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SENATE
LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
Monday, 8 April 2002

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

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

Committee met at 9.06 a.m.

CHAIR—I call the committee to order. The committee will begin this morning with consideration of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related bills. We will then move to consideration of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 in particular this morning to facilitate the appearance of our first witness, Justice John Dowd.

On 20 March 2002 the Senate referred to the Legal and Constitutional Legislation Committee the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related bills for inquiry and report by 3 May 2002. This is the first public hearing of the committee in relation to these bills. To date, the committee has received over 100 submissions. I remind all witnesses of the notes they have received relating to parliamentary privilege and the protection of witnesses. Further copies are available from the secretariat. Witnesses are also 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 a contempt of the Senate.

I also note for the record that, in the preparation for these committee hearings and in the advertising of the inquiries, there has been some considerable public concern about the time frame in which such matters are being handled. I would emphasise, both for the committee and for the record, that the timetable under which the 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 may say in terms of interest, is the package of bills known as the security legislation amendment bills, which we will begin to consider today. I understand that there is considerable concern expressed by members of the public and various organisations about those time frames.

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. We have undertaken to provide time during hearings on other legislation in Sydney this week to discuss matters pertaining to the security legislation. We will be considering it again at length in Melbourne next week, and we will be considering in great detail every submission that is made to the committee on this legislation. I hope that those assurances expressed by me as chair to the secretariat and to other committee members allay those concerns to some degree.

[9.11 a.m.]

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

Justice Dowd—I am President of the Australian Section of the International Commission of Jurists, a commissioner of the world body and a member of the executive committee of that world body.

CHAIR—I invite you, Judge, to make a short opening statement and at the conclusion of that I am sure my committee members will have questions for you on the security legislation to start with.

Justice Dowd—Thank you, Senator Payne. Firstly, may I extend to the committee my thanks for their courtesy in allowing me to come at this time. I am not as constrained by time as I was, so I have allowed a little more time. I also thank you for allowing me to deal with both bills. I have just found out that we are dealing with the security legislation first, so I will now adjust to that. I did put in a submission on the other legislation, which we will be dealing with later, but I gather it is somewhere in cyberspace and copies have been given to you.

CHAIR—Yes.

Justice Dowd—Insofar as I will be making comments about the lack of time, that is not in any way intended to be a reflection on the committee itself. I appreciate the committee is being placed in a very difficult situation by a very tight timetable and I thank you for the courtesies extended to me. We are a volunteer organisation comprising a large number of lawyers. We do not consider that the importance of this legislation is acknowledged by the absurdly limited time that is provided to consider the legislation. The interaction of the Commonwealth Crimes Act, the Criminal Code Act 1995 and these bills requires extensive and careful consideration which, unfortunately, it has not been possible to give. I will endeavour to put something more in writing but, as I have said, we are volunteers and most of us have day jobs.

The difficulty with this legislation is that the devil is in the detail. In my opening remarks, I will tend to go into a little more detail when dealing with matters of principle. There are two matters of principle. Firstly, it is very easy for the law enforcement authorities during times of crisis or perceived crisis to seek additional powers which tend to go onto the statute books as a result of the crisis, or perceived crisis, and remain there whether or not there is justification for it in the long term. In the legislation power is given to the federal ministers to call out the Army. That legislation went through the parliament just before the Olympics and the World Economic Forum in Melbourne because of the threats that there were going to be all sorts of terrorist activities at the Olympics and at that forum. The power within the legislation interfered with arrangements that were operating perfectly well for the police. Nevertheless, that power went through. One was treated as somewhat of a leper if one presented contrary views.

That is the atmosphere in which this legislation is being brought in, which is a concern to us. Although there is an hysteria in the community, matters such as this do warrant further time. There are matters here that will not be obvious on first reading but that will come out later. Some of them I am going to mention will look like matters of detail and matters of periphery. It is all very well to criticise when you are dealing with a very serious problem.

There is no question that we understand the government's role in endeavouring to suppress international terrorism. However, once the powers are on the statute books and law enforcement authorities perceive a problem, those powers will be applied. You do not give powers to prosecute and not have them used. The capacity of law enforcement authorities to bring matters within particular pieces of legislation is quite a healthy one, and we ought not lightly put matters on the statute book.

The first thing is to deal with the act of treason and the new offence set up by schedule 1. The first problem with treason is that it covers countries at war with the Commonwealth. The obvious example is Afghanistan, where you have a power to make a proclamation, which is not reviewable, to declare someone to be an enemy of the Commonwealth. Australia's situation in Afghanistan is a questionable one in terms of international law. The Australians went there possibly—and I do not know—at the invitation of one side of a civil war, and at the invitation of the United States. The legality of that invasion is in question. I do not wish to reflect in any way on the integrity and capability of our defence forces; on the contrary, I am an admirer of them. Nevertheless, the question of whether someone in the Taliban is an enemy of the Commonwealth is a very real one. The fact that one may declare a person to be at war with the Commonwealth is a power that ought not to be there lightly.

In relation to treason, most of the difficulties are not in the principal definition in division 80.1; they are in 80.1(1)(f), (g) and (h). We are looking at the schedule which incorporates chapter 5, 'The integrity and security of the Commonwealth'. If your book is the same as mine, it is on pages 006—the bottom of the page—and 007. Looking at 80.1(1)(f) on page 007, it is very difficult to suggest that someone involved in that civil war in Afghanistan, where Australia is now with questionable legality, who is fighting against an Australian soldier is engaged in armed hostilities against the Australian Defence Force. So, even though there is no declaration under 80.1(1)(e)(ii), he is there. That makes that person who may simply be involved in a civil war in Afghanistan a terrorist, and the fact that Australia has come in—whether by invitation or otherwise—makes that person guilty of treason.

Senator COONEY—I suppose overnight, at the click of a finger.

Justice Dowd—Yes, even though the person was already fighting there before the offence. That covers treason. The penalty for that offence is imprisonment for life, and that is obviously a correct penalty for the principal offence. Treason in 80.1(2)(b) creates an offence which used to be called 'misprision of felony':

knowing that a person intends to commit treason, does not inform a constable of it within a reasonable time ...

Most countries and most Australian states have moved away from misprision of felony—that is, a failure to actively do it. It involves the wife, the coworker, the child and so on who may or may not know. The question of whether you know someone is going to commit an act of treason is a very difficult matter. Again, in my view, that penalty carrying imprisonment for life is too high. I can see why assisting ought to be included, but I think it is very dangerous to cast an obligation on a private citizen to become a constitutional lawyer and to work out whether they should get legal advice as to whether they know. Conversation is easy, and you may very easily commit an offence by knowing something. And when do you know something? If you hear a rumour—if someone mentions that someone is going to do something—there are very tricky consequences.

There are a lot of provisions in this bill involving the Attorney-General's written consent. That is not a safeguard. When you are dealing with matters of hysteria, such as in the case of

the prisoner of war David Hicks—who is being treated by the Americans as though he is not prisoner of war when he clearly is—that is a very high political issue for a political attorney-general: to have the power to start or not start those proceedings will become a political decision. Decisions whether to prosecute or not should be taken by a director of public prosecutions, an independent authority who is not subject to ministerial control and can make a proper prosecutorial decision with the independence of that office—and it works exceptionally well for Commonwealth and state. It ought not to be a political decision in the hands of an attorney-general—and that is no reflection on the current Attorney-General—because an attorney-general may make an apolitical decision. I have had some experience in the role; it does not mean you will make a decision politically but, obviously, the likelihood is there.

Having dealt with treason, I will deal with terrorism itself—and I am on page 009 of your booklet. The creation of the offence of terrorism is at the heart of the whole of this legislation and is the danger of the whole of the legislation. The definition brings in subsection 100.1(2) and sets out a series of categories which are alternatives to the other. But, in the definition itself, the words ‘political, religious or ideological cause’ in their generality are extremely dangerous for offences which carry not only life imprisonment but absolute liability in some cases. I want to use some specific examples: the people who control Israel now were originally terrorists by any reasonable definition. They would not have become an independent state if they had not indulged in terrorism. The people of East Timor, by any reasonable standard in Indonesia, were terrorists. They attacked the armed forces and, clearly, committed offences for a political and ideological cause. In the case of Israel, it was also a religious cause.

Countries such as Indonesia have within them people such as those of Aceh, who do not consider that they were correctly included in Indonesia and have a reasonable argument for that, and the people of West Papua, who were clearly improperly included within Indonesia because of the impropriety with which the United Nations dealt with the matter. There are many causes, such as that of the Tamils, for instance. I went to a fundraising function, before I held my present office, of the Tamil community. In this little dinner, put together by the local Tamil community, they probably raised about \$200 by selling meals and so on. The money was to go to help people injured in the war that is occurring in Sri Lanka, where medical supplies are not allowed through—proper food is not allowed through but particularly medical supplies. These were to help people that had been injured. That, one would think in Australia, is a pretty innocent, reasonable sort of activity. I oppose totally any terrorist activities. I oppose Azeld, as the Tamil community here knows, any act of terrorism in the ordinary sense and have condemned it at every opportunity that I can, to their face and otherwise; but I will not, through fear of this sort of legislation, stop helping orphans, war-injured and civilians injured.

We have then got this, in my view, very dangerous term ‘lawful advocacy’, which excludes an explanation of when advocacy, protest or dissent is ‘lawful’. When you march down the street and somebody breaks out and sprays something on an object or a monument or whatever, does the activity then become unlawful? If a strike is in opposition to the law of a particular state, does that strike become unlawful? At what point in time does a demonstration, carried out perfectly lawfully, become unlawful? For the ordinary citizen ‘advocacy’ is, for example, talking about the people of Tibet—which I do regularly and with enthusiasm—or talking about the problems in Aceh. Many Australians in our sort of

society—we are probably the greatest interferers in the world other than the Scandinavians, in terms of other countries—will find themselves involved in criminal activity.

This legislation ultimately goes to other countries' laws. The Indonesians were very quick to go to President Bush and say, 'Yes, we are against terrorists,' which means they want American money and American support to attack the people of Aceh. In some cases, it may be to attack the Malaccas and the people of West Papua, where some terrible acts are now occurring. Remember that, once you have a crime committed here, and if we have similar laws in both countries and an extradition treaty applies, it means—if there is reciprocity of offences—that Australians may lawfully be extradited to Indonesia or to Sri Lanka to answer offences of terrorism. We can assume that if such treaties do not now exist they shortly will.

The definition then, in subsection (2), deals with concepts such as 'serious damage to property'. To me, spray painting a cenotaph is a terrible crime and is very serious, but putting something on a wall of a building may constitute 'serious damage'. I could not see any definition of 'serious'. That is a very dangerous matter—because not only is it not clear but also the ordinary member of the community does not know what is lawful and what is unlawful.

You then get section 100.1(2)(e), to take an example—I can only do these in a very limited fashion because of time constraints—which says, 'seriously interferes with ... an electronic system' et cetera. Air traffic controllers' strikes occur and are very real events in our community, for which there is no sanction. This may suddenly make these people potentially liable to a charge of terrorism. Whatever your views may be on strikes and otherwise, these people are carrying out lawful protest about wages and conditions, or safety factors. They may do a 'work to rule'. If we do have a 'work to rule', it may not be a strike as such but it may seriously interfere with a 'system' such as the landing and leaving of planes. I do not see where it is defined, but proposed section 100.1(2)(e)(iv), 'delivery of essential government services', is the widest of all possible definitions.

The damage, in the international examples that I have given, is in section 101.1(3) on page 10, where it says that a reference to 'property' includes property 'in or outside Australia' and a reference to 'the public' includes 'the public of a country other than Australia'. We are not likely to want to expand our powers for such an offence as terrorism to cover what happens in another country. I do not particularly want to deal with the constitutional basis, but I would just refer members to paragraphs 100.2(2)(k) to 100.2(2)(o), which contain this extension outside.

Proposed section 101.2, Providing or receiving training connected with terrorist acts, is something where an offence ought to be created, but there is no justification for absolute liability. Absolute liability under the Criminal Code is set out at section 6.2. If you read the section and the other sections on strict liability and so on, you will see that for offences such as murder we still have to prove intent, no matter how heinous that may be. There is no justification for making it easy to prosecute for absolute liability. It is easy for us to pick the worst possible example of terrorism and argue from that; it is very dangerous, however, because of the width of what I have just outlined in terms of the definition of terrorism, to take away the proof of intention to commit crimes.

If you look at 101.3, Directing organisations concerned with terrorist acts, which incorporates at (3) section 15.4 (extended geographical jurisdiction), in effect overseas countries, you will see:

- (1) A person commits an offence if the person directs the activities of an organisation that is directly or indirectly concerned with fostering preparation for, the engagement of a person in, or assistance in a terrorist act.

There are a lot of big organisations throughout the world that obviously we Australians want to attack—organisations such as the Al-Qaeda. But you must never look at a definition in terms of the obvious example; you have to look at the particular offences. Somebody quite sincerely, lawfully and religiously could be taking a stance on a matter and be indirectly involved in an organisation which has a terrorist arm. For example, you might look at Ireland. A lot of money is raised in the United States of America for what, in terms of UK law, is terrorism. People in towns such as Boston raise funds to help organisations such as the IRA, which clearly has a terrorist wing. We use that example to underline that proper legal and ideological clauses are very easily brought within this. I will not go into the merits or otherwise of what happens in Ireland; I merely use that as an example.

I turn to proposed section 101.4, Possessing things connected with terrorist acts. You have absolute liability. It is obvious—someone hands you a bag when you are getting on a plane and that sort of thing. We are used to dealing with that with Customs and so on, but this is an absolute offence—and I take you back to section 6.2 of the Criminal Code Act 1995 for that purpose. But in proposed section 101.4 we have a reverse onus. We in Australia have a system of law which obliges the prosecution, in almost all offences and in all serious offences, to prove all the elements of the offence and to negative self-defence and other defences. This obliges the person to go into evidence. That is something contrary to what we understand as reasonable. That is not reasonable here, no matter how much we may be concerned with terrorist acts.

Senator COONEY—I am sorry to interrupt. Did you find a definition of ‘thing’ in 101.4(1)(a)? I could not find one.

Justice Dowd—No—but that does not mean it is not there. I could not find it in the Criminal Code.

Senator COONEY—I could not find it either.

Justice Dowd—Again, in terms of collecting documents, there are the same problems of absolute liability. Dealing with membership of an organisation, and we are on page 14, section 102.1(a) says:

- (a) a person who is an informal member of the organisation;

There are a lot of organisations, religious groups and so on, whether you are a member or not or an informal member. I think that is a very dangerous concept. You may have taken the step by ringing and saying, ‘Can I have a form?’

It is easy to say that these are absurd examples, but the fact of the matter is that the Attorney-General can delegate power to make declarations to any minister. The most junior minister in the government may in fact be the person with a power to delegate to deal with proscribed organisations. If it is a Tamil organisation—as I said, I oppose what the LTTE does—and if there is related organisation fundraising, then you give a power under 102.2 to make declarations. That power should be subject to review, not just disallowance by a parliamentary committee controlled by the government. It should be reviewable as a matter of law by the courts. Obviously, it will not likely be made, but if Indonesia made a request to us to proscribe an organisation which is in effect at war internally with Indonesia or Sri Lanka, it would be very easy for that to happen. It is non-reviewable and, therefore, dangerous.

I point out that there are dangers in 102.4, Directing activities etc. of proscribed organisations, particularly because it is strict liability and making funds available too. There is an extraordinary provision in 102.4(3)(b). If the United Nations Security Council declares that an organisation was, such as it ought to be, a proscribed organisation, then that can create a retrospective offence, which is contrary to the principles of our law. There is an absurd defence: all the defendant has to do is prove that he got out as soon as he knew. So if there is a bomb and the person leaves the organisation after the bombing—files his resignation the next day—he does not commit an offence, which is absurd. Again, in the Attorney-General's discretion, we will get these absurd provisions such as the Attorney-General saying, 'Well, of course this will only be done in proper cases and this is to exclude the inappropriate cases.' As I say, David Hicks underlines the fact that a person can be demonised and created a leper. They may not have ever committed any offence at all and may not have committed a provable offence. That is a very good example, particularly where the Australian government has taken such a hopelessly weak position in relation to Hicks, where that has occurred.

On this bill, I point out the extension on page 18, at subclause 11, of the amendment to the Crimes Act, 'engaged in armed activities against the Australian Defence Force'. If the Australian Defence Force attacks somebody and someone defends themselves—which could have occurred in an East Timor situation, where it was still part of Indonesia in terms of what Australia recognised—then again we get serious problems of offence creation. Senator Payne, I have tested your patience and that of the committee too much by going into the detail. I want to make only a couple of other references to the border security legislation, but I think that is all I should give you at this stage. I thank you for your patience.

CHAIR—Thank you very much for that submission. I suggest the committee now move to questions on this piece of legislation. We will then take a brief moment so that *Hansard* can change the tape so that we can revert to discussion of the espionage legislation. It was always our view, Judge, that it may take a little more time this morning—

Justice Dowd—I have made arrangements.

CHAIR—because you are making submissions on two bills. We will move on to the deputy chair of the committee, Senator Ludwig.

Senator LUDWIG—Let me take you to some of the issues that you raised in your submission today, dealing firstly with 80.1(2)(b):

knowing that another person intends to commit treason ...

You then made the comment that it is no longer a matter that is reflected in overseas jurisdictions—that may not be quite verbatim—and you indicated that imprisonment for life was too harsh. Do you have a view about whether the provision should be included in the legislation at all?

Justice Dowd—I can see a case for including it. If you had a 25-year penalty, or a somewhat lesser 20-year penalty, in terms of the hierarchy of sentencing, that would be correctly included. Yes, it ought to be included, but there needs to be more precision in defining what 'knowingly' means.

Senator LUDWIG—In respect of the next issue you raised in relation to 80.1(3), 'the Attorney-General's written consent', do you say that there is no room for the Attorney-General to provide consent and that it should be completely left to the Director of Public Prosecutions or do you say there is an area where the Attorney-General should have some input?

Justice Dowd—Relating to matters generally, Attorney-General's consent is a very tricky provision. I proposed it only once in relation to proceedings for criminal defamation, because it was unlikely that that would occur. Here, however, you are dealing with highly politicised issues where there will be enormous pressure politically on an Attorney-General to go along with the government of the day. I do not consider, with something as emotional as international terrorism which has gripped the world since September 11, that that is a real safeguard. The pressures will be such that it would make it impossible for an attorney-general to refuse to prosecute somebody when the rest of his party and the government are howling for blood.

Senator LUDWIG—In respect of the issue you raised in relation to the definition of a terrorist act, particularly the one that deals with 100.1(1)(b), 'the action is done or the threat is made with the intention of advancing a political, religious or ideological cause', you made some interesting comments in relation to East Timor and the Tamil issue. But do you say that that should be removed in total or that there should be some definition which includes an action which is done or a threat that is made with the intention of advancing some matter or do you say it is superfluous to the definition of a terrorist act? Have you come to a view about whether or not it adds to or, in your view, detracts from the definition of a terrorist act?

Justice Dowd—With the intention of advancing, you mean?

Senator LUDWIG—Yes.

Justice Dowd—Clearly those words ought to go in. It is a draftsman's nightmare to try to cover the range of activity that you want to cover. The words 'political, religious or ideological' have over matters of centuries caused people to become martyrs, to kill people and to take activity. What is an ideological cause is the same. I do not, in the short time involved, have a suggested drafting answer to this problem. All I know is that we ought not as Australians countenance having such legislation going on the books on the basis that we can tidy it up later. This in fact is so serious—creating absolute offences—that the definition is too dangerous.

Senator LUDWIG—You made some comments in relation to an air traffic controllers strike. Do you have a view about whether or not there should be an exemption for industrial activity in relation to the bill? Would that be a satisfactory outcome, or do you say that those provisions extend the definition of 'terrorist act' too far and are unsound and should be removed?

Justice Dowd—It is almost impossible to define 'industrial activity', although we have gone a fair way down the track in Australia to exclude lawful industrial activity. In my view, it would be better to leave it out than to include it in terms of the probabilities of what will occur in Australia. Legislation dealing with crimes changes the nature of a society. You do not put something on the books without changing the nature of the Australian culture. We have in fact brought about safer workplaces because of industrial safety issues raised by industrial action. A lot of good things have occurred in our country and we are a better place because of that. As I have said, I would tend to leave it out rather than create the offence, because we are basically here dealing with terrorism, not with lawful industrial action or, for that matter, unlawful industrial action, both of which have had good benefits to the community. So I would leave it out rather than have the consequence of creating serious criminal offences.

