is perfectly right, there is not much difference between a suicide bomber on the Left Bank and the terrorists who ploughed into the World Trade Centre, because they were suicide bombers in the same way. It is just that the bomb was a great big expensive one that no-one expected would be used as a bomb.

Senator McKIERNAN—We are talking about a lot more people.

Mr Burnside—Understood.

Senator COONEY—Can I go to the terrorist act. I just want a technical opinion, if I can, on the definition of it. It says that if you do certain things for a political, religious or ideological cause then you commit the offence, but it does not include lawful advocacy, lawful protest or lawful dissent—or is it just lawful advocacy, protest or dissent?

Mr Burnside—I wondered the same thing, and I do not know whether it would be read distributively or not.

Senator COONEY—I do not suppose industrial action cures the problem for you if you are involved in serious damage to property or serious harm to a person. I take it that the local authorities will still come and collect you; this could not cure you so that at demonstrations you could do what you want.

Mr Burnside—Let us look at different sorts of industrial action. Picketing is not industrial action; striking is industrial action.

Senator COONEY—Say it was lawful industrial action: it would still be picked up if you caused serious harm, I take it.

Mr Burnside—It is, and under the Workplace Relations Act acts done during a bargaining period, for example, cannot be the subject of a prosecution unless they involve harm to property or persons, in which case they can be the subject of prosecution. So the law as it stands makes allowance for the hurly-burly of industrial protest but still provides remedies where persons or property are harmed.

Senator COONEY—I have put this before, but not to someone with the expertise you have got in this area. If you seriously damage property or seriously harm a person for reasons of greed, lust or envy, you are going to be better off, aren't you, than if you do it for political or religious purposes?

Mr Burnside—Yes. If you have a noisy dispute on a building site that leads to property damage or shuts down an important service then life imprisonment, but if you do it because you are greedy then, yes, you are right, it will just be a smack on the wrist.

Senator COONEY—Do it for lust, for a bit of safety.

Mr Burnside—I am just trying to think how lust would drive you.

Senator COONEY—I might have missed you on this. In talking about the declaration the Attorney can make under 102.2, you thought it was reasonable enough if there was a decision of the Security Council. Since then we have been given from the Attorney-General's Department charters of the United Nations anti-terrorism persons and entities list. You are supposed to know that the Al Shifa Honey Press for Industry and Commerce, whose address, among others, is by the shrine next to the gas station in Al-Nasr Street, Doha, Qatar was a terrorist organisation. Surely we want a bit more protection than that, don't we? How would you know that you should not be using a mobile phone to ring up the Al Shifa Honey Press for Industry and Commerce by the shrine next to the gas station? It almost sounds like the Potter problem. That is going to be the effect if you just go straight to the provisions that guide what the Attorney-General can make declarations about. Do we need a bit more protection than simply a declaration of the Security Council, particularly since Australia might not be on the Security Council? I see another one here: the Revolutionary Armed Forces of Colombia. You would probably reckon, 'Perhaps I should not be ringing them up,' but the honey press for industry and commerce might be a bit different.

Mr Burnside—It would all turn on the procedures adopted by the UN Security Council in proscribing organisations like this, and the parliament should be satisfied that those processes are appropriate. But then, you see, there is another layer of protection that you could build in if you were going down that path, and that is what are the acts that are prohibited in relation to a proscribed organisation. The definition of ‘member’ is unacceptably wide, because a member may be a person who is an informal member, and that is where your example of telephoning someone who happens to have gone along to one of their meetings has some real problems. I am not sure whether that organisation is listed in the phone book.

Senator COONEY—Do you have any thoughts about how these sorts of provisions may affect the court? With the problems in Northern Ireland, they set up the Diplock courts. I have been told by reliable sources that the judges on those courts were very worried, or at least some of them were, that they had to impose provisions of the law which their instincts and training told them they should not have to impose. This put real pressure on them. Can you see any problems with our legal system in importing this sort of legislation into the law?

Mr Burnside—If you can predicate reasonable judges who would regard these as laws that should not be enforced or laws which make them uncomfortable enforcing them then you really should ask: are these laws that ought to be passed at all? I ask it rhetorically, but my answer would be, ‘Absolutely not.’

