COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Security Legislation Amendment (Terrorism) Bill 2002 and related bills

THURSDAY, 18 APRIL 2002

MELBOURNE

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WITNESSES

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Thursday, 18 April 2002

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

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

Committee met at 8.44 a.m.

ABBOTT, Mr Anthony Norman, President, Law Council of Australia

GLYNN, Mr Anthony John, Member, Law Council of Australia; Member, National Criminal Law Liaison Committee

HARVEY, Ms Christine Susan, Deputy Secretary-General, Law Council of Australia

CHAIR—On 20 March 2002 the Senate referred the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and related bills to the Legal and Constitutional Legislation Committee for inquiry and report by 3 May 2002. This is the third public hearing of the committee in relation to this bill. The committee has received over 230 submissions. I remind witnesses that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Witnesses are also reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of those notes are available from the secretariat.

I also note for the record that, in preparation for these committee hearings and in the advertising of the inquiries, there has been some public concern about the time frame in which such matters are being handled. I emphasise, both on behalf of the committee and for the record, that the timetable under which the committee works is one that is set down by the Senate and that the committee was provided in the last sitting week of the Senate with a program of almost 10 bills to inquire into and report on by early May. The most significant in terms of number and, some would say, interest is the package of bills known as the security legislation amendment bills. I understand that there is considerable concern expressed by members of the public and various organisations about those time frames.

The committee has undertaken, as it always does, to inquire into and report on matters referred to it by the Senate in the most comprehensive and considered way possible within the guidelines that are provided to us by the Senate. The committee has had a hearing in Sydney, a hearing in Melbourne yesterday and another today and will have a hearing in Canberra on Friday. We will, of course, also be considering in great detail every submission that is made to the committee on this legislation. I understand the concerns, but I do hope that those assurances expressed by me as chair will allay those to some degree.

I welcome representatives of the Law Council of Australia. The committee has before it the submissions of the Law Council of Australia, Nos 251 and 251A. Are there any additions, amendments or alterations that you wish to make to the document lodged with the committee?

Mr Abbott—No.

CHAIR—I invite you to make a short opening statement and, at the conclusion of that, I will ask members of the committee if they wish to direct questions to you.

Mr Abbott—Thank you for the opportunity to appear before you and thank you also for the indulgence in accepting our submission, which was outside the deadline. I understand senators will have had it for two days and I hope that they have been able to read it. The Law Council of Australia takes this issue very seriously. We thought that it was important to assist the Senate committee with a considered submission and so we took a bit longer than the deadline allowed us.

We think it is an important issue. It is certainly important for the future business of the Law Council as part of our strategic business plan for the forthcoming year for a number of reasons: first, the bills propose to add some significant offences to the Australian criminal law punishable by life imprisonment and 25 years imprisonment maximum terms; second, the breadth of the proposed offences causes us extreme concern—and I should say that every one of the Law Council of Australia lawyers accepts the need to respond appropriately to the terrorism threat, but we feel that this response goes much further than is necessary; third, we are concerned by the proposed excessive concentration of power in the executive to proscribe organisations a power which is unprecedented in Australian law; and, finally, we are concerned by the fact that many of the proposed offences are strict liability, which is unusual in our experience. Strict liability is a concept which attaches to planning offences, building offences and regulatory offences but not to offences which carry the substantial term of imprisonment and the opprobrium of terrorist offences.

We say in our submission that the government has not made a case for these proposed provisions yet. As I said, everyone would accept that it is appropriate for the government to increase penalties for some types of acts associated with terrorism, to possibly clarify where the law is uncertain as to the interrelationship between aiding and abetting conspiracy attempts and to possibly deal with the extraterritorial aspects of criminal law, but in doing so the government has in this bill gone considerably further than is necessary and catches conduct which many Australians would regard as innocent, neutral or certainly not as justifying possibly being charged with an offence which carries a term of 25 years imprisonment.

Our general submission is that we say that the criminal law is adequate to deal with most, if not all, terrorist activity which has been the topic of speculation in the public. The government has not demonstrated in the second reading speech or in the explanatory statement why these powers are necessary. We also say that, in responding to the terrorism threat, Australia has gone beyond precedents in the United States and the United Kingdom, and we do not see the need for that.

In summary, in our submission we have set out a number of international instruments and human rights instruments which the committee ought to have regard to. We also say that ordinary Australians—the man in the street—would not accept that innocent conduct, such as doctors making humanitarian aid available to the citizens of a country in which the Australia Army is involved with peacekeeping forces, could be criminalised. That would be treason and punishable by a maximum penalty of life imprisonment under this bill. Ordinary Australians would not accept that a demonstration which might involve damage to property could be a terrorist act punishable by 25 years imprisonment.

The width of the definition of 'terrorism act' is concerning to the Law Council. The requirements are that the act must involve the advocacy of a political cause, and one or more of serious damage to property or person. There is an exemption for lawful advocacy, but, in

the nature of things, many demonstrations and protests involve some form of illegality such as offences of trespassing on Commonwealth property. If that is involved, all the participants in the demonstration, as we read it, could be guilty of a terrorist act. Not only does that have serious consequences for them personally in being able to be charged, but it also leads to the organisation being able to be proscribed by the Attorney-General under other powers in the bill. It also means that, under the ASIO bill which is not before your committee, a warrant can be obtained for people to be detained and held for questioning for 48 hours plus, plus, without legal representation. These offences have very serious consequences and we say that they go too far.

The fact that the offences are of strict liability or absolute liability means that innocent Australians do not have to know that what they are doing is assisting a terrorist organisation. The pistol academy that trains a person is, as the explanatory statement says, put on notice to inquire as to whether the person is a member of a terrorist organisation. That trainer has the onus of showing that he neither knew nor was reckless as to whether he was assisting, by his training, a terrorist organisation. We say that goes too far.

Finally, we say that the power of a politician, the Attorney-General, to proscribe an organisation is unprecedented and the law and the Australian government ought to be satisfied with the ability to prosecute illegal activity rather than proscribing organisations and membership of organisations simply for their membership of that organisation. It would have been quite simple for the government to have made some amendments to part IIA of the Crimes Act which is on the statute book. That power enables the Attorney-General to go to the Federal Court to get an order showing cause why the organisation should not be proscribed. There are some safeguards in that legislation that we think are appropriate and, with a simple amendment to include engaging in terrorism so defined, the government could have utilised an existing procedure without, as we say, conferring undue and unfettered power in the executive. We also have concerns about the fact that, once proscribed, a person can be guilty of a significant offence merely by being what is called an informal member of that organisation.

For all those reasons we have significant concerns with the bill. The submission that we put together was approved by the Criminal Law Committee of the Law Council which consists of a number of experienced criminal law barristers. It is chaired by Tim Game who is a senior counsel from New South Wales. Its joint chair is Michael Rozenes from this state. He is a former Commonwealth DPP and its members are Bret Walker, Tony Glynn and Roy Punshon from this state. They are all leading Queen's Counsels and they are all very concerned by this legislation. They all feel that it is unprecedented legislation which needs substantial review and reconsideration by the parliament.

Thank you for your remarks about the timing. We have written to you to protest at the timing too. We saw no need for parliament to truncate the reporting time and the public comment time in the way that it did. We saw no reason for the government not to have released the bill earlier than it did for public comment. There was nothing in the explanatory statement or the bill itself which prejudiced national security. Public debate would have been enhanced by more time. We have put a lot of effort into it but we have not examined every line of every piece of legislation. We have not made a comparison with the United States and the United Kingdom legislation. We have not trawled through every commentary on those pieces of precedent—we would like to have been able to, but we have not been able to. We think that it is incumbent on the government to have allowed more time and to have put out into the public domain more justification for the legislation—that is, showing where it is

needed, where the existing law is insufficient and why the particular security threat to Australia justifies legislation which appears to go considerably beyond anything which is in the United States or United Kingdom legislation. That is all I want to say by way of opening statement. Thank you.

CHAIR—Thank you very much, Mr Abbott. Mr Glynn or Ms Harvey, do either of you wish to add anything at this stage?

Mr Glynn—No, thank you.

Ms Harvey—No, thank you.

CHAIR—Mr Abbot, I thank the Law Council for their submission. It is detailed and by raising a number of issues it is very helpful to the committee. We have, as you mentioned, received a letter from you in relation to the time frame. That correspondence will be distributed to members of the committee, and the committee will consider it in the course of forming views on the report.

Mr Abbott—Thank you.

Senator LUDWIG—I was interested in your comments in relation to a person in Australia giving aid to an overseas country and being caught by the legislation. I wonder where you could refer me to where you say that.

Mr Abbott—That would be in paragraph 37, page 26.

Senator LUDWIG—I must admit that I read it closely. Could that include people giving aid, not part of the incidents that are actually happening in the country at the time? Say, for argument's sake, it were an orphanage or some such incidental process where a person or organisation had stated aims of trying to help people in another country. Do you say that they could then be charged under these provisions? Is that your contention?

Mr Abbott—That is our contention. No-one could argue with the clear case of people assisting an army which was opposing the Australian Army in a foreign country, but when there is an extension to the law it is incumbent on us to examine the detail. The definition of treason is in the Criminal Code Act. Proposed section 80.1(i)(f) contemplates that assistance to another country could be given in any form—there is no limitation on the type of assistance—so it is wider than military assistance or assistance to an army. It would cover sending doctors, medical aid and humanitarian aid to the people of a country where Australia was engaged in peacekeeping forces which might be subject to hostilities.

Senator LUDWIG—And the penalty for that is life?

Mr Abbott—The maximum is life imprisonment, yes.

Senator LUDWIG—Is there another way of expressing that that would satisfy you? Do you say that with sufficient time you might be able to turn your mind to it?

Mr Abbott—Clearly there are ways in which you could express this better. Much of our submission goes to that. Apart from the power to proscribe organisations, which we say is inherently there, we would say that much of the legislation could be better expressed and then it would be less objectionable. We would say then that it would be fairly clear that it would be coterminous with the existing criminal law. If the government wants to make it clear what the law is in the terrorism area, without citizens having to go to the law of aiding and abetting, conspiracy, attempts and incitement, it needs to do a more precise job than it has done in this bill.

Senator LUDWIG—In summary, do you say that, in meeting the UN Security Council Resolution 1373, the existing criminal law is sufficient or would still need some amendment to ensure that it could be sufficient to meet the resolution? I can perhaps put it in a framework as well: if you consider it in the sense of the proscription of organisations. Although the Security Council has not proscribed organisations, it may do that in the future—it is one of those things. I am not asking you to think about it hypothetically, but at the moment other countries obviously have done that: the UK and the US have proscription powers; they have proscribed organisations. How do you say Australia would meet that commitment?

Mr Abbott—We say that if there is to be a power and the government automates the case for that, it ought to be exercised by a court. We had the precedent of part IIA of the Crimes Act, under which the Federal Court has power on the application of the Attorney-General to issue an order showing cause why an organisation ought not to be proscribed.

Senator LUDWIG—So you say 30AA would be sufficient under the Crimes Act?

Mr Abbott—Yes, with the addition, if necessary, of specific power to show cause on the grounds of the organisation being involved in terrorism activities being properly defined. We would say that one thing which infects this whole bill is the unnecessarily wide definition of 'terrorism act'.

Senator LUDWIG—Also in your submission you take us to section 102.2, subsection (d), where you say that 'or likely to endanger' broadens it out to a significant extent. In addition to that, what do you say about the bill where it says 'the security or integrity of the Commonwealth', when you tie that phrase together with your view about the breadth of 'or likely to endanger'? Do you say that has any impact?

Mr Abbott—Yes, we do. In our submission we say that that ground, which is a separate ground on which the Attorney-General is entitled to form a reasonable belief, is unnecessarily wide too. 'Integrity' is a term which is undefined and, moreover, it is not just integrity of our country, it is the integrity of any other country. As we said in our submission, that means that someone who argues for the overthrow of the totalitarian regimes in Iran, Iraq or Burma would be able to be proscribed, which seems unnecessarily wide.

Senator LUDWIG—I recall that from your submission, but what I was interested in was whether you have a view whether security or integrity is a necessary or unnecessary addition.

Mr Abbott—We would say that it is unnecessary. We would say that, if you want to proscribe an organisation and use the part IIA Crimes Act power, it would assist to have something in relation to terrorism—properly so called—which we would say is the intent to intimidate the government into changing its policy by actions involving threats to person rather than damage to property.

Senator LUDWIG—Turning your mind to some of the offences which are 'absolute liability', have you had a look at or been involved with the International Criminal Court? There are exposure drafts of that legislation around. As I recall, there are not any strict liability offences contained within that. There is, as I understand it, a tribunal to be established in the international fora to deal with heinous crimes, and it does not have 'strict liability'. Have you been able to draw any parallel between that style of court and this type of legislation, which is designed to deal with other types of heinous crimes as well?

Mr Glynn—May I deal with that, Senator?

Senator LUDWIG—Yes.

Mr Glynn—We have not had a look at the proposals.

Senator LUDWIG—No, I was just curious about whether you had.

Mr Glynn—I am not sure they were actually available, even when we were drafting this. I think they have become available since we started work on this.

Mr Abbott—I have looked at them, and, if it is the Statute of the International Criminal Court, there is nothing about strict liability that I can recall. That is the comment that I made, that the experienced members of the Criminal Law Committee of the Law Council could not think of any other precedent serious—

Senator LUDWIG—That was the next question I was going to, whether or not there was a precedent that you could recall. I was using the International Criminal Court as a frame of reference, but I was hoping you might be able to shed some light on to other areas where there might that strict liability offence.

Mr Abbott—No. The Law Council—not me, but other committees—has examined the procedures of the International Criminal Court, and finds they made a good attempt at adjusting the rights of parties and the need to deal with crimes which are sometimes hard to prove—crimes against humanity. But there is no absolute liability and, as I said, the experienced members of the Criminal Law Committee, who range all around Australia and have had experience in both prosecution and defence, cannot think of an occasion where such a serious offence of 25 years imprisonment maximum, with the terrorist connotations of Al-Qaeda, is able to be proved without proof of mens rea, with absolute liability—strict liability—and where the citizen has the burden of showing that he did not know and was not reckless as to whether the person he was assisting or the organisation that he was joining was a terrorist organisation or engaged in terrorist activity.

Senator LUDWIG—With my reference to the international exposure drafts of the International Criminal Court, I was not trying to, obviously, catch you on that. I also sit on the treaties committee, where we went through the legislation in a public hearing. So, I assume that, as it was a public hearing, exposure drafts were released. I will follow that up, anyway, to make sure that they were.

Mr Abbott—I think it was a different arm of the Law Council that had a look at that.

Mr Glynn—Can I just follow up on one aspect of Senator Ludwig's question. In fact, one method that is used by courts in ascertaining where legislation is designed to have a strict liability application, is that they look at the penalties that are available. The more serious the penalty, the less likely it is said to be that the parliament intended that it be treated as strict liability. That applies sometimes where the penalties are much lower than 25 years or life imprisonment.

Senator LUDWIG—Speeding tickets come to mind.

Mr Glynn—Yes, that is right.

Senator SCULLION—Whilst people were giving evidence in Sydney, we came to this issue of a terrorist act. In 100.1, part 2, there are five sections that pretty much define a terrorist act. The first three state:

Action falls within this subsection if it:

(a) involves serious harm to a person; or

(b) involves serious damage to property; or

(c) endangers a person's life, other than the life of the person taking the action.

It goes on to talk about the health and safety of the public, interference with electronic systems et cetera.

Many of the people who have given evidence have been concerned, obviously—and you have mentioned it—that a simple demonstration, or a normal public affray, perhaps, could fall within this net. I had a similar concern in a practical sense. I thought of the most heinous circumstance, in terms of a public affray in the last few years, that I could recall: the invasion of Parliament House in Canberra. There was a meeting, as you can recall, that got out of control. Property was damaged; people broke into the place; violence was perpetrated on people looking after Parliament House et cetera. I thought, 'If any public affray got out of line, perhaps that would be it.' I described that in some detail, and I asked the Attorney-General's Department if those circumstances would lead to people being prosecuted under this act and whether that would be an act of terrorism, for example. They took the question on notice, and I would just like to hear your response to their answer. The answer is:

It is not likely that damage to Parliament House during a demonstration would be a terrorist act.

The definition of "terrorist act" excludes lawful advocacy, protest or dissent and industrial action.

An act that caused damage to Parliament House would only be a "terrorist act" if the act was not lawful advocacy, protest or dissent or industrial action. It would be a question of fact as to whether the act caused sufficiently serious damage to fall within the definition of "terrorist act".

In relation to how "serious" would be defined by a Court, see the answer to question 1.

Question 1 was a question on notice asked by Senator Cooney:

How is 'serious' property damage defined ...

The answer was:

A court would interpret 'serious' in the context of this provision as meaning damage on a very substantial scale.

It is very common for offences to include the word "serious" and for the Court to interpret the term in the context of the relevant legislation.

That was their response. What you think about that?

Mr Abbott—Perhaps Tony might answer soon, but my answer would be that it is an unsatisfactory response, that there cannot be a clear answer that that ought not be a terrorism offence. We will take issue with some of the assumptions in that advice. The words used are 'serious damage to property'. Property could be of any dimension, any value. Serious damage to a door means that it is destroyed, and that would on our reading fall within the purview of the section. Clearly, what is contemplated is damage to buildings, destruction of buildings, but that is not what it says—to a door, it is serious if it is destroyed. That element would clearly be satisfied in our view, and it is just not satisfactory for citizens to be at risk of an interpretation as to serious damage to property like that and whether they are engaging in a terrorist act.

We do say in our submission that, yes, today we can accept that police and prosecutors will be reasonable in the cases that they prosecute and that they would not prosecute as a terrorist offence that type of offence. But it is just wrong for citizens to have to rely on that discretion to be exercised in their favour. They could be terrorised by the police and the prosecuting authorities holding over their heads the possibility of being charged with a very serious

offence which carries undesirable connotations. Tony, do you want to add anything to my lay reaction to that advice?

Mr Glynn—Simply, the definition of the conduct is so broad as to be almost unpredictable in the way it will be finally refined. In fact, you have two in a row: serious harm to a person. Serious harm to a person is probably even broader in that it may contemplate economic harm, emotional harm or physical harm—it is in no way limited. Similarly, with serious damage to property, it is a question of whether the serious damage qualifies the property or is an indication of a scale of damage. In other words, as Tony Abbott says, if you look at a door and it is destroyed, the door has suffered serious damage. Another way to say it is: serious damage to property does not simply contemplate damaging a small item of property. But the provision does not make it clear; people's liberty is put at risk on a very imprecise definition, and put at risk for long periods of time.

Senator SCULLION—Thank you for that. The issues associated with terrorism from a very lay perspective of the bloke on the street, which is pretty much me, are seen in more of an international context. People have given evidence, and I think it is fairly self-evident, that Australia is not somewhere that has a great deal of history associated with acts of terrorism that we normally think about; they are normally international situations—and the names are the sorts of things that we read about in the paper, where there is Black September, or whatever it is—over a number of years which give rise to our concept of a terrorist act. Should the United Nations, for example, move for some sort of international agreement, because it appears that the pursuit of the unwinding of terrorist organisations will involve relationships between countries? Should the United Nations move towards proscribing people and organisations and those sorts of things in an international sense? Would you have any problems with Australia recognising that and being part of that?

Mr Abbott—Generally, I think that there is no problem with proscribing organisations for the 'non-threatening to personal liberty' activities of money transfer and that type of thing. I think that what you say is significant, in that—and many people expert in law and enforcement have said this—the problem in this area is more intelligence gathering rather than enforcement. We are looking at the wrong end of the stick if we think that we are going to be solving these problems by having terrific powers and penalties for offenders once detected. The important thing is to get accurate intelligence as to what is happening in the world community. I understand that there is a degree of cooperation between the law enforcement bodies of Australia and other countries now, so that is a very practical way of dealing with the problem.

Senator SCULLION—Thank you. You also mentioned in your opening statement the example that someone training with a pistol or someone getting trained with explosives may well fall under this act. I, for my sins, in another life am actually a qualified shot firer in Western Australia. I cannot recall anybody asking me anything about any background whatsoever. In fact, the only requirement was basically that you needed to know how far apart you needed to store certain parts of your ordnance, and there was a reporting system in terms of how much you used and you needed to keep a record of that. But beyond that there was absolutely nothing whatsoever. Would you see that as almost reckless behaviour—not having any safety precautions in terms of what people can use those explosives for?

Mr Abbott—I think that from now on, if this bill is passed, that will be right. As the government says, quite rightly, in its explanatory statement, a person who trains in explosives or firearms is on notice that this activity is so inherently liable to assist a terrorist organisation

that they ought to take steps to ask questions or to give up their job. That is in effect what the government is saying in the explanatory statement, and I think it is quite right on the wording of the bill. That is what is required, because you do not want to face a situation where you have to prove in a court that you were not reckless as to that.

Senator SCULLION—So, if you were delivering an explosives course in TAFE, do think it would be unreasonable to require everybody who is doing that course to have, for example, a check from the police or from ASIO that they were not associated with a terrorist body or something like that?

Mr Abbott—It is an example which could fall foul of the law. I think that is one of those grey areas. The Attorney-General's Department might give the answer that you got—that it is a question of fact and the court would assess it at the time. But to the ordinary Australian, you would think that that is just going too far. TAFE lecturers ought not to have to cross-examine all members of their class.

Senator SCULLION—But could it not also mean that it will simply be requiring people to take greater care in view of a slight change in the international environment in terms of terrorism. We would be simply saying: if you are in the business of training people to do certain things, it is a changed environment and therefore you need to take some extra precautions. Certainly it is not without precedent. In Australia we have had the Port Arthur situation and we responded by saying, 'You cannot just have a gun lying around in the cupboard.' There were quite sweeping laws throughout Australia that determined that our behaviour in regard to firearms needed to change. Would you say that that is a good analogy and that, for somebody now who can go in and have explosives, we need to have perhaps a police check and a background check? Do you think that would be unreasonable?

Mr Abbott—There are some precautions that could be made. You would want to look at the type of activity that was contracted on. Clearly, training in plastic explosives might be different from training in dynamite, which is often used in rural and earth-moving activities, and you would want to have a look at the penalties too and the defences, because this legislation is absolute liability for a maximum of 25 years imprisonment. There is no harm with a moderate proposal of, as you say, encouraging the public to be more responsible about firearms and explosives.

Mr Glynn—Could I come to that. The problem is that the defence requires you to show that you were not reckless. What you might think is a reasonable precaution may still expose you to prosecution, and even conviction, because someone else thinks it is reckless. For example, to question those whom you train may be thought not to be sufficient. To ask for a police check may be thought not to be sufficient because it would be expected that terrorists would not have police records. The question would be how far you would have to go. You would have to do it in advance, because if you get it wrong you are at risk of prosecution. If you get it right you are still at risk of prosecution, even though you may be acquitted. But you would go through the trauma of being prosecuted when, had the norms of criminal law been in place—namely, the prosecution had to prove its case—you would never have even been at risk of prosecution.

Mr Abbott—If I could add to my first answer: it is more than that. The powers of proscribing the organisation to which you belong apply, and there is no burden there. A member of the government has to form an opinion. Moreover, that same member of the government can form an opinion, get a warrant for the detention of that person on the ground that they committed a terrorism offence, and question them for 48 or 96 hours. It is not just about the

threat to prosecution liberty, it is about the other consequences which flow from trying to regulate—in a helpful way, but in an overkill way—for the noble purpose of encouraging people to be more responsible about guns and firearms. We say that in many ways that goes too far.

Senator McKIERNAN—I have read in your submission—paragraphs 76, 77 and 78—about the possible constitutional difficulties with the legislation. Do you agree with the arguments proffered by Professor Williams when he appeared before the committee in Sydney a couple of weeks ago? Have you informed yourself of his contribution to the committee?

Mr Abbott—Only from the press reports and not in detail. To be frank, in the time that we have had available we have not concentrated on the constitutionality of the provisions. We have had a criminal law focus in our submission. We have drawn attention, as you say, to doubts about the constitutionality. I suppose it is the same point, that offences of this sweeping nature ought to be clearly constitutional rather than have a doubt about them.

Senator McKIERNAN—I accept what you are saying, your not having looked at the *Hansard* transcript of those proceedings. You draw attention, at paragraph 78, to the possible contravention of the doctrine of the separation of powers in that the bill gives enhanced powers to the Attorney-General. At this juncture would you like to develop on that element?

Mr Abbott—The thrust is that it is a member of the executive finding the element of a criminal offence which is punishable by imprisonment. The principle under our Constitution is that normally the elements of a criminal offence are satisfied by a proof of facts before a court. That is what we are addressing at paragraph 78.

Senator McKIERNAN—Is it simply the fact that the power is held by one individual, rather than a group of individuals, another body or the parliament itself?

Mr Abbott—In our comment about the offence against the separation of powers we are driving at the fact that the power is held by one individual in the executive arm of government, rather than the judicial arm, and that it is not subject to appeal.

Senator McKIERNAN—In paragraph 81 you list a number of organisations that may be caught up by the provisions of the bill: the Australian Council for Overseas Aid, Community Aid Abroad, World Vision, Amnesty International. Isn't it true to say that an organisation like Al-Qaeda would also be caught up in these provisions and, in that sense, the Australian community is demanding that the parliament and the government do something about organisations such as Al-Qaeda, and others who are listed in UN Security Council Resolution 1373?

Mr Abbott—That is the clear case which justifies some form of government response. The Law Council's submission would be that the government has existing powers to deal satisfactorily with a clear case like Al-Qaeda and to give a clear message to people that they ought not to assist Al-Qaeda and that if they do, they run the risk of being charged with aiding and abetting or conspiracy to commit a crime. It may well be that a simple clarificatory provision of the Criminal Code to the effect that assisting in a terrorist act is a crime would be helpful, but there is no need, we would say, to proscribe Al-Qaeda or organisations generally. What should be concentrated on is the activity which they conduct. There is ample scope for the government with its powers now to deal with the activities of Al-Qaeda and organisations like it.

Senator McKIERNAN—Would Australia be unique in western developed democratic countries in not having terrorist legislation on the board?

Mr Abbott—It depends what you mean by terrorism legislation. As we said following the September 11 bombings, and as the Parliamentary Library report shows, for a number of years we have had legislation dealing with terrorism and we have had a number of inquiries looking at terrorism. We also have an extensive range of powers to deal with terrorism. It is not as though there is an absence of powers on the statute book.

Senator McKIERNAN—But is there any specific terrorism or anti-terrorism legislation there? We were told yesterday by a different set of witnesses that this was the first.

Mr Abbott—In Australia?

Senator McKIERNAN—Yes.

Mr Abbott—The Northern Territory has a terrorism offence, but I think that is the only jurisdiction in Australia which has used the word 'terrorist'. Our submission, and the Parliamentary Library research paper, shows that in the ASIO legislation some years ago the word 'terrorism' was used and then was dropped, possibly for the reason that it was thought that it was not necessary to have it. However, this is the first time that there has been a series of acts devoted to terrorism at the Federal level, if that is your question.

Mr Glynn—It seems to me that what is missed by this sort of legislation is that the aim of government is to deter criminal conduct. Whether you call criminal conduct 'terrorism' or 'criminal conduct', does not make much difference. The aim is to be able to punish people for unacceptable behaviour. The significant offences that are usually committed by terrorists include murder. Murder is something that all jurisdictions are able to deal with. It does not require new legislation to enable the community to deal with that. Similarly, just about any other form of conduct that one could contemplate that would be committed by a terrorist organisation is already covered by the criminal law, either by punishment for specific offences or by being able to punish those who conspire to commit specific offences. It may be that in the area of conspiracy there would be a need to increase the penalties for those who engage in some forms of conspiracies, but the legislative power already exists, as far as I can see, to deal with any form of conduct that terrorists would engage in

Senator McKIERNAN—But is it not also true that the events of September 11 were so horrific that there is a community demand for specific anti-terrorist legislation in countries such as Australia, and specifically in Australia? There is a community demand that such legislation be put on the books. Were a committee such as this to have more time available to it, might we not be able to get the support for such legislation from a body such as yours—if we had more time for consideration?

Mr Glynn—Certainly the legislation that has been produced is far too wide ranging. It is really designed to meet a need that does not exist. Perhaps part of the public perception problem is that the public has not been told that there exists now the power to deal with anything that terrorists do.

Mr Abbott—I think that the Law Council would like to be able to assist the government and this committee to come up with workable legislation.

Senator McKIERNAN—Assist parliament. I like to help the government and encourage assistance. Ultimately it is parliament's decision.

Mr Abbott—Yes.

Senator McKIERNAN—The Senate, as part of the parliamentary process, will make the decisions on this legislation. We will have an equal vote in regard to that.

Mr Abbott—That is right. Thank you, Senator. We recognise there is significant public disquiet. As I say, we would like to come up with a tick for this legislation, but recognising that there are significant issues of personal liberty involved, we did seek to engage the government or to have an early look at the bill, and that was not possible, and we find when it comes out, unfortunately, that it contains provisions which we think the public, if they were taken through them, would be just as disquieted about as they are about the terrorism threat.

Senator McKIERNAN—Thank you. Finally—I would like more time to question, but we have got pressures upon us—you end your submission with a quote from Justice Kirby. I have not had the benefit of reading all of Justice Kirby's speech, but he is drawing analogies and comparisons between Australia and the United States and he says:

History accepts the wisdom of our response in Australia and the error of the overreaction of the United States. Keeping proportion.

I assume that he is talking in the context of Australia about the Communist Party Dissolution Act and in the United States he is talking about the events in Hollywood in regard to how they treated the Communist Party members in that country.

Mr Abbott—That is correct. He gave a wide ranging speech. He looked at a number of historical events and precedents, and I think that is what he was referring to—the McCarthyist era and the upholding by the Supreme Court in the United States of their Communist Party banning acts, contrary to the High Court here and defeat in the referendum.

Senator McKIERNAN—Initially, that did not come through, but after thinking about it I thought I had got it. Thanks for the clarification.

