COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON ASIO, ASIS AND DSD

Reference: Review of ASIO's questioning and detention powers

MONDAY, 6 JUNE 2005

SYDNEY

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JOINT STATUTORY COMMITTEE ON

ASIO, ASIS AND DSD

Monday, 6 June 2005

Members: Mr Jull *(Chair)*, Senators Ferguson, Sandy Macdonald, Robert Ray and Mr Byrne, Mr Kerr and Mr McArthur

Members in attendance: Senators Ferguson, Sandy Macdonald, Robert Ray and Mr Byrne, Mr Kerr and Mr McArthur

Terms of reference for the inquiry:

To inquire into and report on:

The operation, effectiveness and implications of:

(i) Division 3 Part III of the Australian Security and Intelligence Organisation Act 1979; and

(ii) The amendments made by the Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003, except item 24 of Schedule 1 to that Act (which included Division 3 Part III in the Australian Security Intelligence Organisation Act 1979); and

(iii) To report the Committee's comments and recommendations to each House of Parliament and to the responsible Minister.

WITNESSES

Committee met at 9.50 am

ACTING CHAIR (Senator Ferguson)—I declare open this public hearing of the Parliamentary Joint Committee on ASIO, ASIS and DSD. This review is conducted pursuant to section 29(1)(bb) of the Intelligence Services Act 2001. The committee is required to report on the operation, effectiveness and implications of division 3, part III of the ASIO Act and to report its findings to the parliament by 22 January 2006. The committee advertised the review on 17 December 2004. Ninety-eight submissions have been received, three of them confidential. This is the third of four days of hearings. A further hearing will be held tomorrow in Melbourne.

I advise those present that the Attorney-General has agreed, in accordance with schedule 1, clause 20(2) of the Intelligence Services Act 2001, that these proceedings should be conducted in public session with the following exceptions: to deal with evidence that has or may have a connection to a current or potential prosecution; to deal with evidence which relates to a past, current or future investigation; to ensure that the identities of ASIO officers and employees are protected; and to ensure that the identities of prescribed authorities are protected. If or when any of the above circumstances arise, the committee will take evidence in closed session.

[9.52 am]

HERMAN, Mr Jack Richard, Executive Secretary, Australian Press Council

McKINNON, Professor Kenneth, Chairman, Australian Press Council

WOLPE, Mr Bruce, Manager Corporate Affairs, Fairfax

RYAN, Mr Mark, Assistant Federal Secretary, Media, Entertainment and Arts Alliance

ACTING CHAIR—I welcome representatives of the Media, Entertainment and Arts Alliance. I invite you to make some opening remarks. Then we will proceed to questioning. Are you all having a go?

Prof. McKinnon—I will open. Our basic submission is simple. We believe that, in accordance with section 34Y of the act, division 3 of part III should be allowed to lapse. We believe it was an overreaction to events in the first place and it is a significant erosion of civil rights. The particular reason for us being here is that it erodes the capacity of the press to ensure that the Australian public is informed to the extent that it should be informed in a democratic society. Indeed, some of the clauses in that part are not found anywhere else in the Western world and are more like those from a totalitarian society than the kind of society we adhere to.

That is our basic submission. We do not want to diminish the strength of our input on that matter but, alternatively, if the committee is not persuaded by the general arguments, we believe that it is important that there be some amendments to the legislation. In particular, we believe that section 34G should be amended so as to remove the onus of proof from somebody who is accused of having information and has the impossible task of proving that they do not have information. That is a logical impossibility, and it is absurd to have that kind of thing in the legislation.

The strict liability provisions should be removed from sections 34G and 34VAA. The definition of operational information is so wide that in a sense nothing can be reported about ASIO that does not come within that definition. We believe that ASIO should be reported for all but those particular activities that have to do with terrorism and matters where there is a particular likelihood of an action. As far as ASIO itself is concerned, the sensible actions of the current Director-General to speak about ASIO and to have it better known are supported, but so too should the press be free to inquire about its activities and report upon those activities in a general way.

Section 34VAA(5) should be amended so that a penalty can only be imposed where disclosure would result in a threat to national security, not in general terms. The two-year and five-year penalty periods are far too long. Indeed, any prohibition should cease when the warrant lapses. In particular we want to make it clear that all clauses in that part of the act that impede the normal surveillance by the press of government activities, the press's responsibility to inform the public and to provide the electorate, if you like, or civil society with enough information to know what the organs of its society are doing, should be removed and replaced with something a bit

more like the society and the civil rights that normally apply. I think I will be supported by others from MEAA and from the combined newspapers, which Mr Wolpe is representing.

Mr Ryan—We also support the lapsing of the provisions from the effective date of 23 July 2006. In our submission we have concentrated on two particular sections, section 34VAA and section 34NB, which is of particular concern as it provides for a five-year penalty for journalists and only a two-year penalty for an ASIO officer who may do the wrong thing. We think it is totally disproportionate for a journalist reporting on matters to be subject to a five-year jail term while an ASIO official who contravenes the provisions of the warrant is only subject to a two-year jail term. We think it is a massive overreaction, and disproportionate to any normal sentencing basis, that a person who reports on the activities of another is subject to a longer period of jail than the person who does the wrong thing in the first place. We can see no basis for that but to try to shackle our members and the effective operation of their work.

Mr Wolpe—We agree completely with what our colleagues have said. If you are going to make a binary decision—yes or no—as to whether to let this sunset or keep it in place, we urge you to let it sunset. If in fact you do want to continue it, we do not believe that it should be continued in its current form. We have all advocated several amendments to improve the operations of this. We support the notion of restrictions on what can be reported in the interests of national security. We have been clear on that, we have conducted ourselves accordingly and we think a better balance can be struck in new legislation as opposed to what we have today. I feel like Dr Johnson commenting on second marriages, because we have been here before—the triumph of hope over experience. But we are here this morning, and we hope that we can get a better outcome if in fact this bill needs to be continued.

ACTING CHAIR—You are here because there was a sunset clause put in the bill.

Mr KERR—I noticed in the submissions that you foreshadow concerns about the constitutionality of the prohibition on the reporting of national security related matters in that two-year window. How do you currently address your obligations with respect to that provision? For example, have you contemplated how you would report or not report a matter where you thought there was a national interest but it might expose you to some potential risk if those provisions are not constitutionally invalid? Have you thought through how this issue might emerge and how you would address it?

Mr Wolpe—We have. In our reporting on a certain situation in Iraq, the Department of Defence and the minister made it clear that there were dangers in reporting certain information regarding certain individuals in Iraq in a situation of conflict. Taking that into account, our papers stopped that line of reporting. There is good dialogue between the editors, media executives and the government. People generally know when a story is under way and, hopefully, there is an opportunity for people to raise views which we do want to take account of in good faith.

Mr KERR—I am talking about the other side of the mirror. You are complaining about the breadth of section 34VAA, which is the provision that prohibits any reporting of what has occurred in these questioning procedures for two years. Your submission says that that prohibition may be constitutionally invalid. Have you thought about your response in relation to your obligations as you see them to report the news to the public? How do you imagine that that

question of potential constitutional invalidity might arise and how would you address it? Would you report and say, 'We think there is a public interest,' and allow the matter to be tested by way of a potential prosecution against your own interests, or would you accept that you should not report but raise the matter as a constitutional challenge? I am just asking whether you have given any threshold contemplation to what you assert in the submission.

Mr Wolpe—It is obviously case by case. The default position of a publishing company is to publish. If we felt that we had something very strong, that it was in the public interest and that it appreciated the existing law and the restrictions on publication, we would weigh it up. I could see circumstances in which you would publish, risk the lawsuit and take it to the High Court and see where you stood. If it were that important a matter of principle, given the importance of the information at stake I could see that.

Prof. McKinnon—To take it further, it is a catch-22 situation that you force the newspapers into. If they were then forced to go to the High Court and there was a declaration from the High Court of the lack of constitutionality of the law, you would be in a really cleft stick. It would be better to amend the law now in ways which might conform better to the constitutional situation than to have it tested in the High Court.

Mr Ryan—It can only be tested if one of my members is in the firing line. It is not an academic argument about being tested. It requires a journalist to write a story, which is published by his or her employer and then for the full weight of the legislation to come into play.

Senator ROBERT RAY—We would love to be able to contest all this with you by citing the government's legal opinion, but they declined to produce it, as always. We are flying blind.

Prof. McKinnon—It is a nice thing, however, that whatever the opinion the government has, it might get a different answer when it actually goes to the court.

Senator ROBERT RAY—That is why we have a court.

Prof. McKinnon—I do not think the government would really wish this to be taken to the High Court, because there would be very considerable reverberations if they got the wrong answer from their point of view.

Mr KERR—It has been put to us in some evidence that an alternative solution would be to enable the forum to make specific orders for suppression. In other words, rather than a general blanket prohibition in relation to the fact that such questioning has occurred or the content of it or anything relating to operational matters, it would be open to the presiding retired judge who conducts these questioning regimes to make a specific order that particular matters were not to be disclosed. Would you have the same objection to that kind of regime as you do to this general prohibition or would that in a sense satisfy many of the concerns that you have but perhaps not all? I am just trying to find out where we would stand with respect to that suggestion.

Prof. McKinnon—It would be much better because that is a situation that is familiar to the newspapers in that it occurs in the courts frequently.

Mr KERR—But in the courts frequently you have a capacity to make alternative submissions. You would never have the capacity to make alternative submissions in this environment. You are not there. You probably do not even know they are happening.

Mr Herman—In some courts, in some states in fact, the press does not have the ability to make submissions at the time of suppression. It can only do it on appeal to the superior court. If there were provisions here for perhaps review of such decisions, that again would bring us back to a situation with which the press was familiar.

Mr KERR—Familiar and comfortable or familiar and uncomfortable?

Mr Ryan—It is better than what is there at the moment. I am not claiming it is a perfect solution but it does give the ability to put forward a point of view at that early stage. At least we know we are getting a hearing. At the moment we have got nothing.

Mr Wolpe—However, as my colleagues said, the definition of 'operational information' is so broad. It is anything that the organisation—ASIO—has or had. Anything, even if it is not relevant directly to national security. There was an amendment earlier this year that was discussed in a previous hearing with Senator Ray about the definition of 'national security', which included anything relating to national security and the national interest. That is everything. So if in fact some of these things that we have pointed out could be narrower, I think it would create a context that is much more positive and workable with the suggestion that you are making.

Mr KERR—It may, but it has its own dilemmas and I am trying to tease these out to see where we might end up. This is the dilemma that I foresee. Assume you become aware that a proceeding has happened and a suppression order is in place. You would like to report something. You think there is something there in the public interest. You go along to where you would have to establish a review mechanism. That would inevitably be conducted under the same rules of secrecy because, at least at the threshold, there is a suppression order. It would draw your newspapers into the murky world of probably trying to contest something without knowing what you are contesting.

How would you address those issues? Would you say there is an obligation to disclose the basis to you so you can contest it? That is not going to happen. I would be quite interested—perhaps in a subsequent piece of paper or something—because this suggestion has come up to us that there be some mechanism but I am actually not so sure it would work very easily. I understand it as a useful middle point but I think we would need to be satisfied that it would have some utility and would actually address your concerns rather than making a recommendation and finding that everybody is as unhappy at the end of the day as they are at the beginning.

Prof. McKinnon—It would be an improvement but the proof would be in how it is drafted. The present division 3 is full of verbiage anyway and it attempts to define everything in minute detail, except that it is all embracing and you cannot report anything. The circumstances in which a security matter was subject to a complete ban need to be defined better and sufficiently finely defined.

We do not contest that there are some security matters which, at the time at least, are properly secret and properly have to be kept secret. We are not contesting that at all; we are saying that what is in division 3 at the moment allows any government to declare everything and make sure nobody can talk about it. We do not think that is in the best interests of an informed public and what is necessary in a democratic society.

Mr KERR—The secrecy provisions have been in force for nearly 18 months. Are there any instances or circumstances that will assist us in describing the impacts you believe that this has had on what you would regard as your obligations to inform the public?

Mr Ryan—We do not know. That is the problem.

Mr KERR—If you do not know, you cannot have reported it. If the answer is 'we know nothing'—

Mr Herman—There may be something. There may be a warrant. We do not know and, if we did find out, the press could not report it for two years after it expired.

Mr KERR—You are not suggesting that there would be a positive obligation of the intelligence agencies to advise you of all these things, so if the fact is merely that you have not reported anything over the 18 months because you do not know anything that has happened over the last 18 months these secrecy provisions have had no impact.

Mr Wolpe—We have not gone to the brink yet, no.

Mr BYRNE—That seems to contradict something that you have in your submission dated 3 December 2003. In item 6, you say:

Journalists are often led to information about ASIO's terrorism investigations by direct or indirect knowledge of warrants.

That is on page 3 of an eight-page submission dated 3 December. That seems to imply that some journalists do have some information about that.

Mr Wolpe—Yes, but if I understand your question correctly, it was whether it has gone to the last mile, so that we would publish knowing that—

Mr KERR—No, I was really trying to ask to what extent this secrecy provision has chilled the debate and had an impact on the range of information that should be in the public domain and should concern us. We should at least be aware of it. I thought your response was that it has had no impact yet because you have not yet ascertained anything that you would have reported in the public interest had this provision not been made.

Mr Wolpe—That is my view of it, yes.

Mr KERR—But you are saying the potential exists.

Prof. McKinnon—Its being used makes us perpetually suspicious that there is something going on that they need to find out about. We certainly do not want a law that puts journalists in

jeopardy to go seeking that information. With regard to all this airport stuff, there are obviously stories behind that that might be interesting. What can a newspaper do about that without risking all kinds of offences against that law?

ACTING CHAIR—I will just get something clear. Mr Byrne raised a very important issue. You said that you do not know what you have not been able to report, yet Mr Byrne raises the issue that you say in your submission that you have had information.

Mr Herman—No, that submission was written by the media organisations before this bill came into effect. In fact, it was a submission on the original consideration in 2003. It was appended to the Fairfax submission as a reiteration of what they had said then. It does not necessarily apply to anything that has happened since then.

Mr BYRNE—For the record, you are saying that no journalist connected with John Fairfax Holdings has any direct or indirect information with respect to these ASIO terrorism investigations. Is that effectively what you have just said?

Mr Wolpe—Journalists may have information but the question is whether it has risen to a level of reporting that conflicts with the statute on the books. I am saying that it has not risen to that level yet.

ACTING CHAIR—Do you have an example of any of your journalists who have felt constrained from reporting because they have information but this legislation prevents them from doing so? That is the real question.

Mr Wolpe—Our journalists do feel constrained by the legislation and are very fearful—

ACTING CHAIR—Can you give us an instance?

Mr Wolpe—I will come back to you with specific instances.

Senator ROBERT RAY—Or is it the case that they don't even bother looking because they are constrained?

Mr KERR—There is the possibility that this has chilled the whole case of relevant information.

Mr Wolpe—I will take a look.

Mr Ryan—Obviously a number of journos have contacts with ASIO people and vice versa, and that has been a longstanding thing. How far they can take that information these days is a lot less than they could prior to the legislation.

Mr KERR—Something that has been raised as a concern by a number of witnesses is when ASIO or the Commonwealth leak, or information comes from the AFP or some source that is unnamed but which is obviously not the people whose conduct is the subject of investigation. As I understand it, there was widespread reporting of two matters before these provisions came into effect. Much of that was sourced—or believed, reputed or claimed to be sourced—from within

the law enforcement, intelligence or government side. That seems to have stopped also since that provision came in. It is an accidental benefit, I suppose, that people are not being portrayed in prejudicial ways, which often was the result of some of this information. It is not merely that the public is getting information; sometimes people's characters and conduct were the subject of widespread calumny as a result of what was published in newspapers in circumstances where, even if they were able to respond, in practical terms their capacity to do so was probably virtually zero.

Prof. McKinnon—I do not quite understand that. Can you give an example of where that occurred? I can remember the ASIO staff member who went to jail. There was a lot of leaking of information before that. It was three or four years ago. My reaction to that was that it was leaked by all and sundry—both sides.

Mr KERR—There was a bit of reporting around the circumstances of the first couple of people who were questioned. It was referred to this morning.

Mr Ryan—I think you may be referring to a former baggage handler from Lakemba.

Mr KERR—We may trespass on awkward ground but, nonetheless, since this has come in there has been no discussion on either side, and no-one has been named in circumstances where people might—

Mr Ryan—No, and for an obvious reason. You don't have to be a rocket scientist to find out how many sources there could be for leaking information. It is either the suspect, their lawyer or an ASIO person—there are very few people. You would not have to do much of an investigation to find out who was the likely source of the leak, which then leads you to the criminal provisions of the legislation. So it is not surprising that those sorts of things have dropped off.

Mr KERR—I think Senator Robert Ray has already adverted to this question when he said that perhaps you are just not seeking this stuff out anymore because of the legislative framework. Has there been a change in the way in which reporters are requested to focus on certain areas? Have they been requested to move away from certain areas because you can no longer report on them?

Mr Wolpe—No, not as far as we are concerned.

Mr BYRNE—If you wanted to publish some information relating to the investigation of a terrorist activity and you said it was in the public interest to do so, what would be your definition of 'public interest'?

Prof. McKinnon—I will let my colleagues try to answer that one first.

Mr KERR—It is probably as broad as the 'national interest' in the legislation.

Mr Ryan—Maybe the national interest is the public interest! Not being flippant, this is a hard thing to define in a given circumstance. Obviously, on one extreme would be the misuse of ASIO power by ASIO officials. If they were, for example, going against the protocols for interrogating or interviewing people, revealing that would be something that we would say is in the public

interest. ASIO keeping on getting warrants against people who are not linked to terrorism or not doing the job properly would be other examples of things that it would be in the public interest to reveal. What would not be in the public interest would be to seek to publish something about an ongoing investigation where it is in the national interest to see whether the person being investigated is linked to a potential action. That is while that was going on. After that was over, we would say that it would be in the public interest to say, 'Somebody actually caught somebody.'

Mr KERR—But are you contending that you are the ones who make the decisions about what is in the public interest?

Mr Ryan—In a democratic society, yes. In a free media, journalists and their employers make those calls.

Mr BYRNE—Say you were a journalist who wanted to write a story and it was within that two-year period and ASIO knew that if that information came out it would compromise an investigation but you did not believe it would. What is the check on that? Just say this legislation did not exist.

Mr Ryan—At the end of the day, it is the editor's call. The journalist can push his or her story as hard as they like and the editor will say yes or no to running that.

Senator ROBERT RAY—Just like they ran the Hitler diaries.

Mr Ryan—Occasionally, people get it wrong. It has been known to happen—even among politicians.

Mr BYRNE—Just to follow up my point, though, you can see that, from an ASIO perspective, if there were some bit of information that you held that had been extracted from one of the sources that compromised an investigation and you did not believe that it did, something very serious could occur as a consequence of your publishing that information.

Mr Ryan—I see your point of view. But at that point in time, there are a whole range of people within a media organisation that would make that call. It would not just be the journalist; it would be the editor. With something like that, I imagine it would even be the board.

Mr Wolpe—They could even go to the publisher, yes.

Mr BYRNE—But you can imagine that it could be a fine judgment call. What if the information prevented some sort of arrest that would have prevented a terrorist activity from taking place? That is a heck of a judgment call.

Mr Wolpe—It is a heck of a judgment call and it could have very serious consequences if that judgment was wrong. But in a free society that is the risk that you live with.

Mr BYRNE—But you could see in that set of circumstances why an intelligence agency would want to have those powers. They would want them for just such an eventuality.

Prof. McKinnon—The opposite side of the coin is also true. History proves that intelligence agencies always want to keep a lot more secret than is justified. When the director-general comes here and in public says he believes the power should be permanent, we say, 'He would, wouldn't he?' That is what these guys do. The papers are there, in the public interest, to keep that fairly much under scrutiny. As far as we in the Press Council are concerned, 'public interest' is defined as 'involving a matter capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or others'. That is the definition that is widely used in the courts.

Mr KERR—If I can act as Mr Wolpe's defence counsel here, he did make the point that, when the military requested them not to publish things because of a fear that it might intrude into a military operation, they did not publish. In the past, there has been a large amount of criticism that the media was too respectful of the D-notices that were issued by Commonwealth administrations, which were voluntary restraints.

Mr Herman—They were not exactly issued. They were in fact agreed to by a committee that included representatives of the government and of the media. That system lapsed in 1983 and has not been revived since.

Mr KERR—But historically there has always been—

Senator ROBERT RAY—I will tell you why it was not revived—

Mr Herman—There were several reasons.

Mr BYRNE—You are aware of the checks and balances that have been built into this system. Do you have a comment about them at all?

