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JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Reference: Review of security and counter-terrorism legislation

MONDAY, 31 JULY 2006

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JOINT STATUTORY COMMITTEE ON

INTELLIGENCE AND SECURITY

Monday, 31 July 2006

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

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

Terms of reference for the inquiry:

To inquire into and report on:

The operation, effectiveness and implications of the:

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

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LYNCH, Dr Andrew, Director, Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales 21

MACDONALD, Ms Edwina, Senior Research Director, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales 21

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WILLIAMS, Professor George, Anthony Mason Professor and Centre Director, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales 21

Committee met at 2.01 pm

CHAIR (Mr Jull)—I declare open this public hearing of the Parliamentary Joint Committee on Intelligence and Security. This review is conducted pursuant to paragraph 29(1)(ba) of the Intelligence Services Act 2001, which requires this parliamentary committee to review the operation, effectiveness and implications of the Security Legislation Amendment (Terrorism) Act 2002, the Border Security Legislation Amendment Act 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 and the Suppression of the Financing of Terrorism Act 2002. The committee is required to report its comments and recommendations to both houses of parliament and to the responsible minister.

The review follows on from an earlier public inquiry conducted by the Security Legislation Review Committee under the chairmanship of the Hon. Simon Sheller AO, QC. The Security Legislation Review Committee was established on 12 October 2005. It reported to the minister and the parliamentary committee on 21 April 2006 and its report was tabled by the Attorney-General in the Commonwealth parliament on 15 June 2006. The parliamentary committee has decided to focus the attention of this inquiry on the recommendations and findings of the Sheller report. However, matters not addressed by the Sheller report that fall within the terms of reference of this present inquiry may also be raised for this committee's consideration.

On 16 June 2006, the committee wrote to all organisations and individuals who participated in the Sheller inquiry seeking their comments on the recommendations of the Sheller report. The committee also wrote to two senior barristers with experience of the enforcement of Australia's terrorism laws. The review was advertised generally on 20 June. Fifteen submissions have been received, one of them confidential. This is the first of 1½ days of hearings. A further hearing will be held here tomorrow.

I advise those present that the Prime Minister and all the relevant ministers have agreed, in accordance with schedule 1(22) of the Intelligence Services Act 2001, that these proceedings should be conducted in public session. As there are a number of criminal prosecutions currently before the courts, I draw the attention of witnesses to the sub judice convention. The committee may exercise its discretion to hear in closed session evidence that may prejudice court proceedings.

[2.04 pm]

CARNELL, Mr Ian, Member, Security Legislation Review Committee; and Inspector-General of Intelligence and Security

SHELLER, Mr Charles Simon Camac, Chair, Security Legislation Review Committee

Witnesses were then sworn or affirmed—

CHAIR—Normally, Mr Sheller, we ask for introductory remarks. You have kindly given us your prepared statement. May I suggest that this be accepted by the committee, which would save some time?

Mr Sheller—Yes, thank you.

CHAIR—Thank you very much. There being no objection, it is so ordered.

Mr Sheller—I had intended using that as an opening statement, but some parts of it are really matters of record, such as you would realise that we are but two members of a committee of eight. It seemed to me that in the time available it might be better if I sought to concentrate on particular matters which may be of concern to the committee and develop what I have to say around those—if that is an appropriate approach. I realise that your time is limited and I do not want to take it up with a lot of unnecessary material.

CHAIR—I thank you very much indeed for that.

Mr Sheller—If that is an appropriate approach. This document is a fuller account, and we have tried to pool 200 pages into about 16 or 17, or whatever it may be. I think it may be an easier approach than simply reading 200 pages, which I imagine is a fairly difficult task. I have found it so over the last three months; it was three months ago that the report was finally prepared and submitted, so I have had to do a good deal of revision.

CHAIR—Thank you.

Mr Carnell—Could I just add that the red folder has the key provisions in the order in which Mr Sheller's address deals with them.

CHAIR—I thought it was interesting that in submissions from groups like the Law Society the suggestion was that we did not really need any specific terrorism laws or legislation following September 11. Your committee did not accept that, even though it came from groups like the Law Society. Could you give us your reasoning?

Mr Sheller—They are dealt with in the report, but I will give them to you in this way. We asked those people who put submissions before us to that effect, I think without exception, to point to particular parts of existing criminal law—either federal, state or territory—which filled the gaps for trying to deal with terrorist events before they occur. My understanding—and the

committee has said this—is that the aim of this legislation is to prevent terrorist activity. On the whole, criminal law is not concerned so much with prevention, in terms of imposing penalty, as with dealing with the results of criminal activity.

On the first page in the red folder that Mr Carnell has passed up, the grey section deals with the personal offences under section 101. The inner circle refers to criminal restraints available in the standard criminal law, such as attempting, aiding, abetting, conspiring and inciting. The opinion of the committee was that rarely if ever would any of those particular provisions deal with a case of a person who, for example, was planning to engage in terrorist activity, particularly if that person was planning alone in this country. The idea of conspiracy would be, if not rare, not common. It was felt very strongly, and we expressed this in the terms of the report, that this legislation is necessary to combat terrorist activity in the sense of trying to prevent it happening—dissuading people from engaging in it or even thinking about engaging in it. I think I can say that all of us were fairly convinced of that.

CHAIR—I want you to expand a little bit on the definitions of what exactly terrorism is and some of the difficulties or controversies that were raised in coming to such a definition.

Mr Sheller—There is set out in the report in a general sense a quotation that we took from something that the former Human Rights Commissioner had stated in a paper. It is under the heading ‘The nature of terrorism’, on page 42 of the report. This is from two papers that were prepared by Dr Sev Ozdowski—I can read them out, but it may be easier to read them yourselves—as a statement of the sort of thing that is certainly regarded by him, and I think by many people, as what terrorism is in that sense.

Of course, within the legislation itself, one gets to the particular definitions of an act of terrorism, which is something that is part of the section of the legislation concerned with terrorism. That is a definition which deals with the motive or objective of some sort of religious or ideological intention and similarly an intention to bring government to account or to intimidate government. So there are two levels to it: there is the general statement and there is the particular statement that is found within the legislation itself.

Mr Carnell—Another one of the arguments for saying that there is a need for Commonwealth legislation is the need for a comprehensive set of offences that cover the country. Yes, there is existing criminal law in each of the states and territories, but you could not say that it presented a coherent and comprehensive code to deal with this conduct. That leads to one important aspect of the definition of a terrorist act. As the review committee, we certainly had some submissions made to us, particularly by the Attorney-General’s Department, that the definition of a terrorist act could be simplified, that it does not need all of the elements that are currently there in the definition.

However, it is indeed a definition that is meant to capture what is particular about terrorism—if you like, the high end. There may be certain other conduct which borders on it or may not neatly fit in, but it will be readily enough dealt with using existing criminal law. The representations we had from the representatives of the Western Australian government made it clear that in making the constitutional referral of power to the Commonwealth—and it was a text referral—it was important that the definition of a terrorist act be at that high end, if you like, that it capture, and only capture, those acts that we would all readily agree constitute terrorism. We

found that the definition of a terrorist act, with two exceptions, was quite sound. But we did have two suggestions, which are in three recommendations, about how one might refine that definition.

Mr KERR—Can I challenge you with a provocative example? Look at Criminal Code divisions 101.1 and 101.2: 'Terrorist acts' and 'Providing or receiving training connected with terrorist acts'. Why would that not make subject to the criminal law of Australia any Australian who goes to Israel, joins the Israeli defence forces and trains to participate in actions which fall within the definition of terrorism?

Mr Sheller—This is 101.2?

Mr KERR—Yes.

Mr Sheller—The question that immediately arises is whether the training is connected with, et cetera, a terrorist act.

Mr KERR—Then go to 100.1, the definition of 'terrorist act'.

Mr Sheller—It is an action or threat 'with the intention of advancing a political, religious or ideological cause'.

Mr KERR—Go to (c).

Mr Sheller—To intimidate or coerce the Commonwealth, a state or territory—

Mr KERR—Or a foreign country.

Mr Sheller—Or a foreign country.

Mr KERR—Why would it not?

Mr Sheller—The answer to that, I assume, though I do not know, is that, firstly, it would be said that it was not a terrorist act that was being trained for. Secondly—

Mr KERR—But I am asking why the definition. We have come to this point that suggests that the definition is not so wide as to encompass things that we would not wish it to encompass. I am putting a specific proposition to you and I am asking you why it would not encompass that.

Mr Sheller—Because it is not done or the threat is not made with the intention of advancing a political, religious or ideological cause. The details of what is going on in Israel and Lebanon are a little difficult for me to deal with.

Mr KERR—But we are dealing with those events through the eyes of others.

Mr Sheller—Yes.

Mr KERR—Why would it not fall within 'coercing or influencing by intimidation' the government of a foreign country—to wit, Lebanon?

Mr Sheller—There are two sections of it. The first is whether it is advancing a political, religious or ideological cause. If a country goes to defend itself, I doubt whether it satisfies that. But I do not know; you may be right. It does not strike me that it would fulfil that part of the definition. The second part, intimidation, is something I would imagine is concerned with an act done to intimidate in the sense of a threat to, say, a government in Australia, an act done to make that government react in a particular way.

Mr KERR—It is, plainly. It is manifestly and overtly expressed as such.

Mr Sheller—It is made as an act of defence. That is one argument.

Mr KERR—It is to influence the government of Lebanon to put its armed forces to the south of Lebanon to prevent certain things occurring. I am not arguing the morals of it.

Mr Sheller—I am afraid I do not know the details.

Mr KERR—I am not arguing the morals of it, but I am arguing the breadth of the definition.

Mr Sheller—It is difficult, without having an exact factual background, but my understanding of this is that what is done, for example, by attempting to blow up or by blowing up a railway station in the centre of the city, which is done presumably, firstly, to advance a religious or ideological cause—

Mr KERR—A political cause.

Mr Sheller—Yes.

Mr KERR—Israel is blowing up power stations to advance a political cause.

Mr Sheller—No, no. It is blowing them up to defend itself. I understand what you mean.

Mr KERR—I am not advancing a case for or against a particular prosecution, but the concern that the definition is narrow enough not to encompass a wider range of possibilities than have been conceived of in normal discourse seems to me to be very real. In its literal and obvious terms, it seems to me to apply to those circumstances. If it does, then we require prosecutorial discretion not to apply it in those circumstances. We come down, therefore, to a circumstance where that which will be prosecuted and that which will not depends on political or prosecutorial judgments of the executive.

Mr Sheller—I understand that.

Mr Carnell—Could I make the comment—and I could not necessarily say this is something that comes from the committee; it is probably more a personal view—that what is controversial is the geographic reach of these provisions and that, as far as a definition of 'terrorist act' goes, I believe that we are close to having an acceptable definition. We can wait and see if the UN

produces a definition which is better. That is probably optimistic. But, in any case, I think as a definition itself it is generally sound. It is the geographic reach so that it can apply to things that are done by any person in any country, whether or not Australian interests are affected. Indeed, in the case of ul-Haque, this is the point on which they are seeking leave to appeal to the High Court. The allegation there is that that young man trained with LET in Pakistan. As I understand, from something that is in the public domain from counsel representing him, they want to put to the High Court the constitutional issue of how training which is said to not involve training for any threat against Australia or Australian interests can legitimately come within the scope of our criminal law. It is a live issue and that geographic reach is—

Mr KERR—This is precisely the point I am making. If it applies in that instance, it also applies in the case of any Australian who enlists to serve in a foreign country, which we permit under other provisions of our Criminal Code, ordinarily. We did not think we were effecting that in these provisions, but it would seem that we are because of the breadth of the definition.

Mr Carnell—I suppose I am simply trying to make the point, which, in a sense, is not directly disagreeing with your main point, that it is not a question of the breadth of the definition; I think it is a question of the geographic jurisdiction of the offences. You could come to the same end—

Mr KERR—If you put the words 'in Australia' it would be unexceptionable, but those words are not there and that is why I raised the very point that I have raised. I raise it in a provocative context in order to put it in a contextual frame that everybody will understand. It makes no difference whether or not it is the Israeli defence forces, the LET, a legitimate recognised government or a de facto government that is in dispute. Many countries have disputed governments. Some are recognised by Australia; some countries have no governments recognised by Australia. We had Australians serving on all sides of the disputed boundaries in the former Yugoslavia. During the Spanish Civil War, Australians travelled to serve under the Republican government and some under the Franco regime. They would all be caught under these provisions—but, if they are, so too is every Australian serving in the Israeli defence forces at the moment, subject only to prosecutorial discretion. That then brings us back to perceived choices being made in relation to these matters as to the merits of various causes rather than the law.

Mr Sheller—In the submissions to us on the definition of 'terrorist act' that you have referred to there were submissions that suggested that was a model form. I understand what you are saying—

Mr KERR—I am asking you a question about your conclusion at the end of these processes.

Mr Sheller—My conclusion is that it would not cover the situation of people acting in a military in defence of a country. If on the other hand the recipients of it were a terrorist organisation that was being fought, it would seem to me that it does not fall within it. That is my reaction to it. One of the things about this, of course, is that it is difficult legislation. A lot of it is fitted in with legislation that has been passed in other countries and to a greater or lesser extent has been copied. Generally, the committee came to the conclusion that it was important that it be separated from, say, murder—if somebody on one side of the border murders somebody on the other side of the border—by introducing these concepts which are said to be particularly

regarded by people generally as distinguishing terrorist acts from ordinary criminal acts such as murder and so on.