Senator BOLKUS—Can I just start off by thanking you for the submission. I think it is probably one of the most useful ones we have had before the committee. I point in that context to items like paragraph 39, where you identified that even in 1979 Justice Hope found that there was no need for any further offences to cover terrorist acts. I do not think that Justice Hope was recognised as someone who was unfriendly to security organisations and there was that sort of assessment from him. Also in the context of you highlighting that since 1936 in fact the world has been looking for a definition for terrorism and has not been able to find that, nothing advanced in the last 12 months has given us any more legal enlightenment to come to such a definition is what essentially you are saying. As I say, thanks for the submission. In paragraph 55 is another point which I would like to refer to where you indicate that you are unaware of a single other instance of substantive offences where absolute liability exists. I gather you have had a comprehensive review of other laws and have come to this conclusion.

Mr Abbott—We have not trawled through the statute books but, as I said, this submission has been vetted by the members of the Criminal Law Committee of the Law Council—

Senator BOLKUS—It is not a trick question, by the way.

Mr Abbott—who have years and years of experience acting for both prosecution and defence, forming charges and defending them. It is their clear view that they cannot think of any other instance of offences of this magnitude being subject to a strict liability.

Senator BOLKUS—I would like to go to the proscription provisions. I note that you say that you do not think there is a need for them. But you also raised specific issues with those provisions which I also find useful. You referred to retrospective judicial remedies as being ineffective—this is on page 46, paragraph 75. You say:

The Law Council does not consider retrospective judicial remedies would provide an adequate or appropriate means of controlling the exercise of the Attorney-General's power ...

Both in respect of that point and other points in respect of the proscription provisions, can you see any room for natural justice to apply, and apply effectively, under this legislation?

Mr Abbott—Yes, because I think courts can tailor natural justice to the demands of the situation. I think somewhere in our submission we do say that we recognise that, in wartime and times of national security threat, natural justice has to be tailored to meet those demands. But a court can deal with that.

Senator BOLKUS—But the capacity for it to deal with it, as you identify in paragraph 75, must be more limited when you are talking about retrospective judicial remedies. Can you anticipate those remedies really being effective in the context of this legislation?

Mr Abbott—No, it will not catch the person who has been guilty of an offence by being a member for an hour or so of an organisation. It might assist someone who might want to join the organisation after the court intervention or the appeal, but it will not affect the person who had been a formal member or assisted in any way a prescribed organisation.

Senator BOLKUS—In the Communist Party dissolution case, one of the main provisions of concern to the court, leading to its striking down the legislation, was the lack of effective review. Do you think the government has overcome the problems identified in that case by the review mechanisms in this case? I note that you say there are constitutional problems but, for the benefit of the committee and anyone else, you might like to explain those.

Mr Abbott—We note Professor Williams's evidence, summarised in the submission, that the limited judicial review that is available to the Attorney-General's decision now might get over one of the defects of the legislation the High Court found in the Communist Party dissolution case, but we are not able to assist with the detail of disquisition of the constitutional law on this point. Our general point is that offences of this magnitude involving such personal liberty ought not to have a constitutional problem about them, and they ought to be considered at greater length by the public and by the parliament before they are enacted.

Senator BOLKUS—You also raise the constitutional point in respect of the external affairs power—at paragraph 77, on page 47—and express some concern as to whether this legislation is considered appropriate and has been adapted to implementing the treaty. Preceding that, you point out that there are some questions as to whether it is appropriate. Would this proportionality ground be one of concern to the High Court?

Mr Abbott—Yes, I think so. That links to our point that these are provisions of extreme breadth. They catch conduct which ordinary people in the community and people in the United Nations would not call terrorists. Inadvertently, no doubt, the government has gone too far in erecting this barrage of offences and the range of powers catching conduct which is not remotely terrorist and not in fulfilment of the laudable aims of the UN Security Council Resolution.

Senator BOLKUS—Then you raise a specific problem with the Suppression of the Financing of Terrorism Bill, and you indicate that the treaty requires specific intent, but the legislation does not. How will the High Court view that sort of discrepancy on existing law?

Mr Abbott—There might be other heads of constitutional power for this legislation. I do not think we speculate on the constitutionality of this legislation. We do say again that it goes too far. Australia is going further than the United Nations has required. It is going further than

the United States has done in its patriot act, both in this area and in the definition of terrorism. We say it has gone too far and ought to be reviewed.

Senator BOLKUS—So essentially you have identified three constitutional issues that could be pertinent to this legislation: the separation of powers, proportionality in terms of implementation of international covenants and the reviewability mechanisms?

Mr Abbott—That is correct.

CHAIR—I will ask one question before I go to Senator Cooney. It pertains to paragraphs 83 and 84 of your submission, Mr Abbott, in relation to the Suppression of the Financing of Terrorism Bill 2002. You make the point there, if I read you correctly, that article 2 of the International Convention for the Suppression of the Financing of Terrorism and UN Security Council resolution 1373 both have a requirement of specific intent for the individual and that this bill does not. Is that the point that you are making?

Mr Abbott—Yes.

CHAIR—Are you also making the point that, to be consistent—because I think the EM refers to the conventions as implementing those articles—this bill would also need to have a requirement of specific intent?

Mr Abbott—That is our point, yes.

Senator COONEY—Can I ask you about the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002. The offence set out at proposed section 72.3, that if you explode a device and do fearful damage then you are going to be punished, seems unexceptional. But proposed section 72.7 says that proceedings cannot be brought without the Attorney-General's written consent. Can you think of another instance where somebody can let off a bomb and kill people and do terrible damage to property, but the Attorney-General of the state or the Commonwealth has to give written permission before proceedings can be brought against the person who did that?

Mr Abbott—Tony, you might know this—but I think there are other provisions.

Mr Glynn—If you are asking the question in respect of bombings, no, I cannot, but in respect of very serious offences, the consent of the Attorney-General is often required for the initiation of a prosecution.

Senator COONEY—I take it that is because of diplomatic or other reasons, but for something as serious as a major bombing it seems strange that you have to get the Attorney-General's written consent when a crime of that nature is under consideration. That is at proposed section 72.7. Perhaps it may be explained at proposed subsection (4):

In determining whether to bring proceedings for an offence under this Division, the Attorney-General must also have regard to:

(a) whether the conduct constituting the offence also gives rise to an offence under a law of a State or Territory; and

(b) whether a prosecution relating to the conduct under the State or Territory law has been or will be commenced.

So what that is really saying is that, if there are alternative courses of action to take against the person who explodes the bomb, that will be taken into account by the Attorney-General. Is that what that means?

Mr Glynn—That is what it seems to me to be telling you, yes.

Senator COONEY—With all the offences set out under the Security Legislation Amendment (Terrorism) Bill 2002 and, indeed, in the series of bills, many of the things that are dealt with in these bills are already dealt with in the criminal legislation of the states, aren't they?

Mr Glynn—Almost all of them are.

Mr Abbott—And in the Commonwealth.

Senator COONEY—Do you have any thoughts about why you should have a provision like that in proposed section 72.7 of the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 which, in effect, says that if the states and territories are looking after this then there is really no need for the Commonwealth to come in at that level? Can you make anything of that? What are the legal ramifications of all of that, where you have a whole series of legislation and, within that legislation, you have a situation where the fact or otherwise of the states and territories having legislation is apparently a major consideration? Why would we want all of these extra provisions, if that is the approach the Commonwealth is taking?

Mr Abbott—We can only speculate, but it is the Commonwealth-state divide. The Commonwealth will obviously want to take into account whether some state was enthusiastically prosecuting or about to prosecute a bombing before it launched its own prosecution. On the other hand, the Commonwealth would say that, if the states were not speedy enough, it ought to be an offence under Commonwealth law so that the Commonwealth could prosecute.

Senator COONEY—It also gives the Attorney-General power to decide who is to be prosecuted. If an offence were committed by one group, the Attorney-General has power to proceed against it; if it is committed by another group, the Attorney-General has power not to proceed. In other words, this legislation allows cherry picking. Is that right?

Mr Abbott—It certainly adds to the range of offences and it adds to the powers of the Attorney-General, who is a politician. It does not give the power to someone like the Director of Public Prosecutions.

Senator COONEY—This is an Attorney-General who has declared that he has to take into account the fact that he is a member of a political body and a member of cabinet in the context in which he has been asked to say something about High Court judges. We have an Attorney-General who says, 'I have to act politically,' and he has power as to whether to bring prosecutions. Is that a matter of concern?

Mr Abbott—Certainly it is of general concern that large powers are placed in the hand of a member of the executive, yes.

Senator COONEY—Proposed section 72.3(1) of the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 states:

> A person commits an offence if:
>
> (a) the person intentionally delivers, places, discharges or detonates a device; and
>
> (b) the device is an explosive or other lethal device and the person is reckless as to that fact ...

I can understand that on its own, but how it fits in with the rest of the provision I am not too sure. It goes on to state:

> ... the person intends to cause death or serious harm.

Given that you have to prove intent to cause death or serious bodily harm but you can be reckless as to whether the device is an explosive or other lethal device, what are the legal concepts behind proposed sections 72.3(1)(b), which refers to 'reckless', and 72.3(1)(d), which refers to an intent to cause death or serious harm? How would you present that?

Mr Glynn—On its face it looks like a poor piece of drafting. I agree: it is difficult to see why there would be a requirement to prove an intent to cause death or grievous bodily harm where the person's involvement in step 1—that is, the delivering and placing et cetera—was done when the person was obviously not knowledgeable but was reckless simply as to the nature of the device. It would be difficult to see how, if they were simply reckless, they would also have an intention to cause death or serious harm. I have to say, however, that I had not turned my mind to it before you drew it to my attention, but on the face of it there does seem to be some inconsistency within the provision.

Mr Abbott—It might be intended to cover the case where an operative is given a device and told to put it outside a government building. They are not told what is in it but they are told that it might inconvenience passers-by, in the manner of a stink bomb or something; it might cause serious harm to people, because their recklessness is the fact that there is explosive in it. It might cover the sort of unthinking operative who is carrying out orders; this will catch them within the offence.

Senator COONEY—But he would have to have an intent, wouldn't he?

Mr Abbott—You would have an intent to cause a lesser form of harm. If the circumstances are such that it is reckless for you to carry out the instruction, then you might be guilty of a greater offence than you might otherwise have been. I think we generally support this bill; maybe the government has got a good balance in this area.

Senator COONEY—Referring to the 'Financing of terrorism' in proposed section 103.1, is there any other law in Australia that allows a court to imprison somebody for life for providing money or collecting funds for nefarious purposes?

Mr Glynn—I cannot think of any Commonwealth legislation, and certainly none in my home state legislation. The legislation in relation to financial transactions tends to be fairly consistent across the states. I cannot think of anything that creates an offence of that nature.

Mr Abbott—I suppose if you conspired to commit murder, which is punishable by life imprisonment in a jurisdiction, and your role is to provide money for the hit man or hit woman, that could be the type of conduct that is analogous.

Senator COONEY—But then you would be paying to have your nefarious deeds carried out and you would be guilty of murder, wouldn't you?

Mr Abbott—That is correct.

Senator COONEY—I think you have made this point but I would like to ask you about it again: do you know of any other legislation that has so many offences punished with life imprisonment? They are scattered through this legislation like confetti. I just get the feeling that whoever drew up this legislation had a stamp that said, 'Imprisonment for life.' It is as if they had a big rubber stamp, and as the legislation goes through the arm goes up and down and they throw them into jail for life.

Mr Abbott—It would have helped public debate, I think, if the government had outlined why these penalties were necessary and how they matched up to penalties in other civilised

countries. I suppose we should be thankful that there is not the death penalty imposed for some of these offences.

Senator COONEY—They would have to lock them up in state jails. You would not know, but we had better ask the question as to whether or not there are plans to expand—

Senator BOLKUS—Woomera.

Senator COONEY—Yes, to expand Woomera, or the jailing facilities somewhere so as to keep people locked up for life.

Senator BOLKUS—We could turn Parliament House over.

Senator COONEY—We could. We have all these terrorists and we have to have them locked up for life. In your submission, on page 7, item (e) says:

the equally indeterminate concept of 'assists a proscribed organisation' ...

I suppose that might cover professional people such as lawyers, or even doctors.

Senator BOLKUS—Or politicians.

Senator COONEY—Yes—do you have any thoughts about that?

Mr Abbott—We certainly said in our submission that 'assist' is a word with very wide application, not qualified with any concept of materiality or nature of assistance. As you say, speaking out in favour, representing them, giving them advice or treating an injured person might well be construed as assistance. The Attorney-General's Department would say that it is a question of fact in each case and the court would probably construe it in accordance with the purpose of the legislation, but on the face of it citizens are put at risk for fairly unexceptional activity.

Senator COONEY—The Attorney-General was on *PM* last night when it was said that there was some concern about this legislation. He said that the problem was that people were too concerned with human rights. That is a bit of a problem, isn't it?

Senator BOLKUS—That is a strange thing for an Attorney-General to say.

Senator COONEY—Is the Law Council of Australia overly concerned about rights?

Mr Abbott—No. We said in our submission that the legislation appears to be contrary to accepted standards of human rights. However, we also say that we think that the ordinary citizen of Australia, who would not have the education about human rights that the Attorney-General and other members of the legal community have, would understand that this is just going too far. It is not enough because it is a very serious problem. However, it is going much too far and making illegal conduct which no-one would accept ought to be illegal.

Senator COONEY—Has anyone been charged at the moment with an offence that could be related to terrorism? Did you check that? I must confess that I do not know of one.

Mr Abbott—No. We assume that David Hicks has not been charged yet.

Senator COONEY—That is hardly terrorism on Australian soil. He has not been able to get back here. I do not know whether Australia is making a great effort to see that he gets his rights, but, in any event, he is in Cuba. Has he been charged with any offence?

Mr Abbott—Not that has been publicly reported.

Senator LUDWIG—I have a point about the issue of retrospectivity. I notice that, in the proscription powers, your submission goes to the point about the appeal mechanism and its retrospective nature. Could you explain that a bit further so I can fully understand your point?

Mr Abbott—You are referring to paragraphs 54 onwards on page 40.

Senator LUDWIG—There is a reference to the appeal mechanism, the ADJR process only—and I understand the point you make in respect of that—and you then mention the retrospective nature. Does it mean that they do not have natural justice and the Attorney-General can proscribe without giving them any notice of the likelihood that they will be proscribed? Is that the retrospective issue that you then talk about in the sense that the appellant mechanism is post that decision? Could you just help me with that?

Mr Abbott—It is directed at the example that the appeal under the AD(JR) Act can only set aside the Attorney-General's declaration prospectively so that, up until the moment that the appeal is decided, it is an offence to be a member of a proscribed organisation or to assist a proscribed organisation. The effect of a successful appeal under the Administrative Decisions (Judicial Review) Act would not be to render that conduct lawful. There would be no retrospective effect to make legal conduct which ought to be legal.

Senator LUDWIG—And it would have devastating effects on the organisation and its membership during that period because your reputation, standing, accounts and the way you conducted your business would be significantly affected and the membership would have to take action to protect themselves as well. The ability to establish yourself as another or the same organisation would be potentially severely hampered. Is that the point you are making?

Mr Abbott—That and the legality of the conduct. If the organisation ought not to have been proscribed in the first place, then people ought not to be guilty of an offence for assisting it or being a member of it from the time of proscription. If they have been, in the interval between proscription and successful appeal, they will still have committed an offence and be able to be prosecuted. The successful appeal under the AD(JR) Act against the declaration of proscription will not make legal conduct which was illegal in the interval between proscription and successful appeal.

Senator LUDWIG—So potentially someone may have been charged and locked up for life?

Mr Abbott—Twenty-five years, I think, is the maximum penalty.

Senator LUDWIG—So potentially someone could be charged, convicted and sentenced, and the organisation could subsequently be found not to be a proscribed organisation, but that would still stand and they would have to then find some other mechanism to—

Mr Abbott—That is the point that we make here.

CHAIR—As there are no further questions, Mr Abbott, Mr Glynn and Ms Harvey, on behalf of the committee thank you very much for attending this morning. Several members of the committee, in addition to me, have thanked the Law Council for your submission. It is of great assistance to us in considering this legislation and we appreciate the time and effort taken in putting it together.

[10.03 a.m.]

BIESKE, Ms Nicole Simone, Convenor, National Legal Group, Amnesty International

MAHON, Ms Claire Frances, Member, Amnesty International

CHAIR—Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Witnesses are also reminded of the notes that they have received relating to parliamentary privilege and the protection of official witnesses. The committee has before it a submission from Amnesty, which it has numbered 169. Are there any additions or alternations that you wish to make to this document?

Ms Bieske—No.

CHAIR—I invite you to make a brief opening statement and, at the conclusion of that, I will ask my colleagues to direct questions to you.

Ms Bieske—Firstly, we would like to thank the committee for the opportunity to appear to address this very significant and concerning legislation. Generally, Amnesty wishes to emphasis the permanence of human rights standards. Human rights should not be something that governments endorse when they feel like it, but they actually constitute the bare minimum of safeguards necessary to protect the safety of individuals from the abuse of power.

To possibly pre-empt some of the questions that may be asked, the role of Amnesty, as seen by our organisation, is to comment on legislation as proposed and to comment on whether that does violate any human rights issues. It is not our role to tell the government whether they should or should not be legislating. We do not see that as being our position in relation to this legislation. Amnesty is concerned, however, that this legislation does breach obligations on international standards and that it does create uncertainty in the law. Particularly we are concerned in relation to four issues.

The first significant issue is the reversal of the onus of proof. I note that you have had significant submissions to this point so far. As you will be aware, the presumption of innocence is very important, and is an important tenet in Australian criminal law. It is also enshrined in paragraph 2 of article 14 of the International Covenant on Civil and Political Rights, the ICCPR, and in article 11 of the Universal Declaration of Human Rights. Reversing the onus of proof means that the person is essentially presumed guilty and it is then up to them to disprove their guilt on the balance of probabilities. That is something which we feel is a violation of human rights and something which we also feel might affect the right to a fair trial in particular situations. It is of even more concern in this instance given the serious of the penalties, given that people will be subject to life imprisonment. As you will be aware, the act does make provision for the reversal of this onus of proof in four sections in relation to training, possessing things, documents, and directing organisations.

The second concern we have with this legislation is the uncertainty of the terms that do appear. I note that the Law Council has made significant submissions in addition in relation to this issue. There is a need for certainty in the law so that people know if what they are doing is breaching the law. When you use terms like ‘thing’ and ‘collect’ and ‘making’ and ‘assists’, those words do not provide any certainty or any clarity in the law and they do not allow people to adapt their conduct to ensure that what they are doing is lawful. So we do have

concerns with those sorts of terms that are used. In relation to the definition of terrorism itself, we have concerns with the meaning of 'lawful protest, advocacy or dissent'. There is very little jurisprudence, as far as we are aware, in Australia on what that means, what those terms are, what is unlawful or lawful in relation to protest. I note that that issue has been the subject of some question by the senators so far. We do also have concerns in relation to provisions that make it a criminal offence to 'indirectly' assist, and exactly what the meaning of that is.

Our third issue is in relation to proscription. As you will be aware and we have raised in our submission, we do have concerns in relation to breaches of natural justice in relation to proscription processes, and that it does provide for a form of collective criminalisation, and that there is no ability for full and complete review of this proscription.

Our final concern is the fact that the legislation lacks any provision for compensation if organisations are proscribed and are subsequently found to have been incorrectly proscribed.

CHAIR—We will begin with questions from Senator Ludwig.

Senator LUDWIG—Thank you for your submission. It is quite detailed for the time that you have had available to provide it. It is of great assistance to the committee. If I could just take you to the submission you made in relation to the Rome Statute and the establishment of the International Criminal Court. As I understand it, Australia has signed it but not ratified it at this point.

Ms Bieske—That is correct.

Senator LUDWIG—Could you expand on your view of how that impacts upon Australia. Is it an analogy that you draw, or what do you say?

Ms Bieske—The reason that we have raised that is because, as you have pointed out in relation to the questions that you were asking the Law Council, of the severity of the crimes that are involved. They are, as you said, heinous crimes—genocide, crimes against humanity—the worst kind of crimes that people can think of, yet they have still continued the presumption of innocence in relation to those crimes. You are right in saying that we have signed but not yet ratified. The International Criminal Court was ratified by 66 countries as of last Thursday, which means it is going to come into existence on 1 July. Australia, through the Attorney-General, has indicated that it is also going to ratify—hopefully, if the implementing legislation can be introduced and passed, before 30 June. They will also be involved in the processes later on. So it is relevant to Australian law in that respect, but it is also relevant in terms of the world community and the view that the presumption of innocence is something that can be applied and retained in relation to those sorts of significant crimes.

Senator LUDWIG—Thank you. I take it that when that legislation comes before parliament and should there be a committee you will also make a submission to it.

Ms Bieske—We have already made three, actually, to the joint standing committee.

Senator LUDWIG—I think I have had a couple from the Treaties Committee as well. We do appreciate your work in that area. In relation to the issue of compensation, which you have raised on page 5, you say that if an organisation is proscribed and it is successful on appeal under AD(JR) or it is revoked, on what grounds do you say there should be compensation? On any grounds, and to what extent? The revocation may relate to reasons which are not relevant to the issue at hand or might not relate to why you would pay compensation. I was just curious how you would say that would work.

Ms Bieske—What we would say is that generally if somebody has been found to have been incorrectly proscribed—and as you were discussing with the Law Council, proscription will have serious implications in an organisation—that it would be fair in relation to natural justice issues as well to provide for a form of compensation now. It is not for our organisation to tell the parliament what that level of compensation should be or how that system should be established. It is just an issue that we wish to raise as something that we see as necessary to be included into this legislation.

Senator LUDWIG—What I was perhaps trying to turn your mind to was whether or not it mattered about whether or not the revocation was because, for arguments sake, the organisation no longer existed or could not be identified in any way, shape or form and therefore it was no longer necessary for it to remain on the statute books. So it was revoked in that sense but there may be members who then claim compensation as a consequence. Or, whether you then say that if there is a successful AD(JR) in that the organisation should not have been proscribed and therefore the Attorney-General proscribed the organisation against the law therefore compensation could accrue. Is that what you say? Is that the point that you make, or should compensation be available for all reasons?

Ms Bieske—I think it is a difficult issue. The thing that came to mind when you said perhaps the organisation no longer exists is perhaps the reason it does not exist is because it was incorrectly proscribed in the first place. So it is difficult to establish what the limits would be on that. I take your point that it is a difficult issue. But I do think that certainly if they have clearly been found to have been incorrectly proscribed they should be able to access compensation. Past that, I think it would be at the discretion of parliament as to when they considered it to be appropriate that compensation were available.

Senator LUDWIG—What about people who were perhaps part of the organisation if it was proscribed during that period? You may have been present during the submission of the Law Council. What about those people who may have then been charged or found guilty of an offence during that period where the organisation was proscribed, and subsequently the organisation was either successful on appeal or the proscription was revoked for whatever reason but they were then serving sentences? Notwithstanding that issue, should they also receive compensation?

Ms Bieske—I must admit that is not something that we have specifically turned our mind to.

Senator LUDWIG—Do you have a view about it?

Ms Mahon—Clearly Amnesty would submit that it is important to provide for access to compensation when people have been injured or had detriment caused to them as a result of an incorrect proscription in a situation where it has later been found that that proscription was not correct. However, Amnesty would put that the specifics of exactly how a provision for compensation should be determined is up to the parliament.

Ms Bieske—As I understand it, there are currently remedies under the common law if you are found to have been held possibly inappropriately.

Senator LUDWIG—Yes, I know. I understand that. We will leave it at this point. But these people would still be in jail in that sense, and they were not wrongly found. During the relevant time they contravened the legislation and are serving sentences. The original reason for the sentence was because they were hypothetically a member of the proscribed organisa-

tion. That organisation is no longer proscribed and therefore the reason for the offence—that is of being a member of the proscribed organisation—is no longer there, so—

Ms Bieske—It may depend, though, as you indicated, upon the reason for the incorrectness of proscription. If it has been revoked because the organisation no longer exists it is a different question to subsequently finding that the proscription was wrong in law.

Senator LUDWIG—Yes. In relation to your general concerns, you mentioned the ICCPR. Are there any other conventions or treaties that you say this legislation may offend?

Ms Bieske—We have mentioned the ICCPR and we have also mentioned the Universal Declaration of Human Rights, particularly in relation to the presumption of innocence.

Senator LUDWIG—Yes.

Ms Bieske—In relation to this legislation, they are the concerns that we do have.

Senator LUDWIG—All right. Thank you.

CHAIR—Just to continue briefly on the question of proscription, on page 11 of your submission you talk about 'collective criminal punishment of an organisation'. I wonder if you could expand on that briefly for the committee and in particular the contrast you have made with the UK Terrorism Act 2000.

Ms Bieske—The concern that we have is that the legislation provides, as we say in our submission, for the definition of 'member' to be extremely broad, to include a person who has taken steps to become a member and to include an informal member. It also allows for proscription of an organisation because of the acts of one person. We feel that, because of the penalties that flow from the organisation being proscribed, what you are effectively doing is collectively criminalising all of the members of the organisation because of the conduct of possibly one renegade member. We have concerns in relation to that particular principle. The UK Terrorism Act specifically targets the organisation and the conduct of the organisation. It does not focus on the conduct of individual members. It requires the organisation to have been involved in terrorism, whereas the Australian legislation, as drafted, provides for an individual member and the acts of an individual member to be sufficient grounds for a proscription if the Attorney-General is satisfied.

CHAIR—But isn't the question really whether the member is committing the offence on behalf of the organisation?

Ms Bieske—But who says it is on behalf of the organisation—does the member say that or does the organisation say that?

CHAIR—I imagine that is a question of fact.

Ms Bieske—But the member may well say, 'What I am doing is on behalf of X,' but the organisation may not agree that that is an act that they would support.

CHAIR—But that is still a question of fact, whether the organisation says yes or no. I think the point you make is that the Attorney-General is not required to hear from the organisation, let alone the member, so how can that point be made?

Ms Bieske—That is correct as well. But it is also the fact that it just says 'on behalf of the organisation' and does not indicate whose perspective that is coming from.

CHAIR—I appreciate that. At the top of page 12, you indicate that your organisation believes that the legislation should require proscribed organisations to be listed in legislation. Do you mean that a bill should be put before the parliament every time an organisation is

proscribed or do you think that the names of the organisations should be reported to the parliament?

Ms Bieske—What is currently happening—I am not sure if the senators are aware of this—is that the Attorney-General is proscribing organisations in relation to financial issues.

CHAIR—Yes, we are aware of that.

Ms Bieske—He is doing that by regulation and then actually publishing that so that—

CHAIR—So you mean in the same manner?

Ms Bieske—it is publicly on the record.

CHAIR—So by delegated legislation rather than—

Ms Bieske—Something along the line, so that then it is more out in the public forum and people can then know more actively if an organisation has been proscribed, and take steps to—

CHAIR—I understand that. So you are satisfied with the current process, in that regard, that the foreign affairs minister has pursued in recent times in relation to the UN declarations?

Ms Bieske—We would prefer that it actually went before the parliament. We would prefer that it was debated by the parliament and was brought to the parliament's attention rather than necessarily just being done by one person under delegated legislation.

CHAIR—But that is not clear from what you have said here. I did not understand that at all. So you are actually saying that a decision on proscription should be made by the parliament, not by the Attorney-General, and it should be made in this manner—or is it merely a matter of report?

Ms Bieske—What we have said in the submission that we have put forward is that the proscription process should be subject to review. I note that you have had numerous suggestions put to you as to exactly how the review process should work. Whether that be section 30AA, or whether that be before the parliament, or how that be done exactly, is something again that we do not feel it is our position to decide, but we have concerns that it is not open to review at the moment, that natural justice is not adhered to and also that, in relation to notification of people, the notification provisions currently provided—that an organisation has been proscribed under the publication in the *Gazette* and publication in, presumably, the *Australian*—are not sufficient to allow people to actually know that an organisation has been proscribed.

CHAIR—You make the point in your submission that the application for review should be made to the Attorney-General. But don't you have the view that the Attorney-General should not be making the proscription in the first place?

Ms Bieske—No. The point that we made in the submission—I apologise if that was unclear—is that currently there is provision for revocation of declarations in the act, but there are no clear provisions set out for an organisation to make an application to the Attorney-General that they be reviewed.

CHAIR—That is because I do not think that is the plan.

Ms Bieske—That is exactly right, but we think it should be there. The power is with the Attorney-General and that is the way that it has been seen appropriate to draft this legislation so far. We are concerned that that should be open to complete review. We are also concerned that organisations should be able to bring an initiative of their own that their particular

proscription be reviewed in that process. So we are suggesting ways in which this legislation can be, if you like, amended to actually comply or address some of the concerns that we have.

CHAIR—It was not entirely clear to me from the submission so we might have another look at that.

Senator McKIERNAN—Could I just follow that up?

CHAIR—Yes. It is your opportunity to ask questions now, Senator McKiernan, as Acting Chair.

ACTING CHAIR (Senator McKiernan)—In response to the Security Council resolution there was a series of individuals and organisations named by the United Nations Security Council and the government, through the Minister for Foreign Affairs, actually proscribed these individuals and organisations. It is quite extensive—16 pages on list 1 and four pages on list 2. How would this proscription by the Minister for Foreign Affairs, Mr Downer, fit into what Amnesty is suggesting?

Ms Bieske—The ones that you are referring to at the moment are the three lists that the Minister for Foreign Affairs has proscribed?

ACTING CHAIR—Yes.

Ms Bieske—We were interested to note—this was noted by Senator Ludwig this morning—that there had not been lists issued by the Security Council, as far as we are aware, of organisations that they think should be proscribed. They refer specifically to resolution 1373 1(c), which states: 'Freeze without delay funds and other financial assets ...' It does not specify organisations, so I do not think that as far as we are aware the Security Council has specifically specified organisations so far.