Mr Wolpe—They generally tend to work. In fact, if representations are made by the director-general of ASIO not to publish something because of precisely what you have said, people of goodwill in the media will respect that and not publish. We are informed a lot more because of events such as the wars in Iraq, September 11 and—going back—Vietnam and the range of interplay between these institutions: us, the government and the intelligence community. We are smarter about it, and people are trying in goodwill to do their jobs in a responsible way. There is more consensus on these issues today than there ever has been, and I think that is good.

Mr BYRNE—Taking out the press reporting, do you have a view about the checks and balances that have been built into this legislation—the prescribed authority, the issuing authority processes and other processes, including the oversight by this committee?

Mr Wolpe—On the whole they are workable.

Mr BYRNE—If we wanted to continue the legislation, do you have a view about a further sunset clause being built in?

Mr Wolpe—It is worth reviewing these things on a regular basis, given the sweeping nature of some of the provisions.

Mr BYRNE—Do you have a time frame?

Mr Wolpe—Two years is a good tight rein on these things.

Prof. McKinnon—In terms of your previous question about the processes that are built in, they depend a lot on the attitudes of two people—the Director-General of ASIO and the minister. Depending on their mind-set, it can be either excessively secretive or reasonable. There may be no getting away from that if you have this legislation. We would sooner that the legislation were much less sweeping and much less punitive and that it concentrated on the few secrets that need to be kept. We would certainly want a further sunset clause if you do not accept our basic submission, which I repeat: let it drop.

Senator ROBERT RAY—On the assumption that that does not happen, what of the proposition that the non-reporting over two years be removed but there be an ability for a suppression order? In other words, I do not think by the prescribed authority, but maybe going back to the original issuing authority if they had a right on application from the prescribed authority in ASIO to issue a suppression order. Would you be more comfortable with that?

Mr Ryan—That would be better. If the whole advice that is sought to be dealt with by the legislation is not to interfere with ongoing operational matters then anyone with commonsense would accept that. But what is said in legislation goes much further than that. It goes way beyond that brief. To bring it back to the core, three years down the track we have some feel of what has happened since September 11. This is an appropriate time to have a look at where we are, what the advice is and cut it back to the basics needed to retain ASIO's operational ability, but a realistic operational ability, and to have the ability to comment after the event. That is not there at the moment in that provision.

Senator ROBERT RAY—Mr Ryan, you mentioned the discrepancy between the five-year—that is 'potential', not automatically five years, by the way; it is 'up to' in both cases—and the two-year penalty. Whenever you raised these points, parliament would be minded to up ASIO's to five years, not reduce the other one. So I think you should have made that very clear.

Mr Ryan—It is not like one of those Dutch auctions where you bring it back the other way. If the underlying penalty is up to two years for an ASIO official then it just seems ludicrous that it is up to five years for a journalist—

Senator ROBERT RAY—For everyone else—not just a journalist.

Mr Ryan—In my capacity it is for a journalist.

Senator ROBERT RAY—I think you will find a lot of sympathy around the table on the non-reporting side. We have had that discussion, but as for the exemption for journalists not to be able to be subject to this law you will not find anywhere near that sympathy. Maybe that is the relationship between politicians and the press and their natural antipathy, or maybe it is because, when we see the way journalists behave on occasions, the word 'ethics' does not always correspond—I do not know. But—if I could be serious—the reasonable test is: what is a journalist's responsibility when they have information of a future terrorist event? Is it to protect the source or to reveal that information, irrespective of whether they are entitled to a right of

silence or prosecution? Ethically, where does a journalist go when they have that information and its disclosure may prevent a terrorist attack? Is their duty to protect their source, or is it to the general public?

Mr Ryan—That would be the extreme end of that debate. I suspect in that particular circumstance a person's human nature would be 'journalist second, human being first'.

Senator ROBERT RAY—You see, I do not regard that as a breach of the code of ethics when that is presented to them. I do not think it was written in terms of an absolute prohibition on revealing a source.

Mr Ryan—No. In fact, the revised code of ethics makes it a requirement for the journalist to question why the person wants anonymity: 'Why don't you want to be named as a source of the information?' And you make that call. But in the circumstance you outlined, which is an extreme one, I would expect the journalist to do two things: go to ASIO and go to the newspaper.

ACTING CHAIR—I guess one of the advantages of this legislation is that you do not have to make that call. Mr Kerr asked you about a situation where, in the absence of these secrecy provisions, a journalist did have a line of information, and you said the editor makes the final call. I think it would be fair to say that a vast majority of Australians would prefer to err on the side of caution. If you made the wrong call and there was a terrorist attack in two weeks time, I would not like to be the editor having to explain to the victims' relatives that they had this information, they decided to print it rather than not print it, and it happened. So we are actually taking that onus away from you, aren't we?

Mr Ryan—We are actually grown-ups.

ACTING CHAIR—I understand. But there is that possibility. If the judgment is left in the hands of the editor about this sort of information, it does leave the editor with an enormous responsibility, doesn't it?

Prof. McKinnon—It is a very difficult argument, Senator. If you keep arguing that way, then you support the whole idea of authoritarian countries, where the more we take away from the public and the more we do it for them in their interests, the better off we will be. That is not what a democratic country is all about. A democratic country is all about the right of the citizens to know, unless it is not in their interests—which has to be established in a very small percentage of cases. What we are debating is: what are those cases, how do we know that they are, and do we err on the side of information, for the public, as is their right, if there is any doubt? I operate with the prejudice that these security agencies, by and large, prefer more security rather than less.

ACTING CHAIR—That is probably a fair summation too. I do not think there are many Australians who feel that they live in an authoritarian society, either. You guys in the Press Council and others may, but I do not think many Australians feel they live in an authoritarian society.

Mr Ryan—Again, we have to go back to the basic point: what is the vice that is sought to be fixed by this legislation? It seems to me that we have had a lot of experience in ordinary police operational matters, where people would become aware of an ongoing police investigation and

they sit on it until that operation has concluded, because it is, firstly, the right thing to do and, secondly, from a professional point of view, you get a decent story out of it at the end of the day—because you get the full story. You get from A to the end. There is not really that much in between security operational matters and policing operational matters. They are both after the bad guys, and we are not going to put a spoke in the wheel while that operation is in progress.

Senator ROBERT RAY—Do you think every journalist weighs up these issues in terms of what is in the public interest et cetera, rather than what is in the interest of their own career? Are we really seriously suggesting that that has not, on occasions, come in?

Mr Ryan—I think in these particular matters concerning policing matters and security matters, people do make the call not for their own benefit.

Senator ROBERT RAY—I would have to say that I have had the experience—and I am sure others at the table have had the same experience—of journalists ringing about certain sensitive matters and wanting information. I am not trying to generalise, but I think there are exceptions going both ways in that regard.

Prof. McKinnon—Sure. But it is sufficiently parallel to introduce the fact that the police are now moving to digital radio, which is much less permeable than what they had previously, and in most states there is now a formula being devised to keep the newspapers in the loop, on the understanding that major stories of the kind being discussed would, in fact, be handled by the editor, who makes the final call, in a way which does not compromise the police operation. Sure, many journalists on small crime stories will pursue what is in their interest, but we are talking about major events that are of concern up the line—to the police commissioner and so on—and the newspapers do have an understanding about that.

Senator ROBERT RAY—You would be in danger of being manipulated there even worse than having clear and specific laws governing your behaviour. It can lead to a degree of Uncle Tom-ism, of agencies feeding information out and controlling the press even more so than having delineated law.

Mr Herman—That has been a problem. It will continue to be a problem because journalists do get close to their sources. But you have to remember that between the journalist and the public there is a layer, and that is the editorial layer. Often—in almost all cases—the decisions on what to publish and how it is published are made by an editor and not by the journalist. And they are much more aware of the overall impact that their newspapers will have, and they are the people who are liable.

Mr KERR—I just make an obvious point: these rules apply as much to blogs and to the web broadcasts as they do to the *Age* and the *Sydney Morning Herald*, where you may have a very sophisticated system of management of these kinds of decisions. Whatever rules we come up with have to apply across the board. We can accept the general proposition that the quality end of the media will exercise the kind of restraint you talk about, but it need not be the case if we got the equivalent of something like Drudge. I will not dare say that Crikey is anywhere in that league, lest I appear in it.

ACTING CHAIR—Otherwise you will get reported.

Mr KERR—Actually, I enjoy occasionally the good Crikey bits—

Mr BYRNE—You want a free subscription, don't you?

Senator ROBERT RAY—You just got yourself a free T-shirt.

Mr KERR—That's right! But it is with things like the Drudge Report and what have you. It seems to me that we can have a 'rule out all reporting' provision, which we have at the moment, or we can have a more targeted one of the kind that I think has been raised earlier by Senator Ray and me—and I would appreciate a further response as to how that could be best operationalised to make it effective and limit the problems that might arise—or we can have no rules. The problem with no rules is that the good guys such as you are probably well able to manage your response, but I am not so sure that everyone else can.

Mr Ryan—I suppose it is a question of the resources of those sorts of bloggers—what contacts have they got and, in a practical sense, how will they get information? You read most of that stuff and it is just rubbish: 'My day; Mark Ryan's day'—24 hours a day from the bloggers. It is boring as!

Mr Herman—My other question about trying to set your law to deal with the internet is that your law is largely going to be ineffective, because most of these people if they have this sort of information that may contravene the law are going to publish outside Australia anyway and you are going to have very little chance of actually getting any proper dealing with them by the law. You can only really—

Mr KERR—Even *Spycatcher* was published outside of England and it was not published here for that reason.

Mr Ryan—And these days that is just instantaneous knowledge. It is ludicrous to say that fortress Australia can—

Mr KERR—No. And you have raised the threshold; there may be constitutional provisions. Nonetheless, nobody would like there to be unauthorised, improper disclosure of matters that might adversely affect an operation which could prevent a terrorist act in this country. The fact that it could be published in an overseas country should not prevent our being resolved to the greatest degree possible to prevent it.

Mr Herman—You will not find any disagreement on that from this table. Perhaps what is necessary if you are going to retain this part in some form is that it be more tightly targeted at exactly that sort of information and not couched in so general a set of terms.

Mr BYRNE—Who would make the decision about that though?

Mr Herman—In other submissions the council has made we have suggested that the onus should be on the release of information rather than on the retention of it; that there should be a set of guidelines, rather like a guideline that Clinton brought down in the 1990s which prescribed the areas in which things should be restricted; and that there should be, additionally, penalties imposed on the improper restriction of information. That would place the onus on people to

restrict information for proper purposes, and only that information which should properly be restricted.

Mr BYRNE—Who would you check that with?

Mr Herman—In this case, I assume that the check would have to be at the ministerial level, if the decision were being made at the director-general level.

Mr BYRNE—So you propose that any journalist with a story that might hit those guidelines would then go the minister's office to check whether or not they could write the story?

Mr Herman—No; we are coming at it from different perspectives. I am talking about the level at which matters become restricted under this legislation. If a journalist were to come upon information and that was restricted, it would be for that journalist to determine with their editor the question of whether or not to reveal it.

Mr BYRNE—What if it was a hazy area? Under the formula that you have proposed, would the journalist or the editor then go to ASIO and say, 'By the way, we have this information,' thereby giving ASIO, the minister's office or any other intelligence agency the right to say in reply, 'We would prefer you not to publish that information, because that would compromise an operation?

Mr Wolpe—I think there would be a call made to check out the reaction of the minister or ASIO in that instance.

Mr BYRNE—If there were then a disagreement, would you allow the minister's office or ASIO the right to apply a suppression order?

Mr Ryan—No.

Mr BYRNE—In the scenario that Senator Ray put forward, we were talking about a suppression order if ASIO et cetera thought it was in the national interest. If the editor were to disagree with ASIO that restricting the information was in the national interest, are you saying that ASIO shouldn't have the right to apply a suppression order?

Mr Ryan—I had the impression you were talking about a situation where information was not ruled out as being a no-go area—about something which was not quite as clear—

Mr BYRNE—Yes, I am.

Mr Ryan—I think that is normal—the editor would have to make a call. If it had not been clearly ruled out at the very beginning, it might be a legitimate story to cover. Obviously, you would have to contact ASIO for their point of view. Following that, the editor would make a call as to whether to run the story or not, and, if so, in what shape or form. That would be the normal editorial way of doing it.

ACTING CHAIR—Gentlemen, thank you very much for your appearance before the inquiry today and for the information and contributions you have been able to provide us with.

[10.44 am]

NORTH, Mr John, President, Law Council of Australia

ACTING CHAIR—Welcome. I invite you to make an opening statement and then we will proceed to questioning.

Mr North—Thank you. The Law Council is very pleased to come to this joint committee hearing and to put its point of view. Having been the President of the Law Society of New South Wales, I should briefly say that people sometimes get mixed up with our respective functions, but the Law Council of Australia is the peak national body which represents 40,000-plus solicitors and barristers and is therefore made up of each of the bars and/or law societies of the states and territories. This is a peculiarly Law Council matter being of Australian national interest. We have made a number of submissions to you and the government over the years, and I know that previously they have been provided to you and you have seen them.

I would like to say how important we consider committees such as this in this type of investigation. In May 2002 this very committee said about the original ASIO bill:

> The bill is one of the most controversial pieces of legislation considered by the parliament in recent times.
>
> … … …
>
> The proposed legislation, in its original form, would undermine key legal rights and erode the civil liberties that make Australia a leading democracy.

Due to your investigations and others and submissions by various interested people, some of those more draconian pieces of the legislation have been ameliorated. We are here today, as I understand it, to discuss whether or not the bill should be entrenched in relation to the detention and questioning powers. It is our firm view and we say to you very strongly—and we have argued for a sunset clause in this legislation—that, if parliament is against us, as they well might be, and we take the pragmatic approach, this should not be the first and only review of this legislation.

We say that because, in our view, there are still pieces of the legislation that infringe on fundamental matters. We believe that any legislation in an Australian parliament should be looked at for its consistency with the rule of law. It should be looked at for its consistency with, and requirements by, international law concerning terrorism. It should be looked at for its consistency with Australia's international human rights objectives. In this regard, we still have power in this act to detain persons in secret who are not suspected of committing any crime but who are believed on reasonable grounds to have useful information on terrorist activities. We have always argued about giving these extensive and overriding powers to ASIO itself.

The difficulty—and probably it is something that the committee can inform me about so I can comment in question time about it—is that we have little or no experience, as we understand it, in the use of the section 34D detention and questioning powers. In fact, we understand that only

a small number of warrants have been issued under this power. We do not even know whether the 168-hour long detention period has been used in the time since this bill came to life, as it were. Indeed, we do not know if there have been any complaints about the warrants that have been issued, but that leads to a difficult dilemma. Firstly, there is little experience for you as a committee to judge whether such draconian legislation should be entrenched. Secondly, if it is due to the circumspect and careful use by the current director of ASIO—who has recently been appointed to become ambassador to Washington—if he has used commonsense and circumspection in the issue of these warrants, that in no way says that the person who replaces him, or, indeed, the minister who replaces the current minister, will fall into the same careful use of these extensive powers. That does not stop this legislation being misused in the wrong hands. That is the first point of view concerning the lack of experience.

The second point of view that you could take, and which we would argue strongly, about the lack of experience of the use of these powers is that you do not need them. We do not know if they have helped to stop any form of terrorist act either within our shores or somewhere more dangerous, such as Indonesia or elsewhere. We have no information on that and that is something that you, as a committee, no doubt would be interested in. But, if we are arguing uphill politically, the Law Council says that we must get into the act specific statutory power to carry out periodic reviews. The timing for that is a matter that we are not strong on, but it would be in the order of two to three years. As I said earlier, this must not be the first and only review, because we just do not know enough about the legislation in action at this stage.

We have said this for one other reason. We need this review if we cannot have the legislation stopped because, over time, the range of terrorist acts has been extended. I will not go into that in my opening remarks, but it now covers a very broad category of persons. These persons include those who are not suspected of criminal acts and can be detained. We know that, thanks to your committee and other pressure, various nasties—to do with the detention of children, for example—have been deleted. You have allowed some legal access to people who are going to be detained. There is accountability with the ability to complain to the ombudsman and to the special—

Senator ROBERT RAY—To IGIS, the Inspector-General of Intelligence and Security.

Mr North—Thank you very much. And you have, to some extent, limited the detention period. But that detention period is a very long one. It is far longer than we allow under any state, territory or Australian criminal justice system. We think that there is a real rule-of-law issue here with the continuation of this legislation. But I have made my point that, if we are pushing uphill, we would like to see that this not be the first and last review.

ACTING CHAIR—You refer to it as draconian legislation, but I think this committee would modestly say that perhaps the changes that were recommended by this committee and adopted in the legislation have reduced whatever draconian measures you might have thought were included originally. I want to tell you that it is on the public record now that there have been eight uses of the questioning power.

Mr North—I was not sure.

ACTING CHAIR—That is public information. And there have been no detention warrants issued. You put the argument that perhaps this suggests that they are not needed. The other argument, of course, is that the legislation has been used properly because detention powers were only ever meant to be used as a last resort and the fact that they have not been used might suggest that the precautions that were put into the legislation mean that the detention powers were only ever there to be used as a last resort and that is, in effect, what has happened. The other issue is that the duration of questioning under these powers has never lasted for the 168 hours that is possible. This again is an indication that it is only being used as a method of last resort. The last witnesses suggested that we should review this legislation every two years, which to my way of thinking means that we will have only finished reviewing it and we will have to start again.

Mr North—We are not hard and fast on that. You are busy; three years might be enough. But intervening things might pull that forward.

ACTING CHAIR—How would your council feel if there were a slightly longer sunset clause and this committee reviewed the operations of the detention powers on an annual basis?

Mr North—First of all, we still say that these are draconian powers because they are powers that in the past had only been used in periods of warfare or where Australia was under unprecedented threat. We really do feel that people should learn a little bit from history and the fact that we have fought for many years to have the rights that each of us as citizens enjoy in a free, democratic society. Therefore, although the 168 hours of possible detention has not yet been used, its very existence is anathema to those who believe in the rule of law because I know that Australia has lived through far more dangerous times than we live in now. The only times that they have been able to bring these types of legislation in without great uproar have been when the Japanese were on our doorstep in World War II or other times like that, and people were able to be detained just for coming from some foreign background that might have been on the wrong side of the war, as it then stood.

To go to your point about whether or not the sunset clause should be given a further date in the future: we would say yes. If we cannot have these detention powers and questioning powers stopped now and normal criminal law standards effected, if we cannot achieve that as our first aim, then we would say yes, extend the sunset clause and keep a very tight view on it as a parliamentary joint committee because the committee has people from the Senate and the House of Representatives and has been a driver of change.

ACTING CHAIR—And government and opposition.

Mr North—That is right; from all persuasions. It has been able to drive changes that have made this much less draconian than when we first looked at it a couple of years ago.

ACTING CHAIR—The other thing you talk about is that historically there have never been such powers put in place. History has shown that even in times of war such measures were not put in place, or not to the same extent. In fact, the recent acts of terrorism and the proliferation of terrorism, modern technology and a whole range of other things may have led us to the position where, if it is now possible to prevent the proliferation of terrorism—certainly around the world

and as it affects Australia—we should use every method available to try and stop this terrible carnage that goes on around the world.

Mr North—We agree. I have a criminal law background in my practice. If you look at criminal cases at the moment, a lot of them are being solved or brought to court based on electronic surveillance, covert surveillance and all sorts of things that can be put in place. The Law Council have absolutely no objection to going full out to try to avoid terrorism acts. We do not want to be standing here and saying, 'Don't do this,' or, 'Don't do that,' that might endanger our citizens. That is not the argument. All the different parties—ASIO, AFP—should use whatever they can legitimately use to find out about, track down and stamp out terrorism but you should not, even if you are only using it eight times, have laws that are anathema to a free, democratic society. That is our fundamental point of view.

Senator ROBERT RAY—When you say 'anathema to a free, democratic society,' I grapple with the double standards. I am not saying that you have double standards. I am not. I am talking about the double standard of approach. I will use this example. If I went out to Villawood tomorrow and said, 'Here are all your rights. You can have a lawyer, you cannot self-incriminate yourself, we can only detain you for seven days maximum, we can only question you maximum for 24 hours and you are entitled to an interpreter,' and I went through all the rights that we have put in this bill that would then apply to them, you know what they would do? They would throw the biggest party in the world for me.

Mr North—I am talking about what the government would do. The people out there would be delighted. And so, might I add, would the Law Council.

Senator ROBERT RAY—But our problem here is that when we look overseas, people say: 'Look at the Canadians. Aren't they fantastic?' Actually, they can detain for as long as they like under their law. Admittedly, you can go to a court. If we look at the Americans, they have 1,100 people detained as material witnesses. People say: 'They have the Bill of Rights. They can go to the court.' But by the time they get to the court, the seven days will be multiplied by 10. It seems to me that at least Australia has been straight up and has said, 'This is what you can do but no more.' All the rest say, 'You've got all these rights.' However, ultimately it is going to be far more draconian for them because the time it takes to exercise those rights is far longer than we have ever put in a bill.