Mr KERR—I understand what it was intended to do; I just do not think it does it.

Senator FAULKNER—Mr Sheller, in the instance that Mr Kerr asked you about he used the example of the current conflict between Israel and Hezbollah. Is it not significant that the military wing of Hezbollah is actually proscribed? Or might it not be significant?

Mr Sheller—In the application of the definition of 'terrorist act'?

Senator FAULKNER—The application of these provisions in the case that Mr Kerr questioned you about. The military wing of Hezbollah is proscribed by, I believe, our parliamentary proscription method.

Mr Sheller—It is, yes.

Senator FAULKNER—This brings, I would have thought, another layer, if you like, to the issue that you have had a dialogue with Mr Kerr about. That is what I am asking. I am not an eminent lawyer like Mr Kerr or you, of course.

Mr Sheller—This is rather difficult for me because I am not so familiar with what is going on in Lebanon as to be able to deal with it in detail. But let us suppose for a moment that this starts with an attack by Hezbollah, of which the military wing is recognised here as a proscribed terrorist organisation, and that is resisted. Is the resister—the person resisting—in those circumstances engaging in a terrorist act? To my way of thinking, it is very difficult to fit that into this definition. But that is only this case. There may be other cases, of course, in which it is more difficult.

Senator FAULKNER—I understand that. The question I ask is: is there another layer of complexity here because of the fact that this action is being taken, in name, against an organisation—namely, the military wing of Hezbollah—which is actually proscribed under Australian law?

Mr Sheller—I agree that it certainly adds complexity. For my own part, I do not think that that is other than a factor that I have no doubt would be taken into account in determining the motive or object of the doing of the act, assuming that what the Israeli army is doing falls within (b) or (c).

Senator FAULKNER—Sorry, Duncan. I just wanted to ask that before you moved on to your next point.

Mr KERR—I was interested in the Australian Law Reform Commission's report, which was mentioned to us earlier today, and their suggestion that the treason offence be limited to applicability to Australian citizens or permanent residents of Australia. I do not think that was a point that was discussed in your report. Do you have any comment in respect of that proposition?

Mr Sheller—I do not have any comment. I do not remember it being discussed and I do not remember it being raised with us. As I recall, one approach to us was that treason altogether was an old-fashioned offence that one does not need anymore. One approach related particularly to the amendment of section 80.1—namely:

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

(i) another country; or
(ii) an organisation

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

That was something that was dealt with in the Gibbs report, I think, nearly 20 years ago. It was not thought of as treason but as a necessary piece of this sort of legislation. But it was not treason. We saw reasons for keeping it as treason, the idea being that if the Australian Defence Force is engaged in activity certainly Australians should not be engaged in assisting the other side. But I see the point. I do not recall it being raised with us that it should be limited to Australians.

Mr Carnell—No, it was not.

Mr KERR—Correct me if my understanding is wrong, but I think the origin of 'treason' was a personal offence against the sovereign.

Mr Sheller—Yes.

Mr KERR—It was, I suppose, a violation of the obligations owed by any person under protection of the sovereign to that protection. As I think the provision is drafted, it extends to the whole world. One would have thought that it was not really appropriate to regard it as treasonous—it may be a criminal offence of many other different kinds, but it is not treasonous—for a person who owes no loyalty to Australia to undertake most of the conduct that is provided for as treasonous. It may well be a criminal act if it is manifested—maybe a murder or what have you—but it does not seem to violate the idea of treason.

Mr Sheller—Yes. I can see the force of that.

Mr Carnell—I can certainly confirm that we had very little put to us as the SLRC about treason. We certainly did not discuss the issue you are talking about. We did think, on our own volition, as it were, that there ought to be knowledge in relation to (f) in the particular provision. There is another terribly important issue, though, that the ALRC picked up on, and that is the concept of support. They thought that it ought to be support of a material kind. So, no, unfortunately, in the SLRC we did not get the chance to deal with it perhaps as fully as it really needed.

Mr BYRNE—I wanted to get some further comments on recommendation 7, 'Definition of a terrorist act—"threat of action"' and recommendation 8, 'Offence of "threat of action" or "threat to commit a terrorist act"'. You have asked that it be separated and be put into a specific category. Can you comment on the rationale for why you would put that in separate category? It is threat of action, section 101.1.

Mr Sheller—It is really a textual thing. If one goes to the definition of terrorist act, one finds that it means 'an action or threat of action'. If one then goes down to section (2)(a) under that—and I am looking at page 214 of the report, where the current section is set out in the right-hand column—it says:

(2) Action falls within this subsection if it:

(a) causes serious harm that is physical harm …

The textual concern about that, which I think was raised by the Western Australian government, was that if in fact no harm was caused, although there was a threat, the threat of action would not fall within the definition of a terrorist act.

Mr BYRNE—Have you accepted that?

Mr Sheller—What concerned us was something like that that could undermine the legislation. I think this is very important. We were not making findings about the law. We were not a court, and we did not hear detailed legal argument. We saw the possibility of that, and accordingly it seemed to us that a straightforward and simple way of preventing that was to take threat of action out of the definition and make it a separate offence, and that is what we recommended.

Mr BYRNE—How does it potentially undermine the legislation?

Mr Sheller—Because, if somebody is charged with threat of action and runs a successful argument that there was no threat of action because there was no action following upon it, the prosecution fails—yet the threat existed. As I said, none of this is set up to say, 'We're absolutely convinced that's right.' But, on the other hand, it seemed to us a reasonable risk that could be easily remedied at this stage.

Mr BYRNE—Do you think one of the motivating factors behind including it within that subsection was that it was the psychological harm that the threat of a terrorist act would cause? You addressed that issue further in your report. So are you diminishing the seriousness of the offence by taking it out and creating a separate subsection?

Mr Sheller—I am not intending to do so at all.

Mr BYRNE—I am asking the question, that is all.

Mr Sheller—No. As far as I can see—and it would require proper drafting, and we did not engage in drafting—there seems to be no reason at all why that cannot be made a separate offence and not part of the definition of terrorist act.

Mr BYRNE—But your point is that the legislation as it stands could therefore run the risk, if we go through a prosecution without that legislation being amended and given the circumstances you have just outlined, that we could have an unsuccessful prosecution.

Mr Sheller—We thought it was a defectiveness which could be avoided.

Mr BYRNE—My other question is with respect to your point about community education. Could you elaborate on recommendation 2?

Mr Sheller—We had before us several people who spoke on behalf of the Islamic community. We had others before us who represented various government bodies that were concerned with liaising with the Muslim and Arab community. One impression, which is not necessarily at the top of the list but goes back to the point that you have just raised, is the difficulty in understanding what the legislation means. We have emphasised that in several places. It is not in any sense intended to be critical of the legislators. This is a very difficult task. The whole point of this was to try and help, and if we saw something that we found difficult to understand or likely to give rise to problems in court we referred to it.

The people who appeared before us had those difficulties in understanding. One particular area is the association offence. There were difficulties in advising people as to what they could do. We were told that some people felt that, with the existence of that offence, they ought not associate with anybody if they could avoid it. They would avoid going to public occasions for fear that they might be said to be associating with people who were members of terrorist organisations. I imagine it is very difficult to deal with that, but we felt that more ought to be being done to try and meet those concerns. It is not very easy, for fairly obvious reasons. In one particular case, it was said to us that a lot of the efforts that are made by government are compartmentalised. One section is doing something and the other section does not really know what is being done, and there is something missing out in between.

Mr BYRNE—Would you be prepared to make a comment about what you believe the understanding of this legislation would be among people of Islamic background in this country?

Mr Sheller—The impression I have is that it is feared and probably not understood.

Mr BYRNE—Could you elaborate as to what the ramifications of that might be for the community?

Mr Sheller—The ramifications of it mean that those people are not having the benefit that people have who, for whatever reason it may be, do not fear it. I suspect—and I accept these things are accidental—that when you find that almost all the organisations that are proscribed are Muslim organisations, that fuels the fear. I am not saying that it can be otherwise, but there it is. I think that the association offence—we have said this in the report—is one that should be repealed.

Mr BYRNE—When you talk about education programs, what form would that actually take so that you could disseminate that information to the broadest range of people from the Islamic community?

Mr Sheller—I have to be very careful what I say here, because I am quite determined—and the committee was determined—not to be pointing the finger at anybody in particular. I think you can get groups of people together in an atmosphere where they feel comfortable and where they feel people are truly trying to help them. I think it is probably important that groups such as AMCRAN, who appeared before us, are able to advise and take part in that sort of community meeting. One person who appeared before us told us that she was involved in going out in the

community and trying to help people but was constantly concerned that she may be training somebody who was a member of a terrorist organisation and, furthermore, doing that recklessly, not because she knew but because she satisfied the 'reckless' part of so many of these definitions.

Mr BYRNE—I have one final question. I know that you have looked at the potential impact on the community of any legislation with respect to proscription. With any other form of legislation that might impact, in terms of security legislation, would you suggest there be some consultation process with the Islamic community or figures within it to explain the implications prior to it being brought into parliament?

Mr Sheller—I certainly would. I can see no harm in that at all. I think it would be positive.

Mr BYRNE—Are you aware of the fact that that has been done to date?

Mr Sheller—I know it has been done to some extent; there is no doubt of that.

Mr BYRNE—But you think just a bit more needs to be done?

Mr Sheller—I think we need to do more.

Senator FERGUSON—I want to address a couple of issues on 102.5, which is to do with training. You suggest that it should be redrafted as a matter of urgency. Then in your executive summary you talk about things such as making an element of the offence either that the training is connected with a terrorist act or that the training is such that could reasonably prepare an organisation or the person receiving training to engage in or assist with a terrorist act. Apart from the word 'reckless', which appears in the original legislation, where is that so much different from the existing legislation? I fail to see where the major difference is, yet you say it is an urgent matter to redraft it.

Mr Sheller—Would you remind me—

Senator FERGUSON—It is 102.5.

Mr Sheller—You were reading from the executive summary; I am sorry I did not pick that up.

Senator FERGUSON—Yes, under recommendation 12.

Mr Carnell—I can give you a layperson's short, blunt go at it: 102.5 does not follow the drafting pattern of the rest of 102, nor for that matter does 102.8, the association offence. They differ. You have got a very logical drafting style in 102.1 up to 102.4, and then 102.5 deviates from that. I suspect—but I am guessing—that what has muddled 102.5 and, to an extent, 102.8 is that there is a question of strict liability where it is a proscribed terrorist organisation. It looks to me as if it is a process where there has initially been that strict liability. There have been concerns about that because it is so fundamentally incompatible with the presumption of innocence in our legal system.

It is mitigated to some extent by using ‘recklessness’ to try to mitigate the effect of the strict reliability, and then it tries to further mitigate it by talking about evidential burdens. But the end result is far from clear. I would have to say this is not simply view of the SLRC; this is also the view of the Commonwealth DPP, as I read their submission originally made to the SLRC. I think its difficulty is that it does not follow the drafting pattern nor necessarily the policy in respect of strict liability that the rest of 102 does, but I am sure Mr Sheller can put that far better than I can.

Senator FERGUSON—But you are also saying that the scope of the offence should be extended to cover participation in training. I thought it already did.

Mr Sheller—I am inclined to agree with you, except that it was put to us by, I think, the DPP that it did not. But I say this: obviously, ‘participating’ ought to be part of it and therefore it is more satisfactory to put in ‘participating’ than leaving some doubt about it. That is again an example, of trying to improve the legislation. I will go back to 102.5, because we said we thought it ought to be redrafted. I invite you to go to the section, which is at page 227 of the book. It is apparently an amendment that was made in 2005 or earlier. Section 102.5 is an amended section and subsection (1) deals with ‘a terrorist organisation’ and thus anything that falls within the definition of ‘terrorist organisation’, which would be either proscribed or not proscribed. It talks about ‘the person is reckless’.

Senator FERGUSON—A person who is reckless as to—

Mr Sheller—Whether the organisation is a terrorist organisation. The penalty is under that. Then you go to (2), and (2) talks only about a proscribed organisation. Why? I do not know. It does not seem to be necessary or sensible.

Senator FERGUSON—In fact in Australia, if they are not a proscribed terrorist organisation, then it is not an offence, is it?

Mr Sheller—Yes. Under the definition, if it is a terrorist organisation as defined, proscribed or not, the derivative offence can flow from it. That goes back to the definition of ‘terrorist organisation’, and we have said a good deal about that. It does not have to be proscribed if it can be shown to be a terrorist organisation. Not all but most of the derivative offences flow from that.

But the point here is that there is this separate subsection which fits upon only the proscribed organisation, and then, when it comes down a little bit further, it says that strict liability applies to (2)(b). Strict liability applies to no part of (1) but applies to (2)(b).

Senator FERGUSON—Sorry; where does it say that? Further down?

Mr Sheller—That is at page 227, subsection (3).

Senator FERGUSON—Yes, there is ‘strict liability applies to paragraph—’

Mr Sheller—Then it comes down to:

Subsection (2) does not apply unless the person is reckless ...