Senator COONEY—There is also the issue of informers. You have no doubt heard the 1938 radio broadcast of Winston Churchill in this area. In his broadcast he talked about Nazi Germany. He said that that society encouraged the development of informers and that this was very bad: people were going about their business not sure what was going to happen to them. That account you gave of your friend who had some difficulty with eight people from the immigration department made me think of it, with the informer in the street talking about them. This creates the climate where that happens. Do you have any thoughts about that?

Mr Burnside—I think it is a distinct possibility, and it is profoundly disturbing. Interestingly, in 1938 Churchill was extremely unpopular politically and his rhetoric probably would have brought him within the provisions of this act!

Senator COONEY—It would have, of course, because he was advocating preparations for war.

Mr Burnside—Yes.

Senator COONEY—I would like to go back to the example you gave of your friend who was raided—there were eight people, were there?

Mr Burnside—Four at the front door and four at the back door in case anyone tried to leave.

Senator COONEY—Did they enter the house?

Mr Burnside—They entered the house, they cross-examined the Iranian woman, who was eight months pregnant, and they wrote down phone numbers and the like that they saw on pieces of paper. This was all after they had been shown the visas that these people had.

Senator COONEY—And this is on a warrant issued by their own department—

Mr Burnside—Yes.

Senator COONEY—not by a third party such as a judge?

Mr Burnside—No, issued by their own department.

Senator COONEY—And they said it was on information given to a member of parliament?

Mr Burnside—As I understand it, that was the chain of communication that led to it, but the nature of the information is not identified in the warrant itself.

Senator COONEY—But from what you can gather, the strong impression that you got was that someone in the area had rung up the member and the member had passed on this information.

Mr Burnside—That was the clear fact that we were told. Interestingly—

Senator COONEY—They did not tell you; they would not tell you what happened or how this occurred—how they got to come down—in any detail, except in general terms?

Mr Burnside—Yes. And interestingly, since we are talking about the atmosphere in which these things take hold, a week earlier a real estate agent had rung my friend and warned him that there were Middle Eastern characters at his house. The real estate agent did not realise that he had invited them there.

Senator COONEY—This is in a leafy suburb, I take it.

Mr Burnside—Yes.

Senator COONEY—When the four at the front and the four at the back came, what time of day was it? Could the neighbours see them being raided?

Mr Burnside—I think it was four or so in the afternoon.

Senator COONEY—In full view of the neighbours?

Mr Burnside—Apparently so.

Senator COONEY—Was any apology ever proffered or compensation given?

Mr Burnside—No. It only happened in the afternoon of the day before yesterday. He has expressly asked for an apology and he has not got it yet. He is a bloke who can look after himself, so he got right on to it, but so far they are just saying, 'We're doing our job.' In one sense it is trivial but, if you think about it for a minute, it is deeply disturbing on every level.

Senator COONEY—From the impression that you have of it—you cannot know every detail—is the real vice that these people had was that they looked Middle Eastern? There seemed to be no other reason than that.

Mr Burnside—Yes. They were a man and a woman in their early 30s; the woman was eight months pregnant. If that is how you think terrorists or burglars look, we have come to a very unhappy position.

Senator McKIERNAN—This happened at the home of a friend of yours. Are you aware if that friend, or members of his family, had previously publicly offered sanctuary to persons who may be escapees from detention in Australia? I know that offer has been made publicly by some prominent individuals.

Mr Burnside—I do know that he has not done that.

CHAIR—Are there any further questions in relation to the legislation?

Senator COONEY—Did you see them? Were they dressed in veils, or what did they do? What was the sinister part of their dress?

CHAIR—Senator Cooney, I understand the importance of the issue that we are discussing, but I also appreciate the fact that we are examining a package of legislation, and that Mr Burnside is conveying on behalf of another person his appreciation of the situation. I really would like to concentrate on the examination of the legislation and perhaps, if you wish to take the matter up with Mr Burnside later, we can do that.