Senator LUDWIG—Where you commented on absolute liability, the provision at 101.4(4) seems to provide an excuse:

Subsection (1) does not apply if the person proves that he or she was not reckless with respect to the circumstance in paragraph (1)(b).

That is an absolute liability which seems to provide an excuse. Does that sit well in your view or should the absolute liability provision not have an excuse?

Justice Dowd—I believe the absolute liability should go. If you have a reverse owner, there is a difficulty about ‘not reckless with’. Take, for instance, my attending a function in a school hall to raise \$200 for wounded Tamil people. Was I reckless in not checking where the cheques went? I think I contributed \$20 to pay for the meal. I suspect the profit on that was fairly negligible, but was I reckless in not checking the accounts of that organisation—or do I have to not go? When you have extended jurisdictions, such as in 101.4(5), then that is in fact too high an onus and you need something better than that. I should not have to prove that I was not reckless—because I possibly was. I use the personal example to illustrate the point, not to confess to some terrible crime.

Senator LUDWIG—I think that is taken as granted. Proposed section 102.2 is the prescription declarations. The Attorney-General is charged with that responsibility under the proposed bill. Do you have a view about whether or not that is the appropriate executive officer to have that responsibility—notwithstanding there is a delegation available to others, as you outlined—or do you say that it should be charged to an independent organisation, or should the Attorney-General take advice in respect of that, and then of course the reviewable nature of that?

Justice Dowd—I am sorry, what do you mean by ‘reviewable nature’?

Senator LUDWIG—Is it subject to a greater power to have the decision reviewed? It appears to have ADJR, but in a limited way.

Justice Dowd—The ADJR remedy would be so limited as to not make it a real review. Particularly with Commonwealth legislation where, as in tomorrow’s bill, our organisation on migration, they are redefining natural justice to take it back to Hickman—and someone else will be appearing to talk on that—ADJR is not a remedy. The alternative remedy of course is parliamentary review under subordinate legislation law, but those committees tend to be government dominated and tend—whoever is in government—to follow a government line.

In the Senate, for instance, there is an opportunity to review. But I think this should be done by legislation if it is to be done at all. It is sufficiently important, if there is a range of organisations—such as Al-Qaeda—that are now known to be typically subject to inclusion, that you ought to pass an act about that. It is not terribly difficult to pass an act of parliament on something as important as creating criminal offences. If you do not do that, then have subordinate legislation or have an application before the courts—the courts handle much less serious matters than this—for a declaration that the organisation ought to be proscribed. But this simple ministerial power ought not to be there on our statutes.

Senator LUDWIG—Have you got a view about whether or not it should be a disallowable instrument in terms of section 46 of the act?

Justice Dowd—In the Australian Senate, where no government, in reasonable history forward or back, will control the Senate, you do have a real safeguard. But you can never assume that there will not be a lunatic swing to the right or the left in the Australian community on a particular issue. One government may, in my lifetime, control a Senate. Subordinate legislation tends to be dealt with on party lines, even though it may not be

morally justifiable. Therefore that is a safeguard, particularly in our Senate, but it must be remembered that there is a danger here.

Senator LUDWIG—So you would prefer a more reviewable mechanism that rests with the courts?

Justice Dowd—It is not difficult to have a simple act to schedule so-and-so of the act which proscribes. When this act goes through you could put in 10 organisations now, presumably, that are clearly known. The government might include the LTTE, looking at government attitudes on the matter. That creates serious problems. Nevertheless, if you are going to include an organisation, let it be debated in the parliament. Let the parliament go over the whole issue and say why or why not. Let the people's parliament decide and not, in effect, an official in the Attorney-General's Department with the approval of the Attorney-General. Remember: governments are very quick to come to Australia to get their enemies in their own countries proscribed. The first meeting I went to after 9-11 was organised by the Sri Lankan community to talk about why the LTTE should be proscribed. Those things will happen very quickly and are going to be very difficult with the comity between nations.

Senator COONEY—It makes it very difficult too, if you look, for example, at attitude changes with respect to the Middle East crisis. Sometimes we are more and sometimes less in favour of the Palestinians having a go. We have really got to keep reading the news to see whether we are going to commit a crime or not!

Justice Dowd—And, as someone who led the Australian delegation to supervise the election of the Palestinian council, I was very conscious that the Australian government wanted to see the Palestinian authority set up. But now you see acts of terrorism on the part of the state of Israel—state terrorism against the Palestinians—and the issue is what is and is not reasonable in terms of a people defending itself against invasion.

Senator COONEY—You might be in trouble no matter which side you defend or support.

Justice Dowd—I ask you to think about Taiwan. The People's Republic of China might have a very strong view just about the extent to which Australia works with Taiwanese organisations. Taiwan is in fact our biggest difficult international problem other than Indonesia.

Senator LUDWIG—In conclusion, as I understand we are running short of time as we always do on these committees—

Justice Dowd—But in this case it is not your fault!

Senator LUDWIG—No, but I might certainly be blamed shortly if I continue to ask questions. Do you have a view about the need for the legislation more broadly, given the threats that actually face Australia and the adequacy of the current Crimes Act and other legislation within the state?

Justice Dowd—We are a member of the United Nations and believe in that institution. The United Nations has passed certain resolutions which cast on Australia an obligation to bring about anti-terrorist legislation. The government and the opposition have acted responsibly in endeavouring to try to do that. In terms of the principal offences, we do not oppose that. What we do oppose is the infelicity of expression and the width of it to cover a lot of other activities that may in fact be encompassed within terrorism. All I am saying is that we should hasten slowly, but there is no doubt that we must carry out our obligations substantially complying with the UN Security Council resolution.

Senator SCULLION—I just have a point of clarification. In your evidence and in response to Senator Ludwig in regard to the definitions in division 100.1(2) of the Suppression of the Financing of Terrorism Bill 2002, you alluded to the possibility of somebody taking industrial action and you made the analogy that this potentially could be someone like air traffic controllers. I think you were referring to paragraph (e):

seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to ...

And then it goes on. I just want to clarify whether there is some sort of potential—or has there been in the past that I may have missed—that industrial action includes the destruction of electronic equipment? I am just not sure if I missed the point and I just wanted to clarify that in my mind.

Justice Dowd—It is the words ‘seriously interferes with’ in 2(e). Industrial action is excluded. All I am saying is that it is not clear what industrial action is. If you interfere with an electronic system—I am not concerned about destroying it; that ought to be an offence—I am concerned that if you work to rule and slow it down or you refuse to process information in a system, then you may be incorporated within it. If (e)(iv) interferes with a ‘system used for the delivery of essential government services’, if you work to rule in terms of Kingsford Smith airport, in terms of distances between planes and so on, as I understand it, you may in fact improve the safety of human life. In fact, you may be simply doing what the law requires, but you may congest the airport and block it all together. I am concerned with the use of the word ‘interferes’ there rather than with ‘destroying’.

Senator SCULLION—Thank you, that clarifies that for me.

Senator COONEY—I am looking at proposed sections 101, 101.1 and 101.6—that is the definition of terrorist acts. Proposed section 101.1 states:

A person commits an offence if the person engages in a terrorist act. Penalty: Imprisonment for life.

If you look at 101.6, you can see that it talks about the preparation for or planning of a terrorist act and, as a result of all of that, you get life imprisonment. It extends it very far. It would almost, I think, contemplate people who take part in demonstrations such as occurred on September 11 in Melbourne. Certainly you could extend this legislation to include people who do that protesting overseas where they might want to damage cars or carry out serious offences but certainly not the sort of offences that you would lock people up for life for. Have you got any comments on that? This legislation increases the penalties available for actions that would almost be treated as street offences, for example, where you have pushed over a fence or you have pushed over a policeman. It takes it from an offence which would be considered, say, in the context of S11 as it was in Melbourne, as an offence that might bring a prison sentence but not one of any great length to one where you could finish up in jail for life.

Justice Dowd—This however is a problem with all legislation of this sort. If you do something under the Customs Act dealing with drugs, if you deal with matters relating to murder—the accessory before, accessory after, parties to and so on, or acts intending—normally they do carry the same maximum penalty, in this case imprisonment for life. But with proper sentencing principles—and there are eminent authorities all around Australia on Commonwealth and state legislation—principles apply as to what is at the lowest range, particularly with Commonwealth legislation where your Crimes Act sets out in great detail factors to be taken into account and nonparole periods and all of that sort of thing. What you

are really outlining is that there will now be an offence on the books which carries a maximum of penalties in Australia of imprisonment for life dealing with relatively trivial matters. It is going to be very difficult sentencing because some of them will involve, in effect, relatively minor street offences and this is the danger of the breadth of this. I would not like to have to draft a bill which covered a graduation of offences, which is normally in print in sentencing.

Senator COONEY—It seems to me that the problem you have got here is that the Commonwealth is now entering into a field which up until now has been very much a state field. The states have chosen to label these sorts of offences with relatively minor punishments—but any sentence of imprisonment is a very nasty thing. But here it has gone ahead in gigantic leaps, and it is the Commonwealth coming into an area which was originally the states’.

Justice Dowd—Yes, you have an overlap here of Commonwealth and state. The states have dealt with this matter over many scores of years—100 years or so—very well. By suddenly categorising them as aspects of terrorism I think your question underlines the serious problem here of saying to the United Nations, ‘Yes, we will pass laws,’ and then looking at the detail and creating for minor offences a penalty. The consequence of that is that a citizen must always be in greater fear. The whole reason for having a hierarchy of penalties is to allow a citizen to know what range the penalties are in. A citizen is not going to know. It is all very well for me to say, ‘That is at the bottom of the range; that is at the top of the range.’ How does the citizen know where he or she is in that hierarchy? This will inhibit discussion within Australia. It will inhibit lawful activity pushing causes. That danger is something that comes from this legislation, and I think more time should be taken to get it right. We must do it but we ought to get it right in terms of the hierarchy.

Senator COONEY—This might be a facetious question in one way but it may be in Melbourne at least a more serious question. If you get a crowd of people going to a football match, ideologically committed to a team, you get pretty close to invoking this legislation.

Justice Dowd—I do not think that you want me to comment on that, Senator Cooney.

CHAIR—That would just open up a discussion about codes of football, that he does not want to have.

Justice Dowd—I am a Swan supporter.

Senator COONEY—The other point I want to raise is that this does not come on its own. There has been a whole series of legislation passed in the immigration field making things tougher. The states themselves are passing more and more severe legislation. You get to the situation where the climate and the culture of a society change to the extent that it becomes much more oppressive than it should be. The poet Robert John Clark from the *Nameless Men* sums up what I am trying to say. The poem says:

Once in, there seemed no mousehole out.

The cause of righteousness became

a juggernaut as frightful as

the monster he’d set out to tame.

I was wondering whether we were not getting into that position.

Justice Dowd—You have to live with the fact that, once you give this power, you give the power to investigating policemen or policewomen to say, ‘I can charge you with this.’ It

makes it very easy when you have alternative Commonwealth and state offences to say, 'We could charge you under the Terrorism Act,' and it becomes much easier for you to plead guilty to a street offence or a minor property offence under a state law because you have that sanction. Do not lightly give law enforcement agencies powers because, although we have a very good record in Australia with law enforcement agencies, available powers can be abused.

CHAIR—Judge, as there are no further questions in this area, I thank you for your evidence on the security bills, as they are broadly described. We will take a short break and then we will move to the espionage legislation.

Justice Dowd—I am sorry that I have not been able to properly consider all of the matters. I wanted at this early stage to bring up a number of issues, and I thank you for your courtesy.

CHAIR—We appreciate your assistance. Thank you, Judge.

Proceedings suspended from 10.06 a.m. to 1.35 p.m.

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

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

McINTOSH, Ms Susan Mary, Principal Legal Officer, Security Law and Justice Branch, Information and Security Law Division, Attorney-General's Department

CHAIR—Welcome. We will resume our hearings into the consideration of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related bills which, of course, we began this morning with the Hon. Mr Justice Dowd, representing the International Commission of Jurists.

I did note this morning when we began considering this issue that there were some public concerns expressed in relation to this timeframe under which the committee is working. I want to place those remarks on the record again for the benefit of witnesses who are here for this afternoon's proceedings and, if necessary, I can remind other witnesses as they appear. In the preparation for these committee hearings and in the advertising of the inquiries there has been some considerable public concern about the timeframe in which these matters are being handled. I want to emphasise, both on behalf of the committee and for the record, that the timetable under which the committee works is one that is set down by the Senate and that in the last sitting week of the Senate the committee was provided with a program of approximately 10 bills to inquire into and report on by early May. The most significant, in terms of number and some may say in terms of interest, is this package of bills known as the security legislation bills which we are considering from today. I understand that there is considerable concern expressed by members of the public and various organisations about those timeframes.

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. We have undertaken to provide this time during hearings on other legislation in Sydney this week to discuss matters pertaining to the security legislation. We will be considering it again at length in Melbourne next week and we will, of course, be considering in great detail every submission that is made to the committee on this legislation.

I hope that those assurances expressed by myself as chair and on behalf of other committee members do allay those concerns which have been raised with us to some degree. In welcoming officers of the Attorney-General's Department again, officers should note they will not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to the minister. I also remind officers of the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, which are published by the Department of the Prime Minister and Cabinet. Mr Ford, I am not sure whether you have an opening statement on this occasion, but if you do, we would be pleased to hear that and I know that members of the committee have questions for you.

Mr Ford—Thank you, Chair. The events of 11 September fundamentally changed the nature of terrorism and of counter-terrorism planning and these changes are likely to be enduring. The issues that we are facing in Australia are also being faced in the US, the United

Kingdom, Canada and New Zealand and in all other member states of the UN. The legislative response of the Australian government and the reasons for it have been outlined by the Attorney-General. At base, they focus on identifying and addressing gaps in legislation to protect the public while continuing to ensure that the rights of individuals are protected. Parts of the legislative response are mandated by UN Security Council Resolution 1373. The centrepiece is the Security Legislation Amendment (Terrorism) Bill 2002. It creates a new general offence of committing a terrorist act. Previously, our law has treated the various types of terrorist acts, such as aircraft hijacking and hostage taking, as separate offences referable to particular UN conventions. While such legislation will continue, the new bill will fill in the gaps that remain. In so doing, it will cover the kinds of actions involved in the September 11 attacks and in subsequent events that have come to light in the war on terrorism. An example would be training with a terrorist organisation to commit a terrorist act. It will also cover possible future acts of terrorism.

The terrorist bombing and the terrorist financing bills will give effect to particular UN conventions. Both have a potentially wide application—for example, the use of a civilian aircraft as a bomb is an act that may be covered by the bombing convention, albeit one that was not in contemplation at the time the convention was negotiated. The financing convention will fill some gaps that exist in our current law—the Crimes (Foreign Incursions and Recruitment) Act 1978—and it recognises that to address the financial base of a criminal organisation is often the most effective action that can be taken against it.

The Telecommunications (Interception) Amendment Act will add terrorist acts to the list of warrantable offences and clarify the application of the act in the environment of modern electronic technologies. It will also make other changes unrelated to terrorism. It is included on the basis that, as for other forms of crime fighting, telecommunications interception is often the most effective tool. I hope this brief outline helps place each bill within the broader context of the government's counter-terrorism policy. In relation to this appearance before you, it is quite a broad subject and we have brought along quite a large team. I would like to be able, as occasion demands when questions are asked, to bring other people to the table and introduce them if that is possible.

CHAIR—Absolutely, Mr Ford. We are very grateful that the department has made every endeavour to answer the questions that members of the committee may come up with by doing that, so that is absolutely fine. Before we begin with questions from Senator Ludwig, I note that some of your officers, and you Mr Ford, may have heard evidence from His Honour Mr Justice Dowd this morning on behalf of the International Commission of Jurists. As I said in relation to the espionage bill, there were some specific examples raised in that evidence which are of some concern to the committee as to whether they fall within the provisions of this legislation and the impact they would have on Australian citizens if that were the case. It might be helpful if you could agree now to address those matters on notice and respond to the committee.

Mr Ford—Yes, I agree.

Senator LUDWIG—I take you to division 80—Treason, and in particular 80.1(2)(b), which is the offence of knowing that another person intends to commit treason but does not inform a constable of it within a reasonable time. The elements of the treason offence are broadly stated from 80.1(1)(a) to 80.1(1)(h). Are you seeking, effectively, for anyone who might know about something to have to then go and tell a constable—not that that is the usual phrase we use; it is usually a law enforcement officer or an AFP officer, but you have used the

word ‘constable’. So they tell the sergeant or the constable next door that they have a problem. Is that your intention?

Mr Alderson—The word ‘constable’ is to replicate the terminology in the Crimes Act that, for enforcement purposes, uses the term ‘constable’ with the same definition here. It is the intention to maintain the position that exists under the existing Crimes Act treason offence that if a person knows that another intends to commit treason they should tell a police officer, whether that be their next-door neighbour, the closest police station or what have you. Obviously, this is going to be a rare situation and it is a high onus in that they must know that the person intends to commit treason. But in that situation, yes, it is intended that they should have to notify a police officer.

Senator LUDWIG—Do you say that the penalty of life imprisonment is commensurate with the offence? A person perhaps innocently knows about the commission of treason but does not understand the charge, or does not understand whether or not it will be carried out, or someone makes casual remarks and, if they fail to tell the constable that that could be the outcome, they could be charged with an offence under this provision and face life imprisonment. Do you say that is reasonable?

Mr Alderson—There are two points. Firstly, it is a maintenance of the existing penalty and offence as they exist under the Crimes Act that has been translated across with the rest of the treason offence subject to a couple of changes that have been made. Secondly, that threshold of knowing would mean that if someone said, ‘I’ve heard so and so is going to do such and such’ in casual conversation, it is very unlikely that—unless you had some credible information that would suggest that one of these serious acts really was going to occur—you would meet that ‘knowing’ threshold. The other factor here is that the treason offence consists of very serious elements: harming the sovereign, levying war against Australia and so forth. If you had enough information that it could be said you knew that a treason offence was going to be committed, then being able to stop that occurring—being able to stop an armed invasion of the Commonwealth, harm to the sovereign et cetera—could reasonably be viewed as a very serious matter and I guess that is the rationale for the penalty that exists.

Senator LUDWIG—But, if you link it with division 80.1(e)(i), which states:

at war with the Commonwealth, whether or not the existence of a state of war has been declared.

It is only to the extent of division 80.1(f)(i):

engages in conduct that assists by any means whatever ...

That is a very broad offence in itself. So, for argument’s sake, a person who might go to a dinner to assist an overseas country with which war has not yet been declared might talk about going to an Irish dinner or a dinner to celebrate the Taliban—that might be clearer, but what about the lesser ideas?

Mr Alderson—Again, the issue you are getting to as to whether it is a casual comment or there are ambiguous circumstances is what the use of the word ‘knowing’ in division 80.1(2)(b) is directed to.

Senator LUDWIG—Is this provision reflected in other legislation in other countries?

Mr Alderson—There are two answers to that. Our examination of the treason provisions in other countries suggests that, no, there is not an equivalent specific provision like this that relates to treason. In the broader question, Justice Dowd mentioned the broader concept of ‘misprision of felony’ and the idea that it is a general offence of failing to report a serious

crime; that has been removed from the statute books in some states and territories but not in others. So the concept does exist elsewhere, but it is in here on the basis of its continuing the existing provision in the Crimes Act.

Senator LUDWIG—So you have not seen the necessity to delete it on the basis that it really does not exist under legislation in other countries that is designed to combat terrorism?

Mr Alderson—On the terrorism side there has been legislative activity in a number of countries in recent times. On the treason side, there are all sorts of reasons why they may take a different approach. Also, I am not sure of the position in some of those countries as to whether they have preserved a concept equivalent to ‘misprision of felony’.

Mr Ford—We could include that in answers to the list of questions we will provide, if you wish.

Senator LUDWIG—Yes. Division 80.1(3), under the heading of treason, states:

Proceedings for an offence against this section must not be commenced without the Attorney-General’s written consent.

Does that require the Attorney-General to be the gatekeeper, in effect, for all of these offences of treason? If you look at the definition of a terrorist act, which is in division 100.1(1)(b), it says:

the action is done or the threat is made with the intention of advancing a political, religious or ideological cause.

We will come back to that, but in that instance wouldn’t that consent be better held by the Director of Public Prosecutions as an independent person?