This is a structural matter, and we go through this fairly carefully. For some reason, in section 102.5(1), you find 'reckless' stated as an ingredient of the offence. It is provided in the act that the proof of 'reckless' can be proof of knowledge. If one goes down then to subsection (4), it says:

A defendant bears an evidential burden in relation to the matter in subsection (4) ...

That means that, if somebody is prosecuted under this part of the section, that person has to throw up some sort of case that it was not reckless or, for that matter, he did not know. In the authorities that we have referred to dealing with the legal burden of proof, which is different—and we have explained all this in the report—that has been said to be contrary to the presumption of innocence. A person accused of an offence has to prove in effect that he is innocent.

Senator FERGUSON—I just have one—

Mr Sheller—I am sorry to go on about this.

Senator FERGUSON—That is all right; I just have one further question.

Mr Sheller—It is a complicated section, and that is why we are of the view that—

Senator FERGUSON—It should be redrafted.

Mr Sheller—it needs to be redrafted.

Senator FERGUSON—You talk about the offence being extended to cover participation in training because you do not believe that it necessarily already does cover it. Is that because the committee felt that participation in training can hardly ever be considered to be innocent participation in training? In other words, if someone is training with a terrorist organisation, it follows logically that they are training to either be a part of or commit a terrorist act. Is that the logic behind your thinking?

Mr Sheller—It really is just a matter of language, as to whether the language used sufficiently covers participation. In general terms—and again we heard this from people who came before us—what does 'training' mean? You could be training people how to engage in Red Cross activity and all sorts of activities, and so on. That is another problem with it. But that is not what we were really dealing with here. Here we were dealing with what we regarded as a section that, for whatever reason—as I say, it is not pointing the finger at anyone—needs to be rethought and redrafted.

Senator NASH—Regarding proscription, I understand that the members agreed on some reforms, one of which was:

If practicable the organisation and its members, or persons affected, or interested persons, should be notified and have the opportunity to be heard before an organisation is proscribed.

You say there is every reason why an Australian organisation should be given that opportunity. Can you just clarify the reasons?

Mr Sheller—Can I just say that I understood that proscription was not part of this inquiry, and we have proceeded on that basis. Can I have that clarified? My understanding is that proscription is the subject of an inquiry that is being held early next year.

Senator NASH—Okay.

CHAIR—That is right, yes.

Mr Sheller—I am quite happy to answer it, but it is not something that we have addressed in what we have put here.

Senator NASH—No, that is fine. If it does not relate here, that is fine.

Senator ROBERT RAY—I have just two or three issues. We understand that a lot of these things will settle on the papers—what is in your report and what other people have put—so we do not need to raise them with you today. I want to just raise three quick issues. You talk about psychological harm. I can see where you are coming from, but how in heaven's name do you prove it in a court of law? I cannot work out people's psychology and the way they are thinking anyway, so how do you prove it in a court of law?

Mr Sheller—I would assume that, if a railway station were blown up and somebody emerged with something diagnosed as mental illness, under the existing legislation that would not satisfy the section because it is confined to physical harm. It was put to us that that ought to be extended, as the dictionary provides, to cover any harm. The dictionary says either physical harm or 'harm to a person's mental health.'

Senator FAULKNER—Like a psychological stress disorder.

Mr Sheller—Yes, thank you. There has been a lot of litigation, unfortunately, rising out of the *Voyager* inquiry and, indeed, damages have been awarded.

Senator FAULKNER—That is called post-traumatic stress disorder.

Mr Sheller—Yes. It is another example of the same thing.

Senator FAULKNER—That is what you are speaking of?

Mr Sheller—Yes.

Senator ROBERT RAY—Now that you have cited *Voyager* you are worrying me. The committee dabbled with ongoing review. I do not know that you precisely came down with a recommendation on that. I just looked again at who you had on your committee. It is almost a round-up of the usual suspects—a couple from the Law Council, a judge in charge, the Privacy Commissioner, the Ombudsman. No-one missed a guernsey. Is that too narrow a focus for the next review?

Mr Sheller—It may be. The problem that we had was that there had been a great deal of amendment in 2005. We got advice and we were told that we ought to be looking at the original

legislation in its current form, which seemed sensible. The problem was, though, that that legislation, with very few examples, had not been tested in the courts. It would be very much better for an inquiry of this sort to look at the legislation, taking account of what particularly the courts had said. Of course, there may be a lot of academic material, all sorts of material. But because it was such a short gap we lacked the benefit of that.

Furthermore there is a history of review, particularly in Great Britain, and, on the whole, I think that is regarded as beneficial because particular problems may be thrown up by particular groups in the community, and the review is an opportunity to deal with that. I understand that we may have all been part of the usual suspects, but it was an independent inquiry and I think that shone through all the time. There was nobody there who was, as it were, putting a particular point of view because they had a particular interest in anything. So it had that advantage. But as to how you set up an inquiry like that and who should be on it is, of course, always an open question. I think, if I can say so, that our inquiry worked well within the constraints of the time factor that I have referred to.

Senator ROBERT RAY—I understand the problem. This committee has constantly had it: having to review things that are not fully developed. But we are also pleased that they have not ever fully developed, too.

Mr Sheller—That is another factor.

Senator ROBERT RAY—You touched on security clearance of lawyers. That came up in another context, in terms of legal cases that we will not go into. There were problems in a Melbourne or Sydney court—Sydney, I think—about security clearances for lawyers. How do you view that? Do you think that is a practical thing? Can it be solved?

Mr Sheller—I have not thought it through. I can tell you this: I know one particular case in Sydney, because I know the judge who has been sitting. I have been careful not ever to speak to him about it, but I do know from anecdotal discussion that there were various problems of that sort raised. So far as I know, they were sorted out. How exactly they were sorted out, I do not know. We particularly had in mind the use of the public interest monitor, which is something that exists in Great Britain. It has been attacked in Great Britain as being unsatisfactory in the way that it is set up because there are limits on the degree to which the public interest monitor can speak to the client and so on.

There is the concept of having a highly qualified lawyer security cleared in every way that it is necessary to be cleared but able to quite independently look at, for example, the material that it is said that counsel cannot look at and, for that matter, the client cannot look at, and form an independent view as to whether or not that is an appropriate claim to be made on the basis of public interest immunity. Furthermore, supposing the point can be taken and that it should be immune from disclosure, that advocate is then able to, as it were, put the case that takes account of that to the court. It is obviously going to be quite a difficult thing to work out in detail, but there is some precedent for it.

Senator ROBERT RAY—Would that be an appointment that is not renewable, in order to ensure the independence of that person?

Mr Sheller—I suspect that it would be people who would hold that office and be called in for particular cases. One of the criticisms of the British system is that the appointment is made by the Attorney-General, so it is easy enough for people to say, 'Oh well, the Attorney-General is the appointee.'

Senator ROBERT RAY—But he appoints all judges in our country too. We would not want to make that point!

Mr Sheller—No, but you can see—

Senator ROBERT RAY—Yes, I can.

Mr Sheller—the problems that have been raised in England. Ian, did you want to say something?

Mr Carnell—Many of those issues about security clearances and how sensitive material is used in court are the subject of the National Security Information (Criminal and Civil Proceedings) Act. That was not within our remit. You make a very good point: in any future review of these provisions, that ought to be encompassed because it is a very important part of how these offences play out when they are before the courts. The other thing that we discussed about review in the committee is that there will be a review in 2010—commissioned by COAG—of control orders, preventive detention orders, some of the police stop-and-search powers and the 'the' to 'a' change.

I have a personal view that, policy wise, you really ought to look at something like control orders at the same time that you are looking at the preparatory act offences, because they go to the essence of what these provisions try to get at: the great difficulty of how you effectively act to prevent, whether it is better to have preparatory acts taken through the normal criminal prosecution regime and whether some form of control order is a better alternative to the control order regime that we have. In a policy sense, I think you have to look at them together. That would argue for saying that the scope of that 2010 review ought to be broadened. But there are different ways of skinning this cat and the committee did not want to be too prescriptive. We saw a lot of merit in the sort of role that Lord Carlile plays in the UK, where he monitors on an ongoing basis. You could readily see a senior person talking to judges or counsel and following quite closely the cases that will go through the courts in the following years. Therefore, rather than people having to get up to speed in 2010 when there is a review, some sort of monitoring on an ongoing basis is attractive. Those are the sorts of things that we talked about in our committee. We did not think that there was an obvious or very best solution, but we certainly thought that there is a strong need for further adequate review, not least because so few cases have been through the courts at this stage.

Senator FAULKNER—Very briefly, given that your report contains some 20 recommendations and I think 13 findings, are you able to tell this committee whether those recommendations and findings—obviously they were agreed by your committee—were broadly or unanimously agreed?

Mr Sheller—Everything was unanimous, with the exception of the question on proscription—whether it was appropriate to have an executive act or, alternatively, whether it should be a

matter that goes to court. That was the only point of difference, so we put both as part of our report. We gave those two choices. It was a narrow difference and I can understand both sides.

Senator FAULKNER—So we can say in relation to the other recommendations and findings that they were the unanimous view of the committee?

Mr Sheller—Yes.

Senator FAULKNER—I do appreciate the substance of many of the recommendations, and I want to talk to you about some of these issues that you have spoken about—getting some clarity and tidying these issues up. Having being very involved in the parliamentary debates at the time, I can assure you that that is appreciated. We did our best in the parliament, but working with the former Attorney-General, Mr Williams, was difficult to say the least. That is as moderate as I can be. So I am very pleased that those issues have been canvassed and addressed by the committee. However, one thing that surprised me was that it did appear as if the report of your committee had been leaked. Your report was presented to the Attorney-General on—

Mr Sheller—I think it was 21 April.

Senator FAULKNER—Yes, 21 April, and it was tabled in the parliament on 15 June, but there was a bit of activity in the *Sydney Morning Herald* and *Age* newspapers on 8 May 2006 which disclosed details of a leaked report. I wondered if there had been any contact with you from any authority about this leak.

Mr Sheller—I can say this on my own behalf: I was overseas at the time that the report was tabled and had been overseas, I think, for four weeks. Nobody spoke to me about it, and indeed I would not have spoken to anybody if they had tried to. I do not know whether it was a leak. There was some newspaper article I saw that referred to an expression I had used during the time that submissions were made to us, and I assume that was taken from some transcript. I think the transcript was—

Mr Carnell—Yes. The transcripts of our public hearings are available on the website and were at that time. There was one article which was pretty clearly sourced to the transcripts. I should say that I looked with interest at the *Sydney Morning Herald* article too. Clearly the journalist did not have a copy of the actual report. If you dissect it, there were effectively five assertions in the article, as I recall, about what was recommended in the report. Three of them were wrong. We can now say that because the report is in the public domain. One of the others was a point that had nothing to do with our report. It was in fact about ASIO questioning and detention warrants. The fifth was close to the money. So clearly a copy of the report itself was not leaked. It did look as if the journalists had spoken to some people, but it is not clear whether they had given any sensitive information or not. It struck me as the usual confection.

Senator FAULKNER—My question to you, Mr Sheller, was whether there had been any formal inquiries made about this ‘leak’.

Mr Sheller—Not that I am aware of, no.

Senator ROBERT RAY—You have read the Attorney-General's Department's explanation under questions by me at estimates, Mr Carnell?

Mr Carnell—Yes.

Senator ROBERT RAY—So you have drawn the conclusion that you have given a far more credible explanation today?

Mr Carnell—Don't do that!

Senator ROBERT RAY—That was a rhetorical question.

Mr Carnell—I still see my former colleagues occasionally.

Senator FAULKNER—All you have to say is yes.

CHAIR—We are well over time, but Mr Kerr and Mr Byrne both have very brief questions.

Mr Sheller—I am still thinking about the last one!

Mr KERR—I have a quick question about the future reviews. One of the matters that has been identified in the United Kingdom is the need to keep records and publish the number of times that the various powers exercised by police and agencies are utilised. I suppose it both addresses community fears of an overwhelming use of these powers and also makes certain that when the review ultimately occurs there is a bed of information that would be appropriate for people to look back on. I do not think such a provision was part of your recommendations. I am wondering, were we to reflect on that innovation that the United Kingdom has adopted, whether it would be consistent with your approach. And I might cheat and throw a curve ball to Mr Carnell. In responding to the issues that I first raised, you said that my questions about the breadth of the definition would go back to the territorial aspect of the legislation. As I understand it, the committee made a recommendation to maintain the broad territorial application of the legislation, so I wondered whether you had some other additional point in mind when you made that comment.

Mr Carnell—To answer the second question first: no, I was simply trying to be helpful and at least defend our view of the definition of 'terrorist act'. On the question of reporting about use of the powers, as a committee we did not reach any firm position, but, speaking personally, I would have thought there is some scope for drawing together, for example, information about cases where charges have been laid and what occurred in the courts, taken from DPP and AFP public submissions to us. So that at the very least ought to be collected. If there were some sort of ongoing reviewer, you would look to them to be producing a report.

Mr KERR—Sorry, I was more thinking of things which are covert, because those are the sorts of things where the public may have a greater fear of the numbers of instances in which, for example, coercive powers are being exercised and they may feel that there are a number of instances where state police have exercised powers that may or may not be factually correct. In some ways there is some assurance, I think, to be given by simply reporting on a regular basis

these factual data—of course not the subset of facts underneath them—so that there is a better understanding in the community of what is actually happening.

