COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD

Reference: Review of the ASIO Legislation Amendment (Terrorism) Bill 2002

WEDNESDAY, 1 MAY 2002

SYDNEY

BY AUTHORITY OF THE PARLIAMENT

[PROOF COPY]

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to: **http://search.aph.gov.au**

JOINT COMMITTEE ON ASIO, ASIS AND DSD

Wednesday, 1 May 2002

Members: Mr Jull *(Chair)*, Senators Calvert, Sandy Macdonald and Robert Ray and Mr Beazley, Mr McArthur and Mr Leo McLeay

Senators and members in attendance: Senators Sandy Macdonald and Robert Ray and Mr Beazley, Mr Jull, Mr McArthur and Mr Leo McLeay

Terms of reference for the inquiry:

Review of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

WITNESSES

Committee met at 9.30 a.m.

BIBBY, Dr Richard Martin (Private capacity)

CHAIR—I declare open this hearing of the Parliamentary Joint Committee on ASIO, ASIS and DSD, and welcome witnesses and members of the public. The committee has been requested by the House of Representatives to inquire into and report on the proposed legislative reforms in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. Today the committee will take evidence from Dr Martin Bibby, the SEARCH Foundation, the Supreme Islamic Council of New South Wales, Dr Greg Carne, the New South Wales Council for Civil Liberties, the Administrative Appeals Tribunal, the Australian Section of the International Commission of Jurists and Professor George Williams. The committee will continue its public hearings in Melbourne tomorrow.

I welcome our first witness, Dr Bibby. Although the committee does not require you to give evidence under oath, I should advise you that hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Dr Bibby—Yes. There is no doubt that, if this legislation is passed, it will be abused. Experience in the United States with the FBI, and in Australia with what police forces have been known to do to people who have been incarcerated, means that there is any amount of evidence that, once people are imprisoned, they are subject to abuses. Those abuses are likely to be their being kept in ignorance of their rights or being misinformed about their rights; or they may be induced or forced to sign false confessions—and there are plenty examples of that in Australia in the recent past, not least in this state of New South Wales. The abuses, if they do occur, are very serious abuses—abuses that, under other laws which will be overridden by this legislation, would amount to kidnap, false imprisonment and perversion of the course of justice.

Accordingly, the bill really needs to be amended in order to make the equivalent offences into offences, and ones which will have equivalent penalties. So a penalty for wrongly taking somebody and keeping them in jail, or for keeping them in jail repeatedly when there is no evidence against them or else inadequate evidence, should be the same as the penalty for kidnap. The discovery of abuse of process by forcing confessions and the like should be the same as occurs elsewhere for perversion of the course of justice, and so a serious and long jail sentence ought to be the kind of penalty that is being looked at. But one needs more than a high penalty: in order to deal with any kind of criminal act or seriously wrong act, one needs certainty of discovery; and that is a real problem as this bill makes it almost impossible for wrongdoing to be revealed, subject to the fairly limited powers of the Inspector-General.

I do not know if you have had a chance during these hearings to look at the Inspector-General of Intelligence and Security Act 1986, but the powers of the Inspector-General are quite limited in terms of reporting and in terms of whom he or she can report upon. The Inspector-General is able to report to the Attorney-General, but then the Attorney-General is already involved. The Inspector-General reports once a year to the Leader of the Opposition—that is a long time between reports—and the Inspector-General cannot report on aliens. So tourists, businessmen and asylum seekers could all be caught up under this. They are entitled under the legislation to

write a letter to the Inspector-General, but the Inspector-General has no powers to act on their behalf. So there needs to be fairly considerable change, I think.

It has been asserted that the bill is balanced. I am saying that no serious effort has been made to balance the principles that are involved. Although there has been some effort—and, I think, a quite inadequate effort—to reduce the possibility of harm, there is nothing in the bill by way of compensation for people who are harmed, and very little by way of ensuring that the harms do not take place or by establishing penalties for people who misuse the legislation.

CHAIR—You have also been fairly critical about the definition of 'terrorism' in the bill.

Dr Bibby—Yes.

CHAIR—I was wondering if you could expand on some of your concerns there.

Dr Bibby—The definition of terrorism is not in this bill but in the terrorism bill, I think. The definition is extraordinarily broad. Anybody who takes action opposing armed forces—such as if people in industrial campaigns that are being dealt with by troops sent in happen to raise some sticks or something, which is something you may or may not consider to be appropriate but which certainly is not terrorism—will be caught up under it.

Anyone who acts with a political purpose in any country and uses force or a threat to persons or property is counted as a terrorist. That means that, had our forces in Afghanistan been involved in trying to change the government there, under the proposed bill they would have been counted as terrorists. Anybody who supported them would be, too. So I imagine the entire defence department would then be counted as supporting a terrorist organisation, and I presume that the Minister for Defence would likewise be caught up. Okay, it is not too likely but it is an indication that that bill has not been thought about properly, because this bill is dependent upon it. Both bills need fairly considerable redrafting and a much longer time for public discussion.

Senator ROBERT RAY—While I probably do not disagree with you a lot about this problem of a definition of terrorism—and we have had an endless number of critics of it—I am waiting for one of the critics to put an alternative definition that I can grab. Can you put one?

Dr Bibby—Not on the spot. I have managed to give it a little thought. There is literature on the morality of terrorism versus things like assassination and so on. If you draw on that, a definition of terrorism would have something to do with the intent to produce political results by killing people arbitrarily. Terrorists set off a bomb in public place and they do not care who gets killed. They intend the fear that everyone would have that they might be killed to be the means by which the political change will take place. Terrorism differs from assassination: assassination picks out a specific target, and may be done with a political intent or not. Terrorism differs from ordinary acts of civil disorder and commotion that a group of people might produce because they are angry. It differs in purpose and it differs in the means by which political change is attempted. I do not have a legal definition and I am not a lawyer, but that is the way the philosophical literature on terrorism runs.

Senator SANDY MACDONALD—I think you are in strife already, because I think you can have terrorism without the intention to kill people.

Dr Bibby—It is the arbitrary selection that is the thing. Terrorists blow up people at random.

Senator SANDY MACDONALD—They could also put a foot-and-mouth virus into a water supply.