Mr Alderson—The decision as to whether to prosecute is with, and remains with, the Director of Public Prosecutions. Again, this maintains an additional gateway—to use your term—over and above what exists generally. So for all Commonwealth offences, other than some special rules about the prosecution of tax offences, the general rule is that the Director of Public Prosecutions, whose independence is enshrined in the DPP Act, has the decision as to whether to go forward with a prosecution. The office of the DPP has published guidelines about the tests it applies to decide whether a prosecution is appropriate. That, as with other serious offences, applies here: the DPP has its normal role, but there is an additional gateway, as under the existing Crimes Act treason offence, that the Attorney-General has to agree to the prosecution going ahead. But that in no way diminishes the DPP’s independent role.

Senator LUDWIG—Part 5.3—Terrorism, at 100.1(1) says that ‘terrorist act’ means an action or threat of action where:

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause;

Perhaps it could be a right to life organisation picketing outside a clinic. Although I was not here in parliament at the time, I am told that timber trucks blockaded the Commonwealth parliament in Canberra. From my recollection, farmers have turned up and dumped hay and such material at Parliament House. The action that could include that type of issue is at subsection (2), which says:

Action falls within this subsection if it:

... ..

(c) endangers a person’s life—

et cetera; which it may not—

- (d) creates a serious risk to the health or safety of the public or a section of the public; or
- (e) seriously interferes with, seriously disrupts, or destroys, an electronic system ...

It can also include serious damage to property. Those sorts of things could be caught by those types of activities. They could then be framed under the idea of a terrorist act. Could you give me a view about whether or not that would be possible, especially where the Attorney-General is the person who is required to give written consent under this legislation? One of the difficulties would always be where a political decision is made on the run, given a certain circumstance has a high profile. It might then grab the eye of the incumbent government, who might say, 'We need to do something about the trucks outside parliament, or the farmers picketing, or the right to lifers in front of clinics.'

Mr Ford—I think the point at which to start is to recognise that those words are meant to be words of limitation. The words in subsection (2) carve out the aspects of harm that might be caused by the offence and the qualification that the action is done with a particular motive—for a political, religious or ideological cause. They are meant to be words of limitation.

Senator LUDWIG—Those groups I have mentioned would fall within that definition, wouldn't they? They would have either a political or religious cause they wish to state.

Mr Ford—That may be, but the other elements of the offence would need to be made out as well. The second point I want to make is, as Mr Alderson said, the process by which these things go forward—that the DPP makes an independent assessment as to whether the facts warrant a prosecution. The Attorney's role becomes one of veto.

Ms McIntosh—With regard to the terrorism offences, the Attorney-General's consent is not required, as it is for the treason offence. So the issue of the role of the Attorney-General's consent does not arise in the context of the terrorism offences.

Senator LUDWIG—So the Director of Public Prosecutions would decide whether that should be pursued. If during a protest a person or organisation—such as the National Farmers Federation, in the protest I have described—goes a little too far and breaks a door, they fall within the ambit of that offence?

Ms McIntosh—Potentially—if the damage to property was serious.

Mr Ford—I think there is another point that needs to be made. As was recognised this morning, there is great difficulty in trying to cover all the things that need to be covered while at the same time not going too far in terms of unforeseen applications. The kinds of issues that we are facing in Australia are no different from the kinds of issues that have been faced in the UK, the US and Canada in developing this kind of legislation. We have had regard to the precedents that they have set. The same issues have arisen but have not arisen in practice. In other words, the consequences of the UK legislation of 2000, which goes back a couple of years, have not been predicted to apply in such a way.

Senator LUDWIG—So are you saying, 'Trust me'?

Mr Ford—No; I am just trying to define the nature of the problem and to say that there is quite a bit of experience in the international community.

Senator LUDWIG—But that is no answer to the problem that we have in front of us.

Mr Ford—No, I recognise that.

Senator LUDWIG—Potentially, the National Farmers Federation or some such organisation could fall within the provisions of part 5.3—Terrorism, which I do not think was intended. It does seem to be an unintended consequence of this legislation. I understand that you agree that that could be the potential outcome—that they could fall within it and they could be charged under this provision.

Mr Ford—Not quite. The agreement is only to the extent that it can apply to anyone if the circumstances are such as to satisfy the words of the statute. I want to emphasise that the harm has to be serious, the motivation has to be there and so on.

Senator LUDWIG—You have not ruled it out. You certainly have not excluded it.

Mr Ford—I have not ruled out any application, no.

Senator LUDWIG—Would you agree that it is the intention of the terrorist legislation to apply to the National Farmers Federation or some such organisation that was trying to make their point of view known to parliament?

Mr Ford—No. I would like to add that the other qualification, of course, is the exclusion for lawful advocacy, protest or dissent.

Senator LUDWIG—Yes, I know it is an exclusion, but it says ‘lawful advocacy, protest or dissent’. I am not a qualified lawyer, but if people were picketing outside Parliament House and went a bit further than they would otherwise go, it really falls on the other side of that, as we have already agreed, as I understand. For example, if they go a little bit further and perhaps unintentionally break a door in their protest or put property there that should not be there or otherwise jostle the Prime Minister as they walk through the crowd—without stepping too far, issues that have occurred in the past that we have not regarded as terrorist acts—these are issues which could certainly fall within the gamut of this legislation.

Mr Ford—In the context of this legislation, they would not be the kinds of actions that could satisfy a court that this offence had been committed.

Senator LUDWIG—So do you say that picketing and public demonstrations are not included?

Mr Ford—That would be my interpretation.

Senator LUDWIG—But it says:

- (c) lawful advocacy, protest or dissent; or
- (d) industrial action.

Where do you say public demonstration or picketing are excluded?

Mr Ford—They are not expressly excluded, but I do not believe that kind of action would be judged to come within the terms of the provision.

Senator LUDWIG—Do you say that industrial action includes or does not include picketing?

Mr Alderson—To go back to what Mr Ford said, we have to keep all the elements in mind—and you go back to serious harm to a person, serious damage to property, endangering a person’s life. Senator, you gave the example of someone jostling the Prime Minister. It would be very unlikely that merely jostling the Prime Minister would be viewed as endangering—

Senator LUDWIG—They might want to persuade him about what to do or not do about an issue. I remember the pigs issue had significant airplay in the media. I am not sure which groups were involved, but the farmers were certainly making a point about all of that. Although it is only anecdotal recollection about the timber trucks blockading Parliament House, I think they were making a point. I suspect that was more than a minor incident.

Mr Alderson—In terms of the factual illustrations, the other side of the equation would be if you have a purely domestic group that perhaps starts off with lawful, legitimate objectives but moves on to some activity like bombing Parliament House or placing a bomb out the front of Parliament House and therefore meets these limbs, then that may be a case that would be intended to be dealt with under these provisions.

Senator LUDWIG—We are not envisaging the National Farmers Federation doing that.

Mr Alderson—No.

Senator LUDWIG—Certainly, I cannot foresee them stepping across that line to that extent at all.

CHAIR—They may take issue with the analogies you have drawn so far, Senator.

Senator LUDWIG—Yes, they may. When you state that it does not include (d), which is industrial action, my understanding is that industrial action does not include picketing, so the concept of picketing falls outside of that. Did you have a view about that? Is picketing caught by this?

Mr Alderson—The main thing about picketing is that, unless it met those other tests of serious harm, serious damage and so forth, it would not come within this.

Senator LUDWIG—Regarding someone picketing and preventing vehicular access or suchlike—maybe the crowd gets out of hand and starts to rumble the bus, so to speak—then do you say that, if it does create serious damage, they are likely to be caught by the terrorist legislation?

Mr Ford—No, I would think that is not a terrorist act.

Senator LUDWIG—Do you agree that they could cause serious damage in that picketing? They could cause damage to a bus at significant expense. It may not have been intended but it may have been caused. They were picketing, and it was for ‘a political, religious or ideological cause’.

Mr Ford—I think that the word ‘serious’ there has to be given a meaning that makes sense in the context of the purposes of this legislation: to combat terrorism. Just rocking a bus, even if it causes some damage to a bus such as smashing a window or something, would not satisfy that criterion on any prosecution and certainly would not get past the DPP.

Senator LUDWIG—But, in addition, they could create ‘a serious risk to the health or safety of the public or a section of the public’ by picketing on the footpath or causing traffic congestion.

Mr Ford—That, again, would be too minor to attract this sort of provision. To attract this sort of provision in paragraph (d), it would have to be biological weapons or something of that nature.

Senator LUDWIG—The differentiation between ‘serious damage’ and ‘serious harm’ or ‘creates a serious risk to the health’ is dependent upon your view about what it means rather than the court’s?

Mr Ford—No, Senator, but you are asking what my view is and I am doing my best to answer you.

Senator LUDWIG—Regarding 101.4—this is actually Senator Cooney’s issue, but I have circled it so I will ask it—

CHAIR—Where you going, Senator Ludwig—101.4?

Senator LUDWIG—Yes, division 101.4—Possessing things connected with terrorist acts. Division 101.4(1)(a) states:

(a) the person possesses a thing.

Is a ‘thing’ defined? Can a mobile phone be a thing?

Ms McIntosh—A ‘thing’ is not defined.

Senator LUDWIG—So a roll of paper is a thing?

Ms McIntosh—Potentially. A map is a good example, if you are talking about papers.

Senator LUDWIG—So it can include anything?

Ms McIntosh—Yes.

Senator LUDWIG—Then in relation to—

CHAIR—Are you moving on to 101.4, Senator Ludwig?

Senator LUDWIG—Yes.

CHAIR—Weren’t you going to discuss the question of absolute liability and the reverse onus?

Senator LUDWIG—I was either going to deal with it or come back to it. I can deal with it now.

CHAIR—No, I will leave it to you. That is fine.

Mr Ford—Could I just add to the answer on ‘thing’? You instance the possession of a mobile phone. I just do not want to leave the record with the suggestion that we would agree that, under this provision, somebody could be guilty of an offence which involved nothing more than possession of a mobile phone, which was alleged—

Senator LUDWIG—No, that is not what I meant. I was using that as an example to work out what a ‘thing’ was. A mobile phone could in fact be a ‘thing’ which, if you then take it in conjunction with 101.4(1)(b), ‘is connected with preparation’—it may very well be. I was curious as to whether there was a definition of a ‘thing’ and what you conceptualised a ‘thing’ to be.

Senator COONEY—It would certainly include a mobile phone, though. I quote:

A person commits an offence if:

(a) the person possesses a thing; and

(b) the thing is connected with preparation for, the engagement of a person in, or assistance in a terrorist act.

It must include a mobile phone.

Mr Ford—Yes, but my only comment was that, with the elements that would need to be proved to satisfy that offence, there would still have to be a case made out that the thing was used in connection with a terrorist act.

Senator LUDWIG—Yes, but we have gone through that. Where a picketer is using a mobile phone in furtherance of their political view and, in the picketing, unfortunately, serious damage occurs, that is caught by the possession offence. Would you agree?

Mr Ford—I am not sure what I am being asked to agree to.

CHAIR—Do not agree to anything on that basis! Do you want to restate that, Senator Ludwig?

Senator LUDWIG—Here a person commits an offence, so it is an offence of possessing a thing, such as a mobile phone, and it has to be connected with a terrorist act, or assistance in a terrorist act. That terrorist act, as we discussed earlier, is defined under part 5.3, division 100, which could include, on one view, a person advancing a political, religious or ideological cause, where the action results in serious damage. That could include a person picketing, with a farmers organisation, for example, outside parliament, where serious damage results. Maybe the damage was not intended, but it results, so not only could those people be potentially charged with a terrorist offence, they could also be charged with possessing things, such as mobile phones, in my view. These might be people who are quite innocently in the crowd, but they lay themselves open to those potential charges where they might be organising the rally by the use of mobile phones.

Mr Ford—I understand the question. With respect, I disagree with the premise. I know you do not want to go over the same ground, so if I could just leave it at that.

Senator COONEY—Could I just expand on that? I think Senator Ludwig is right. If a farmer here has a phone and contributes in some way to the planning and carrying out of, say, an action by farmers in France who disrupt traffic and even cause serious damage by tipping over cars, then he or she has committed a terrorist act in Australia.

Mr Ford—The reason I disagree is that I think ‘serious’ in this context has to be given a much more restrictive interpretation than—

Senator COONEY—Yes, but some of those farmers in Europe who protest cause quite serious harm to property, in terms of vehicles they tip up. If a person is here on a phone saying to them, ‘Yes, I recommend that you go around parliament,’ that is a terrorist act. It must be, within the terms of this legislation.

Mr Ford—I understand the point and I guess we can take different views as to the meaning of the word ‘serious’, but if you see it as a drafting question and consider what other words might have been used—such as ‘catastrophic’; the word ‘destroy’ was instanced this morning as one possibility—none of those really capture the kinds of damage that is needed to be covered by this kind of legislation.

Senator COONEY—Say you punch me in the nose with your powerful right cross and smash my nose and it bleeds, that is a serious offence, surely? It causes serious damage.

Mr Ford—I do not think it would cause serious damage.

Senator LUDWIG—It goes on to section 101.4, which creates an absolute liability, although it then goes on to 101.1(4), which provides:

... that he or she was not reckless with respect to the circumstance in paragraph (1)(b).

So, there is that excuse. With that absolute liability, there is no ability to then have a broader view applied. Justice Dowd raised this this morning, if you recall, when he questioned the use of an absolute liability in this area. I wonder if you have a view about that.

Mr Alderson—The way it works is along the lines you say. The default position for Commonwealth offences is that the prosecution has to prove fault for each element unless you displace it. The absolute liability displaces proof of fault from (b), but then (4) reinstates the concept with the onus now on the defendant so that, instead of the prosecution having to prove fault as to that element of the offence, the defendant has an opportunity to raise and establish on the balance of probabilities that they lacked fault in relation to this element of the offence.

Senator LUDWIG—In respect of the actual charge, then, going back to the scenario of picketing, there is an absolute liability—the onus is then on the person to disprove it on the balance of probability or beyond reasonable doubt.

Mr Alderson—The one clarification is that the onus is reversed in its absolute liability in respect of the person's mental state—the mens rea, or fault. The facts in (b) still have to be proven by the prosecution beyond reasonable doubt.

Senator LUDWIG—Yes. So, once the picketing takes place and once there is damaged property—seriously damaged property, if we want to make it more specific—then liability arises.

Mr Alderson—Liability arises if a court is satisfied beyond reasonable doubt that a thing was connected with preparation, et cetera, for engagement in a terrorist attack. In that part of the trial where the prosecution led its evidence to establish that, the defendant would have an opportunity to show that they were, in essence, not culpable for what happened.

Senator LUDWIG—Yes, but in the first instance Public Prosecutions does not have to prove that there was an intent by these people to cause the serious damage to the property during the picketing exercise. Some of the words are 'there is no intention', because it is an absolute liability. That is right, isn't it?

Mr Alderson—Yes.

Senator LUDWIG—There is no 'out', in the sense that the defence cannot say, 'We did not intend that result to occur.' So, straight away we come back to the issue that I raised earlier. The person taking part in picketing—they might have organised it with a mobile phone—may then find that it gets out of hand more than they wanted it to. Serious harm or serious damage results, and they are staring down the barrel of a terrorist offence. The only defence is then to say, 'Well, you have got absolute liability at first instance,'—in other words, no intention needs to be proved—and we will charge you and prosecute you according to law, and then, on the balance of probabilities, you can raise somewhere down the track that you were not reckless.'

Mr Alderson—In practice, the DPP would assess all of the relevant evidence before going ahead with a case. The DPP does not want to get into court, put a lot of effort into a trial and then be surprised to find out that the person in fact had no culpability. So, just as they would before prosecuting somebody if fault were required to be proved, they would assess both the facts and the person's mental state or culpability. They would make that assessment here, too, to assess whether that defence will be able to be made out by the defendant.

Senator COONEY—The only problem with that approach, Mr Alderson, is that what you are really saying is, 'We will guarantee that we will have wise DPPs that never make a mistake—people of absolute integrity.' That might be the case with Mr Bugg, but can you guarantee it forever?

Mr Alderson—For all offences, the effectiveness of the role of the DPP as an independent safeguard is underpinned by the DPP Act and by the quality of people who are appointed. That is an issue not only here, but for all offences.

Senator COONEY—Can you think of another offence where you get life, where there is absolute liability? I am trying to think of one. Can you think of another offence where the maximum penalty is life but where the prosecutor can rely on an absolute presumption against the defendant?

Mr Alderson—It certainly is unusual. There is no example in the Commonwealth Criminal Code to date where an element of this kind carries absolute liability, although there are jurisdictional elements and so forth, for serious offences, that carry absolute liability. As Mr Ford mentioned earlier, part of the process with the legislation was examining the approach that has been taken in other countries. This approach—in terms of your question about precedent—is comparable to the approach taken in the British terrorism legislation.

Senator COONEY—Is this the Diplock courts and things like that?

Mr Alderson—This is in the Terrorism Act 2000—the array of offences they have to deal with terrorism.

Senator COONEY—What are you saying? You would approve of the Diplock legislation, would you, of the seventies? When I say ‘you’, I mean the system.

Mr Alderson—Senator, it would not be my place to approve or not approve.

Senator COONEY—All I am saying is when you say that is a precedent, I do not think the Diplock courts are looked upon around the world as a real example to follow. I am not sure whether they would survive an appeal these days against the European statute.

Mr Alderson—Your reference is very specialised legislation that was put in place to deal with the IRA, whereas the much more recent package of British legislation does not contain those sorts of simplified procedures that were put in place. These are offences that would be prosecuted in an ordinary court of law and not just directed to the IRA situation.

Senator COONEY—The Diplock courts made use of extraordinary powers to cover a problem. This piece of legislation is attempting to do the same. You can carry out an act which might look like murder, but the Crown has got to prove it. Here, if you look at the terms of 101.4, all you have to do is prove a person had a mobile telephone with a number on it that was connected with a body which the Attorney-General, two hours before, had declared to be a terrorist organisation. That is all you have to prove.

Mr Alderson—For this terrorism offence, as well as proving the person possessed a thing such as a mobile phone and that they knowingly possessed that thing, you would have to prove in fact and beyond reasonable doubt that that thing was—and I quote:

... connected with preparation for, the engagement of a person in, or assistance in a terrorist act.

Senator COONEY—No, you do not, because there is absolute liability for that:

(2) Absolute liability applies to paragraph (1)(b).

Mr Alderson—This is a key point, though: that the absolute liability is about the person’s mental state. Traditionally, in a criminal offence, you have the *actus reus*—the physical act—and you have the *mens rea*—the mental state of the person, their awareness of their conduct. The absolute liability is only directed at the question of mental state, and there is a defence to deal with that. With respect to the facts of the events that happened or the circumstances that

were occurring, absolute liability does not affect that those facts must be proven in a court of law, beyond reasonable doubt.

Senator COONEY—It says in paragraph (1)(b), ‘the thing is connected’. That is what the absolute liability is—and I quote:

(b) the thing is connected with preparation ...

That is what it says. It does not say, ‘Absolute liability applies to intent under paragraph (1)(b).’ It says:

(2) Absolute liability applies to paragraph (1)(b).

Mr Alderson—These amendments will be inserted in the Criminal Code, and there are existing provisions in the Criminal Code that explain how Commonwealth offences work in terms of physical elements and fault elements. With respect to these provisions, when you say ‘absolute liability’, it means the mental state of the person in respect of that physical element.

Senator LUDWIG—Perhaps you could take that on notice and provide those provisions. If there are any court decisions which explain that, they might also be helpful to the committee.

Mr Ford—Yes, we will do that.

CHAIR—Senator Ludwig, when the opportunity arises, I would like to invite Senator Scullion to direct questions as well.

Senator LUDWIG—I will not be too much longer. In relation to division 102—Proscribed organisations, would you agree that that power could be exercised by the Attorney-General under 102.2 or that that power could be delegated by the Attorney-General to be exercised by a junior minister?

Mr Alderson—The provisions do allow a limited delegation to another minister, that is correct.

Senator LUDWIG—Is that decision reviewable, or is only the more general decision when the Attorney-General makes a declaration reviewable?

Mr Alderson—The question as to whether it is reviewable is an interesting administrative law question. It is not the intention that the review of that decision be an accountability safeguard. Delegations, if they are done properly and meet the requirements of the legislation, should stand as is. They are not really intended to be something that you challenge as a basis of accountability. One reason for a provision of this kind is that the Attorney-General may be overseas, incapacitated or so forth.

Senator LUDWIG—Unfortunately it does not say that, though. It is a power at large that has broad application which could allow the Attorney-General, in effect, to delegate it to a junior minister. Would you agree that that is a possibility?

Mr Alderson—It does allow delegation to a minister, that is correct.