Mr Carnell—That sort of point is probably less relevant to the provisions that were of immediate concern to the SLRC, but for control orders and preventative detention orders there are certainly reporting requirements in the legislation. I would chance my arm and say that I think what is in at least some of the state and territory legislation about reporting in that sense is more fulsome than what is in the Commonwealth provisions, but the basics are there with the Commonwealth provisions. The Telecommunications (Interception) Act, of course, provides for law enforcement reporting about warrants, which is very useful, I think. The other significant change in the No. 2 act from last year was police stop and search powers, but that would involve the state and territory police reporting probably more significantly than the AFP. I certainly would not personally disagree with your central point that some reporting on these matters is very useful. I think we have some elements reported currently; it is probably worth looking at whether that covers the field sufficiently.

Mr BYRNE—I have a question relating to section 102.7, ‘Providing support to a terrorist organisation’. Subsection (1)(a) states that a person commits an offence if the person intentionally provides to an organisation support. Could that include verbal support? I know that your committee has examined that and has some level of concern about that.

Mr Sheller—I think there is a real concern about support and the use of the word ‘support’, which would apparently include verbal support. Indeed, in the current climate—it was touched upon earlier—there may be members of the community who would support at this time a terrorist organisation. When I say ‘support’, it is in the sense you have used it—praise and so on. This is partially a problem in 102.7—and again I am sorry to divert slightly to the same problem in 102.8, where subsection (6), on page 233, says:

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

That to me is an extraordinary piece of legislation. There it is: the person who is trying to understand this law has to be able to determine what view the High Court would have about this. This is all discussed in the report, but I think that demonstrates an approach which is unsatisfactory, to put it in a fairly mild way.

Mr BYRNE—In a purely hypothetical case, someone in a pub could get into a fight about Hezbollah and what they are doing and someone who turns around and says, ‘I support Hezbollah,’ could be prosecuted, according to your fears under this particular section.

Mr Sheller—Yes. There are other matters of definition, knowledge, recklessness and so on and so forth but, in theory, that is quite possible. There is a good deal of discussion about the support section, but added into this section are issues of association and assembly. That cuts right across well-understood human rights. Why have that there? If you are interested in just support, just have a support provision that says that, provided you can confine it—not with a subsection like that but in some way, presumably, where it does not interfere with what could be generally described as political comment—it may be all right.

Mr BYRNE—Part of the difficulty is also that, if you started to explain some of this to people, you would almost have to be a constitutional lawyer.

Mr Sheller—Exactly.

Mr BYRNE—Are you saying, as part of your brief, that there is a lot of ambiguity in this legislation that is quite pivotal and really does need to be tidied up?

Mr Sheller—Yes. We recommend that 102.8 should be repealed and have suggested an alternative, if it is really thought that one needs some lesser 'support' offence than 102.7, but the constitutional problem is undoubtedly a very real one, as in this case is the human rights problem.

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

Mr Sheller—Thank you, Chair. There was one thing I was going to raise. Of course, there are other submissions that are going to be received by you. Since we handed in our report, the committee has come to an end, in a sense; it is functus officio. It occurred to me that, if there is anything in particular that is raised in other submissions that you wish Mr Carnell and me to look at, we would be quite prepared to do that. It may take a little time to do it, but we would do it.

CHAIR—Thank you very much.

Mr Sheller—Thank you for hearing us and giving us this opportunity. I will be thinking about what Mr Kerr asked me for some time.

[3.20 pm]

LYNCH, Dr Andrew, Director, Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales

MACDONALD, Ms Edwina, Senior Research Director, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales

WILLIAMS, Professor George, Anthony Mason Professor and Centre Director, Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales

Witnesses were then sworn or affirmed—

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

Prof. Williams—Yes, we would like to make a short statement. We would like to start with our starting point in approaching this legislation. We take a different view, for example, to that of Lex Lasry but a similar view to that of the government. We believe that new laws were needed and remain necessary to deal with the imposition of new crimes with regard to terrorism. We believe that the law needs a clear statement about these matters that clearly rejects political violence directly rather than indirectly through other criminal offences. We also think that these types of laws are necessary because they are clearly required by Australia's international obligations, including under resolution 1373 of the Security Council.

We would also say as our starting point that we recognise what a difficult task any government has in constructing such an enormous legal regime with great haste. The haste was of course required because Australia had no national laws dealing with this topic prior to September 11 yet clearly they were needed after that time. We are hence dealing with laws that now run to some hundreds of pages, including not just these provisions but other provisions that were in some cases passed quite quickly through parliament. Given that background, we believe it is no surprise that the laws are far from perfect or far from finished. We would suggest that this is no different than dealing with other areas of the law where there have been important changes in regulations, such as trade practices or other matters. There is a need for ongoing review, and the Sheller report has quite clearly identified common-sense and other matters that we believe are worthy of support.

We would also say that there is a particular aspect to these types of laws that makes them different to those in other nations and increases the need for scrutiny by this committee and parliament. That is that, even though we have in some cases copied laws from the United Kingdom and elsewhere, they of course have different judicial mechanisms that enable the courts to blunt, if you like, the rough edges of those laws through charters of human rights or other instruments. In fact, it is quite stark how different the approach is in this country with the absence of such a charter and the extra burden that places upon parliaments to revisit legislation.

An example of where the problem arises is with the exception relating to the implied freedom of political communication, which reference has already been made to. It is an attempt to blunt some of the edges but a particularly ineffective one. You are right—you may want to ask a constitutional lawyer how it applies but, having talked to a couple, I would say there are at least six different opinions you could point to as to what the impact would be. It is an example of increasing the lack of clarity rather than giving any real protection in such a case.

Our view on the Sheller report is that it is an invaluable and common-sense series of recommendations that, some 4½ years after many of the laws were initially enacted, suggest a range of reforms that we believe should be made. We would support all of the recommendations in the report. We would, however, suggest in some areas this committee might want to consider going further. But there is nothing that we would disagree with.

We also appeared before the Sheller committee, and it is perhaps useful to put on record that we found them to be a very independent committee. They did their job in a way that gave us great confidence in their processes, even though a majority of the members were appointed directly by the government or through their appointment to other government positions. We have no doubt that it was an independent and effective process.

I want to turn to a couple of specifics, and Dr Lynch will also mention a few specific things, that might help with your questioning and make it as short as possible. Firstly, as I have said, we support the recommendation for further review, but we would quite specifically say that any form of further review should include an independent reviewer, as with Lord Carlile in the United Kingdom, because statutory review every three years simply does not capture the ongoing nature of the work. Also, one critical element that is missing from this inquiry and others is the lack of a holistic look at the legislation itself.

One of the interesting areas here is how these reviews intersect with the ASIO detention and questioning regimes. Are there any issues where the overlap has caused problems not only in the inappropriate sharing of information but also where things have perhaps fallen between the cracks and in fact we need a greater integration of those regimes? Other issues also apply through telecommunications interception, through the control orders, and we would clearly argue that it is necessary to have ongoing review that enables someone to look at how the laws are operating in practice, with a view to looking across the whole of the laws.

The Lord Carlile mechanism has worked well in the United Kingdom. It has given the public confidence. It provides an annual point of view and, I think critically for this committee, would provide a good, solid, independent body of material that this committee, with its less regular reviews of this legislation, could work off to form opinions. The committee would have the benefit of someone who has good access rather than people like us, who often do not have the sort of access that an independent reviewer might have.

The second and last specific point I want to make is about the definition of ‘terrorist act’. We support the changes recommended that relate to harm that is physical and the threat of action. We also recognise that the Australian definition is indeed one of the best in the common law world. We have looked at other definitions around the world and we believe that the parliament did a very good job in scrutinising that definition, introducing safeguards and coming up with a

definition that is appropriate. Some tweaking is necessary; nonetheless, it is a very good starting point.

We also want to put on record, because it was part of submissions to the Sheller inquiry and is noted in their response to government, that a submission was made by the Attorney-General's Department to remove two of the safeguards from the definition, and that is an issue that is still clearly on the table. The suggestion was that the definition should exclude any reference to 'political, religious or ideological cause', and the government's response in looking at the rejection of that by the Sheller committee was simply to say, 'We note it and will give it further consideration.'

The second submission they put was that the exception for 'protest, dissent or industrial action' should also be removed. Those safeguards are what make this definition one of the best in the world. If we remove them it would very quickly become one of the worst in the world, particularly if we remove the political, religious or ideological cause element. That is exactly what clarifies what terrorism is, as opposed to other criminal conduct, so we would support the maintenance of the current definitions, subject to the tweaking proposed.

Dr Lynch—I would like to conclude our opening comments with just a few points that relate to points raised in our submission. The Sheller committee declined to comment on the change from 'the' to 'a', which occurred in November 2005. Obviously that is crucial to many of the provisions they are actually reviewing. We repeat the view from our written submission that that remains of concern. The removal of the requirement that preparatory activities be geared towards some specific act we think makes those provisions unacceptably wide.

There are two bases for our concern: firstly, it is well outside orthodox notions of criminal responsibility whereby, normally, intention has to have crystallised before charges can be laid; secondly, we think those provisions may now prove to be very unpredictable in practice as courts have to apply them. Obviously we recognise that there are trials still pending on those so we will have to wait and see what occurs with them. But the aim of securing convictions of people charged with terrorism offences is, in our view, rendered slightly vulnerable because of the width of those provisions now, and juries will have to make sense of those.

More specifically, and these are points that were raised when talking to Mr Carnell and Justice Sheller, we have concerns about the use of a legal rather than an evidential burden throughout these offences. We have particular problems with sections 101.4 and 101.5, which criminalise activities but do not make clear the connection between those activities and the intention of the individual charged to facilitate, prepare for or engage in a terrorist act.

With respect to section 102.3, we would go further than the Sheller committee report and recommend that it not cover informal membership of terrorist organisations. We appreciate the difficulty, obviously, in establishing membership of an organisation or a terrorist cell or group, but the extension in that manner is extremely vague. We think it is probably not going to add anything. It would certainly be preferable that someone be charged with another offence from the division, rather than them being an informal member of a terrorist organisation.

The provision, as it stands, demonstrates the Sheller committee's view that some sectors of the community may be very alarmed or fearful of these offences. Certainly, that is with respect to

the last provision I would like to raise, which is 102.8. We certainly support the Sheller committee's recommendation that that be repealed.

CHAIR—Professor Williams, in terms of the ongoing review and your statements now and in your submission on Lord Carlile, have you ever had an opportunity to have any dialogue with him? Have you spoken to him about his role?

Prof. Williams—No, I have not. I did spend some months in the United Kingdom last year, and so I got to see second-hand how he worked and got to see the influence that had on public debate, but, no, I have never met him.

CHAIR—In the studies that you did, are there any particular difficulties that he faces in his work that may be duplicated here?

Prof. Williams—There are always issues about the extent to which he has access to classified information. That is a real tension anybody, including this committee obviously, runs under in dealing with these issues. But, no, I am not aware of any major systematic problems that prevent him from doing his job beyond the obvious, which can never be adequately dealt with when you are dealing with an area shrouded in such secrecy. From what I have seen, and the people I have talked to in the United Kingdom, they recommend the model. They think it does work, and perhaps if there was anything I missed that would be in his most recent report, which I think was released a couple of weeks ago. I did read that at the time, and nothing struck me at that point as being a problem of that kind.

CHAIR—Is there anybody in Australia that you can see fulfilling this role? When I say that, I mean could this be something that was done by the Inspector-General, for example?

Prof. Williams—I had wondered that myself, but I think it is highly significant that the committee that has reported includes the Inspector-General, includes the Ombudsman and other people with such a role. In appearing before that body, this issue was discussed, and it became clear that they had very specific mandates, but their mandate does not include the holistic approach that needed to be taken, and also they do not have the level of independence of government in the sort of work they do. They are independent authorities doing a particular task, but not in the same way as Lord Carlile. For this type of job, it would be appropriate to appoint someone who might be a retired judge, an eminent lawyer or someone else who has no political affiliations of any kind, but someone who clearly is well accepted within the community, and someone who can also comment on the role of IGIS—whether their powers need to be expanded, whether they are doing an adequate job. Clearly those organisations are unable to be the watchdogs on their own functions.

CHAIR—Who should do the 2010 COAG inquiry? Should that be another Sheller?

Prof. Williams—It is a good idea at that point to again have an independent body of that kind made up not of parliamentarians fulfilling a particular role, but of people who come from IGIS and other bodies. However, for that job to do its job most effectively, to take advantage of the prosecutions and the other agency work, you need an independent reviewer to feed them information. In turn, you would imagine that that COAG review would come before this committee, as it should, but this committee has quite different roles being a parliamentary

committee. One thing the Sheller report does show is that there are some great advantages in having people with expertise and authority doing an independent review of this work, even despite the very limited mandate that they had.

Senator ROBERT RAY—I very much agree with your holistic approach; it brings a new dimension to these reviews. This Carlile equivalent, would that person report to government, to governments, to parliament or to parliaments?

Prof. Williams—I would favour that person reporting to parliament, because I think it is clearly the role of parliament in this area to exercise scrutiny over the government. The appropriate course would be for the person to make an annual report, which, after being security cleared as many of these reports need to be security checked, should be tabled in parliament as a public document.