Dr Bibby—Does foot-and-mouth kill people? I am not sure that it does.

Senator SANDY MACDONALD—But that could be—

CHAIR—Anthrax?

Senator SANDY MACDONALD—Anthrax.

Dr Bibby—The question is whether the bill is going to deal with terrorism or whether it is to be on a whole range of different offences. If it is, the bill is going to need to be specific about which things it is dealing with, set the definitions and probably set the procedures. If anything will justify this extraordinary intrusion on civil liberties, it is going to be terrorism, properly so understood.

Senator ROBERT RAY—One part of your presentation this morning that I find hard to come to grips with and that I differ on is that you seem to be implying that this bill is about ASIO seeking evidence when the whole tenor or the whole intention of the bill is ASIO seeking information. You go on to talk about confessions and all the rest of it—and we will come to self-incrimination later. Do you really believe this bill is about seeking evidence rather than seeking information?

Dr Bibby—I am happy to take that correction.

Senator ROBERT RAY—It does not weaken your submission.

Dr Bibby—But the difference is not terribly significant. When it comes to somebody being charged with terrorism, then what is being discovered by the procedures will be used as evidence. The bill prevents it from being used as evidence in other sorts of proceedings but not if someone is going to be charged with a terrorism offence.

Senator ROBERT RAY—This bill is different inasmuch as it compels people to speak.

Dr Bibby—That is true.

Senator ROBERT RAY—That is fairly rare, but there are the examples. But usually where in other legislation you are compelled to speak there is some rule on self-incrimination. There is not here.

Dr Bibby—That is right, and I presume the civil liberties organisations have been talking about that.

Mr BEAZLEY—Supposing this bill were to have removed from it the capacity for self-incrimination for anything that you told the officials in the course of an interview. Would that alter your views on the other checks and balances that are contained in your submission? In other words, if all that could be used of your words was effectively for an intelligence gathering exercise—in that the words could not of themselves constitute any confession or evidence that would be used against you in any subsequent proceedings—would that, to your mind, redress some of the other concerns that you have as to representation in relation to times and the rest of it in your submission?

Dr Bibby—When you put it so carefully, yes, it would. It would reduce some of the concerns but it would not reduce the concerns about false imprisonment and disruption to people's lives—possibly deliberate disruption to people's lives. I could envisage the fact that somebody had been detained being subsequently made public and then the intrusion on a person's life would be long lasting and possibly seriously deleterious.

Mr BEAZLEY—You talked a bit earlier in your remarks about the powers of the Inspector-General. Specifically relating to this legislation, how would you adjust those powers? How would you adjust the reporting rights?

Dr Bibby—In the early 1970s I put forward some suggestions for what might be done in the way of providing more scrutiny of ASIO and of the security organisations generally. What I argued then was that there ought to be regular, frequent reporting to the Leader of the Opposition and that there ought to be regular reporting to a judge who should have a right to inspect at any time. Some of that stuff is still under the legislation here. The problems, as I outlined in my opening statement, are that, firstly, aliens are not covered—and they would need to be. They are going to be prime targets for this sort of thing. Secondly, the Inspector-General needs to have a power—and indeed the obligation—to report more frequently to people other than the Attorney-General. At the moment I think he or she reports to parliament once a year.

Senator ROBERT RAY—If I may interrupt you there, aliens are probably not covered under the inspector-general act—

Dr Bibby—That is right.

Senator ROBERT RAY—but the Inspector-General is given a specific reference in this bill which will allow him to cover them, I think.

Dr Bibby—All it allows is for people to write to him. It is a question of legal interpretation. I do not think things should be left in this case to a judge to decide whether the argument, from silence, means that it was deliberately left out or whether in fact the intention was that it would override the other act and that the Inspector-General can act. It might be a minor amendment but I think it needs to be made.

Senator ROBERT RAY—We did hear yesterday from the Inspector-General, who has argued he was going to be a little more proactive than we assume and said that he was going to attend the hearings of prescribed authorities whenever he could et cetera. Nevertheless, that does not detract from your point. But he is going to be a little more proactive than you or we assumed.

Dr Bibby—Yes, I am talking about his legal powers, and it is much better—

Senator ROBERT RAY—to entrench them; sorry to interrupt.

Mr BEAZLEY—Do you think it would be enhanced? There was a very nice statement made by the Inspector-General yesterday: if it were put in place it would materially affect the protection of anybody who is called up under this. If the Inspector-General thought it was a reasonable thing to do at this committee to foreshadow that he would attend all interrogations, do you think it would be a sensible thing to write into the act that he or his representative should?

Dr Bibby—I think there are two things about it. The more people who are involved the less chance there is of collusion or panic or simply ignorance. I think of events in the eighties where the ignorance of parliamentarians led to ASIO getting away with things that they should never have got away with, so the more people involved and the more experienced people involved the better. The second thing I want to say is that there has been a tendency in recent public life for people to calumnify public watchdogs in the way that the auditor-generals in the various states have been treated, for instance, and in the way the commissioner against corruption in New South Wales occasionally is treated when it does not suit the government or the opposition that he or she is engaging in a particular inquiry and coming up with particular things. The result is to calumnify. When a government changes it is not uncommon for them to try to appoint someone who suits their own views, and so on.

So, yes, it is a good thing for the Inspector-General to have broader powers—that might require that he or she attend the hearings, not just whenever possible. But the potential for misuse is so strong, especially in circumstances where there is a real or manufactured crisis and emotions are running high and radio jocks are doing their stuff. One needs to have that sort of situation in mind, because that is the sort of situation that the bill is intended to address.

Senator ROBERT RAY—One of the things we knocked around yesterday is that, as you know, there is no requirement for legal representation. The rationale is that if you are a terrorist the very fact that you ring your own solicitor will tip everyone off. We looked at setting up a panel of senior counsel, who do a lot of pro bono work. As far as we know, these powers would only be used several times a year; we do not know for sure, but we do not anticipate they would be used a lot. They would be able to go there and represent for the entire proceedings before the prescribed authority. Have you got any comment on that?