Senator LUDWIG—As such, the reviewable nature of that is also an issue that the courts will have to pore over for some time, because that is still a delegation that is possible to review.

Mr Alderson—A delegation could be a decision of the kind that could be reviewed.

Senator LUDWIG—But the overall decision which is then made about the declaration of a proscribed organisation is in itself reviewable but only to the extent of the ADJR. Do you

recall Justice Dowd's submission in which he said that parliament should have the ability to review that? Do you have a view about that? Do you think that the ADJR is sufficient?

Mr Alderson—It concerns the merits of different approaches; it is not something that I can really comment on. In explaining the role of the ADJR Act, that is an act that applies across the board to Commonwealth decision making and is about the quality of the decision making process. It requires that all relevant facts be taken into account, that the decision not turn on irrelevant factors, that natural justice be accorded. That is a well-established decision making framework. Challenges under the ADJR Act have been very widely used in many contexts.

Senator LUDWIG—But it does not extend to a merits review?

Mr Alderson—It is not a merits review, that is right.

Senator LUDWIG—So a declaration of a proscribed organisation could possibly include any body corporate. Proposed paragraph 102.2(1)(a) states:

if the organisation is a body corporate—the organisation has committed, or is committing, an offence against this Part (whether or not that organisation has been charged with, or convicted of, the offence).

Going back to the picketing organisation—the farmers organisation—they could be declared a proscribed organisation and their only ability to defend themselves against that would be to seek an administrative decisions judicial review. Have I read that correctly?

Mr Alderson—I guess our interpretation of the legislation we have put forward is that the fact of picketing would not bring you within it. In terms of an organisation that did, if the Attorney, based on cogent and persuasive information put before him, is satisfied that an organisation has committed an offence, then he can proscribe that organisation, and that decision is subject to judicial but not merits review.

Senator LUDWIG—I was curious whether or not a lawyer assisting a proscribed organisation could similarly be caught by the legislation; in other words, if they were trying to unstick them from that. Who can help them? Once you become a declared organisation can a lawyer assisting them similarly find themselves in a difficult position? How do you appeal? If you are then going to appeal to the ADJR—although it is limited, as you know; it does not include merits review and is limited to the law, effectively—how does a lawyer assist that proscribed organisation to draw up the appeal papers and file them without having themselves caught by the legislation?

Mr Ford—I do not think the bill would prevent a lawyer from appearing on behalf of an organisation in the Federal Court to challenge proscription.

Senator LUDWIG—Is that just your view or does the legislation exempt them?

Mr Ford—It is certainly my view but I guess I am looking for assistance as to why that suggestion is made, Senator.

CHAIR—Probably because of 102(4)(e), I would have thought.

Senator LUDWIG—Yes.

Mr Alderson—There are two issues. Because the government has clearly put on the record that it intended that this be subject to judicial review, that would be a factor taken into account in the interpretation of this legislation. I think there would be good argument that a court would read in that it could not have been intended to prohibit someone using a lawyer.

Senator LUDWIG—Perhaps you could take it on notice and come back and tell me why. The way I read 102(4), assisting a proscribed organisation, is that once the declaration is made

and the lawyer assists—whether or not they would take that step is another issue in itself—if they do take that step and they are paid for their services or expect to be paid for their services, to exercise a right which is apparently given to them under the provision, then potentially they would fall within the ambit of the legislation and have a penalty of something in the order of 25 years, which is a harsh penalty. Certainly I cannot speak for lawyers, but I do not know whether I would contemplate putting myself in the area of having imprisonment for 25 years hanging over my head if I tried to assist an organisation to fulfil its appeal rights under the act.

Mr Ford—We will take it on notice, Senator.

Senator SCULLION—Like my colleagues, I am concerned about similar issues—issues associated with ‘things’ fascinate me. I am just looking for some of the background to this policy not to actually define what a ‘thing’ is. Prior to September 11 one would not normally have suspected that a 747 would necessarily be a ‘thing’. Is that the sort of logic behind that?

Ms McIntosh—Yes. It is really not possible to say which things may be associated with terrorist acts and which other things may not be. It is impossible, if you like, to define a thing down to, say, that it is a 767 and not a megaphone, for example. A thing is going to be relevant if in fact it is connected with a terrorist act and what those things may be could vary enormously.

Senator SCULLION—In regard to a terrorist act, let us just take a thing. Let us take the case of Joey Plummer. The thing is bolt cutters, and Pine Gap is a bit quiet this year so he is going to spend Easter at Woomera. He is a steel fixer and he is never too far from the job so he has his bolt cutters in his pocket. He has arrived at Woomera and he is an innocent sort of bloke and he has got caught up in the activities around the fence and things like that. If you applied the circumstances we have here under a terrorist act, for example, I think lawful advocacy would go out of the window pretty swiftly. It is certainly not industrial action.

As you go down the list, it involves serious harm to a person. I think anyone who was watching the footage on that would certainly see that that was happening. It involves serious damage to property. The fence was certainly better looking when it was upright. It involves endangering people’s lives. Clearly, there were injuries and all those sorts of things happening there. It talks about a serious risk to health. Woomera actually does have provision for a quarantine exclusion area, and human health is the specific reason for that. In those circumstances, would Mr Plummer be talking to someone about being involved in a terrorist act?

Ms McIntosh—Are you suggesting that Mr Plummer, in this case, used the bolt cutters on the fence because, if he had the intention to advance the political, religious or ideological cause and it was not a protest situation—

Senator SCULLION—Quite so. He probably would not be saying so, but I would say that would probably be the scenario.

Ms McIntosh—If a person who was involved in the political, religious or ideological cause used the bolt cutters to involve serious damage to property and so on, then that person may be committing a terrorist act, depending upon all of those other elements that would be required to be there.

Senator SCULLION—I can understand why we have these concerns. We had a lot of analogies about the founding fathers in agriculture and their fairly benign protests on Parliament House. I have some friends in the trades and labour movement and, probably more

importantly, in the Aboriginal advocacy area who were involved in a very unfortunate incident that was well publicised where one thing led to another, unfortunately, and we actually had an invasion of Parliament House. We talk about terrorism. That is the sort of stuff that people immediately think about. An invasion of Parliament House is a pretty serious end to things, isn't it? And we are not talking about picket lines here; they knocked the doors off their hinges and the people who were protecting Parliament House were kicked, punched and moved out of the way. If you go down the list in those sorts of circumstances, we had the most serious damage to property and people's lives were endangered. I do not think there is any question about that. I am not really sure about the health or safety of the public, but let us say that we know about the incident and that was about as serious it gets in those sorts of circumstances.

What I would like to know is: would people see those acts of public mischief or violence—or whatever words you want to use—as necessarily coming under the purview of this sort of act? Other colleagues here would probably like to know that. In the future, will those sorts of affrays be treated in a different way—in other words, would we look at the terrorist act to see if we could treat them under that act rather than under another?

Mr Ford—I understand your point. We will certainly take that on notice and cover that in our response. What I can say here is that the example you give is one where we are moving further along that continuum from some of the examples that were given before—like picketing, damage to fences and things like that. Once you have a demonstration that involves violence at Parliament House and damage to the building—

Senator SCULLION—I do not think a scenario could get any worse than that, but people would like to know. In the past that has been treated as a very serious offence, no question, but basically as a public affray that got out of control. In my mind, a public affray that gets out of control and an act of terrorism, at the moment, are separate. I guess there would be a wider community concern. In your response on notice, I would like to know where it would be intended to draw the line.

Mr Ford—All right.

Senator COONEY—Can I take you to the definition of 'terrorist act'. Subsection (2) says: Action falls within this subsection if it—

and then it goes through a series of points—(a), (b), (c), (d) and (e). At the moment there are criminal provisions prohibiting those acts—mainly in state legislation, but I think there are some in the Commonwealth Crimes Act. The penalty for those varies, but I suggest in no case can any jurisdiction in Australia at the moment sentence somebody to life imprisonment for doing any of those things. That is the objective act—and I just want you to look at that—and the definition of 'terrorist act' is set out in subsection (2). So there is a series of provisions in various jurisdictions that punish them, but I would suggest that in many cases they would come nowhere near to life imprisonment. Why is it that, if somebody acts for a religious motive, well held, or for a political motive, well held, that element itself should so increase the range of penalties available? When you were working this out, did you go through that concept?

Mr Ford—We did, Senator. In fact, up until—

Senator COONEY—Can I just put it like this?

Mr Ford—Certainly.

Senator COONEY—If I do something which is motivated by greed, envy, lust or any of those sorts of things just to get your money, I get a penalty that is a lot less than if I do it for high ideals, in effect. Why is that the situation?

Mr Ford—I will just try to answer the question in this way, and if I do not answer it, I apologise. Until September 11, that was the whole thinking that underlay all our work in this area. As you know, all the counter-terrorism conventions were fastened on specific acts such as aircraft hijacking and so on. That did leave a gap, which was shown in that particular incident. I am just going back to the point I made at the very start, which is that the point of this is to fill that gap to get a broader general provision. I understand the problem you are raising: does that therefore mean that if somebody does something for religious motivation, they are going to be hit with a higher penalty?

Senator COONEY—They are going to be hit with a higher penalty, aren't they?

Mr Ford—My answer to that is that in terms of applying this extraordinary legislation—and it is an extraordinary piece of legislation—you have to interpret it according to its purpose. You cannot give the same kind of meaning to those actions in subsection 2 as you would to a state act on public audit. I know that you would prefer a tighter definition, but I am just trying to define the problem.

Senator COONEY—If I carry out arson and burn down the local town hall, I might get 15 years at the maximum. If I do that out of lust, greed or envy, I am going to serve less time for committing a deadly sin than I would if I were—as some people would call it—'acting with high motive'.

Mr Ford—I was just conferring with my colleagues, and I may be able to throw some more light on this. It is a problem that does emerge at the international level as well in negotiations within the UN and that phrase, if it did not appear in the draft general convention on terrorism, was certainly in some of the other ones on financing and so on. That is the derivation of using words such as 'political'.

Senator COONEY—I should not say this, but I cannot resist the temptation. This legislation says: do things for lust but not for love. I do not want you to answer that, but that is really what we are talking about. Also, let me go back to that issue that Senator Ludwig was talking to you about, where absolute liability applies in 101.4, but subsection 4 says that subsection 1 does not apply. Do you then go to section 4 of the Crimes Act which says that, subject to this act and any other act, the principles of the common law with respect to criminal liability apply in relation to offences against laws of the Commonwealth? The common law of course puts the onus on the prosecution, so you can put that aside. I would have thought that the practical effect of 101.4—subsection 1, subsection 3 and subsection 2—is to take away the right to silence.

Mr Alderson—With respect to the first half of your question about the Crimes Act, that provision no longer applies to other than a very small number of remaining Commonwealth offences. The Criminal Code has replaced the common law principles. The provision I was referring to earlier was section 6.2 of the Criminal Code. It says:

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
 - (a) there are no fault elements for any of the physical elements of the offence;

Senator COONEY—Thank you for that, Mr Alderson. I am putting the question rather badly. I am saying that subsection 4 used to be the original position, wasn't it?

Mr Alderson—Yes.

Senator COONEY—And you keep changing it.

Mr Alderson—Yes.

Senator COONEY—This is another example of where it has been changed, but in a big way. This takes away the onus of proof, teachings or philosophy, if you like, behind the common law; it takes away the right to silence philosophy behind the common law. It does that in respect of very serious offences for which you get a penalty that cannot be exceeded, unless you go to a death penalty, which I hope is not going to be next off the rack.

Mr Alderson—Senator, you will be pleased to know that the reference to the death penalty has been removed from the treason offence.

Senator COONEY—I think we ought to congratulate the legislators for doing that.

Mr Alderson—The question of what is and is not the right to silence is a philosophical debate on which many books have been written. It predates the previous century that offences have had defences. You can view it as an abrogation of the right to silence, but traditionally the right to silence has been seen as a different issue from creating defences, in part because making out the defence does not necessitate the defendant giving evidence and explaining their actions; there are other forms of documentary evidence and so forth that you can use to make out defences.

Senator COONEY—It was at one stage, of course. Ned Kelly was tried, and I think that he was not even allowed to speak in his own defence. We have now got to the point where you have to speak in your own defence or you are finished. All I am saying is that the good parts of the common law keep being leached out; it has occurred not only in this legislation but again and again. That is a fair comment, isn't it? Perhaps I should use the words 'taken away' instead of 'leached out'. You could answer that.

Mr Alderson—I guess the answer is yes, this is different from the position on a purely common law system of offences. But we have had statutory modifications of the criminal law, I am sure since before 1788. So it is a longstanding thing. You are right in saying that this is different from the traditional common law approach, and the response to that would be: circumstances have changed significantly.

Senator COONEY—How similar are the declaration provisions at 102.2 to the provisions in the Communist Party Dissolution Act?

Mr Alderson—They are very different from the Communist Party Dissolution Act because that act said: the Communist Party is hereby disbanded; anybody who associates with it is breaking the law, and so forth. The validity of that act was changed essentially on the basis that it was based on an assertion rather than being built on facts you could point to, and it was not based on any prior grounds or requirement for reasonable belief. This provision requires the Attorney-General to have objectively reasonable grounds and to meet these specific grounds. So it does not just simply declare organisations to be proscribed.

Senator COONEY—But he does that, doesn't he? Does he have to reveal his reasonable grounds? What he does is publish declarations. He does not have to give his reasons under subsection 2; he just publishes without reasons.

Mr Alderson—That is right. But unless the decision is based on sound reasons and sound facts—

Senator COONEY—But how do you know whether it is?

Mr Alderson—If you do not like the decision and you challenge it under the ADJR Act then the Attorney will have to defend his decision by disclosing his reasoning process.

Senator COONEY—But then you have to make out your case before the Federal Court under the ADJR Act. How do you do that?

Mr Alderson—The way administrative law and judicial law work, if the Attorney attempts to fold his arms and say, ‘I am not disclosing what my reasoning process was,’ the court would say that that in itself was a ground for—

Senator COONEY—It might. It is up to the court, isn’t it?

Mr Alderson—It is up to the court.

Senator COONEY—What would it cost, do you think, to get your case together to go off to the court? What if you are a person who has not got the money? This is another part of it. This is all legislation that throws the onus on the person accused, where he or she has to get himself or herself out of the situation. That is pretty expensive.

Mr Alderson—This is a provision designed for a very problematic situation where you are attempting to completely shut down an organisation that you are satisfied—

Senator COONEY—Not that I am satisfied—

Mr Alderson—No, the Attorney is satisfied.

Senator COONEY—A political officer, as he himself says—a political officer is satisfied that it is an organisation that should go.

Mr Alderson—Having taken that step, this legislation is designed to shut down such an organisation.

Senator COONEY—That is right. Any organisation he declares to be an organisation. His declaration holds until you can get to court, which might take you some months.

Mr Alderson—And then you would have the normal court processes of injunction or what have you.

Senator COONEY—And all that time you have been held in jail, I suppose. They can come along and say, ‘He is held in there waiting for a reasonable time and to see what the court says,’ couldn’t they? The Attorney would then say, ‘We have arrested this person because he’s part of a terrorist organisation that I have declared. I am going to think whether or not we should charge him. He’s appealing. We’d better see what the court says before we let him out of the cells.’ He is in the cells because he has been part of this organisation, you see. He has been arrested.

Mr Alderson—In terms of the specifics, there are again two sides of the equation. It is in the Attorney’s domain to make the proscription declaration.

Senator COONEY—And it is in the Attorney’s domain as to whether or not he is charged once he has been declared to be part of an organisation.

Mr Alderson—No.

Senator COONEY—Yes, it is.

Mr Alderson—Under the legislation, there are the two sides of the equation so—

Senator COONEY—Where is that? You tell me.

Mr Alderson—That is under the DPP Act and the role of the DPP. The decision as to—

Senator COONEY—No. Hold on.

CHAIR—Senator Cooney, can I hear Mr Alderson's answer because I am interested in this as well.

Mr Alderson—The DPP still has its ordinary role. In the first instance, the police have a role as to whether they consider it appropriate to make an arrest, so the police would need to make a decision to arrest. The periods for which they can detain someone would be the normal periods under the Crimes Act that are allowed. There is no departure from that. Then the decision whether to prosecute somebody would be made by the DPP under the DPP Act.

Senator COONEY—I was properly brought to book: thank you, Chair. But what I was trying to stop you for is this: the Attorney-General makes his declaration in writing and does not give reasons; he just says, 'This organisation is an organisation that I proscribe.' He does not give his reasons. Bang—he publishes it. That then becomes, on the publication, an organisation that is proscribed. A person is then arrested and held. All the DPP would be able to look at is whether or not there has been a proscription made by the Attorney-General. He then says he has. That is that part dealt with; he does not have to go into the reasons why. So he recommends a prosecution. The person in the meantime is struggling to prove that he should not be held under the ADJR Act. That might take months.

All the Attorney needs to say is, 'We're holding him during a reasonable time, we wouldn't want to let him out'—and this has happened with the migration legislation—'but we're going to hold him until the court gets around to deciding whether or not it is reasonable.' That happens now in Australia with the migration legislation. We are now giving power under this act to create a situation where somebody might be held in wrongful detention until the hardworking Federal Court gets around to seeing whether the provisions of the ADJR Act are applicable.

Mr Alderson—You are quite right in the sense that the DPP does not review the proscription decision—because that is a separate process, they take it forward from there in terms of the merits of the offence based on that. If the assessment had been made and they had been arrested and charged then I suspect you would have potentially two timetables: there would be a judicial review action and possible interim remedies under that, if there were a basis for that, and there would be also the procedure for dealing with a criminal offence.

Mr Ford—We can take that on notice to give you a more complete answer.

Senator COONEY—I cannot resist asking this, Mr Ford; I should not. Is this why we have probative clauses under the Migration Act now—to make the courts available to hear these applications instead?

CHAIR—I am not sure that is a matter for Mr Ford.

Senator COONEY—No, that is true.

CHAIR—We need to move on to other witnesses, and I think I can guarantee that the officers of the Attorney-General's Department will be able to join us in Melbourne for the next series of hearings on this legislation. On this piece of legislation, it is clear that there are further questions to go on notice and, Mr Ford, you have already taken a large number on notice for this and for the previous unrelated matter. We are meeting again in Melbourne next week. Whilst we will ensure that the department is invited to appear again—because I am sure there will be further questions—we will also be grateful for your assistance with providing us

with responses to those questions. Senator Cooney, do you have further questions to place on notice?

Senator COONEY—With respect to serious property damage, you could find cases and it might even be defined in statutes. Could you look that up and see where that is defined elsewhere.

Mr Ford—Yes.

Senator COONEY—I think some of the cases say, ‘Damage could be serious even though he might not think it is terribly serious.’ Can we look at the overseas legislation or, indeed, legislation here, as to how terrorism and terrorist acts are defined. You probably have that, anyhow.

Mr Ford—Yes.

Senator COONEY—I have mentioned the Diplock courts. I wonder if there are any other precedents for that terrorist act.

Senator LUDWIG—I have put some questions on notice. In addition to those, I have verbal questions which I could quickly put on notice. We have been talking about the proscribed organisations, but perhaps the Attorney-General’s Department could give us a step by step example of how that would work in practice—from start to finish—and whether or not that is to deal with emergency situations in their view, whether it is designed as a preventative technique or whether it is an extension technique designed to catch other third parties as well, outside the original target group, perhaps. That is dealing with the purpose of the proscription, step by step, and an examination of how the proscription would work and I guess seeking an assurance from the Attorney-General’s Department that the ADJR Act is an appropriate safety net and that they have considered others—such as merit review or parliamentary review—and come to the conclusion that the ADJR Act is the best alternative.

I also ask whether or not they have considered or why they would not consider that show cause proceedings under judicial orders would not be better ways to go for unlawful association provisions of the Crimes Act 1914. There is already a provision there, so why could you not have picked that up rather than provide a proscription. You are aware of the show cause proceedings already available under the Crimes Act, so why would you not simply use those. The bigger question is why you would not simply utilise the current provisions of the act—why there is the need to develop a separate class with terrorist provisions.

CHAIR—I thank Mr Ford, Mr Alderson, Ms McIntosh and the other officers for your assistance this afternoon and for your agreement in taking so many of those matters on notice. Mr Ford, the committee received an information paper from the department for which we were particularly grateful. Is there any objection to the committee publishing that document?

Mr Ford—No. However, I would ask that a couple of questions on pages 13 and 14 be deleted, for reasons of privacy.

CHAIR—I understand that. Would you like to provide us with a revised copy of the document?