Senator ROBERT RAY—If you were talking about, if you like, an inspector-general of legislation—because that is almost the definition, as opposed to an inspector-general of activity complying to legislation—how do you ensure its independence? Generally these positions are independent. Should it be a COAG appointment as opposed to a national government appointment, or should it be a national government appointment with consultation with states? What do you put into the system so that people will have confidence in it? I must say that I am not too keen on parliamentary approval at this stage. We do not want to go the way of the American confirmation system.

Prof. Williams—I would agree with that, and that is a big question because, of course, the question applies in so many contexts. I think that to some extent you have got to recognise that you always place faith in governments to make appointments of this kind, and that is inescapable. Nonetheless, I think it is appropriate, particularly given the COAG inquiry, that there is, at the minimum, consultation with other state governments in making this appointment. But I think it is difficult to cast it as a joint appointment.

Let us say that some people suggest that the Leader of the Opposition and the Prime Minister jointly make an appointment. I just cannot see that working as a matter of practice. So I think that, inevitably, the best you can do is to set down criteria, set down the type of person who is being looked for, and you put trust in a government to do it correctly. If they do not, there should be a public debate about that, but I cannot see a better way of doing it.

Senator ROBERT RAY—No, I accept that.

Senator FAULKNER—Could I ask something on the same matter. You yourself, Professor Williams, describe the Sheller committee as an independent and effective process. You were generous in the comments that you made. Is part of your concern the fact that it is a committee as opposed to, perhaps in this case, Justice Sheller undertaking this responsibility without the support of a committee? Or does it go to issues of actual powers of the appointed reviewer as well?

Prof. Williams—It goes to all of those things. The Sheller committee did an excellent job almost despite the limitations. Having taken part as a commentator in the debates at the time, the

creation of the Sheller committee was somewhat of an afterthought, if you like. It was not in the original legislation. It slipped in right at the end, and very little provision was made for—

Senator ROBERT RAY—This ‘slipped in’ business, when they forced it in!

Prof. Williams—Perhaps I was being generous again.

Senator FAULKNER—‘Deal’ might be a better word, or ‘sop’.

Prof. Williams—I think that what the Sheller committee demonstrates is that even with something of that kind, it can do a good and valuable job in bringing something to public attention—even where, as I see it, the majority of members are government appointed, directly or indirectly. But I do not think you can do an ongoing, holistic task by committee. I think it is too difficult. You need a person who is going to do the job. I do not think it should be something that is incredibly expensive.

We are not talking about setting up a whole new apparatus; we are talking about something like what Lord Carlile allowed, which is someone who is independent, who has good access, who can actually get the information, and who has a reputation of integrity to bring issues to light to ensure that parliamentary committees and other bodies have the information they need. I think most importantly, given the educative role that many people have talked about—including the Sheller report—it should be someone who can actually provide information in a clear manner that actually builds public confidence in the process. At the moment, the lack of such a process means that it is very hard to get basic information sometimes about what is going on. I think that a role like this can actually help build trust and confidence in the community.

Senator FAULKNER—How wide ranging would you see the powers of such an independent reviewer needing to be?

Prof. Williams—It depends on which model we go down. You could go down the IGIS model where you give them very extensive powers. But of course if you go down that route, it has potentially large budgetary implications, and also you are replicating some of what IGIS does. I would not go down that route, because I would say again on the record that I think that the work IGIS does is excellent; I think the Ombudsman does excellent work as well. So I do not think we need to replicate or look again at that. I think the person needs sufficient powers so that they are not compelled but they can clearly interview and talk to people. They can look and see how prosecutions and other matters are going, and I think that for much of this information it would be able to be done by the public record, because if nothing else it is someone who can look at how the prosecutions are operating and see what the courts have said on the public record. That sort of material is not picked up in any systematic way at the moment. And that on the back of the annual reports of IGIS and other bodies, and the ability to talk to them behind the scenes, I would hope would be sufficient.

Senator FAULKNER—I am not sure of this but in my reading of the Sheller committee report my understanding was that Justice Sheller and his committee did not have access as a committee to any classified material. That was my understanding—someone will no doubt correct me if I am wrong. Do you believe that if you have the different model—let us describe it as the Lord Carlile model—that consideration ought to be given to access to classified material?

Prof. Williams—I do and perhaps I can put it this way: I do not think the person should have the same powers of coercion and compulsion that bodies like IGIS have. I think that goes too far but, on the other hand, I think the person should clearly have sufficient security clearances and access to documents that would be necessary for them to form their opinions about how the law works.

Senator FERGUSON—Our counterparts in the British parliament intelligence committee all have security clearances. Do you know if Lord Carlile has a security clearance?

Prof. Williams—I do not know, but it would be hard to think he would not, simply because of the sort of work he does. I have to say that I do not know.

Senator FERGUSON—They seem to have different requirements to our parliament, because none of us do.

Prof. Williams—It would seem surprising that they do not, given that you have to have security clearances to be a lawyer in defending people these days, and that includes the different systems that the UK has set up. I would be surprised if that person did not, but I have not read it in a recent report to know either way.

Senator FERGUSON—I am interested in your recommendations about formal and informal membership of terrorist organisations. You say it is very hard to define what informal membership of an organisation is. I would have thought it was as difficult to define what formal membership of a terrorist organisation is quite frankly.

Dr Lynch—I would agree with you. If you are going to have a membership offence then, obviously, it will have to be at its core a formal membership offence. If you then try to widen that to include informality, then I think you will run into problems. I did not think it would be helpful for us to suggest that you repeal the offence of membership of a terrorist organisation. Also, we can imagine that there are circumstances where, if that can be established clearly, it may well be appropriate to charge people with that. If you are going to have a whole division of the Criminal Code which deals with connection to terrorist organisations and you are going to proscribe organisations then it seems reasonable to have an offence of membership. But the problem with accepting informal membership as part of that is that you risk picking up people who are floating around on the fringes.

Senator FERGUSON—What is the difference? I find it very difficult to make any distinction between informal or formal membership.

Dr Lynch—With some organisations, I think it will make no difference. Others will not even have thought of themselves as a terrorist organisation until perhaps they are proscribed or arrested for the offence of being members of a terrorist organisation. It would only make a difference with those organisations which are listed and which have some formalised structure, presumably.

Senator FERGUSON—I am sure they have not got membership lists.

Dr Lynch—I am assuming that most of them do not, but, on the assumption that any of them do, presumably you can nail somebody as being a member of the organisation. But, again, membership offences are hardly the most desirable offences under which to charge someone. From a criminal responsibility point of view, it would be preferable to charge people with engaging in an activity which is targeted towards the doing of some terrorist act, and membership is clearly not that.

Prof. Williams—I will add something quickly on that, which is a different point. The reason you define a term like membership is to bring greater clarity. The problem with the definition of formal or informal membership is that it is no greater in its clarity. In our view it would be better to leave it referring to membership. All you do by referring to informal membership is create fears in the community because people say: 'What does it mean to be an informal member? It doesn't tell us what it means. Does it mean attending a meeting and then leaving?' It is an example of where the legislation creates more barriers to people without assisting in a legal sense because you are back to square one any way.

Senator FERGUSON—What do other countries do? How do they define membership of terrorist organisations? Have you got any idea?

Dr Lynch—I cannot give you that at this point. I could forward that information to the committee if that is useful.

Senator FERGUSON—It would be interesting to know. Other countries that proscribe terrorist organisations must have some method of deciding whether somebody belongs to an organisation. I have no idea. It is not something we have looked into.

Dr Lynch—We can forward that to the secretary.

Senator FERGUSON—That would be very helpful.

Senator NASH—You mentioned before when we were discussing the independent reviewer that it had the ability to improve the level of trust and confidence in the community. The issue of trust and confidence in the community has come up through the Sheller report. How do you broadly measure the level of trust and confidence out there in the community?

Dr Lynch—I think you really have to take the submissions that you get from persons from those communities who are speaking to these committees, such as AMCRAN. Really, it seems to me that they are using this mechanism as a way in which to inform the parliament that there are concerns in their communities about these laws. I know that they have prepared a guide for the Muslim community to try and give a plain English explanation as to what these laws mean, to try and allay some fears. That is one way in which you can get some feedback on that. This was discussed in the last question period as well. The consultation that the government has had with elders from the community might be another way to get feedback. I do not know how regularly that meets and how often the communication occurs between the government and representatives from the Islamic community in Australia, but those are the only guides that you can go on.

There is also, I suppose, general polling of the population as to what they think and their fears not just about terrorism itself but also about how the laws work. I know that occurred in respect

of the sedition material at the end of last year. People were asked whether they felt comfortable, whether they understood it, whether they were worried about it and whether it could potentially apply to them. That had much more impact than anything else that was discussed at that time, so there are ways in which that can be found out.

Senator NASH—Certainly, with regard to the specific groups, this type of thing is very helpful, but do you have any suggestions of an ongoing nature? We are currently in this environment but, in terms of an ongoing nature, what things could be done to ensure that we continue to measure that level of trust and confidence?

Prof. Williams—In terms of measuring it, it is very hard. Unless you do formal polling or something like that it is very difficult. I think what you can do, though, is look to history and look at the sorts of mechanisms that parliaments have put in place in other areas where they know they are dealing with an area of great sensitivity, where they know that great and coercive powers are being exercised and where they know also that there is a possibility even of scare campaigns being run against governments, that things are being done and that people should be fearful even if they are not.

In those sorts of areas the sorts of elements you find that actually improve trust and confidence are effective review by bodies like IGIS and others that have access, but also, critically, information to actually bring clarity and understanding to the area. In fact, one of the greatest problems in this area sometimes is not the law itself but the fact that it is so hard to understand, the fact that it is a mess in some areas and the fact that you have so many faults, offences and defences, with recklessness and strict liability, that people read a section like 102.5 and it just does not make any sense. It leads to great concern on the part of people that in that sort of area they may well be subject to coercive action, true or not.

I think that an independent reviewer continually puts the government on its mettle to ensure that it explains its work properly and that it has the laws in the best possible shape at all times, and it does the sort of ongoing and holistic role that no parliamentary committee can do. I think that is the best you can say, because in the end there is always going to be fear and distrust. All you can do is manage it in the most effective way.

Senator NASH—Given the complex nature of the legislation, how do you distil it into a simple form to enable the community to understand it? As you say, that particular section is very confusing. How do we distil it to make it easily understandable?

Dr Lynch—Firstly, the legislation has to be easily understandable to a lawyer, and our view is that it is not at present. So, firstly, the legislation has to make sense and then, once it does, I think you have a hope of doing that. I was just going to add too that the point of having an independent reviewer is to provide a focal point for people in the community who are concerned about the operation of these laws. They can approach that office and either make submissions to it or also, presumably, have some kind of discussion with it.

In many ways the annual reporting by Lord Carlile in the UK will often report favourably on the operation of various provisions or explain how things are no longer to be used because other things have come in. For example, the control orders in the UK, he has suggested, will now have

a much diminished operation because they have a suite of preparatory offences—which Australia has had since 2002 but which are only very new over there.

A statement like that makes it very clear that this control order issue, which I think has fed a lot of community fear in the UK, is now being sort of sidelined and we now have much clearer criminal offences for actually doing an activity, and then there will be a trial and so forth. The providing of that kind of information about changes in the legislation provides a means by which the community can be kept up-to-date as to what is happening as well.

Prof. Williams—And it often dispels doubts. One of the most important things Lord Carlile does is to say, 'There's this fear and it is not correct.' It is very hard for a parliamentary committee or any body to do that unless they are seen as having some independence from government.

Mr KERR—One of the issues that was mentioned in our discussion earlier was the possibility of establishing a body like the Public Interest Monitor which would have a different role of looking at instances which go beyond IGIS's remit to areas where matters might have then moved into the court system, to the juristic system, where questions of public interest, immunity and admissibility of evidence arise, particularly given that there is a history of some defence lawyers declining to be security cleared. There is no effective party to contest a claim of privilege. Whether it could be contested effectively even if a lawyer were security cleared is ambiguous or awkward, but there is no such party. I do not think your submission has given any reflection on that, but I wonder whether you have any reflection on those contentions.

Prof. Williams—It is a very difficult area because, on the one hand, somebody requires a proper defence to be put on their behalf; on the other hand, if you are dealing with particularly sensitive information that in some cases may be very hard to reveal to the defendant, you can be in a bit of a bind. I have real problems with the current system requiring security clearance, particularly a system whereby it may not be possible even for a security cleared lawyer to check the veracity of something with their client. It puts a defendant in an unenviable position and may even be constitutionally invalid. I think that will be tested in the High Court.

As to the monitor system you put forward, it is not that dissimilar in some ways to what you see in the UK as well with some of the things they have there. It has real problems, but frankly I cannot think of a better way of doing it. I think you have to do something like that or come up with some other system, and I am not aware of a better system at the moment. It is just the bind you are in when you are dealing with this type of information in a fair trial. But the bottom line for me is that the system is not adequate at the moment and it would better to at least consider something like that than to leave it as is.

Mr KERR—I raised perhaps a side wind in the earlier discussions. International humanitarian law makes attacks on civilians a war crime. European law distinguishes between international humanitarian law, which governs both parties to an armed conflict, whether they are state or non-state parties, from laws on terrorism. Your submission does not address the definitional issues or how terrorism law intersects with the law of war. Is there any reason why the Australian definition should not make a distinction between terrorism and breaches of the laws of war, and are there any issues relating to territorial or geographical reach that you think are appropriate for us to consider?