Dr Bibby—I saw it this morning in the *Sydney Morning Herald* and thought: 'I wished I had thought of it myself.' It would certainly help, but I think they need to have powers that come into play even before the prescribed authority takes place.

Senator ROBERT RAY—I am not suggesting that that be the only change. We may be contemplating or recommending, or we may not, a whole range of changes. This is one of them. It would not be in isolation.

Dr Bibby—I think that would be a distinct advantage. At the very least it would mean that a person would be advised by someone whom they might have more reason to trust that indeed they do have to speak or they face a five-year jail term.

Senator SANDY MACDONALD—The distinction being that, as there is no right to silence, they at least would have some independent advice—that is what we were talking about yesterday—particularly because they have no right to silence. The onus of proof has been reversed. On the prescribed authority, 34B says that the minister may appoint as a prescribed authority a federal magistrate or a particular member of the AAT. Are you satisfied with that? Do you feel that the status of the prescribed authority is appropriate? What comments do you have?

Dr Bibby—I am not cognisant of the qualifications required for a member of the Administrative Appeals Tribunal. I would want it to be a senior judge with tenure—someone who has had long experience in the law—and I would want there to be someone other than the Attorney-General. They are appointed by the Governor General in Council, presumably. But I would like there to be a requirement for agreement by the Leader of the Opposition or some person outside the government of the appointment of such a person as well.

Senator ROBERT RAY—I think the intention is to appoint a class of people, but not make it compulsory—that is, federal magistrates or AAT members.

Dr Bibby—But the actual appointment of a specific person is something, if I remember the bill correctly, that is determined by the Attorney-General.

Senator ROBERT RAY—More like a panel of people, so you can go to a variety of them. It is not just one person.

Dr Bibby—It would be done with a general description so that everybody of a certain description is—

Senator ROBERT RAY—No. Federal magistrates, yes, if they agree that they are willing to do it. AAT members with five years legal experience if they are willing to do it.

Dr Bibby—So they will not be appointed for a specific case?

Senator ROBERT RAY—No. The difficulty Senator Macdonald is alluding to is that AAT members are on limited tenure subject to reappointment.

Dr Bibby—Yes. I repeat that I think it would be distinctly more secure for an experienced judge to be the sort of person who was appointed.

CHAIR—Could I go back to your statement regarding the necessity for penalties. How would all that work? I suppose what I am really trying to come to grips with is who would watch the watchers. I assume you have a series of protocols in there with appropriate penalties attached. How would that be administered?

Dr Bibby—I think it is probable that a person would have to take a civil suit and seek reparation of some kind in the first case. But if we are going to have a crime there needs to be somebody who can watch the watchers. I have no idea how that would be implemented. It would not be something I would comment on off the top of my head.

CHAIR—Would it really be a role for the Inspector General? It probably would not be.

Dr Bibby—I have an idea of the Inspector-General then having his own set of bitter spies. It boggles the mind a little, yes.

Senator SANDY MACDONALD—If I could pick you up on one thing you said to Mr Beazley and also in your opening statement: it is my understanding that the Inspector-General has the ongoing power of a standing royal commission. I think you said he did not have the power to investigate aliens, for argument's sake.

CHAIR—Protect them, I think.

Dr Bibby—It says so specifically. I do not know if I can find the clause quickly, but it specifically restricts his powers to report to citizens and permanent residents.

Mr BEAZLEY—That is an important point here. I think Attorney-General's may well say that while that power is absent from his general inspector's powers, because of the character of this legislation it covers anyone contained under it, be they a citizen or a non-citizen, and therefore the Inspector-General could operate. I am sure Attorney-General's would say that. Nevertheless it is worth our while to follow it up with Attorney-General's to see whether or not that needs to be made explicit.

Senator SANDY MACDONALD—The other point I think worth making here is that, as the arresting officers would be federal police, any actions that they might commit are subject to the Ombudsman, whoever that may be.

Dr Bibby—They would be subject to the normal disciplinary procedures that applied, yes.

Senator ROBERT RAY—The great weakness in this legislation is not really citizen versus alien. It gives the right for a person to make a complaint to the Inspector-General. Then what happens? There is not much point in what happens two or three months later. Can anything then happen? The Inspector-General yesterday said he will consider that. He will consider whether he might attend them, but what is his process of intervention? It may well be solved—I just put this proposition to you—by a requirement in the act for ASIO to draw up a protocol of interview. There is nothing to describe how the 48 hours is conducted. If there was a requirement on ASIO to draw up a protocol, including what role the Inspector-General has, and then have that protocol, firstly, cleared by the Inspector-General and, secondly, this committee informed of it, it may well take a lot of the concern away from the process issues that are left so open in this bill. Would you like to comment on that?

Dr Bibby—We are talking about what is going to happen while people are locked away in cells—or wherever they are kept. What happens in terms of them coming before a prescribed authority and being dealt with is one thing. Where are they kept, for instance?

Senator ROBERT RAY—Yes.

Dr Bibby—In a jail? Are the other prisoners going to have access to these people who have been sought in relation to terrorism offences? Could you hope that the people would be secure

under those circumstances? I mean, we have to keep child abusers in separate sections of prisons so that they are not killed.

Senator ROBERT RAY—From what we currently know of the management of ASIO, none of that would apply: they would not take them to a jail; they would take them to a hotel room because what they want to do is not poison the well. However, it would be much better if it was controlled by way of some sort of protocol or regulation, I would argue.

Dr Bibby—Yes, in which case you rely on ASIO's sense, goodwill and capacity to keep clear head.

Senator ROBERT RAY—If there is nothing there, you are right; if there is a protocol there, you have an Inspector-General to make sure they enforce it. That is, how many hours you can interview—

Dr Bibby—What is the legal force of protocol?

Senator ROBERT RAY—I think it is binding. It is binding in terms of the relationship between the Inspector-General and ASIO.

Dr Bibby—So it would be justiciable?

Senator ROBERT RAY—Probably not.

Dr Bibby—Is it in a better position that the old brown book used to be for the Victorian Police?

Senator ROBERT RAY—One would hope so.

CHAIR—Doctor, thank you very much indeed for giving us your time today. That was most valuable, indeed.

[9.57 a.m.]