Mr Ford—We will do that.

CHAIR—We will move to publish that as soon as it is received.

[2.56 p.m.]

COX, Ms Eva Maria (Private capacity)

CHAIR—I note for the record that the committee has, by agreement, given permission for the ABC to take film footage of this afternoon's proceedings. Welcome, Ms Cox. Do you have any comments to make on the capacity in which you appear?

Ms Cox—I am an academic and a member of many organisations, but I am appearing in a private capacity due to the short time that I had to get prepared; that was all I could do.

CHAIR—We have received a submission from Ms Cox which the committee will number 62, and the committee authorises its publication. Ms Cox, I would like you to make a short opening statement and at the conclusion of that we can move to questions. I apologise again for the delay this afternoon.

Ms Cox—That is all right and I perfectly understand that. I found the last part of the discussion fascinating and I think the committee should take serious note of the fact that there are so many holes in this particular bill as manifested by the Attorney-General's Department. It reinforces my sense that this is a bill which should not be passed in anywhere near its current state because it has so many problems.

I am appearing as a non-lawyer. I know you have a whole lot of lawyers appearing afterwards, so I am going to try and avoid talking too much about the various legal concerns. I will pitch it in terms of one of my major areas of interest: what is going to happen to non-government organisations if this bill goes through? I have been on the phone over the weekend and again this morning to a whole range of other organisations. These are not just the usual suspects and ratbags; I believe you have got submissions from people like the Red Cross and Oxfam—or you are getting them. The ACTU is concerned with a group like AFIDA, a trade union group; there are certainly very real concerns about that. There is a real concern from groups—which might generally be called diasporic groups—that represent people who are refugees or immigrants from countries where there is some concern about the current government.

I would like—this point has not been raised—to remind people of the fact that this extends well past the Crimes Act. I hope the lawyers will pick up afterwards, in their submissions, the fact that this will also apply to the integrity and security of other countries undefined. I would like to raise the possibility that this puts Australia in quite a difficult position. What would have happened during the situation some years ago when various Care Australia workers were imprisoned in what was, I think, then Serbia or ex-Yugoslavia? What would have happened if the Yugoslav government had requested that the Australian government declare Care a terrorist organisation on the grounds that they had arrested some members of Care who had come to their country's notice for what they deemed to be terrorist-type activities? I know that the workers were eventually freed, but it sets Australia up in a very difficult position.

A lot of overseas aid agencies, and agencies that are international like the YWCA, are going to feel very nervous about their interactions with countries overseas, and nervous about whether their protests about other governments—and their ability to organise on behalf of the sorts of democratic groups that have had to leave countries where there have been dictatorships and various other things—mean that those countries will bring pressure to bear on the Australian government to act against them.

There have already been a few examples of those things. Groups here, which are probably perfectly innocent but noisy, may well be deemed by certain countries as being anti their particular form of government and as being threats to their security and integrity. That is something which has to be noted, which I have not put down in my submission because it was something that occurred to me on the way here when I was thinking about the fact that there is quite a difficult situation, once we start using that extraterritorial power and start opening up some very real cans of worms.

There is a whole lot of issues around this and one I will make a point of, because one of the things that is being run on this particular terrorism act is that people are saying, 'The world's changed since September 11.' I think our consciousness of what has happened has changed since September 11 but, if you actually look at what has happened around the world over years, many of the countries—including, particularly, the UK because of the IRA situation, the USA, Europe and many countries in the Middle and Far East—have had very high levels of terrorism all along. It is just that this particular act turned up on television in the USA in the centre of New York, and so we suddenly became extraordinarily conscious of it. I do not think there has been such a massive change to the process of terrorism—apart from television and the fact that they used planes in this particular case in a particular way. I think we need to put this in the broader context of the fact that terrorism of some fairly feral varieties has been around for long time and will be around, probably, as long as there are groups prepared to take those sorts of actions. To try and claim that we suddenly need to bring in something which is completely different is not the best thing.

I suggest that the bill in its present form should be withdrawn and redrafted, because it has real potential to stifle democratic debate and due processes. Listening to the stuff this morning and this afternoon, you realise how often this could be used. I am probably one—I do not know who else is in the audience—who has probably done what might be seen as non-lawful things and has been part of demonstrations to save The Rocks and to save buildings around Sydney. I have been a part of a whole lot of radical movements, and I know what happens within those movements. Some of the points raised earlier by Senator Ludwig, Senator Cooney and Senator Scullion are very relevant because there is a big difference between the public 'motormouthing off' of some groups and the capacity of groups to say things. I was wondering if you could continue to wear a badge which says, 'Guy Fawkes is the only person who has entered parliament with honest intentions' or whether that would be regarded as encouraging people to blow up the houses of parliament.

There are some very serious questions about freedom of speech and about how one deals with freedom of speech. I would like to lay in front of the committee a very strong statement that we not kill off democratic processes by trying to protect democratic processes against terrorism. There is a very real contradiction in that, which came up in many of the last points, about whether or not we should be bringing in forms of legislation which seriously limit these things. I have some real concerns about the issue of proscribing organisations, and I would like to focus on that in particular because that affects a lot of the organisations I know about. I mean, there is no definition of terrorism in that act, really. A lot of the definitions of a terrorist act, as far as I can see in my non-lawyer way, have been put in in order to try and face it up to the Commonwealth powers, where the Commonwealth has powers, in order to avoid a High Court challenge—which is one of the reasons you list all of these things like electronics and corporations and so on, because that happens to be where the government has power to legislate. We really need to start discussions about what really is terrorism and what is just unlawful behaviour, protest and debate.

If you do introduce a bill of this type, it would be interesting to say, 'If we have to have a bill, can we at least have one that is not proclaimed until there is actually evidence that we do have a serious terrorist risk, so at least it cannot be used in a haphazard way?' If you have one that has been passed but not proclaimed, at least you have the capacity then to proclaim it fairly fast if you need it, but you do not proclaim it until we have a serious terrorist threat—and the Attorney-General's own web site and his second reading speech made it very clear that there is no immediate threat. We have to be very careful that we do not bring in legislation when there is no actual threat.

Any bill that has to come in should have within it: (a) sunset clauses and (b), as was shown in the discussion earlier, some very real safeguards. For instance, if you want to proscribe an organisation, first of all, the reasons have to be published in some way or tabled in the Senate or whatever it happens to be; secondly, I suggest that you have a proscription process which might have an initial period of 30 days and which could then be reviewed in some sort of process—not this sort of open-ended thing. That would deal with some of Senator Cooney's problems. Can we at least have something which respects that fact that the large bulk of community organisations, including some which will come under this legislation, are likely to be thoroughly scared off with this idea of proscribing legislation?

I know that there is already a Northern Territory act which has some very similar provisions. I know some of these provisions are in the Crimes Act and have never been used. This raises a very interesting issue: why, when we have a lot of these provisions and they never get used, are we putting them back in again, and putting them back in an extraordinarily badly drafted way so that they provide real problems?

One of the things that comes out of this and one of my very real concerns—and this goes back to work that I do as a sociologist and also as a community activist—was raised earlier, I think, by Senator Ludwig when he asked the question: are you asking us to trust the Attorney-General? If we look at some of the issues around public opinion polls—and this is my area of speciality—it is really obvious that parliament is not trusted, that the trust of politicians is very low. If one has this sort of act, I am saying that we cannot trust it to actually be used with goodwill. We have seen, over the last few weeks in particular, very many examples of confusion between public servants, between defence forces and public servants, and between defence forces and politicians, about what the truth is in particular instances. If you have this sort of background running underneath this, why would we want to bring in a form of legislation where we trust the Attorney-General to act sensibly and we trust politicians to act sensibly? We need legislation. I hate to say this but, in a low trust environment, we need legislation which is very clear about the sort of areas in which people can actually have trust.

There is a real issue around developing trust, and there is a very real issue around community organisations—they are fairly fragile. This government has done a lot of talking about community organisations and it does a lot of talking about the protection and rights of the individual. If you are looking at issues like civil society—and, as people know, I have actually done a lot of work in this area—you are looking at organisations that do run on an incredible level of goodwill and trust. If you have a form of legislation like this, what would one have done with the situation of Kirsty Sword—who was actually a worker with Australian Volunteers Abroad, as it was then; it is now Australian Volunteers International—who was working in a way which was undermining the Indonesian government in East Timor? She is now the wife of the potential President of East Timor. Under this particular act, you could have had both Australian Volunteers Abroad itself and Kirsty Sword declared. What good would that have done anyway at all?

We have to be very realistic about the fact that this is a world with some very difficult foreign relations, and we do not want Australia to get itself tangled in trying to look at what is happening with these organisations here. Are we going to declare your Zionist organisations; are we going to declare some of the Muslim organisations on the grounds that they are saying things which might be seen as inappropriate? A lot of people say things that are inappropriate. Turn up at any demo, run into a pile of Trots or Spartacists, and you run away thinking, 'Good heavens, what are they doing here?' But the point about it is that they are a collection of motormouths who rabbit on in ways which could actually breach these laws. That is what is really important. We want laws in this area, if we have them, that really are constrained to those things which seriously endanger the security and safety of the country, which do not pick up the normal levels of rebel rousing political dissent, which some of us are part of in odd moments—and we wonder sometimes what we are doing there. The point about it is that this is part of the normal thing. I teach at universities. There is a lot of stuff that goes on there. The laws as currently drafted would pick up an awful lot of my students in terms of some of the things that they say in tutes. Am I supposed to ring up from time to time saying, 'Guess what! One of my students has just done an assignment on X. This could be interpreted'?

The words are so vague. I have gone through this to some degree in my submission: what is terrorism and what is an organisation? I am sorry but I do not accept the fact that the Attorney-General can decide things on no basis, apart from the word 'reasonable'. This has to be challenged, as I think Senator Cooney pointed out very carefully at an ADJR thing. It is not a test of merit; we actually have these really broad things. These are the sorts of things you might expect in a country behind the so-called Iron Curtain at some stage, which was attempting to suppress dissent. People will say, 'But we don't mean it like that.' That is what all the people from the Attorney-General's Department have been saying—'We don't mean it.' But that is how it comes out, and that is how the law says it. So can I please ask that the committee be very careful about not passing laws of that type. I will stop there.

CHAIR—Thank you very much for those oral submissions, Ms Cox, and for your written submission. I think you were here at the beginning of this afternoon's proceedings when I did comment on the concerns in relation to time frames. So we appreciate you providing us with this document and for your appearance today. We will begin with questions from Senator Ludwig.

Senator LUDWIG—I have only a brief question. In summary, are you saying that the terrorist legislation is not necessary at this time, or that the existing laws are adequate already to deal with those offences or, as you outlined, that we could wait for a threat to materialise before enacting the legislation?

Ms Cox—I think you could redraft this bill to be a much more restricted, much more defined bill in terms of acts of terrorism, in terms of some sort of test of reasonableness and in terms of setting some sunset clauses in setting time-defined things that would actually meet some of the questions. I am not blind to the fact that there are these sorts of questions. I think there is a real problem in the sense of trying to play into that public perception that we are under terrorist threat. The other thing is that, as a sociologist, I am very concerned that that sort of moral panic idea does not get played out too much and that we do not feed much into it because it does lead to some very scary things—as we have often seen in the political scene—where you do get the sort of populist lashback. So I am not saying that the government should not act and that the opposition should not support some things—not most of the things that they seem to be supporting in this one, judging by the second reading debate in the other place—but I would very much like to see a much tighter, sharper set of provisions.

I would like to see the bill passed if necessary but not necessarily proclaimed. You can proclaim it immediately if there is a threat. But I do think that for non-government agencies and for the community sector generally if there is this sort of looming thing sitting there, even if it is not used, you actually have a sense of apprehension. Given the fact that so many of these provisions have not been used in the Northern Territory act, in the Crimes Act and in various other acts, you do wonder, if there is an emergency, why we cannot just have one that can get royal assent and be introduced almost immediately if we need it, rather than having it there as a sort of sword of Damocles.

Senator SCULLION—Thanks very much for your evidence, Eva. I also am not a lawyer, so I appreciate the very straight talk that you have given us. I had some difficulty with this, and I am not sure if you were here whilst the Attorney-General was giving evidence—

Ms Cox—Yes, I was here for most of that.

Senator SCULLION—but we went substantively through a terrorist act and the sorts of issues that could be potentially associated with prefacing or proscribing an organisation. With that as a background, I have some concerns that the Red Cross or the YWCA should have any concerns about becoming a proscribed organisation. I would like you to help me with that a little.

Ms Cox—I am not saying this is likely to happen, but it certainly is possible. That is one of the lines that you always play with in legislation. Do you want legislation which makes things possible and rely on goodwill and commonsense to make it unlikely? I think that legally as a non-lawyer—and you will have all the lawyers speak afterwards—puts us in a fairly dicey position.

I think the example I gave of Care Australia is probably a fairly cogent one because people normally would not assume that Care, which is fairly apolitical, would be involved. Given the fact that you can proscribe an organisation under the vaguest of all things, people do not actually have to be members, they just have to have had a membership form or rung up and made an inquiry in order to be entrapped within it. A person doing an act on behalf of an organisation can then lead to that organisation being proscribed. Because of the onus of proof being reversed, it could take you a very long time—if you were a fairly small agency—to turn up and manage to go to court to haul yourself out, by which stage your entire donation base would be dead as a dodo—by the time you got up through ADJR and they discovered that this was actually a terrible mistake. I think that there are real dangers. I am not saying that those big agencies are likely to be caught in the fray, but the potential is there. You should not draft legislation which allows it potentially to happen and just rely on the good names of agencies to keep them out of it, because those agencies do a lot of work overseas.

Certainly groups like the YWCA and some of the other groups here who have international links do support things which, for instance, might be seen as anti the government of the day. If you look at some of the stuff the YWCA does on genital mutilation and various other things in supporting women, you might well find that you get a particular government which says, ‘Look, we consider these people terrorists. They are funding projects in our area. We found that these projects are busy organising women in order to oppose this, that or the other.’ And then we put ourselves in the very difficult position of being asked to proscribe the terribly respectable, blue-rinse, country women’s association or whatever it happens to be, doing that. I think that they are sufficiently concerned to be putting in submissions, so therefore they see that this is a danger. I do think that what will happen with some of those organisations is that they may well close down—maybe certain education or birth control or other sorts of projects

that they are running—for fear that if something went wrong with some of those that they were seen as undermining the security of the country in some way and that they would find themselves vulnerable. I think it could easily gut the capacities of those agencies to move and support democratic or rights based organisations in countries where democratic rights are not very easy to find.

Senator SCULLION—In summary, would you say that there is simply no need for this legislation? I was surprised to hear in some evidence given in another place that we basically do not have any legislation at all to proscribe terrorist organisations at the moment. Do you think there is absolutely no need for that process?

Ms Cox—I am not convinced at this stage that there is an urgent need for it. I think that if enough lawyers say that we need some mode of doing it, then perhaps, but I think that proscribing organisations becomes fairly difficult. I gather we already have some provisions under our UN obligations regarding organisations which they declare as terrorist organisations, and I would not have a problem there—in fact, I put a tick against the idea of being able to proscribe branches of organisations the UN has declared terrorist organisations.

But being able to proscribe organisations that threaten the integrity and security of Australia, in those incredibly broad terms, is a problem. Perhaps you can still ask the Attorney-General's Department what the limits are on the terms 'integrity' and 'security'. Almost anything could be done under the basis of integrity. I have no problem with a much more limited set of provisions being brought to bear and having, as I said, a proscription that should be time limited. You can proscribe an organisation for 30 days; that is long enough to stop it acting. At the end of that period maybe you can produce some evidence of the basis on which you proscribed it before you can renew the proscription. This does not seem to me to be beyond possibility, and it would get away from the secrecy of the process and the possible damage you could do by proscribing an organisation.

CHAIR—One of the issues which has been raised in some of the public discussion concerns the impact on individuals who happen to be members of organisations which may be proscribed—impact both on people who actually are members of the organisations and potential impact on individuals who may share the name of somebody who is a member of an organisation and who ends up in a terrifying vortex of finding themselves a member of an organisation that they were not a member of in the first place—if you understand my tortured syntax.

Ms Cox—Yes, I do understand what you mean.

CHAIR—Is that an issue that has been raised with you, Ms Cox, or which concerns you?

Ms Cox—I think there is a very real concern, particularly about the fact that we do not even define what a member is.

CHAIR—And what recourse those people have.

Ms Cox—Yes. You can be declared a member of an organisation where you have done no more than having been rung up and then making a donation, and your name then appears on some list somewhere, particularly these days when you seem to get onto email lists with incredible ease. Given the fact that one could easily offer donations or—as someone said earlier—you have gone to a concert in support of Palestinian refugees or to a fundraiser for some particular group, you may well find that you are suddenly part of a proscribed organisation.

This is why this whole issue of what is ‘proscription’ of an organisation and the definition of ‘members’ is incredibly loose. I am probably on a lot of lists, because I am somewhat well known and have a somewhat radical profile. I am quite sure I would be claimed—and have been claimed—by all sorts of organisations that I have no consciousness of ever having joined, and I think this is a real possibility. Certainly there is the idea that you could find yourself dubbed to be a member of an organisation when you are not. Some organisations have an appalling membership list and do not take you off for the next 500 years; they do not have staff as they are all run by volunteers, and who is going to remove the dead membership? There are a whole lot of things that catch that, and that is why I think this is an absolutely appalling bill.

There are an awful lot of real threats both to individuals and to organisations that may share names or share some sort of identifying characteristic with others. We have already seen a lot of prejudice against what are seen as Moslem organisations: people make assumptions that, because other people wear scarves, they are obviously terrorists. You can see completely how particular organisations might end up being stigmatised and labelled because they have similar names or similar characteristics to others. I think it is very scary. The only salvation is the idea that it might not be acted on, but I do not think that is a basis for proposing new legislation.

CHAIR—As I read it, the recourse available to an individual who finds themselves in such a position is to seek a revocation by the Attorney-General. If they are caught up in error, by mistake, that still remains their only recourse. Do you regard that as an adequate level of recourse?

Ms Cox—No.

CHAIR—What would be the alternative, in your view?

Ms Cox—I am very concerned, for instance, that the onus of proof is reversed in all of these things—and there has been a fair bit of discussion about that already this afternoon. This could affect a lot of people. For example, if you do not speak English very well and you do not understand what is going on, how are you going to work out how you are to get yourself through to the Federal Court and an ADJR to present a claim that you were not conscious of this, you were not part of such things, you never gave them any money, you never went to a meeting—you never did this and you never did that? For a lot of people, this would be an incredibly scary process. Often they might not even know that they are on the list, until somebody comes banging on their door. For people—particularly those who have come from backgrounds where there are secret police and various other things who come banging on their doors and telling them, ‘You are on the list for some particular organisation and, if you do not want to be charged, you now have to prove that you have had nothing to do with it’—proving that you have not had anything to do with an organisation can be incredibly difficult.

I cannot understand why the onus of proof has been shifted on all of these things. It seems to me to be a totally bizarre abandonment of the basic principles of British justice that we have been operating under for most things. I cannot see that, because some plane has banged into a tower in the USA, it gives us justification for reversing the onus of proof in the Australian legal system. The causal connection, I am afraid, somewhat escapes me. I think one of the things we are trying to defend here are the basic principles of democracy, and that stuff in particular strikes me as being totally undemocratic.

CHAIR—Do you think the proscription power is an appropriate power to be delegated from the Attorney-General to a minister of any other sort?

Ms Cox—No, I do not think it should be delegated, and I do not think it should be the sole power of the Attorney-General—unaccountable. As I said before, I think that the Attorney-General requires something, apart from the legal review—the AD(JR) Act—which is not a merit review. I would find it very disconcerting to have the Attorney-General—particularly the current Attorney-General, who has not shown himself to be the wisest of bears in various ways recently—given sole responsibility. Why give any one person, however good or bad they are, that sort of responsibility?

I think there has to be a sort of process by which the Attorney-General does not have sole ability to do that. As I said, maybe it could be given for 30 days but no more, with some sort of review by the parliament, by a committee of cabinet or by somebody else, with a requirement that the reasons for it be published. Why can't they be tabled in the Senate, like all sorts of other regulations and other sorts of things? That at least would give the people that Senator Payne is talking about some sense of what was going on: why this organisation had been proscribed and what it meant. At least there would be some documentation. At the moment, you are going to get an ad in the *Gazette* and presumably the *Australian*. Of course, we know that all of these people spend all their time reading the Commonwealth *Gazette* and the *Australian*, in order to find out whether they are part of a proscribed organisation.