Mr North—That is true. We are not here to discuss that. We have very strong views about detention centres and holding people for inordinate amounts of time. We have been very forthright with the government about the Hicks and Guantanamo Bay situations. We need not talk about that here. What is fundamentally wrong with this legislation is that it allows people who are not actually suspected of a criminal offence to be held. That falls directly into the analogy you just made about many of those in detention centres. That in itself is a blight on our society.

Mr KERR—But you would not object to persons who might have information relevant to a possible terrorism offence who were not suspects being subject to questioning, would you?

Mr North—Not at all. But we would say—

Mr KERR—Even under compulsion, as can be the case for the Australian Crime Commission?

Mr North—Our second submission said that we would prefer this power not to be handled by ASIO—which, after all, is a secret intelligence organisation that has a function of trying to gather information about these problems—but to be dealt with by an authority such as the Australian Crime Commission. That had not actually been put in place when we wrote our submission and we were talking about the old NCA, which became the Australian Crime Commission. We agree that if you are going to question people—if you are going to issue warrants—it should be done in that way rather than in the way it is done in this act. That was the second point.

The first point was the fact that people who might not even be suspected of a crime can be kept for such a long time and questioned for up to 24 hours at a time. The second point was the fact that that is being handled by ASIO. It worries us that just because we had somebody not overusing the power—someone who was bright and intelligent and realised what the political fallout might be—people thought that was okay. We do not know who is going to replace Dennis Richardson. Therefore, when you have legislation like this, if you entrench it, in the wrong hands it can be misused.

Senator ROBERT RAY—There are four steps, of course. You not only have to have the director-general go a bit off key; you then have to have the Attorney-General go off key. Then you have to find an issuing authority—a Federal Court judge or a magistrate—who is off key. Then that is also appealable back to a different Federal Court judge. It is not just one rotten apple, if you like.

Mr North—A lot of these things are only as good as the paper each rotten—I nearly said 'rotten apple'; I unreservedly withdraw that!

Mr KERR—He got it in before he withdrew it!

Mr North—A lot of these things are only as good as the paper they are written on and what the fundamental warrant is going to say and how it goes there. If you have somebody who begins to start asking for a warrant a day and starts going around to a different judge here and there, immediately you have one of these situations where it can be misused. Some of the judges will stop it but others will let it through.

ACTING CHAIR—But we have four safeguards. How many levels of safeguards would we have to have for you to be happy?

Mr North—We appreciate the safeguards. We also appreciate the things that you have managed to get changed in this. We still say that it is fundamentally wrong in our society. We do not need it at this time.

Senator ROBERT RAY—I have said this to others: I do not know much about the law but one thing I am learning to have a massive concern about at the moment is how warrants are ever benchmarked. I understand what you need to produce to get a warrant. But I am wondering whether we are testing warrants at the end of the process to see if they were justified. I know in

terms of seizure of documents, and especially electronic documents now, that time and time again we find the warrant does not justify what they have seized. That worries me. In this case, I wonder how we can go back and say, 'That warrant was justified.' You just raised the point and asked: what if they are issuing rubbish in warrants?

Mr North—We see it all the time in criminal law when it is a fishing expedition really. That warrant will issue if the director-general decides that person A is a person of interest and they think they have some reasonable grounds. That is a very hard thing to benchmark. That is why, if you are going to do these things, you should do them properly and do your investigation of non-criminal people within the confines—which are not that confining—of the criminal law.

Senator ROBERT RAY—At the moment, you cannot know what happens before the prescribed authority, but the inspector-general, the prescribed authority and even the lawyers representing the person being interviewed can. It is matching what happens there back to what was in the original warrant to make sure it was not a fishing expedition. What sort of processes can we put in place, bearing in mind that the lawyers present have very limited objection or speaking rights?

Mr North—That is right. They can only say that something is not clear; they cannot intervene in the way that the questioning is going. That is an extremely good question and is something that the committee can maybe take on in a regular review process. But you would then run into ASIO or someone else saying, 'We don't want to show you this information because it is potentially damaging to our national security.'

Senator ROBERT RAY—You would be surprised how good they are with regard to these things.

Mr North—You have only eight warrants at the moment that could found the preliminary investigation into whether or not those warrants should have been issued in the first place, but it is a starting point and, by the time we meet again in the future—if you do decide to continually review this—you would have some really solid information as to whether or not this legislation is either necessary, is being abused or is effective or not. That is one of the troubles that I had today coming before you with such a lack of information.

ACTING CHAIR—We would actually hope that there would not be more than eight, for Australia's sake.

Mr North—Exactly. If we were having one a day—

ACTING CHAIR—We would have something to worry about.

Mr North—one would wonder why bombs were not breaking out all over Martin Place.

Mr KERR—In some of your submissions, you raise serious concerns about the renewability of a warrant. I understand that this committee looked at that but decided that it would not insist on a provision that added greater restraint other than that the warrant must arise out of new circumstances. Can you tease out whether you think that that concern remains, or are you now satisfied with the way in which it operates?

Mr North—With regard to the current operators of ASIO, the minister and so forth, we have no concrete example to say that that has been abused, but the fact that someone could be subject to one warrant for up to 168 hours and questioned for up to 24 hours without a break at any period during that time and the fact that that exercise could be repeated is something that the Law Council still has strong concerns about because, in the wrong hands, that would be a real abuse—particularly if it is a citizen who has not committed any criminal act.

Mr KERR—You have suggested that, in your view, there is no proper basis for detention of a person not suspected of actual engagement in some defined criminal act. In respect of people who may be suspected of participation in a terrorist related offence, would you not have that same objection? In other words, assuming that the fundamental position that you put that the legislation should not exist—

Mr North—If someone is reasonably suspected of either participation in, preparing for or even the aftermath of a terrorist act, they should be arrested and dealt with immediately according to whatever charge they fall under in the terrorism legislation. They should be arrested and charged.

Mr KERR—You cannot arrest and charge somebody on the basis of material that would not justify the prosecution of a criminal charge.

Mr North—I thought I said, 'if they were reasonably suspected of having committed an act'—just like when the police arrest someone for murder or anything else.

Mr KERR—That is a threshold test. You cannot arrest somebody without reasonably suspecting, but it does not mean you arrest everybody you reasonably suspect. In fact, if you did arrest everybody you reasonably suspected you would not be able to get prosecutions in respect of all of them, would you?

Mr North—That is right. I think we are at cross-purposes. Our concern is for people for whom there is no reasonable ground for thinking that they have committed a criminal act, yet under this legislation they can still be held for up to 168 hours and questioned for a period leading up to 24 hours. We are saying that should not occur. I might have misunderstood you. If the authorities have reasonable grounds for suspecting that someone is involved in a criminal, they should follow the normal course and arrest them. They should question them and hold them for the normal interrogation periods and, if they can be charged, they should be charged.

Mr KERR—If the real reason you are holding somebody is to prevent them from going about their otherwise unlawful business—in this instance—rather than interrogating them, that would be a misuse. Let me take you back a bit. Let us assume that our intelligence authorities reasonably suspect that X has been in communication with Y overseas. They believe that X may be about to undertake some act, either by himself or through others, which is going to be dangerous to people in Australia. They do not have the sort of material that would entitle them to arrest and to prefer charges. They simply do not have that information. They suspect that person of direct involvement in a case but they do not have the information to a degree which would entitle them to make an arrest. Is it the Law Council's view that in that instance there be no mechanism that could be utilised which would allow for that person to be subject to questioning?

Mr North—No, not at all.

Mr KERR—And perhaps to detention if required, if it is felt that the moment he leaves after six or seven hours questioning he is going to call somebody and trigger some kind of terrorism event?

Mr North—No. The Law Council has said that person should be allowed to be arrested, pulled in and dealt with but he should be allowed to be arrested, pulled in and dealt with in accordance with the oversight of the Australian Crime Commission rather than ASIO and he should not fall within that long period of detention, 168 hours. In other words, it is the very argument that we are making. The person you have just outlined as X, with the wide way that these terrorist bills have now become law, might, by contacting a proscribed organisation or something else, be in breach of that law and could be pulled in and charged. So he does not fall within the group of people that we are worried about. If he is exactly as you said and there is no basis or reasonable basis for charging him, our argument is: yes, you should still be allowed to question him but only within the confines of, say, the Australian Crime Commission and normal criminal law standards, not the elongated and longer periods that this act now allows for.

ACTING CHAIR—Let us extend it one stage further. The law is in place where it can apply to people not necessarily involved in an act who have information that may lead to the prevention of a terrorist attack overseas.

Mr North—Exactly.

ACTING CHAIR—The view expressed by the Law Council is that without division 3 there still exist adequate means for obtaining intelligence about terrorism. This legislation specifically allows for ASIO, who have reasonable belief, to apply through these three stages because they believe a person has information that may lead the authorities to prevent a terrorist attack. Outside of this piece of legislation, where in law is it that they can obtain that information?

Mr North—We say that you could bring them in under the Australian Crime Commission, question them for up to four hours and then apply for an extension for four hours. We would have no trouble with that. We, as the Law Council, do not want to encourage terrorism.

ACTING CHAIR—They have no involvement; they just have information.

Mr North—Before you start pulling them in and saying they have no involvement, we would really hope that the Director-General of ASIO has reasonable grounds for suspecting. Under the current legislation, he would have to convince Senator Ray's four people.

ACTING CHAIR—But he might have information purely through his acquaintance with other people, and that is the only information that has been passed on.

Mr North—That is right, and we say—

ACTING CHAIR—So he does not have direct involvement in any terrorist activity. He is just in possession of information.

Mr North—We are not proposing that that sort of person should not be questioned, but we are saying the limits of the questioning should be—

ACTING CHAIR—Okay. So it is not the powers; it is the time?

Mr North—It is the power as well, because we are opposed to it being an ASIO power, and we have put that in our submission.

Mr KERR—I think what you are saying there is that you could bring these offences under the ACC umbrella and the power could be exercised in that way.

Mr North—Yes. ASIO would still go to the Australian Crime Commission, but it would not be them. They are the secret intelligence organisation of a country. If we were in another country, they are the ones you would be really looking at—in the old days—as a power in themselves that nobody in a democratic nation wants to give excessive power to. They should be checked. That is why we ask for proper judges to be there at the start to look at warrants and for it to go to the Australian Crime Commission. We have a real problem with ASIO being the one who can make these decisions. Duncan Kerr's comment—'Oh, what if we had reasonable grounds but didn't really think this person had committed a criminal act'—is getting precisely at what we say is the mischief of this ASIO bill, because those are people who have not committed any criminal act.

ACTING CHAIR—ASIO then has to go through the three stages of getting a warrant—

Mr North—I know. So you would want some pretty solid grounds. The fact that you say there have only been eight—again to take Senator Ray's point up—gives us a real starting point so that if ever this comes back on the agenda in a year or so's time we can start looking at whether those warrants should have been issued in the first place. Because we do not want ASIO or any other statutory authority set up apart from our judicial system to be able to do this to our citizens. We just do not want it. We do not live in that sort of country. The current situation does not warrant it.

Senator ROBERT RAY—Something that slipped completely under my radar and I suspect that of this whole committee when we were dealing with the original bill is 34U, which deals with professional privilege between a lawyer and an interviewee. In fact there is a provision in the bill that allows monitoring of those conversations.

Mr North—Yes.

Senator ROBERT RAY—Subsequent to that there was a division made between a questioning warrant and a detention warrant. Whilst I can see some utility in having monitoring in a detention warrant, because it is all about tipping off, I am absolutely confounded as to why we let through on questioning when, if you are representing a client, the moment you walk out of the building you can talk about what you like unmonitored. So I take it that the Law Council would want provision 34U removed.

Mr North—Yes. I have not put my mind to that and I do not know if we have submitted on that.

Senator ROBERT RAY—Maybe it went under your radar as well. That makes us feel better.

Mr North—In our submissions, we were arguing initially about the lack of any legal representation. We were at that threshold issue and then we put these things in and the changes were made and we have not really come back to you at all till now. So we will take that on board, if we may.

Mr KERR—Can I ask you, too, to come back on this other point.

Mr North—Do you mean come back to the committee?

Mr KERR—Yes. Can you come back to the committee with a response about whether we can make a separation between a warrant for questioning and a warrant for detention? What you have said makes some sense in that the questioning regime could be done by ACC or it could be done by this mechanism and amended in whatever way. But I think you are suggesting that the existing questioning mechanisms can be used as a default for detention—in other words, the mechanisms that were inserted as limits on the capacity of law enforcement to ask people questions for the maximum time before taking them before magistrates. Those provisions were introduced with a whole range of safeguards under the ACC as extraordinary measures to enable the questioning of persons under compulsion. Historically, they have never been thought to involve detention but, in a sense, they are able to be used as proxies for detention.

Mr North—Exactly.

Mr KERR—I am reluctant to see that occur because what you get is legislative creep. Once you start allowing these questioning regimes to be used as proxies for detention, which is not what they are designed for, I think it opens up a very seriously dangerous course for civil liberties. But that is the course you are arguing. You are arguing that there are sufficient powers to enable security agencies to detain people about whom they have suspicions—that it can be done through the existing powers, which are not designed as detention powers at all.

Mr North—No.

Mr KERR—I would like you to come back with a view as to how it is lawfully proper to satisfy what has been put to us as a necessary, but in extremis, case where you would want to be able to detain somebody that the authorities think might communicate some information that potentially could lead to a terrorist act. I would like you to come back with a view as to how you could use questioning regimes that are not designed as detention models in those circumstances.

Mr North—You are quite right, and we will come back to you about it. The point about questioning somebody for up to 24 hours at a time is really about keeping them locked up way beyond any time that you are allowed to keep them under the substantive criminal law. We are not arguing that you should be allowed to do that; we are arguing that, if you do it, it should not be ASIO who does it; it should be the ACC and it should be for a limited period so that it really is just in relation to questioning, not in relation to unlawful long detention.

ACTING CHAIR—As there are no further questions, I thank you for appearing before us today, Mr North. You have helped us in our deliberations and your contributions are appreciated.

Mr North—Thank you, Senator. It is a very interesting topic.

[11.33 am]

AGGARWAL, Ms Alison Gita, Human Rights Policy Officer, National Association of Community Legal Centres

BISHOP, Ms Julie Anne, Director, National Association of Community Legal Centres

PETTITT, Ms Annie Frances, Convener, Human Rights Network, National Association of Community Legal Centres

SHULMAN, Ms Joanna Laura Rosenman, Convener, Human Rights Network, National Association of Community Legal Centres

ACTING CHAIR—Welcome. I invite you to make opening statements before we move to questions.

Ms Bishop—Annie and I will make the opening statement between us. I will address my remarks purely to the national association, just to let you know why it is that we have made a submission and what our interest in the inquiry is. You may be aware that the National Association of Community Legal Centres is a peak body for 207 community legal centres based in locations around Australia—in all electorates and in rural, regional and urban locations. As a peak body, NACLC makes submissions to a number of inquiries and committees. We select to make submissions to those that affect significant groupings of our clients. In a way it is like giving a batch advice or batch assistance. One of the ways we work is by trying to identify areas that we think will impact on our clients. The ASIO inquiry and the terrorism act are one of those areas that have an impact on groupings of our clients. So that is where our interest comes from.

The second thing is that community legal centres nationally serve around 250,000 clients a year, so it is a fair client base. We assist our clients with around 350,000 problems per year. Those problems cover most areas of law, with the exception of commercial law, I suppose. Given the client base and the number of problems that we address, we have noted that it is significant that, even though centres have been advised that they have had clients referred to them on issues related to the terrorism act, not one client has actually arrived at a centre to discuss that. That leads to our next remarks, which Annie will make, that will list further our chief concerns.

Ms Pettitt—On behalf of the National Human Rights Network of the National Association of Community Legal Centres, NACLC, I would like to begin by congratulating the committee on the extensive and thorough process of review of the powers relating to terrorism offences contained in division 3 of the ASIO Act. I would also like to take this opportunity to thank the committee for the opportunity to appear before the public hearing.

I will not repeat the content of our submission but will rather highlight some key issues and recommendations. Let me begin by reiterating, though, NACLC's support for the submissions made by other community legal centres to this inquiry, including the Public Interest Advocacy

Centre, the Federation of Community Legal Centres Victoria, Illawarra Community Legal Centre and the UTS Community Legal Resource Centre.

Fundamentally, NACLC advocates the repeal of the special questioning and detention powers. ASIO has suggested that the eight instances in which the questioning powers have been used in the past two years have produced information that has prevented terrorist activity from occurring. However, as we are unable, for obvious reasons, to see or access this information, NACLC remains unconvinced that the powers are necessary or proportionate to the perceived or actual security threat to Australia or Australian interests overseas. Further, we contend that the safeguards are inadequate, given the severity of the powers. Having said this, if the committee is of the opinion that the powers should be renewed, we have the following comments and recommendations.

With regard to the sunset clause, NACLC understands that the Director-General of ASIO, the Attorney-General's Department and the Australian Federal Police have recommended that the questioning and detention powers contained in division 3 should not only be retained but that the sunset clause should be removed. In support of this, the director-general argued that the self-interest of public servants facing a serious penalty is sufficient to guarantee that the powers will not be abused. NACLC finds this argument unconvincing and perhaps irresponsible. NACLC is strongly of the opinion that a sunset clause is absolutely essential. It has been noted numerous times, indeed by the Director-General of ASIO himself, that these are exceptional powers.

Further, it has been asserted that the war on terror has given rise to a new security environment and therefore exceptional measures are required to respond to this new environment. Indeed, it has even been argued that the sunset clause should be removed because the security environment is unlikely to change in the near future. NACLC also finds this line of argument unconvincing. While it may be an argument for reintroducing the powers, it fails to adequately address the safeguard provided by a sunset clause. A sunset clause providing public parliamentary debate is the most fundamental safeguard in a representative democracy. There have been recent discussions about the future role of parliamentary committees, as I am sure you will all be aware. Given that we do not know if there will be any changes to the role of this committee, it is particularly important, if the powers are reintroduced, that a sunset clause be retained.

The parliamentary committee process and review of legislation is an essential part of liberal ideology and representative government. Such processes provide an important opportunity for public participation in the life of a nation. This is especially important with exceptional powers such as these. In his briefing to the committee, Mr Geoffrey McDonald said that the Attorney-General's Department believed that the special powers were not inconsistent with Australia's international human rights obligations. The committee may be aware that the Office of the High Commissioner for Human Rights provides assistance to countries to ensure that they protect human rights while countering terrorism. But NACLC wonders: has the Attorney-General's Department provided this committee with a report from the office of the high commissioner that certifies that these laws are consistent with Australia's human rights obligations?

There are several human rights treaties to which Australia is a party that are relevant to this legislation. The United Nations Convention on the Elimination of All Forms of Racial Discrimination recently raised concerns about the impact of these laws on Muslim and Arab

communities in Australia and stated that this may amount to indirect discrimination and, therefore, may be inconsistent with the convention. Perhaps the human rights convention most relevant to the special powers is the International Covenant on Civil and Political Rights, the ICCPR. Since the introduction of these exceptional powers, Australia has not been reviewed by the Human Rights Committee, which is the United Nations committee responsible for monitoring the implementation of the ICCPR. Australia's next periodic report is due to be submitted to the Human Rights Committee on 31 July 2005. It would seem prudent at the very least to retain the sunset clause until that committee has conducted its review of Australia. NACLC also recommends that the ICCPR be explicitly recognised in the ASIO Act, to ensure an appropriate balance between human rights and national security. NACLC encourages this committee to recommend that the government adopt any changes recommended by the Human Rights Committee when it conducts its review of Australia to make this legislation consistent with Australia's international human rights obligations.

In addition, we bring to the attention of the committee a recent report by the Advisory Council of Jurists of the Asia Pacific Forum of National Human Rights Institutions. The committee might already have a copy of this report; if not, we would be happy to provide you with a copy. However, in the absence of, and until a review of, the United Nations human rights bodies, NACLC believes that this report—which includes specific analysis of the Australian counter-terrorism regime, focusing particularly on the exceptional powers—should serve as guide to amendments that are required to make this legislation consistent with Australia's international human rights obligations.

NACLC advocates that, even in the context of terrorism, the values and principles that underlie the fabric of Australian society must be upheld. As an organisation that works towards ensuring a just and equitable legal system is in place in Australia, NACLC believes it is important to ensure that Australia's legal system is transparent, upholds the rule of law, is open to parliamentary scrutiny and is accountable. The rights of review and remedy are fundamental safeguards, inherently required for a strong and rigorous legal system. To this end, the coercive powers of the state allowed for under this act need to be balanced against the imperatives of democracy.