TUBBS, Mr Michael, Member, Social Education and Research Concerning Humanity (SEARCH) Foundation

WALSHAM, Mr Richard, President, Social Education and Research Concerning Humanity (SEARCH) Foundation

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Do you wish to make some introductory remarks before we undertake questions?

Mr Tubbs—Yes, if it pleases the committee. First I would like to thank you for the opportunity of presenting some of the foundation's views regarding the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. First of all, we would like to say that it is part of a package of bills—the Attorney-General himself referred to himself as a package of bills—dealing with the same general topic. In some cases I will refer to 'the bill', which is the major bill I am here to talk about, but inevitably some of those comments will carry over or be relevant to the package of bills, and I will refer to them as 'the bills'. The foundation's concern is the bill itself. Once you accept there is a need for such a bill then, in a certain sense, apart from possible other objections, the rest of it follows almost as a matter of logic.

The other objections could well be constitutional objections to the bill. We would say that the bill is not really necessary. Having a look at the definition of terrorism, the attempt at defining it, I notice from the previous speaker the difficulties you run into in a legal sense. I cannot find anything in the definition as it stands now that is not already covered by the criminal laws in existence. Once you try to create a new crime and you incorporate in that new crime existing elements of crimes, then you inevitably run into all kinds of legal problems when you come to implement them, including duplicity, double jeopardy and the like.

This is particularly important in relation to this bill, because, with all respect, whilst the bill nominally refers to terrorism as its reason or its purpose, when you look and take the substance as a whole, it is really dealing with due process; it is really setting down the procedures which are to be followed in respect of any terrorist or suspected terrorist activity and the due process and rights of the people so suspected, whether they are knowingly involved or unknowingly involved. That is an even more dangerous proposition to get into.

So far as I am able to ascertain, the problem with the bill, apart from moral and political objections—the philosophical objections dealing with civil liberties and the like—is its constitutional foundation. In short, we would question that. We would submit that it is really the Communist Party Dissolution Act revisited in an even more extensive way 51 years on. We would submit that the question of due process comes not from the Commonwealth but from domicile rights in each of the states. That was the substance of the Communist Party case. It

was not just about whether the Communist Party Dissolution Act was a valid act of the Commonwealth; it looked at it from a position, in my respectful submission, of the residents of the states and their rights. And there are other cases that have dealt with this. The bank nationalisation case was another one.

Another objection we have is that the Commonwealth has no expressed legislative power in regard to that question of the domicile rights of the states' residents. We get those rights as a matter of common law in the states. Federation did nothing to obliterate those. In fact, the Commonwealth is one of those unusual parliaments, with all due respect, that has limited powers—not unlimited powers in the way, for instance, the United Kingdom parliament has. Therein lies the problem that I see and that the foundation sees, in addition to the moral and political objections, with this bill. We question its necessity, and I will get to that in a minute, and we question its constitutionality.

One of the interesting features of the Communist Party case in 1951 was how the court centred on the defence powers, because it quickly recognised there was no express power within the Commonwealth Constitution for the legislation. It analysed the defence power and saw it as a unique power and the only one that was in two parts. The obvious parts are providing for defence and a number of them referred to the secondary powers. My understanding of it is that it was the only head of power that had the unique distinction of a secondary head of power, but it qualified that head of power using the words 'national emergency', and other places refer to 'hot war'. In other words, it said that that power may possibly come into existence in those kinds of conditions.

One of the big weaknesses of this bill, at this juncture, is provided by the Attorney-General himself. The only fact he produced in his second reading, as I understood it, is September 11 in the United States. As tragic as that event was, it is not an Australian national emergency. It may be an American national emergency, but it is respectfully submitted that following the Communist Party case you cannot grab the national emergency of another country to replace or to substitute an Australian national emergency. This is totally deficient, at the present time, of the kinds of conditions that I would submit may possibly bring into existence the secondary defence powers.

We get our right of association, our right to free speech, our right against arrest without charge, our right to be brought before a court 'without delay', according to O'Leary's case in the New South Wales Supreme Court—I am talking about New South Wales domicile rights—not from the Commonwealth but from the states. It is my respectful submission in those circumstances that the substance of these bills is to alter forever our state domicile rights. I would submit that another feature of the Communist Party case was that, even where this national emergency arose and these secondary powers may come into operation, they only lasted as long as the national emergency. There is not even a sunset clause that I can see in the bills.

Effectively, what they are saying is that the domicile rights of the citizens of New South Wales are abolished forever, if it involved terrorism or possible terrorism. I submit that the conditions are not there and it is not an expressed head of power. Of course, if it is not an expressed head of power, following the Engineers case all the way back to 1920, it belongs to the states. The Commonwealth has got its heads of power—as I said, they is limited—but the

states, within the powers of their constitution, other than section 109, are unlimited. About the only limitation on this state's constitution is that it has to have a referendum to amend that constitution. Some states, as I understand it, do not even need that; it can be done by a legislative act in parliament.

The other objection we have is this: even if I am wrong on the domicile rights of the residents of the states for this kind of legislation, following the political advertising case where implied rights arose it must flow as a matter of legal logic that all of these rights that we are talking about here—and that the committee is obviously trying to come to grips with—become part of those implied rights. It would seem extraordinary to me that, for example, we have an implied right to be bombarded with political advertising but no implied right to freedom and democracy. It seems to me they are two parts of the whole, that the implied right to receive political messages from our esteemed leaders is part of the whole democratic process and structure of our society. In the circumstances there is an additional argument that they form part of our implied rights, and therefore our constitutional rights, that the Commonwealth also cannot legislate to abolish.

The final point I want to make is this. Unlike the English parliament, we have a written Constitution. The English government tends to talk in terms of doctrines—such as the separation of powers doctrine, because there is no written document that has any legal binding force, anyway—whereas we have a written document that encompasses that doctrine, the Commonwealth Constitution. Chapter I deals with the legislative powers of the houses; chapter II, the executive functions and authorities; and chapter III, the judicature. That is the division of power under the Westminster system and it is written into the structure of our Constitution.