Senator COONEY—I would like to follow on from what you are saying there. Section 102.2 of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] that you have been talking about, where the Attorney-General can make a declaration in writing if he is satisfied on reasonable grounds, is the test that that legislation sets out.

Ms Cox—That is it. Full stop.

Senator COONEY—Then you get penalties of 25 years if you take part in the activities of that organisation. If you look at the Suppression of the Financing of Terrorism Bill 2002, item 15, page 19, it says:

(1) The Minister must list a person or entity under this section if the Minister is satisfied of the prescribed matters.

(2) The Governor-General may make regulations prescribing the matters of which the Minister must be satisfied before listing a person or entity under subsection (1).

It goes on into other provisions, for example subsection 5:

(5) A matter must not be prescribed under subsection (2) or (4) unless the prescription of the matter would give effect to a decision that:

(a) the Security Council has made under Chapter VII of the Charter of the United Nations ...

I should have asked the Attorney-General about this, and perhaps I will. I did not have time.

CHAIR—You will have that opportunity.

Senator COONEY—It bears out what you say, that in one piece of legislation they take one test and in another they take another test. I would have thought that the more stringent test was the test in the Suppression of the Financing of Terrorism Bill, but if you breach that you get something like five years, and the much looser test is the one that brings you 25 years. What the rhyme or reason of all this is I am not sure.

Ms Cox—I appreciated your earlier comments on the difference between doing things out of lust and greed, and out of belief. I think that that raises an interesting issue. I had not read

that particular bill because I had limited time. This is interesting and it does say something about the priorities of government, that we are much more concerned about the financial aspect than the reputation of organisations. If you are going to provide something financially, you are going to have all of these constraints against knocking off people's finances, but you can knock off their entire lives and put them in jail for 25 years with absolutely no documentation. I think the contrast is a very good one and we need to recognise it.

Accountability and transparency are key issues. You cannot take away the reputation of an organisation, or the reputation of people who are members of that organisation, without offering some clear statements about why. This is an appalling attack on civil liberties and on community organisations. I am surprised that a government that talks a lot about its interest in having partnerships with non-government agencies has not consulted with these agencies at all in this area, or has not thought through what any of the implications are for many of the overseas and international agencies that could be covered with this. This is also true of some of the local ones, as I say, which deal with groups that have international connections, or even local connections. The examples that were raised earlier by Senator Ludwig were very pertinent.

I have been involved in demonstrations where we have sat down and refused to move. That is unlawful, so you immediately lose any sort of protection the minute you refuse to obey a lawful command, including one to disperse. You are preventing expressions of civil disobedience of a fairly minor sort, which is often one of the ways that people vent their frustrations. One of the things that the committee ought to consider is the fact that if you deny people the capacity to sometimes be unlawful in minor ways, as a form of protest, this is exactly the sort of situation that leads people to take up terrorism. If you frustrate angry people for long enough, such that they cannot sit down in front of the police or do minor things which might be irritants to the system, the temptation for some people—I am not saying for most people, but there will always be a ratbag minority—is to go in for something crazy.

The provision of good civil interactions, the ability to demonstrate, and accountability and transparency in decision making are keys to people accepting the rule of law. The rule of law has to be a two-way process. I hate to give you Sociology 101, but I think it was Max Weber who said that laws have to be both proclaimed and accepted. If you have things like this which are unacceptable, you arouse in people the feeling that law and government are not to be respected. One has to be very careful about passing this sort of legislation, which is seen as grossly inadequate. It creates an assault on civil liberties of a fairly major sort.

Senator COONEY—I suppose it might be there to encourage us in the study of international law. A month ago we were allowed to support only one side of the political equation in Angola—now they have become reconciled and there is an official opposition. You have to know about Shining Path, and what is going on in the Philippines.

Ms Cox—I had a lunch on Saturday—which could have been a very subversive lunch—with a young woman from Afghanistan, who claims that the Northern Alliance is a collection of fundamentalist thugs and that we should not be paying any attention to it. Does this mean that the various women's groups that are going to support Afghani women and that are extremely concerned about the fundamentalism of the current regime in a similar way to the last regime are all about to become terrorists because they bought two T-shirts and a couple of posters from her and because, possibly, they are going to use this in Afghanistan to point out that the current Afghani regime is probably no more democratic—and not much more civilised, if at all—than the last one? Where do you start drawing lines in terms of what is

all—than the last one? Where do you start drawing lines in terms of what is seen as terrorism? This is why a bill that has no definitions and no guidelines is really a farce.

Senator COONEY—Within the terms of the learning that you pursue, I am interested in what you would say about the following proposition. It seems to me that a lot of this legislation would lead people to worry, as you just said about that lunch on Saturday. What the Attorney-General's Department has said, with great sincerity—and this is from people I respect—is, 'You don't have to worry about that.' But I suppose you do worry about it, don't you? The fact that you are not going to be prosecuted—or, if you are prosecuted, you will only get life—may not be much comfort if you are worried about it and if you have got to spend big money proving yourself correct. Have you any thoughts about those comments?

Ms Cox—I think so. That is one of the points that I have tried to raise. In a sense, if you do not have a culture of a reasonable level of trust in political process and if you think that the government is going to pass legislation that, whether or not it is going to use it, acts as a threat due to the possibility that dissenting voices may be silenced, it reduces your trust in government, it reduces your sense of security and it actually affects the whole political and social culture. This is my area—I am a sociologist and that is what I have been looking at.

As I mentioned earlier, if you get situations such as the one you have at the moment, where you get the moral panics and scapegoating, this easily occurs. This is an extraordinarily badly drafted piece of legislation. If you pass legislation in a hurry—if the government is seen to pass bad legislation in a panic-stricken manner on the off-chance that maybe we might have a terrorist threat some time in the next 12 to 18 months in Australia—it diminishes the reputation of the government and of the opposition, if you vote for it, and it also allows a lot of people who are politically aware to lose faith in the capacity of government to have any sense of good judgment and good legislative powers. Bad cases make bad laws, as they used to always say.

They say, 'Because of September 11 we have got to have this law.' And they talk about the British law, but the British law comes out of a lot of the stuff about the IRA and not really out of September 11, in that sense. It comes from their own worries and from the fact that they have had a lot of experience with terrorism, as a lot of the other countries have had—even the Canadians, who have had problems with the Quebecois and various other things. Australia has been remarkably exempt. So the fact that we are moving further, in some ways, than they are in trying to constrain things strikes me as totally bizarre. It is much more about gestures than about decent, sensible, commonsense legislation.

Senator COONEY—What you have told us about the sociology of the whole thing, about the worries and concerns—I just want to get this on record, one way or the other, to qualify you—is mainstream learning in your field?

Ms Cox—Yes, I think there is a very strong agreement now. You can find this in almost all of the stuff—in the work that I have been doing for years on social capital with Robert Putnam and in the whole idea in political science about having a look at the concept of legitimacy of governments, and things like that. It really does run on a social contract—a hidden social contract or a compact—between people and government, which involves non-government agencies and which some people refer to as civil society. I think civil society is bigger than that. But the whole idea that one has relationships that are built on a reasonable level of trust and responsibility on all sides is very much mainstream political science; very much mainstream sociology. I am not talking here about fringe-area things.

The recognition of how you undermine, if you like, political trust is a really major problem. If you look at the Roy Morgan polls, trust in politicians has been sliding for some time, and I think it is really important that politicians actually prove that they are trustworthy. I get very scared about the future of democracy when people start losing trust because that is when you get populism; that is when you get folk panics; that is when you get some of the sorts of things that we have seen with some odd ratbag movements. They become more popular and people lose trust. The definition of populism is loss of trust in the major political system, and I think we have to be very wary of that.

Senator COONEY—If you look at the—

CHAIR—Senator Cooney, we are almost out of time. In fact, we are out of time.

Senator COONEY—Yes—102.2: when you are looking at declarations of proscribed organisations, it does not even go at the parliamentary level. That is confined to an officer of the government.

Ms Cox—I think it is confined to one officer, one member of a government. I know he is supposed to be the first law officer, but I think one has to really be very wary about giving any member of parliament, any officer, any minister, that sort of position that has those sorts of broad powers, long-term effects, without providing some decent accountability and responsibility within the system. We have lots of examples, so why do it this time? All I can do is urge that the Senate does not go into panic mode because of what happened on September 11. We have to sustain our own institutions of politics and social relationships and make sure we do not undermine them, otherwise the terrorists win. Either they win by terrorising us or they win by making us behave like them, and I think that is a real problem.

CHAIR—There are no further questions in this area. Ms Cox, thank you very much both for your written submission and for your remarks this afternoon. I do appreciate, taking into account the time frame which you referred to in your remarks and to which I have referred also, the effort you have put into making those.

Ms Cox—Thank you for the opportunity to do so. Are you having hearings in Canberra at all? I know various groups would very much like hearings in Canberra, so can I just put a plea on the record that a hearing in Canberra would allow some of the aid agencies and people who are headquartered in Canberra, who do not have the money to fly around the states, to possibly appear. Could I ask that the committee actually consider having a Canberra hearing?

CHAIR—I will note that. As I said, we have hearings in Melbourne again next week, and we will be making further decisions on public hearings in due course.

Ms Cox—Thank you for the opportunity.

CHAIR—Thank you, Ms Cox.

[3.38 p.m.]

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

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

CHAIR—I welcome representatives from the New South Wales Council for Civil Liberties. I believe the committee has a submission from the council. Are there any amendments or alterations you wish to make to that submission?

Mr Murphy—No, there are not, but we did want to put in a more comprehensive submission on the Suppression of the Financing of Terrorism Bill 2002 and the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002—

CHAIR—Yes, I note that from your correspondence.

Mr Murphy—and the telecommunications interception bill. Unfortunately, in the short time frame that was given to us, we have not had time to prepare anything.

CHAIR—No, but having flagged that with us, Mr Murphy, we would be pleased to accept any further written comments you wish to make on those bills.

Mr Murphy—Thank you.

CHAIR—As I said, the committee's consideration is ongoing and considerable. In relation to your other submission dated 4 April, are there any changes you wish to make to that?

Mr Murphy—No, not significant.

CHAIR—Thank you very much. What I would ask you to do, if it is possible, is to make a brief opening statement. We have had some time this afternoon to canvass some issues of concern to the bill. You may wish to point out others but, the shorter your statement, the longer time we have for questions and that enables the committee to elicit any further information that we need.

Mr Murphy—I think this is a very poor response to the events of September 11. This package of bills is, I believe, some of the most insidious legislation that we have ever seen in this nation. It removes people's fundamental rights and civil liberties. It attempts to cover such a wide field that any possible future action, or any group, could be outlawed as terrorist. It allows the government to outlaw virtually any group—any church, any political party or any human rights activist. Even a football club could be outlawed under this legislation. It is the worst of all possible responses to the events of September 11. It destroys the fundamental principles of our democracy in order to suppress and prevent terrorism; that is exactly what this package of bills seems to be doing. Many people around the world who were once labelled as terrorists are now regarded as international leaders or even statesmen. People such as Gandhi and Nelson Mandela have been labelled as terrorists in the past. Hindsight shows us that these people are not terrorists but freedom fighters. Even today, Aung San Suu Kyi, Xanana Gusmao, or the Falun Gong movement—who have groups in Australia that support and assist them—could be regarded as terrorists under this legislation.

There is a belief that this power is safe because none of us would use it to outlaw the Catholic Church or the Australian Labor Party or some other group that might not be supporting the government of the day. But none of us can predict who will be in power or when this legislation will be used, and that is the danger of putting this sort of legislation on

the statute books. This legislation is inconsistent in its application and it attempts to cover ground that is often already covered in state legislation. It is curious that the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 will not apply to anything that occurs wholly within Australia. Not only that, but this bill excludes the actions of Australian defence forces, so what people would ordinarily regard as an act of terrorism within Australia will not be covered by this legislation; we will have to fall back on state legislation. It is an interesting message that we send as a nation when we say that we are deadly serious about terrorism and that we need all these other provisions to proscribe groups and individuals but, when it comes to terrorism by our defence forces, there is an exception and they cannot be prosecuted. So we are all against terrorism until we do it. I think that is an inconsistent approach and something that should be rejected by the parliament.

The package of bills has the potential to suppress dissent and political discourse. It also has a great capacity to be abused by the government. Every day in Australia we see other nations placing pressure on our government to take action against groups such as Falun Gong, individuals like the Dalai Lama, or even other nations, such as Taiwan. If this power is granted to the government, it will only be a matter of time before that pressure succeeds and is abused by the government and used against those groups or individuals. One only has to look at the incredible abuses that have occurred in other jurisdictions, like the United Kingdom, where this sort of legislation has been in place. The insidious nature of these powers is that they will sit on the statute books for years and years before they are used by someone. The Malaysian Internal Security Act is a great example of that process. It resembles the group of bills that is before the parliament at the moment. The legislation was used successfully, indirectly, against Anwar Ibrahim. It was not used to hold him for weeks or to extract information from him or to threaten him with being a terrorist, but it was used against others who then came forward and were happy to provide evidence that led to his conviction.

I will finish by saying that there is no place in a democratic nation like Australia for this sort of control, particularly not in the hands of one individual or their delegate. In a democracy there is no such thing as absolute security; they are mutually exclusive. The safest places in the world are often military dictatorships that deny people fundamental rights and democracy, and the last thing we should be doing in Australia is turning ourselves into an oppressive, terrorist regime in order to protect ourselves from terrorism. That is all I have to say. David Bernie, my colleague, will go into a couple of the main points of the legislation.

CHAIR—But briefly, Mr Bernie.

Mr Bernie—I will try to be brief. There is quite a lot to cover and we have not even covered all of the legislation here because of constraints of time.

CHAIR—No, but we do have your submission as well.

Mr Bernie—I am going to expand on some things that we have not been able to cover in the submission, in relation to two of the other aspects. One is reform of the law of treason—and I can call this the ‘Hicks amendment’. It seems to me to be totally unnecessary. The existing law of treason already makes provision for organisations to be proclaimed under section 24 of the Crimes Act. I am not aware of any proclamation ever being made under that section. It would have been a simple matter, I would have thought, for the government to make a proclamation in relation to the Taliban or Al-Qaeda so as to make it clear that conducting activity with them did amount to treason under section 24. So we have this added provision which is going in which now makes it such that you could be convicted of treason for fighting the Australian Defence Forces whether you are aware that they are involved in the

activities or not. Particularly in covert sorts of operations, you could find yourself fighting the ADF without knowing about it and in those circumstances be guilty of treason. We give some examples in our submission in that regard.

It is also interesting that the second reading speech said that this is to modernise the law of treason, but we still have the rather odd situation that killing the Duke of Edinburgh is an act of treason but conspiring to blow up the federal cabinet or the federal parliament is not an act of treason.

CHAIR—A point well made, I think, Mr Bernie.

Mr Bernie—I think if we are going to modernise the offence of treason, let us do a real modernisation. Going to the other bill, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, again we get a definition here which makes reference to doing activities for religious, political and other reasons. It seems that if you are just a plain homicidal maniac who takes these actions you will not be caught by the provisions of this bill and if you do not bomb something connected with the federal Constitution you also will not come within this bill. There are already quite adequate state laws in this regard—conspiracy to murder, for whatever reason, is an offence under all state jurisdictions, with already massive penalties. It is also an offence which is actually quite easy to prosecute if the relevant evidence is there. In a conspiracy to murder offences, evidence can be produced on intention which cannot be produced on other offences. So there are already existing laws to deal with exactly that sort of violent or proposed violent behaviour.

Going to the worst aspect of this proposed group of bills, this is, of course, the provision for proscription of organisations. I have been a practising lawyer for 21 years and I have had to deal with things ranging from the Dog Act through to the federal Constitution, but I can confidently say that this is both the worst drafted and the most frightening piece of legislation I have ever seen in Australia. Not only are the grounds that enable the Attorney-General to make a declaration under 102.1 so incredibly broad but the relief to get out of these grounds is, in effect, almost impossible in practical terms for almost any organisation. It is enough that a member of an organisation is said to be committing a terrorism offence on behalf of the organisation. We all know that large organisations always have some ratbags in them. It is enough that they try to do something within the definition of a terrorism offence and say, 'I'm doing this on behalf of this organisation,' for the organisation to find itself proclaimed under this provision.

I will not go through all the definitions, but they are really bad definitions. Even the one that would seem to be the least contentious—that is, the one about a decision of the Security Council—uses the words 'reasonably appropriate'. What does that mean? I have no problem in principle with giving effect to Security Council resolutions, but why do you use the words 'reasonably appropriate'? Also, even though you may have been proclaimed under one of the provisions, to seek a revocation you have to prove that none of the provisions apply to you. It does not matter whether you are a large organisation or a small organisation, you have problems here. If you are a small organisation, you are simply not going to have the resources, particularly if the resources you are talking about are taking on an administrative law type action. Every day I advise people about whether they can or cannot take on actions. Often they simply do not have the financial resources to enforce their legal rights. Most small organisations would fall within that range. If they find themselves proclaimed, they would have no other practical option but to simply accept that they have been proclaimed, even if they have been wrongly proclaimed. Large organisations, which may have more resources,

would find themselves in the situation where they have to prove that none of their members could come within the category of section 102.1(b). How do they do that? They are in a catch-22 situation. It is a complete reversal of onus. It seems to me that you are snookered by this. Then there are the offences which provide imprisonment for 25 years. First of all, we have:

(a) directs the activities of a proscribed organisation ...

That is still fairly vague. The list goes on:

(b) directly or indirectly receives funds from, or make funds available ...

Does that mean the bank teller who processes their funds is committing an offence? Then it goes on:

(c) is a member of a proscribed organisation ...

Remember, the definition includes 'informal member'. A member who is doing nothing is liable for exactly the same penalty—imprisonment for 25 years—as somebody who is directing the activities of the organisation, without proving any further involvement. Section 102.4 continues:

(d) provides training to, or trains with ...

and we mention in our submission that this could include training for touch typing. Training is not defined, as far as I could find in the short time I have had. Then:

(e) assists a proscribed organisation.

Does that mean dropping off the sandwiches? It may well mean a lawyer who tries to get the organisation to have its declaration revoked. Would you find that, having attempted to try to get a revocation of a declaration and been unsuccessful, the lawyer would then be guilty of an offence under (1)(e) for assisting the organisation and be liable to imprisonment for 25 years? Quite frankly, this is the sort of legislation that Robert Mugabe would be proud of, and we should not even be considering it in this country.

Ms Cox gave evidence today about the sociology in relation to all of this and about the Malaysian Internal Security Act and how that has been used in what Cameron has referred to. It leads to an insidious situation. You do not even need to use it; people know it starts to apply and it comes to be held over people. It really is a case of back to the drawing board with this one.

CHAIR—Mr Bernie, I note that, in relation to the question of legal representation and the matter you just raised in relation to lawyers assisting, there is a question on notice to the Attorney-General's Department expressly on that point. So we have sought an answer on that.

Senator LUDWIG—I will deal with some other parts of your submission before we get to the main terrorism bill itself. The Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 seeks to give effect to the International Convention for the Suppression of Terrorist Bombing. Do you have a view about whether or not Australia should be party to that convention and, if you say we should, do you say we should give effect to that convention by the use of this legislation or by some other means?

Mr Murphy—I think it is more a matter of what is appropriate in Australia. The way this piece of legislation is constructed at the moment places it in a position where it is inconsistent in terms of the definitions and some of the areas it covers in relation to the other legislation that is before you in the same package. I think that we need to have a regard for international conventions in this way but, whenever you get into a method of defining what is an act of terrorism or what is a terrorist group, it is very muddy water. As a government it is difficult to

work out exactly what should be covered. To do it in a way such that the onus of proof is reversed and to do it in a way in which it is wide in its net and covers many different types of acts, acts of assistance or other things, is, I think, the wrong approach. What we should be doing is putting in place defences for people who are activists, for people who are exercising political discourse and for people who are acting in what might be a national interest. If you are engaging in an act overseas fighting a repressive military regime, is it then appropriate for you to be prosecuted in Australia and be granted, say, extradition back to that regime to face justice? I think it is something we need to consider more carefully than is shown by the legislation that is being proposed.

Senator LUDWIG—In respect of the first bill, which deals with the security legislation amendment on terrorism, I would like you to look at section 100.1, which deals with the definitions, and in particular ‘terrorist act’, which has provisions (a), (b), (c) and (d)—depending on which document you have, it is on page 9 or page 7 of the bill. My question goes to your view in terms of where you sit as the Council for Civil Liberties. Is the exclusion—which includes lawful advocacy, protest, dissent or industrial action—broad enough to encompass those issues that would normally be regarded as day-to-day political discourse by Australians in making plain their view?