One of the most essential elements of Australia's democratic system is the principle of the separation of powers, which provides a system of checks and balances to enable a sustainable balance among the different interests in society. The separation of powers between the executive, legislature and judiciary is central to the Australian constitutional and legal systems. The separation of powers operates as an important protection for human rights in that it represents a check against the arbitrary use of executive power. The warrant regime for questioning and detention under this act allows for extraordinary measures which are seriously invasive of people's civil, political and democratic rights. The serious consequences of any improper use of these powers raise the bar for the need to ensure greater checks and balances. The current safeguards in place are in this sense inadequate. NACLC recommends that the safeguards be strengthened across the judicial, executive and parliamentary arms. At the judicial level, NACLC recommends that a clear right of judicial review of the decision to issue or exercise a warrant, and of any conduct connected to the warrant at any time during the process, be allowed, including a legislative requirement for information to be provided to the person of these rights, assistance in accessing courts pursuant to these rights and simplifying procedures.

Judicial review is essential to ensure that the powers provided to ASIO are implemented in accordance with ASIO's purpose and functions—that is, to obtain, correlate and evaluate intelligence relevant to security, the protection of the Australian people and to ensure ASIO's actions are carried out in the interests of the Australian people. The breadth and scope of powers under this act, particularly given the broad definition of 'terrorism', make it essential to ensure that there is a clear, effective and communicated right to judicial review. ASIO cannot be seen to be beyond the reach of the Australian legal system. It is important to note that, in order to ensure that a person's right to remedy is effective, it is essential for the person to be explicitly given the opportunity to address the prescribed authority through their lawyer.

For the executive arm, NACLC recommends that there be a complaint mechanism established for the conduct of the prescribed authority. NACLC would also like to endorse the recommendation of both the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman that, if reintroduced, the legislation should explicitly specify that, if a person has a concern regarding conduct of a member of the state police force, they be able to lodge a complaint with the state police complaints authority and that they be informed of this right.

Turning to the third arm: in terms of parliamentary review NACLC recommends that this committee be empowered to review the implementation of the act annually but also, should this act not be revoked, that the sunset clause be retained and that this committee have the right to review the need for the legislation every three years and that the results be made public. Further, NACLC recommends that ASIO be required to report quarterly, not annually, as, due to the secrecy provisions, this is the only source of information that can be used to regularly monitor the actions being taken under this act. In addition, and consistent with international human rights standards, we further recommend that the information be disaggregated according to race, ethnicity, religion and gender.

An essential consequence of the right of review is the right to remedy. NACLC believes that, consistent with Australia's obligations under the ICCPR, any person subject to a warrant should be explicitly conferred with a personal cause of action, including the right to seek compensation for improper issuing of a warrant and for breaches of the act by officers charged with implementing the warrant.

NACLC recommends that if this legislation is reintroduced it be amended to require, like the Attorney-General, for the issuing authority to be required to be satisfied that other methods for collecting that intelligence would be ineffective. NACLC believes that this additional judicial test will provide an additional safeguard. ASIO has asserted that the questioning and detention powers are not about suspects and nonsuspects but rather about intelligence gathering. NACLC maintains, however, that the powers nonetheless provide for the detention of innocent people who have neither been charged nor necessarily suspected of any involvement in any terrorist activity or other criminal offence. Indeed, the distinction between suspects and nonsuspects is made with regard to children between the ages of 16 and 18.

NACLC further supports the recommendation made in several submissions that the criteria initiating the exercise of the exceptional powers under sections 34C and 34D be amended to include the requirement of reasonable suspicion of an imminent terrorist offence involving

material risk of serious physical injury or serious property damage. If the threat is not imminent, it is hard to see how these powers are a last resort.

NACLC supports the recommendations made by HREOC, particularly with regard to the removal of the powers to question and detain children between the ages of 16 and 18. Under international law people are considered to be children until they are 18 years of age.

As stated in our submission, NACLC maintains that the two-year non-disclosure period severely curtails freedom of the press and political expression, which could suggest that the act may be inconsistent with the Constitution. The detention of nonsuspects is serious enough, but to effectively place a moratorium on the public debate and scrutiny is perhaps the most draconian aspect of this legislation. NACLC recommends that section 34VAA be repealed as a matter of urgency. If it is not repealed, we support the recommendation made by PIAC in their submission that the disclosure of the existence of a warrant and any operational information particular to the execution of that warrant be limited to a maximum of 28 days after the expiry of the warrant.

ACTING CHAIR—Who are PIAC?

Ms Pettitt—PIAC are the Public Interest Advocacy Centre. As a result of the secrecy provisions, community legal centres are limited in their capacity to provide adequate services to targeted communities in two significant ways. Firstly, the laws have created a tangible environment of fear, which is preventing people from accessing legal advice and leading to further alienation and marginalisation. As Julie stated, NACLC understands that it has been recommended to people in the Muslim community to contact the local community legal centre, and yet these people have not come forward. In addition, attendance at community legal centre public education forums has been low, and we have been informed that this is because of fear of and a reluctance to attend forums that focus on counter-terrorism. Secondly, community legal centres face challenges to ensure that the secrecy provisions do not impact on legal and administrative staff and the many volunteers that CLCs rely on.

In addition to comments made in our submission regarding legal representation, NACLC supports the Public Interest Advocacy Centre's recommendation that persons subject to warrants for questioning and warrants for detention have access to legal representation as a matter of right, which should include private consultation between lawyer and client and which should permit lawyers to represent their client's best interests and advocate on their behalf. This is essential to ensure that the person's right of remedy is effective.

NACLC supports the recommendations made by the Inspector-General of Intelligence and Security in his submission and presentation to this committee. Specifically, we support the recommendations that there should be greater scope for legal representation to address the prescribed authority, that the provision of legal aid should be automatic, that persons under questioning or detention warrants should be able to consult with a lawyer before they appear before the prescribed authority and, finally, that client-lawyer privilege be respected. This generally ought to be private, particularly when it is a questioning-only warrant. If under a detention warrant it is absolutely necessary to monitor interactions between detainees and their lawyer, it should be visual monitoring only, not audio. That concludes our opening comments.

ACTING CHAIR—Thank you. I notice in your submission on page 5 you talk about recommending:

> ... that the role of ASIO should be limited to the prevention of actual terrorist activities and that the powers should be defined more clearly and should not hinge on the broad and arbitrary definition of 'terrorist' act contained in the Criminal Code.

Perhaps you could expand on what you mean by 'limited to the prevention of actual terrorist activities'?

Ms Pettitt—In that context we are referring to the broad and expanded definition of terrorist offences that this act hinges on. That has been expanded since this legislation was actually introduced and now includes offences such as association and training with an organisation deemed to be a terrorist organisation.

ACTING CHAIR—You do not think that should be included?

Ms Pettitt—We see this as what we would call legislative creep, in that you have a power that is implemented at one point and then gets slowly but surely added to and expanded. It is like the net becomes—

ACTING CHAIR—That was not my question. The question I asked was: do you think those provisions about people training with a terrorist organisation should not be included?

Ms Pettitt—I might answer the question in relation to the association offences because perhaps it is more relevant to the association offences. You may see someone who could be detained under these powers and questioned coercively where the link to the actual terrorist offence is several people removed or several places removed. We would question why it is essential that these people be compulsorily questioned and face detention when in fact they have committed no crime and have not been charged with anything. Yet, by instance of their association with someone who may be deemed to associate with a terrorist organisation, they may end up falling under these powers.

Senator ROBERT RAY—Maybe because some of us regard potential victims as having rights too, not just the people who are questioned. You can only detain someone—not that anyone has been detained—

ACTING CHAIR—No-one has been.

Ms Pettitt—No, I understand that.

Senator ROBERT RAY—if they are likely to abscond, which is not an uncommon thing in Australian law, if they are likely to destroy evidence, which is more uncommon, or if they are likely to tip someone off, which is always a problem, even though the person may not be involved in terrorism. The very tipping off allows terrorists to escape. It is those three criteria. It is not just an arbitrary right to detain someone. It is not something that can be capriciously used. I just ask you occasionally to think about the rights of victims too. That is not to say you should not think of the rights of people interviewed either.

Ms Bishop—I think we are all concerned about the rights of victims and I do not think any of us here would want to experience a terrorist situation, let alone have it happen in Australia. I think we need to clarify that those views are uppermost in our mind. What we are talking about is how best to achieve that while maintaining protection of democratic values and principles that all sides of government have attempted to protect. Within the act there are a number of sections that attempt to make sure that that happens. We are trying to identify areas where perhaps it has not been done so effectively. It is not to say, 'Who cares?'. It is about saying that association is probably a case where it is extended too far because someone can be unknowingly associated.

I understand what you are saying in terms of intelligence. In many countries they watch the white person because they are easier to identify in the black crowd, because it leads you to a potential suspect, but the problem is that you have to do it with great care. So that is the reason we are asking. It is not that we have not understood that point; we are just saying: please consider these additional safeguards. That would be the way to talk about it.

ACTING CHAIR—I want to go back to my original question. You said that you want them limited to the prevention of actual terrorist activities. You go on to talk about the broad and arbitrary definition of a terrorist act. I will ask you for a third time: under what you have recommended, do you not believe that training with a terrorist organisation should be included as one of the reasons that ASIO should be able to question people? That is part of the broad definition. It is all very well to talk about extending it. I asked you a specific question. This broad and arbitrary definition that you are talking about includes training with a terrorist organisation. Even if you think they do that unknowingly, I would find that very hard to believe.

Ms Bishop—Yes and no. Someone else might want to answer as well but the issue is not training with a terrorist organisation. It is not as if I go and join al-Qaeda and train. I think the issue is who the defined terrorist organisations are. Part of the concern is that an organisation may be deemed as a terrorist organisation, and it is not necessarily. I think that is one of the concerns.

Ms Pettitt—The offence is not merely 'to train with' but to 'provide training to'. This issue has come up with the Senate Legal and Constitutional Committee that reviewed that legislation. It is possible, within the definition of providing training to an organisation that is deemed to be terrorist, that you could be providing first aid training to, for instance, the LTEE, which does now conduct community education and support—we know that. So the question is really about how these powers to question and detain hinge on a whole lot of other definitions that we still have concerns about.

ACTING CHAIR—You talk about making sure that we comply with all of our United Nations human rights conventions and obligations. The United Nations has listed something like 200 organisations. A significant number are listed as terrorist organisations. Australia has listed only some 17 or 18.

Ms Pettitt—But those listed by the UN are incorporated into Australian law as well.

ACTING CHAIR—No, they are not.

Ms Pettitt—I believe a lot of them are, under the UN Charter.

ACTING CHAIR—No, we have 17 or 18.

Senator ROBERT RAY—I think the original proposition was for incorporation, and then, when it was made a disallowable instrument, we actually had to proscribe them ourselves. It has changed a little in the process, and it is not easy to follow.

ACTING CHAIR—I am not sure, for instance, that the LTEE is one of those that were listed.

Senator ROBERT RAY—No, it is not.

Mr KERR—The case you are making is that the very broad definition of a terrorist offence that triggers the availability of these powers is such that it could lend itself very easily to utilisation in circumstances which could be oppressive. That is a very reasonable point to make. The difficulty that you and everybody sitting on that other side of the table inevitably have is that there is no transparency to see the way in which these powers have been used. You have to rely on assurances from people like the Inspector-General of Intelligence and Security and, to an extent, this committee, I suppose, that these powers are not being misused. Some assurance, though, should come from the fact that only eight instances of use of the questioning power have occurred, and no instance of the detention power being used has yet occurred. However, that would strengthen the argument you make that there should be a standing capacity to have this legislation reviewed further and to expire at a future date if either the need for it has ceased or it is being used in a way that is inappropriate.

I could also accept an argument that we could, if we started all over from scratch, define the powers differently and perhaps pick up the point that the chair wants within a definition. But you are absolutely right too that the way they are defined is so broad that, if they were exercised with malice, they could pick up many thousands of Australians who would ordinarily not expect these powers ever to be used against them. Your submission is understandable, and the powers are broad enough to allow you to drive a train through them. But the question is: are they being exercised in that way? If they are not, do we need to pull back the definition or do we need to maintain the high level of supervision and oversight for these powers? I suppose that ASIO and others would argue that the definition remains broad to cover the fact that it is difficult to conceptualise every circumstance where you would recognise the legitimate interests of the society in calling people in to be examined and questioned.

Ms Bishop—I think that is right. The nature of terrorism is such that they do not advertise their activities, do they? That is why it is such a scary thing for society and such a difficult issue for government. Government must try to protect its citizens—it has that sort of duty of care on the one hand, but, on the other hand, it has a duty not to infringe the rights of its citizens at the same time. We understand that complexity. I suppose it has been cited in all the submissions that it has happened only eight times. Our concern is for a day when it might happen 20, 30 or 40 times indiscriminately. Our suggestions are not based on a situation of goodwill; our suggestions are based on a situation where there is no goodwill. That is what it is about: the balancing of protection versus civil liberties, I suppose.

Ms Shulman—That is why the right to review is so important. We can argue for days about the definition of the offence. But another way to look at it is that, if you have an explicit right to

judicial and legislative review, then that may partially overcome some of the difficulties that we are raising at the other end. So that is what we are focused on.

Senator ROBERT RAY—So the right to judicial review does not occur at the issuing of the warrant but does occur when the matter is before the prescribed authority.

Ms Shulman—Part of the problem is that some of the restrictions that have been placed on legal representatives mean that that right to review may not be understood or properly conveyed until a later time when the damage may already have been done.

Senator ROBERT RAY—We might at a later time this morning get to the restricted rights of advocacy, but I would strongly assert that that one right—that is, to appeal before the prescribed authority to say you are going to the Federal Court—is not restricted by anything in the act. That part is not. We have heard evidence about other things having severely restricted advocacy, and you have made that point. You may well stick to your guns and say you should be able to appeal the warrant, but I am saying you can at least appeal at the prescribed authority stage.

Ms Shulman—You can, and I would agree with that.

Mr KERR—One of the things that concerned me was your statement that there exists such a tangible climate of fear in the community presently, for various reasons, that people are not coming forward. That is something that you can give direct evidence of, whereas you are inferring most of the other things because you cannot know what precisely is happening. 'A tangible climate of fear' does seem a very strong statement and I have to at least test it, because it was stated out of the blue, without an evidential basis to satisfy us of its linkage back to this legislation. I would be very interested to see how that can be justified.

Ms Aggarwal—We have a number of workshops around this, primarily to inform us and the community about the implications of the act. Through that process we have been in contact with a number of community organisations who are in direct contact with a number of people from the communities—a lot of Muslim and Arabic communities particularly.

Mr KERR—Sorry, can you go back a step? When you say 'we have', who is that?

Ms Aggarwal—Community legal centres.

Mr KERR—And what communities do you mean?

Ms Aggarwal—They are primarily Arabic and Muslim communities and organisations that work with those communities. So through this process we have started to find more and more anecdotal evidence of the kinds of stories people start to hear and the kinds of concerns people start to express. The level of fear within a community has then risen in terms of what people cannot do or say for fear of somebody coming and knocking on their door—informally or formally—to question them about various activities that they, their parents or some other member of the family or the community might be involved in. This has a dampening effect on people's ability to openly communicate and associate in those communities. I will give a personal example, one from my own experience. I was in a community discussion with some

young women and women in relation to the Beijing Plus 10 events—this was not about community legal centres; it was in relation to the Beijing Plus 10 preparations.

Mr KERR—That is a forum about women's rights?

Ms Aggarwal—It is a forum about women's rights, yes. There was a concern expressed by a person who wanted to hand out anti-Coke pamphlets amongst members of her family and was told, 'Don't do that, because it will invite trouble.' It is like these innocent gestures of being able to talk, to say what your choice is, and to put forward your own political view all of a sudden starting to be repressed because of this fear that exists in the community. I think that is what we were talking about.

That was further manifest in terms of the organisational stuff that we were doing, with people not feeling comfortable to approach others for advice, because there is this whole sense of 'we can't talk to anybody; if anyone is approached, we can't talk to anyone, so who do we go to?' Even community legal centres are finding it difficult to ensure that we are accessible to people who want to talk about what they are experiencing or what their family members are experiencing and how that might be impacting upon them.

Mr KERR—Is any of this linked to ASIO or this legislation? I suppose, in the end, there may be many reasons why particular communities at different times feel under threat.

Ms Aggarwal—The context I was talking within was in relation to the questioning, the detention powers and the secrecy provisions—and the combination of the information about that within the community.

Ms Pettitt—May I also add that the Human Rights and Equal Opportunity Commission report, *Isma*, quite clearly and explicitly documents the levels of fear amongst the Muslim and Arabic communities in Australia since September 11. If the committee is interested in looking at that report—

ACTING CHAIR—As part of this legislation?

Ms Bishop—I think what you are asking is: how can we link it to the actual act?

Mr KERR—I am trying to link it back to this. I am not trying to be so narrow and pedantic as to say, 'Look, you've got to isolate it specifically to this legislation,' but that is the legislation we are reviewing. But we have to think about whether, if we remove, amend or change this legislation, it will address the concerns of people who might have a whole range of other reasons for feeling under pressure.

Ms Bishop—Yes. I can identify one specific example that, in hindsight, was probably silly, but there was a perception that people were scared unnecessarily, out of ignorance of what the act actually involves. One of the centres tried to convene a discussion group on the terrorism act, and nobody came. When asked why people did not come, they were told, 'You should not have called it "the terrorism act"'. That was enough to keep people away. They thought, out of ignorance, possibly—

Mr KERR—If you turn up to want to know about a terrorism act, it says that you have been involved in terrorism and you need some legal advice.

Ms Bishop—Exactly. So, clearly, it should have been called something else. Since then, having made that mistake, they made other attempts, but it did not matter what euphemism or gentle nudging was used. People just knew you could not be seen to be even talking about it, even for the sake of trying to understand that you were not under threat by just handing out these leaflets. So that is the reason why we say it—it has not even been possible to spread the information that they are not at risk.

Mr KERR—One of the things that we have raised is the need for some community information programs about, for example, proscribed organisations. I think Annie Pettitt made the suggestion that every organisation on the UN list is proscribed and that membership is therefore criminal. That is not true. As the chair has quite correctly pointed out, only about 17 organisations have been proscribed. So there may be a whole range of misunderstandings and fears, some of which are reasonable and some of which are ill-founded.

Is the community legal centre network a mechanism that could work cooperatively with agencies like ASIO and the Attorney-General's Department to provide some community related outreach? Or is there an ideological or practical objection that can be made to undertaking that cooperative work?

Ms Pettitt—I think the main problem would be resources. Community legal centres run on a very tight financial shoestring—

Mr KERR—Sure, but you have indicated the desire to do some of this and, if you were better resourced to do it, is it conceivable that you could do that task without—

Ms Pettitt—Calling it a lecture on the terrorism act.

Mr KERR—Without calling it a lecture on the terrorism act, also without an emotional overlay, because obviously if the other components of this are going to be happy with you doing it they do not want you to go beating up bushfires when there are not bushfires; they want practical, straightforward, non-hysterical information which can be delivered whether or not you object to the legislation at all. At the moment there is not an easy mechanism for getting this stuff out. We got evidence from the director-general that he gives some speeches from time to time to different communities, but you are out there in many of these communities and generally have community involved in your management.

Ms Bishop—That is our charter, to try and do that, and we have made efforts to do it. I doubt whether we would do a joint session with ASIO, for instance—

Mr KERR—Why not?

Senator ROBERT RAY—Somebody is relieved at the back of the room!

ACTING CHAIR—The problem is that fears either perceived or actual have exactly the same effect.

Ms Bishop—Yes. Certainly we could discuss it.

Ms Pettitt—One of the community legal centres, the UTS community legal resource centre, has actually supported the work of the Australian Muslim Civil Rights Advocacy Network in their production of a small booklet, which you may or may not have seen, around people's rights and the laws. I believe that is currently being updated to keep up with the amendments to the laws and also being translated into community languages. That is an example of the kind of work that community legal centres are involved in.

Senator ROBERT RAY—You mentioned when trying to define what these ASIO powers should be restricted to, I noted down at one stage, protecting the Australian people. Should it be a bit broader than that: protecting anyone around the globe? Quite often terrorist acts are planned in one country and executed in another. Would you at least clarify that?

Ms Pettitt—We would agree with that.

Senator ROBERT RAY—You talk about the issuing authority having to look at the same criteria as the director-general and the Attorney-General. On the surface it sounds like a good idea, but I think it is disastrous because it presumes knowledge by the issuing authority about all alternate methods and when that knowledge is imparted it will restrict the amount of issuing authorities to one or two rather than a multiplicity. What we would like is for there not to just be one or two judges that issue these things but a wide spread so that you get a wide view and you do not get people, if you like, captive of agencies. So, whilst it seems like a good idea, I put it to you that it can backfire, and that is the reason why the act is so designed. Would you like to respond to that?