Prof. Williams—That is a tough question because, even though I have said we think the Australian definition is one of the best, if not the best, in the common-law world, there are certainly some very large and thorny issues that it does not deal with. One issue that you could add to that was in proposed South African legislation. They put an exception in there relating to national liberation movements. I think it is probably incontestable that Nelson Mandela would be a terrorist under our legislation. There is really no doubt about that. I think it is also arguable, if you got into some of the Middle East issues that you raised earlier, that it could cover some of the matters arising in Israel. It is not clear to me that that would be the answer, but it is certainly arguable that that would be the case.

On the other hand, I cannot come up with a form of words that fixes that. I have looked at this over some time. It is because you are dealing with a concept that is inherently slippery. You can get into areas like international law and other matters, but it does not solve the issue because that law itself is so contested and so subject to debate, including after Iraq with questions about whether what occurred there was a legitimate act of international law or not. So, if there is a particular form of words you had in mind, I would be happy to comment on it but, having looked at it, I think that in the end this type of legislation comes down to a common-sense application, which is not entirely satisfactory when it arguably has a broader legal reach. But I cannot see any way of escaping that.

Mr KERR—I have always been very uncomfortable about casting the criminal law at large and then saying, 'Those components of unlawful conduct which we choose to prosecute will be crimes.' We do not do it in any other area. We do not give that political choice—in an area which smacks so much of fear and misunderstanding—to our prosecutorial authorities in any other area.

Dr Lynch—I would respond to that by saying that I appreciate your concern. I suppose the difficulty is not unique, in that no-one has really been able to pin down a very satisfactory definition of terrorism—although there are certainly better and worse models. Where I share your concern is not so much with the definition, which I think is inherently problematic. The width of the offences is to my mind where a line can be drawn. To try to crystallise the perfect definition of terrorism is to set ourselves almost an impossible job. But, having an awareness of the fact that, in different contexts, the definitions can shift, should make us determined to make the offences very strictly constrained.

Mr KERR—If you go to the specific issue I raised in the first instance, the very wide definition of terrorism fits into a very widely defined offence, which would appear to clearly cover a whole range of instances that this parliament would never have considered.

Prof. Williams—That is exactly why we think there should be such a focus on a number of these offences to tighten them up and bring greater clarity—because, when you do combine it with a fairly wide definition, it causes real problems. We think that, given the definition itself is insoluble, if you have a definition of terrorism, it is very hard to see how it can be done better. We could point you to 90 or 100 definitions that have been used around the world, and the Australian one comes up very well. It is hard to do better with that, particularly since it already does include things like exceptions for protest, advocacy and industrial action—things that are not commonly found elsewhere, which we think should remain.

The key, then, is to recognise that the definition itself does not impose any criminal liability—it is only the follow-on offences that do so, and those should be drafted with great strictness to ensure that the sorts of issues you are dealing with do not arise. You might also include in that the fact that the definition does not deal with state sponsored terrorism. At the moment it is agnostic as to that issue, and that is an enormous issue as to discretion. That includes your Israeli example, where it would or would not fit within that.

Mr KERR—It would appear to come in under 101.2. As the legislation makes no distinction, it applies.

Prof. Williams—I think that is the likely answer, but no court has decided it. Like a lot of things in this legislation, until we have a series of court cases, we will not know the answer—which of course is one of the great difficulties for people who are trying to advise or understand where they fit. Absent a High Court decision, or a number of decisions over the next 10 to 20 years, there are enormous grey areas of application when the offences are drafted so broadly.

Mr KERR—And we do face the conundrum of Australians who are pursuing different conceptions of what their responsibilities and duties are to serve their homelands or countries of past nationhood in various fields and who hitherto have not thought themselves liable as terrorists under Australian domestic law.

Prof. Williams—Take the Australian Israeli who died in that conflict.

Mr KERR—Precisely.

Prof. Williams—Had that person been fighting for Hezbollah, they would have been a terrorist and there would have been an entirely different legal consequence. I am not casting any judgment on that, but I think that is the legal effect, unless you accept that the Israeli-Australian soldier was himself a terrorist under our legislation. I accept that that is arguable, but I am not convinced it would necessarily be the outcome.

Mr KERR—We are not convinced that it would necessarily be prosecuted.

Prof. Williams—Again, you point to the problem that a lot of this hinges on discretion and common sense. The rule of law normally demands that it is not acceptable to repose these type of powers in the government for it to make its mind up through the DPP whether to prosecute. That is of great concern, and something that is not normally accepted, but in this area it is very hard to escape.

Mr BYRNE—In relation to page 15 and page 16 of your submission, I was particularly interested in your reference to the minor textual amendment and how that might impact on the legislation, particularly division 101. You say here that there could be some prosecutorial difficulties as a consequence of that amendment. I wonder whether you could elaborate on that.

Dr Lynch—Is this on page 4 of our original submission?

Mr BYRNE—Yes, I think it relates to section 102.1—the paragraphs under the heading ‘Terrorism offences (Key findings)’.

Dr Lynch—We have used that shorthand expression—the change from 'the' offence to 'a' terrorist offence—but really it is the addition of those subsections. For example, with respect to a training offence, section 101.2 states:

... the training is not connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act;

That is probably not so problematic in relation to training as in relation to the possession of a 'thing' in section 101.4 or the collection or making of documents in 101.5, where you can possess something that is connected to terrorism in some way but there does not need to be an intention by the person who possesses it or collects it to actually use it themselves in pursuit of a terrorist act—nor does it even have to be about a specific terrorist act.

As the Director of the Terrorism and Law Project, I have a number of books in my office which deal with terrorism. They are documents that are connected to terrorism but certainly not in any specific sense. Obviously—I hope!—I am not going to be charged with an offence under these sections. Again, it gets to the use of discretion. Why I have said that it may well be problematic in prosecution is that it would seem to me to enhance the difficulty of convincing a jury beyond a reasonable doubt that someone has committed a criminal act when they have done something only in preparation of the act and their intention is not connected to any specific plan.

We are not suggesting that it is impossible to charge someone with preparatory offences unless you know every minute detail of what they intend to do. But, if they are up to no good and have expressed an interest in collecting chemicals or maps and so forth, I would support that that is someone of interest and you may want to have them looked at very closely by intelligence. But whether you can charge them and convince a jury that they are at the stage of having committed a criminal offence seems to me to be questionable.

Mr BYRNE—Is it your proposition that those changes have actually weakened the legislation?

Dr Lynch—In practice, they have rendered the ability to prosecute successfully more dubious.

Mr BYRNE—So that creates doubt; therefore, what would you do, as a lawyer drafting this legislation, to strengthen it to ensure that successful prosecutions could be undertaken?

Dr Lynch—Firstly, as an element of the offence, I would require that it is the intention of the person who possesses the thing, or the document that is collected or made, to use it in a terrorist act. At the moment, that is not an element of the offence, but it is a defence provided later on in the sections. The defendant bears the onus of proving it, which also does not seem terribly fair. Putting that as an element of the offence would, I think, reduce the fear and uncertainty that surrounds those sections. With regard to subsection (3)(b), the idea that it need not be connected to any specific terrorist activity throws open those sections far too wide. I do not believe that the change that was made in early November was necessary.

CHAIR—There being no further questions, I thank you all very much for appearing this afternoon. If the committee has any further questions, they will be sent to you in writing by the secretariat, and a copy of the transcript of your evidence will be sent to you for any correction of statement or fact.

[4.04 pm]

KOCAK, Mr Mustafa, Senior Adviser, Ahlus Sunnah wal Jama'ah Association of Australia

Witness was then sworn or affirmed—

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

Mr Kocak—Ahlus Sunnah wal Jama'ah trades as IISCA, the Islamic Information and Support Centre of Australia.

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

Mr Kocak—Yes, I do. In the name of God, most gracious, most merciful. Firstly, I would like to thank you on behalf of the organisation for giving us the opportunity to come before the committee. Anything that can help the Muslim community and the Australian community in general is very acceptable to us. I did not realise how hot this seat would be actually! I want to give an introduction to the organisation itself and our submission to the committee. Ahlus Sunnah wal Jama'ah is a non-profit, volunteer organisation that has been established in Australia for more than 20 years. It is independent from any external governments or political movements and its purpose is to pursue and express the truth about Islam to Muslims and non-Muslims alike, based on the Koran and the Sunnah.

The organisation has affiliates around the country and we provide vital community services for Muslims and non-Muslims such as marriage counselling. We provide charitable services such as the annual collection and fundraising activities for the Royal Children's Hospital in Melbourne and the tsunami and earthquake appeals. We provide many youth services, annual camps, sporting events and also classes on a regular basis inside the various facilities that accommodate youth and elders of all denominations.

Ahlus Sunnah wal Jama'ah, like many others inside Australia, believe that the new laws do not make Australia a safer country or protect the community from harm. We believe in some circumstances they seriously undermine civil liberties and other freedoms, and promote the feelings that Muslims can be basically whisked off the street and disappear without trace from their loved ones and concerned family members. We believe that they target the rights of ordinary law-abiding Muslims and target organisations. These all have the net effect of limiting lawful services and activities to the community. We also believe that they can be selectively applied and biased against Muslims depending on particular circumstances.

There are a number of issues that we have raised in the submission. I will start with the first issue, which is financial relationships, past, present and future. The concept of informed memberships has been raised a number of times this morning. The concept of informed memberships and supporting organisations implicated in the new laws is of great concern to Muslims. There is guilt by association perhaps and unknown financial responsibility, not knowing where the moneys you have donated or the times that you have donated will end up.

Practising Muslims' religious requirements are to pray five times a day at any mosque or congregation. Quite often they will be at the workplace or they will go to a mosque in any locale and just stop and pray for five or 10 minutes. They will not know what the political affiliations are of the organisation or the place that they are praying in. They will not know who the guys next to them are, what their previous nationality is or what language they speak. The mosque is used as a central place and a central part of a Muslims' life.

The Muslim perceptions are that their religious requirements and obligations may see them fall foul of the new laws and that the new laws limit their ability to donate to and support invaluable community services. They also limit volunteers wanting to do unpaid volunteer work and they have implications for the past, present and future of the donated moneys and times of the individual concerned. There is a real concern that today they may be considered to be helping an organisation that is legally lawful, tomorrow it is not, and then all sorts of images are conjured up in their minds. It is practically unfeasible, illogical and unreasonable to require a practising Muslim to check a government register before attending, supporting or using a mosque facility in the act of worshipping their creator—as I mentioned, this is five times a day on a regular basis.

On the second issue: the process of identifying a terrorist organisation or a group causes concerns in the sense of the lack of transparency of process and also the retrospective nature of applying those laws. The Muslims' perspective is that there will be selective application of the new laws, due to either a previous or an intended attendance relationship and or support for such organisations. When you consider the veil of secrecy behind the laws and the lack of confidence in the decision-making process, it culminates in the perception that the process is subjective with little or no hope of redressing the situation once a decision is made.

A commonly quoted perception amongst Muslims is that if the government want to get you they will. It is widely accepted in Muslim circles that an individual or organisation is targeted for terrorism offences and then the case is built up against them. The underlying assumption of guilt is assumed and the onus is on that individual or organisation to prove their innocence. An example that gives credibility to this perception is the handling of immigration—the secretive and ongoing culture of unchecked bias within departments, while many Australians are incarcerated for months and years and even deported. The extent of abuse of unchecked power has left many lives shattered and leaves a justified and lasting impression, especially in the minds of Muslims, in relation to this.

The third issue in our submission is that of power and balances and the perception that individuals are denied their rights to natural justice for terrorism related offences. The government and their agencies are using severe financial penalties and suffocating legitimate debate about individual cases. They—and I am using this word generically for the government and their agencies—can abuse their powers to skew cases against defendants, using a variety of tools at their disposal. Section 34VAA of the ASIO Act is such an example.

There is also the problem of the selective leaking of sensitive information or the frequent release of inaccurate information to media outlets, whether that is deliberate or unintentional. This leads to a trial by the media and a presumption of guilt in the court of public opinion, and it limits the rights of the individuals or the organisations to receive a fair and balanced trial without a preconceived bias against them. Muslims and/or defendants lose their credibility as they cannot

and do not vigorously pursue redress due to the fact that (1) they have the lack of financial ability and (2) they have the lack of official support through various mediums—Legal Aid, for example—or just want to escape from the relentless media attention around them and their families. It destroys lives. Alternatively, they are not aware of the other avenues of redress to basically say that the accusations are just not true and unfounded and to stand up for themselves.

The legislation, from an average person’s point of view, is verbose and convoluted. Therefore, it is difficult for the accused to know what their rights may be, especially regarding the interrogation process, the interview process and/or the arrest. Examples of this are the trial of Faheem Lodhi, where the trial judge had to delay the actual sentencing because of the impact of the laws, and also Jack Thomas, who was charged and sentenced before it became evident that he had to serve a minimum of three-quarters of his sentence before he was allowed out on parole.

The current climate allows media, politicians—and I make no direct insult on any particular political party or individual here—and government agencies to manipulate these laws. In some cases they are free to make ludicrous statements without the need for substantiation. The traditional avenues are costly and beyond the reach of most Muslims. There is a perceived acceptance of the legitimacy of the new laws by the general community, except when non-Muslims are affected. I can give you an example of that later on, if time permits, but these are some of the issues to do with the power and balances.