Senator LUDWIG—Resolution 1373 does not proscribe organisations. Potentially it could, but it has not at this point. Organisations exist which other countries have proscribed and Australia, as I understand it, would develop its own list of those organisations which it would proscribe. The list we have—and I am not sure if it is a public list yet, but I think some senators have referred to it—is a collection of organisations that we would consider being our list of those organisations which we would proscribe based on, I suspect, by looking at it, what the US and UK have done. But that would be a hypothetical conjecture on my behalf.

Ms Bieske—I think that is correct. The organisations the Minister for Foreign Affairs has proscribed have been specifically in relation to financing thus far and restrictions on financing. I am not aware of there being any list thus far issued by the Security Council specifying organisations

ACTING CHAIR—Thank you for that clarification. I want to return briefly again to the matter of compensation. Thank you for raising it. It was not something that I had addressed my mind to prior to reading it in your submission. If the bills went through the parliament in their current form, with no avenue in them for compensation in the event of an organisation being incorrectly proscribed, would compensation be available under the normal criminal law procedures in your opinion?

Ms Bieske—For the proscription process?

ACTING CHAIR—For an incorrect proscription?

Ms Bieske—Given that they can seek limited review under the AD(R)Act, I would imagine the remedies that would apply would be the remedies of administrative law, not the

remedies of criminal law. If what you are talking about is, as Senator Ludwig mentioned, specific people who are imprisoned as a result of proscription and that proscription is found to later be incorrect, should those particular people have remedies under the criminal law? I am not sure if there are currently remedies that exist under the Australian law in that particular situation, I am afraid.

Ms Mahon—Amnesty International is concerned that remedies become available under this act and are set out specifically so that it is clear that if an organisation has been incorrectly proscribed there is a very clear remedy available, especially given the fact that the provisions state that it is an offence to assist an organisation and presumably that would also mean it is an offence to assist an organisation to appeal an incorrect proscription. Therefore, we are concerned that provisions for compensation be very clearly established within this bill.

ACTING CHAIR—My final question relates to the comment you made in the summary, in the second paragraph:

> Amnesty International is encouraged that the package of "anti-terrorism" legislation introduced in Australia does not expressly alter the procedures for determination of the status of refugees and asylum seekers.

That comment stuck out as not necessarily being related to the thrust of the bills that are before us.

Ms Bieske—That is exactly the point that we were making. What has happened in legislation overseas is that it has expressly changed provisions for asylum seekers and refugees within those countries and in some instances has allowed for them to be summarily deported, if you like, if they are determined to be terrorists by the Secretary of State—for instance, the United Kingdom. We are very pleased that that is not present in the legislation as it appears before us in the Australian parliament.

ACTING CHAIR—So that has occurred in the United States? Has it occurred in any other country?

Ms Bieske—In the United Kingdom.

ACTING CHAIR—In the United Kingdom as well?

Ms Bieske—It is only, as far as we are aware, in the United Kingdom. As you would be aware, the United States have been quite active in pursuing people who they believe have breached visa conditions and those sorts of things.

Senator COONEY—Amnesty International goes about courteously writing to people trying to get governments to release people who might be locked up for their political, religious or ideological beliefs. Is that right?

Ms Bieske—That is correct. Breaches of—

Senator COONEY—What do we object to if we are in Amnesty International?

Ms Bieske—Now we are actually taking a position in relation to all of the rights under the Universal Declaration of Human Rights—civil, political, economic, social and cultural rights. Breaches of all of those rights are now something that Amnesty International—

Senator COONEY—Can you say that again?

Ms Bieske—It has traditionally been limited to civil and political.

Senator COONEY—Yes, that is right.

Ms Bieske—And now it is also economic, social and cultural rights.

Senator COONEY—Not racial rights?

Ms Bieske—Not specifically. It is based on all of the rights in the Universal Declaration of Human Rights.

Ms Mahon—Under the Universal Declaration of Human Rights there is an obligation not to discriminate on the grounds of race, religion and the usual provisions. Therefore, that is where race would come into it.

Ms Bieske—That would come under social or political rights.

Senator COONEY—I have referred to this in respect of other witnesses as well. It fascinates me that it can only be a terrorist act if it is done with the intention of advancing political, religious or ideological causes. If you are racist, I don't think it applies to you. Amnesty International only helps people if they are non-violent, as I remember.

Ms Bieske—That is correct. The reason that we have not gone into any detail in relation to that aspect of the definition is that Amnesty International does not condone violence or criminal activity.

Senator COONEY—But can you think of why you should punish people who have political, religious or ideological causes more than you would punish other people? Have you thought about that?

Ms Bieske—Unfortunately, Amnesty also does not take a position in relation to the severity of penalty in that respect. It is not our position to tell the government what penalty should be applied in particular situations.

Senator COONEY—Around the world is it Amnesty's position that as long as people are treated according to the law that is all right, no matter how severe the law or how unhappy the law?

Ms Bieske—No. You will note that under the ICCPR there are provisions in certain situations to abrogate your responsibilities under those acts but they must be in accordance with the law, they must be proportionate, they must be reasonable. Things which are lawful are not necessarily in compliance with human rights standards. For instance, detention may be lawful but it may still be arbitrary.

Senator COONEY—What you mean by lawful there is in accordance with the law as written.

Ms Bieske—The law of the country—that is right.

Ms Mahon—Amnesty International has concerns with countries that make laws. We would like to see that whatever laws are made and whatever acts are deemed lawful or unlawful within that state are still compliant with the international human rights framework.

Senator COONEY—You have this concept that the laws ought to be reasonable?

Ms Bieske—And proportionate.

Ms Mahon—And necessary, if they are derogating from the human rights obligations that the countries have signed on to.

Ms Bieske—One of the other issues that we have made in our submission is that the laws need to be clear and certain. This legislation raises very significant concerns about the lack of certainty and clarity by the terms that are used.

Senator COONEY—Your submission here this morning is very much in the tradition of Amnesty's actions in trying to address concerns around the world?

Ms Bieske—That is correct.

Senator COONEY—Have you thought about the relationship between these laws and the laws of the states and territories and how they compare?

Ms Bieske—It is not something that we would specifically seek to make submissions in relation to.

Senator COONEY—Have you looked at whether these laws would stand up in Europe? Who deals with their human rights provisions?

Ms Mahon—The European Court of Human Rights.

Senator COONEY—Yes, but what is the statute?

Ms Bieske—The European Convention on Human Rights.

Senator COONEY—You are right. That has been brought into the domestic law of all the European states.

Ms Bieske—That is quite similar to provisions under the Universal Declaration of Human Rights as well. They focus very much on presumption of innocence. The concerns that we raise would be similar to concerns that would be raised in the European Union. There are significant concerns as well in relation to other legislation which has been introduced in this package of bills.

Senator COONEY—Have you looked at what would happen to these five bills if they were introduced in Europe?

Ms Bieske—We have not turned our mind to it in that particular way. We have looked, to a limited degree, at laws that have been enacted overseas to see any similarities or differences in those laws.

Senator COONEY—What have you found?

Ms Bieske—One of the interesting questions that I noted the committee was asking yesterday was whether there had been prosecutions under relevant acts overseas. Because most of those acts in relation to terrorism have been introduced since September 11, the time period is so short that there has not been time for prosecutions of note to occur. I did look at the Terrorism Act in the United Kingdom and found a couple of references, mostly in relation to Northern Ireland issues.

Senator COONEY—Given the time that has been available to you, I suppose the organisation has not had time to make the comparisons you would like to make.

Ms Bieske—We would have liked to have provided a much more detailed submission, but in the time available that was not possible. We would have liked to have gone into some more detail in relation to the international position as well. I appreciate the comments that have been made by Senator Payne in relation to the effort that the committee is going to. I have been impressed by the time that you have been putting in and your ability to wade through the material that you have to wade through, but we had limited time and unfortunately we are all volunteers. It is very difficult for us to do this in addition to our jobs and to put the effort and time into these submissions that we think the committee deserves.

Senator COONEY—I suppose you would have some concern that this legislation has been expedited through—to use a neutral word—given the heavy penalties that are imposed.

Ms Bieske—Very much so. The point was made yesterday that this legislation is so important—and has been emphasised to be so important—that we should allocate an appropriate amount of time to recognise the importance of the legislation to make sure that we do get it right.

Senator COONEY—Do you know of any widespread and ongoing acts of terrorism occurring in Australia at the moment?

Ms Bieske—Not off the top of my head.

Ms Mahon—I do not think Amnesty would be aware of those things. In further answer to your question about our analysis of how the Australian proposed legislation compares with other legislation overseas—

Senator COONEY—And whether it stands up to other legislation.

Ms Mahon—That is right—Amnesty has had the opportunity, in a brief way, to analyse how broad the provisions under the Australian laws are and how they compare with provisions, say, in the legislation which has been introduced in the UK. We have looked at elements such as the definition or the mention of 'things' as a concept within the legislation here and compared it to the UK bill, which provides for 'articles' or 'an article'. We believe that the Australian legislation is far too broad and imprecise in its drafting in comparison with legislation which has been produced in other countries.

Senator COONEY—What other countries have you looked at?

Ms Bieske—We have looked mainly at the United Kingdom legislation.

Senator COONEY—And our legislation is broader. Is it much broader?

Ms Bieske—Parts of it are, and the terminology used is, as a general rule, significantly broader in our legislation than it has been in the United Kingdom. The legislation there is much more precise. It would be easier to know whether you are offending against the provisions of that legislation because of the way in which it is drafted. I note that the UK legislation also provides for specific review provisions in relation to the proscription of organisations. It allows for organisations and individuals to bring applications for review. Those sorts of steps are clearly set out in that legislation. We are not endorsing the legislation; we are comparing it.

Senator COONEY—I can follow what you mean. How many hours work have you done on this after your own work?

Ms Bieske—Probably more than we should have, given our other obligations.

Senator COONEY—What time were you getting to bed of a night—very late?

CHAIR—Senator Cooney!

Senator COONEY—I am getting very worried about them.

CHAIR—We have got to draw the line here somewhere, Senator Cooney, and I am just about to draw it.

Senator COONEY—Are you working hours and hours into the night?

Ms Bieske—We have been, yes.

Ms Mahon—It has involved a large amount of time.

Senator COONEY—I think that ought to be acknowledged.

Ms Bieske—Given the complexity of the legislation as introduced, the different bills, you will note that we have only made submissions to this committee in relation to the terrorism bill. We just have not had the time, unfortunately, to look at the other bills, although I am sure that we would have concerns about those if we had the opportunity to do so. We have also put submissions to the other committee and will do so to you in relation to the ASIO bill.

Senator COONEY—And you spent hours and hours on it.

CHAIR—Thank you

Senator COONEY—Thank you for thanking them, Madam Chair.

CHAIR—I was thanking you, actually, Senator Cooney.

Senator COONEY—I see. I thought you were thanking them.

CHAIR—Now I will thank Amnesty International on behalf of the committee for their submission and for their oral evidence this morning in assisting the committee with our deliberations.

Ms Bieske—We also have a report called *Rights at Risk*, which generally overviews the world situation in relation to this type of legislation.

CHAIR—Would you like to table that?

Ms Bieske—If we could.

CHAIR—Thank you very much.

[10.36 a.m.]

THAM, Mr Joo-Cheong, (Private capacity)

CHAIR—I call the committee to order and welcome Mr Joo-Cheong Tham. Do you have any comments to make about the capacity in which you appear?

Mr Tham—I am a lecturer at the law school at Victoria University and am appearing in a personal capacity.

CHAIR—I remind you that the evidence given to the committee is protected by parliamentary privilege, and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind you of the notes you received relating to parliamentary privilege and the protection of official witnesses. The committee has before it your submission, which it has numbered 61. Are there any amendments or alterations that you wish to make to that submission?

Mr Tham—No.

CHAIR—I invite you to make a short opening statement, and at the conclusion of that ask senators to direct questions to you.

Mr Tham—My submission, as you will know from the beginning of my submission, is confined to schedules 3 to 5 of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2], so my remarks are confined strictly to those schedules. I note incidentally, however, that the remarks I am going to make actually have wider relevance, because I think schedule 3—in particular, the definition of 'terrorist act'—really forms the cornerstone of the counter-terrorism legislation package and, insofar as that definition is broad, it infuses the operation of legislation that is proposed.

There are really two parts to my opening statement. The first is that I am going to actually draw on various illustrations of the application of these various schedules. The second part basically distils the main reasons for my ultimate position, which is that these schedules should be abandoned in toto and that the Senate committee should recommend, in the process of considering legislation in its campaign against terrorism, a proper deliberative process and that process should be constituted by a parliamentary commission of inquiry comprised of Commonwealth parliamentarians as well as state parliamentarians with broad terms of reference—and, in fact, you can take a leaf from the broad terms of reference that you find in the Protective Security Review Report that was completed by Justice Hope in the wake of the Hilton Hotel bombing. That committee should have ample time to report, say a year, and allow for proper public involvement.

As to the first part, illustrations of the breadth of the bill, I think the key to understanding the operation of the bill is really the foundational concept of a 'terrorist act', which you find defined in proposed section 100.1. I will stress two things. One is the outer limits of what I have described as the action element. There are two main elements to the definition of 'terrorist act': there is a motive element 'intention of advancing a political, religious or ideological cause' and the other is the action element, which the bill describes as action falling within subsection (2).

The outer limits of the action element are basically constituted by two circumstances: action involving serious harm to a person and action involving serious damage to property. I will come back to this, but the use of the word 'involve'—note that the bill does not use the

words 'cause' or 'directly cause'—loosens the nexus between the action of the alleged terrorist and the serious harm or serious damage. I will give you illustrations later. It allows the serious harm or serious damage to be inflicted by a third party. The second point about the definition of 'terrorist act' is the limited protection that is afforded by the exclusions. The first exclusion is lawful advocacy, protest and dissent. As the New South Wales Council for Civil Liberties mentioned in their presentation at the public hearings in Sydney, public demonstrations technically involve some element of unlawfulness. Any public demonstration, even though it is completely peaceful and might involve trespass or public nuisance, will not come within the envelope of this exclusion.

The second exclusion relates to industrial action. That is left undefined by the bill. The significance of this is that, under the Workplace Relations Act, the full bench of the Federal Court has defined industrial action to exclude all forms of picketing. I should be emphatic about that point: it excludes all forms of picketing. It was suggested yesterday by the ACTU that some picketing comes within the rubric of industrial action. In my opinion that is incorrect. If senators want to pursue this point, footnote 17 contains the references for what I have said.

Those were my general remarks. Let me now give some examples of what would constitute terrorist acts under the bill. The outer limits of the action element involve serious damage or serious harm. Let me pick an example that Senator Scullion put to various witnesses about representatives of the National Farmers Federation coming to Parliament House. Say the National Farmers Federation, because of a political issue, comes to Parliament House and enacts a truck blockade. The motive element is clearly satisfied—there are no worries about that. In setting up the blockage, they are probably trespassing and there is a public nuisance, so the protection of lawful advocacy, protest and dissent is out the window. Thirdly, when they set up a truck blockade, they know there is a real chance that those trucks will be removed to allow passage to Parliament House for people like you. When that happens, the Australian Federal Police move in and remove the trucks. It is seriously arguable that the National Farmers Federation knew that the truck blockade carried a high chance of being removed and their action involved serious damage to property. The fact that that action did not directly cause serious damage is not the point with this definition in the bill, because the word 'involved' is used.

Another example is the protests at Richmond Secondary College, where various people were engaged in passive civil disobedience. They linked arms and blocked off the entrances to Richmond Secondary College. When they did that, they knew that there was a very strong chance that the police would come in and remove them and, in that process, inflict physical injury or serious harm to a person. That is what happened: the police came in, applied pressure-point tactics and inflicted serious harm to various protesters. It is seriously arguable, under the bill's definition of a terrorist act, that the action of protesters in engaging in purely passive civil disobedience would constitute a terrorist act.

Let me give you a few examples from the industrial sphere. Assuming that you accept my argument that picketing is excluded from the exclusion of industrial action—there is a strong chance that that will be the case, given the interpretation in the Workplace Relations Act—various types of picketing are going to constitute terrorist acts under the bill. You can assume that the motive element is satisfied. If people usually picket for some notion of industrial or wage justice—fine; tick—the exclusion of industrial action does not apply. The exclusion for lawful advocacy, protest and dissent is not applied because, as you see set out in my submission, any form of picketing, whether peaceful or otherwise—this is to be stressed—involves some unlawful element. Peaceful picketing can involve nuisance, defamation,

unlawful element. Peaceful picketing can involve nuisance, defamation, trespass and so on. The common law has always been trenchantly hostile towards forms of industrial action. So we have those two elements satisfied.

The third element is the action element. If you have picketing that elicits heavy-handed tactics by police or private security guards, again you can run through the same analysis about action involving serious harm or serious damage. In other cases there is the absence of heavy-handed tactics by police or private security forces—for example, picketing by information technology engineers. When they take industrial action, they intend to disrupt information technology systems. You have to satisfy the action element and the action element can be satisfied if there is action which seriously disrupts or interferes with the electronic system. The same reasoning applies for picketing bank tellers.

You satisfy the action element in a different way for picketing nurses. The action element can be satisfied if it creates a risk to the public or a section of the public. The bill does not define what a section is, but let us say a section is 10 people. When nurses picket, it is not uncommon that there would be a risk to the health of certain sections of the public. These are illustrations of the breadth of the foundation or the concept of a terrorist act. I will run through a few examples and, as I am very conscious that I am running out of time, I will confine my remarks.

I want to talk about the impact of this bill on business. I will illustrate some examples of the offences found in proposed sections 101.4 and 101.5. Proposed section 101.4 criminalises a person possessing a thing—that is the first element. The second element is that the thing is connected with the preparation, engagement and so forth of a terrorist act. The bill affords a limited defence where it is established that a person was not reckless as to the fact that the thing was connected with the engagement, preparation et cetera. The impact on business may be as follows. We know there is a wide range of items that could be used for terrorist purposes in a primary sense. It could involve fertiliser being used to make explosives. Another example relates to my father who, when he was boarding a plane in Malaysia, had his nose hair tweezers confiscated. That gives you an idea of the range of items that could be used for terrorist purposes in a primary sense. In the example of an unfortunate retail business which sells fertilisers that could be used for explosives, that business possesses a thing—no worries. If one of its customers uses that fertiliser to make a bomb, the thing is connected with a terrorist act. It then falls on the business to discharge, on the balance of probabilities, that he or she was not reckless as to the fact that this bag of fertiliser was going to be used for a terrorist purpose.

As the Law Council mentioned, the explanatory memorandum is clear. If you possess a thing connected with a terrorist act, you are put on notice. You either divest yourself of the thing—for the business, it means closing down the business and getting rid of the bags of fertiliser—or you ensure that that bag of fertiliser will not be used for terrorist acts. Let us try to imagine what that might mean. What that might mean for business is, I would say, an effective system of inquiry directed at the customers' usage of their items. For example, that might require customers signing statutory declarations saying 'I shall not use this for a terrorist act' or—depending how judges interpret this particular provision—obtaining clearances from the AFP, the state police and so on.

Let me illustrate this with a short hypothetical to make this concrete or more real. Let us take a 'Mr Abdul', who is a sole proprietor. He runs an incorporated business called Abdul Pty Ltd which sells agricultural products. One of the things he sells is fertiliser. A Mr Smith

who patronises his shop is a member of a white supremacist group and he plans to bomb the office of a cabinet minister or whatever. He has been told by his comrades in Tennessee, 'If you buy this fertiliser, it is particularly effective in making homemade bombs and explosives.' He has a sheet of paper with specifications about what particular fertiliser he has to buy. He walks into Mr Abdul's shop and he hands over the sheet to Mr Abdul, and Mr Abdul says, 'Great, I've got that fertiliser,' and he sells that fertiliser, takes the money from Mr Smith, issues an invoice and dutifully puts down the GST component and so on.

Even before Mr Smith carries out the bag of fertiliser and exits the shop, I can count a list of five separate offences that have been committed under this bill—and maybe some people can count a few more. Let us assume Mr Abdul does not have an effective system of inquiry into his customers' use of items; he does not ask for such declarations and has not heard of the Security Legislation Amendment (Terrorism) Bill 2002. While the bag of fertiliser is sitting in Mr Abdul's possession, he is committing the offence of possessing a thing connected with a terrorist act. It does not matter under the bill that a terrorist act has not been committed because that is expressly spelt out in the proposed offences. That is offence No. 1.

Offence No. 2 is committed when Mr Abdul is in possession of the documents specifying what fertiliser should be bought for making explosives. Again, he is committing the proposed offence of possessing a thing connected with a terrorist act. When he collects the document, he is committing the proposed offence of collecting the document connected with the terrorist act. When he issues the invoice, he is making a document connected with a terrorist act. Finally, because he is a sole proprietor—as he is directing the business of Abdul Pty Ltd—he is directing an organisation indirectly concerned with the preparation of a terrorist act. There are five offences, each of them punishable by life imprisonment.

Senator McKIERNAN—If convicted.

Mr Tham—If convicted, of course. That is taken for granted. Those are my comments about the legislation's breadth in terms of the offences in proposed schedule 3. I will speak briefly about the power to proscribe in proposed schedule 4, and I will make two short comments. Firstly, obviously they are infused by the breadth of whatever the terrorism offence is from proposed schedule 3, so they are similarly tainted. Secondly—and this is a point that I am surprised has not been raised more often in these public hearings—proposed schedule 5 of the bill confers retrospectivity of sorts to the power to proscribe. At the risk of boring the senators, I am going to read it out because no point has been made. Proposed schedule 5 reads:

The Attorney-General may make a declaration under section 102.2 of the Criminal Code—

and that is the power to proscribe organisations—

after the commencement of that section in relation to:

(a) acts or omissions committed before or after the commencement of that section ...

Again, that has clear problems. I come to the second part of my opening statement, where I am going to briefly state my reasons for abandoning the proposed schedules in toto and starting the new process, if you like. The first is that you can see from my discussion about the illustration of the bills' applications that the package is going to have a clear adverse impact on freedom of assembly, freedom of association, business and the right to strike. For that reason alone, these proposed schedules should be abandoned. The second reason is—and the point has been made repeatedly by witnesses before this committee—the adequacy of the criminal law. I think Senator Bolkus raised Justice Hope's comments in respect of that, and

the point is made clearly by Justice Hope in the Protective Security Review Report, which was commissioned by the Fraser government after the Hilton Hotel bombing. He said, 'Terrorism by its nature involves breaches of the ordinary criminal law.' Former High Court Justice Windeyer, who tendered an opinion to Justice Hope, said this:

> Since all forms of violent wrongdoing that are called terrorism are punishable as crimes under Commonwealth or State law, it seems to me questionable whether the importation into Australian law ... of the word 'terrorism', as a concept in law is useful or desirable. The best safeguard against the new terrors and apprehensions may lie in the rigorous enforcement of existing criminal law rather than in making new laws expressly about terrorism.

And the third reason—I flesh out the other reasons in my submission—which is perhaps the most disturbing aspect about this bill and about the counterterrorism package in general, is that the process leading up to the proposals contained in the bill really represent a grievous failure of democracy. In saying this, I can accept what I think Senator Scullion said in the Sydney public hearings that, 'It's rubbish to say that the world hasn't changed since September 11.' That is true. But the question is: how has it changed? It is clear that there is great pressure on people like yourselves—politicians—to introduce new laws to respond to what Eva Cox described as the 'moral panic' that has arisen since September 11. But a key question for the Senate is this: what is the demonstrated need for new legislation, new offences and new powers? We know for one thing that there is no specific known threat of terrorism in Australia. We know this because the Attorney-General, Daryl Williams, has reassured us numerous times since the September 11 attacks that that is the case. All we have to clutch at in terms of demonstrated need for new legislation—new offences punishable by life imprisonment or 25 years—is just vague references to a 'changed international security environment' and the like. For the most part, the need for legislation is assumed rather than explained or justified. The transcripts of the Sydney hearing, for example, had Mr Ford from the Attorney-General's Department referring to 'gaps in legislation'. That is assumed. I for one could not find why these were considered gaps—why the existing criminal law could not cover whatever was intended to be covered.

The scandalous nature of the failure to justify—and it is really a failure to be democratically accountable—is thrown into stark relief when one looks at the *Protective Security Review* report by Justice Hope and the careful examination that is contained in that report. After the introductory chapter, you have two chapters examining the counterterrorism machinery at Commonwealth and state levels. Then you have the next three chapters scrutinising what Justice Hope described as 'the three lines of defence against terrorism': intelligence, preventive action and crisis management. Then you have another four separate chapters containing in-depth analysis of various areas of protective security—for example, the relationship between ASIO and the police forces, in particular the special branches and the protection of VIPs. To my knowledge, none of these areas has been examined in any detail in the process leading up to this bill.

To close my opening statement, I am going to quote from Justice Kirby. This quote is reproduced in my submission, and I think it is important to bear it in mind. Justice Kirby, in a speech entitled 'Australian law—after September 11, 2001', said that:

> keeping proportion, adhering to the ways of democracy, upholding constitutionalism and the rule of law, and defending, even under assault, and even for the feared and the hated, the legal rights of suspects are the ways to maintain the support and confidence of the people over the long haul. He said that every erosion of liberty must be thoroughly justified, that sometimes it is wise to pause before acting precipitately and that always it is wise to keep our sense of reality and to remember our civic traditions.

These are salutary words to be borne in mind. It is also important to bear in mind that being 'tough on terrorism', whatever that means, might very well mean being weak on democracy. These schedules should be abandoned.

CHAIR—Thank you very much for your opening statement, Mr Tham.

Senator McKIERNAN—I would like to make the point that you repeated the words of the Attorney-General that there is 'no terrorist threat in Australia at the moment'. I am comforted by that but I also have the knowledge that we now have in Australia what are known as air marshals flying on domestic airlines, and we have air marshals as a direct result of the happenings of September 11 of last year.

Mr Tham—In terms of justification and rationalisation that is clearly the case. The whole point about this—it seems unremarkable to say this: when people set out to resolve a problem they identify the nature of the problem and then propose solutions—is that all we know is that September 11 has occurred. We know something has changed, but what is the exact character of the change? What are the exact risks or dangers of terrorism that are actually being addressed by these measures? As I said, run through the *Protective Security Review* report. None of that analysis has happened prior to the introduction of these bills. To say that there are measures that have been justified on the basis of September 11 is of course true, and it is trite to say that, but to say whether they are properly justified is a different question altogether.

ACTING CHAIR (Senator McKiernan)—But they are there, and the enhanced security at airports is also there and, thankfully, not as bad as it is in other parts of the world. We do not want to see people with submachine guns patrolling our international airport in Australia at this time. But, nonetheless, there is enhanced security at our airports, and that is because of an increased threat of terrorism throughout the world, and it seems to have had an impact in Australia.

Mr Tham—What do you understand as 'an increased threat of terrorism'?

ACTING CHAIR—I am not going to respond to your questions, I am sorry.

Mr Tham—That is precisely the point: that this process of proposing legislation has not been preceded by a process identifying what is the exact threat of terrorism. The fact that you cannot answer me—and this is not a criticism of you, it is a criticism of the process—

ACTING CHAIR—Where I am coming from, as a legislator, is that I have been given a task as a member of this committee to examine some legislation that is before the parliament at the moment. You have come here to give some evidence in regard to that legislation. It is my job to question you in regard to that legislation. I am not seeking—and it would be wrong of me, as a member of the opposition parties—to justify legislation such as this coming into place. That is why I am not going to answer your question. I am not being disrespectful to you, but I am not going to allow you to put me in a position that I personally do not want to be in.

Mr Tham—I understand that.

ACTING CHAIR—You are offering, in your very detailed and very worthwhile submission, a justification for some form of legislation in Australia, aren't you?

Mr Tham—That is incorrect. I am offering a justification for a process to determine and deliberate whether there is any need for legislation.

ACTING CHAIR—Your specific suggestions are related to schedules, and you said the schedules should be abandoned.

Mr Tham—Yes.

ACTING CHAIR—You are not saying that the bills, as such, should be abandoned. You are offering—for me to put a crude interpretation onto your very detailed submission—some suggestions for amendment to the legislation, rather than suggesting the total abandonment of the legislation, are you not?

Mr Tham—The reason my submission is confined to the schedules is, of course, the shortness of time. That is all I have examined in detail. So the fact it is confined to that actually says nothing about the desirability or otherwise of other parts of the legislation. The second part is that I am suggesting the total abandonment of the schedules.

ACTING CHAIR—Of the schedules?

Mr Tham—Yes, because that is only what I have managed to examine in the shortness of time.

ACTING CHAIR—Not of the legislation?

Mr Tham—I make no comment.

ACTING CHAIR—You offer suggestions on the proscription, for example, don't you?

Mr Tham—Yes, I do. It might well be your view that my position is a very hard line approach, and it is a very hard line position, but it is one that stems from my analysis of the schedules and an examination of the process leading up to the bills. That leads to the conclusion that these schedules should be abandoned.

ACTING CHAIR—But you are saying, as I interpret your submission and your oral presentation here this morning—which I commend and am very grateful for—in summary to that, there is a need for some form of antiterrorism legislation in Australia.

Mr Tham—That is not a correct interpretation of my position. I have made it clear that what I am recommending is a proper democratic process to consider the need, if any, for legislation in the campaign against terrorism. I made that clear in my oral presentation, and I have also made it abundantly clear in my submission. I actually quite resent being corralled into a position that I do not hold.

ACTING CHAIR—But you are suggesting a way forward.

Mr Tham—Yes.

Senator McKIERNAN—Why are we going to have a way forward if there is going to be no legislation?

Mr Tham—The reason is, firstly, to examine whether there is any need for legislation. Why is that such a hard proposition to accept? For example, isn't that inherent in this Senate committee process right now? This whole process is to consider whether there is any need for legislation, too. I am suggesting a process that is more democratic and that allows for more time and proper deliberation.