Ms Pettitt—We believe that the issuing authority plays a judicial role in the issuing of the warrant and therefore the test should be the same as what it is for the Attorney-General in that there should be the requirement that there be no other options and this should really be a last resort; otherwise the test of a last resort is defined by another executive officer, the Attorney-General. So you have the executive powers being held by both the director-general of ASIO and the Attorney-General but you have no full judicial review, which is about the separation of powers.

Mr KERR—Strictly it is not a separation of powers issue because judiciary cannot exercise an executive function and therefore warrant issuing is only exercised in this instance by retired judges—I mean prescribed authorities. Warrant issuing is not strictly a judicial act but it is quasi-judicial and it is oversight. The point that Robert makes is not a bad one, is it: if you have to pump the judge full of all the background that leads to a conclusion that there is no other way in which a particular intelligence operation can be conducted, you are really turning them very much into an agency of the executive. They are having to make judgments about how an agency should operate and conduct itself, which is really outside the normal run-of-the-mill stuff that judges do. I do not know.

Senator ROBERT RAY—We will ponder that. Can I just follow up on something that you have not raised but that has come up in other evidence. We have not returned to it for a while. It may well come before you in an indirect way; I am not sure. Someone is either brought in for questioning or detained. They cannot disclose the matter to a third party. How does that leave

them in relation to their employer? You do not turn up for work for seven days; you cannot go in and say to your employer that ASIO detained you—then you get sacked for no explanation.

Ms Shulman—Or to your wife, for that matter!

Senator ROBERT RAY—It is even more serious now!

ACTING CHAIR—Don't worry about your employer!

Senator ROBERT RAY—You've even got ASIO's and Attorney-General's interest now! If they indirectly hint at it—they cannot tell you directly—and you divine that, what advice can you give them?

Ms Pettitt—What advice would we give them as a legal centre?

Senator ROBERT RAY—If you divine that, if you assume it without them breaking the law by telling you—because they cannot.

Ms Pettitt—I think that example illustrates one of the fundamental problems with the non-disclosure period. I read the transcript where you had this discussion and I think it is a very good example: what does someone do? They risk losing their job and then the cycle will continue. One of our recommendations is also that the permitted disclosure grounds include telling a spouse or de facto partner and perhaps religious leaders and even counsellors, because it is quite likely that this experience of being detained could be traumatic. How do people then deal with processing this if they are not allowed to talk to anyone about it? Maybe the government should be providing certain counsellors or there should be a security check for counsellors, if that is a requirement. At the very least, detaining someone who is essentially innocent, for seven days, is a serious thing to consider. So we would recommend that if that part of the legislation is retained the permitted disclosure areas be expanded.

Senator SANDY MACDONALD—Let's put aside the question of judicial review and the safeguards that are embedded in the legislation and talk about the legislative review, which is something that the committee is very much involved in. Does NACLC have a view about the legislative review—the suggestion that there be a sunset clause of three years or five years and increased power of the parliamentary joint committee to continue to have an oversight role? Have you put your minds to that?

Ms Pettitt—Yes, we have. We are supportive of the recommendations and the suggestion that this parliamentary committee have increased review capacities, perhaps an annual review. However, we strongly support the inclusion of a sunset clause because this puts it back to parliament, it opens it up to public debate, to an inquiry such as this where community groups and representatives get to inform this committee and engage in a discussion about whether it is necessary to retain the powers. But we certainly support the role of this committee. In fact, we would recommend an additional review be done annually, as well as the retention of the sunset clause.

Senator SANDY MACDONALD—Three questioning warrants were identified in the annual report 2003-04. To the extent that the information was provided in the report, were you happy with the way that the process had been completed?

Ms Pettitt—I think we would say, particularly because of the secrecy provisions, that we would like to see ASIO reporting on these powers on a quarterly basis, because we have only recently become aware that there were an additional five instances in which the questioning warrants were issued. So that is quite a long lag before information is released to the public. That is the first thing.

The second thing is that, as I said in my opening statement, we would like to see that information disaggregated according to race, ethnicity, religion and gender. That information is not provided. That is a standard provision that international human rights bodies call for, because otherwise you cannot really track which communities are actually being particularly affected.

Senator SANDY MACDONALD—This is no criticism of you at all, but it is hard to get close to how the process works. It may be analytical or it might be hearsay or information that has been relayed to you independently. But it is important that, if you are going to pass judgment on the process, you should be closer to it. So it is difficult for you to make a judgment on these things.

Ms Pettitt—Yes, it is, because the information that is provided in the annual report is pretty limited. It has how many warrants were issued and how long the questioning time was—

Senator SANDY MACDONALD—I am sorry to interrupt, but I did not really get to the question I was going to ask you. Do you have any other sources of information? Have you been approached by any groups?

Ms Pettitt—No.

Ms Bishop—No, it is just from the public record.

Ms Pettitt—Can I just say that, with regard to the questioning time, I believe that the inspector-general commented on there being a lack of clarity around what is considered to be questioning time and procedural time. Reading the annual report, that was certainly an issue that came up for me when I read it. That is a lot of questioning time. But how long were people actually being held and questioned? I think that is a different amount of time, obviously, with the prescribed breaks and things like that. That information would be useful, I believe, if it was included in the annual report as well.

Mr KERR—Can you identify and perhaps tender the report that you referred to? I did not quite get the name of it.

Ms Pettitt—It is the Advisory Council of Jurists report to the Asia Pacific Forum of National Human Rights Institutions. It is on the web. It makes very explicit recommendations with regard to these powers particularly. It concentrates on this. There is a whole section on Australian counter-terrorism practices. We believe that the recommendations should be seriously considered.

ACTING CHAIR—Our time has concluded. I did mention earlier fears that are perceived or actual. I notice that, in your opening statement, you expressed some fears about the future of this committee. I think we could give you an undertaking that the fundamental structure and role of this committee is unlikely to change in the foreseeable future. I hope that puts your mind at rest and you can sleep better! Thank you very much for appearing before us today. You presented a different perspective and we need to hear as many different viewpoints as possible. Thank you for your contribution to the inquiry.

Proceedings suspended from 12.33 pm to 1.33 pm

ROUDE, Mr Ali, Deputy Chairman, Islamic Council of New South Wales

ACTING CHAIR—Welcome, Mr Roude. I invite you to make an introductory statement, after which we will move on to questions.

Mr Roude—I would like to thank the parliamentary joint committee on ASIO for the opportunity to participate in the review of the ASIO Act. Let me give you some points in relation to the antiterror laws and their impact on the Muslim community. There is a perception that laws are being used against the Muslim community. The *Isma* report shows there is a perception that laws are 100 per cent directed at Muslims. Where is that perception from? In Australia, all of the organisations that have been proscribed as terrorist organisations have some link to the Islamic faith. This is in stark contrast to the situation in the United States, where only 22 out of the 37 proscribed organisations are connected to Muslims.

In view of the wide range of offences associated with terrorist organisations, we submit that most, if not all, of ASIO's investigations will involve members of the Muslim community. This is further confirmed by regular contact with members of the Muslim community. In our contacts we have heard many accounts of members of the Muslim community being approached by ASIO officers for questioning. Dennis Richardson himself in his appearance before the committee acknowledged that this was the perception.

Regarding the detention and questioning powers, ASIO can detain someone for up to seven days and can question them for up to 48 hours under this act when they have a warrant issued against them. They do not even have to suspect that the person was involved in a crime. By comparison, the police can only detain you for 12 hours before charging you with an offence—yet you can be detained for 24 hours for terrorism offences. It is personally psychologically damaging and can lead to emotional scars for a long time for someone who may not even be suspected of having been involved in a crime.

As for the power to issue a warrant, it is used as a threat to get cooperation from Muslims. In other words, someone is told to have a cup of coffee with ASIO officers and in some cases when they advise the ASIO officers that they would prefer not to answer their questions or they say that they do not know, they are often told that the law authorises the issuing of warrants under section 34D of the act and this would compel them to cooperate. These statements are sometimes accompanied by further explanation, in the form of a veiled threat, that under a warrant the person's passport would be confiscated, section 34JBA. Thus, any answers count as cooperation under duress and the use of the law in such a manner should not be allowed.

As for the secrecy provisions under the act, a person detained under an ASIO warrant is not allowed to talk about it to anyone nor are they allowed to disclose any operational information within a two-year period. They cannot even tell their spouse or their employer. If they do so within a two-year period then they are liable to five years in prison. The problems with the secrecy provisions are, firstly, it is extremely impractical for a person to disappear for up to a week and not be able to tell anyone where he or she was and still maintain normal social or working relationships. Secondly, in addition, we are most concerned that these secrecy provisions will hamper the work that the Islamic Council and other Muslim welfare

organisations are able to provide. It is our mission to assist members of the community in times of uncertainty or instability such as would be caused by detention under the act and to provide support to them and their family members. How can we possibly provide assistance to our members when they are prohibited from approaching our organisation or anyone for help, counselling or other assistance?

Thirdly, we submit that the people who have been questioned by ASIO or the police, whether or not under an ASIO Act warrant, are more fearful of being involved in any social activity. As a result they are more fearful for the safety of their children, discouraging them from engaging in social activities or anything that can be seen as political. This is an alarming phenomenon which we have felt helpless to improve since the secrecy provisions effectively discourage these people to openly discuss their experience.

If ASIO applies for a warrant, a person's passport is taken away immediately. We submit that this is an extremely broad power that may be invoked by ASIO to prevent travel and may be based on very thin evidence. In addition, as discussed earlier, we are concerned that this provision will be used specifically as a means of coercing members of the community to cooperate when no warrant has been issued for their questioning or detention. So the antiterror laws directly affect not only individuals but the community. Our concern is that there is a close impact on the liberty and rights of individuals in the community, as a result of the questioning powers.

As I said earlier, organisations such as the Islamic councils have the responsibility to secure, advocate and support the already disadvantaged community which is suffering an increased level of race and religious vilification resulting from local and global events. Giving ASIO greater authority to detain people means that the whole community will have to pay the price for crimes that they have not committed. Detaining people under these laws will further compound and increase the already negative and hostile perception towards Muslims, which we believe will be counterproductive and promote greater hatred and disharmony within Australian society. The Australian Muslim community need to feel protected and involved within the fabric of Australian society. The current ASIO laws and any proposed increase in powers will only act to reinforce anti-Muslim sentiments that are not in the best interests of a harmonious society. We fear that this will create a backlash against the community which will place organisations like the Islamic Council of New South Wales to deal with the continued social ramifications which we do not always have the resources to deal with.

Australian Muslims are eager to get on with the business of living and participating like a worthwhile citizen and having a sense of normalcy. We are now seeking the right to live in freedom from fear, which Australian Muslims feel at the moment. We have a diverse Muslim community who came to Australia seeking a new life based on security, safety, freedom and the rights enshrined in the principle of democracy. We feel every individual human being has the right to live safely and protected. The laws of the country in which we live must ensure that the new laws do not act to further curtail and diminish individual rights and freedom of speech that we have come to value as a significant principle. Australian Muslims will stand firm against any security threats that may be directed at its nation and its people. However, we believe great caution and wisdom need to be applied to ensure that any laws do not undermine basic human rights and further reinforce hatred against Australian Muslims.

The impact of these acts will only be to further marginalise and alienate the Australian Muslim community and promote the feeling that the Muslim community is being targeted. We are concerned that the young people in particular are at risk and that it further reinforces the 'them and us' idea, which we believe is very unhealthy. Thank you for listening. May I present you with a copy of our annual report, which gives you some background information about our activities.

ACTING CHAIR—Thank you. You have raised the issue of fear amongst members of your community in relation to the current legislation. Since the legislation has been enacted there have been just eight warrants issued for questioning and no warrants issued for detention, which would suggest that the laws that have been enacted have only been used as a last resort. Is there any other way that either the agency itself—and I know that Mr Richardson has spoken to some members of the Muslim community in Australia—or we can allay their fears in the knowledge that this legislation has only been used rarely and as a matter of last resort?

Mr Roude—At the moment it is used rarely, but we do not know how it will be used in the future. We hope that the situation will improve. Of course, we are affected somewhat by whatever happens globally, overseas. It is always the fact that the Muslim community have to stand up and respond to global issues. It depends on whether, globally, the situation gets better or worse. Australia will respond and the Australian Muslim community will have to justify their existence somehow—as you can see, we are always being asked questions about things that are occurring overseas. We appreciate that ASIO has a role to play to protect Australia and the citizens of Australia. We believe that ASIO's existence is important to protect citizens and ensure that any threat is identified before it occurs. We live in a democracy and we enjoy living in a democracy. We enjoy freedom. Australia is seen in a good light abroad. Basic human rights are always regarded as part of this important principle.

If you compare some of these acts to those in Third World countries or some countries in the Middle East, you will find that we are no different from the rest. We want to feel proud to be Australian and belong to this land. We want to live in a country where we have rights like any other people and where we are seen in a good light as Australian citizens, not always targeted and seen as possible threats to Australian security. This is the feeling at the moment. We are seen as possible terrorists. If you talk to members of the community, that feeling exists. We have to allay the fears somewhat.

ACTING CHAIR—Surely the fears could be somewhat allayed by the very fact that there have only been eight warrants issued for questioning and none for detention? We would hope to get to the stage where there are no warrants issued. That would mean that we do feel totally secure about any events that might be taking place in Australia. But I am just not quite sure that, in your role as part of the Islamic Council, you cannot convey to your community that, in fact, this is a piece of legislation that is rarely used. The questioning powers have been used eight times. The detention powers have never been used.

The other argument, of course, is that, if it is never used, it is not necessary anyway. In fact, there are two arguments or schools of thought. One school of thought is that it is in place and has never been used because it is only a last resort. The other school of thought is that, because it has never been used, it is not required. I would have thought that it is partly the role of governments, agencies and your council to allay the fears of your community about this rarely used instrument.

Mr Roude—We are happy to do that. We have the means, we have access to the community, we have the radio—we will certainly disseminate that information. But before the introduction of the ASIO antiterrorist laws ASIO had access to members of the community. The community was accessible to ASIO, happy to talk to members of ASIO. At present, with these laws in place, people would be terrified. They would be questioning ASIO officers' approach to them. I recall I once held a meeting and I was surprised that they did not come and talk to me, because I know that when Rushdie came to Australia some years ago they were active and they spoke to other members of the community.

We say, 'Look, they have a role to play.' We understand their position and we have nothing to hide. They are welcome to talk at any time about any issue, and we are open with them. But you will agree with me that having these laws in place you would be doubtful, you would be a bit scared, about talking to ASIO. I gave an example earlier of how ASIO could move a bit further and say, 'Look, we're not satisfied with your explanation. We can go further and get this done to force you to explain further.' It is possible. It is logical. It is commonsense. I do not want to force you to agree with me, but it makes sense.

ACTING CHAIR—I probably won't!

Senator SANDY MACDONALD—This question is perhaps a little unfair, Mr Roude, but how do you think the terrorist threat is understood by the Islamic community? Do you think that, within the Islamic population, there is a greater or a lesser appreciation of the terrorist threat, compared to the rest of the community? Is there a shared feeling of threat, do you think?

Mr Roude—A shared feeling?

Senator SANDY MACDONALD—Is there a feeling of threat within the Islamic community that is similar to that of the rest of the Australian population?

Mr Roude—The point I am making is that at the moment no-one is in a better position than us to reflect what the community is feeling. The community is made up of different ethnic backgrounds. Since the introduction of these laws, we have noticed a sense of fear. We have noticed that, for example, a person who once claimed to be a proud Australian of Muslim faith has started to ask questions like: 'How am I seen? Am I part of that community?' Particularly when you listen to talkback radio, you feel that you are in a state of war, the way you are criticised, the way you are condemned and the way you are seen by not only people who phone radio announcers but the announcers themselves, who inflame the situation. That puts a great burden on us as an organisation.

Senator SANDY MACDONALD—The question, though, is: are the detention and questioning powers the cause of this anxiety or has this anxiety been raised by other aspects of world events?

Mr Roude—It reinforces that feeling of threat.

Senator SANDY MACDONALD—Do you think that the questioning and detention powers have in any way led to a greater desire by certain Muslim groups to be involved in terrorist organisations, or do you think they have helped to dissuade them from that?

Mr Roude—It is a difficult question. I personally feel that, if you are coming to Australia to live, bring up a family, be happy and make a contribution, looking at the question of terrorism or dealing with any organisation that is seen as a threat to Australian security is like bringing a problem to yourself when you are running away from problems. You want to live happily, settle successfully, give your kids a good education and be proud of them. There are of course individual cases where people act in a funny way. We have seen it not only amongst Muslims but also amongst other faiths as well. We cannot control that. I am taking about the community as a whole. Religious leaders have that strong attachment. They have loyalty. We have seen the recent case of the involvement of Sheikh Taj al-Din al-Hilali, who travelled to Iraq to help get Douglas Wood released. That sent a strong message of how we feel. If Australians are affected or hurt, you will find that there is automatically action by Australian Muslims.

We played a very important role during the Olympic bid, for example, when the International Olympic Committee members came to Australia to inspect the sites, because China was competing. There were four our five Muslim committee members. We had functions, dinners and invited them to the mosques. We did our job. We forced them to swear on the Koran that they would vote for Australia. When they met the government they said, 'We're not supposed to say who we will be voting for, but this Muslim community left us with no choice but to put our hands on the Koran.' Australia won by two votes. We all contributed. I am not claiming that all the credit goes to us, but it shows you how Australian Muslims react to anything Australian. There is a sense of pride. Whether it is in sport or whether it is someone hurt overseas, there is that love. Introducing laws of this nature really backfires. It makes people question whether they are seen as part and parcel of this society.

Mr KERR—I ask you to examine two of the things that you have talked to us about. One is the automatic confiscation of passports. Are you suggesting that, when people from the community are approached by ASIO officers, this is used as some kind of threat to induce their cooperation in ways which they would not provide?

Mr Roude—It is a possibility, yes.

Senator ROBERT RAY—ASIO can apply to have the passports suspended without reference to this legislation. The only way of appeal is to the AAT. Under this legislation, it is hardly a threat because the passport has to be restored within 28 days. There is an existing power that is far more draconian than what is in this legislation. That is why I cannot understand that point.

Mr Roude—That is why I cannot understand the whole introduction of the antiterrorism laws in the first place.

Senator ROBERT RAY—Let us go specifically to the passport issue.

ACTING CHAIR—You raised it.

Mr Roude—Yes.

Senator ROBERT RAY—At the moment, ASIO can apply to the Department of Foreign Affairs and Trade, and the foreign minister can have a passport suspended without reference to this legislation. Unless the AAT overturns it, it can be suspended for years on end whereas, under

this legislation, it is only for 28 days from the time of the warrant, as I understand it. Every day of the week, courts are issuing orders to take in passports, usually through some businessman or others trying to leave town. It is just one point.

Mr Roude—Fair enough—I take that point. But I was always of the belief that the authorities had the power, before the introduction and passage of the antiterrorism laws, to deal with any issue if they had evidence or information that caused concern that an individual or an organisation was involved in any activities that would create disharmony, violence, terror or whatever. That is my personal view.

Senator ROBERT RAY—With this one exception: if the investigation is through the Criminal Code—whether it is conducted by the police or another body—people have a right to silence. The crucial part of this legislation, and the toughest part, I would have to admit to you, is to take away that right to silence if other people could become victims of terrorism. On the other hand, you cannot incriminate yourself, which is good, but that is where it is different. You say the existing array of powers would have been sufficient; I do not think they cover this one area. By all means, dispute that, but I think that is one of the problems.

Mr Roude—As long as the person is given the opportunity to defend himself or herself. There are other issues, which we will deal with later on as part of looking more closely at the act. But, to the best of our ability, we are reflecting community feeling. I appreciate your question as to what needs to be done to allay the fear in the community and the observation that since the introduction of that act there have been only eight cases where there was no warrant issued.

ACTING CHAIR—I noticed that in your report there was an interview with the federal commissioner of police at, I think, the Voice of Islam radio studio. Is that not a vehicle for you to allay some of the fears within the community by getting Dennis Richardson, government or anybody to come and talk directly to your people?

Mr Roude—To specifically respond to your question as to the allaying of fears, the presence of the police commissioner, Mr Mick Keelty, at the radio station did help somewhat. He is an outstanding public servant. I think he deserves an award for opening the door for the Muslim community to educate Federal Police officers about Islam. That was a very positive step. While the pressure is on us to do something, the authorities also have some responsibility to allay the fear, and that is exactly what Mick Keelty did. He is accessible. He is saying, 'I have a role to play as the police commissioner,' and we are all behind him. We want to feel we are in a safe place, and his role is to make sure that this place is safe.