Mr Murphy—Absolutely not is the answer to that. Most dissent or political discourse is done in a way of creating a protest that may be technically unlawful. If you disobey an order, graffiti a wall, or something like that, you may be committing an act which is unlawful in its nature but it is certainly not a terrorist act. I do not think that there is an adequate defence. Often industrial action is unlawful, but it is being done in the public interest or in the interest of a union’s members and this does not give adequate protection to people who are in that category.

Mr Bernie—As a matter of interpretation that exemption only applies in relation to an interpretation of ‘terrorist act’ which is then used in relation to the following offences, but in the proscription provisions there is no general exemption for lawful advocacy, protest, dissent or industrial action. I think that is very important because I saw that exemption when I was referred to the matter of a lawyer finding himself being imprisoned for 25 years for assisting an organisation. That exclusion is only in relation to that definition of ‘terrorist act’ which then gives you some sort of exemption in relation to the following offences, but when you get to the proscription provisions in subdivision B that does not help you because, looking at the very broad grounds on which you can be proclaimed, it does not have to be a terrorist act. So while that does provide an exclusion in relation to those offences, in relation to proscription of organisations, organisations which are carrying on lawful advocacy, protest or dissent or industrial action could find themselves proscribed under section 102.2.

Senator LUDWIG—On page 8 of the bill—but on page 10 of the document that you have before you—at 100.1, subclause (3) states:

In this Division:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia;

Do you have a view about the extraterritorial effect of the legislation?

Mr Bernie—We generally are opposed to an extraterritorial effect. If an offence is committed, our general view is that people should be prosecuted where the offence is committed.

Senator LUDWIG—And in respect of (b), which also includes a reference to the public of a country other than Australia?

Mr Murphy—Yes. That is exactly the sort of provision that is going to capture many activist organisations. Organisations like ours that are fighting for people's civil liberties within Australia and overseas could be caught up by this provision. Many human rights groups that are opposing illegitimate military dictatorships in other jurisdictions could be caught up under this provision. Essentially, it is the broadest possible definition that you could put in place, and it should not be there. Things should be limited so that people are entitled to engage in political discourse and they are entitled to oppose regimes that are breaching fundamental principles of democracy or are oppressing people in other jurisdictions.

Senator LUDWIG—Do you say by way of that submission that they are materially different types of undertakings than what you have regarded to be caught by this type of legislation? I do not want to put words into your mouth.

Mr Murphy—What we are being told, or what is being publicly portrayed, is that this legislation is about preventing terrorist groups from operating in Australia, in a broad sense. I do not think anybody opposes that. The problem is that we are allowing one person as the Attorney-General, on flimsy criteria, to be able to declare a huge range of different activities and groups as terrorists. It is an enormous power with an awesome responsibility that is completely unchecked. Most of the community would accept that people have a right to attack a regime—I mean in the sense of outlining the problems that are occurring in places like Burma and other parts of the world, or even in Australia—to protest against action by governments that is denying people their rights. That is entirely different from what people would generally consider to be an act of terrorism or being a member of a terrorist organisation. There is no clear distinction in this legislation.

Mr Bernie—There is already power, of course—and I think there has been reference to this—for unlawful associations in terms of attempting overthrow by violent means, and that is in part 2A of the Crimes Act. That requires the Attorney-General to go to court in order to get an order along those lines, and not just a power of the Attorney-General. Also, the consequences that flow from it are quite different from this provision. It really does beg the question of why part 2A has not been tried. Why are we trying to actually put in a further provision when it has not been shown that the existing provision is in any way inadequate?

Senator LUDWIG—Do you have any view in respect of the proscribed organisations, particularly the membership? I was looking for your view about how organisations or community groups might work where the definition at 102.1 states:

- (a) a person who is an informal member of an organisation; and
- (b) a person who has taken steps to become a member of the organisation; ...

To my mind, that might include someone who has rung up an organisation—not even asked for a form—and inquired about what it does to gain an appreciation of whether or not they should join. That may be regarded as taking steps.

Mr Murphy—We oppose this provision in its entirety, but generally, if you were going to put this sort of provision in place, I think a distinction would need to be made between a member of the organisation and someone who is in control and directing its activities. In a lot of cases it is very difficult for someone to take the steps that are outlined in the legislation to cease membership of an organisation. In some cases it could be virtually impossible. There is

no clear framework in place for people to do that. How does one leave the Catholic Church if they are a member? Is a letter to the Pope enough?

CHAIR—I assume that is a rhetorical question, Mr Murphy.

Mr Murphy—Let us say, for example, that you had made an inquiry about membership of Al-Qaeda and you had no idea that they were a terrorist organisation at all. They are declared a terrorist organisation under this legislation and you are on a list somewhere, having made an inquiry. How do you take steps to leave the organisation? Do you have to communicate that to Osama bin Laden? How do you go about doing that? It just seems to be so poorly drafted that there are significant problems in the whole area of the sorts of people it catches in its scope and problems for people in terms of the defences. And the burden of proof is on you.

Mr Bernie—Further in that regard, the reverse onus defence is in subsection 102.4(4):

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—

not just reasonable steps but all reasonable steps—

to cease to be a member of the organisation as soon as practicable after the organisation became a proscribed organisation.

Now if it really is a terrorist organisation, the last thing in the world you want to do is to send them a letter with your address on saying, ‘I no longer want to be a member.’ The legislation is badly drafted and not well thought out at all.

Senator LUDWIG—In respect of the declaration by the Attorney-General, do you have a view about whether or not the Attorney-General or the delegate should be able to make that sort of decision or would it be better placed for a show cause provision before a judicial officer? In addition, are the ADJR remedies sufficient to ensure that the Attorney-General’s decisions are correct?

Mr Bernie—I will attack your questions in reverse order. The administrative law aspects are clearly insufficient. The ADJR enables a certain amount of review but on limited grounds that do not always go to factual matters but often to procedural aspects of them. So that is not enough. Going to the first part of your question, as to whether it should be done by the Attorney-General or a minister, the Attorney-General is a minister. At the end of the day he is a member of the government and he will do what the government wants. We feel that that is not good enough. Again, there seems to be no reason for there to be a departure from the present section 30AA where the Attorney-General must make an application to the Federal Court of Australia for an order. Again, you have organisations proscribed, and the onus should be on the Attorney-General to go to court for an order where there can be some independent review of the evidence, some basis on which the organisation is being proscribed.

Mr Murphy—At some point any proscription of an organisation should be based on evidence, and the way this is constructed at the moment is that it is based on loose terminology and flimsy criteria about the satisfaction of the Attorney-General. At some point in this process there should be independent judicial review or the power should be limited by the parliament, or both of those things, and I think the Attorney-General should have to prove that an organisation meets whatever criteria is set down and not simply satisfy himself or herself that that is the case.

CHAIR—I know we have questions from Senator Scullion and I am sure there are some from Senator Cooney. Senator Cooney, would you like to start and then we will conclude this session with questions from Senator Scullion.

Senator COONEY—I will take up the point about section 30AA of the Crimes Act 1914. I wonder why the legislation has moved away from that position. That would be a better position.

Mr Bernie—You will have to ask the Attorney-General's office that, but we cannot see any reason why that would be the case. I even have concerns with part IIA, but at least it does have that basic provision that there is a necessity to go to court and you are before somebody independent to produce evidence. I would still have concerns about that even; but, as it stands—and this goes back to Senator Ludwig's question about this—just leaving that decision entirely in the hands of a minister of the government is really unsatisfactory. When the administrative law remedies are clearly unsatisfactory, it makes the whole thing unsatisfactory.

Senator COONEY—In particular where the Attorney-General—to be fair to him—has declared himself to be part of a cabinet and therefore bound by the political decision of the cabinet.

Mr Bernie—Yes. We saw that in another issue recently where the Attorney-General made it perfectly clear where he stands in relation to those conflicts.

Senator COONEY—You would have thought he would have been even more political in a situation like this. The other problem that you might face—do you have any comments on this?—is that he has got the discretion; it is up to him not to declare an organisation a terrorist organisation. You were talking about the football club. There were some problems a few years ago—I do not know if you remember—and I think the association stepped in and said there were not going to be any football clubs based on a particular ethnic group, and that has happened. So your example might not be all that fanciful. But what happens if there is a group that you say is feeding money to terrorist organisations and because of the political situation the Attorney-General does not declare that body?

Mr Bernie—That shows you one of the powers that government always have to set agendas in that regard. It is just that, hopefully, in using those powers there is some sort of independent review.

Senator COONEY—But how can you review?

Mr Bernie—I do not know.

Mr Murphy—The fundamental problem here is that if the Attorney-General decides not to proscribe an organisation as terrorist then there is nothing that anyone else in the community can do about it. If someone is engaging in acts of terrorism, if they clearly do meet the criteria, it seems to me that your only option is at the behest of the Attorney-General. If the Attorney-General decides not to name a group for political reasons—there might be a prevailing economic interest in supporting a particular regime overseas—then there is nothing you can do; you cannot go to court, you cannot get any independent group to declare that group as terrorist.

Senator COONEY—So you might support one side of a contest and that is declared a terrorist organisation overseas and you are in trouble under the legislation dealing with financing terrorism. I support its opponent and I am left free.

Mr Murphy—If you have got the support of the Attorney-General, you are in the box seat.

Mr Bernie—It is a good example of how the legislation could act in capricious ways as a result of that.

Senator COONEY—I will take you to section 72.3 of the suppression of terrorist bombings legislation. Subsection (3) reads, ‘Strict liability applies to paragraphs (1)(c) and (2)(c).’ The headline after that is ‘Jurisdictional requirement’. The other provisions in the Security Legislation Amendment (Terrorism) Bill 2002 at 101.2 say ‘absolute liability’ but at least you have got a way out. I wonder why they have made that ‘strict liability’.

Mr Bernie—It is beyond me. And I can see that if somebody was used as a plant they would actually be caught by that and be liable for imprisonment for life. There was one case when someone attempted to bomb an aircraft by getting his girlfriend to take the bomb onto the aircraft. In these circumstances, she would be liable under 72.3 (c) because it is strict liability even if she is not aware of it and has no requisite intention. So somebody who is the mere dummy, who is unintentionally delivering a bomb, could end up being imprisoned for life under this provision, despite the fact they had no knowledge of it and, indeed, they had been used.

Senator COONEY—Their reputation and everything is gone.

Mr Bernie—Yes.

Senator COONEY—I asked Attorney-General’s this: can you think of any other offence where you can get life imprisonment on the basis of strict liability or of absolute liability?

Mr Bernie—No. In New South Wales at present we are talking about life sentences for killing a police officer. That may or may not be appropriate; I think most people would think it is appropriate. But this is life sentences or sentences for 25 years for strict liability offences or being liable to a penalty of imprisonment for 25 years for simply being a member of an organisation, not doing anything active—you may have never put your hand on a gun or a bomb or anything like it, and you could find yourself liable to these very severe penalties: penalties that equal that for committing murder, penalties that in some circumstances here are greater than for importing heroin into Australia. Those are the penalties that apply to many of these offences here. By using the strict liability aspect so often throughout this legislation, many people who have no intention at all to do anything untoward could find themselves facing those sorts of penalties.

Mr Murphy—Regardless of whether someone is actually prosecuted for the offence or not, the effect of having this in the legislation is that it is going to make community organisations very wary about taking action, about supporting people’s rights in other jurisdictions, because the penalties in place are so severe they are going to think, ‘My God, if I make a small error and I am not exactly sure or have not taken every possible step to find out where my \$20 goes that I am donating, I could be jailed for an extended period. Or if I assist someone or I am a member of a group I could face 25 years in jail or, in some cases, life imprisonment.’ It is the most severe response and it really does not take into account the sort of things that most people in the community are engaged in for the best of reasons.

Senator COONEY—You might want to take this on notice: can you think of any other offence of recklessness where you get imprisonment for life? If you look at 72.3 that is an offence of recklessness.

Mr Bernie—It is possible. I think manslaughter in New South Wales, as a state crime, still carries a maximum penalty of life, but usually that is not applied. There is provision whereby you can be convicted of manslaughter with gross recklessness; but, again, your acts there have had to lead to the death of somebody before you become liable to do so.

Senator COONEY—The only other point I want to raise with you at this stage is in the Telecommunications Interception Legislation Amendment Bill 2002.

Mr Bernie—We have only had a chance to have a quick look at that but hopefully we can answer your question.

Senator COONEY—I think you will be able to answer it. You can see that that expands the cover of the Telecommunications (Interception) Act and that in this area you can see the legislative creep over the years in that 1979 act. Has the New South Wales Council of Civil Liberties got any thoughts about the sorts of legislation where onuses are reversed, where there is absolute liability and strict liability but, nevertheless, they attract life sentences or sentences of 25 years—anyhow, big sentences, certainly life in some cases? Do you have any concerns about that sort of legislation creeping into other laws; that, given what some people call a law and order atmosphere in which parliament legislates, this sort of stuff will go from this act, the terrorist act, into what we might call ordinary legislation and state legislation?

Mr Murphy—That is the real danger in this, and we have seen similar things occurring in state legislation where you have had strict liability offences being extended into all sorts of areas that you never would have thought they would be, and you see inconsistencies in the law. For example, in New South Wales we now have a situation where even with traffic infringements you have much more severe penalties in place for doing a burn-out or making a lot of noise with your vehicle than if you are guilty of driving under the influence and then running into someone. So you see this great inconsistency in the law, and it comes into place according to issues that are populist. Doing a burn-out in a car is not generally regarded as the most serious of offences but it is treated that way in the law because a lot of people do not like it. You find that strict liability is working its way through legislation in areas that are seen to have inadequate sentences or inadequate prosecutions taking place and where it is popular for the government to do so.

Mr Bernie—Traditionally, strict liability was used only in regulatory areas like health—

Senator COONEY—traffic—

Mr Bernie—and others, those public consumer type protection areas where it was considered that you needed to have strict liability in those circumstances, otherwise businesses would never get their game together and improve the health circumstances of selling food to the public and things similar to that. But those sorts of offences in those areas have usually been dealt with by some sorts of fines not leading to people's imprisonment. The idea that people can go to prison on a strict liability offence, when they have never had the requisite intention or an onus is on them to prove that they did not have the requisite intention or they do not even have a defence in that regard, is really a quite frightening development.

Senator COONEY—You are better off if you murder your parents to get your inheritance, which you can spend on licentious behaviour. You have more protection there than you do for placing an explosive device against a wall if you do it for religion, politics or ideology.

Mr Bernie—If you do it for personal gain, you will not be caught by this.

Mr Murphy—But if you do it for a religious, political or ideological cause, you will. It comes back to the homicidal maniac description.

CHAIR—We are familiar with that.

Senator SCULLION—Mr Bernie and Mr Murphy, thank you very much for your very passionate deliberations on these issues, and I can see this must be a very interesting time for you. People do not normally deal out civil liberties when we are considering this sort of legislation, the very necessary legislation that needs to deal with these issues; it is generally about taking them away. I have been very interested to note around Australia the whole range of ways of dealing with the same issues of September 11 as we are now. Whether it is getting on an aeroplane, being in town, coming into ports or moving around Australia, we have already lost a whole range of liberties that we took for granted before that day, and to say the world has not changed is just rubbish. I speak to a number of people in the wider community, and the vast majority of them in fact say, ‘Look, we understand there has to be a balance and I’m happy with that. I’m happy to lose some of my civil liberties to ensure that when my children, my wife and my mother go down to Woolies they are going to come back.’

In the past we in Australia saw our country as one which was completely isolated from those events. We are not now, for other reasons and because of other political decisions, and I think people need to concern themselves with that. It is a matter of finding the balance, and I would like some advice on that. What you seem to say is that there is a plethora of other associated issues but that the main issue, and I can understand your concern, is that the power be given to the Attorney-General to make a decision on a proscribed organisation. I can understand where your concern is but you need to give me some assistance, perhaps some ideas of where we can go in an operational sense where somebody has to make a decision, not in a judicial sense over a number of years but an operational decision in a number of days. What other circumstances and processes would provide the sorts of things that you are very legitimately pursuing and that sense of: ‘Listen, we really need to make a decision on this today or tomorrow in an operational sense’?

Mr Murphy—First, there are a couple of issues in what you have had to say. One of the problems with this is, you say, that we have compromised civil liberties at every step in the process. Chris Puplick, the New South Wales Privacy Commissioner, explains this quite well where he says that is ‘the salami approach’ to civil liberties. You can slice away a civil liberty and, each time you do so, you can do it for a very good reason—we need to be searched at the airport in case bombs go on planes; another one might be that we need to be able to stop and search people in public in case they are carrying weapons. If you keep going down this path and you use a quite reasonable example in each single case, it is like slicing a salami where at the end of it you have nothing left and you do not have any rights. This process is the same.

The second thing that you said is, ‘We need a response.’ At the moment we have got circumstances in which the government, including the Prime Minister and the Attorney-General, have repeatedly said that there is no direct or indirect threat to Australia’s security, that there are no terrorist groups operating in Australia that they are aware of. Before you take away people’s civil liberties, which are fundamentally important rights in a democratic society, the onus of proof should be on the organisation that wants the power to justify not only why it wants it but what it is going to use it for and whether it is useful. At the moment we have got a situation where this has been thrown up and we are told that we do need this in response to September 11. I am not sure exactly what that means. Our buildings were not flown into by planes. There is no immediate threat—that is what everyone keeps saying to

Australia. We may be able to use it in a week. But the problem is this is going so broad and so far, and there has been no justification here. The onus of proof is on the Attorney-General's Department, on ASIO and on all of these agencies to demonstrate why these changes are more important than our civil liberties. At the moment you all seem to be asking me to justify why we should keep our civil liberties, without having any evidence that these changes are going to produce results. We have seen legislation that has been on the books for years—decades—that has never even been used. The danger is one day it might.

Mr Bernie—We abhor violence or any organisation that would be engaged in violence. The present law, as I have mentioned before, already deals with conspiracy to murder or attempt to murder and gives powers of arrest to state police to deal with that. You may want to have a power to proscribe organisations which are directly involved in plotting violent offences, but the trouble is the criteria in here go way beyond that. Indeed, as we mentioned in our submission, quite clearly organisations in support of Fretilin in East Timor would have been banned under this provision. It goes way beyond that.

Where you are concerned about your children for the future, I hope you are also concerned about democracy for the future. To quote one American on this: 'I just don't think the best way of defending democracy is by dismantling it.' If this was more restricted to actual organisations promoting violence, that would be a first step. The next thing you say is you might need to take immediate action. The Attorney-General might be able to proscribe an organisation but must within seven days go to the Federal Court to justify the action—that might be another way of dealing with that.

Senator SCULLION—Thank you for that. I have just one last question, to clarify something you said earlier. Perhaps these sorts of discussions need to happen over a beer, over a couple of hours. You said that rather than trying to fix this, we need to throw it out because it is principally not necessary. Is that really your position—that you do not think that the operational environment in Australia at the moment requires us to go down this path?

Mr Murphy—I think that you could say that. There is no reason why the important things that are trying to be achieved in this legislation cannot be dealt with in another way under existing state or Commonwealth legislation. There has not been really any concrete justification for some of these measures and some of the ones that are not dealt with under existing legislation are so wide in their net that you are going to end up putting pressure on ordinary community organisations that are activists. Essentially, you are going to defeat the aims of the bill in that it will not be used against terrorists by and large but will be used to indirectly suppress dissent or people that are helping people overseas engaged in dissent or directly, one day, it may be used by a government of the likes of the Mugabe government to take action directly against groups or individuals. I think the best approach is to throw this out, take a breather as such and come back with a proposal that meets sensible objectives.

What it really seems to be doing at the moment is trying to cover every conceivable type of individual, organisation, group or anything related to a terrorist act that we do not even know could happen now. One of the things that September 11 taught us is that we are never sure what is over the horizon and this legislation seems to be trying to cover everything in case something that we have not thought of arises. In doing that it is also going to suppress a lot of ordinary activities that are in the public interest. So instead of taking that approach maybe we do need to take a step back and think about what we are trying to do, what organisations we are trying to outlaw, what the reasons are and then directly do that instead of indirectly allowing every organisation to be caught up in this.

CHAIR—Thank you very much, Mr Bernie and Mr Murphy, for assisting the committee for the second occasion today. We are very grateful for both your written submission and your oral evidence. I note that you have indicated you will be providing further information to committee on those other bills mentioned in your correspondence, and we look forward to receiving that.