Senator McKIERNAN—Not only on the schedules?

Mr Tham—That is right.

Senator McKIERNAN—But I do not think that has come through to me from your submission, which is very detailed—it is over 30 pages—or from your oral presentation this morning. The message I have is that you are opposed to the process contained in the legislation, because that is what you have devoted your submission to and also your presentation here this morning.

Mr Tham—I am sorry, I must have missed something. I am not quite sure of your question, Senator. I am finding it hard to respond to.

Senator McKIERNAN—It was not so much a question as a summary of where we are at the moment with regard to your submission and your presentation here this morning.

Senator GREIG—Thank you for your submission, Mr Tham. I understand that you were here yesterday; you made reference to hearing some of the submissions yesterday. Amongst others, we heard from Mr Julian Burnside, from Liberty Victoria. He argued, principally, that existing laws are enough to deal with terrorism or threats of terrorism. Is that where you are coming from? You are saying that the way forward is not so much to bring in legislation, which you consider unnecessary, but to better use existing laws?

Mr Tham—In part, yes; that is correct.

Senator GREIG—Can I be devil's advocate for a moment and walk you through the hypothesis you gave about Mr Abdul and his fertiliser, and Mr Smith the purchaser, in Kentucky or Tennessee, or wherever you placed it. There would be those who are generally supportive of the principles behind this legislation who would say, 'Oh, come on, Mr Tham, this legislation is not directed at people selling fertiliser. Clearly the key word here is "recklessness" and it would be absurd or unreasonable for any court to say that a retailer selling somebody fertiliser could be deemed to have been reckless. It would be like saying a second-hand car dealer might be convicted because somebody was involved in a car accident because they sold them that car'—if I can draw another analogy. What would you say to those people who would say, 'No, the law is structured in such a way—the terminology is there in such a way—that it would not capture people in the fringe hypothesis that you give; it is more directed towards more concrete examples of recklessness'?

Mr Tham—The clear terms of the bill basically place the onus on whoever is charged to discharge, on the balance of probabilities, that he, she or it was not reckless and that the thing was not connected with the preparation, engagement and so on to commit a terrorist act. That in itself inherently requires that person to take some positive steps to actually discharge that onus. It is well settled: you can look at the Acts (Interpretation) Act and you can refer to the explanatory memorandum in interpreting the bill. The explanatory memorandum says quite clearly that people who have things connected 'with a terrorist act' are put on notice. Again, that means it requires them to take some positive steps to be able to discharge their onus and say, 'I was not reckless.' Those positive steps, of course, could only be settled by judicial interpretation, but it is quite arguable to say that those positive steps would involve at least some inquiry by the retail business or whoever asking, 'What are you going to use this for?' I think that is an eminently plausible interpretation of the bill.

Senator GREIG—I cannot imagine a scenario where somebody retailing fertiliser would ask the purchaser what they were going to use the fertiliser for, as opposed to somebody purchasing a rifle or a weapon or explosives of some sort. But even there I cannot picture an example where a purchasing officer in a mining camp in Western Australia would be asked why he would be buying gelignite, for example.

Mr Tham—In those situations, if you cannot imagine it and if those businesses have not actually asked questions about why the customers are using it, those businesses run the risk of being convicted under this bill.

Senator GREIG—We discussed with other submitters yesterday the scenario, where there was media follow-up, in terms of the pilot training that was done by some of those who flew in the terrorist attacks of September 11. I wonder in fact if the legislation before us now were enacted in the US and had retrospective application whether those people who trained the pilots might fall foul of this law. Would that be your reading?

Mr Tham—The would not fall foul of the training offence because the training offence is confined to use of arms, explosives and so on. I am thinking aloud more than anything else, really.

CHAIR—But you are thinking aloud on the *Hansard*, Mr Tham.

Mr Tham—Sorry?

CHAIR—You are thinking aloud on the record.

Mr Tham—I will have to take that on notice. I do not think people in those situations would be caught by this bill.

Senator GREIG—In terms of your overall presentation, if the bill were to progress and to become law in some form, would you be supportive of advocating a sunset clause to the entire package of legislation so that it only maintained itself for, say, four or six years and then was reviewed at the end of that?

Mr Tham—At the public hearings a lot of witnesses talked about the adequacy of review and the adequacy of safeguards and so forth. For me, actually discussing that is like walking into a bear's pit because it involves conceding something I do not concede—that there is demonstrated need. I am open that there might be a demonstrated need, but so far I have not seen a demonstrated need for such legislation. It is so important. It might be trite to insist that that is the logically anterior question: is there any need for legislation of this sort? That needs to be answered before we start talking about adequacy of safeguards, sunset clauses, review mechanisms and so forth. I am going to be frustratingly hardline about this and say that I do not want to make comment on that.

Senator GREIG—Thank you.

Senator LUDWIG—I was interested in your view in relation to the effect on commerce. Do you say, given your scenario in relation to the fertiliser seller, that in fact it does have an economic effect on business? If it amounts to an economic effect on business, do you take the next step and say that a regulatory impact statement should have been prepared?

Mr Tham—Not just a regulatory impact statement. If you look at the last paragraph of my submission, where I give some suggestions about the terms of reference of a parliamentary commission of inquiry—

Senator LUDWIG—Yes, I understand that. You understand a regulatory impact statement?

Mr Tham—I fully understand what you are trying to say, yes.

Senator LUDWIG—It is not what I am trying to say; it is what I am trying to ask you. Aside from all the other recommendations you make, you did not mention whether a RIS should or should not be made —a regulatory impact statement.

Mr Tham—Can you repeat that, Senator? I did not catch your last sentence.

Senator LUDWIG—Aside from the other recommendations that you made, you did not say a regulatory impact statement needed to be made.

Mr Tham—That is true.

Senator LUDWIG—My question then is, given that you have said it may have an effect on commerce—

Mr Tham—Yes.

Senator LUDWIG—and you used the analogy of the fertiliser seller and the paperwork that they would have to produce—

Mr Tham—Yes.

Senator LUDWIG—would you then say that a regulatory impact statement would need to be produced with the legislation?

Mr Tham—I think it would be a positive step, but it would not be a sufficient step.

Senator LUDWIG—Yes. I am not suggesting at all that it would be a sufficient step. I am just asking you—

Mr Tham—It would be a positive step.

Senator LUDWIG—I am not asking whether it would be a positive step; I am asking you whether you have considered whether or not a RIS should or should not have been developed. It is not a trick question. You know what a RIS is, I take it.

Mr Tham—Yes, I do.

Senator LUDWIG—A RIS is usually prepared where there is an effect on business.

Mr Tham—Yes.

Senator LUDWIG—You have said it has an effect on commerce. Does that issue amount to an effect on business in your view?

Mr Tham—Yes, it does. I am prepared to adopt your suggestion.

Senator LUDWIG—It is not my suggestion; I am merely asking you whether or not a RIS should be developed.

Mr Tham—I think it is a good idea and it should be done, if that is what you want from me.

Senator LUDWIG—I do not want anything from you. We are not going to get very far, are we, if we adopt this process, but we will continue.

CHAIR—Not for very long, Senator Ludwig. That is the constraint under which we are operating.

Senator LUDWIG—In relation to the issue of serious damage to property, you used the word 'cause'; in other words, you then say there is a causative element that is involved in that.

Mr Tham—There is a causal element, yes, but it is a loose causal element. It is looser than if you used the word 'cause' or the words 'directly cause' instead. But there is a causal element, yes.

Senator LUDWIG—Have you come to a view about what 'serious damage' could or could not include, or do you say it is such a wide term that it could include practically any damage?

Mr Tham—No, I would not take the latter view. It is serious damage and that is the phrase being used.

Senator LUDWIG—The Law Council used an example where a door to a building might be seriously damaged—in other words, completely destroyed, which amounts to serious damage—but in the context of the size of the building, damage to a door may not be serious.

Mr Tham—Exactly. This is going to be finally settled by judicial interpretation. It is hard to know. There will be a threshold. Any damage will not quantify; that is quite clearly going to be the case. I do not have any definite view on that and I cannot give you a definition of a definition right now.

Senator LUDWIG—In relation to your oral submission about a passive demonstration or a passive picket, I was curious that you then used the term 'pressure point tactics'. Do you say they could cause or contribute to a serious risk to the public? You might want to help me explain what your submission is. I am not putting words in your mouth—I should have started off with that. Do you say that it might start out as a passive demonstration but, because of the utilisation of pressure point tactics to deal with the passive picket, it might then cause serious harm to people—for instance, the picketers—or that the use of those tactics might cause retaliatory measures that then cause serious harm?

Mr Tham—Pressure point tactics are police tactics.

Senator LUDWIG—Yes.

Mr Tham—I am not completely across the technical detail.

Senator LUDWIG—Neither am I; that is why I was asking you.

Mr Tham—Basically, from what I understand it involves police going in and trying to immobilise the demonstrators in some form or other. They apply pressure point tactics. This is my understanding from newspaper reports. Last year there were actions against the police for their use of those pressure point tactics, which involved payments of compensation to demonstrators who suffered physical injury as a result of the police pressure point tactics.

Senator LUDWIG—So as a consequence they could be included within the definition of terrorism? That is the point you make?

Mr Tham—Acts of passive civil disobedience, yes.

Senator LUDWIG—You mention the downloading of material in your submission. Is that a person who—innocently, I guess, because it is a strict liability offence—downloads material which could then include them within the definition of terrorism? They might be simply searching the web or surfing the web for a whole range of assignments on terrorism, for argument's sake.

Mr Tham—Exactly. Take the example of a document detailing, blow by blow, the actions of Al-Qaeda. The bill uses the phrase 'connected with'; a document 'connected with' the engagement in a terrorist act. I think it is seriously arguable that a document documenting the terrorism of Al-Qaeda is a document 'connected with' the engagement in terrorist acts. It arises from the natural and ordinary meaning of the bill. If a person downloads the document from the Net, he or she makes a document 'connected with' the engagement in terrorist acts. I

am a university academic. If I knowingly do research—I know it is a document about Al-Qaeda, because that is what I am doing research on—and knowingly download a document, I cannot avail myself of the defence that I was 'not reckless' about the fact that it was connected with the engagement in a terrorist act, because it was a knowing act.

Senator BOLKUS—Can I start by referring you to supplementary answers provided by the A-G's Department. I do not know if you have seen them—

Mr Tham—No, I have not.

Senator BOLKUS—but they do respond to some of the points that you raise. Given the time constraints, it might be worth while if you could have a look at them and come back to us—

Mr Tham—Okay.

Senator BOLKUS—for instance, in respect to the point you make about the definition of 'terrorist act' including certain instances of picketing and public demonstration. They tell us that it is not their intention, but they do not really confront the issue that you raise. The same also applies to the point I want to start with, and that is the retrospective aspect of this legislation. You quite rightly point out the fact—very few people have raised this point—that under 'Application' on page 17 of the bill an organisation can be proscribed under 102.2 of the Criminal Code for 'acts or omissions committed before or after the commencement'. I note that on page 25 of your submission to us, which I must say I find quite valuable as a quality submission, you do refer to an explanatory memo to legislation where the Attorney-General in a rare moment of honesty says:

... one of the criticisms that can be directed at retrospective criminal legislation is that people will be unaware that their conduct is an offence.

That is a pretty fundamental criticism to make. But that does not appear in the second reading speech. The retrospective nature of this provision is something that he chose to not tell parliament in the second reading speech. In A-G's reply to you, they say that this is a standard transitional provision, a proscription will be prospective only. This is what they say. But then they go on to say that it may be also considered appropriate to utilise the provision to give effect to resolutions of the UN Security Council that predate the commencement of the bill. I am raising this as a matter of concern for me, but is there anything else that you would like to raise—for instance, in response to their claim that this is a standard transitional provision?

Mr Tham—I am at a disadvantage in the sense that that I have not read and do not have in my possession the supplementary submissions. The only point I can make about this being a standard transitional provision is that, from my understanding, chunks of the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] were inspired by the UK terrorism act, and the important point I make about this is that the genesis of the UK terrorism act was actually the Prevention of Terrorism (Temporary Provisions) Act of the United Kingdom, which was specifically legislated with respect to the Northern Ireland situation and also had a sunset clause. What we are seeing now, and what unsettles me about this process, is that crisis requirements are being progressively diluted. We have legislation that originates from counterinsurgency situations now applied to a situation where, according to the Attorney-General, there is no specific known threat of terrorism and that is justified on the basis that the United Kingdom has it and therefore perhaps we should have it.

Senator BOLKUS—But you are not saying that the UK has a retrospective provision for proscription?

Mr Tham—I have not examined the UK legislation in detail, so I will make no comment.

Senator BOLKUS—That is my concern here. Clause 5—'acts or omissions committed before or after the commencement of that section'—can go back to Federation, basically.

Mr Tham—Yes.

Senator BOLKUS—I just find it hard to believe that we have been living in a society for the last six years where the government may have known of acts of terrorism but are choosing now to attach criminal provisions to them by retrospective legislation.

Mr Tham—Yes. The point to be made is that it hinges on the offences that are contained in schedule 3 and the broad definition of what is a terrorist act. So there might be terrorism in a primary sense that we might all agree upon and they could be used in respect to that, but the breadth of that power, the retrospectivity that is conferred, actually is much wider than that.

Senator BOLKUS—Yes. Just going on to another point, you refer to the word 'involving'. You refer to problems with the term 'industrial action'. For instance, in respect to protecting what is known to be ordinary industrial action like picketing and so on, are there words that can be developed to cover that situation, or are these sorts of definitions or problems so fundamentally difficult that it is best to toss out the provision?

Mr Tham—I am sorry, Senator; I am going to be frustratingly hard line again. I do not see the need for this legislation. To start talking about safeguards and proper definitions I think is premature at this stage.

Senator BOLKUS—On page 18, you refer to what I think is also a somewhat worrying provision which has not been focused upon:

… the Attorney-General can proscribe an organisation if s/he believes *on reasonable grounds* that a relevant offence has or is being committed.

What you are suggesting there is that by that position the Attorney-General is putting himself into the position of judge and making an assessment of whether an offence is committed, and that offence does not have to be proven at law.

Mr Tham—It does not have to be proven at law and, further than that, the person does not even have to be charged with that offence for the Attorney-General to reach an opinion.

Senator BOLKUS—It has got implications on the rule of law, then.

Mr Tham—I agree.

Senator BOLKUS—On page 22, under the heading 'The limited significance of judicial review', basically you are pointing out to the fact that the review is only available in respect to the legality of a decision, not the merits of a case.

Mr Tham—Yes.

Senator BOLKUS—I know you have not seen this, but the A-G's response is, I suppose, one that would be predicted. They say that in canvassing legality breaches of the rule of natural justice are relevant and taking into account any relevant consideration in the exercise of power is also relevant. Is that sufficient to satisfy your concerns?

Mr Tham—No, it is not. The other point I make is that merits review in the area of national security is actually not a new thing. In fact, if you look at the ASIO Act, it sets up merits review in respect to security assessments that are actually put forth by ASIO. So the

fact that this is in the sphere of national security, whatever that means, does not mean that we should actually preclude some form of merits review.

Senator BOLKUS—You raise concern about the constitutionality, and you refer to Higgins and former Justice Windeyer. But can the government not justifiably argue that by using other heads of power—the external affairs power, for instance—they would be covered, or do you see some problems in using that power?

Mr Tham—My discussion about the constitutionality is not that these provisions are unconstitutional. I agree with Professor Williams who is saying proposed section 100.2 is quite successful in preserving the constitutional validity of these provisions. There might be some question with the powers to proscribe—whether they are unconstitutional on the grounds of separation of judicial power in that they might constitute what the High Court has described as a bill of attainder or pains or penalties. I have not reached a concluded view about that. I just have not had time. My point about the constitutional complications is this: because the Commonwealth only has limited constitutional competence, it has to fit the offences into various heads of power in section 51 of the Constitution. Whether an offence is committed or not depends on whether they can pigeonhole it within those heads of power.

Let me give you two examples where I actually have grave doubts whether people would be committing offences under this bill. This was interesting because when Senator Cooney asked Amnesty International whether anybody had been convicted of a charge of a terrorism offence I thought, well, Peter Knight, who is on trial before the Victorian Supreme Court, is alleged to have killed a security guard at a fertility clinic. It is alleged he did it because he was a right to lifer with anti-abortionist views. I am just guessing, but I am guessing that most of us would consider that as some kind of terrorist act. There are very interesting points about this episode because it is quite clear that the existing criminal law can actually pertain to it. The other interesting point about this is I have grave doubts whether this would actually be covered by this bill or whether it falls within any of the areas in section 51. It might be a question that senators might want to put to the Attorney-General's Department—whether they think that Peter Knight would actually be covered by this bill because of the constitutional limitation of the Commonwealth's powers.

I will give another example where I have grave doubts. My hunch—and it is a hunch because I have not reached a concluded view about this—is that attacks on Commonwealth parliamentarians would be covered by this bill. However, attacks on state parliamentarians or backbenchers I think would not be covered by this bill because that is not within constitutional power. That raises real questions about the rule of law because one tenet of the rule of law, as Chief Justice Gleeson said in a recent speech, is that the criminal law should operate uniformly in circumstances that are not materially different. You have the situation where somebody who falls on one side of the constitutional envelope is not punished by life, while someone who falls on a different side of the constitutional ball line is punished by a different regime.

Senator BOLKUS—I could probably go on all day, but I will not.

CHAIR—Thank you, Senator Bolkus. We are running up against a very challenging time schedule. I still have to call Senator Scullion and Senator Cooney, so if questions and, to the extent that it is possible, answers can be as concise as possible I think that would be helpful.

Senator SCULLION—Thank you very much for your very comprehensive presentation, Mr Tham. I just note that the whole nub of what you are saying is: is there a need for the bill?

I would just like to explore that for a while, perhaps in a very lay sense. I notice that you have these images, particularly from Israel recently—and I do not mean to go there in a political sense, but I just think this could have happened on either side—of a bus which looks more like an egg, with bits hanging out of the top of it; there are body parts; it is just horrific stuff. That is generally the thrust. Or there is the image of an aeroplane someone has bombed and you see a few things floating on the sea, or you think of Lockerbie. That is the sort of image the public have of terrorism. Would you agree with that? To a lay person on the street that is a terrorist act—this reckless behaviour that endangers others apart from who you target.

Mr Tham—Yes.

Senator SCULLION—Just recently in Western Australia I looked at an aerial photograph of a car bomb that had just eradicated everything within a 20-metre area and killed the two occupants. It was placed there by an organisation, it is alleged; an organisation interested in motorbikes, I understand, although I do not want to go to that part of it. I go to that whole issue of: is there really a need? The only difference between that particular aspect, clearly, is that it was more about somebody taking revenge on a government officer, or an organisation perhaps taking on a government officer. You could extend that to perhaps an organisation challenging the government in some part. It moves in a very vague way towards what we would consider a terrorist act in any event. I do not try to draw specific conclusions there.

Mr Tham—I understand.

Senator SCULLION—Given that those sorts of events naturally occur as society progresses, do you still say that there is absolutely no need for this sort of bill?

Mr Tham—The car bomb detonating would clearly constitute some criminal offence. There is no doubt about that. The second point I would make again is that there are doubts because of constitutional issues that the bill actually covers that situation. If this officer being attacked is, let us say, a state government functionary, I have grave doubts whether this bill actually extends to that situation.

Senator SCULLION—Just in regard to the penalties, very briefly, at the moment I understand people are being pursued and they will be charged with murder or whatever it is going to be. But it is going to be for the taking of two lives. I guess it appears to me that in the nature of terrorism, the nature of the acts as such, there is a potential to take a great deal more lives. For example, that particular car bomb was placed in an area on one side of Perth and it drove a considerable distance through traffic, past kindergartens or whatever, to get to somewhere else and then was detonated. The difference, I suppose, in the approach is that an act of terrorism is usually seen to have this recklessness to other people, whereas we only have the capacity under Western Australian law at the moment to charge them with the death of these two people. However, under the terrorism act, if it was appropriate, the penalties would perhaps be more appropriate because of the risk of greater mass destruction, I suppose.

Mr Tham—They could also be charged for attempting to inflict serious injury and attempting to murder various people. So, apart from being charged for the murder of those two persons, various other charges could be put, for people who were not actually hurt as a result.

Senator COONEY—You mentioned Peter Knight. I do not want to mention him; I think he is on trial. You would not remember Julian Knight, would you?

Mr Tham—Sorry, I have been in Australia for just about seven years, so no. I am sorry.

Senator COONEY—Julian Knight is somebody who shot dead six or seven people in Hoddle Street in Clifton Hill, or Collingwood. You have heard of the shootings in Port Arthur in Tasmania? Were you here then?

Mr Tham—Yes. I am aware of that.

Senator COONEY—Neither of those examples would be examples of terrorism. Even though lots of people were killed, they were not terrorist acts under this definition. That is right, isn't it?

Mr Tham—Because of the motivation, yes.

Senator COONEY—So what we are punishing here is motivation rather than facts. Is this what you were saying before—that there is already plenty of legislation there to deal with the facts, and what this is dealing with is motive and that is all? Motive is normally used to work out whether a person is likely to have committed a crime, not in intelligence provision. The intent is what counts in criminal law, isn't it, rather than motive?

Mr Tham—That is right.

Senator COONEY—You said that this is very vague legislation in the sense that many issues—and I think you talked about integrity and things like that—are very wide. Does that, in your view, allow an Attorney-General to pick and choose whom he will prosecute and on the basis of what? You understand that the Attorney-General has got to give the tick-off?

Mr Tham—The power conferred by the bill is a power to proscribe; it is not a power to prosecute as such. But of course the power to proscribe can lead to a decision to prosecute. The discretion is with the Attorney-General or the delegated minister. There is nothing compelling either the Attorney-General or the delegated minister to actually make a decision to proscribe. So the answer is yes.

Senator COONEY—So the government in effect can prosecute some and not prosecute others under this legislation, depending on their view.

Mr Tham—That is very possible under this bill, yes.

Senator COONEY—You were here yesterday and you heard the evidence of how this is affecting people, particularly the Arab and Muslim community.

Mr Tham—I am sorry, I was just here for the ACTU presentation.

Senator COONEY—Well, there was some strong evidence given that this legislation is affecting people. They were in fear. There was some other evidence given that the government is targeting people of Arab origin, and there was evidence of a migration raid on a house occupied by an Australian citizen, on the basis that he had had a couple of people in who looked as if they were from the Middle East. Can you understand that this legislation might create those sorts of fears in people's minds when it is so vague, so imprecise and where the Attorney-General has the ability to prosecute some but not prosecute others?

Mr Tham—I can fully understand it. In my submission I refer to Justice Brennan in probably the leading case with ASIO, where he talks about the chilling effects of ASIO powers. I think the same can be applied to this legislation. I think it is a necessary part of analysis to find out what is strictly within the four corners of the bill, but also to think a bit more broadly. The fact that some picketers think that they might be punished with life imprisonment, or that some public demonstrators might think that they might be punished with life imprisonment, I think is cause for concern in itself.

CHAIR—Thank you very much, Senator Cooney. Mr Tham, other senators have thanked you for your detailed and complex submission and the committee thanks you also for the effort that you have put into making that submission. It is very helpful to us in our deliberations. I thank you also for the time you have spent here this morning, and yesterday afternoon listening to other witnesses. Thank you.

[11.41 a.m.]

PARGETER, Rev. David, Director, Justice and International Mission Unit, Uniting Church in Australia

ZIRNSAK, Dr Mark Andrew, Social Justice Development Officer, Justice and International Mission Unit, Synod of Victoria, Uniting Church in Australia

CHAIR—Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind witnesses of the notes they have received from the secretariat in relation to parliamentary privilege and the protection of official witnesses. The committee has before it your submission, which we have numbered 12. Do you need to make any amendments or alterations to that submission?

Rev. Pargeter—No.

CHAIR—Thank you. I invite you to make a brief opening statement. At the conclusion of that, we will turn to questions.

Rev. Pargeter—I would like to begin by saying that the Justice and International Mission Unit of the Uniting Church in Australia is deeply concerned with many of the provisions of the Security Legislation Amendment (Terrorism) Bill 2002 and believes that the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 should be rejected outright. The unit believes that there has been insufficient demonstration that most of the provisions in the Security Legislation Amendment (Terrorism) Bill are needed, as most of the offences listed in the bill appear to be already covered under the criminal law from other legislation. Murder, serious injury and damage to property, or conspiring to commit any of these offences, are already criminal acts under Australian law. War crimes in international conflicts are already criminal acts carrying up to life imprisonment under Geneva Conventions Act 1957. This act could be extended to include war crimes committed in non-international conflicts or armed conflicts that do not involve governments. The unit would also support amendments to tighten up the legislation relating to mercenaries to allow it to capture those Australian residents that engage in armed conflict as part of a foreign armed force. The unit is concerned that, given the severity of the proposed penalties in the bill, there is a need to ensure that the offence as defined in the bill will not catch nonviolent protest activities even when these are unlawful.

The issue of greatest concern to the unit is the issue of proscribing organisations. Of great concern to the unit is section 102.2 of the bill, in which the Attorney-General is granted the ability to proscribe any organisation where that organisation 'has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country'. We are concerned that this provision could be misused to proscribe nonviolent political independence movements in other countries. For example, this provision could be used to proscribe nonviolent Kurdish, Tamil, Palestinian, Sudanese or West Papuan organisations that seek independent states, as these movements could be seen to endanger the integrity of another country.

The unit is deeply concerned at the level of executive power that this provision places into the hands of the Attorney-General. We would seek that 1(d), which states that '... the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country', be removed entirely from the legislation. Further the

proscribing of any organisation should require legislation specifically banning the organisation, which would require the consent of both houses of parliament.

We are deeply concerned that anyone that 'assists' a proscribed organisation in section 102.4 could face 25 years imprisonment. Despite written assurance from the Attorney-General's Department, it remains unclear what would constitute assistance.

It also remains unclear to us why an offence of treason is needed. We are concerned that the current definition, when Australia is engaged in armed conflict and when emotions run hot, could be used against those that engage in nonviolent protest against Australia's involvement in the armed conflict in question.

The unit is also concerned that the definition is too broad, especially in relation to extending to serious damage to property. The unit notes that the same definition of terrorism is used in the Suppression of Financing of Terrorism Bill 2002.

I would like to conclude the opening comments by referring to the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

CHAIR—That bill is not under consideration by the committee in these hearings. I note that you have referred to it in your submission. The Parliamentary Joint Committee on ASIO, ASIS and DSD is currently examining that, and we have a reference which we will deal with at a later date.

Rev. Pargeter—All right. That ends my opening comments. My colleague and I will try to respond to any questions that you raise.

CHAIR—Thank you. I omitted to apologise for the slight delay in reaching your evidence this morning. We are grateful for your patience in that regard. We will begin with questions from the deputy chair, Senator McKiernan.

Senator McKIERNAN—Am I right that your suggestions in your oral comments about mercenaries were not, to the best of my knowledge—and I have scanned your submission again—included in your submission?

Dr Zirnsak—Yes, they were.

Senator McKIERNAN—Can you point to them?

Dr Zirnsak—Yes. Under 'Definition of treason', on the bottom of the second page, we make references to the Crimes (Foreign Incursions and Recruitment) Act 1978.

Senator McKIERNAN—You are referring to mercenary activity by Australians overseas? It was not clear to me, in reading your submission. You are referring to Australians operating overseas on mercenary activities when you make these comments here?

Dr Zirnsak—Correct.

Senator McKIERNAN—Thank you very much for the clarification. Regarding your suggestion on banning or proscribing organisations, you suggested, Rev. Pargeter, that that might be done by the parliament. As a parliamentarian, I am nearly always ready and willing to defend how parliament operates, but would this be the most efficient method of doing it if such a banning or proscribing process was required?

Dr Zirnsak—If I may respond on that, I note that in December, it is my understanding, legislation was passed that actually prohibited financing. There are a number of organisations which it is now forbidden to fund, being listed as terrorist organisations. My understanding is that that was a piece of legislation that was passed. I gathered that was done through the

parliament rather than passing it to the Attorney-General to decide which organisations could be banned in terms of being financed as terrorist organisations.

Senator McKIERNAN—It was actually a declaration by the Minister for Foreign Affairs, which did not actually go through the parliament. But that brings us to the point. The parliament rose about September last year and did not reconvene again until February of this year. That was close to a six-month gap. If there was a need for some parliamentary action in the banning of an organisation that was clearly engaging in a terrorist-type activity, it would be a bit much to have to wait six months, four months or five months to do that, would it not? That is why I am talking about the efficiency of putting in a parliamentary process for the proscribing or banning of an organisation that is clearly engaged in terrorist-type activities.

Dr Zirnsak—The concern that we have raised is, obviously, with the seriousness of the penalty that is imposed for people who assist that proscribed organisation. Noting the large discretionary power that currently is offered to the Attorney-General, we think there need to be greater safeguards. As you pointed out, there may be some practical limitations in terms of the parliament, but we would argue there is a need for greater safeguards than simply the say-so of one person within the government.

Senator McKIERNAN—I take the point that you are making about safeguards, but I am not so sure that parliamentary process would be the most efficient way of doing it. It may be more democratic and may certainly be more open, but the openness might also be a problem if we are talking about security matters. There are from time to time reasons why matters of security are not put up clearly in the public domain for public comment, because that could cause grave fear in the community and could therefore cause more damage, by way of panic, for example, than not revealing all the sources of threat or all the causes of threat.

Dr Zirnsak—But surely in this case there would be a desire to make it as public as possible that an organisation was to be proscribed. Given that then being a member of that organisation would carry a penalty of up to 25 years imprisonment, surely you do not want to be doing that in secret. You want the public to know that, if they are a member of that organisation, they will face 25 years penalty or if they assist that organisation they can be imprisoned for up to 25 years under the present bill as proposed.

Senator McKIERNAN—Do you think the gazetting provisions that are included in the bill are therefore sufficient?