ACTING CHAIR—I am sure that if you had invited Dennis Richardson he would have done exactly the same thing too.

Mr Roude—But he has gone to New York.

ACTING CHAIR—You may wish to invite his successor.

Mr Roude—We will ask his successor, certainly.

ACTING CHAIR—If you are talking about allaying fears, this approach would seem to be a very good vehicle, because if you have—

Mr Roude—But you can see our efforts in this regard?

ACTING CHAIR—Yes, I can; I appreciate your efforts.

Mr Roude—He invited us to address the executive in Canberra. He also invited us to address all the staff through a video. My sister Nada gave a talk, which the staff found very useful, and that is what is needed. With our lack of resources, of course, we do not have any more energy—we have run out.

Mr KERR—I am interested to draw out this question of how fear is generated. I think it was the acting chair who said earlier that a justified fear and an unjustified fear are the same.

ACTING CHAIR—Yes—perceived or actual fear.

Mr KERR—I think Mr Roude is saying that an accidental by-product of the passage of this act has been heightened fear in the communities he speaks for. From the point of view of reviewing this legislation, when you refer to some of the fears that have been brought to you, is there any sense that any of the ASIO officers and the like—the AFP; you have spoken of the AFP—have been doing anything that you really would not have expected them to do anyway? You mentioned that before this act was passed ASIO operatives would from time to time seek out members of communities, talk to them and seek their cooperation. You have said that now there is the sense that hanging over this is the possibility that people might be caught up in a formal questioning regime or a detention. Is there any suggestion that this is being used deliberately as a threat? Is it coming back to you that in some way the community is being subjected to officers who are acting improperly in pursuing their inquiries?

Mr Roude—Some time ago, approaches by members of the security forces were seen as being a bit rough. Issues that were raised with us were conveyed to the commissioner, Mick Keelty. Following our presentation to the Australian Federal Police, there has been a significant improvement in their approach. With ASIO, we have not done that. I do not know whether it is out of fear or whether we felt that we might not be able to access them. I do not know what it is. I hope it will be the same as with the Federal Police. We noticed the difference after talking to them. It is possible that if we talked to the senior ASIO staff it might change things positively and allay the fear, hopefully.

Mr KERR—From this side of the table we have generally been taking comfort from the fact that there have been only eight instances where these powers have been used. We are reassured that, in the main, ASIO, if it has some legitimate area of inquiry, would normally proceed by asking questions, seeking cooperation and expecting cooperation from members of your community—as it would expect that cooperation from members of any community. It would only be in rare instances where these powers would be required. You have turned this around a little by saying that the use of informal questioning has increased or has become more intimidatory as a result of this legislation. People feel more intimidated.

Mr Roude—They feel ASIO have more power.

Mr KERR—They do; they are meant to have more power under the legislation.

Mr Roude—We understand that. The question is whether that power can be misused and applied in order to force a person to provide information.

Mr KERR—We know that, before these powers existed, ASIO would routinely have conversations with members of your community—as they would with whichever other communities—seeking cooperation and trying to fill the gaps and find out things necessary to protect Australia. Then the legislation comes in. I would not be concerned if ASIO continued to do exactly as it used to in the past. What I would be concerned about is if they conducted themselves in ways which would otherwise be thought to be improper—in other words, if they leant on people, if they intimidated people, if they said, 'You must undertake this voluntary process'—for days or hours—or if they required people to do things that were unreasonable in so-called voluntary cooperation. If that were happening, I would be worried. I am trying to tease out whether those are the sorts of examples that you are referring to or whether people generally feel a little bit more worried because ASIO has these additional powers, which we have deliberately given them.

Mr Roude—That is the case. They feel that ASIO has more powers. ASIO is aware that there will be a review. It is possible that the style of questioning may not be as intimidating, despite the power they have. But who knows? No-one can give a guarantee that an officer who lacks education and knowledge and has personal negative feelings about this community will not exercise his power to intimidate people. That is a possibility. That could happen. We have to ensure that there is a system in place that will not be misused.

Mr KERR—I understand that. You, presumably, will be the vehicle for any case studies—because people can come forward. There is no legal impediment if you are being the subject of a voluntary questioning.

Mr Roude—But you cannot now.

Mr KERR—Yes, you can.

Senator ROBERT RAY—What you are implying is that ASIO may use the threat of these powers to voluntarily interview people. If they do not use the powers, you may protest, you may publicise and you may take it to the Inspector-General for complaint.

Mr Roude—If they have not used them.

Senator ROBERT RAY—That is right. If the potential abuse of power is that they may threaten to use these powers unless you cooperate on a voluntary basis, you can take that to the inspector-general. You are not inhibited from public comment on it et cetera.

Mr Roude—That is fine.

Senator ROBERT RAY—And if there is ever an example that you can bring to this committee where you believe that ASIO has intimidated people by threatening to use the

powers—and I say threatening rather than advising—then we will take action. But, until there is a concrete case, we cannot.

Mr Roude—Fair enough.

Mr BYRNE—On page 2 of your submission you say:

> ... we have heard many accounts of members of the Muslim community being approached by ASIO officers for questioning. Many of these people do not disclose any details, but our general observation is that they are confused or nervous about the prospect of being questioned by 'officials', as they do not understand what is involved.

Subsequent to this legislation being introduced, has there been more questioning by ASIO officials of your community or not?

Mr Roude—The questioning is an ongoing thing. We do not have a case we can present where we can say that ASIO staff misused their power. But this is an ongoing activity. We feel that the introduction of these laws has created a sense of fear. Although at the moment there have been eight cases where no warrant has been issued, we feel that it is an important point to raise when we talk on the radio. We are saying that, in the future, there is a possibility that it can be used in a negative way.

Mr BYRNE—How many people from the Islamic community, in your experience, have been questioned or approached by ASIO officers over the past 12 months?

Senator ROBERT RAY—Outside of this process.

Mr BYRNE—Yes—just in a general sense.

Mr Roude—We have had it conveyed to us through a third party. People were even concerned to talk to us directly. Our friends probably had more direct contact with these people.

Mr BYRNE—Would you have the general number?

Mr Roude—I cannot tell you. But I am certain that there has been questioning and contact with members of the community. I cannot tell you the number.

Mr BYRNE—Just in terms of your experience, when ASIO officers approach someone to speak to them about any particular matter, do they have an interpreter with them if they believe that that person—

Mr Roude—I am not aware of any bringing an interpreter. In none of the cases that have been brought to my attention am I aware that an interpreter was brought in. It could be the case, but I am not aware of it.

Mr BYRNE—Do you believe that that could potentially create some confusion? If you have an ASIO officer rocks up at the door and wants to have a conversation, then people could feel they are being harassed without fully understanding why that ASIO officer has approached them.

Mr Roude—If the ASIO officer is genuinely concerned about a case and they feel that this person in question may have some information, it is advisable that they bring an interpreter to help in the process. Whether they are doing that, I am not sure.

Mr BYRNE—You could take this on notice, if that is okay, Chair. From your experience, could you just let us know how many of the people who have approached you about an encounter with an ASIO officer tell you the officer had an interpreter with them? That would be helpful.

Mr Roude—I can find that out, maybe. But I am not aware of any such cases.

Mr BYRNE—I have a question about the questioning period. During the questioning period, if you have some difficulties with English—

Mr Roude—May I interrupt you? It is possible that some ASIO officers speak the Arabic language. That is an advantage. I do not know how many, but I recall when I met that lady from ASIO some years ago that she spoke Arabic very well.

Mr BYRNE—That is a very good point.

ACTING CHAIR—I promise you none of us do!

Mr BYRNE—Just with respect to the questioning period: where someone has difficulty with English the questioning period can be extended up to 48 hours. Do you have a particular view about that? Normally it is 24 hours but it can be extended up to 48 hours if you need an interpreter.

Mr Roude—I will give an example. If it could be reduced. that would be good. That person goes home. They cannot tell their wife what occurred. If they have a jealous wife, she will probably accuse them of being with another woman and they have another problem. At the least, if ASIO believes that this person is important to them gaining some information that will lead them to something, we say that it is important—if a warrant is issued—to inform the family that there is an ASIO or Federal Police process in place. This way, you are creating an environment of ease.

Mr BYRNE—Sorry to interrupt you: if there were a process where, for example, you could explain in an abridged way to an employer what was happening, would that allay some of the suspicion? There is a suspicion within the community that you can be taken off the street and held for questioning. If there were an understanding that, if you had a questioning warrant served on you, for example, you could explain in some way to your employer and to your family what was happening without breaching national security, would that go some way to allaying some of the concern within the community?

Mr Roude—ASIO is in the best position to say: 'We have some information. It came to us, and we believe that this person may have, because of his links to whatever, some information that will lead us further.' We are saying that, if that is the case, his parents, his wife, his employer need to know where that person is.

Mr BYRNE—So if there were more information on the warrant, if there were a better explanation of what was happening, would that go some way to alleviating some of the concern within the Muslim community at the moment about these particular powers?

Mr Roude—It would help. At the same time, that person needs someone to assist him—a lawyer, perhaps, or someone who can give him some advice. ASIO has all the facilities, lawyers or whatever, but that individual needs to have someone who understands the system to give him some advice during questioning.

ACTING CHAIR—Mr Roude, one of the great unknowns in what we have discussed today is that we have no idea whether or not the questioning of your community by ASIO as they go about the normal course of their duties, outside of the questioning by warrant, would have increased or decreased with or without this legislation. It is very difficult to know whether or not the introduction of this legislation has increased any activity at all amongst your community.

Mr KERR—I think we would all say that if there are cases where you believe that there has been any impropriety or abuse—

Mr Roude—We will document them.

Mr KERR—or that this legislation has been used to impose a regime of discomfort or that something is done in an improper way, the Inspector-General of Intelligence and Security can receive those complaints.

ACTING CHAIR—We would want to know as well.

Mr Roude—We will look into that very seriously. I said that people do come for help. Some probably feel fear about coming forward. That fear really puts them in a corner, and they do not want to have any links with even their own organisations. They come from a place where the intelligence service is very frightening, and to meet someone from ASIO brings back dramatic memories.

ACTING CHAIR—Mr Roude, thank you very much for appearing before the committee today. Your evidence is very important to us. We wish you all the best in your community.

Mr Roude—Thank you very much.

[2.22 pm]

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

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

ACTING CHAIR—Welcome. I invite you to make an opening statement, and then we will proceed to questions.

Dr Kadous—We would like to thank the joint parliamentary committee for giving us the opportunity to appear today. The Australians Muslim Civil Rights Advocacy network is dedicated to protecting the civil rights of all Australians and presenting an Islamic voice on civil rights issues. Participating in the review process of legislation such as this is a privilege which we deeply appreciate. We have many concerns with the powers in division 3 of part III, which are covered in the submission made by AMCRAN, amongst others. However, in the small amount of time allotted, we would like to focus on three areas that we feel are most important. These are: the potential for the misuse of the legislation, the severe problems surrounding the secrecy provisions and the impact of the powers on the Muslim community.

It is important in examining legislation such as this that one considers not only how it has been used but how it could be used. Even if one can show that, under the management of the capable and eloquent Mr Richardson, ASIO used its powers prudently it is no guarantee that they will be used prudently in future—certainly when the sunset clause has passed. History abounds in this lesson, whether it be in the manner that Hitler used the enabling law to take control of the Reichstag or the way that Mahathir used the Internal Security Act, originally designed to combat communism in the sixties, to imprison his own deputy. I do not mean this as a comparison with the antiterrorism laws we are examining today. I merely mean to point out that preventing laws that are susceptible to misuse, such as this one, is an important defence of democracy. This is why we would have grave concerns if these powers were to become a permanent part of Australia's legal and political landscape, as the member for Denison has put it. It is therefore AMCRAN's recommendation that ideally division 3 of part III should be allowed to lapse or at the very least it should continue to have a sunset clause applied to it.

Let me quickly outline some of the potential for misuse of the legislation. One of the major flaws is that the exercise of detention powers is based on the terrorist offences defined in the Criminal Code. The ASIO Act allows for the issuing of a warrant if it will substantially assist the collection of intelligence that is important in relation to a terrorism offence. In our submission, we have argued that the definition of terrorist offences in the code is overly broad and that it is not limited to what an average person on the street would identify as a terrorism offence. The net result is that using these offences as a basis for questioning and detention powers grants a broad and discretionary power to ASIO.

ASIO, according to its own charter, was not institutionally designed with the appropriate safeguards with respect to reporting and public accountability in place for detaining people.

According to the ASIO Act, ASIO's purpose is intelligence gathering and it specifically excludes the carrying out of or the enforcing of measures for security within an authority of the Commonwealth. This was a deliberate design decision in the founding of ASIO to prevent the formation of a secretive enforcement organisation. ASIO's ability to detain a person because they may—and I emphasise the word 'may' here; not 'likely', 'probably' or 'definitely'—do something in the future like destroy evidence or mention it to someone else crosses the line from an issue related to security intelligence gathering to one related to enforcement.

It is ironic that the institutions that were wisely and judiciously set up to enforce measures—namely, the state and federal police forces—can only detain a suspect for up to 24 hours. Therefore, AMCRAN recommends that, if the powers are not allowed to lapse, ASIO should not have the power to detain someone beyond the need for questioning and that a period of detention be limited to that of the AFP—namely, 24 hours.

Secondly, I would like to look at the issues surrounding the secrecy provisions. There are a number of issues here. Firstly, the definition of 'operational information' is very broad. This is compounded by the strict liability in such cases, creating a kind of double whammy for questionees and detainees. Secondly, the effect of the provision is likely to throw someone's life in turmoil. I believe that Mr Ali Roude has made a convincing case in that regard. What happens, for example, with respect to employment? We must remember at this point that the people ASIO can detain may have simply been in the wrong place at the wrong time and may not actually have been involved in a terrorist offence at all. Losing a week of your time is inconvenience enough but not to be able to tell others what happened to you or risk jail is a recipe for serious interpersonal, social and career problems.

Furthermore, the secrecy is not symmetrical. While the person questioned may be liable to jail, the same constraints do not apply to the Attorney-General, who may authorise disclosure under section 34VAA(5)(h). So he can authorise himself to disclose such information. The subject of the warrant would not even have the right of reply even if the Attorney-General were to disclose such information publicly.

One perhaps unexpected effect of the secrecy provisions is that it has cast a shadow over these very proceedings conducted by the committee here today. The review is being conducted approximately 23 months after the secrecy provisions received royal assent. Consequently, there is a legal question as to whether anyone detained or questioned could even make a submission to this committee. Can an inquiry whose purpose is to evaluate, as the terms of reference specify, its 'operation, effectiveness and implications' offer a comprehensive report when it is not even clear if those directly subject to the powers can even make submissions?

Perhaps in part due to our submission, the committee helpfully sought an opinion by Brett Walker SC regarding whether or not parliamentary privilege would extend to such cases. His opinion was in the positive; however, it was released almost a month after the deadline for submissions closed. Even if time had allowed, such people would have had to have made submissions directly to the committee without the assistance of community organisations such as ourselves. This is why AMCRAN recommends firstly that the secrecy provisions should ideally be removed altogether. If not, our recommendation is for the prescribed authority to make an assessment on a case by case basis for nondisclosure. In addition, the period of nondisclosure should be limited to the period of the warrant and not beyond it unless assessed by the prescribed

authority as absolutely necessary and still have a maximum imposable ban for a period of two years, and the definition of 'operational information' should be clarified.

There should also be a general condition of breaking the seal of secrecy. For example, if the Attorney-General breaks the seal on a particular person's detention the detainee should have a right of reply. Finally, the confusion around people detained or questioned making submissions bolsters the case once again for a sunset clause to be added. As part of this process it should be made clear that parliamentary privilege extends to such individuals and that submissions in languages other than English are welcome.

Thirdly and finally, I would like to focus on the term of reference, which has not been paid much attention by some of the previous speakers, to do with the implications of the powers. There is little doubt that the Muslim community's perception is that the legislation is targeted at them. I believe Mr Roude has already made a case for that, but even Mr Richardson himself pointed to that in earlier testimony. Furthermore, the Human Rights and Equal Opportunities Commission's *Isma* report, which surveyed 1,400 people, found that this was a common belief amongst Muslims. One person said in the report:

> There is a fear in the community that one day you will wake up and your husband will be taken away under the new ASIO laws.

In another survey they conducted in Adelaide, amongst young people, they found that three out of the nine people had been questioned by ASIO.

One might be tempted to argue that this was perhaps a Muslim community adopting a victim mentality. However, there seems to be some basis in fact, which I hope to outline. The issues relating to the proscribed terrorist organisations have already been covered, but even this committee, in the listing of the Palestinian Islamic Jihad, argued that perhaps a considered response would be more desirable in future. The parliamentary research note noted that the listing of PIJ was 'curious'. This means that certain parts of the legislation, such as the association offence, apply solely to Muslims at the current time. Further, there is evidence that quite dramatic mistakes can happen in the application of these laws. I am going to give an example here from the AFP, simply because the matters related to ASIO generally are not as widely known and open as in the other case. In the Tayba incident described in our submission, the AFP raided someone's home at midnight at gunpoint for supposedly stalking the AFP's officers. It would appear that the AFP succumbed to certain stereotypes of Muslims in this particular case and that they had gone a little bit over the top. The details of this are in our submission. When it came to court they dropped all charges and paid his legal fees. This shows that it is at least a possibility that stereotypes can affect judgments made in security organisations.

Finally, I do want to address some of the issues raised during the conversations relating to the previous witness regarding disturbing occurrences that we have observed. The argument has been made extensively—it is in the *Hansard*—that only eight people have been questioned. But the reality is that these powers create a problematic implication. It suggests that some of these powers are being used as coercive measures in the community, particularly in light of the provision that allows a person's passport to be surrendered, notwithstanding the IAAT issues. We have directly heard of two incidents of coercion and, while AMCRAN has good community

contacts, for obvious reasons people do not always come forward and so this would be more likely to be the tip of the iceberg. The individuals involved did not grant us permission to discuss what happened publicly, precisely because they are overly—perhaps irrationally—fearful of ASIO. Therefore, I will present two hypothetical situations based in the incidents but not directly related to them.

Person A is an expatriate Australian. He has come for a short visit back to Australia and, upon arrival, ASIO tell him that they would like to meet with him but, as his time is limited, he says he would prefer not to. ASIO makes it clear that they can take certain steps to ensure that he does answer their questions. Person A consults a lawyer, who explains that under a questioning warrant his passport would be taken away and he could be left stranded in Australia.

Person B is contacted by ASIO. They ask her some questions. The first few she answers but, as the questions go on, they become offensive to her. They ask her if she knows anyone who is a member of a terrorist organisation. They ask her if members of her family belong to terrorist organisations. Resenting the accusations, she becomes angry and refuses to answer. ASIO tell her that they can take steps to force her to answer. She, in anger, says, 'Do your best.' She is surprised to find that when she goes to travel her passport has been revoked.

These are cases we know of, and they are people who have come forward to us. These are not people who are likely to make submissions to the inspector-general, because they are already fearful and many of them are migrants who do not understand that there are safeguards in the system. We have even advised such individuals to approach community legal centres but they have been cautious to do so, even with the understanding that CLCs are quite separate from the government. If this is the case, then the real impact of these powers is yet to fully register and it casts further doubt on whether these laws should be permanently part of the statute books. We would argue that further sunset clauses are required to investigate this.

These stories propagate through the Muslim community. AMCRAN has, ironically, on occasion been told things like, 'ASIO can pin anything on you,' and we have found ourselves in the unusual situation of defending ASIO and explaining the safeguards introduced by, amongst other things, this very committee. Furthermore, we have heard extensive stories of self-censorship, sons and daughters being advised not to be involved in political activities and arguments resulting from people making submissions to inquiries such as this one.

When we have conducted community legal education workshops in places like Cringilla, near Wollongong, and Cabramatta, it is these detentioning and questioning powers which elicit the strongest response from the community. They cannot believe that an Australian government institution has these powers. For many of the migrants it is a reminder of the very things that they fled. These detention powers elicit the fear that this could happen to them. The people attending these education sessions are average Australian working-class Muslim families who are battling to make their way, just like other Australians. They are in no way involved in terrorism, but they are deeply troubled that there could be a mistake similar to the Tayba incident that could deprive them of their liberties.

In short, the questioning and detention powers and the discretionary nature of antiterrorism legislation have created a wedge between the Muslim community and law enforcement and security organisations. The Muslim community is at the forefront of efforts to weed out

terrorism, but this aspect of the legislation makes cooperation extremely difficult. Thank you very much for your time.

Senator ROBERT RAY—I should just address the point that you made about people involved in a questioning regime not being able to give evidence here. It is our view that they can. Parliamentary privilege covers them, although preferably it would be in camera evidence. I take your point that the Brett Walker opinion was published after the closing date, but do not think that would have stopped us from talking to anyone who approached us.