What to me this bill does—and I have noticed it not just in relation to this group of bills or these heads of legislation or heads of power; I have noticed it creeping into other legislation over the last 15 or so years—is bypass chapter III wherever it can, wherever it thinks it can get away with it. It is giving much of that function to the executive arm of the government, which of course has quite different functions. For instance, under the bill there is a body set up to issue orders. Now orders are judicial in nature. There is a power to detain. That is a due process; that is judicial in nature. There is a power to seize property. Those powers are judicial by nature. What seems to be happening is that convenience of the administration of government is sometimes overriding the necessity for constitutional correctness. It may be inconvenient at times to apply the Constitution fully and absolutely, but that must be the position if we are to protect our freedoms in the way that most Australians presently enjoy them.

Without overdramatising it, in my respectful submission, the bill is far more extensive than the Communist Party Dissolution Act was—much more extensive. It even purports to authorise the commission of what would be crimes in New South Wales. I mean, abduction is a crime that carries life in New South Wales so that one. For someone appealing a case involving that crime, the fact that it is 48 hours or 48 years makes no difference at all if it is illegal. Once again, this is not the only act of parliament I notice this kind of thing creeping into—that is, the authorisation to commit crimes. It seems to me a contradiction of quite significant dimensions to have in the preamble to section 51 of the Constitution—where you get nearly all your heads of power—to 'make laws for the peace, order and good government' and to say that that is best attained by authorising the public mischief of committing crimes while all others have to abide by the law.

I noticed what the High Court had to say in respect of the Ridgeways case—the Commonwealth has passed some legislation to try and correct the matter—and my view, for what it is worth, is that if it ever gets before the High Court it will go down too. At present, it stands as law that the Federal Police are able to participate in crime. I do not know how you rationalise that but the parliament obviously has managed to. Ask the average person in the street and the first thing they think about when you raise that possibility is that that is the conduct of a rogue state; that is the conduct of a totalitarian state. Why should some people have to comply with the criminal law but others not?

I could make an unkind remark and say that the history of policing authorities since 1970—we have had the Beach inquiry, the Fitzgerald inquiry, the West Australian one and the Wood royal commission in New South Wales—has not been good. It is not a matter of controlling the population sometimes; it is a matter of controlling those who are vested with the power to control the population's behaviour—that is our police forces. I realise I would want to leave the committee some time. Thank you for the opportunity.

Senator ROBERT RAY—You said that these events happened in the United States, implying that it is almost none of our business. You are aware that the ANZUS treaty has been invoked; therefore, it is totally our business legally, isn't it?

Mr Tubbs—I think the ANZUS treaty, if my memory serves me correctly, was in existence way back in the Cold War days of the early 1950s, but that did not seem to worry the High Court too much in relation to the Communist Party case. My submission, Senator, is that they were quite specific about this aspect of it because—with respect—they saw the dangers and implications that are involved if there is not some limit to the Commonwealth power in this.

It may be that we do not have such honourable gentlemen as yourselves in future parliaments or in future executive arms of government. It may be. We have had those experiences. I notice in some of the submissions that have been made what some people might call fairly extreme examples of what could go wrong. But the bottom line of those extreme examples is what in fact eventually happens. That is what causes the public concern and notoriety when they get publicised. It is not the unimportant little things that were done wrongly; it is the things that have real impact eventually that the public sits up and takes notice of. That is often the first time they realise what a particular power has done.

So yes, Senator, we have obligations on that, but those obligations, in my respectful submission, do not alter the Constitution of this country. I am aware of the relevant High Court decisions in relation to the foreign affairs powers, but in my respectful submission that would not assist in respect of this particular legislation.

Senator ROBERT RAY—I was not going to the later remedies, which you have every right to criticise. You just made the bald statement that the events in the United States do not directly affect us. I was trying to make the point that, if they invoke the ANZUS Treaty, they directly affect us—just in rebuttal of that one point you made.

Mr Tubbs—I think what I said was that it may be a national disaster in the United States, but it cannot be construed as a national disaster for Australia.

Senator ROBERT RAY—But if we have means available to us to detect a potential terrorist act in an overseas country, we should act, shouldn't we—not necessarily in the way proposed in this bill—

Mr Tubbs—Yes, if it is within the Constitution.

Senator ROBERT RAY—We have an obligation as a country, surely, to try to prevent terrorism overseas.

Mr Tubbs—If it is within the Constitution, yes.

Mr BEAZLEY—I think the thing about the ANZUS Treaty being invoked now is that it never has been before.

Mr Tubbs—Yes.

Mr BEAZLEY—I do not think anyone is fully aware of what all the legal ramifications of that are, but, as the senator says, we have some obligation not to permit crimes to be committed from our soil elsewhere. The more this hearing proceeds and the more we listen to those who would be the people who would operate the bill, the more it is apparent that this is not about establishing an opportunity to convict somebody of a crime. This is about intelligence gathering and adding to the capacity of ASIO to participate in intelligence gathering. Indeed, yesterday, Mr McLeay, Senator Ray and I questioned the ASIO director as to whether, for example, were there to be a removal of the self-incriminating parts of this bill, that would have any material effect on his capacity to gather intelligence, in his judgment, from the operation of the other parts of the bill. We asked whether it would be deleterious to that objective. He said no, it would not. That is a pretty clear indication that, in his mind, what we are engaged in here is essentially an intelligence gathering operation, not a preliminary to a criminal conviction of some person. If that is the fundamental purpose of the bill, how do you think the capacity to gather information on threats to the community does not stand within the powers of the Commonwealth generally for the good government of the place?

Mr Tubbs—I have no doubt the Commonwealth has the power to gather information. There are two aspects to a constitutional head. There is the head itself, the expressed head, and then there is what is referred to as the incidental powers—section 51, placitum xxxix—which are usually the means by which it exercises that legislative power. More often, I would submit, it is the second of the legs, the means by which it chooses to exercise the power, that it falls down on. The case that readily comes to my mind on that is the second uniform tax case in 1952, where the High Court said that the Commonwealth legislation was okay but the means which they had chosen to exercise it were struck down. I think that that is the case here. There is no question in my mind—and I do not think any sensible person would argue—that a government does not have the right to collect information. It is the means by which it sets about to do that that would be the argumentative point.

Mr LEO McLEAY—If the means did not include self-incrimination, would you have less of a problem with this legislation.