Dr Zirnsak—I think we may have some concerns as to the extent to which they may be successful, but we think there needs to be greater information provided from the government about how that would work and the safeguards to ensure that people would be appropriately informed if an organisation was proscribed.

Senator McKIERNAN—In relation to your concerns about the proscribing of organisations and the including in those proscriptions of nonviolent organisations—and you name a number of national groups that might also be involved in that—the church, your organisation, would not, I would take it, have a problem with proscribing or banning an organisation such as Al-Qaeda, would you?

Rev. Pargeter—No.

Senator McKIERNAN—I think that is the generally accepted community feeling about such an organisation. I do not want to read all the names that are included here, but some of the national groups associated with the nation states that are mentioned here—and indeed one of them is not a nation state, because they are fighting for the establishment of nationhood—do actually engage in violent activity. Do you draw a line between violent activity and

o actually engage in violent activity. Do you draw a line between violent activity and nonviolent activity?

Dr Zirnsak—In this case, we were highlighting, though, that, within those groupings, while you may be referring to the more well-known groups—for example, Kurdish groups, you may be talking about the—

Senator McKIERNAN—I was thinking more of the Tiger Tamils.

Dr Zirnsak—That would be one group. But, at the same time, there are other Tamil political organisations that are not so well known that would favour, and have favoured, a nonviolent political movement towards independence. That is more the reference we are making in terms of those groups that are engaged in nonviolent political activity that seek independence. Under this, it would appear that they could be labelled as threatening the integrity of the country from which they are claiming independence.

Senator McKIERNAN—If there was a motive behind the labelling of them?

Dr Zirnsak—Sorry?

Senator McKIERNAN—If there was a motive for the so labelling of a nonviolent group?

Dr Zirnsak—Yes.

Senator McKIERNAN—Thank you. That is all I have.

CHAIR—I might go to Senator Cooney, because I have been harsh with Senator Cooney in terms of time.

Senator COONEY—I would like to take up that issue of the Tiger Tamils and the pressure it might put on people. I take it you know there is a very substantial and a very respected community of Tamils in Melbourne—in fact, in Victoria. Do you see any problems where you have a community like that and, justifiably, no doubt, Tiger Tamils are proscribed, and then that proscription is used—perhaps not used deliberately but having the effect—to make those people, the Australian citizens of Tamil background, feel more insecure in society?

Rev. Pargeter—It most certainly would.

Senator COONEY—Is that your perception.

Rev. Pargeter—It is our perception. It would also be our concern, because, as you probably know, we have Tamil communities within the Uniting Church. At the same time, we work with other organisations who try to seek peacefully to bring about changes in the countries which they have left in order to settle here. For example, we would form a great deal of support for the Sudanese People's Liberation Movement, but we would find it difficult to support the SPLA. We recognise it is a very complex arena that we are in, but the moment we begin to proscribe organisations, we are making judgments against the people from the countries from which they come. That is the point you are raising, I think.

Senator COONEY—You would not be as old as me, but you would remember the El Salvador situation.

Rev. Pargeter—Yes.

Senator COONEY—And the problems that occurred there. If we are serious about a multicultural society and taking people from all over the world, what do you say about legislation like this, which is all very vague? I think you have made the point, but I just want you to consider it again. What do you say about a situation where a government, or even one

person in the government, can proscribe bodies, which then has implications for our citizens? We were given evidence yesterday by one person from the Arab community and two from the Muslim community that this whole scenario that has been developed since September 11 has had a very bad impact upon the Arab community. I do not know if you have noticed those sorts of things within your church.

Rev. Pargeter—I certainly have.

Senator COONEY—Have you found any legislation that is complementary to this or contained in this which in any way tries to save the multiculturalism that we allegedly pay great tribute to in the community?

Rev. Pargeter—We do not support the legislation—

Senator COONEY—I follow that, but can you find anything in here that in any way helps us overcome that problem?

Rev. Pargeter—No. There is nothing in here to reduce the effects or the impacts of such legislation—especially when we recognise that in times when there are significant terrorist acts like in September enormous paranoia is unleashed in the community, and this just feeds that.

Senator COONEY—One of the people I mentioned was Arab—when I say Arab, he had been here for five generations, but nevertheless because he looks Arab, as he said, he is in effect persecuted. He talked about a student who was quite brilliant but now has been affected by that. This legislation caters to that sort of paranoia, xenophobia or whatever you want to call it. Would you agree with that?

Rev. Pargeter—I would agree with that, and that is one of our concerns about it.

Senator COONEY—You probably cannot remember the fifties—

Rev. Pargeter—Not very well.

Senator COONEY—That is when the communists were the ones on the outskirts of society and the same sort of thing was going on, and legislation was passed in that context.

Rev. Pargeter—Yes.

Senator COONEY—Has the church got concerns about that? The synod of Victoria and the Uniting Church of Australia have a long and noble history in Australia, and the Presbyterian Church before it, not leaving the other church out either. Given the history of Australia and our background, do you see this as a real shock to the sort of history we have had and the sort of culture we have developed over the decades?

Rev. Pargeter—We see this as a very retrograde step in terms of multicultural policy within our nation. We have spent the last 12 months specifically supporting racial and religious tolerance legislation in Victoria which is designed, again, to try and cement within public consciousness the need to not define people by their race, by their origins, by their culture or by their religion. Legislation of this kind by its very nature is going to lead to the perception in the public mind that certain people of certain cultures and backgrounds are almost de facto aligned with terrorist acts. I think the implications of that for society are quite enormous in terms of undermining public confidence in the capacity to live together as a harmonious people.

Senator COONEY—The other problem we might find with this—I put this as a proposition to you—is that having on the books legislation as vague and as wide as this could

cause trouble for groups if in fact a terrorist act did occur. People have been putting it on the basis that we ought to have this in case there is a terrorist act. But having this here may lead to some real problems for people who are accused of a terrorist act when it occurs. Do you remember the Oklahoma bombing?

Rev. Pargeter—Yes, I remember that.

Senator COONEY—At first Arabs and what have you were blamed, and it turned out to be somebody else. It might be fairer to everybody if it was left to the traditional policing authorities to deal with it under the legislation that is already in place. Do you have any thoughts about that?

Rev. Pargeter—That is our main position: we do not see the need for the legislation. That is the primary issue. Picking up a personal note, I was living in London during a lot of the bombings of the IRA campaign. I also had many Irish friends who were very nervous about walking the streets, simply because of their accent—they would be picked upon, sidelined and identified with the IRA's activities in Ireland. This legislation will lead to the same kind of spurious identification with people simply because of their accent, colour, culture or faith. That is a very dangerous precedent to introduce into Australian legislation.

Dr Zirnsak—As you pointed out with the Oklahoma bombing and following September 11, today I read some information about US officials' actions against the bank in Somalia. Those actions caused great problems for many ordinary Somali people. There is now an admission that the links between that bank and Al-Qaeda may not be established and that officials may have acted in haste and quite unnecessarily, yet the restrictions placed on that bank caused great suffering for those people in Somalia.

Rev. Pargeter—Acts of terrorism are designed to produce knee-jerk reactions, and that feeds into the environment of terrorist activity. A knee-jerk reaction is unnecessary.

Senator COONEY—We had evidence from Julian Burnside, a very eminent silk in this city, who had a close friend whose house in a leafy suburb—

Rev. Pargeter—I know of the case.

Senator COONEY—was raided, simply because a couple of people of Middle Eastern appearance were around the house. It does not sound like much reasonable investigation went on before the unleashing of a warrant.

Rev. Pargeter—After the events of September 11, we know of a vehicle on the Eastern Freeway being pulled over because it contained people of Middle Eastern origin. They were actually going off to work, but they were stopped and asked to produce papers. That is the paranoia that this legislation will feed. We are very nervous about that, because it seems to contradict the notion of how you build a multicultural society based on living in harmony when, at the whim of the Attorney-General, a group can be regarded as a risk to Australia. It is weird.

Senator COONEY—Even though they were Australian?

Rev. Pargeter—Even though they were Australian.

Senator LUDWIG—An informal member could include a member of the church, for argument's sake. I am sure that you do not check the credentials of the people who come into your church every day. I am sure that you invite them in to participate in services. When you look at the proscription powers, if the church were involved in humanitarian overseas aid to organisations, you could end up with a circumstance in which these types of offences might

apply. Have you turned your mind to whether that could be the case? I refer to the actions not only of a church but of its members in providing overseas aid or assisting overseas organisations in the provision of aid, an orphanage or something like that. I am not sure of the process you go through in the Uniting Church, but I assume that you do not have an application form and that people do not identify themselves strictly in that way.

Rev. Pargeter—No, they do not.

Senator LUDWIG—They would be likely to be caught by this legislation if the overseas organisation ended up being proscribed by some other country and Australia picked it up as something that we should similarly proscribe. The aid, though—I am not imputing any adverse inference—is genuine in the sense that it goes to victims of mines and so on, but the chain follows back. Have you turned your mind to whether this legislation would catch not only the church but your members?

Rev. Pargeter—We have considered both. One of our concerns about the legislation—had this been in place during the church's campaign to end apartheid in South Africa—is that we would have a number of people still in jail simply because of their involvement in their support of the ANC and the allocation of funds at times to support education programs in the schools in South Africa. Under this legislation, a number of people would be sitting in jails at the moment, potentially.

Senator LUDWIG—If you look at the revocation powers—perhaps you can help me with this—an organisation, such as the ANC, hypothetically may have been proscribed because of its activities if this legislation were in place. Subsequently it would, I am sure, have been revoked, but those people who were caught being a member, supporting or assisting would still be in jail. There would seem to be no way that they could be released. Perhaps they could petition the Attorney-General, but that seems to be the only way.

Rev. Pargeter—It is the only recourse.

Senator LUDWIG—Have you turned your mind to whether or not that could be brought about?

Dr Zirnsak—We have not looked closely at that section. As we indicated, this is the part of the bill that causes us the greatest concern as a church organisation.

Senator LUDWIG—Yes, because it is a strict liability. There does not seem to be any way. An excuse of recklessness would not really be an excuse you could use, because you would not be recklessly providing aid to assist an orphanage overseas; you would be doing it with the full intent of the object of assisting an organisation to provide an orphanage, assist victims of war and the like.

Dr Zirnsak—As churches, we also provide political assistance. We have relations with a number of partner church organisations around the world and we often feed into common bodies, such as the Middle East Council of Churches and the World Council of Churches. We make comment and seek to actively assist those partner churches. Hypothetically—very theoretically—you could end up in a situation in which someone we are assisting is banned. That puts us in a situation in which we are in danger of being caught under the assistance provision.

Senator LUDWIG—Not only you but your informal members.

Dr Zirnsak—Yes.

CHAIR—If there are no further questions, Dr Zirnsak and Reverend Pargeter, I thank you on behalf of the committee for your assistance today and, in particular, for your submission, which raised some new issues and made some new suggestions. We are very grateful for those, which will assist us in our deliberations.

[12.09 p.m.]

FIFER, Ms Dimity, CEO, Victorian Council of Social Service

PETTITT, Ms Annie Frances, Policy Analyst, Victorian Council of Social Service

CHAIR—Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Witnesses are also reminded of the notes they have received from the secretariat relating to parliamentary privilege and the protection of official witnesses. The committee has before it the submission of the Victorian Council of Social Service, which we have numbered 145. Do you need to make any amendments or alterations to that submission?

Ms Fifer—We would like to make some additions, but not amend the submission we put in. Since that time, because we prepared a week later a submission for the Joint Committee on ASIO, ASIS and DSD, we have done some extra work on some of the definitional elements which relate to both bills and we would like to be able to add another attachment to our submission.

CHAIR—Is there a document you wish to table?

Ms Fifer—We can table the submission that we made to the other committee or do that at a subsequent time.

CHAIR—It would probably be helpful if you tabled it. I was going to note—before inviting you to make an opening statement—having examined your submission, that this committee is not considering ASIO legislation in this package of bills and, as such, we have not been discussing it in the public hearings. If you would like to table that, that would assist the committee. I ask you to make a brief opening statement and then I will seek questions from my colleagues.

Ms Fifer—We thank you for allowing us to make an oral submission to your committee, and our opening statements confirm that we are greatly concerned at the lack of adequate time to talk about the implications of these bills, which we think are far reaching, particularly in the light of our country supporting its peacekeeping commitments and its multicultural nature. This afternoon we would like to concentrate on the Security Legislation Amendment (Terrorism) Bill 2002, particularly on the definitional issues, and then specifically on a few concerns on a number of proposed sections.

In terms of the definitional issues, the definitions of 'enemy', 'terrorist act' and 'proscribed organisation' give us the most concern. Our No. 1 question is whether the committee will recommend that, when there are suitably ratified UN definitions of 'terrorism' and 'terrorism act', the Australian government—if it goes ahead with this bill—will adopt an immediate amendment to the bill to ensure Australia is in accord with international determinations. We are unclear about whether this committee would be making that recommendation. In terms of the actual definitions, we are greatly concerned at what we perceive as the collision of political imperatives and criminal actions. We do not believe that those drafting the bill have thought through a number of the wider policy implications and so have come up with some legal determinations of definitions. We are greatly concerned with the area of impartiality of the Attorney-General—and I will raise that later—and the use of the term 'political causes'. I

want to raise proposed section 80.1(e) around the definition of 'enemy', because we did not find it in proposed section 100.1, 'Definitions'.

Senator COONEY—Which bill are you referring to?

Ms Fifer—In respect of the Security Legislation Amendment (Terrorism) Bill 2002, we raise proposed section 80.1:

(e) engages in conduct that assists by any means whatever, with intent to assist, an enemy ...

We do not find any definition of 'enemy' in the subsequent proposed section 100.1, 'Definitions', so we raise some issues there. While some of the other terms are ill-defined, we do not find a definition of 'enemy'. Subsequent to that, we do not find any definitions for 'the implications of armed hostilities', so we do not know whether an unarmed hostility or an armed, non-hostile activity is part of this whole ambit. We want some clarity around that. We note that the bill refers, in the explanatory memorandum, to an enemy being not just a country but an organisation, but the fact that now an enemy is someone who is not officially declared at war opens that whole ambit. It is so broad and there are no definitions, so we have some of the same concerns that we have with proscribed organisations et cetera.

In terms of that issue, why hasn't 'enemy' been defined? Is it really that an enemy could now be a country or an organisation? If it is an organisation, is that a proscribed organisation or a non-proscribed organisation? Does 'armed hostilities' refer to activities in East Timor, for example, or in Afghanistan? In the recent hostilities in Afghanistan in which Australia was involved, who exactly was the enemy? Was it the people of Afghanistan or just the suspected terrorist party that was suspected to live in Afghanistan? Was assisting the Afghan people within the ambit of this 'enemy' clause? How do we now define peacekeeping activities, for example, in East Timor? Are there such things as armed non-hostile activities? We felt that that set of clauses raised a lot of questions that were never answered. We are greatly concerned at that.

We are greatly concerned also about some of the definitional issues around 'terrorism' and 'terrorist act'. Proposed section 100.1(1) defines 'terrorist act'. We are concerned that page 8 of the explanatory memorandum states:

terrorist act ***is defined to mean a specified action or threat of action that is made with the intention of advancing a political, religious or ideological cause.***

Then we talk about the effects of that, which are serious harm et cetera. We wonder why a more policy or sociological approach has not been taken. I guess we are asking 'what-if' questions. If someone decides to undertake an act of self-immolation, for example, in Bourke Street Mall, is that a specified action or threat of action advancing their cause which would come within the ambit of this bill? Do the recent activities at the Woomera detention centre come within the ambit of the bill? Also, there were the S11 protests at the world economic forum. Whenever we have isolated an activity that we have seen in the recent and far recent past, it was unclear whether it would be within the ambit of this bill, so we decided that the effect was the overthrow of the social norms of a society. We do not feel that the current definition will add value to the debate in our Australian community; it will detract from it. That is another reason why we need to wait until the UN gets a suitable signed-off definition.

A number of activities that are occurring in Australia at this time may prima facie have the look of an act or threat of an action which is advancing one of those three causes. Such an act may have a harm, impact or effect, but it is not a terrorism act, if you define 'terrorism' as overthrowing a society's norms. It is not good enough to have the definition around the intent

being political, religious or ideological and to look at the impact, which is the serious harm or damage, which could be broken windows or overturned fences and so on. We do not believe that that adds up to a terrorism act. There is a missing element that the legislation has not been able to articulate and define. We find the implications of that extraordinary and very grave for our society. There is the whole issue of a definition that understands that terrorism acts are more about undermining, destroying or overthrowing political norms.

A lot of other activities that have occurred in Australia may have the look of 'a political, religious or ideological cause' and the effect of some serious property damage, but they may have been about upholding the values of the democratic state. For example, in the case of the Woomera detention centre, where you have a cause within this meaning and you actually have some damage—it may or may not have intentionally become violent and there was damage for whatever reason—the people involved believed that they were upholding the norms of Australia. The fight there is about what they believe is right for Australia, as against someone else's belief of what is right and politically good for Australia. We do not believe that that should be within the ambit of the legislation.

We believe that this bill has not been able to get to the real nub of what a terrorism act is—it is not just a violent action and it is not just something with a motivation that is political, religious or ideological. There is something else again. We do not have a definition to offer you; we do not even think it is our right to. We are saying that the fact that this act has not got to the nub of what a terrorism act is is very dangerous. Because of our multicultural society and because we believe our social norms are about debate, protest and the like, we believe you are catching everything that is good about Australia. We believe this bill might be working exactly against the very principles you are trying to uphold—and which VCOSS would also uphold, because we do not support treason and we do not support terrorism. We are concerned that this bill may not be getting what you are aiming to achieve.

We also believe the proscribing of organisations is not going to get you the outcome you want to achieve. We are dreadfully concerned about proposed section 102—what the definition of an informal member is—and what the whole process for taking steps to become part of an organisation is. What happens if someone is coerced? What happens if the organisation is putting forward a false front through false advertising?

Proposed section 102.2 goes to the impartiality of the Attorney-General. We are not questioning the integrity of the Attorney-General but we are saying that when you have a process where you have someone with their own political imperatives making a determination of someone else's political imperatives you have an inherent conflict of interest and no impartiality. We are particularly concerned because in one of the clauses the Attorney-General can actually delegate it to another minister. Terrorism and treason are the most important things a country can talk about. We do not think that the Attorney-General is good enough, but the Attorney-General might just delegate it off to someone else.

Senator COONEY—Have a look at proposed section 102.2(4).

Ms Fifer—If the most important thing our country needs to protect is our safety and security we want the highest level of probity and process instituted. I notice that you raised earlier whether parliament should be recalled. I would like to know how many times we think this is going to happen in any particular year? If it is so important, yes, I believe that perhaps parliament should be recalled. But I think some sort of joint committee or cross party process to reflect our Westminster system should be instituted. It is not good enough for an Attorney-General or their delegate to be involved with such an amazing level of input.

Has the committee also understood the range of organisations that have been alluded to within the different bills? I have already noted that there are proscribed organisations, and these are either UN defined proscribed or non-UN defined proscribed organisations; there are non-proscribed organisations; and then there are potentially proscribed organisations and potentially non-proscribed organisations. I note that each of these seem to be dealt with in a different manner throughout the bills. Also, even though you are not dealing with the ASIO bill, the fact that ASIO is involved in the process of potentially proscribing an organisation or being involved in a non-proscribed organisation impacts upon this bill. I do not see any articulated understanding of the different types of organisations that are being thrown around within the different sections.

With regard to other links, we are concerned about the explanatory memorandum and proposed sections 101.2, 101.4 and 101.5. In some sections, a knowing connection is needed. There is a term that says 'to his or her knowledge' in 80.4. But in 101.2 through to 101.5—and there might be other spots—you have not included the words 'to his or her knowledge'. Where I felt that it was fairly useful that there had to be a knowing connection, you have not got that elsewhere. Someone could provide or receive training connected with terrorist acts not knowing anything about it and still be in the ambit, whereas I would have thought that the point was a knowing connection.

That also relates to the making of documents or the possession of a thing connected with terrorism or terrorism acts. I would have thought that a 'knowing connection' was also what you were going for—notwithstanding that we do not agree with it—and that there would be some consistency there about 'knowing connections'.

In terms of our specific concerns, which we did not raise in our submission earlier and which are raised in the report that we will table now, we also would like this committee to consider the racial discrimination implications of this bill. We note that clauses in the Migration Act 2001 allow the minister to draw adverse inferences in response to certain behaviours of unauthorised arrivals and protection visa applications. It was a concern that we had with that legislation about adverse inferences based on prejudice or racist judgments in relation to an organisation's or an individual's political motivation, seeking a right to silence et cetera.

We believe that this act also opens up that gambit for inappropriate adverse inferences to be made. In a multicultural society, we believe this is totally unacceptable and we are not sure whether the implications of this will go against the Racial Discrimination Act. We also believe that this suite of bills provides us with almost a companion document to our Constitution. Our Constitution does not have any articulated set of rights for the Australian people. We do not have a separate legislated bill of rights; however, we believe this suite of bills provide a de facto companion document, almost providing a legislative expression of our missing rights in our democratic society and that, we would like it to be noted, is of great concern.

CHAIR—Ms Pettitt, do you have anything to add?

Ms Pettitt—I would like to add to Dimity's introductory comments and highlight four points that I made in the submission. The first point is that the current Australian criminal legal system is sufficient to deal with the effects of any acts of terrorism. Whilst Dimity has highlighted some of the border issues, I think it is important to return to what the effects of those acts may be and whether the current system is sufficient. If it is not sufficient, we would

like to see the committee and the Attorney-General address those issues and highlight where those gaps may be in the current criminal justice system.

The second point I would like to highlight is that our submission refers to the affirmation by the UN Commission on Human Rights that all measures to counter terrorism must be in strict conformity with international law, including international human rights standards. We raised in our submission that some of the effects of this suite of antiterrorism bills may be the violation of some fundamental human rights that we uphold in our democratic society, including the right to freedom of speech, the right to freedom of association and the right to silence.

I would also like to reiterate our concern that the word 'terrorism' in the current international climate is very loaded and has racial and religious overtones. One of our greatest concerns is that, in Australia's apparent multicultural society, this suite of bills does not look at peacekeeping and peace building in Australia.

The final point would be about 'proscribed organisations'. It seems inappropriate that it be developed a priori, people will be judged guilty before they are found to be innocent, merely by association. This has been highlighted by some of the examples that Dimity gave of East Timor and of the ANC—that what may now be considered a proscribed organisation, or an organisation that may be fighting for its liberty with terrorist methods, may in the future may not be considered so.

CHAIR—The oral submissions you have made are quite complex on a range of the issues, particularly definitional ones. We did not have the benefit of the written document that you have now tabled. I want to seek clarification with you on one point, which was one you raised in relation to proposed section 80.1(1)(e). As I understand the explanatory memorandum, on page 6 it says:

... 'enemy' is defined within the section as one specified by proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth. This is a replication of the existing paragraph 24(1)(d) of the Crimes Act.

To take the first point that you made, you were correct; it had not been raised with us, to the best of my recollection, elsewhere.

Ms Fifer—Is that at the top of page 6?

CHAIR—The second full paragraph of the explanatory memorandum says:

... 'enemy' is defined within the section as one specified by proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth. This is a replication of the existing paragraph 24(1)(d) of the Crimes Act.

Had that come to your attention?

Ms Fifer—When I printed that out, we must have got different page numbers.

CHAIR—If you have the part of the explanatory memorandum that goes to treason, it begins with proposed paragraph 80.1(1)(e), on the third-last line.

Ms Fifer—Yes.

CHAIR—That is the point you were making, wasn't it? You were concerned about a lack of definition there.

Ms Fifer—Yes, and how that interacts with the next paragraph, 80.1(1)(f). That paragraph also removes the need for an enemy to be proclaimed and makes it clear that hostilities can

involve a foreign organisation rather than a foreign country. On the reading through, I found it contradictory.

CHAIR—Thank you very much for clarifying that.

Senator McKIERNAN—You made comments that explanations ought to be given where the laws are inadequate. I think that is partly addressed by the bill. If you look at the section on treason, for example, it says 'cause the death of the Sovereign, the heir apparent or the Consort of the Sovereign'. It is a change to the non-gender neutral language that was previously in the bill. A lot of the amendments contained in the bills are actually doing that, don't you think?

Ms Fifer—I did notice that there were some small administrative changes which were going through and they were mixed up with some of the more major implications. I am not sure that I raised that earlier in terms of the treason definitions.

Senator McKIERNAN—I just used that as an explanation. That has occurred in some of the other amendments which this bill addresses. The bill is actually amending a number of other pieces of legislation on the way though. I thank you for the explanations on the term 'enemy'. The definition of the 'enemy' was something I was going to address as well. You talked about the Australian troops in Afghanistan in the past tense.

Ms Fifer—I am sorry, that was just a mistake.

Senator McKIERNAN—They are there now. Is it the contention of your organisation that these troops may unlawfully be in Afghanistan at this time?

Ms Fifer—That is not the point that we are trying to make there. The point we are trying to make is that we are concerned that there is a lack of clarity around the definition of the 'enemy' at this particular point in time in the armed hostility. Somewhere in the explanatory memorandum we talked about this bill trying to make changes to come up with a modern definition of what war and conflict is. I do not think we have actually had that debate publicly in Australia; this bill is now bringing it to attention. Our defence forces are now involved in a number of different activities, and that is the implication of what we are trying to talk about. Some of them are peacekeeping activities, some are armed hostilities and some are within a country. We are asking, 'What is the enemy here in Afghanistan?' and, like the previous submission by the Uniting Church, 'Who is it that an Australian citizen may or may not be assisting at that particular time that would get them under the ambit of this bill?'

Senator McKIERNAN—In regard to the Australian troops in Afghanistan, these decisions were taken last year and are not addressed in this bill as such. Do you accept that?

Ms Fifer—Yes.

Senator McKIERNAN—Australia sent troops into Afghanistan by exercising its obligations under the ANZUS Treaty?

Ms Fifer—It is about the implications of this bill and how it now intersects with some of the current and future activities of the Australian government and the Australian defence forces. In relation to some of those implications we are really asking what-if questions; it is not so much answers or assertions that we are coming up with, but we are saying: 'What if ...?' What if this scenario occurred? What if an Australian citizen was involved in some assistance within this state—is that in the ambit or not? That lack of clarity is of real concern.

Senator McKIERNAN—You also said that it should be done in accordance with international law. I am testing this particular element of things: Australian troops are currently

in Afghanistan, fighting together with the United States and New Zealand—and a number of other countries are in there as well—as part of the international obligations this country has entered into. If this bill is not addressing the reasons Australian troops are in there—I only raised it because you raised it—

Ms Fifer—I did; you are quite right. I raised it in the terms that the UN does not have an agreed definition of 'terrorism' and 'terrorist act'. I am wondering if this committee is actually going to recommend to parliament that, when that definition is adopted, this bill would have a consistent definition.

Senator McKIERNAN—That is something that this committee will have to address as a committee in developing a report on the bill for presentation to parliament. It is not the committee's bill as such; it is the government's bill.

Ms Fifer—Sure.

Senator McKIERNAN—It is just a small point that seems to have missed a number of people. Midway through the second page of your submission, you make the comment that:

Late last year the government released a list of groups and organisations deemed to be or have so called 'terrorist' connections.

You then go on to say:

The existence of this list is profoundly disturbing.

Can you develop what you mean by that and why it is profoundly disturbing?

Ms Fifer—I think one of the other senators talked about what occurred back in the 1950s. We are not talking about the members on this list but about the existence of the list in policy terms in Australia, the process whereby those organisations were named on this list and the implications it had for the rest of society. We believe that it was inappropriate for the government to deem those groups or organisations terrorists before a fair trial—and even, indeed, before a proper definition of terrorism had been adopted by the parliament, if that is the way they saw fit. The implications of that list are what we were trying to deal with, not the fact that there may or may not be organisations on our planet who are pursuing terrorist aims.

Senator McKIERNAN—Just to make sure we know what we are talking about, are we talking about the list that was made public by the Minister for Foreign Affairs, Mr Downer? Is that the list you are talking about?

Ms Fifer—Yes, the list of organisations that it was deemed inappropriate to be involved with.

Senator McKIERNAN—That list, as I understand it, came from the United Nations Security Council, and there were some obligations for Australia to assist the United Nations Security Council in the halting or at least the curtailment of the financial activities of the named individuals and organisations that were on that list.

CHAIR—I would like to clarify that, Senator McKiernan. In fact, it follows from a Security Council resolution. The names and the groups are a combination of names and groups identified by the United Kingdom and the United States, in particular. Because I want to get the language right I will come back to the resolution, but the countries themselves are a combination of information from the United Kingdom government and the United States government, not from the Security Council itself.

Ms Fifer—I do not think we have any quibble about the fact that there are terrorist organisations that the UN or particular countries may want to name. The philosophical point is what we were trying to allude to there, Senator Ludwig. Perhaps our language pointed you off in another direction. We are not fighting about the existence of terrorist organisations in our phraseology there.

Senator McKIERNAN—Quite often it is put forward by proponents—including, it happens from time to time, in the parliament—that if people do not come down with a very hardline action against known terrorist organisations, they are seen to be joiners. I instance the comments in the House of Representatives of one particular individual, whom I will not give the benefit of naming here, and the quite disgraceful assertions the individual put in his contributions to the debates on these bills in the House of Representatives last month. That is why I am seeking to have organisations such as you also perhaps clearly distance yourselves from known and recognised terrorist organisations, some of which were named on the list. I thank the chair for the further elaboration of where the list actually came from.

Ms Fifer—I think I said earlier that VCOSS does not support terrorism or treason and we are not an organisation—the very fact that we could be debating whether VCOSS, which is absolutely supporting democratic principles, could even be part of this list, and that that is the place that we are at in society, I would say is inherently disturbing. I am very concerned about that assertion.

Senator McKIERNAN—Sorry, I hope that you took no inference from me that VCOSS should be included in such a list.