The fourth issue in the submission is the limitation on freedom of speech and expression and on religious beliefs. We believe—and, again, this is the perception in the Muslim community—that the new terrorism laws and the state anti-vilification laws have combined to have the effect of requiring Muslims to take extra precautions and carefully consider voicing their beliefs publicly under the current political climate, as again they may fall foul of the new laws, or someone from the media may take issue with a particular element or component of the statements they are making.

In contrast, talkback radio hosts, media personalities and some politicians alike seem to have a free hand in abusing, ridiculing and inciting hatred towards Muslims. Regular commentary on the programs of John Laws, Alan Jones and Steve Price in Sydney are examples of this, where they seemingly incite open hatred towards Muslims, their beliefs and their culture. All too often they incite the hatred of their audience, egging them on and then encouraging callers to make derogatory statements, rather than making the statements themselves.

These ‘shock jocks’, if I can use that terminology, are deliberately ignoring their obligations to censor offensive material during the 10-second air delay. An example of this was during the Cronulla riots, when untruths about the circumstances surrounding the events were deliberately manipulated into a story of ‘us versus them’. All these elements, together with widespread unsubstantiated claims, increased and heightened tensions in a volatile situation. In reality, thugs of all religious denominations were involved in this.

The commercial stations, too, are also actively encouraging some of the division within the community. An example is the *Today Tonight* program on Channel 7, where the journalist went on the road with Muslim youth in Lakemba. The *Media Watch* program aired a fantastic piece on

the youths involved and the full statement they were making as opposed to what aired on *Today Tonight*. This highlights some of the hypocrisies levelled against Muslims in the community.

There are also other issues which are causing problems or fanning the flames of problems within the community, and they are the politically motivated strategies. Senior politicians and/or senior commentators in late 2005 seemed to start the ‘if you don’t like it, get out’ campaign. On the surface this was quite simple, but it was quite effective. It was aimed at Muslims of all ages. Even primary schoolchildren were affected, and they were not immune to the constant barrage of insults and ridicule made as a result of this campaign. The climate set in this campaign was best summarised in Paul Austin’s article in the *Age* newspaper dated 2 March 2006 and appropriately titled ‘Don’t turn on Muslims, says Bracks’.

The fifth issue is the heightened levels of angst within the community. It seems to be that the laws were implemented quickly and the impact on the Muslim community and those affected mostly was not thought through. It did not allow for the normal process of scrutiny which actually communicates the law to the community most affected. There was not the possibility for the accused and/or individuals concerned to limit the impacts of the laws against them as individuals. Muslim youth, who often lack the maturity of mind to deal with such complex issues, act rather than thinking through their desires, ostracise themselves from society and have the inability to express their anger. We have respected Muslim scholars and imams within the community who have tried to capture the hearts of these youth. Prior to the events of September 11 they were actively encouraged by the intelligence agencies to keep talking and reining in these particular youth to bring them back into a process where they were actually openly talking and discussing.

I will jump straight to the recommendations, if I may. From our organisation’s point of view, we would like children to be educated about Islam and Muslims in general. We would also like Muslims to be educated about their rights and matters concerning the new laws in places frequented by Muslims—in schools and mosques, possibly even teaching the imams so they can communicate these laws, as they carry tremendous weight in the community. We would like tougher penalties and the establishment of a special task force to investigate the leaking of sensitive information when someone is accused of a terrorist related crime. We would like, if possible, an improvement to existing laws covering the incitement of hatred radiated throughout talkback radio and tabloid media, possibly even widening Commonwealth, state and/or Ombudsman powers to investigate and deal with these matters.

We would like methods to expedite terrorist cases to trial. We would like operational frameworks for gathering information about thought crimes which limit the time spent incarcerated whilst the case is developed and/or limiting the maximum amount of time the accused is held in detention before trial. We would like, if possible, a new class of detention for an accused held awaiting trial which takes into account the consideration that the crime may not have been committed and the rights of the family and friends to visit those detained. We would like additional funding for legal counsel proportionate to the severity of the alleged crime and a transparency of process in the aftermath for the accused once innocence has been proven, with reasonable compensation payments. We would like open public debate with a wider level of expert opinion and legal counsel, with politicians and Muslims together.

This list is in no way exhaustive. However, I will finish on this final point, which sums up what Muslims generally believe. They believe they have little or no rights compared to others in society. They can be whisked off the street and vanish for weeks without trace. When charged, they can be detained for lengthy periods of time in solitary confinement or other methods of incarceration usually reserved for people who have been tried and convicted of the worst crimes. They can be held at will whilst the case is made against them, and they can listen helplessly as politicians or government agencies, including the AFP, state police and public servants, make irrefutable statements and leak information which denies them the ability to receive a fair and balanced trial. They can be tried in secrecy, where the evidence will not become public knowledge until the statute of limitations allows its release. And they can be incarcerated for disproportionately lengthy periods of time, when compared to the accepted norms of punishment for other crimes, when a crime has not been committed but only thought of.

CHAIR—You have been quite devastating in your criticism of the media. There are provisions to make official complaints about media reporting.

Senator Robert Ray interjecting—

CHAIR—No, there are the Press Council and others. To your knowledge, has any approach ever been made to these bodies to try to rectify the situation?

Mr Kocak—There have been individual attempts made to these particular bodies when a certain event, article or feature has been aired and complaints have been made. It tends to be a very tedious and painstaking process, and most Muslims, if I can generalise here, come from low socioeconomic backgrounds. They struggle to make a living, and the people within the community who have that level of knowledge tend to devote it to more important matters within the community. Programs such as *Media Watch* have done a fantastic job, and they get a lot of complaints from the Muslim community. In fact, they contact a lot of the bodies representing Muslims to get some of that background research and information to help them put forward a show. But it is a very tedious and drawn-out process.

From what I understand, the issues regarding some of the comments made by some radio talkback hosts have been with the body that deals with complaints of this nature—I forget its name—for some two years now without any recourse. They relate to the *Today Tonight* program airing a particular piece about Muslims in general. One of the radio talkback hosts egged it on, and it resulted in a number of callers making derogatory statements against Muslims, including, ‘They should be put on a ship and all be blown up,’ and, ‘We’re sick to death of them being in this country.’ The host repeated on a number of occasions: ‘Did you hear that? I didn’t say that; he said that. Did you hear that? I didn’t say that; he said that. Did you hear that? I didn’t say that; he said that.’ However, in reality he did not utilise the 10-second on-air delay to cut out such statements.

I have examples here of particular articles to do with the ‘17 plus two terrorist suspects’ being arrested, as opposed to John Howard Amundsen, who was the Australian national who was arrested in Brisbane. In the case of the 17 plus two terrorist suspects, you had the police commissioners of both states—I can read their exact statements if you like, but I will summarise them for you—saying, ‘We have averted a potentially catastrophic event, and we’re convinced that we’ve stopped a terrorist activity from taking place.’ This was on the day of the arrests.

They provided footage from the police helicopters of the arrests taking place. I will refer to my notes; it is very important. Police Commissioners Ken Moroney and Christine Nixon basically said, ‘We’ve stopped a potentially catastrophic attack.’ Ken Moroney said:

I am satisfied that we have disrupted what I would regard as the final stages of a terrorist attack or the launch of a terrorist attack in Australia.

The report continued:

Victoria’s Police Commissioner, Christine Nixon, agrees that police have prevented a major terrorist attack from occurring.

“We believe that they were planning an operation,” she said.

“We weren’t exactly sure when nor, more importantly, what they planned to damage or do harm to.

Prosecutor Richard Maidment QC told the city Magistrates Court that the nine formed a terrorist group to kill ‘innocent men and women in Australia’. Detective Sergeant Chris Murray made the statement that Melbourne man Abdulla Merhi, 20, who is expecting his first child, dreamed of being a suicide bomber. He said:

He wanted to die here. He said he wanted to be a martyr (for Islam) ... It was quite clear that he wanted to go the way of ... a suicide bomber.

Then you had descriptions from prison officials about how comfy and cosy their prison life would be. They were reluctant to use the word ‘solitary confinement’. In the words of Corrections Victoria’s Paul Delphine:

It is an oppressive regime, but it is not solitary confinement ... “We don’t use that word,” deputy commissioner for Corrections Victoria Paul Delphine said ... From now until they reappear to face court again in January, they will be “managed individually”.

However, in the case of the alleged terrorist John Howard Amundsen, the media took a more cautious approach, giving prominence to a spokesperson from the Queensland Council for Civil Liberties. You have got to understand that John Howard Amundsen was found with explosives and the like. The quote is:

“We would accept that there must be certain security concerns, but the regime seems to be ... totally over the top,” he said.

“No matter what he is charged with ... he is presumed innocent until proven guilty, and to treat him like that just violates that fundamental rule of our legal system.”

This gives you the disparity in the reporting on a particular event. They are both heinous things. The charge of terrorism is a quite serious matter, but the way that it is represented is quite different when Amundsen is involved. I do not believe that there is a conspiracy, so do not misunderstand what I am saying here. It seems to be much the same with the immigration department. The culture here is that where there are unchecked powers you can keep adding to the barrage of information that has been unsubstantiated and unchecked to fuel the flames of the

fires you want, to the detriment of the Muslim community as well as that of the Australian community in general.

Mr KERR—I am quite sympathetic to your concern about the way in which people of Islamic faith are portrayed in the media, and I agree with that. But just in relation to those comments that you have raised, some of the remarks you have cited were those of the police speaking to the court and there the media is entitled to report those allegations. They are inflammatory in the sense that the allegations are ones which, if ultimately proven, are very serious. I am not trying to detract from what you are saying but one or two of those specifics that you gave were not the media beating something up; they were instances of what the prosecutor advised the court was the substance of the complaints. Whether or not that will ultimately be proven, the people are entitled to the presumption of innocence, and I understand the point you are making about that.

Mr Kocak—You are absolutely correct in the context of what has transpired in the court. The media has the ability to communicate that information. The point that I was trying to make here was that the whole article is swayed in a particular way that is going down the path of a guilty verdict by the court of public opinion. Taking the whole article and the context of it, this was just another endorsement from the prosecution. It was an official statement made in the court—I agree with that. In the case of John Howard Amundsen, one of the first things he did was say, ‘I’m not a Muslim; I’m not a terrorist.’ Suddenly the media backed off him. If that is all it takes to get the media off your back then perhaps we should all consider handing out badges to media personalities that say, ‘I’m not a Muslim; I’m not a terrorist,’ if that is an arguable defence.

The case behind this is just one particular example. There are so many more examples of this to do with government agencies. There are a number of government department and/or finance corporation ones that are available to the general public. In this era of heightened awareness about terrorism, and in a potentially inflamed situation, the Australian Film Finance Corporation, as I understand it, has financed a film called *The Wrong Girl*. It is produced by a former chief, Catriona Hughes, and it is about Jessie, who gets raped 26 times by Arab assailants. She takes the rapists to court until all men are found guilty.

The Australian Film Finance Corporation funded that film, but they would not finance or fund a film called *In the Shadow of the Palms* by Wayne Coles-Janess, which is a documentary. It is not political in nature. It shows the lives of ordinary Iraqi citizens before the war, leading up to the war, during the war and after the war and it shows the human side of these people. Yet one is considered not in the public interest and the other is. At this time of political sensitivities, it seems—if I can use the word—a stupid thing to do to inflame more hatred within the community by putting this type of garbage out there. I am not saying that there is not a right for it to be out there but timing is critical here.

Mr BYRNE—Would you agree that the legislation is necessary to actually prevent some terrorist act?

Mr Kocak—I would agree that some form of legislation is required but it seems from the Muslim community’s perspective that the legislation is solely and exclusively targeting Muslims, and that is where the problem lies. In the normal process of legislation being passed there is a forum of public debate with expert opinion from both sides of the fence, for and against. There

are talkback show announcers and media commentary of all shapes and forms that communicate that information throughout community. In the case of these terrorist laws that were put into place you are well aware of how it was put into place and the fanfare associated with that legislation. If I recall, one of the articles was saying that Mr John Howard, as in the Hon. Mr John Howard, let the cat out of the bag and let the terrorists know on notice that they were going to be arrested soon because he pushed the legislation through parliament. It seems that these laws have been focused too heavily on Muslims.

Mr BYRNE—In terms of some of these laws, has your organisation, or any other similar organisations, or you, been approached in the drafting and the explanation of the intent of that legislation?

Mr Kocak—Not that I am aware of. We have worked closely with AMCRAN, the Australian Muslim Civil Rights Advocacy Network in the production of this report and other reports, but in terms of the initial legislation, no. We have volunteered our time and services to help because ultimately our kids, whether they practise their religion or not—and I am not just talking about Muslims here; but about Australian kids in general and whether they believe in the creator or not—they have to learn to get on with one another and live with one another. The more open debate and discussion there is with parliamentarians or anyone else from the government, the better for us. We would have a deeper understanding of what the objectives of the laws are and we could go out there and talk within our own communities. But when it happens so quickly and suddenly and you are not consulted in this process, then it gives you the feeling that the laws are aimed directly at Muslims and yet you have had no involvement. I might add that our organisation has been working willingly with the authorities for quite some time.

Mr BYRNE—So in essence, rather than you reading about it in the media, you are saying that a solution would be for some sort of ongoing consultation with organisations such as your own Muslim youth et cetera to explain the intent of the legislation so that it can be discussed within the community before it gets tabled in parliament. Would that go some way to addressing some of the concerns you have?