Mr Tubbs—Marginally less. If the *Herald* newspaper report today is any indication, I like some of the things I read in that. I think the words used were that there is a gap created there. Well, let it be as long as the gap is either closed or widened—whichever one is going to reduce the impact on civil rights that we normally take for granted. Let me make this point too. I think—and, on the spur of the moment, all we can do sometimes is think about some of these things—in the constitutional conventions of the 1890s, if it was the intention that the parliament should have jurisdiction over legal due process, then one would have expected such an important thing would have been stated in the Constitution.

Senator ROBERT RAY—The Constitution does not even cover the Air Force, because it was not invented then. This is part of the problem.

Mr Tubbs—Yes, but due process was. That has been with us—

Senator ROBERT RAY—For a long while.

Mr Tubbs—for a long time. The thing is, if the parliament thought at both conventions that it would be better for the administration of the government and for the protection of rights and justice that the executive government have judicial functions, it would have given them. The separation of powers doctrine was alive and well during those conventions and would have excluded any reference to the judicature and any need for chapter III. But it is quite clear that the founding people of our Constitution did have certain things in mind and definitely allocated certain powers and functions to the different arms of the government.

Senator ROBERT RAY—Let me just ask you—and we are about out of time—in your submission I think that you say that the AAT is not an appropriate body. I should say that this has been canvassed heavily already—and I think we have got them up later today as witnesses. Would you just like to say why you do not think they are an appropriate body?

Mr Tubbs—Basically they are an administrative body. It is part of the process. It is my understanding that the High Court has found them to be non-judicial. Some have used the reference 'quasi-judicial'. That is the major objection we have. We think these are judicial functions. Somebody's liberty, and whether it should be taken away, has traditionally been accepted in our society as a judicial function until relatively recently. I can add the Social Security Act and some of the others where they have suddenly given the right virtually to issue injunctions to the executive government to stop payments from a damages case. That is a function of a court. It has never gone up for challenge. But the question of injuncting somebody's victory in a litigation matter is a judicial function and always has been. We would be concerned therefore that the Administrative Appeals Tribunal continues that trend. I see one of the clauses actually says that they are not to be considered to be acting in a judicial capacity. Why would you want to say that?

Senator ROBERT RAY—But they are also given the rights and immunities of High Court judges at the same time.

Mr Tubbs—Yes, but why would you at the start want that? What is the fear of a judge?

CHAIR—Thank you very much indeed, Mr Tubbs and Mr Walsham, for your time today.

Proceedings suspended from 10.29 a.m. to 10.43 a.m.

ELGAFI, Mr Gabr, Chairman, Supreme Islamic Council of New South Wales

ELMOWY, Mr Bilal Jamil, Youth Councillor, Supreme Islamic Council of New South Wales

GODDARD, Mr David Dougall, Public Relations Officer, Supreme Islamic Council of New South Wales

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Elgafi—Yes. We have further documents to submit later on.

CHAIR—Yes, certainly.

Mr Elgafi—One is the position statement of the Supreme Islamic Council, the second is an Islamic legal opinion on the searching of women and children, and the third is the response from the AMA to our request that, if the ASIO bill passes the parliament, special doctors be present when the warrant is being executed.

CHAIR—We might get you to submit those now, if you like, and then we can incorporate them into the record. Thank you. Please proceed with your statement, if you so desire.

Mr Elgafi—It was a shock to our community in general to learn of the suggestion that further power might be given to ASIO. From reading the documents, it appears that most of the Muslims in Australia have escaped systems which are similar to the system being introduced at the moment, which arrests on suspicion only. Also, the right to be silent is very much of concern to us, as is the right not to answer questions which can be taken against you: you can be up to five years in jail. As a community, we work with ASIO, as you know. I have been in this country for over 36 years and I have not seen a case of terrorism against Australia. Australia is a very lucky country that enjoys harmony and the loyalty of our community.

The new legislation which has come before the parliament will introduce laws like those from which these people escaped and under which they had no rights. The right to be silent, for example, means that when an officer arrests somebody he will tell him, ‘You have the right to be silent. Anything you say will be taken against you.’ What is the arresting officer going to say now? Is he going to say, ‘If you are silent it will go against you, and if you talk it will go against you’? So these are things that we see as introducing into Australia a sort of dictatorship that will give ASIO the right to prosecute people on the ground of suspicion only and to keep them enclosed for a long time—as long as it wishes—and in the end to put them in front of a judge and say, ‘Give them five years.’

We feel that this is an injustice not just to the Muslim community but to Australians in general. What happens if a journalist has a source and he has been asked by ASIO to divulge that source and he refuses? He is going to go to jail. What happens to anybody that has information and has given his word not to give it away? I think these are very important factors we have to think about that will affect community harmony in general. This legislation, if it passes, will cause not harmony but the opposite. Instead of encouraging talking, it will cause frustration and trouble in general. I cannot see why ASIO needs extra powers; it has all the power it needs. It acts now in a lawful way as an intelligence gathering body.

Also, we can see it is going to cause trouble to the police in the policing of it. Which police are going to do it? Will it be the federal or the state police? Where are they going to take the victim? Are they going to take them to a local police station or to wherever they want? Where are they going to interrogate them? What sort of interrogation is it going to be?

We would be converting our information gathering body into the type of security body that a Third World country has. Yesterday we heard Egypt had arrested opposition leaders and opposition party members because it considered them to be a security risk. Are we going to do the same here? It is very important that we think before we pass such a commitment on to the Australian public. We feel as Muslims we would be vulnerable because, as you know, the whole world is now looking at Muslims as a threat. That is a fact; that is not fiction. Maybe we are not a threat, but that is what the propaganda says. Our religion forbids us from being terrorists. It forbids us from doing any harm to even a bird or a plant, but we are portrayed as terrorists. Anybody with a beard is already subjected to harassment by ASIO and the police force. Anybody who has a beard and is passing through an airport gets questioned for hours about what he is doing and where he is going. So it is very important for us. Does it make any difference to give ASIO these powers? Is Australia under threat? Is it going to cause harmony or disharmony in this community?