Ms Fifer—I think the fact that we are even talking about this is of great concern, to be perfectly frank. I do not think I can add anything more to it. That is why—

Senator McKIERNAN—If it is of such great concern, why did you put it in your submission?

Ms Fifer—As I said before, I humbly apologise if that sentence alluded to something it was not meant to. I am trying to clarify that, in our democratic society, the way a list is determined, the way it is used, the way legislation deals with lists of organisations, as already raised by Senator Bolkus, has had effects in the past and is of concern. The dealing, the proscribing, the use of lists and the legislative implications of having lists in society—that is what we want to start discussing.

The other point that I would like to raise is whether this committee is actually aware of and supportive of how the UN proscribes organisations. VCOSS is asking these 'what if' questions in a more circumspect way, to say, 'Is this really what we believe in as an Australian and a democratic way of living our life in 2002?' That is the point we are trying to make and that is why the point we raised before was that we do not believe that this current bill gets to the nub of what terrorism really is. It is not just about political motivations and discussions and it is actually not just about violence. The two of them together add up to something more to equal a terrorist attack, and we do not believe that this bill has got there yet.

CHAIR—Thank you very much, Ms Fifer. Let me place on the record the relevant clause of the resolution, which reads:

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf

of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

That is resolution No. 1373 of the United Nations Security Council, to which the discussion pertains.

Senator GREIG—Thank you both for your submission. We heard in some oral submissions yesterday from representatives of the Ethnic Communities Council, and spokespeople for the local Islamic community, their concerns about what they see as inherent racism in the way in which the bills may be applied, not the way in which the bills are structured. It is reminiscent perhaps of the mandatory sentencing debate which we have also been through, where it was argued that the laws for mandatory sentencing were not racist but that they had a racist outcome. That was one argument.

In your oral submission today you were pointing to the potential for the way in which some or all of this legislation may interact with the Racial Discrimination Act. Can you elaborate a little further, because I do not understand what you mean by that and I would like to hear a bit more about it.

Ms Fifer—Just to begin with, we are asking the question of whether there are any sorts of implications for that. We are asking that because of what we saw in the migration act 2001—there are about six of them, actually—where it allows the minister to make adverse inferences around certain people's behaviours or non-behaviours. I was quite amazed that that bill said it in black and white, actually. This bill actually does not go that far, but there is the very fact that this bill gives permission for the Attorney-General and/or a delegated minister—and then of course we have got other bills which talk about officers of other organisations—to make inferences about people's motivations and intentions. We are saying it is not a direct relation but it may actually start to move into an area where people are making interpretations of people's behaviours which are more to do with their racial or cultural backgrounds. In a multicultural society we do not believe that is appropriate and we think those implications need to be teased out.

It sounds like you have already heard today and yesterday about some of the very inappropriate consequences that occur from bills of this type, and where law officers or other officers are actually making some of these inferences or implications. It may be after the bill is in operation that some of those unintended consequences occur; it may be that you cannot do more than what you have to capture that; it may be that a retrospective review is needed. But we would say, because there is a very high potential—and we are seeing it operating at the moment—for some of those racial implications to occur that are discriminatory in their impact, that we believe that this bill should have the highest level of review and reporting of some of those unintended consequences and that in any annual report to parliament on how this bill operates there should definitely be a discussion of whether there have been unintended consequences in terms of racial discrimination. So we think it should be articulated that way, as part of any review.

Senator GREIG—You will often hear people in public office refer to a behaviour as 'un-Australian', which in recent years seems to mean non-Anglo, non-Westminster—is that where you are coming from?

Ms Fifer—This bill goes right to the heart of that; it is starting to determine what people's political motives are. We have also got to remember that we are in a multicultural country, so we are going to start to have different expressions of what is Australian, but, as I said before, that is actually not what terrorism is about—because all of those people with their different

interpretations of what it might be to be Australian are actually trying to uphold what is a great Australia. They are not trying to destroy it, undermine it or overthrow it, and that is what a terrorist act is. So any time this bill starts to talk about that, we are saying that is totally inappropriate; this bill should never be getting into that sort of arena.

Senator COONEY—In the fifth paragraph of your submission you say that you are particularly concerned about the adverse effect this might have on particular communities, notably Arab and Muslim communities. So the sort of evidence you heard yesterday would be consistent with your understanding of what is going on. You go on to say:

> Following the events of September 11, Arab and Muslim communities in Australia, and women in particular were, and continue to be, the targets of high levels of racial and religious vilification and discrimination.

Were these women attacked by men or by the community as a whole, or is it a bit of both? Are you saying that these Muslim and Arab women were put under attack?

Ms Fifer—The full range. I will let Annie outline that a bit more. VCOSS does work with a number of different community groups and certainly we run a number of seminars and forums on women and racism issues. After September 11 we noticed—although it had been occurring before that, but particularly after that point in time—the amount of violence and racially determined acts increased greatly against the Arab and Muslim communities. It is not just against women either; it is against all genders of those communities. Did you want Annie to outline any specific examples—the range and type?

Senator COONEY—Not now, but could you do that by letter? Would that be too much of a worry?

Ms Fifer—That would not be a problem at all.

Ms Pettitt—In response to that, Senator, it was well documented both in Melbourne and across Australia that there was an increase of racial vilification against Arab and Muslim communities—particularly those women who wear the hijab because they are visibly identifiable as being part of that community. The Victorian government took a step to establish a telephone service in its multicultural affairs office for people to ring in and document the attacks that were occurring to them. I would also like to point out that in relation to Senator Greig's points about the Racial Discrimination Act 1975—and earlier focuses of other statements made around the racial effects of such legislation—it is also included in the Racial Discrimination Act and the International Convention on the Elimination of All Forms of Racial Discrimination that systemic racism should be addressed. I would propose that in not addressing what the potential effects of this legislation may be that it may itself be adding to, and be a form of, systemic discrimination.

Senator COONEY—You would say that a terrorist act, according to the definition, does not include racism. Is that correct? In any event have you seen the definition of 'terrorist act' in the legislation? Do you see that it is not a terrorist act to do something because you are racially prejudiced?

Ms Pettitt—I am not suggesting that—

Senator COONEY—I just want you to understand that this legislation does not address racial prejudice.

Ms Pettitt—That is precisely the point that we would like to make.

Senator COONEY—You say that VCOSS represents over 700 organisations. That is correct, isn't it?

Ms Pettitt—Yes.

Senator COONEY—And among those are Victorian community legal centres—you go into this on page 6 of your reference. You tell us where these people come from. I take it that they are people, since they come to the legal centres, without a great deal of money. Is that the position?

Ms Fifer—Senator, you are referring to the attachment?

Senator COONEY—The fourth paragraph on page 6 of your submission.

Ms Fifer—Yes. 'A significant proportion of the service users …' This paragraph was part of our submission to the Victorian Parliament Scrutiny of Acts and Regulations Committee to their review—*The Right to Silence: An Examination of the Issues.*

Senator COONEY—But that point remains?

Ms Fifer—Yes.

Senator COONEY—You say there that they do not have an understanding of the law and really have not got the language to cope with it. Are they the sorts of things you say now?

Ms Fifer—Yes. What we were saying in that submission—and that data is back in 1998, so it is not updated—is that people from a non-English-speaking background who may have experienced coercion, physical beatings et cetera already have a particular experience of detention in another country. If they are detained, interviewed or questioned at an Australian police station they already carry a history and a memory of that experience. It would not be appropriate to make any adverse inference about their asking for a right to silence, as if they were Australian citizens who had only lived here and only experienced a democratic form of criminal justice.

Senator COONEY—Are things much the same now or have things changed since July 1998, on your impressions?

Ms Fifer—Going on impressions, I would say it is exactly the same, and that is part of our multicultural country. When you have people coming to live here who have had other experiences of criminal justice in other countries, we have to be very circumspect and compassionate and a lot more mindful of how they will interpret our criminal justice systems—and we will be raising that with the Joint Committee on ASIO, ASIS and DSD as well.

Senator COONEY—You have talked about the work you do amongst over 700 organisations. Have you got the impression that there are any rampant approaches to things that would be in any way close to coming within the terrorist definitions that you have read in this legislation?

Ms Fifer—No.

Senator COONEY—In order words, can you see within the groupings you deal with any sign that would give you an alarm?

Ms Fifer—No, none whatsoever. I have not once bumped into an organisation that looks anything like what I would deem to be a terrorist organisation or that talks of terrorist acts.

Senator COONEY—Have you come across any person about whom you would say, 'This person is about to let the bomb off'?

Ms Fifer—No.

Senator COONEY—On the other hand, from what you say, you have come across lots of people who are affected—either emotionally or otherwise—by the approach that people have taken to terrorism?

Ms Fifer—Yes. Obviously, VCOSS is an organisation that works in the political arena—and I suspect that is why you are asking us those questions—and you have a lot of people who are very interested in upholding democratic constitutions and their rights to protest, assent, debate or whatever. VCOSS absolutely does not condone violence, but I am suggesting that there are a lot of people and a whole gamut of Australians out there who would be involved in a whole range of activities to support the sorts of institutions that we all believe in, and it would be an anathema if anyone ever interpreted any of those people, their actions or their motives as potentially terrorist.

Senator COONEY—You cannot see anything wrong with people having a peaceful protest in front of the library or in the mall or up at Treasury gardens?

Ms Fifer—This bill specifically excludes that, anyway, but that is part of the definitions, as well. I think the Uniting Church raised the issue of the definition around 'lawful protest'. Even there, it begs the question: is it an unlawful protest or is it a lawful protest that then becomes violent? That is why, in the submission that we will be tabling, we have asked who will determine whether political acts of violence go the criminal route or the terrorist route—and that is still unclear.

Senator COONEY—Thanks for that. I was asking that question in the light of your assessment, and I suppose you have spoken to other people in VCOSS?

Ms Fifer—Yes.

Senator COONEY—Your impression is that there is, across those groups you deal with, no indication of any terrorist activity?

Ms Fifer—No indication of terrorism.

Senator COONEY—Would you agree with that, Ms Pettitt?

Ms Pettitt—Absolutely.

Senator COONEY—Have you spoken to other people in the administration of the organisation?

Ms Fifer—Most definitely.

Senator COONEY—Have any of them got any impression that this is going on?

Ms Fifer—No impression at all. But that is the exact point we are talking about: where does civil disobedience lie in relation to these bills? That we are talking about this concern is what worries us. Where does civil disobedience rely on the implementation of this bill? Will this become a catch-all piece of legislation that will be used first, rather than second, with little ability to discriminate between acts and motives that cover a wide range of intents? That is why we are asking whether, if you just see something that looks politically motivated or if you just see a violent act, or even the two things added together, that is this bill. We are saying that no, it should not be, that that is not good enough. The Criminal Code already deals with

violent protests. That worries us, because we are defining 'motivation' and 'violence impact' but not 'terrorism', VCOSS believes.

Senator COONEY—Can I go back to page 6 of the submission again? You talk there about people who come from Vietnam, China, El Salvador, Somalia, Ethiopia, Eritrea and Turkey. What do you say about the ability under this legislation—if there was any terrorism—for the Attorney-General to pick out some countries and not others, even though the conduct might be the same across all countries?

Ms Fifer—I guess that is our point. Because the Attorney-General—because of their position—already has political motives and imperatives, making a determination of that all by itself we believe is totally inappropriate. It should be a cross party, bipartisan process—if that process is the most appropriate way to go.

Senator COONEY—You were talking about the Immigration Act and the ASIO Act and what have you. We are not dealing with those specifically, but I took your point to be that there is now a whole raft of legislation in addition to this that the government has brought out which creates a climate—and you would say a climate of fear. Would that be accurate?

Ms Fifer—Most definitely. The bill we have been talking about refers to proscribing an organisation, but you need officers out there from ASIO or wherever to start the process of determining who is a potentially proscribable organisation and then who is a potential organisation that would fit under this. That is starting to capture a lot of organisations and people we believe it is inappropriate to capture. This bill cannot be interpreted on its own. A lot of earlier search warrant, surveillance and spying—if you will—activities are now going to affect people and organisations just to get them into the ambit of this legislation. It seems to me that ASIO would never stop doing any of this surveillance. It is a real worry. There is no point that says, 'Now we will start to determine whether an organisation is proscribable.' That is the implication we are worried about that you raised earlier.

Proposed section 102.3 does not outline a process for revoking or appealing if you become a proscribed organisation. It says the Attorney-General can unproscribe you, but we are not sure what that process is and what, if you see your name in the paper, that process of appeal is. I have not found that either. I could just have missed it.

Senator COONEY—Did you mentioned the Communist Party Dissolution Act?

Ms Fifer—No, I think you raised it earlier with the previous witnesses.

Senator COONEY—You would be too young to remember it.

Ms Fifer—Maybe; maybe not.

Senator COONEY—I do remember what I was going to ask you: do you know whether anybody was ever prosecuted under any of the provisions of the acts which were against treason or espionage or what have you right throughout that period?

Ms Fifer—No.

Senator COONEY—All right.

CHAIR—If there are no further questions, I thank Ms Fifer and Ms Pettitt for your assistance to the committee today, for the initial submission that you have given us and for the tabled document. That tabled document, as I understand it, goes to your oral submissions earlier in your opening statement. We are grateful for that information. Thank you.

Proceedings suspended from 1.04 p.m. to 1.46 p.m.

MacDONALD, Mrs Margaret Lillian, Delegate, People Against Repressive Legislation

TOSCANO, Dr Joseph, Delegate, People Against Repressive Legislation

CHAIR—Welcome. Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Witnesses are also reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. The committee has before it your submission, which we have numbered 10. Are there any amendments or alterations that you wish to make to that document you have lodged with the committee?

Dr Toscano—Yes. We would like to lodge an addition to that first submission we have made.

CHAIR—So there are no alterations to this one, but you would like to table a further document?

Dr Toscano—That is correct.

CHAIR—Thank you. I invite you to make a brief opening statement, at the conclusion of which committee members will ask you questions.

Dr Toscano—I would like to say a few words and then Mrs MacDonald would like to say a few words, if that is all right.

CHAIR—Yes, indeed.

Dr Toscano—Basically, we are here and were formed as a group in early February as a response to this legislation. Because of material appearing in the media at that stage, we were quite concerned about the ramifications for the common law rights that we have in this country to be able to protest and agitate. We have people from various groups within our group. It is a nonparty political group, having people from the right and left as well as environmental activists and people from radical organisations—the Socialist Party, the Anarchist Media Institute and a number of others.

We are concerned because, although terrorism is a problem, as I think we would all acknowledge, the main terrorist acts that have been committed this century and throughout human history have been committed by states—by state apparatus. Pol Pot and his killing fields and Adolf Hitler and the Holocaust would not have occurred if those people had not had unlimited state power to impose their viewpoint and their will on the people they controlled. We are very concerned about the checks and balances that exist in society that protect the individual from the state. At the end of the day, although individuals and organisations may be responsible for terrorist acts, mass killings throughout human history have occurred when a Stalin, a Pol Pot or a Hitler totally controlled a state. We are quite concerned that this legislation, in attempting to define and deal with 'terrorism', basically is removing these checks and balances—whether advertently or inadvertently, we do not know.

We believe that the definition of 'terrorism' is too broad. Perhaps I could quote here from the legislation. We are told that 'lawful protest, advocacy, dissent and industrial action are expressly excluded from the ambit of the definition'. That brings a smile to my face because I remember the famous Paul Keating line that the 'tax cuts were in law'. What we have to remember is that common law rights in this country can be legislated away at any time because, in the Australian Constitution, we do not have a bill of rights as far as human beings

are concerned. It is mainly a trade document and a doctored relationship between the states, between the states and the federal authority, and the federal authority and the Queen, the monarchy. As there are no real human rights—apart from, possibly, trial by jury and the right to vote—in the Australian Constitution, we are quite concerned at the use of the word 'lawful' in front of that definition outlawing or potentially outlawing certain actions. Potentially, if something like an occupation, nonviolent and direct action, a picket line or some type of protest causes physical damage or injury, that then becomes a terrorist act as far as the definition is concerned. If parliament or the government of the day is concerned about maintaining the integrity of people's right to advocate and protest, I assume that the word 'lawful' would be removed. Although certainly things are illegal, it does not make them terrorist acts. That is the first thing.

The second thing we are quite concerned about is the extraordinary powers that the Attorney-General will have under this legislation. I am not a lawyer, and thank heavens for that. I am sure that you have had more than enough lawyers in the last two days.

Senator COONEY—To say something like that might be a contempt of parliament.

Dr Toscano—I am happy to be in contempt of parliament. I have always wanted to try the new cells that I understand you have down in the basement.

CHAIR—They will have to move the stationery, I think.

Dr Toscano—I go back to the extraordinary power: When I read it, I could not believe that the Attorney-General, on advice, has the power to proscribe, to ban an organisation. There is no judicial review, no parliamentary input but, because the Attorney-General believes that some organisation—let us say, the Anarchist Media Institute—is possibly or may be involved in terrorist activity, he can ban that organisation, irrespective of whether criminal charges have been laid, let alone convictions recorded. You can imagine how this particular point in the legislation will be used by the government of the day to harass its political opponents, especially those like ourselves who use that common law space to protest against the encroachment of individual liberties by the state. To me, that is one of the most offensive and dangerous aspects of the legislation. We want to control terrorism somehow, but to have some type of definition like that controls everything; everybody comes under that definition. That is the second thing we are very concerned about.

The third thing we are concerned about, as I said before, is that the power that these bills give one person, the Attorney-General. The antifinancing bill and the other terrorist bills allow people to be jailed for 25 years for having an association which an organisation is proscribed from having. Even during the Second World War we did not have legislation like this, and I am sure that the threat during the Second World War was much more immediate than this. Historically, there has been a precedent for this type of legislation. During the First World War in 1914—although most people who attend Anzac Day ceremonies seem to forget their history—there was a strong anticonscription movement, which was spearheaded by a militant workplace organisation called the Industrial Workers of the World.

The anticonscription movement was supported by the Catholic Church and a number of other community and women's organisations. On two occasions during the First World War, referendums which were put to the people to bring conscription to this country were defeated. But the people who provided the muscle, who put their bodies on the line—the industrial workers of the world: their organisation was banned. Those who were not Australian citizens were deported. People were jailed for six months for belonging to a banned organisation. In

this legislation, if you have an association with somebody's uncle you are going to be jailed—possibly for 25 years. This is the scope of this legislation. We are using a hammer to crack a nut. If we look at the laws that are now available, it is all there: if I jump this table, smash you in the face and say it was a political act because I think this Senate committee is a total waste of time and a charade, there are many laws via which you can resolve that problem. Why do we need these laws? As a delegate for the People Against Repressive Legislation, our mandate is very clear that we are against these laws. We are against the seven bills, but I understand we are only discussing three bills today—is that correct?—or is it seven?

CHAIR—Five.

Dr Toscano—Five? Could I clarify that? We are discussing the suppression of the finance of terrorism bill; the espionage and related offences bill—

CHAIR—No. The bills under examination by this committee in this package are: the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2], the Suppression of the Financing of Terrorism Bill 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, the Border Security Legislation Amendment Bill 2002 and the Telecommunications (Interception) Legislation Amendment Bill 2002.

Dr Toscano—Looking at the bombing bill, which all sounds very nice, our concern is that, under that legislation, if somebody is responsible for damage to a foreign embassy—if an Australian citizen is responsible for damage to a foreign embassy in this country—they can actually be extradited to the other country because of the United Nations convention that we are going to sign. That is a real problem. Say, when the Indonesian dictatorship was in power, somebody did something to the Indonesian Embassy. Although in the first of those four acts we are talking about politically motivated violence, in that particular bill an act where a bomb is used is, under the convention, a criminal act and not politically motivated violence. It just does not make sense. And that means, if it is not politically motivated, that the particular person can be extradited. Would we have been willing, as a country, to extradite somebody to be judged and tried by the Indonesian military dictatorship, or Idi Amin's regime, or some Stalinist North Korea? Would we be willing to do that? As I said before, I am not a lawyer. But these bills are poorly drafted. They incorporate everybody. They do not resolve the problem of what terrorism is.

As a parliament you can ban whatever you like, but, at the end of the day, it is people like us who put our bodies on the line every day in protest activity, trying to limit the damage that the state does. As far as the legislation is concerned, it is people like us that this bill will affect. It will affect the rights of individuals to freely associate, to protest, to become involved in political activity—which you may define as criminal under the Criminal Code, and which we are willing to accept as criminal under the Criminal Code. We are willing to take those risks because we believe in what we are doing. But there is no way that that type of activity can be defined as terrorism, and that is what the bills are about. We are very concerned because what you will do, maybe inadvertently, by passing this legislation—and I have no doubt that this legislation will be passed with minimal amendments; everybody is scared because of so-called terrorism, and we have come here to put our point, not because we expect to change anybody's mind—is remove those checks and balances which have maintained this society and made it what it is. Are we willing to lose that for this elusive goal of collaring terrorism? Terrorists do not go out and protest on the streets; most terrorists I know wear suits and have gold Visa cards. They are bankrolled by states. That is the reality.

CHAIR—Thank you very much, Dr Toscano. Mrs MacDonald, I invite you to also make a brief statement. I invite you to be mindful of the time so that we have an opportunity to ask you questions as well.

Mrs MacDonald—Thank you, Chair. I feel I am speaking for the people behind me and many thousands outside. I am an ordinary person, brought up in a decent home that had security, respect, fun, a hard work ethic, a strong sense of social justice and very much community involvement—indeed, privileged to live in a free country. There were certainly thousands like me.

I lived in a small country town where, in the early fifties, people opened their doors to displaced people and families from the Baltic regions. My parents accommodated a number of these families over a period of some years. They dined with us and my mother taught them English. I learnt first-hand how these people suffered under the effects of war and very harsh regimes. In the early seventies, I returned to teach at Mitcham High School. Many children from Vietnam and Laos were accommodated in a hostel nearby. I felt uplifted to be part of a school community that welcomed and supported these young folk who had suffered such traumas—again, from war and despotic regimes. We had their stories translated into English. It was compulsory for all staff and Australian students at the school to read and reflect on the previous lives of these inspiring young people.

With this background, my husband and I in our retirement have continued to stand in the way of any injustice shown in this country to our fellow man. I continually remember and reflect on those of our fellow men and women who were prepared to make the supreme sacrifice so that we could enjoy the free democracy of this country. I have a badge at home, given to me by a politician. On it, it reads: 'Their sacrifice and service. Our freedom.' A song resonates in my mind, and has since I first heard of this legislation: 'Do you hear the people sing, singing the song of angry men?' This is how we feel. We feel angry that any government could contemplate bringing in such repressive legislation. We are strongly against terrorism, but we feel that this draconian legislation is unnecessary and will impinge on our long-held civil and democratic rights for future generations—future generations that I care about as a mother and also as a teacher. Thank you.

CHAIR—Thank you very much, Mrs MacDonald. I invite the deputy chair to begin questions.

Senator McKIERNAN—Thank you, Chair. Dr Toscano, I think you made the point—and many earlier witnesses have made the point—that this legislation is not needed, that the laws that are in place are adequate to deal with any terrorist threats or actions that may occur in this country. Is that right?

Dr Toscano—Yes.

Senator McKIERNAN—Does that then mean that the laws that are in place would come within your definition of repressive legislation?

Dr Toscano—There are certain laws which I personally believe are repressive and which I am willing to work against.

Senator McKIERNAN—What particular laws in terms of the terrorist realms of action?

Dr Toscano—Not in terms of the terrorist action; there are laws as far as assault is concerned—

Senator McKIERNAN—I accept all that but I want to confine the dialogue between us to just terrorism, because we are dealing with bills that relate to terrorism. If we accept the arguments proffered by you and other witnesses that these bills currently before us are not needed because there is other criminal legislation that is able to cope with it—

Dr Toscano—I think the problem is that you are trying to define what terrorism is. There are laws that define what happens when somebody involves themselves in terrorists acts. Whether it be a hoax, a threat, an assault or property damage, there are hundreds if not thousands of laws that cover all contingencies. What the government of the day is trying to do is define something that is indefinable. As we all know, one person's terrorist is another person's freedom fighter.

Senator McKIERNAN—So would you say that the laws that are currently in place to deal with terrorist type activities within Australia—or the threat of or the planning of terrorist activity—are in turn repressive in the same way as this law is repressive?

Dr Toscano—No. Those laws are there because of the consequences of actions that a terrorist takes. Do an action and there is a legal consequence. What these laws are doing are defining away our ability to act and protest, by attempting to define what terrorism is.

Senator McKIERNAN—But the law in relation to treason is already on our statute book. It is addressed in this package of legislation.

Dr Toscano—Yes. There are changes that I found a bit amusing in certain cases—for instance, causing fear to the monarch or whatever. The laws of treason are there but that is not what I am arguing about. We are arguing that, by trying to define what terrorism is, you are removing those checks and balances that make us the type of society we are. That is my concern: we are moving from a society where there are some common law rights to do certain things if we are unhappy with government legislation to a society where there will be no common law rights.

Senator McKIERNAN—Thank you very much.

Senator COONEY—Dr Toscano, to get an idea of how you are putting all this, what are you a doctor of?

Dr Toscano—I hold a Bachelor of Medicine and a Bachelor of Surgery from the Queensland University, 1976; I hold a doctorate of medicine from Melbourne University, 1987.

Senator COONEY—Well, I am glad that Melbourne is in there.

Dr Toscano—So I am a real doctor; its an honorary title. It is a little better than your ordinary PhD.

Senator COONEY—When you said Queensland only I was a little worried, but now that Melbourne is there I am very pleased.

Dr Toscano—It is very interesting that you raise that because I actually had to leave Queensland in 1976. I graduated in 1975 with a Bachelor Medicine and a Bachelor Surgery. I did my internship during the Bjelke-Petersen era, when there was a law that you could not actually protest without having a permit, which we opposed. At the end of 1976, after my internship, I was told by the head of the department that there was no point applying for a position in the state system because the National Party at that time had black-banned me as an individual. So I was forced to come to Victoria, where I worked for five or six years in the public health sector. After I received my doctorate of medicine I found that most of my

research possibilities had dried up all of a sudden, which I assume was because of my political activities, and I was forced into private practice, which I now conduct. I work at least 60 hours per week.

Senator COONEY—What sorts of activities were those; that sounds pretty drastic?

Dr Toscano—I am a spokesperson for the Anarchist Media Institute. We are involved in activity that raises concerns about the power of the state in relation to the individual. We would like to create a society that is based on a voluntary association, where people have equal access to power and wealth. We are interested in direct democratic principles instead of representative democracy. We are interested in sharing the common wealth, as in the common wealth of Australia, which we tend to forget, for the common good. So obviously my own personal positions are radical positions in comparison with most people in this society and, because of that, there is a price to pay. I was happy to pay that price, but this is different.

Senator COONEY—I just want to stick with this. You say that, because you took a particular position, you have suffered at the hands of governments.

Dr Toscano—That is right.

Senator COONEY—You would be concerned with this sort of legislation because that sort of thing might be repeated on a wider scale?

Dr Toscano—This is much worse. This is legislation, as we know, which before was directed at small radical groups. This is different: this encompasses everybody—anybody who is involved in protest.

Senator COONEY—Mrs MacDonald, I gather that you are a teacher because you have said that on a couple of occasions. Can you tell us how you come to be presenting this submission and why you feel strongly about this?

Mrs MacDonald—A number of years ago, when my husband and I retired, we found we had the time to be more involved in fighting forms of injustice that we felt were in our community. We joined Save Albert Park, the most wonderful group of intelligent people I have ever been involved with.

Senator COONEY—What are we up to now: 2000 and how many days?

Dr Toscano—How many days has the Albert Park group been going?

Mrs MacDonald—It started about eight years ago.

Senator COONEY—I go past there of a morning and I see—

Mrs MacDonald—I am sure that you do. People give of their time, their talents, their energies, their money, the lot, because they are standing up for a just cause. My husband and I are also members of the Friends of the ABC. We also joined People Together some years ago, which has now disbanded. That was headed by one our previous governor's wives because she felt so concerned about the lack of concern by government for people who were virtually in the poverty trap. I am also a member of the Uniting Church—I have tried to live by those principles.

Senator COONEY—Did you hear the witnesses from the Uniting Church in Australia giving evidence this morning?

Mrs MacDonald—I did.

Senator COONEY—And do you agree with what they said?

Mrs MacDonald—I certainly do. I am also a member of a group that gives elderly people a luncheon every Tuesday—these are people who are shut in, they live on their own—and I have been doing that for 22 years. This afternoon, if I make it back in time, I will be taking some students in grades 5 and 6 from a local primary school who are struggling. It is a one-to-one session and there are eight retired teachers who, in a voluntary capacity, are giving them some help after school because they have passed through the system and are struggling.

I come from a family where my father was a shire president in a small country town right through the war years, I might add. Our farm was not far from Puckapunyal; in fact, the main road to our farm was the back road to Puckapunyal, so I saw a lot of khaki in my early life. I mentioned earlier the displaced people after the war. Those families kept in touch with my mother until the day she died. Over the years I taught students in Horsham and Echuca and I taught Aboriginal children who lived up along the Murray River. I was involved in the Good Neighbour Council in Horsham when I taught there and I ended up as a senior mistress at Warracknabeal High School. So I guess I have been around the traps a lot.

I live in Blackburn with my husband in what is the most incredibly wonderful neighbourhood because we all help each other. This is the Australia I grew up in, and I will do anything to keep the fields of compassion, integrity and decency. This is why when I heard earlier this year that it was even dared to present this legislation—and I might add that the media have been very lax in presenting this to the ordinary people out there. We just have not been given much information at all. I am looking at the submission—which you have not mentioned anything about—that my husband and I put in. This was put in in February and it is a very small submission because we had so little knowledge of this legislation.

Senator COONEY—Have the people you associate with, who seem to be a wide range of people—

Mrs MacDonald—The salt of the earth, actually.

Senator COONEY—been calling for legislation like this?

Mrs MacDonald—Have they been calling for it?

Senator COONEY—Yes.