Senator COONEY—With respect, I will just put it into context. We have some legislation to pass. The engine for that is terrorism, which is going on around world—although, from what we can gather, it is not, on the surface at least, very prevalent in Australia, and I say that advisedly. On the other hand, we have legislation which, on the evidence that we have been given so far—we do not have to accept it, but it seems to be fairly cogent—is causing a change in the culture of Australia and the way people approach things. If that is so, when we come as legislators to think about whether or not to pass this legislation, we cannot simply sit there and say, ‘This is just aimed at terrorism,’ and not take into account the sort of climate this legislation creates. From what Mr Burnside has said, it is part of an overall build-up of factors in the community which are creating an impression of these sorts of people. It is dreadful that you should be raided. I could be raided when I get home. I have a daughter who was supposed to deliver a baby last Saturday; it might be exactly what she needs to bring her on! In any event, it would be dreadful if that sort of thing happened not only to me but also to these people who have come from a Middle Eastern country and wonder what is going on. That is how I see it.

CHAIR—I want to make it quite clear that I view the matter which Mr Burnside has raised with grave seriousness and the implications that lie behind that with even graver seriousness. I do not seek to diminish the importance of the issue. I did not, however, understand Mr Burnside to be linking this package of legislation with the events that have occurred to his friend. In fact, that was the point that I was making in seeking some attention to be paid to the legislation. I do take on board, however, Senator Cooney, the issues that you have noted and ask that you keep questioning Mr Burnside.

Senator COONEY—Just do not take Mr Burnside’s evidence on it is own. Earlier in the afternoon, the witnesses from the Ethnic Communities Council and the Islamic Council were talking about this. Take Mr Burnside’s evidence together with theirs.

Senator SCULLION—Mr Burnside, we have talked about the terrorist act in section 101.2 that refers specifically to an act, and you have very articulately put the concerns, because that is a little wide. I asked a question of the Attorney-General’s Department when we were in Sydney. Being a very practical person without any legal background, I thought of an analogy of the worst sort of public affray that deals with matters that could come close to that, and I cited the example of the invasion of Parliament House a few years ago where there were a number of people involved. It got out of hand, people got hurt—bashed and punched—doors got knocked in, and Parliament House was invaded. It was the worst scenario I could think of that somebody might confuse with a terrorist act. So I put it to them whether in those circumstances they would or would not consider that to be a terrorist act. I have got their response on notice. They say:

It is not likely that damage to Parliament House during a demonstration would be a terrorist act. The definition of terrorist act excludes lawful advocacy, protest, dissent and industrial action. An act that caused damage to Parliament House would only be a terrorist act if the act was not lawful advocacy, protest, dissent and industrial action. It would be a question of fact as to whether the act caused sufficient serious damage to fall within the definition of a terrorist act. In relation to how ‘serious’ would be defined by a court, see answer to question 1.

Just briefly, that was a question on notice by Senator Cooney. The question was about how ‘serious property damage’ is defined. The answer is:

A court would interpret ‘serious’ in the context of this provision as meaning damaged on a very substantial scale. It is very common for offences to include the word ‘serious’ and for the court to interpret the term in the context of the relevant legislation.

I wonder if you could make a comment on that response.

Mr Burnside—I think it illustrates pretty clearly just how difficult it is to be confident about the meaning of provisions that are sprinkled with value laden words. ‘Serious damage’, ‘substantial damage’—it is impossible to get away from the idea that what constitutes lawful advocacy, protest or dissent will be understood according to the popularity of the group who are engaged in it. Otherwise, it is about as useful as saying that it does not include the conduct that we regard as essential to a democracy—which in one sense is what it is about. The trouble is that you will never get a group of people to agree on what that really means. What one person thinks is reasonable for democracy, someone else will regard as a gross infringement of their right to get to work on time. The vagueness of it is the real problem, and I would not be confident that a prosecution against this section would not be brought if the group involved were unpopular.

Senator SCULLION—On another point of clarification—

Ms O’Rourke—May I respond to that also. As you were talking, I remembered that incident. If you take it that, let us say, it was by members of the CFMEU, they might be an organisation that has endangered, or is likely to endanger, the security or integrity of the Commonwealth, and then that action could be interpreted within that definition and thus they could become a proscribed organisation. The response that you were given is not necessarily the case. It is a matter of interpretation. These things will be argued out.

Senator McKIERNAN—Isn’t it more than interpretation? In fact, some of the people who were involved in that protest were members of the CFMEU.

Ms O’Rourke—That is right.