Arrest without proof is also a factor—it is only on suspicion. If you do not talk, you are in trouble and, if you talk, you are in trouble, so proof of innocence will be on the person. These things all have to be accounted for. The freedom we enjoy here has been enjoyed since we came to this country, and we love it. So why take it from us just on mere suspicion? These are the things that we feel are going to affect our community. The community feels vulnerable in that sense in that it will be taken for granted, and that there will be arrests for no reason. It will give extra power for no reason as well. So it is very important for us to think deeply again about this.

We are giving a politician, the Attorney-General, the right to issue warrants. He will do what the government of the time is inclined to do. Why are we taking this from the Director of Public Prosecutions? Why are we taking this from a judge who could judge if the warrant was valid or not? So there are a lot of flaws in this legislation that have to be corrected before you people pass it. We prefer that it not be passed, because ASIO, as it is, is a strong power and it is doing its job wonderfully. There was a lot of fear over the Olympics. Not one incident came out of the Olympics, but there was a lot of propaganda about fear. There was a lot of cooperation between us, ASIO and the community in general. There was no trouble—not one incident—so why bother about introducing this? What is the purpose of introducing such a thing? That is what the community is asking. Why does the government want this to go through? What is it for? Are we just doing it to please some other power in the world or are we doing it for our own security? As

I said, Australia enjoys the marvellous love of our people and their dedication and loyalty, and we want that to remain. Thank you.

CHAIR—Thank you very much indeed. Our big difficulty is trying to get some sense of balance in terms of intelligence gathering, which is what this is all about. If you were to look at a number of propositions in terms of things like self-incrimination and being able to provide some legal advice to someone who may be taken in for questioning, would that ease your concern or do you think we should wipe the whole thing?

Mr Elgafi—I think you should wipe the whole thing. On legal advice: it is up to ASIO to tell this person whom to get in touch with. It is up to ASIO to determine if he is going to be incommunicado—not to be in touch with anybody—or to be able to get in touch with somebody. This is a Third World country control. You get somebody, you throw them in a room, you belt the hell out of them until they talk. We do not want that here. We are not saying that it is going to happen, but the proposition is there. It says only ASIO can determine whether or not this person will be able to get in touch with someone, whether or not he will be incommunicado. After 48 hours, they can determine another 48 hours or another 48 hours and continue that until the person talks—maybe he does not know anything, but they think he knows. So there will be lot of injustice here for people. The bill states at 34F:

A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention.

Is that a fair law?

Senator SANDY MACDONALD—Would you feel happier if that prescribing authority were a more senior legal figure?

Mr Elgafi—Of course we would feel a lot happier if, first, as I said, a warrant was not issued by a politician—with due respect—

Senator ROBERT RAY—Where in the legislation does it say, as you have claimed, that the Attorney-General can issue a warrant? He cannot. All he can do is apply for one.

Mr Elgafi—He will issue the warrant or any prescribed persons.

Senator ROBERT RAY—I could have misread the bill. No, the Attorney-General can only request a warrant.

Mr Elgafi—It is there. He can give permission to issue a warrant. He is the only one.

Senator ROBERT RAY—No, he is the only one who can request a warrant. A warrant has to be granted by the prescribed authority, which makes Senator Macdonald's question more important because the more senior the judicial area the more you would probably have trust in them.

Mr LEO McLEAY—The mechanism under this bill will be that the Director-General of ASIO goes to the Attorney-General—

Mr Elgafi—That is right.

Mr LEO McLEAY—and asks him—

Mr Elgafi—For a warrant.

Mr LEO McLEAY—No, asks him to give approval for the Director-General to go to a prescribed authority to get a warrant.

Mr Elgafi—What is a prescribed authority?

Mr LEO McLEAY—He has to give the Attorney-General a draft copy of what the warrant will ask for, and then he goes to a prescribed authority who can be, under 34B of the bill, a federal magistrate, deputy president, a full-time senior member, part-time senior member or member of the AAT. They are the persons who issue the warrant.

Mr Elgafi—It is a very big description of prescribed persons.

Mr LEO McLEAY—That is what has been proposed. Senator Macdonald is asking you: would you have more confidence in this if, instead of it being a magistrate or an AAT person, the person who issues the warrant is a Federal Court judge?

Mr Elgafi—That is what we suggested to you—a Federal Court judge. It must be a Federal Court judge and—

Senator ROBERT RAY—I just did not want it to go unnoted. You said the Attorney-General being a political person could issue a warrant. I was just trying to—

Mr Elgafi—I said, with due respect—I am not making a derogatory remark—we do not know who the next Attorney-General will be. What will be his inclination?

Senator ROBERT RAY—No, the point being that the Attorney-General cannot issue a warrant—he can for phone taps, by the way. But here they have to get permission off a level of judicial authority. We are quite keen for that to be as senior as possible, but the Attorney-General himself cannot issue a warrant; he can request a warrant.

Mr Elgafi—It has to be approved in writing by the minister. The bill states:

(2) The prescribed authority is only to give a direction that:

(c) has been approved in writing by the Minister.

Mr LEO McLEAY—You are missing the point. The Director-General of Security goes to the Attorney-General and asks him does he agree that the Director can then go off to a prescribed person and get a warrant. He provides the Attorney-General with a copy of what he will be asking for in the warrant, and then the bill provides that that is the only thing that the Director-General can ask the prescribed authority. He actually gives it a tick to start.

Mr Elgafi—You agree the warrant has to start with the Attorney-General. It has to. He is the first step. So there is no warrant without the Attorney-General's approval, and that is what we are objecting to. We say that the DPP should be the one to issue that.

Senator ROBERT RAY—With due respect, if you look at the three criteria that the Attorney-General will need to take into account, one is that he has to satisfy himself that there are no other alternative means of collection. I put respectfully to you that only an Attorney-General would know that; a Director of Public Prosecution would never be briefed or be across the whole the security apparatus to know whether that criterion can be met. Therefore there is a difficulty in just eliminating the Attorney-General. After all, we want to hold someone politically responsible. The Attorney-General is politically responsible to the parliament, and I would prefer to find him responsible than some DPP that I cannot control. Anyway, that is just a point I wanted to make.