Mrs MacDonald—Information about it?

Senator COONEY—No, for the legislation itself.

Mrs MacDonald—I am sorry, I do not understand.

Dr Toscano—He is asking whether the people you mix with want this legislation.

Mrs MacDonald—They are appalled, absolutely appalled.

Senator COONEY—You quote here the Eureka oath of December 1854. I think they were charged with treason—or was it sedition?

Dr Toscano—Treason, high treason.

Senator COONEY—They were all acquitted, as I understand.

Dr Toscano—Yes, they were all acquitted. We stand by that oath and we have that oath because it is people like that—and the striking shearers and other militants through the history of this country—who have pushed parliaments in the direction where people have pensions and health care. People have forgotten their history.

Senator COONEY—How would you classify Glenrowan in June 1880. Was that a political act?

Members of the audience interjecting—

Dr Toscano—It is a reasonable question. I find the Ned Kelly myth interesting. In 1854 we had a rebellion which ended up in a massacre of 30 miners, the arrest of 120 men and the trial of 13 for high treason—and it is hardly mentioned.

Senator COONEY—And, you might say, a multicultural force.

Dr Toscano—Yes, it was a multicultural group. That is why we use the oath as our heading:

We swear by the Southern Cross to stand truly by each other and fight to defend our rights and liberties.

They stood by each other. There were people from 19 different nation states who fought to defend their rights and liberties. There is nothing about religion, there is nothing about country; it is about human solidarity and the rights and liberties that individuals need in order to function as a community. In regard to the Ned Kelly myth, it is interesting how we push this myth of an outlaw—

Senator COONEY—I put that as an example because there are people who would regard the whole thing simply as a criminal act and a certain consequence follow. Others, as you know, would interpret it as having political overtones because of the situation in the north-east. In a certain sense, what happened would not really matter but, whatever it was, it was sufficient to accommodate that situation, as some would say.

Dr Toscano—At the end the day, after the Eureka rebellion, every demand they made was accepted by the colonial authorities within 12 months—universal male suffrage, equal electorates, payment of members, the abolition of the miners' and storekeepers' licence and there was one other point which I have forgotten. So a defeat can sometimes be a victory, but we do not have to get to the stage where we need to foment armed rebellion in this country to protect our rights and liberties. If this legislation is passed, it will be setting the groundwork for that type of hostility. People in this country may be happy down at the Crown Casino—we have, what, 30 people here and there are 25,000 at Crown Casino while I speak—but at the end of the day, when they understand that these bills have a direct impact on them and their ability to organise, there will be problems.

Senator COONEY—What about the waterside strikes in Melbourne in the twenties?

Dr Toscano—That is right, there was a returned serviceman killed. Those types of strikes and activities were necessary for people to enjoy the rights they have today. Look at the important historical moments of Western history: the French Revolution was a violent revolution where people fought for their liberties and the American War of Independence saw the overthrow of their colonial masters. On each occasion, people took up arms in order to have those rights and liberties. For the parliament to remove what few common law rights we still have will lead eventually to that type of situation, because nobody is willing to live in an authoritarian regime.

Senator COONEY—On the other hand, the New Guard was handled in a different way, wasn't it?

Dr Toscano—Yes, the New Guard was handled in a different way. A lot of people thought that the New Guard was actually part of the government. That is the difference—the shock troops. We could have a history lesson, but—

Senator COONEY—It depends very much on interpretation, and it depends who you want to tackle and who you do not want to tackle. Did you deal with the Ustashi at all, that issue, in the sixties, seventies?

Dr Toscano—I was around at that—

Member of the audience interjecting—

CHAIR—Order! Dr Toscano, please continue.

Dr Toscano—I am just saying, just remember that, although there was that so-called terrorist threat in the seventies, the people who were arrested were eventually found to be innocent.

Member of the audience interjecting—

CHAIR—Dr Toscano, would you please continue

Members of the audience interjecting—

Senator COONEY—Hold on! Can I just say something. I thought Dr Toscano and Mrs MacDonald were doing quite magnificent—

Member of the audience interjecting—

Senator COONEY—Give him a go.

Member of the audience interjecting—

Senator COONEY—Give him a go. You are doing well, Doctor.

Dr Toscano—All I can say is at the end of the day either you have common law rights which allow people to express their opinions in protest and act in a politically motivated manner—and on certain occasions there will be violence, and on certain occasions there is push and shove—or you remove those common law rights and give the state ultimate power to determine the futures of the people they rule. To remove those checks and balances, which I am sure you are all very familiar with, which protect the individual from the state apparatus is asking for a killing field, is asking for a Holocaust. The road to Nazism did not happen overnight; it happened over 20 years. The road to an authoritarian government does not happen overnight; it happens by parliamentarians or people trying to do the right thing, by combating terrorism.

Senator COONEY—We have gone through a whole series of history things. Why do you think there was no terrorist legislation passed in respect of any of those, and then we have it now? Have you got any thoughts on that?

Dr Toscano—What happened in New York was abysmal—over 3,000 people were killed—we all accept that. People can go into the reasons for it, and there are obviously various opinions about what happened. What has happened is we have got an angry giant who, because they are angry, is no longer following its own civil legislation. We have had people panicking the streets and passing legislation all over the world in western countries—not in Europe so much, but in the United States and possibly England—which remove people's rights, thinking that that is the way to beat terrorism. To me, the United States government and Al-Qaeda are basically two sides of the same coin, because they are authoritarian regimes which are hierarchically structured which remove people's rights. Al-Qaeda is a terrorist organisation, end of story. What has it got to do with us? Why remove our civil liberties to fight terrorism?

CHAIR—Mrs MacDonald, in the submission which you made on behalf of yourself and your husband and in the submission made on behalf of People against Repressive Legislation you make reference to the proscription power that is provided for the Attorney-General in this legislation—you make it clear that the power is inappropriate. Could I just seek your clarification as to whether you oppose a power of proscription in any context or whether it is specifically in relation to the power given to the Attorney-General?

Mrs MacDonald—Basically it is that power for the Attorney-General. I cannot believe that one man, or his other choice in parliament, could have that power. That is what frightens us.

CHAIR—I understand that. If a power to proscribe an organisation was provided through reference, for example, to a court, would that alter your view—other submitters have suggested to the parliament?

Dr Toscano—Would you want a court to have the power to ban an organisation, or would you prefer to have neither?

Mrs MacDonald—I would really prefer to have neither.

CHAIR—Thank you very much for clarifying that point. There being no further questions, Mrs MacDonald and Dr Toscana, may I thank you both very much for attending and assisting the committee this afternoon, for providing us with both your written submissions and your oral submissions today. We appreciate your assistance.

[2.25 p.m.]

LAWSON, Mr Damien, Spokesperson, Federation of Community Legal Centres (Victoria) Inc.

CHAIR—Welcome, Mr Lawson.

Members of the audience interjecting—

CHAIR—Members of the public are invited to attend and to listen. I welcome representatives of the Federation of Community Legal Centres (Victoria) Inc.

Members of the audience interjecting—

CHAIR—Ladies and gentlemen, the committee is not going to proceed until we have order. Witnesses are giving their time and their intellectual effort in making submissions, and the committee is very grateful for that. I think it is appropriate for those people who are making submissions to be heard in silence.

Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Witnesses are also reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Mr Lawson, the committee has before it the submission of the Federation of Community Legal Centres (Victoria) Inc., which we have numbered 97A. Do you wish to make any amendments to that submission?

Mr Lawson—There are no amendments to that submission, although I will be raising some new matters in my verbal statement.

CHAIR—Do you wish to table a further document in relation to those?

Mr Lawson—I would be happy to provide the committee with a written summary of what I say today.

CHAIR—We will have it in *Hansard*. I invite you to make a short opening statement, at the conclusion of which I will seek questions to you from members of the committee. I note in your submission that you consider the bill colloquially known as the ASIO bill. That is not currently before this committee and as such we have not been discussing it. If we can restrict our discussion to the bills known as the security package, that would be helpful.

Mr Lawson—Sure. I thank the committee for providing me with the opportunity to address you today and to raise some of the further issues that the federation have considered since we made our submission. As you know, I have been here over the last two days and, like most people who have submitted to the committee, we view this legislation very seriously. We think it is probably some of the most significant legislation that the Australian parliament has ever had to consider. Like other witnesses, I want to put on the record quite strongly—I know you have heard this before—that we are very concerned about the time line. We understand that it is not the fault of the committee. However, we recognise that that decision was made by parties that were able to make that decision in the Senate. To that extent we think that it is inappropriate and we have grave concerns that those parties would choose to do that. The government had several months in which to prepare the legislation after the attacks in Washington and New York. We think that, at the very least, the Australian public should have

the same amount of time to consider the implications of the legislation. Unfortunately, that has not been the case.

I will try to keep my statement now fairly brief, because I know you have been here for two days. I have been here for a long time as well, so I am quite tired. Many of the matters that I wish to raise have been raised, and I will try not to go over ground that has been gone over before. Just to orientate you, I want to cover three areas. Firstly, I want to make some brief comments regarding the definition of terrorism, the proposal for a proscription power and some of the other issues that have already been raised. I will try to do that very briefly, because most of the concerns that the federation wishes to raise are issues that have been covered very well by a number of those who have made submissions to the committee—in particular, I believe, Liberty Victoria. I was lucky enough to be here yesterday to hear their comments.

What I want to do in a little more detail is raise some issues in regard to the Suppression of the Financing of Terrorism Bill 2002, because I do not think there has been adequate consideration given to that bill in a lot of the submissions that have been raised. Once again, I think that is because of the time; certainly that is our situation—we focused on the Security Legislation Amendment (Terrorism) Bill 2002. We have since had an opportunity to consider the Suppression of the Financing of Terrorism Bill further, so I want to focus in on that. I recognise that we have not given you a written submission in any detail about that but I would be happy, as I said, to provide some more detail later. I also want to follow up on a couple of questions that have been raised over the last couple of days which I can perhaps help the committee with. Before I do that, I want to emphasise from our point of view some of the concerns that have been raised over the last couple of days in relation to what various people have talked about as the 'climate of fear' that we are currently experiencing in this open-ended period of the declared war on terrorism that we all seem to have been caught up in even though we have not been in any way involved in making the decision to be part of that. In particular, I want to look at how that climate of fear impacts on certain communities and how this legislation may impact on them.

As you know, I represent the Federation of Community Legal Centres, but my substantive work is with the Western Suburbs Legal Service in the western suburbs of Melbourne. We are lucky enough to have a large Arab and Muslim community in my local area and, like all the local communities in that area, we work closely with that Arab and Muslim community. To that extent, we have an understanding of how the war on terrorism, as it has proceeded over the last few months, has impacted on that community, and also how the attacks on Washington and New York on September 11 have impacted on that community.

In many senses, as the community knows, the climate is similar to what occurred during the Gulf War in 1991, in which Australia participated. Members of the Arab and Muslim communities have been subjected to racial vilification and to physical and verbal racist attacks, as was raised this morning. In particular, young women have been the objects of these sorts of attacks. We have had complaints to our community legal centre which we have tried to assist people with, and I know that most of the other 42 community legal centres that are part of the Federation of Community Legal Centres have had similar complaints to them and have tried to assist when they can. Obviously to some extent these are individuals in the community forming their own views about Arab and Muslim people, but this climate is also fed into by statements by governments and by the media. I am not just talking about the shock jocks and the tabloid media, although I think it is true that they do feed into it. The mainstream media's reporting of conflicts around the world and the construction in the

present period of a 'terrorist' as someone of an Arab and Muslim background also contribute to this climate.

To the extent that this legislation will be used to label certain groups in society as terrorists, we have concerns that this legislation will contribute to that discriminatory climate that people experience. In particular, we are concerned that we already know many people in the Arab and Muslim communities who have been visited by—'visited' is probably a polite word; they have experienced interrogation and inquiries—members of the Australian Federal Police and the state police and in conjunction with ASIO. Obviously in the future, if this legislation is passed, part of that investigation, part of that interrogation and part of those inquiries will be about collecting information to form the basis of criminal prosecution or possibly proscription under this legislation. To that extent, we are very concerned. We already know of cases where ASIO, the Federal Police and the state police have acted inappropriately towards members of the Arab and Muslim communities, and we are concerned that if greater powers are given to those agencies under this raft of legislation those powers will be used inappropriately. I just raise those issues—you can ask me more questions about them if you wish to.

In summary, as you have seen from our submission, we believe the existing criminal law is adequate to address any realistic prospect of, or actual acts of, terrorism within Australia. I do not want to go over the ground that Julian Burnside went over yesterday, but I think it is fairly clear that that is the case. Indeed, as Julian pointed out yesterday, the onus is on the government to show where the legislation is inadequate. I refer you to the Attorney-General's Department's responses to questions that the committee has raised with them. In relation to question 12, they have been asked that question and really they have not made out an answer, I would say. The only areas where they argue that there is currently not an offence that could be covered by existing legislation are:

> … making it unlawful for a person to provide or receive training connected with preparation for a terrorist act

and:

> … there is no offence for directing an organisation concerned with fostering preparation for a terrorist act.

On the second of those points, I would argue that that is covered by aiding or abetting provisions or conspiracy provisions. In relation to the first, providing or receiving training connected with a terrorist act, if someone receives training connected with preparation for a terrorist act, I would argue that possibly attempt laws would cover that—attempting to commit murder, attempting to commit criminal damage, attempting to commit grievous bodily harm, attempting to hijack an aircraft, et cetera. Whether or not it should be unlawful for someone to provide training, in the manner under the legislation where it is an offence—I cannot remember whether it is an absolute or strict liability offence—we certainly have concerns about that. But if someone is actively, consciously and knowingly providing training to someone to commit a terrorist act like murder, criminal damage, grievous bodily harm et cetera then, once again, conspiracy, aiding and abetting before or after the fact would cover that. So we think the Attorney-General's Department has been asked that question—why is there a need for the legislation?—and they have not been able to articulate why there is a need.

So in a sense all my other comments to some degree are redundant. If that has not been made out, why are we even continuing with the discussion? However, I will flag some of the

points that other people have made. We believe the definition of 'terrorist act' and the ancillary offences associated with it are so broad in scope that they will, if prosecution proceeds, be used to criminalise a whole range of political, social and union activity which in some instances, as other people would point out, may be unlawful but certainly should not attract an accusation of being terrorist acts—they may be other sorts of unlawful acts—and certainly should not attract life imprisonment. That is all I will say about the terrorist act issue. We have the same concerns about absolute and strict liability. We have the same concerns about reversal of onus of proof, which attacks the presumption of innocence. I think that is fairly clear and I think you have heard a lot about that.

In relation to the proscription power, we categorically say there is no need for it and that not only is there no need but it should not occur. In a democracy, the government should not be able to ban ideas or organisations. It is as simple as that. Where I differ with Julian Burnside's comment yesterday is that I do not accept that the mere fact that the UN Security Council has put someone on a list should then trigger us putting them on some proscription list in Australia. I will explain a little bit more why I think that is the case.

I think this was possibly raised by Amnesty this morning, but if you go to page 22 of the Attorney-General's Department's answers to you where it talks about the United Nations Security Council's resolution 1373, the Attorney-General's Department correctly points out that that resolution does not require Australia or indeed any other government to create a process for a general proscription of organisations. So we are under no obligation to create this power for the Attorney-General. We should be absolutely clear about that. There is no obligation that we create this power for the Attorney-General and, for the reasons that people have pointed out—and I will not go into them now—it is not desirable that we do so.

Secondly, under the Suppression of the Financing of Terrorism Bill 2002, there is another proscription process—essentially in relation to the freezing of assets. The Attorney-General's Department argues that that is necessary to fulfil the requirements of paragraph 1(c) of UN resolution 1373—the one that Senator Payne read out earlier today—and, because it is under chapter 7 of the UN charter, there is a positive obligation on governments to enact legislation to fulfil that. However, there is a debate within the UN at the moment and, in particular, within the Counterterrorism Committee of the UN—which was set up under resolution 1373—about how member states should implement that obligation.

Some countries have gone down the road that the Attorney-General and the government are suggesting that we go down: there is a legislative regime set up where you list organisations and their assets are frozen. Other countries have said, 'We will just use our existing criminal law, where people can be charged with conspiracy, aiding and abetting or a range of other ancillary offences, to deal with this requirement.' So we should not be under the illusion that, merely because the United Nations Security Council has passed this section of a resolution, we have to enact the Suppression of the Financing of Terrorism Bill 2002. There is a debate going on amongst member states about exactly that, and I think we need to be aware of those debates and integrate them into our analysis and deliberations about whether this legislation is desirable.

I know I am speaking at length, but I want to go a bit more into the Suppression of the Financing of Terrorism Bill 2002. Our concern in relation to this bill, in a sense, mirrors our concern about the banning of organisations generally and the capacity to label people as terrorists through the criminal offences under the proposed security legislation. Once you are labelled as a terrorist or as someone who has terrorist assets, whether under this Australian

legislation or under the United Nations, there are severe consequences. The consequences may not even necessarily be legal; they are just the consequences of effectively being, in certain circumstances, defamed. Once you are on a list, it is very hard to get off, and that is why we are concerned about some of the provisions in the bill.

Proposed schedule 3 effectively mirrors the regulations which the Minister for Foreign Affairs promulgated in December and which I know you are familiar with. As Senator Payne pointed out today, that was essentially a list obtained from the United States and Britain—so it was not, in a sense, fulfilling the requirement of the UN Security Council. The UN Security Council did not say, 'Here is the list,' rather it said, 'You must freeze assets,' and then the Minister for Foreign Affairs got the list from the United States and Britain and did that. There is a process whereby a UN committee can determine who should be on a list of terrorist organisations. It is an amazing process, and we have to understand that process because it will be used in the future by either the Minister for Foreign Affairs or the Attorney-General—if he receives his proscription powers—to determine whether an organisation should be proscribed or an individual listed as a terrorist.

Essentially, the process works like this: any UN member country can put forward a name and they then put forward some evidence to support that. That it is then considered by a UN sanctions committee. For the people who are nominated—either the organisations or the individuals who are named—there is no natural justice and there is no ability to have input into this process; it just occurs. Member states are given merely 48 hours within which to object. If no objections are raised, you are on the list. It is that list which, in the future, the foreign affairs minister could use under the Suppression of the Financing of Terrorism Bill 2002 to list organisations which then have their assets frozen. There are serious legal consequences for financial institutions in Australia which are involved in dealing with those assets.

As an example, the *Independent*, a British newspaper, reported on the case of a number of Swedish businessmen who were placed on that list. No-one objected, because the 48 hours went past. The Swedish government did some work on their behalf, but it took them many months to get taken off that list. The damage was already done; they were already identified as terrorists. There is a very significant impact, regardless of the legal implications of that. I think we have to be concerned that there is not a proper process, I would argue, at the UN for creating these sorts of lists, in the same way that there is not a proper process outlined in the legislation for the Attorney-General to proscribe organisations.

This obviously has consequences for other individuals. As Justice Dowd pointed out in Sydney, we all go to various fundraisers, we could be handing over money, and we could perhaps be reckless about it under this legislation, whether it is in relation to proposed section 103.1 in the Suppression of the Financing of Terrorism Bill—where we are reckless about handing over money to some organisation or individual that has committed a terrorist act—or whether it is under the schedule 3 provisions of where an organisation is listed. Are we supposed to check the UN list before we go to every fundraiser? We laugh, but this is a serious possibility. There are all sorts of implications from this, which I do not think have been fully worked out.

Turning to schedule 2 of the Suppression of the Financing of Terrorism Bill, I think there are onerous provisions that will be put on organisations that work in the finance and banking industry, in terms of mandatory reporting requirements. Basically, they have to report on anyone they say may be dealing with their money and may be involved in terrorism in some

way. Given the broad definition of a terrorist act, is it realistic to expect that the banking and finance industry will be able to fulfil that obligation? That brings me to, I suppose, a final point on all this: there can be some really serious impacts on small business by this legislation, both in Australia and overseas.

I will give you an example of how it has already impacted on someone. You may be familiar with this case; I do not know whether it has been raised before the committee. James Milne is a Collingwood pub owner and a rock music entrepreneur. He had his bank accounts frozen on 21 December last year—when the foreign affairs minister promulgated the list that we are familiar with—without evidence that he was connected with terrorism, except that his music business was named The Shining Path. I imagine that the members of the committee are aware that the group Shining Path in Peru is alleged to be a terrorist organisation.

The Commonwealth Bank started to bounce his cheques in January. The accounts were unfrozen only in February and only after he had gone to the media and talked about it. Up until then, he had been contacting the government, the Attorney-General's Department, the Department of Foreign Affairs and Trade and the Australian Federal Police to get his assets unfrozen. He was not able to do that until he went to the media. The Attorney-General is refusing to discuss it, the foreign affairs minister says it is a case of mistaken identity and the Australian Federal Police are refusing to give Milne a letter clearing his name, explaining that this could threaten national security. This is all according to the *Financial Review*. The *Financial Review* was asked not to publish the Federal Police explanation for this, as this would also threaten national security interests.

To my mind, that is an example of how someone could easily be labelled under any of these provisions in both these acts and face very serious consequences. Even if you since rehabilitate yourself, the damage is already done in various ways. Obviously there are some remedies. There are some remedies outlined under the Suppression of the Financing of Terrorism Bill. Certainly the remedy of asking the Attorney-General—and you only get one go every 12 months—to take you off the list is certainly not adequate. Every 12 months you get one chance to say, 'Please don't,' and it is only the Attorney-General who gets to decide. Sure, there would be remedies under the civil law and in the courts, but you only have to look at previous cases where national security issues have come in: the courts are very reluctant to engage in national security issues.

I will give you an example that one of our member community legal centres was involved in. That community legal centre was representing someone who had successfully got refugee status but they were waiting on an ASIO assessment. ASIO effectively said that they were a security risk; it was taken to the Federal Court; the Federal Court said it did not even want to look at ASIO's information, because it was a national security issue. It was only through going to the Inspector-General of Intelligence and Security that, after several months, after the Federal Court had refused to look at it, effectively, that ASIO eventually said, 'We made a mistake.' These mistakes do happen and innocent people do get caught up in them. That is just an unintended consequence, leaving aside the actual consequences. I will leave it there, because I know Senator Payne wants me to wind up and I did say I would be brief. I just want to flag one final issue in relation to this.

CHAIR—That was your penultimate comment then, Mr Lawson!

Mr Lawson—The issue is this: the problem with all this is that there is all this information flying all around the world between all sorts of agencies. Some of it is sensible information; some of it is perhaps accurate information; some of it is not. The problem is that this is all

done in secret; there is very little process of review or transparency and so in many instances you do not even know this information is flying around about you.

Just to flag one other concern with the Suppression of the Financing of Terrorism Bill 2002, an example of that is the notion that the Commissioner of the Australian Federal Police or his delegate or the head of ASIO is effectively able to provide financial transaction reports, private financial information, of Australian citizens or perhaps non-Australian citizens to any foreign law enforcement agency and there would be no process apart from that. It could be compounded: you could be whacked on a list here in a mistaken way by ASIO and that information could then leave your assets being frozen here and then that information could be provided to every law enforcement agency around the world and you would find that all your assets around the rest of the world were frozen as well, and there is very little recourse to get yourself off these lists. I will leave it there and anything else I want to say I will bring up in questions.

CHAIR—Mr Lawson, thank you very much. I was only concerned that we did have the opportunity to ask you questions. I appreciate the importance of you going to the question of the financing bill in this package.

Senator McKIERNAN—The disturbing matter you raised about the businessman in Melbourne using the name Shining Path: that appears to me—and I only have the information you have provided here this afternoon—to be an error by the bank rather than an error by this proposed legislation or indeed any current legislation that is on the statute books of this country. Would I be right in arriving at that conclusion?

Mr Lawson—I do not know the answer to that question, because the Attorney-General, the foreign minister and the Australian Federal Police are effectively refusing to talk about it. You may be right. It may be that that is the area, but to my mind that highlights exactly the danger of creating a list and then saying to everyone, 'Here you go. Here is the list.' What will happen is that it will be interpreted by all sorts of institutions. Of course, who generates the list is a question as well.

Senator McKIERNAN—Have you seen the list itself that was released by the foreign minister, and the reference to—

Mr Lawson—Yes, it was made public.

Senator McKIERNAN—I know it was made public. The question was: have you seen the list and have you seen the particular item dealing with the details of Shining Path?

Mr Lawson—I can have a look at it now. I seem to remember Shining Path as one of the organisations on that list. I see what you are saying.

Senator McKIERNAN—So you have seen it and you have seen the details?

Mr Lawson—You are saying his name is not on the list. I am not sure.

Senator McKIERNAN—No, the question was: have you seen it and have you seen the details associated with what is on the list?

Mr Lawson—Yes, I have.

Senator McKIERNAN—Thank you. You talked about the provisions of the United Nations when they develop a list and the 48-hour period for lodging an objection. If an objection is lodged within that period of time, does that objection have the power of veto in

the sense that it would stop the United Nations body including the name of that individual or corporation on the list?

Mr Lawson—I am not sure of the decision making process. I do not think there is an absolute veto. I could be wrong about that, but I do not think there is.

Senator McKIERNAN—You spent some time on the second piece of legislation, the Suppression of the Financing of Terrorism Bill 2002, which in effect is an amendment to the Financial Transaction Reports Act, the Mutual Assistance in Criminal Matters Act and the Charter of the United Nations Act. Specifically, what are the objections to this particular piece of legislation? I do not mean the thrust—I understand where the politics are coming from; I understand that and I am not arguing against it.

Mr Lawson—Firstly, it uses the same definition of 'terrorist act' that we have concerns about. You are fairly familiar with what those concerns would be.

Senator McKIERNAN—Yes, indeed.

Mr Lawson—The second aspect is that proposed section 103.1, like most of the offences in the security legislation amendment act, is effectively a strict liability offence. You have a defence of recklessness, but effectively it operates so that if you have handed over some money—regardless of what your intention was, to a large degree—you have committed the offence and it attracts imprisonment for life. In the same way that we are concerned that I could be possessing a mobile phone which is said to be a thing connected to a terrorist act, by handing over some money which is later found to be somehow connected to a terrorist act I could be committing an offence which attracts life imprisonment.

Senator McKIERNAN—If convicted.

Mr Lawson—Obviously, if convicted. The third issue relates to the onerous mandatory reporting requirements on cash dealers. The fourth concern is that the Federal Police and ASIO can hand over private financial information to any foreign law enforcement agency. The fifth concern is in relation to schedule 3, which is the listing of organisations under the UN charter.

Senator McKIERNAN—Thank you very much for those specifics. I appreciate that. Previous witnesses have talked about worst case scenarios with this legislation. That is a valid comment; I make no objections to the argument of that. We, as legislators, always have to be aware of how legislation which we enact and participate in the formulation of can be abused and misused and the potential for that, so I do not have any problem with that. I also have responsibilities with regard to those law-abiding citizens who need to be protected. If an organisation such as Al-Qaeda was operating in Australia, if it was operating in the good city of Melbourne and collecting funds and resources in this fair city to finance its operations in other parts of the world and possibly in Australia, what provisions of acts in the Commonwealth could be used to halt them, particularly with regard to the suppression of financing—the aims of this legislation to which you have drawn additional attention—as well as the legislation that is before us?

Mr Lawson—Like you, I am not familiar with how Al-Qaeda exists as an organisation. From what I have read in newspaper reports, it is some sort of network of a range of organisations that are somehow cobbled together in some way. That is the impression I get. So it obviously would depend on the specifics of the activities of people connected with the Al-Qaeda network. Certainly, if there are individuals who are engaged in preparation for criminal acts, the existing criminal law and criminal justice processes can be used to investigate,

prosecute and convict those people of possibly acts preparatory to committing murder et cetera. Similarly, if I find out that someone in this audience is preparing to knock off someone else in the audience, I do not have to wait for them to be killed before we can investigate and prosecute that person.

Senator McKIERNAN—But the acts that were committed on September 11 last year were so horrific that they now involve this country in a war against terrorism and our troops in affairs overseas.

Member of the audience interjecting—

CHAIR—Order! Senator McKiernan please continue.

Member of the audience interjecting—

CHAIR—Ladies and gentlemen, this is a public hearing of this committee.

Interjector—We are the public. We support you. Give us a chance. Free speech, free country, not corrupt banks, criminal lawyers.

CHAIR—Ladies and gentlemen, if the committee does not have the opportunity to continue its hearing in silence, the committee will adjourn.

Interjector—Yes, do adjourn.

CHAIR—We cannot go on until we have an opportunity to continue our hearings in silence. I think Mr Lawson is presenting a submission which is very important to the consideration of these bills. The committee is very grateful to Mr Lawson for the effort he has put into that and I think that he does deserve the respect of the public in allowing him to be heard in silence. I can understand it if you have no respect for the committee but I would appreciate it if you had respect for the witnesses. Senator McKiernan, please continue.

Senator McKIERNAN—Mr Lawson, would you like to respond?

Mr Lawson—Can you just repeat the question? Sorry, I have lost it in all that. I think you were actually halfway through your question.

Senator McKIERNAN—Indeed, but I concede that there are elements that obviously do not want us examining terrorists or terrorist activity or the possibility of that activity and the organisation for it and they will seek to decry and shout down the whole democratic processes that this committee is obliged to engage in. So I will leave it at that and let my other colleagues address some questions to you. Your assistance is much appreciated already and it is regrettable that we are not able to further benefit from your coming along here today, but it is not the fault of the committee that it is not happening.

Senator LUDWIG—I wondered if you would expand on your mention of Shining Path. Was that something that you read in the *Financial Review*?

Mr Lawson—Initially I read about it in the *Financial Review*.

Senator LUDWIG—Do you have a reference for that?

Mr Lawson—Yes, I can give you that reference. Do you want me to just give that to you at the end? Is that the quickest way to do it?

Senator LUDWIG—Or on transcript, or while you are talking you can have a look for it, if you like.