Senator McKIERNAN—So that the answer that was given back to the senator at the Sydney hearings would, I imagine, have taken that matter into consideration and the answer would still stand, rather than the conjecture that you are seeking to put on the response now.

Ms O’Rourke—Yes; but, when that event occurred, you did not have legislation that allowed you to proscribe organisations. If that event occurs once this legislation is in place, it may be a different sequence of events that is then interpreted that brings that union within this legislation.

Senator McKIERNAN—I am not sure if there continue to be representatives of the Attorney-General’s department in the room—

CHAIR—There do indeed, Senator McKiernan.

Senator McKIERNAN—but they might take that other element on notice and, if they can further address that question with the new interpretation that you put on it, I will certainly be interested to hear that.

Senator SCULLION—The *Hansard* will reflect that in Sydney I actually used the more general terms of a trade union movement and indigenous activists who were present at the time, as an example, to make that very point that then they would appear to be—but clearly the Attorney-General’s response was as I have read it. I thought that was of interest.

Mr Burnside—I wonder whether, Senator Scullion, you could think about it this way, because no-one can predict the circumstance in which this legislation might come to be used. Imagine that same episode at Parliament House: lots of damage and so on. Then imagine that in one scenario all of the people participating are dressed in balaclavas and have CFMEU logos front and back. Next imagine that they are all Aborigines. Next imagine that they are all distinctly Middle Eastern in appearance. Next imagine that they are all calling out in a broad Irish brogue. Add the stereotypes as you like. At that point, ask: will they be treated in any different way? Will people understand this legislation any differently, according to the identity of the people involved? I suspect that the honest answer is that, yes, they will. If it were a bunch of middle-aged housewives who had just got a bit carried away after bingo, I think that people would react rather differently. Then add to that this question: what is the political complexion of the government of the day? Does that make any difference to your confidence that there will or will not be a prosecution? Unless you can answer with confidence and unless people generally would accept your answer as accurate, it is unacceptably vague in its coverage.

Senator SCULLION—I am not going to accept that comment, Mr Burnside. What I have just said was that I had a question of similar concerns to yours, and that was the answer from the Attorney-General's Department. I thought I would have your comments on it, but I have not actually made my position on that clear, at the moment.

Mr Burnside—I do not doubt the sincerity of the answer given by Attorney-General's, but it might change from time to time.

Senator SCULLION—On one other point of clarification, Mr Burnside, you spoke about the outer reaches of your concerns, and throughout your evidence that you have given today we have dealt with some of those issues. I wanted to confirm the example that on one side you say that basically there is no real need to change the laws, because there is no threat to Australia. That seems like a—

Mr Burnside—No; that is not what I said at all. I said that the things that we would all agree amount to terrorist acts are already punishable by laws that are well understood.

Senator SCULLION—Ones existing in this country. I see. I withdraw that remark. I unfortunately took it that the general tenor was that—and perhaps evidence may have come from someone else—if effectively there were no terrorist acts here at the moment then there would not be any real need. You made what was perhaps a throw-away comment that in the situation on a work site somebody might push and pull and a little damage might be done, and someone might end up with life imprisonment. Would you see that that was at the outer reaches of our concern?

Mr Burnside—It is not at the outer reaches. Some of the evidence that is being given in the current royal commission involves actions which would fall squarely within the definition, and they are already amenable to criminal prosecutions under various provisions. I think it is horrifying to think that they might be regarded also as terrorist acts punishable by life imprisonment. I do not think it is what the legislation intends, but there is no doubt that it reaches there. How far beyond that it reaches is anyone's guess.

CHAIR—Thank you very much, Senator Scullion. Senator Scullion quoted from a document of answers to questions taken on notice during the Attorney-General's Department's appearance before the committee in Sydney recently, on 8 April.

Resolved:

That the document be received and made public.

CHAIR—Mr Burnside and Ms O'Rourke, on behalf of the committee I thank you both. I know that your time here has taken you significantly out of the time period in which you expected to be with the committee, and we are very grateful that you have been able to assist us for an extended period, both with questions and with your written submissions. We appreciate your assistance this afternoon, thank you. In closing today's hearing, I thank all of the witnesses who have given evidence to the committee today. I declare this meeting closed. The committee will reconvene on the same matters at 8.45 tomorrow morning.

Committee adjourned at 6.00 p.m.