Mr Murphy—Thank you for the opportunity of appearing today.

[4.32 p.m.]

WILLIAMS, Professor George John (Private capacity)

CHAIR—I welcome you, Professor Williams. The committee has received and agreed to publish your submission. Are there any alterations you wish to make to that document?

Prof. Williams—No.

CHAIR—I indicated this morning in my opening statement to witnesses that evidence to the committee is protected by parliament privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I invite you to make a brief opening statement. At the conclusion of that members of the committee will direct questions to you. We are, as you can see, running some 15 minutes behind your scheduled appearance time. The committee, for a range of reasons, must conclude at 5.15 p.m.

Prof. Williams—I start with a few brief opening comments directed towards my submission. My opening position is that I see a clear need for specific laws targeted towards terrorism. I also accept that there is a need and an identified political need for laws that deal with organisations that support or otherwise are involved in the practices of terrorism. My submission is really directed towards two questions. The first is: do the laws as we currently have before us achieve an appropriate balance as a matter of public policy in dealing with those objectives that I accept? The second is: would the laws likely be constitutional under our system of government in the way they go about their objectives?

What I have in my submission is dealing with both of those areas. Firstly, in the constitutional issues, I look at the question of whether there is an adequate head of power that would enable the federal parliament to pass these laws. Secondly, I deal with the question: even if there is a head of power, is there nonetheless some constitutional limitation that might enable the High Court to strike down whole or in part this law because it might breach the freedom of political communication or the freedom of association?

I do not reach a definite conclusion on those constitutional issues, largely because the time in which I had to develop this paper was not sufficient to give what I would call a lengthy or full advice. But I would identify to the committee the fact that, when dealing with any form of constitutional question in this area, the parliament must ask itself the same question that the High Court would ask—that is, is this law appropriate and adapted to the need as parliament sees it in dealing with the menace of terrorism? If it is not fairly tailored to the problem, if it is not appropriate and adapted, there is at least an argument that the High Court would strike this down as going beyond the proper bounds of the sort of legislative response that parliament might want to achieve in dealing with terrorism.

The High Court has applied this test in a variety of contexts. It has proved willing in other contexts to strike down legislation because it has unduly breached freedom of speech. There has not been a case to date that deals with freedom of association, but I think it is clearly arguable that the High Court would imply a freedom of association and if, for example, the proscription power were too broad in dealing with association, the whole proscription power might be struck down. So in examining a law like this it means that it is critically important that the law be tailored to the legislative objective. If it is not, invalidity may follow.

The sorts of issues that you might look at in asking whether this legislation is appropriately tailored are the issues of public policy and community concern that I identify in the second

half of our submission, and there are some issues that I would identify in the area of the proscription power and that I think raise some very grave doubts about whether this legislation deals appropriately with the problem. As I have said, I come from a position where I can understand the need but I think that, simply, this legislation must be rewritten substantially in the area of the proscription power.

The first problem the High Court might take into account—or even, absent the High Court, that we ought to consider as a matter of whether this is a good law—is the fact that there is no role for any independent body in the making of a decision to proscribe an organisation. That type of decision, when it is made solely by the Attorney-General, is quite problematic because normally in our system of government we do not vest powers such as this solely in the executive. The separation of powers suggests that you must have a court involved, that you ought to have someone independent involved—because, if you do not, you risk danger to the democratic system in the longer term.

The second problem is that, obviously, the Attorney-General has stated that there is a desire to have appropriate judicial review after any decision that might be made; and, indeed, he suggests that might be a balance for the fact that judges are not involved in the initial making of the decision. But I think that, if you carefully examine the legislation, there is not the scope for meaningful review of a decision by an Attorney-General to proscribe an organisation. One reason is that it is possible that any Attorney could actually remove a decision made to proscribe an organisation from review by passing or making a regulation under the Administrative Decisions (Judicial Review) Act. Section 19B actually enables the Attorney to, if you like, protect from review one of those decisions. Of course, that can be overturned; it can be disallowed by the House. But there is no telling that such a decision might not be made when the houses are sitting, and that raises questions about process and about timing.

The second problem, if you like, about meaningful review is that, even where there might be scope for review by a court, courts have often been extremely reluctant to engage in review after a decision has been made, where the decision has been made on national security grounds. Courts have often stated that they simply will not get involved in reviewing national security decisions; that is a matter for the executive. So, where you vest the decision in the executive to be made on national security grounds, there is a real possibility there might not be meaningful review, for that reason alone.

You could also add that, where a decision is made where reasons do not need to be given, where someone can be proscribed under any one of four criteria, the onus resting upon the organisation to disprove that the decision was properly made is too high a burden. It is very hard to ever marshal evidence to show that there were not adequate national security grounds for making such a decision. It is stacked against the organisation and against the courts in such a way that there is unlikely to be adequate review.

The final reason, and perhaps in some ways the most important reason, is that even if you overcome the national security problem, even if you overcome the evidence problem, there is simply no scope under the Administrative Decisions (Judicial Review) Act for any review of the merits of the decision. There are very narrow, well-tailored grounds for review that relate to the legalities of the decision but they do not relate to the merits of the decision. So, indeed, the Attorney could make a decision that might be wrong on the merits but there will not be any review of that decision under the avenue of review that the Attorney has identified. I think what that means is that, where we have a decision where the power is vested solely in a member of the executive, without any meaningful possibility of review, we simply cannot rely

upon retrospective judicial review to cure this decision making process of its obvious problems. Not only would it take a lot of time but the likelihood is that an organisation would be damned by the process by the time the courts could look at it. As I have said, there is just not the scope under the mechanism that the Attorney has identified for meaningful review on any ground.

My concern also with this legislation and the proscription power is the disturbing similarity between the legislation we have here and the legislation passed in 1950 to ban the Communist Party and other related organisations. That legislation was struck down by the High Court. Arguably, this legislation might be struck down by the High Court if it is passed in the current form. It is different in some critical respects, but still there are definite constitutional issues there. But, apart from those constitutional issues, you would have to say we ought to have learnt our lesson from that legislation: do not vest powers of this kind in the executive and do not vest powers of this kind where there is not adequate review. As the High Court itself reflected in that case, the dangers to our civil liberties do not just extend from at that point communism or at this point terrorism; they extend from the fact that we might unbalance our democracy by giving too much power to any arm of government. As Sir Owen Dixon said:

History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.

That is of great relevance because here we have legislation that would give unbounded, untestable power to an Attorney-General, which I think is obviously going too far.

The final thing I would put in terms of an objection to the proscription power is the overbreadth of that power in relation to the criteria that might give rise to proscription. I see that the New South Wales Council for Civil Liberties has already made some comments along those lines. I share those concerns, because we have the word ‘integrity’ in paragraph (d) of the proscription power, but ‘integrity’ has no fixed meaning that is clearly understood in the popular or legal community. We have searched through cases to find out what ‘integrity’ might mean and we have found nothing which would suggest a clear meaning of that word.

This means we have a word which is malleable in the sense that an Attorney can use it to mean what he wants it to mean, and there is nothing in the law or otherwise that might be used to suggest otherwise. It is a word that clearly on the current meaning—an unbounded, open meaning—would extend to organisations such as freedom fighters using violence and whether or not they should be proscribed, and also to organisations that might seek to challenge the territorial integrity of nations by peaceful means, organisations such as those supporting independence for Tibet or organisations perhaps supporting independence for East Timor in prior periods. This legislation, in extending to those organisations, is clearly far too broad. Australians do not regard those organisations as terrorist organisations. Those organisations ought not to be within the ambit of this power, and it is disturbing to see how broad it might go.

To draw these threads together then: our submission is that this legislation, although targeting a genuine need, does go too far, particularly in regard to the proscription power. It goes too far in a way that might ultimately cause it to be struck down by the High Court because it is not appropriately adapted to a need identified by the parliament—it goes too far in the powers that it vests. But more than that, more than simply the constitutional problems, the proscription power is bad law, because it would vest undue, unfettered power in a member of the executive. We ought not to give any politician this sort of power without meaningful review. I am thinking not only of today’s government: for me it is largely irrelevant to today’s

government. I am thinking here that this statute could be on the books for 20 years or it could be on the books for 50 years. If you look at other legislation, statutes tend to stay for a very long period on the books and often are never used. Here we are trusting the wisdom of an Attorney-General in 20 or 50 years time. We do not know who that will be, and it simply is not good sense to vest such a power in a way that ultimately might be abused to the detriment of our democracy. That is a brief five-minute summary of the submission, and I am happy to answer any questions.

CHAIR—Thank you very much, Professor Williams, and thank you for that very concise submission. In relation to the question of the use of the word ‘integrity’ in 102.2(1)(d), do you have a suggestion for an amendment of the provision which might make it more acceptable in your view?

Prof. Williams—I think if there were a proscription power—and let us assume that it did have some form of an independent review—then it should clearly limit proscription to organisations engaged in terrorist acts. With an organisation that has members that carry out terrorist bombings and perhaps extends to issues like financing, I do not think you could argue with that. But it goes way beyond that and it ought to be tied very carefully to terrorist acts.

CHAIR—So you could use the word ‘integrity’ if you tied it more tightly?

Prof. Williams—I would not use ‘integrity’ at all, because it does not have a meaning that I think is commonly understood.

CHAIR—So you suggest its removal?

Prof. Williams—I would definitely suggest its removal, because it does not have a meaning that is clearly understood in this context.

CHAIR—Thank you very much. Bearing in mind the time constraints under which we are working, I will turn now to Senator Ludwig.

Senator LUDWIG—Thank you. I understand the import of that referral. We will stay on the topic that we have just been talking about, which is the declaration of the proscribed organisations. You mentioned that, if politicians were to have the power, it should be reviewable in a more meaningful way than in, I take it, the ADJR provisions. Do you say that the review provision should rest with the politicians or should be similar to, say, 30AA under the Crimes Act, which provides that the Attorney-General may apply to the Federal Court of Australia for an order calling upon any body of persons—basically a show cause provision? I am trying to distil what your view is in terms of the mechanism. Should it be a provision which would allow the Attorney-General to make the decision but, however, that decision would have both law and merits review applicable to it? Or should 30AA of the Crimes Act apply, where the Attorney-General may need to pursue a show cause notice to the Federal Court? Do you have a view about that?

Prof. Williams—I do. I do not think any form of subsequent judicial review of a decision made by an Attorney-General could ever be effective in this context. Any form of independent involvement must be at the decision making stage because, once an Attorney makes a decision on national security or other grounds, a court simply is not well equipped to review such a decision, even if you gave it the power to do so on the merits. That means that, if you want a power to proscribe organisations, ideally it would work in such a way that the decision would be made only by an independent and open tribunal—or perhaps in camera, in very limited circumstances. It would be a tribunal that might be required to exercise a decision at extremely short notice, and courts have often proved able to do that. You can think

of issues, such as seeking warrants and other things, where the police will do so very quickly. But there is a clear, independent mechanism where you involve someone respected by the community as a safeguard. I think that is what is needed. If that is not what is going to happen—that would be my first choice—then you might have a mechanism like that in section 30AA of the old Crimes Act's unlawful associations legislation. I think it should be a very clear standard whereby organisations cannot do certain things and, if they do, you can initiate a judicially based process. They can be proscribed or otherwise dealt with. Then you have community confidence in the process, and we do not have issues about the separation of powers being breached.

Senator LUDWIG—I take you to section 100.2, which provides for the constitutional basis for offences. Do you have a view as to whether or not that would satisfy your concerns about the constitutionality of the bill itself? In other words, is it a provision which seems to say that the bill is constitutional in its effect?

Prof. Williams—It does not have a proscription. That extends to offences. Clearly, yes, it is adequate to deal with the prosecution of anyone for one of the terrorist offences and it is very carefully drafted—although I always have problems with provisions of this kind because it means that, whenever someone is charged, they have got the issue not only of 'Am I guilty according to the clearly established offence?' but also 'Do I fit into one of these often fairly intricate constitutional categories?' and that puts up another barrier. It is often why criminal law is better made by the states, where you do not have these issues involved—or at least there could be a reference of powers, which would cure the need for that. But, yes, it would solve the issue, though complicated, but clearly it would not solve the proscription issue. That is why I focus largely upon that—because 100.2 does not deal with constitutionality in that same context in section 102.2. The early words of 100.2(1) talk about action giving rise to an offence. That is not the nature of the proscription power.

Senator LUDWIG—Dealing with the proscription power itself more generally at 102.2, in addition at subsection (1)(c) wherein it states 'the declaration is reasonably appropriate to give effect to a decision of the Security Council,' do you have a view about the wording of what is reasonably appropriate?

Prof. Williams—Again, it is using vague language in legislation that can lead to severe consequences. I just think that is inappropriate in a power such as this. If there is a clear need, it ought to be clearly tailored to that. I am always wary whenever legislation vests such a dramatic power by using words such as 'reasonable', 'reasonably appropriate' but that power rests essentially in the hands of a member of the executive without effective review. So really the whole proscription power is flawed, and that is an example of why.

Another thing I would add about the constitutional basis of some of this is that I am not aware of any treaty or convention that is likely to support the proscription power. The government, from what I can tell, seems to be progressing on the basis that there might be a norm of international customary law that might support such a power as this. Arguably there is such an emerging notion that countries have an obligation to attack terrorism, and Australia, acting upon that, might pass such legislation. That is an untested basis of power. The High Court has never held that international customary law is a basis for passing legislation. It might do so, but we are entering into what you might call untested constitutional territory and subclause (c) is potentially an example of that.

Senator LUDWIG—Finally, before we run out of time for me at least, concerning the area of the revocation of a declaration, let us look at page 17, clause 102.4(4):

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 ...

Is it sufficient to say that the defendant took ‘some steps’ or ‘took all reasonable steps’?

Prof. Williams—I am not aware of something like this. The only parallel I really know with the proscription power is the anticommunist legislation of 1950 and it contained nothing like that. An element I find disturbing with taking ‘all reasonable steps’ is that you can be an informal member, so in a sense you might not even believe that you are a member of an organisation—you have done nothing officially—but you can be considered to be a member because of the informal link. So you may never think you have to take any steps. If informal membership simply means attending one meeting or knowing some people in the organisation, which arguably could be enough, what would you expect that you would need to do?

Senator LUDWIG—Yes.

Senator COONEY—A lot of this legislation, or some of it anyhow, arises under the International Convention for the Suppression of Terrorist Bombings. I am looking at the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002. Clause 72.7(1) says: ‘Proceedings for an offence under this Division must not be commenced without the Attorney-General’s written consent.’ I want to ask a question in the light of that. That is already in the act and it is not an unusual provision. The idea is that the Attorney-General is the first law officer and stands above the political give and take of the parliament. I put this to other witnesses and I would be interested in your opinion, if you want to give it; if you do not, it will not matter. The Attorney-General has declared himself, in a different context—which you would know about—on whether or not he ought to defend judges when they are under attack. He said, ‘I’m part of a political organisation and a political cabinet which makes political positions,’ which is correct. Have you got any comments to make about the constitutional propriety—that might be the wrong word—or the constitutional sense of an attorney-general who has now openly declared himself to be a politician first?

Prof. Williams—I think a provision like this simply shows that that approach has always been unworkable, because we often need an attorney-general to be involved in making decisions like this. For someone who is the first law officer of the Crown, there is a proper role to play in decisions to prosecute in certain cases and, if he was not to do it, it is not clear who would. So I do not think you could take it away from him, because then you would be left with the difficult position that nobody was playing that role. I think the only answer is that ultimately we need an attorney-general to recognise the full ambit of his role in this sort of context. I do not think there is any suggestion that the current Attorney has not done that. In other contexts, I and others would disagree with him about the role he has taken, but here I have seen nothing to suggest that it would be problematic.

Senator COONEY—The only problem you have, if he acts politically, is that there are some people he might not prosecute and others whom he will.

Prof. Williams—That is true. That is the danger. But at least here the decision of guilt is not made by the Attorney; it is made by a court. It is merely a gateway as to whether it goes further, but a necessary gateway.

Senator COONEY—But people say, ‘Look, this person ought to be prosecuted but is not.’

Prof. Williams—Often you have offences within society where clearly there is a role for the political arm of government to make prosecution based decisions. Euthanasia and other

related issues are often raised where we clearly do not want these things automatically prosecuted, and so there is a legitimate political debate that goes on. Here I think you could equally argue that there ought to be such a debate.

Senator COONEY—Looking at 72.7(3), it says that ‘in determining whether to bring proceedings for an offence under this division, the Attorney-General must have regard to the terms of the convention’—including paragraph 2 of article 19. What is the effect of that? Is this really just creating a Teoh situation in this area?

Prof. Williams—It could do. It is really just setting up a discretion for the Attorney to ask himself or herself whether this prosecution really matches the spirit of what that convention is about. It is potentially a sensible provision, because it enables prosecutions not to go ahead where they would not be contemplated by the nature of the convention. That is not a decision that a DPP might be able to take, because the DPP simply ought to prosecute in most circumstances without taking into account those more political or international considerations.

Senator COONEY—I take you to 102.2 of the Security Legislation Amendment (Terrorism) Bill 2002 where it says that the ‘Attorney-General may make declarations’. These are the proscribed organisations which you have told us about. If you look at 102.2(1)(c), it says that the ‘Attorney-General may make a declaration in writing’. It goes on to state, ‘if the organisation, the body corporate’—and I think (a), (b), (c) and (d) are all alternatives.

Prof. Williams—Any of them is sufficient.

Senator COONEY—‘The declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations.’ There is no capacity there for Australia to look at whether the decision of the Security Council had merit, or whether it was made with procedural fairness or by an appropriate procedure. Therefore, I would not have thought that there is any way of reviewing that for Australia. So the Attorney-General may just declare an organisation to be a ‘proscribed organisation’ because the Security Council of the United Nations has said it has to be. Do you feel there are any problems with that? It is not subject to any prerogative writs or such, so far as I can see.

Prof. Williams—I do have a problem with that, because of the nature of the criminal offences that follow from the proscription of an organisation. You are setting up quite severe penalties based not upon ascertainable or knowable criteria but upon a decision of that council that might have been made that day or the day before. It is very hard for anyone to take account of what that council might do. When you think of current conflicts in the Middle East and other issues which can change so rapidly—today’s freedom fighter can be tomorrow’s terrorist—that is quite dangerous in this context. That is why my own view is, in targeting organisations, it should be that they are targeted because of their relationship to clear, identified criteria that target terrorist acts. So, if an organisation bombs or does something else, that is why you target them; you do not do so because of some other more convoluted process. In a sense, what you have here is that you become proscribed because of a political decision made by the United Nations. That is what you have here.

Senator COONEY—And there is no process whereby, with a treaty, you sign off and then ratify it and go through that process?

Prof. Williams—Australia does not necessarily have any influence or vote in that, and it does not seem to me to be an appropriate ground.

Senator COONEY—I want to ask about section 100.2—the constitutional basis for offences—where it seeks to bring the provisions of the legislation within the Constitution. It says:

(2) Without limiting the generality of subsection (1), an action, or threat of action, gives rise to an offence under this Part to the extent that:

(a) the action affects, or if carried out would affect, the interests of:

(i) the Commonwealth ...

‘Would affect the interests of’ seems to me to be a vague expression.

Prof. Williams—It is very vague. The first thing I would say about this is that it may be appropriate in the Trade Practices Act, where you see provisions such as this, but it is not appropriate in criminal statute—again, because of the vague language in it. A person is charged with an offence and, as a criminal defendant, you are forced to look at the issue of whether it is carried out or whether it would affect the interests of the Commonwealth, and that is not a proper issue to be dealt with in a criminal trial. I am not really quite sure what they are referring to there. I suspect that they are referring to the nationhood power. They are referring to a collection of powers under which the Commonwealth can regulate its public servants and the Public Service, and they are trying to catch the other powers that they have not specifically mentioned in some of the other heads. As a constitutional lawyer, it is not obvious to me what they are referring to. Really, what they are trying to do is catch things they might have forgotten, and I have concerns about any criminal statute operating in that way.

CHAIR—We can follow that up with the Attorney-General’s Department, but we have not done that as yet. Professor Williams, the committee is extremely grateful for your submission. We recognise and have acknowledged on the record that the time frame for consideration of these bills is a very tight one, so we are grateful that you have made the effort to provide us with your submission and also to attend and give us oral evidence this afternoon. Thank you very much for your assistance. I would also like to thank all the witnesses who appeared before the committee today for their assistance and their submissions. I also thank the secretariat and Hansard for their assistance.

Committee adjourned at 5.03 p.m.