Mr Kocak—It certainly would. It gives you the feeling of it being a consultative process. It gives you a feeling of ownership of what is taking place rather than it being forced and enacted upon us. It is very similar to the Muslim reference group and how it was implemented, if I can use that word. There was no cooperation or consultation. We were told, ‘This is your Muslim reference group—boom. They represent you.’ By and large the Muslim community has not accepted that, and why should they? It is not a theological discussion of whether Islam is the right religion or not. It is a matter of: these people will represent you on behalf of the Muslim community to the government. I am not talking about myself here; I am talking about individuals in general. Muslims will not accept this.

Mr BYRNE—As you say in your submission, one of the things that your organisation and other organisations like yours are very concerned about is the radicalisation of some of the young people. Are you saying that as a consequence of the government’s actions or perceived actions that is perpetuating the cycle of radicalisation?

Mr Kocak—In some ways yes and in other ways no. I will give you the analogy of a policemen out on the beat. I am not a policeman so forgive my inaccuracies. It is as I have seen

it on *The Bill* and other TV shows. When there is someone standing in front of a policeman, when he is not talking, the policeman has no control. He can either physically restrain the person that he is trying to apprehend or he has to knock him out—it is one way or the other. Once he starts the process of actually communicating with that person he has opened up a bridge or doorway of communication between the two. He can try to understand where the person is coming from and meet that person's needs, whatever they are upset about.

The same is true of the Muslim community and Muslim youth in general. You can take the ostrich approach, which is to put your head in the sand and pretend that this does not happen—that kids are not discussing this; it just does not happen. The problem is out there. The reality is that we live in an awful world. There are lots of injustices. Inhumane acts are committed by governments and non-governments all around us. The youth see that. As I mentioned, they want to act out their desires without thinking them through. Scholars and Muslim representatives of all denominations, I might add, had the ability to communicate with them prior to September 11, October 12 and October 1. There were a lot more people talking about this, so the youth had somewhere to go. These laws have had the effect of curtailing that free speech. There are a certain number within the community that have very hostile feelings towards the way the government is behaving in relation to these new laws. But unless you go out there and start discussing it with them, you are never going to be able to change their views or outlooks on life.

The police monitored the 17 plus two youths who were arrested for, as I understand it, 18 months. In most Muslim countries, where a lot of these kids come from, and other countries around the world, the police would have taken them in and said: 'Look, do you think we're idiots? We know what you're up to. What you're doing is stupid.' They would have pulled them in with their parents. Believe me—with a lot of those kids, if their mothers knew half of what they were up to, their ears would have been ripped off their heads and they would have been pulled into line because there is a very strong relationship between Muslims and their parents, and in particular their mothers. Under Islam the belief is that basically the doors to heaven are under your mother's feet—not physically, but it means that your mother has tremendous power over you. Yet none of these considerations were even considered.

The police and the authorities did not consult with people with the know-how in that particular area. They wanted to go for the Rambo style—swinging through the window, kicking open the door, fanfare, helicopters, choppers, cars and a whole convoy of media and TV cameras following them in pursuit of these alleged terrorists. We have all lost. The Muslim community has lost and the Australian community has lost.

Senator FERGUSON—I understand that you are not a signatory to this submission, but did you prepare it? Are you the author of this submission?

Mr Kocak—I actually did sign the report. I am one of the authors. Sheikh Mohammed Omran is the actual head of the organisation and we had to go through and get it agreed to.

Senator FERGUSON—It is just that within your submission you used some rather extreme language yourself. You talked about people sensationalising things. You talked about a whole range of people ridiculing and inciting hatred towards Muslims.

Mr Kocak—Where are you referring to, Senator?

Senator FERGUSON—It is on page 28. It is where you talk about shock jocks and everybody else. Further down, you talk about your concerns and about the new laws giving an impression. Can you tell me of any instance where a Muslim has been whisked off the street and vanished for weeks without trace?

Mr Kocak—I said this was a perception. It is not an example of an actual event.

Senator FERGUSON—Aren't you doing exactly same thing yourself in inciting tensions by using that sort of language?

Mr Kocak—We believe that this is a very real report about the perceptions of the average Muslim out on the street. You have to understand that, prior to the arrest of the 17 plus two, in June 2005, I think, there were arrests by the AFP and state police in Western Australia and Sydney and prior to that, some time earlier in 2005, the authorities actually consulted religious leaders. They were told, 'Look, the way you're doing it is all wrong. You should be considering the fact that Muslims take tremendous offence if their wives or daughters do not have the opportunity to cover themselves before men come into their houses. Try knocking on the door before entering.' The arrests that took place in June 2005 were a lot more civilised, if I can use that terminology. So these are real perceptions that are out there. It may not necessarily be true, and this is one of the points that we raise.

Senator FERGUSON—Don't you also have a responsibility to try and tell your community that these are misconceptions? You do not know of anybody who has been whisked off the street and vanished for weeks without trace, do you?

Mr Kocak—No, but that is the fear.

Senator FERGUSON—Isn't that partly your job as well?

Mr Kocak—Of course it is. To be quite honest, we have been doing this whether the committee here sanctions it or not. Why? Because we actually live out on the streets. I have neighbours who are non-Muslims. My children go to school and suffer the consequences of what happens in this room and out in the media. Sheikh Omran has been asked, as have I, by individuals, 'When the AFP or ASIO comes and knocks on your door, what do you do?' Some of the youth said, 'If they come into my house, I have a cricket bat.' It is not a baseball bat, it is a cricket bat—because that is the Australian thing. They say, 'I'm not going to let them come in and violate the privacy of my home.' I encouraged them, as did Sheikh Omran, to open the door and invite the officers in. I said, 'Give them a cup of tea. Talk to them. You may find that by talking to them they might realise that the ogreish image of you being presented is not necessarily true. Don't be afraid of the police or other authorities coming into your house.' Following the events of the 17 plus two arrests and the media barrage—we had saturation coverage of those events—people were actually concerned that some time between 12 o'clock and three o'clock in the morning they should have their jeans ready by the bedside so that they would not be arrested or caught with their pants down. It sounds ludicrous, but that was the real fear that was out there in the community. I do not think any of these youths had committed a crime, but again there was the thought that they had associated with some of those kids. It took several weeks to pass before normality resumed and people started to calm down, and started to come back to the mosques and discuss it openly.

Senator ROBERT RAY—I would like to follow up one point from Senator Ferguson's question. This is not about perception. In the submission you talk about talkback radio hosts and media personalities. I have no dispute with you there by the way. But then you say:

... politicians alike seem to have a free hand in abusing, ridiculing and inciting hatred towards Muslims.

I do not know what planet I am on, but I have not heard politicians be quite so direct. I have heard them being insensitive and almost crass at times, but I certainly have not seen any evidence—and I would like to hear any evidence of it—of them abusing, ridiculing or inciting hatred of Muslims, because as a professional politician I would not tolerate that sort of behaviour; I would be out there criticising them. I have not seen any evidence that politicians have done this. I certainly have with respect to radio talkback people.

Mr Kocak—Which page of the submission are you referring to?

Senator ROBERT RAY—I am referring to last paragraph of the submission. Unfortunately our pages are numbered according to the overall background briefings. The paragraph starts with the words, 'In contrast'.

Mr Kocak—There have been statements made, for example, by Bronwyn Bishop with regard to the wearing of the hijab. There have also been other various comments. I will have to get back to you on notice because I do not have the exact comments.

Senator ROBERT RAY—You go on two paragraphs later to name a few politicians who may, as I say, at times have been insensitive or even crass but hardly fit those other three descriptions at page 8. You have some very good recommendations in here, but I am put off by these claims long before I get to the sensible recommendations.

Mr Kocak—Let me assure you that it was not intended to make you feel that way.

Senator ROBERT RAY—I do not take it personally—but professionally, though.

Mr Kocak—I understand, but you also have to understand it from a Muslim's perspective. The 'If you don't like it, get out' campaign had direct consequences for the Muslim community. There were a number of politicians there who actually made those statements. We look at politicians as being the leaders of the community. We look to politicians to set an example of balanced and meaningful leadership—that is, if the population is going in a particular way that is unfair or unjust, we expect the politicians, our leaders, to pull the community back on line, even if it is not the right, politically correct thing to say or do. But, in a period when Muslims were made to feel as if they did not belong—and it started way back, from the 'children overboard' debacle to the riots that took place in Cronulla and the barrage of other insults that took place—to say, 'If you don't like it, get out,' and then for Brendan Nelson, who was the Minister for Education, Science and Training at the time, to say it at the school level where schoolchildren were talking about it—and they were openly saying it to schoolchildren—is irresponsible. I agree with you that the points there could have been reviewed and perhaps put in a somewhat gentler tone, but it is not just referring to politicians; it is referring to talkback radio hosts. But the politicians have inflamed the situation as well.

Senator ROBERT RAY—It is a pretty good spear when you link us with radio talkback hosts; that is all!

Mr Kocak—I am sorry for relating talkback hosts and politicians in the same quote.

Senator ROBERT RAY—It would have been better if it had said, 'It is the perception.' I am just saying that that was my point of view. But I really want to ask you about two of your recommendations. You talk about educating the general public on the ways of Muslim life et cetera, and I accept that. But then you say there is also a requirement to educate Muslims about the new laws. Do you find it a problem that the government has not—and none of us, really, have—ever actually published a simple, or even complex, explanation of all the laws that have been passed? Is that a problem?

Mr Kocak—It is a problem, but, then again, when you are talking about laws that were in place prior to the antiterrorism laws, most of them are common-sense laws. You learn about them through trial and error. The rule of common understanding applies here. Most people know that what they are doing is either right or wrong. With terrorism and this antiterrorism legislation, the way it was introduced, the lack of scrutiny of it and the lack of public debate, we do not know what, how or when these laws can apply to an individual, an organisation or a group. In terms of making the laws more easily accessible and understandable to Muslims—and it is not just Muslims but, as I mentioned before, these laws appear to be targeted at Muslims—

Senator ROBERT RAY—Here is a chart that was produced for us today, just to help us out, and we are supposed to be experts in this area—and it was very helpful, by the way. My last question, where we are definitely singing off the same song sheet, is about the leaking of information. I have raised this, as the chair would acknowledge, on many occasions. Do you have a proposed solution to this in terms of penalty investigation? I would have to say to you that generally we have come to the conclusion, without an overwhelming degree of evidence, of pointing the finger at state police rather than ASIO or the Federal Police. Have you thought this through? Should there be extra penalties for this? How do we approach it? Do you have any advice for us?

Mr Kocak—It is a carrot and stick approach. On the one hand, you have to have strong, stiff penalties to prevent people getting away with this. In the examples of Jack Thomas and also the 2005 AFP arrests in Brunswick in Melbourne, that information was leaked to the Channel 7 news crew and also to the news network. You have to have very stiff penalties for people who are caught or involved in this. You also potentially need to set up task forces that are independent of normal police jurisdictions and boundaries to go and investigate these matters.

In terms of isolating and determining why people do certain things, I cannot answer that. There is a lot of bias within the police—for and against—on a number of issues. Education is the key. The police need to be educated about the differences of religions—about Muslims, differences of beliefs and so on. I believe that the people that leak this information believe they are doing good for the community by setting up the bias within the general community that a particular person is guilty as charged and so on. I think you have to educate the police. You have to have stiff penalties. You also have to encourage them to come forward with an independent arbitrator or process that will allow police who hear about this to come out and say something about it without any recrimination or any chance of someone finding out about it and getting

back at them. I am sure there are many elements in many of the organisations, government agencies and the like. They see these things going on, see the culture around them, but are powerless to do anything about it for fear of repercussions.

Senator ROBERT RAY—I always like to finish with a rhetorical question. Do you think we should have penalties for journalists who protect police leakers? Don’t answer that.

Mr Kocak—I will take that one on notice!

Senator FAULKNER—Mr Kocak, you would be aware that we are undertaking a review of the operational effectiveness of a range of security and antiterrorism laws in Australia. One thing that we are specifically charged to do is to take account of Mr Justice Sheller’s report into security legislation. His review committee has reported. From what I have heard from you, it is not clear whether you had any views that you might let this committee know about the recommendations or findings that Mr Justice Sheller and his committee have brought down. You may not have, but for the sake of the completeness of the record I want to establish that from you before we conclude.

Mr Kocak—Thank you very much for asking the question. We are supportive of the recommendations of Justice Sheller. We have not had direct involvement in the drafting or tabling of the report. We have, however, had dealings with AMCRAN, which I understand has worked closely with Justice Sheller on some components of that report. We feel it is a sign from the government, parliamentarians and politicians alike, that they are taking this matter very seriously, and it is appreciated by the Muslim community. Our involvement in any way, shape or form that will help the Muslim community is—

Senator FAULKNER—I note your comment in the submission about your broad support of the approach of AMCRAN. I gather that your own organisation did not separately provide a submission or appear before Mr Justice Sheller’s committee. Is that right?

Mr Kocak—No, we did not appear before Justice Sheller.

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

Mr Kocak—My humblest apologies for the wording of the report. As I mentioned, a lot of us work on a voluntary basis. I do apologise if we touched on any sensitive issues there.

Committee adjourned at 4.54 pm