Mr Lawson—I think all that highlights is that once you start generating lists, you do not necessarily have any control over how they are used by various institutions. The point I was trying to make is that with the information that is often used to create these lists, there is no natural justice process involved. There is no natural justice process involved in the proposal for the proscription of organisations outlined by the Attorney-General; there is no natural justice at the level of the UN; and there is no natural justice in this process by which the foreign affairs minister would promulgate a list as well. And of course other institutions then use that list, as possibly happened in the case of the Shining Path example. It just happens. The Commonwealth Bank did not notify this guy; he just went to try and get his money and it was not there—he could not access it. The thing is, once you create these lists that people have been talking about, you create this whole crime thing.

Senator LUDWIG—I understand—you are using it as analogous to the potential effect with the proposed bills, and it also a live one in the sense that there is a person who has suffered, it seems.

Mr Lawson—That is right.

Senator LUDWIG—I was also curious about whether the approaches that you mentioned, to the Attorney-General and other departmental heads, were by the person in question or through solicitors? I am curious about how that came about and whether or not the Attorney-General has acted in any way.

Mr Lawson—My understanding is that there has not been any action taken by anyone in government, apart from ensuring that he no longer has those assets frozen. I can undertake to the committee to make further inquiries of people I have talked to and offer that the committee would like to know more.

Senator LUDWIG—I am unsure of what the committee might think, but it would be helpful for me in trying to understand how the present legislation might impact upon people if we have got—

CHAIR—Senator Ludwig, I can say that tomorrow we have the opportunity to question AUSTRAC, and they are pivotal in that process.

Senator LUDWIG—Yes, I see that as well, but it might also be the Commonwealth Bank. There may not be clear—

CHAIR—We can certainly write to the financial institutions.

Mr Lawson—I can undertake to provide any more information that I am able to obtain for you.

CHAIR—Thank you.

Senator COONEY—Mr Lawson, you raised a point which has been overlooked a bit, and that is the point of the declaration by the Security Council of the United Nations. I would like to deal with that. That is 102.2(1)(c) and so on.

Mr Lawson—Does the committee have a copy of the resolution?

CHAIR—Yes, we have one here.

Senator COONEY—What I was talking about was the provision itself in 102.2(1)(c). I think that appears elsewhere. Could you tell us a bit about the United Nations: if, say, a nation signs up to the Convention on the Rights of the Child or the International Covenant on Civil and Political Rights, and so on, it must sign it and then ratify it. From what you were saying—

and I might be wrong in understanding what you said—the declaration is made and it is not necessary for a nation to accept it in the same way as they might accept a convention. Is that right?

Mr Lawson—I am not here as an international law expert. As you know, there are various conventions Australia has signed up to. The process in Australia, unlike in other countries, is that before they are generally recognised as law within Australia there has to be some legislative process, such as with the Human Rights and Equal Opportunity Commission Act, to implement them in law before they become law. In the case of resolutions, there are different types. There are, if you like, non-binding resolutions and legally enforceable resolutions. My understanding is that this resolution was promulgated under chapter 7 of the United Nations charter and therefore is, in a sense, legally binding on states. There is a sense that states must implement this particular resolution. However, the resolution does not outline in detail how that implementation should take place; it just says that states should do certain things. It is then up to each member state to look at that resolution and work out the best process for implementing its obligations under that resolution.

What I was saying before is that a variety of methods and approaches have been adopted by various member states to implement that resolution. Some states, such as the United States and Britain, who we seem to be following, have implemented this process of listing organisations and then requiring financial institutions to freeze those assets. Other states have said that the existing provisions under the criminal law, such as aiding and abetting and conspiracy, in their states are adequate for dealing with preparatory activities that involve financial accumulation in support of terrorist acts, and they have gone down that route. Part of the reason they have gone down that route is precisely because they do not want to create a situation where you have a list of names and all the implications and problems that go with it that we have talked about over the last day and a half.

Senator COONEY—Proposed section 102.2(1)(c) says that the Attorney-General may make a declaration.

CHAIR—Hang on for one second, Senator Cooney.

Senator COONEY—It says that:

> The Attorney-General may make a declaration in writing ... if the Attorney-General is satisfied on reasonable grounds that ... the declaration is reasonably appropriate to give effect to a decision of the Security Council ...

That is a decision, I take it, that Australia would not have a part in making unless it was a part of the Security Council. Is that right?

Mr Lawson—Yes, that is right. Decisions of the Security Council are made by the members of the Security Council. As you know, certain members of Security Council have a veto power over certain decisions as well.

Senator COONEY—So the Attorney-General may make a declaration—he does not have to by the looks of things—in respect of a decision made by a Security Council in which Australia has not played a part.

Mr Lawson—That is right. The Federation of Community Legal Centres' view is that in general we support Australia abiding by international law and decisions of the UN. What we are saying is in order for Australia to abide by its international obligations under this resolution it is not necessary to go down the route that is outlined in the suppression of financing of terrorism legislation. There are other options and possibilities that could be

pursued that do not have the same implications of creating lists of organisations and individuals labelled as terrorists.

Senator COONEY—What do you say about the Attorney-General having a discretion as to whether or not to follow a decision of the Security Council depending on how it effects him? Does that become too loose in your opinion or what?

Mr Lawson—I do not think the government should have a discretion. But what I am saying is that, like all governments—like anyone who follows a decision—there is a level of interpretation. This is recognised by the Security Council and the UN bodies. Otherwise, they would detail in some detail a piece of legislation. Do you know what I mean? In relation to the whole question of listing, if you look at the list that was provided to Australia by Britain and the United States, to my mind that highlights the problem of listing. In some senses it is arbitrary and in some senses it is actually extremely selective. Effectively, lists of alleged terrorists—individuals and organisations—reflect the foreign policy of the particular governments who make those lists. In the case of that list, which we have all seen, there are certain organisations, such as for instance the West Papuan Independence Movement, which are not listed there. I do not think it should be listed there—that is my personal view.

Senator COONEY—What you are saying is—

Mr Lawson—It is not listed there, whereas another organisation, the Kurdish organisation—which in some senses is in many ways very similar to the West Papuan organisation—is listed. That reflects more on Britain's, America's and perhaps Australia's relationship with Indonesia or with Turkey than necessarily any objective criteria of who or who is not a terrorist. That comes back to the whole problem with this legislation. You cannot define terrorism. You can define criminal acts and you should prosecute and punish criminal acts. But once you go down the route of trying to define terrorism, either in the international arena or in the domestic arena, you get yourself into problems. That is why the UN does not have a definition of terrorism. If you look at the UN resolution, it says it wants governments to prevent the financing of terrorism but it does not define what it means by that—what terrorism is.

CHAIR—Thank you.

Senator COONEY—The only other question I wanted to take up with you was in your capacity with the federation. If a person was charged with a serious offence under this legislation, if it came in, what sorts of resources would there be from the community legal centres—or indeed the general system, whether parts of your federation or parts of the other sections of the legal profession who try to help on a pro bono basis—to help such a person or a group of people who were charged? What sorts of costs would there be, do you think?

Member of the audience interjecting—

Mr Lawson—As perhaps some of the audience are well aware, the legal aid system we have in this country is under a complete crisis at the moment. There have been significant cutbacks in legal aid, which impacts on community legal centres, on legal aid and on private practitioners who are funded by legal aid. The latest cutback in that regard was the $6 million that was taken out of the legal aid budget and given over to the royal commission into the CFMEU, which means that legal counsel involved in that royal commission are able to receive legal aid funds. It may or may not be appropriate for them to receive funding, but there certainly should not have been $6 million taken out of the legal aid budget for that royal commission. Certainly the situation at the moment is that legal aid funding is woeful, the way

legal aid tends to operate—and it operates in different ways in different states—is that, if someone is facing a term of imprisonment, they are eligible for legal aid, but there are caps.

In such a politicised situation, I think it is quite likely that any prosecution under this legislation will be very difficult for legal aid to fund. So if someone is impecunious, if someone does not have any money, it is going to be very difficult for them to fight either a proscription of their organisation or a prosecution unless there is a solicitor, lawyer or barrister such as Julian Burnside, someone like that, willing to take the risk of prosecution themselves—and not only the risk of prosecution but the risk of themselves being labelled as a supporter of terrorism—to pursue this case. With no criticism of the legal profession in this country, I would say that the majority of the legal profession in this country would be very reluctant to take on that role pro bono, not just because they may face prosecution but because they face being labelled as a supporter of terrorists themselves. That is the danger of this legislation. The review mechanisms that are there, such as the AD(JR) Act, with all their flaws, are totally inadequate, and the committee knows why. On top of that it will be extremely difficult for anyone to find someone willing to represent them legally, to challenge any of the provisions in any of these acts or the offences they are being charged with.

CHAIR—The committee must conclude this session. Mr Lawson, have you been able to pin down the reference to the *Australian Financial Review* article you referred to earlier?

Mr Lawson—It was in the *Australian Financial Review* of 9 March. It was an article written by Brian Toohey headed 'A-G's war swings from tragedy to farce', on page 51. For instance, the information regarding the Commonwealth Bank actually bouncing the cheques in January was covered by that article as well. But I will try to obtain other information which may be able to assist the committee, or put you on to the persons involved.

CHAIR—That does assist the committee. On behalf of the committee, I thank you for your written submission, for your additional comments this afternoon and for your forbearance during the process of assisting the committee. We are very grateful for that.

[3.18 p.m.]

McCASLAND-PEXTON, Ms Anne, Research Assistant, Castan Centre for Human Rights Law

KINLEY, Prof David, Director, Castan Centre for Human Rights Law, Faculty of Law, Monash University

JOSEPH, Ms Sarah Louise, Associate Director, Castan Centre for Human Rights Law, Faculty of Law, Monash University

CHAIR—Welcome. Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind witnesses of the notes that you have received relating to parliamentary privilege and the protection of official witnesses. The committee has before it your submission, which it has numbered 136. Do you need to make any amendments or alterations to that document?

Prof. Kinley—None.

CHAIR—I invite you to make a brief opening statement and at the conclusion of that members of the committee will have questions for you.

Prof. Kinley—Thank you very much, and thank you for inviting us to give evidence. We will spend a few minutes introducing this issue from our perspective. First of all, we would like to say that in our view terrorism is unquestionably a violation, and sometimes considered a gross violation, of human rights. To some extent laws need to curtail and prevent terrorist acts and to punish and/or rehabilitate terrorists. International standards concerning human rights laws recognise this much expressly, and I would like to emphasis that point. This is not something that is sidestepped; rather it is fully embraced by international human rights laws. They allow states the opportunity to protect the rights of others, to maintain public order and national security, and public health.

However, the challenge for any country such as Australia is that the legal response to terrorism must be one that falls within the acceptable bounds of a democratic society and a society like ours, which is proclaimed to follow the tenets of the rule of law. The bottom line is that the response must be proportionate. Our concern with the manner in which the bill chooses to go is that it has chosen not to fall under the normal criminal law provisions, but rather to have a specific act. The terrorist net that is cast by the bill leaves, we think, too much opportunity for incidental or collateral damage. Therefore, it is not, in our view, proportionate in certain respects. In particular, our concern is that the decoupling of intention from the damaging outcome was an ill-advised move. We understand that the initial concerns were that 'intention' would be part of the bill. We believe this is ill advised for two reasons. First of all, it makes the issue more legally complex. From our reading of the bill, it throws up issues that are going to have to be determined legally—and that means bringing in lawyers. What is 'lawful protest'? What is the 'reckless provision of training'? What is 'direct', and more to the point what is 'indirect' assistance in the directing of terrorist organisations? How does one deal with the reversing of the onus of proof—the proof now having to be demonstrated by the individual that they were not assisting a claimed terrorist organisation?

Secondly, the net that is cast by the terrorist provisions is potentially too wide, and wider than is necessary. Incidental unlawfulness that may occur, as we say in the submission, at

Woomera—is that to be considered part of a terrorist act? In the protests against the WTO, are the incidental elements of unlawfulness or the whole of that protest to be considered a terrorist act? Indeed, one can go so far as to say: is the promotion of an ideology such capitalism, if it has environmental damage as a consequence of pushing the ideas of capitalism—in other words, a corporation seeking profit, and this happens—a terrorist act? I think there could be an argument raised that that would fall under the current provision.

There is a degree of unconscionable breadth, and I think that we need to be careful and chastened by situations in countries analogous to ours where this can go wrong. A perfect example of this is the United Kingdom where there is and has been a manifest terrorist danger, which is perhaps more than can be said of Australia today. And yet they have had real difficulties with their prevention of terrorism act. I need not remind the committee that the elements of that have allowed an overzealousness on the part of the British police. It has brought, I think, serious damage to the standing of the British justice system as a consequence of the overturning of the Birmingham Six and Guildford Four. We have one other dimension to this opening statement, which is the constitutional features. My constitutional expert on my right, Ms Joseph, shall refer to those.

Ms Joseph—I need not remind the committee that all federal laws need a head of power. Upon my reading of the bill, I think the potential general heads of power for this bill are probably 51(vi) the defence power, the implied nationhood power and maybe the external affairs power 51(xxix). With all of these heads of power, perhaps uniquely proportionality is a necessary component of laws within these heads of power. As my colleague has mentioned, we do have concerns with the proportionality of this particular legislation and one of the consequences of that disproportionality could be that this legislation in fact in many respects would lack a head of power. I will also add that there is a possibility that this legislation might disproportionately inhibit some constitutional guarantees, such as the guarantee of free political speech and rights to freedom of association.

CHAIR—Professor Kinley, do you have any further comments?

Prof. Kinley—No, that is the end of our opening comments.

CHAIR—Ms McCasland-Pexton?

Ms McCasland-Pexton—No.

CHAIR—Thank you for your submissions to the committee. Professor Kinley, in terms of the 'defence to terrorism offences' aspect of your submission, which I think is on page 2, the penultimate paragraph on the page states:

> The necessary knowledge, intention, and defences must be included so that non-terrorist parties are not included within the scope of terrorist acts.

That follows a couple of examples you have used about people who may—to use a colloquialism—suffer guilt by association in its process. Do you apply that necessity to all of the proposed sections of 101.2, 101.4 and 101.5 that you refer to at the beginning of that section? Should all of those, in your view, have those as prerequisites?

Prof. Kinley—Yes, it seems to us that that is a necessary element, otherwise you do potentially cast the net too wide. It seems to us also the sensible legal way by which to go about it. You thereby prevent the temptation to incorporate people who are guilty, as you say, by association, which would be inappropriate. What is more, it means that the decision maker as to who would fall under this focuses on the notion of intent rather than just the resulting action.

CHAIR—I think that you make two points in relation to matters that are included in the EM but are not included in the substantive legislation. One pertains to whether the life imprisonment penalty is maximum or mandatory; the other is intention. You cite a particular case. I just wondered if you wanted to expand on that for the committee.

Prof. Kinley—Is it the Communist Party case?

CHAIR—No, I was not referring to that. It was the lawfulness, I am sorry. It is footnote 10 where you refer to two cases: Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374 and Minister for the Arts, Heritage and Environment v. Peko-Wallsend Ltd [1987] 75 ALR 218. Could you expand on those for the committee?

Ms Joseph—Those cases, in particular the CCSU case, which is a British case—I do not think that the issue has been so clearly resolved in Australia; but we do tend to follow British law—have indicated that issues regarding national security are virtually non-justiciable. So this part of our submission was concerned with the power of the Attorney-General to proscribe certain organisations. Yes, on one level, one could say, 'But that is subjected to a safeguard of judicial review by judges.' There are a couple of things to remember. Judicial review is quite narrow. It does not include notions of proportionality. Also, these cases indicate that judges themselves tend to treat judgments made on the basis of national security as effectively non-justiciable. One might imagine that, if the Attorney-General were to proscribe an organisation under this legislation, it would probably be for 'national security reasons', and judges tend to defer to the executive in that instance. That means that that decisions could in many cases end up being effectively non-justiciable and, therefore, there would be no effective way of challenging it.

CHAIR—Thank you very much, Ms Joseph. The other point in relation to inclusion of details on penalty you believe should be in the substantive legislation and not in the explanatory memorandum?

Prof. Kinley—I would have thought so, yes.

Senator McKIERNAN—The comments that you made in your second paragraph under 'Terrorism 5.3' make mention of what was thought was going to be in the legislation—that is, the phrase:

> ... designed to intimidate the public with regard to its security and intended to cause serious damage to persons, property and infrastructure.

At this late stage, after the bills have been introduced through the House of Representatives and are now before this Senate committee, if there was a recommendation from this committee to the Senate to include this phrase, how much would the inclusion of that add to the proportionality aspects of the bill that you mentioned in your opening comments? Would it serve any useful purpose at this late stage to seek to include that definition in the bill?

Prof. Kinley—In my view, yes, it would. Looking at Australia separately and looking at what the circumstances would be if you do not have it in there, I think it will create—as we said a moment ago—greater legal complexity and therefore challenge, but it will also create the opportunity to cast the net much wider than is necessary. But if you then—as lawyers and legislators, of course, often do—draw a comparison with comparative countries and what they are trying do and you look at the United States and you look at the United Kingdom, they do have an inclusion of intention. They are different words, but I take your comment to be the intention of these words about intention.

Senator McKIERNAN—In regard to that particular element, on definition we have heard similar words. It would not, of course, remove some of the other excesses that have been pointed out?

Prof. Kinley—That would be my view, yes. But the notion of intention would provide an extra safeguard for those who would otherwise fall under the current scope when their intention was never anything to do with terrorism but rather some sort of other consequential damage or criminal act. That would be dealt with under criminal law if it was sufficiently criminal, whereas now it might fall under a piece of legislation which is concerned with terrorism. That seems to us to be inappropriate. We are not excusing property damage or otherwise criminal acts, but they are dealt with by the criminal law. Why put the possible danger of dropping it under the heading of 'terrorism' when there was no intent for a terrorist act?

Senator McKIERNAN—Yes.

Ms Joseph—For example, Professor Kinley mentioned the recent protests at Woomera—that they could fall within the current definition of terrorism. It would be hard to describe those protests at Woomera as 'designed to intimidate the public with regard to its security'.

Senator McKIERNAN—I am thinking of certain individuals in government that might, but I am not here to defend government, so let us not at this late stage in the day go down a different path. Thank you for that elaboration.

Professor Kinley, in regard to the response to that question I ask you about definitions, you also raised the aspect of Australia looking at comparisons overseas. I am not so sure how valuable—and this is the question—the final point of the submission is where you draw the committee's attention to recent happenings in a US court which found that a law preventing US citizens or residents from providing training and personnel to listed groups violated the constitution. Bearing in mind the different systems of law and the different constitutions that we and the United States operate under, I am not so sure what the value and merits of drawing this particular element to our attention is. I am not at all questioning you including it, but I am not so sure what value it is to us that we in turn might point out to the Senate.

Ms McCasland-Pexton—I think the value is that the issue could be raised here. If charges were to be brought under the provisions of 102.4 for providing training or assistance to a proscribed organisation, the fact is that, as in the US case, the words 'training and assistance' are not clearly defined and it is unclear whether something like human rights advocacy training, legal training or, in fact, legal assistance could be included under that definition.

Senator McKIERNAN—Yes, but as I understand what you have put to the committee here, it was found not to have complied with the constitution of the United States. We do not have those constitutional rights in Australia that we in turn can rely on.

Ms McCasland-Pexton—So you are saying that a person charged as being a member of a proscribed organisation would not have a constitutional right to legal representation?

Senator McKIERNAN—We do not have a bill of rights in Australia that they have in the United States.

Ms McCasland-Pexton—I know, but I am asking whether we have such an equivalent right to legal representation under the circumstances?

Senator McKIERNAN—There is a right to legal representation, but I am not sure that is the point you are making. If it is the point you are making, thank you for making the point

because I was seeking to find out what point you were making by including this in it. I am sure Professor Kinley understands every word that I just said.

Prof. Kinley—Of course there is not a constitutional right to legal representation, but under the Dietrich results there would be a right to legal representation for serious criminal offences—and this would be one of those. One of the points, though, that is raised by my colleague is the notion of the proximity of association. Under proposed section 101.2, for instance, 'Providing or receiving training connected with terrorist acts', that is only really curtailed by—as I referred to in my opening remarks—the fact that it must not be recklessly provided.

But what, for instance, if you are a pilot trainer and you provide training to a pilot who then uses that knowledge in a way perhaps as dramatic as September 11? You take all the normal precautions about who you are employing, but that would not include, presumably, the question, 'Are you a terrorist?' in the questionnaire. Even if it did, what use would it be to ask that when you sign someone on? How would you define the notion of recklessness on that person's part? It would take a leap of imagination to work out that this person could use it for terrorist ends. Many fertiliser providers could be guilty by association, because fertiliser can be used as a very powerful substance. How far do the training, services and substances provisions go?

Senator McKIERNAN—All I can do in response is say I rely on the judiciary who would be, ultimately, making the determinations on charges of that nature that were brought before their courts and hope that the judiciary would see the sense in things. Again, we are glancing far into the future. Thanks for your help.

Senator SCULLION—Professor Kinley, I was very interested in your opening remarks. You were looking at circumstances that perhaps would be caught in the net unintended, and you are the first person giving evidence to suggest that if a corporation were somehow involved in some sort of ecoterrorism then it would be caught in this net. I am just having a quick glance at proposed section 100.1. Could you lead me through how you came to that conclusion?

Prof. Kinley—Take the definition of a terrorist act, at proposed section 100.1(1), which is that:

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

There are so many things that would fall under that, and at least one thing could be capitalism; I think that is an ideological cause. The definition continues:

... but does not include:

(c) lawful advocacy, protest or dissent ...

You might say that capitalism could be considered, on its broad basis, a lawful advocacy—that is, the advocating of capitalism. But then it says, at 100.1(2), that:

Action falls within this subsection if it:

(a) involves serious harm to a person; or

(b) involves serious damage to property ...

If that happens as a consequence of a proponent of capitalism—a captain of industry or a company—then they immediately remove themselves from the protection of lawful advocacy because it is unlawful damage to property. I am saying that it is not just the liberals—with a

small 'l'—the open-toed sandal wearers, who might be inadvertently caught by this but also the captains of industry. That shows how unnecessarily broad the definition is. I was being deliberately dramatic, but I do not think the point has been lost and I am glad you raised it.

Senator SCULLION—As a passionate capitalist, I had not recognised those feelings were in fact ideological. Thank you for that.

Senator COONEY—Can I take something up with you. I want to indicate how this debate seems to have gone so far, including what I get in reading the package set up by the Senate Legal and Constitutional Legislation Committee, which contains second reading speeches in the House of Representatives. None of the material seems to have gone into what we have had in here over the last couple of days, which is evidence as to what threat this or like legislation is having on the community, and into what effect the background to this—that is, the outrageous events of September 11 last year in New York—has had.

We have had a series of witnesses. Before you were Damien Lawson from the Federation of Community Legal Centres, Reverend David Pargeter, Joo-Cheong Tham, Dimity Fifer and lots of other people. They have given evidence from their own experience or on the basis of people they have spoken to, that this legislation and the background to it—the whole episode from 11 September on and even before that—has had a fearful effect on certain groups in society, such as Arabs and Muslims in particular, but on ethnic groups generally. Has your organisation got any concern about that, or have you got any answer to that? Nobody has been able to produce—and I have read the speeches in the second reading debate quickly, though I might have missed one—any evidence of terrorism in Australia or indeed any threat of it. So if you look at proportionality, you have got a very harsh effect, if you accept the evidence—and I do not see any reason why we should not—that affects multiculturalism in a very bad way, and yet nothing that really seems to point to any terrorist act. Do you have any points to make about that?

Prof. Kinley—I think this is an enormous dilemma, but I think it is a very crucial part of law making. Unquestionably, like medicine, the best thing to do in law is to prevent violations of human rights, of which terrorism, as we said at the beginning, is one example. But if you do that in a way that is pre-emptory but overextending in its pre-emptory form, you will end up yourself producing violations of people's rights, including discord within society, which is what I think you are expressly referring to. There is no doubt that, in providing or receiving training or in the normal course of events with the general public, people must be careful about the sort of person they are associating with because if that person turns out utterly unbeknownst to them to be a terrorist, then they may fall within the net that says that they have aided and abetted a terrorist. As we said in our submission, if you are a photocopier, are you therefore to look at somebody and think, 'They look Middle Eastern, they look Arab, so therefore I should refuse to allow them to use my photocopier'? That would be unconscionable.

Senator COONEY—Let me tell you about some evidence given by Julian Burnside QC. He said a couple of days ago a friend of his was raided by eight people from the immigration department on the basis of information apparently given to the department through a member of parliament, who in turn was informed about this by somebody who said that he or she saw two people of either Arab or Middle Eastern appearance. That was the only evidence. This led to the department writing itself a warrant and raiding this person at four o'clock in the afternoon. Is that the sort of climate we want, do you think, in a society which wants to be seen as a free and open society?

Prof. Kinley—I need hardly say absolutely not, in my view. I do not think that this piece of legislation on its own would propagate senses of racism or an unbalancing of a multicultural society such as ours, but what does are notions of concern, fear, misunderstanding and an inability to listen. I think that legislation such as this—even if it is constrained by terrorist criminal acts—if it is couched in the way that we think it is currently couched, will provide an excuse, if they need it, for those who do fall under those categories of being unlistening or of being fearful, to have a particular attitude towards sections of society who have been associated with these terrorist acts. There is no need to fan that fire. I think that it is in danger of doing that. I do not think it has created the fire—by no means are we saying that—but it will fan it. I do not see that that is an appropriate consequence of legislation such as this.

Senator COONEY—We have had evidence from people like Dimity Fifer, from the Victorian Council of Social Services and from lots of other people whom, because of time, I will not name. But nobody who has given evidence here, either today or yesterday, can point to any terrorist act, any impression of people complaining about terrorist acts within Australia or any impression that such an act is likely to be committed. Is there, from your point of view—

Interjector—Who are the worst terrorists? The banks!

Senator COONEY—People have had concerns about the banks over the years, but I am concerned about ordinary people who are struggling—

Interjector—What about ordinary people? They put you under house arrest; they steal your assets and put you under house arrest. What is that if not terrorism?

Senator COONEY—It is pretty important that I get this question asked of you, Professor Kinley. Do you see nonetheless some need for terrorist legislation, in spite of the fact that there seems to be no need for it within Australia at the moment? I put it that one of the problems is this: once you have legislation there if anything does happen it might well be used rather than the normal criminal provisions. That may of course, if people are wrong, label a victim—as he or she would be in that case—in a way that it would probably take a long time to recover from in terms of reputation within the community.

Prof. Kinley—On the question of whether in fact we need it, leaving aside whether there is a clear and present danger, I am open to the suggestion that the criminal law as it presently stands would be sufficient. I am not an expert criminal lawyer; therefore I would not be able to attest to the fact that every single possible criminal act that is a terrorist act would be covered by criminal law, but I would think there is a strong argument to say that a lot of it, if not all of it, could be. Therefore there is a question mark as to whether you need a specific act.

Bringing into that picture the factual circumstances which you are referring to, there have been—at least to the public's knowledge and to my knowledge—no cases of terrorists acts within Australia, post September 11. If you look at Northern Ireland within the United Kingdom, countries I have familiarity with, where there is a real danger and not a supposed one, there is terrorist legislation there—and, I might add, plenty of argument was raised that ordinary criminal law could deal with that—which has been used in ways which I think you can safely say have not helped Irish-English relations. Even more importantly for this committee, they have not helped the standing of the criminal justice system in the United Kingdom. As we referred to earlier, I think there is no greater embarrassment since the war than that over the incorrectly jailing of the Birmingham Six, for instance. No matter what you think of the issues involved, that was a travesty of justice.

I have one final point on what you raised about the surprising permanence of something that is temporary. I think that is a real problem. The Prevention of Terrorism Act in the United Kingdom was brought in as a temporary measure and it has never been got rid of. It was five-year renewable and it was renewed every time because it is a power. The executive, the police and the government like that power. It can be somewhat intoxicating for your relations with the electorate, especially if there are signs of continuing terrorist activity, which is certainly the case in the United Kingdom. It may be that the case here could be made that: 'The reason we do not have any terrorist activity is because we've got this act, so let's jolly well keep it.' That is a real danger.

Senator COONEY—Terrorism in Northern Ireland led to Diplock courts. I gather that that had some judges worried because of their having to apply principles which their legal training said they should not apply. It put pressure upon them. Do you have any concerns about this sort of legislation, with absolute elements in the offences in some instances and strict liability in respect of other elements in other offences? Do you feel that this may affect the way your legal system goes about the task of making sure that only those who ought to be convicted are convicted?

Prof. Kinley—I have never heard any suggestion in the current debate that Diplock courts, where there is no jury and just a judge sitting, should be followed. There were peculiar circumstances in Northern Ireland at the time that were used to justify that. I have not heard that that has been raised here. However, I think that the point was made by Ms Joseph earlier that there is no doubt that, on issues of national security, judges defer to the executive's definition of national security, which will then mean that they effectively remove themselves from it. That is a concern—and that is rife within this bill. Therefore, the reaction, if it is predictable—and that is the case we try and make—would be that judges would not step in to override the decision of a minister of the executive as to what was a terrorist organisation. I think it is a danger.

Ms Joseph—The judiciary is not used to trying people who do not have the presumption of innocence. In pretty much all the offences, the onus is on the defendant to show that they were not reckless, which appears to me to be a reversal of the burden of proof. Our judiciary is not used to dealing with criminal offences of that type.

CHAIR—Thank you, Ms Joseph. On that note, if there are no further questions, on behalf of the committee I thank Ms Joseph, Professor Kinley and Ms McCasland-Pexton for appearing before the committee this afternoon and in particular for your written submission, which has been very helpful to us in our considerations. We are very grateful for the time you have been able to give us today. I also thank all witnesses who have given evidence to the committee today, the committee secretariat and Hansard, in particular, for their assistance with what has been a very complex and lengthy detailed hearing, not always in the easiest of circumstances.

Committee adjourned at 3.53 p.m.