Dr Kadous—That is understood, but it does point to the difficulties surrounding the secrecy provisions. Certainly if we were in contact with someone who we thought could make a submission then we would encourage them to do so, but it is not like they are going to come up to us and violate the law.

Senator ROBERT RAY—Sure. You have used two examples—example A and example B—and I do not think they are the same. I think example A that you have just given us would be ASIO exceeding their power, using the legislation as leverage. It would be a complaint that the inspector-general would have upheld. In your example B, which concerned the lady who refused to continue to answer questions, that is precisely what this legislation is designed to do—not to threaten, but to then move to the next stage. So I do not think that the two examples are the same. That first one would be a very serious breach of what is intended here.

Dr Kadous—I understand that I have just taken an oath. I obviously would not make such statements unless I was sure that this was the case.

Senator ROBERT RAY—I am not going to the accuracy of your evidence; I am going to the interpretation of it. The first example in the evidence you have given would be a breach by ASIO of what they should be doing. But in the second one, if the circumstance is as you have described, it is perfectly right for ASIO to move to the next stage after the refusal at a voluntary level to answer questions. That is what it is designed for. Whether you like it or not, it is actually legal and proper.

Dr Kadous—I understand your claims, but this woman was just intimidated or felt intimidated. Now she might be detained for up to seven days because she felt a bit intimidated and lost her temper under questioning. That seems a bit disproportionate to me. One of the requirements under our international obligations is that there should be proportionality. Losing your temper and saying, 'Do your best,' does not seem to me to be an invitation to be detained for seven days, which it could lead to in this kind of context.

Senator ROBERT RAY—But we do know that no-one has been detained; that it is very much a reserve power; and that it can only be used, as I think you acknowledged, if a person is likely to abscond. You cannot detain someone to question them on terrorism per se. You can get a warrant to question them on terrorism, but the detention relates to absconding, destruction of evidence or—and this is the much harder one and the real reason for it—that they might tip someone else off. All of that evidence is run together and we have to disconnect it, I am afraid. That does not mean that you will still not oppose the detention. I have made the point before that the detention is a very tough measure.

There are a lot of Islamic members of the Australian community who have been detained for several years, several months or several weeks with no such protections that are in the ASIO Act. They are the victims of DIMIA. I always regard that as far more tragic. Here at least you know that, after a week, it is coming to an end and it can only be renewed if new evidence appears. Sorry—I am not trying to justify it. You talk about proportionality; so do I. I look overseas, and I see where people's rights are far better protected than here. They can be detained years at a time by going to other methods.

Dr Kadous—The answer to that, always, is two wrongs don't make a right. AMCRAN has objected in the past to the mandatory detention of refugees. With respect to the legislation, if your argument is that it is a measure of last resort, it does not seem that the legislation has been drafted in such a manner. For example, a person can be detained on the basis of any of the terrorist offences and there is no concept in the legislation of imminent threat. I am aware of the discussion that has preceded me, including Professor Williams and HREOC. They have suggested that it is a reasonable amendment that there be a requirement of imminent threat and not merely a terrorist offence, which could include something as minor as an association offence, for which the maximum penalty is a mere three years.

Senator ROBERT RAY—This is where our interpretation differs. You say 'detained'. I say they can be questioned on things relating to a terrorist event. They can only be detained on those other three grounds that I have indicated. If we run the arguments together and we do not disaggregate them, it makes the analysis harder. That is my point.

Dr Kadous—Sure. Even disentangling them, as you have suggested, the wording of the legislation is 'may'. It is not 'likely', it is not 'probable', it is not 'definitely'; it is that a person 'may' tip someone off. To detain someone simply because they may in future do something, or may in future commit a crime, that is unprecedented in our legislation generally. There may be other examples, but that, to say the least, is a little bit unusual—to detain someone on the basis of what they may do in the future.

Senator ROBERT RAY—You have made the point—I think very validly—that the inability to tell a partner or an employer could massively disadvantage the individual. Would you like to expand on that?

Dr Kadous—Sure. Even if ASIO were to visit an employer and say, 'We are from ASIO; we have questioned this guy,' do you really think that that person has much of a career in that place? The HREOC report has already pointed out examples of people calling up for a job and saying, 'My name is Mohammed,' and being told that the job is filled, but calling back five minutes later and saying their name is Michael and being told to come down for an interview. Being advised that ASIO is questioning someone is a disendorsement rather than an endorsement. So I am not sure that that particular measure helps.

It is likely to cause psychological issues. It is likely to cause relationship issues. Worse than that, the story will propagate through the community. Unfortunately, people's imaginations are more vivid than the reality of ASIO's actions. If someone comes up to you and you ask them, 'Where were you last week?' and they say, 'I can't tell you,' people are going to make up all kinds of stories in their heads that are even more exaggerated than the reality of what happened

with ASIO. So I think there is a potential for these secrecy provisions to backfire and to be counterproductive to the seeking of information relating to terrorism.

Senator ROBERT RAY—It is a real dilemma, as you say. You get released from the secrecy provisions and tell your boss, 'ASIO has detained me for a week.' It is not going to help your career, is it?

Dr Kadous—No.

Ms Chong—It is not really just a matter of being able to tell your employer what has happened to you in the last seven days, or however long you have been detained or questioned. I think there is also an issue of people being able to approach organisations like ourselves or other organisations under the umbrella of the Islamic Council of New South Wales to seek assistance and support such as counselling. Say someone was concerned that they were being fired. They may want to seek advice from a religious leader about certain issues, but the secrecy provisions prevent that as well.

Dr Kadous—Or, for example, to seek advice from a union about what they would do. They could not even do that under the secrecy provisions. But again, one of the things that concern us is particularly related to the Attorney-General's power to disclose by basically authorising himself to make a permitted disclosure. That is another injustice that exists within this legislation which seems at odds with what you are saying.

Senator ROBERT RAY—That was going to be my last intervention, but I would like to raise just one more issue, and I apologise to my colleagues. One of the possibilities—and it is only a possibility—that we are at least looking at is not that there be a secrecy rule but that ASIO via the prescribed authority could go back to the issuing authority and get a suppression order at that stage. In other words, the onus of proof would be reversed and be on ASIO. They would have to show the issuing authority—not the prescribed authority, and I think you would understand the difficulties there—and would have to go back to the Federal Court judge or magistrate and say, 'We need this information suppressed. It is bad luck for the employer and bad luck for the wife or husband. We can't help there.' But, in the normal course of events, you would be able to disclose that.

Dr Kadous—That sounds like a reasonable proposition, except for one issue—that is, there is no representation of the questionee or detainee before the issuing authority. If there were representation of the detainee or questionee before the issuing authority, that would be something worthy of consideration. As it stands now, you do not have natural justice. You have one person saying, 'We have to keep this secret,' and no-one on the other side saying, 'This is why you shouldn't keep it secret.'

Senator ROBERT RAY—I would have thought that, if events coming out of the prescribed authority—that is, the interview—were required to be suppressed and ASIO had to go back to the issuing authority, automatically a person's legal representation would also go to the same hearing with the issuing authority. I would have thought that was a very logical move and would close off what you see as a problem.

Dr Kadous—If that person had the powers that a lawyer would have in a court, rather than the curtailed powers that a lawyer has during questioning, that would be worth considering. It would be a worthwhile improvement on what we still see as flawed legislation.

ACTING CHAIR—We have raised the issue with you and other witnesses—and you have raised it yourself—that, under the provisions of this act, only eight questioning warrants have been issued and no detention warrants have been issued. But you are concerned about what might happen in the future. Would it not be fair to say that the past record of this committee, and the fact that we continually monitor what is happening, would give you some sense of security? You know that, if there was a sudden increase in the issuing of warrants for questioning or a sudden increase in the use of the detention power, this committee would in fact want to know what was the cause or the reasoning behind it. We get annual reports which tell us how many people have been questioned. I would have thought that perhaps you could put some faith in this committee, given the historical contribution of the committee, that we would follow that up. I do not know why you are so worried about what might happen in the future.

Dr Kadous—I understand where the committee is coming from, but, for starters, those reports come out every 12 months. By then, it might very well be too late to do anything because the problem has already occurred. We also appreciate the work done to add safeguards to the legislation by not just this committee but also the inspector-general. However, again, even the inspector-general's powers in some ways are limited in his ability to say, 'Wait a second here.' There are limits to what the inspector-general can do.

Ms Chong—I would like to add that one of our concerns is not only the future application of the powers but also how the powers have been used so far. Our submissions are different to the focus of other submissions or other parties because they are focused on how the laws have been used. You have rightly pointed out that questioning warrants have been issued only eight times but, as Waleed said in his opening statement, the implications of the powers are much wider in the informal questioning scenario.

ACTING CHAIR—The informal questioning could have taken place with or without this legislation, that is the point.

Dr Kadous—People being interviewed by ASIO now have a legislative gun pointed at their head. There might be some safety catches on that legislative gun, but it is still a legislative gun.

ACTING CHAIR—I am not sure that I agree with you there, but I will hand over to my colleagues.

Mr KERR—I understand the point but it is not a point that had come to the forefront of my mind when reflecting upon this. I have been focusing on—and I think all of us have been focusing on—the actual impact of the legislation. All of the members of the committee, if they believe that in a sense the community has become frightened that this has been a licence for inappropriate conduct under the cover of 'voluntary cooperation', would be concerned. But the case has not yet been made to us although you have mentioned two instances where you feel that this may have emerged. But if the legislation does go on it is something that needs to be borne in mind. It is obviously a concern. It was said by Mr Roude and by you so we cannot pretend that there is no concern. There are two other matters. One is strip searches. You mention strip

searches in your submission but you did not address it orally. To the best of my knowledge I do not think that the power has been used—I think that is the evidence we have had.

Dr Kadous—That is correct. It has not been used.

Mr KERR—But you still think this is a very important issue to clarify, do you?

Dr Kadous—I will briefly outline what we said in our submission and leave it at that. Strip searches do exist in normal police investigations and the usual purpose of strip searches is to take from someone items that could be used as weapons or to escape from imprisonment; however, in this legislation there is a special clause added for strip searches conducted by ASIO, which is that any matter related to intelligence that they retrieve could be retained by ASIO. Our concern is that that creates an incentive for ASIO to encourage strip searching on the off-chance. The idea is that usually you are only allowed to strip search someone if you have a reasonable belief that the person has an item that can be used to escape et cetera. But under these provisions, because there is no justification of the requirement for strip searches other than perhaps verbal permission by the issuing authority, as I recall, we fear that it may be to some extent abused as a fishing expedition to find perhaps interesting items that might be on a person and thus it creates a special incentive for ASIO officers to do strip searches. Given, as we mention, that certain offences apply solely to Muslims at the current time, strip searches are an extremely degrading and demeaning experience for everyone but particularly Muslims for whom it is a form of personal violation and likely to lead to psychological issues.

Mr BYRNE—I have a quick question on your hypothetical where you were saying there was a female questioned by ASIO. Were the ASIO officers conducting the questioning female?

Dr Kadous—How could we know? I was going to address this earlier with respect to Mr Kerr's question. If ASIO were using its interviews and actually making threats, how could we find out given that people are fearful of reporting to IGIS or even to CLCs and they may be prohibited from reporting to CLCs? How could we find out whether the questioning officers were female? There is a requirement that searches be conducted by the same gender but there is no such requirement for inquiries from officers.

Mr BYRNE—Are you encouraging that? Is that what you are asking for for females being questioned, or not?

Dr Kadous—That would be preferable but, again, we are tweaking at the edges here. There are issues of much greater concern to us than whether the person doing the questioning is male or female. It is an issue of concern but way down the list beneath all of the other much deeper concerns that we would have.

ACTING CHAIR—Thank you very much for appearing before us today. Your evidence before this committee is very helpful for our deliberations. We appreciate the time and we wish your organisation well.

[2.54 pm]

BANKS, Ms Robin L, Chief Executive Officer, Public Interest Advocacy Centre Ltd

STRATTON, Ms Jane, Policy Officer, Public Interest Advocacy Centre Ltd

ACTING CHAIR—We welcome you to this inquiry and invite you to make an opening statement which we will follow with questions.

Ms Banks—Thank you for the opportunity to speak to you as the committee reviewing division 3, part III of the ASIO Act. We certainly congratulate the committee on its work to date and acknowledge the important role that the committee plays in monitoring ASIO, ASIS and DSD.

As you are aware, the centre have made a comprehensive written submission. We do not intend to elaborate in any great detail on the points but we want to amplify several issues. Before I do that, I will briefly remind the committee of our fundamental position, which is that the compulsory questioning and detention powers ought to be repealed because they are extraordinary, unnecessary and disproportionate to counter the perceived or actual security threats to Australia. In the event that the committee's recommendation, and the parliamentary decision, is not to repeal the legislation, we certainly would urge the committee and the parliament to make amendments that will be coherent and consistent with the intended purpose of the law while maintaining protection of appropriate and core values of our parliamentary democracy.

Firstly, the notion that a new security environment exists has been used to counter or contradict fundamental human rights protections and the rule of law. In our view, measures to be implemented in response to any new security environment or potential threats to Australian society should be carefully tailored to recognise and reinforce the compatibility of international human rights with the protection and sustainability of society rather than seeing those as competing outcomes, as we think this legislation does. The appropriate form of regulation should be determined from the perspective of Australian constitutionalism; the human rights obligations which Australia has also voluntarily entered into as a part of an international process in the UN; the constraints on the exercise of governmental power that are found and reinforced by the rule of law; and the separation of powers between the executive, the parliament and the judiciary. The focus should therefore be on ensuring that any powers granted to the executive, in the form of ASIO, are subject to adequate and independent review by the other two arms of government, the parliament and the judiciary. Obviously this committee process is part of that, but we say that the process needs to go further. This means retaining a sunset provision that allows regular review of whether or not the powers continue to be necessary, quarterly reporting to parliament on the use of the powers and providing for independent judicial review in relation to the issuance and exercise of powers under the legislation.

Secondly, the other matter we want to focus on is our submission that the application of the powers should be narrowed in relation to the notion of terrorism; they should be limited to the prevention of imminent terrorist threats. To that end we reflected on what ASIO said in its

unclassified submission to the committee—that the need for the powers comes to the fore particularly where there is a threat of harm which is immediate and where other forms of intelligence collection have not been sufficient and are too slow. The other things that ASIO has pointed to are the circumstances where limited insight has been gained into terrorist activity and where other attempts by the groups have interfered with ASIO's attempts to identify who is involved or assess the extent of the threat where there is a reasonable suspicion of terrorist activity, but efforts to resolve it have been unsuccessful and there has been a lack of cooperation.

Those criteria articulated by ASIO are not reflected explicitly by sections 34C and 34D of the act, yet they are more consistent, in our view, with the purposes of the division—namely, to prevent an imminent terrorist attack. We argue that at a minimum the provisions need to be amended to reflect that imminence and to ensure that that is when the powers are called into play. There should also be more selective and careful definition of 'terrorism' and 'terrorist offences' used in this legislation than that which is provided in part 5.3 of the Criminal Code and which is currently relied on for this legislation. It would result in a more tailored and more proportionate legislative response to the legitimate ends of seeking to prevent terrorist attacks in Australia.

Finally, PIAC reject the assertion by ASIO that the distinction between 'suspect' and 'nonsuspect' is irrelevant. The distinction is key because it lies at the heart of the constitutionality of the detention regime, its compliance with human rights standards and, ultimately, whether or not ASIO is the correct body with which to vest such powers, which in our view are fundamentally policing powers and belong with the Federal Police. That is the extent of our opening statement. I am happy to take any questions the committee has.

ACTING CHAIR—I notice that you said in your opening statement that the provisions of the act are out of proportion to any perceived or real security threats to Australia. How do you draw that conclusion when the only people who really understand what some of our security threats are are the intelligence organisations themselves?

Ms Banks—In my view, the threats clearly exist. I do not think anybody can doubt that. As you say, the extent of them is unknown to many of us and probably to you as well. To undermine the protections that are so central to the rule of law, in our view, could only be justified if the threats were immediate and really were widespread. The rule of law has been a solid and effective protection mechanism to enable government to act appropriately in response to threats it faces for many decades—centuries even. In our view, while the threats we are currently facing may be of a different nature and may be harder to identify—certainly by us—that should not be allowed to undermine the effectiveness of using the rule of law as the mechanism to protect against threats.

ACTING CHAIR—You have expanded a bit. First you talked about immediate threats and now you are talking about immediate and widespread threats. Can you give us an example of what you think are immediate and widespread threats?

Ms Banks—I do not have a response to that.

ACTING CHAIR—You said it, not me.

Ms Banks—Yes, I did. You asked me what would be proportionate, but it seems to me that, unless a threat is going to affect a significant percentage or a significant aspect of our society, it would be an extreme response to take away the fundamental protections we have through the rule of law.

Ms Stratton—I think that the language that we have used in the submission and that we would like to use going forward is the concept of imminence. We note that ASIO uses the concept of immediate threat in its unclassified submission. We would think that immediate and/or imminent would be the threshold of threat—that is, where there is a material threat to property or to people in Australia that is identifiable. It is more than a whim; it is something that is identifiable.

ACTING CHAIR—Identifiable by whom?

Ms Stratton—ASIO is the organisation. I think that it is important to mark the normality of the bounds of what we are trying to say. Our first position is that these powers ought to be repealed but, in answering your questions, we are obviously working within the environment—

ACTING CHAIR—That is fair enough. I guess the follow-up question is: how do you know that there is not an immediate or imminent threat today?

Ms Stratton—The honest answer to that is that we do not.

ACTING CHAIR—I do not know.

Ms Banks—Perhaps you should.

Ms Stratton—That is what we are saying.

ACTING CHAIR—I am not too sure about that.

Ms Stratton—That is the position that we take. We deal with that in our submission in the public accountability and reporting requirements. We think that, if parliamentary scrutiny is to be meaningful, this parliamentary committee ought to be able to do more than merely request information of ASIO; it ought to be furnished as a matter of right with that type of information so that it can provide the supervisory jurisdiction that we think it ought to in a properly functioning separation of powers.

ACTING CHAIR—This committee does take some evidence in private, so there are some issues that we would necessarily not raise in public.

Ms Stratton—We acknowledge that in our submission.

Ms Banks—The fact that you identified that there may be threats that you are not aware of suggests that there is a process operating outside any scrutiny and without review, which is surely not the appropriate mechanism in a parliamentary democracy. While you may not know about it when it is an immediate threat, the need to be able to review it at a later stage is vital to ensure that the powers are being exercised appropriately. I may never know because I am not a

parliamentarian, but I would hope that any powers that are exercised by the executive are subject to parliamentary scrutiny. That is the purpose of our constitutional framework.

ACTING CHAIR—You talk about the definitions of 'terrorism' and 'terrorist acts' as being too broad. One of the other submissions today made a recommendation about it being an actual terrorist threat. How do we define 'terrorism'? What do you believe is an actual terrorist act? I am not sure why you think that 'terrorism' and 'terrorist acts' are too broad. Can you expand on that?

Ms Stratton—This raises the really difficult question of where to draw the line, but it is one that we think the committee should grapple with. This act, of course, borrows from the Criminal Code part 5.3 in its definition of 'terrorism'. In the way that these powers are triggered it talks about 'information that may be important to terrorist offences', so you get all those concepts of terrorist offences that are in the Criminal Code.

ACTING CHAIR—The exact words that were given to us this morning by the National Association of Community Legal Centres were:

... the role of ASIO should be limited to the prevention of actual terrorist activities ...

Ms Stratton—There are two points I would make. First of all, we are clear about the concept of 'imminence' or 'immediate threat'. That is the kind of threshold that we are trying to find a way of expressing through what is already defined as a terrorist offence. In our submission we use the concept of 'actual knowledge', or something that is more than recklessness, in terms of the mental element of the crime. I think that is a separate question.

There is also the difficult question of where to draw the line. There are a very broad range of offences at the moment captured as terrorist offences. Whether that is proper or not is an entirely separate discussion, because it goes to the criminality of what is a terrorist, who should be arrested and who is properly put in jail for particular acts. That is not what we want to discuss. We are saying that these powers, which the government itself has said are extraordinary, ought to be limited to something that amounts to an immediate or imminent terrorist threat. Trying to map those two concepts is what we are interested in asking the committee to think about.

Mr KERR—The difficulty is that we use the language of terrorism generically when we speak, but statutorily it is defined in a very broad way. Sometimes the language gets muddled up: we use one when we should be using the other or we don't work through the subtleties of some of it. If we were minded to follow up the point that you are making, we would understand you to be saying that the language that defines the various criminal offences of terrorism under the Criminal Code is not the appropriate triggering language that should be used for this statute.

Ms Stratton—That is what I am trying to say.

ACTING CHAIR—I tried very hard to get the witness this morning to say whether or not they agreed that training with a terrorist organisation should come under the range of terrorist acts that we are talking about here, and I did not really get an answer. How would you feel about someone who trains with a terrorist organisation?

Ms Stratton—I would prefer to reframe it, and say that that is not the appropriate way to frame what constitutes an 'immediate' or 'imminent' threat. We need to think about coming up with a concept that captures the idea of imminence or immediacy, without perhaps being so tied to offences that are easily tripped, such as the association offences. For instance, if I regularly attend Lakemba Mosque and make donations to a particular organisation, I may well be unwittingly caught up in the operation of the Criminal Code, because recklessness is the threshold mental element. We say that is too low for a person to be caught up, compulsorily questioned and, particularly, to be detained under these powers. So I am not sure that thinking about it offence by offence is the right way to do it, and that is why we have not tried to do that.

Senator ROBERT RAY—Why would anyone in their right mind, believing you have committed a criminal offence, want to question you when none of your answers can be used in evidence? They would just arrest you under existing powers and question you there, surely?

Ms Stratton—Perhaps that strengthens the submission that we are trying to make: that existing powers are enough and the Australian Federal Police—

Senator ROBERT RAY—It might. It does not strengthen that argument. It is just bringing it to bear, I am afraid.

Ms Stratton—I think it is a separate point. There are a number of parallel arguments at play here. I am not positing a threshold. I do not have an open and shut—

ACTING CHAIR—The reason I am talking about the imminence and immediacy of the threat is that I bet the perpetrators of 9-11 did not do all their planning the day before. This is something they had put in place over months and years. Why should it be an immediate or imminent threat when in fact the worst case that we have ever had was obviously planned well in advance?

Ms Stratton—Because these powers were posited as a last resort, that is why. ASIO framed them that way, too. They say that the reason they use these types of warrants is where all else has failed. So, if they do not already know about it, it is too late anyway. These powers are probably not going to help you.

ACTING CHAIR—I disagree. I know we are not here to debate the issues.

Ms Stratton—I wish that I could find this but somewhere I read a media report in which Mr Dennis Richardson was saying that he did not believe that these types of powers would have been sufficient to prevent an attack like that. I do not know whether he was framing it as an 'attack of that scale' or something else, but he said that it would not have been sufficient to have prevented 9-11.

ACTING CHAIR—I think he may have said that it 'may not' have prevented it, not 'would not'.

Ms Stratton—Okay.

ACTING CHAIR—That puts a different complexion on the whole issue.

Ms Stratton—I will accept that it may not have prevented 9-11.

ACTING CHAIR—But it may have, or it may not have.

Ms Stratton—Yes. But I am not sure that we can come up with something—

Mr KERR—This will not prevent everything. Let us assume that one of the principals of 9-11 got caught. They would probably have told fibs or kept their mouth shut and taken six months in prison for a first offence. This will not work with everything. There is a hard question here. We have had it for just under two years. We have had some experience under the current administration, but that administration will change.

ACTING CHAIR—You are not talking about the administration, are you?

Mr KERR—No, Dennis Richardson's administration. That, at least, will change. We have hopes of larger change. A number of submitters are trying to pare this back into a narrower frame and some are trying to eliminate it entirely. Others say that it should be entrenched in the statute books. Within that sort of framework, it would assist us if on reflection you are able to do what you say you currently cannot, which is to give us a threshold test that would be preferable. It does not take us very far to have a critique that says the existing threshold is not apt.

Ms Banks—Our recommendation talks about active knowledge rather than the recklessness of being not aware whether or not the organisation you are dealing with is a terrorist organisation. That notion of intention that reflects the criminal law is certainly part of any threshold test that we would see as appropriate.

Senator ROBERT RAY—The whole concept here that we often confuse is that this legislation seeks to be an intelligence-gathering exercise and not an evidence-gathering exercise. If you want to boil this down to its most fundamental point, the toughest point in it is that it takes away the right to silence. Everything else derives from that—all the other protections, penalties or whatever else. What the Australian parliament has said is that in regard to a potential terrorist act that is going to affect innocent victims you do not have a right to silence. That distils this legislation right down to the bottom. You basically say, 'It is too big a human right to give up.'

Ms Banks—I think that is probably not a bad analysis. This is absolutely about intelligence gathering; it is not about policing. And yet what has been given under this legislation to ASIO is, in our view, much more akin to policing powers than intelligence-gathering powers. They do not seem to sit particularly with ASIO's role and mechanisms because, in order to protect ASIO's identity, you have to have all of those secrecy provisions. If the legislation were more coherent with the notion of intelligence gathering, you might not have as many of the problems of protecting from disclosure who was questioning and what they were questioning about. All of that comes from the fact that you are granting to an intelligence-gathering body something that is not particularly akin to intelligence gathering, except in the most brutal sense—and I do not mean in a physical or violent sense; I mean in the most direct sense possible.

Mr KERR—Many people have raised the association offences as a concern. I remember a lot of the early submissions were around the Communist Party dissolution case. Most people who study history will remember that the United States had a particularly nasty period under Senator

McCarthy where people were asked to name names and to identify people who were members of the Communist Party. It does not seem, in this round of submissions, that there has been any strong case put forward that any of the organisations that have been proscribed have a legitimacy that we should acknowledge. We have done reviews of those organisations and without exception we have not recommended disallowance of any of the proposals. Basically, no-one is defending the entitlement to participate and belong to proscribed organisations. Doesn't that weaken some of the attack on the breadth of the terrorism related offences? Certainly, if we were proscribing organisations that even fringe groups out in the community say are playing a legitimate part in the political discourse, then we would be having a very different debate than we are having currently, I suspect.

Ms Banks—I think that is correct, certainly in terms of the proscription process. We made submissions in relation to the recent review of that. It is very difficult to know whether or not those groups are properly proscribed because the detail of their activities that makes them the subject of proscription is not publicly known.

Mr KERR—Yes it is. It has to be, virtually. The Attorney publishes his or her reasons.

Ms Banks—But the detail of the reasons is limited.

Ms Stratton—We do not know the background information. The criteria may be publicly known, but not the precise reasons the government has for believing that. It is the background intelligence that no-one in the public sphere knows. You may know that, as members of the committee, but we are not in a position to know that.

Senator ROBERT RAY—The reason it was made that way, if it is a disallowable instrument, is that you cannot have the government claiming stuff that is not on the public record. But, you are right. It is a problem for the general public to understand, I am sure. It is one of the weaknesses that we have to deal with.

Ms Stratton—It is an understandable difficulty, but it is also the reason many of the submissions, our submission and other submissions in a similar vein, come from first principles. We do not have the mill and grist of the information that you are privy to—

Mr KERR—It may be a bit more than that. If anybody out there were making a case that an organisation really should not be proscribed, surely we would have heard it. All I am saying is that, given the capacity for concern about this legislation, if there were not a case—if one of these organisations truly was a civil society organisation or a people's liberation movement, like the ANC might have been, which certainly conducted acts of terrorism but was engaged in broader social objectives at the same time, such that it had a number of supporters—we would have heard some argument addressed on the merits of a particular organisation not being proscribed.

We have not had that. We have had concern that organisations should not be proscribed without adequate reasons being given. But, to my knowledge, I do not think we have ever had a positive case advanced to us that any of those organisations are organisations which you could belong to, knowingly, which would not take you outside the social compact that we all share as citizens.

Ms Banks—I cannot disagree with you. I think you are right; there has not been a strong argument put as to whether those organisations somehow are good bodies to join as a local community.

Mr BYRNE—Your recommendation on page 21, which relates to the heavying of people who are questioned by ASIO, recommends that the act be amended to 'create a new offence by persons empowered to seek or execute warrants, such that threats made to persons to induce them to give information et cetera'. We took some evidence from some groups, just before you came to the table, which were talking about people being 'heavied', for want of a better term, to provide information, otherwise those powers would be used. Are you aware of any specific instances of that?

Ms Stratton—Only the instances that AMCRAN—the Australian Muslim Civil Rights Advocacy Network—shared with us. I think they have disclosed those to the committee, to the extent that they know about them. There is anecdotal evidence from community legal centre workers. PIAC participates in the National Association of Community Legal Centres' Human Rights Network, which is a nationwide network. It is convened by telephone. We have regular hook-ups and workers have shared anecdotes. We are aware from similar workers reporting to us—not from the case load that we have—that there is a reluctance to come forward and a lack of understanding about what you can and cannot say, a lack of understanding as to whether or not you are subject to a warrant, and that is what inspired us to include this recommendation.

Mr BYRNE—Some sort of protection so that those people would not be—

Ms Stratton—A good faith requirement.

Mr BYRNE—That would be incorporated within the act. With respect to disclosure of any matter on which the committee requires information—that is on page 19—what would make you think that that disclosure is not occurring at the present time?

Ms Stratton—We do not have information as to whether it is or whether it isn't. If what you are saying is that that disclosure is occurring then that is comforting. I suppose in that respect the submission is positing an ideal state of affairs.

Mr BYRNE—With respect to the protections that are built in with respect to the issuing authority and the prescribed authority—it is not a perfect world—are you comparatively happy with those particular protections or safeguards that have been put in? Do you have any alternative to the systems kept in place?

Ms Stratton—We have issues—and I believe this is mentioned in other submissions also—with the issuing authority on two counts. One is that the cumulative requirements that the Attorney has to be satisfied of in exercising the consent in section 34C are not carried over to the issuing authority. I would be interested to hear why that is—

Senator ROBERT RAY—To give a good reason.

Ms Stratton—and whether there are practical impediments. Another issue is judicial review. We note that there is access to the Federal Court in relation to the execution of the warrant but

we are concerned that, in relation to the issuing of the warrant, it might be appropriate for there to be independent supervision of that process also, which is consistent with the safeguard that has already been built in for the execution of the warrant when someone is actually in custody. The preference that we have expressed in our submission is that that be judicial oversight, and I think that is what we think is preferable because of our position on the separation of powers. But if we needed to frame it more generically, a second position might be some kind of independent oversight. We think that is important.

Mr BYRNE—A separate judicial oversight of the entire process or just sections of it?

Ms Stratton—We say that it should be over the entire process and, by covering the issuing authority, that would be to complete the oversight, if you like.

ACTING CHAIR—One of your recommendations bothers me somewhat, and that is that—

Ms Stratton—I am glad it is just one of them.

ACTING CHAIR—It is only the wording of it. It is on page 15 of your submission where you recommend:

... that the Committee approach this legislation with the understanding that Australian constitutionalism, rule of law and commitment to human rights are non-negotiable and must be protected—

then you say:

especially in any response to threats to national security.

Why the emphasis on threats to national security and not everywhere else?

Ms Stratton—We emphasise that because often, as Robin alluded to in the opening statement, national security is pitted against human rights discourse or rule of law, for instance. The best recent example I can give you was a statement by Mr Robert Cornall, the secretary of the Commonwealth Attorney-General's Department. He said that human rights are a concept that is well and good—and I am paraphrasing brutally here—but belong to a comfortable time, but in the age of terrorism they need to be limited in their exercise by individuals by a concept that he termed 'community rights'. He located that idea in article 3 of the Universal Declaration of Human Rights, which is the right to life and security. I think the argument is that individuals refer in a way that individual right to the Commonwealth, which holds it in trust and exercises it on behalf of everybody as a community right. It is a utilitarian type of argument. We reject that logic firmly and we have done so publicly. We say that individual human rights are not something that accrue to the state; they are something that individuals hold and they are something to be asserted against the state. We reject fundamentally the type of opposition of the discourse of national security against human rights, the rule of law, so that the argument might be: 'This is a time of emergency, so it is important that the executive can do this. It is extraordinary. It justifies the rolling back of civil liberties.' We are concerned about pitting those concepts against another. We do not see it that way.

Ms Banks—Individual human rights, the rule of law and constitutionalism exist in order to protect the integrity of the state and its citizens. They are coherent rather than combative. We should be seeking to achieve measures that reflect that coherence, the compatibility of protecting individuals and the state with the rights and constitutionalism that we live with within that framework. In using the word 'especially', we are saying that this has been used to counter but we do not think that that is the appropriate way to think about what is occurring. You can maintain the protection of rights and constitutionalism, and implement appropriate security measures.

ACTING CHAIR—I am not sure I am any wiser.

Mr KERR—But better informed!

ACTING CHAIR—Perhaps I should show the transcript to Mr Cornall and give him another dig.

Ms Stratton—We shared our correspondence with him at the time.

Senator ROBERT RAY—I remember in your opening statement you talked about threats to Australia, which is a recurrent theme. I am sure it is unintended, but what we intend with this legislation is threats to anyone. If there is terrorist planning in this country, at least 50 per cent is a terrorist act overseas rather than here. Do you think we should be trying to protect people overseas by using the powers of the state?

Ms Banks—As part of an international community I think we have responsibilities to ensure the protection of all global citizens. In talking about threats to Australia the primary focus is an important one, but obviously protecting others is important as well.

Senator ROBERT RAY—You made the point earlier, Ms Stratton, that the issuing authority should take the same criteria into account as the Director-General and the Attorney-General. The problem with that is we would have to train every issuing authority—that is, the Federal Court and the Federal Magistrates Court—with the knowledge of what alternative measures are available to ASIO, which we are reluctant to do.

The alternative to that is to have only one or two issuing authorities, which goes totally contrary to the way we want the act to work. We do not want a couple of tame Uncle Tom judges being the ones ASIO go to all the time—and I do not think they would ever intend to. So there is our dilemma. We consciously made different criteria for the Attorney-General and the issuing authority so that we would get a widespread issuing authority. We even put in senior AAT people in case the other two were not available, which we were also reluctant to do.

Ms Stratton—We resisted the AAT measure.

Senator ROBERT RAY—I think that even though the act allows it, in reality you have won the case on that. We have enough issuing authorities with Federal Court judges and magistrates wanting to do it, but if we expand that criterion we are going to narrow the number of issuing authorities. It is not an easy dilemma; that is all I am saying.

Ms Banks—Does that not reflect a lack of trust in the judiciary?

Senator ROBERT RAY—No. It is not a lack of trust. The need-to-know basis is not a silly concept when it comes to intelligence matters. You do limit it as much as possible. We do not really want some of the techniques of interception to be known, frankly. I probably have a different philosophical approach from you, but I think it is part of the social compact and political compact that you cede to the executive very limited areas that they are entitled to protect. We have to take them on trust, and they have to win that trust. If they do not then a lot of the points you make come into play. We differ on that; that is all.

Ms Stratton—I just wonder, Senator Ray, whether there is not a midway point that means giving full disclosure not of secret operations A, B, C and D, but rather of the means that are available to ASIO. A lot of that would be in legislation or some kind of regulation. Would it not be a matter of ticking the boxes? If ASIO were making representations, of course they would be confidential. Or perhaps it would be a matter of not going into classified material and there being limited ability for the issuing authority to go behind that.

Senator ROBERT RAY—You are looking at some of the very small matters here and you are missing the big picture, which is: do the results of the questioning regime justify the issuing of the warrant? That is the big issue. The issuing of the warrant on this or that ground is not so important; it is whether the end process justifies the issuing of the warrant. In our legal system, it occurs to me, we have hardly a method of benchmarking that. There are a couple of ways. If it turns out at the end of the day that the type of questions asked, let alone the answers, do not justify the warrant then we have a major problem. It is much bigger than whether or not there is an alternative method. That seems to me to be the big picture item here. You cannot be expected to tackle that, because you do not know what occurred in the questioning process. But I think we have to find a way, because it is not just in this process but right across the legal process. In the issuing of a warrant, often the result at the other end does not justify the original warrant. That is my concern. I think it is a bigger issue than the one you have raised.

Mr McARTHUR—On page 7 of your submission you have raised the matter of the new security environment. You suggest that September 11, Bali and other incidents are not quite a new environment. You suggest in your recommendation that really the institutional self-interest of the organisations should be reduced to improve security. The people in Australia expect the government and the parliament to take some action after September 11 and Bali and these types of attacks. What are you suggesting the agencies should do?

Ms Stratton—I cannot answer that without going into the entire submission, but the point we are trying to make there is that we think this is a question of framing—that is, the way that the story is being told. We think that there is not a pre- and a post-9.11 world. Terrorism has been around and with us for a long time—and if not terrorism then another type of threat. The point is that there have always been threats. Every nation state faces threats; every community faces threats of different ways and means. We are trying to say that, regardless of what that is called—whether it is called communism, as in the Cold War period, or whether it is the idea of foreigners coming to our shores through the White Australia period or today, when there is mandatory detention—we need to look behind the rhetoric of the new security environment and be rigorous with the concept. We need to demand that the people who claim they are acting in the name of national security or a new security environment or a threat environment ground their claims. We

should not just accept that at face value, which is an easily understandable, emotionally driven thing to do, especially when you know people who have died or who have been touched by those sorts of events.

Mr McARTHUR—Wouldn't you agree that there is an expectation amongst the Australian people that the agencies will actually seek intelligence and be aware and undertake some of these activities so that they can at least understand where the next potential terrorist activity might be?

Ms Stratton—Yes, but our point is that existing intelligence tools and methods are adequate to do that. That is the point that we are making.

Ms Banks—And responding with such measures could be read by the populace as an admission that in the past we have not had appropriate mechanisms in place to protect the populace and gather intelligence, and that does not appear to be the case. It appears that ASIO has had a range of powers that have enabled it to go about its business appropriately. So in some ways, in responding to the events of September 11 the response has suggested that there is a much greater need for fear. In fact, there has been a threat in existence for much longer than that and we have had mechanisms to intercept and deal with threats for much longer than just since September 2001. So it is that idea that we should treat the world as a different place when the world has been a dangerous place for much longer than just the last few years.

Mr McARTHUR—So you do not think it has changed very much since September 11 in terms of technology and ongoing—

Ms Banks—No, not since September 11. There is a range of technologies available that creates threats to people. The technology used in those attacks was not particularly sophisticated: it is not about using high- and new-level technologies: it is about using force, and it seems to me that to suggest that something fundamental has changed in the way in which terrorism operates is to focus on the wrong problem. ASIO does have powers and has been using them appropriately for a long time. The question becomes whether you feed the fear by suggesting that you need greater and greater powers or whether you continue to do the job that you are doing effectively and government reassures people that it is doing everything it can to respond to—

Mr McARTHUR—There are a lot of checks and balances in this whole process, surely.

Ms Banks—I am sorry: I am not sure—

Mr McARTHUR—Well, the process of issuing warrants and—

Mr BYRNE—Safeguards.

Mr McARTHUR—There are an enormous number of checks and balances in the way the warrants are issued and in this whole process in the Australian context. What do you say to that?

Ms Stratton—We applaud the safeguards that are currently in place and we know that it is due to the work of this committee that some of those safeguards are there. But this committee

recommended things that were not necessarily implemented, so even on the committee's own record there are things that could be improved. We echo that, and we go further, consistent with our submission, by saying that there are key aspects—in particular, explicit human rights protection and joining the dots of judicial review—that we urge the committee to take up in making recommendations about the further passage of this legislation if it is not repealed. It is proper that there should be checks and balances in this legislation, because the powers are extraordinary, and that is why the first thing that we said this afternoon was that a sunset clause and ongoing scrutiny by this committee are crucial.

Mr BYRNE—Would your concerns be assuaged if, on a hypothetical basis—say, on the number of warrants that have been issued so far and in the future—the committee was satisfied that it met the test for those warrants to be issued? Given that the committee is obviously privy to some classified information that cannot be put out in the public domain, if the committee, operating on behalf of the public, were scrutinising the processes and what has actually transpired and it met their tests with unanimous agreement, would that provide some comfort if that committee then, without going into too much detail, reported back the parliament that what has been issued has met the test that you have set down?

Ms Banks—You asked: does it add some comfort? Yes, it does, inevitably. When you have got a multiparty or bipartisan approach with a number of people coming at it from a number of different angles, and if you are all reassured that the criteria have been met—

Mr BYRNE—Hypothetically.

Ms Banks—certainly that would suggest that it is not merely one person saying, 'It is all okay.' Obviously the more scrutiny it gets and the more the committee as a whole accepts that the criteria have been properly applied, it does obviously add a level of comfort.

Ms Stratton—But I think the judiciary is the branch which has traditionally exercised that type of balancing role, particularly when individuals' rights are involved. We cannot not put that on the record. The judiciary plays that type of supervisory role.

Mr BYRNE—But in the potential absence of the judiciary—

Ms Stratton—Then certainly.

ACTING CHAIR—Thank you very much for appearing before us today and for your contributions to the inquiry. No doubt they will help us in our deliberations. Thank you very much.

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

That this committee authorises the publication, including proof transcripts on the internet, of the evidence given before it at the public hearing today as part of the records of the committee's review of division 3 part III of the Australian Security Intelligence Organisation Act 1979.

Committee adjourned at 3.41 pm