Mr Elgafi—We are talking about issues where we do not know the inclination of the Attorney-General: whether he is just going to agree with the government's mood at the time or not, whether the government is doing the right thing or not—we do not know. But as the public prosecutor is an independent person, from our point of view we would prefer him to be the one that judges these issues. Also, only a federal High Court judge can issue a warrant.

Mr LEO McLEAY—A High Court judge?

Mr Elgafi—Sorry, a Federal Court judge.

Senator ROBERT RAY—In your submission, you say on the last page:

ASIO should not become a secret police.

Mr Elgafi—That is true.

Senator ROBERT RAY—You will not get any argument here. You go on to say that:

It is a secret unaccountable organisation.

I would have thought it was accountable to the Attorney-General, to the secretaries of the departments that make up the Security Committee, the Security Committee of cabinet, the Inspector-General of Intelligence and Security and ultimately to this committee. I cannot see where you could justify that it is 'secret' and 'unaccountable'. It is accountable. It may not be as accountable as you would like, but it is accountable to a range of different organisations and individuals.

Mr Elgafi—Have the raids after 11 September been accounted for?

Senator ROBERT RAY—They have to be accounted for.

Mr Elgafi—Was a reason given for them?

Senator ROBERT RAY—If you put the word 'publicly' in there—'publicly accountable'—I would not challenge it as much, but I would not like to leave the impression from your submission that there is not accountability on ASIO. That is why this committee exists as a parliamentary committee.

Mr Elgafi—That is fine. I accept that.

Senator ROBERT RAY—That is why the Inspector-General is there: to make sure they do not act unlawfully. He is entitled to independently report—he has the same independence, incidentally, as the DPP—about unlawful behaviour by ASIO.

Mr Elgafi—That is fine.

Senator ROBERT RAY—Your community and every community should know they can complain about any act by ASIO to the Inspector-General, and I can give you the assurance he will take it seriously.

Mr Elgafi—That is fine; I will take that as an assurance. But when they pointed a machine gun at a woman's head, I did not hear anybody saying anything to ASIO: why did they do the raid?

Mr BEAZLEY—So you are suggesting that ASIO were carrying weapons?

Mr Elgafi—No, they brought the Federal Police. The Federal Police laid the woman on her face and put the machine gun to her head. She was by herself at home.

Senator ROBERT RAY—All these matters are complainable.

Mr BEAZLEY—They should go to the Inspector-General. You can complain to the Inspector-General about that, and you should do so.

CHAIR—They should go to the Inspector-General.

Mr Elgafi—These issues concern us a community, and that is what we are worried about with the new powers that they are going to get.

Senator ROBERT RAY—You make one point very specific to your own organisation and supporters about strip searches. Would you like to expand on that? I think for your community in particular this is a very difficult issue.

Mr Elgafi—It is a very difficult issue. I am not sure whether you are familiar with Muslims. Muslims and nudity do not mix. To a lot of people, nudity does not mean anything. In Islam, we are prohibited to appear nude in front of someone. It is an absolute no-no to strip women, specifically, and we submitted a legal advice from Dr Raymond Hammides, a professor of Islam. Also, I think his PhD is on Islamic security.

Resolved (on motion by **Mr Leo McLeay**):

That the additional submissions by the Supreme Islamic Council of New South Wales dated 30 April 2002 be accepted as evidence and authorised for publication.

Mr Elgafi—As you know, women have to be covered, and they do not uncover themselves except for their husbands. So to appear nude in front of an officer of the law is a bit difficult. Also, if they are going to search the internal parts of her body—

Senator ROBERT RAY—That is prohibited in this bill.

Mr Elgafi—It is very difficult for the Muslim community. It is an issue we have to tackle, and we have suggested to you a few things about that—the presence of a doctor of the same religion and the same gender. We are not trying to be difficult. As we said, if this legislation were not passed we would be quite happy. If it passes we would like these amendments to it, which are constructive amendments, not destructive ones. We are saying that a doctor of the same gender would do the search or the stripping. Also, the police officer has to be the same gender.

CHAIR—My understanding is that the provisions in this legislation are similar to those that obtain in areas such as Customs. Do you know of any arrangement between Customs in terms of searches and the Muslim community?

Mr Elgafi—I am not aware of any. We have not been searched yet, so hopefully not.

Senator ROBERT RAY—You are aware, though, that in this bill, as you have described it, the police have to be of the same gender. You made that point. That is already in the bill.

Mr Elgafi—Yes. I realise that.

Senator ROBERT RAY—You are suggesting that they should be able to avail themselves of officers of medical services of the same gender and the same religious or—

Mr Elgafi—We are not talking here about just Muslims. We are talking about Buddhists—

Senator ROBERT RAY—Yes.

Mr Elgafi—That is the whole idea.

Senator ROBERT RAY—Yes. Even though you abhor the idea of strip searches, these at least help a little.

Mr BEAZLEY—Given the evidence that was given us yesterday by Attorney-General's, the strip search provisions of this bill exactly replicate those in the Crimes Act and the Customs Act. You probably have not run up against it in any of your dealings on a day-to-day basis, but it is conceivable that there is some experience of this within your community. Perhaps it is something you might like to take a look at and advise us accordingly so that we can contemplate some appropriate amendments. Whether this bill passes or not, if this process here as described is a serious problem for you, you already have the problem.

Mr Elgafi—We have.

Mr BEAZLEY—It is not anything new. So it would be quite a good idea to hear from you on this.

Mr Elgafi—I think like most organisations we work well with the police. They ask us for advice all the time and we advise them. Whether it is a legal thing they do or not, they do it with sensitivity, and that is all we are asking for. If it has to be done, it has to be done according to the culture, whatever ethnic group you are looking at—Indian, Sikh, Buddhist or whatever. We have to look at these issues from that point of view. If a husband sees his wife or his 10-year-old kid being searched it is going to be traumatic for him; it is going to cause a lot of disharmony. He is not going to look nicely at them in the future. This guy will be carrying a grudge because he has seen his 10-year-old kid terrified. Searching a 10-year-old kid, asking them to strip, is a major issue—and not just for me, I am sure, but with any Anglo-Saxon as well. If you see your kid being searched in front of you, you are not going to be happy, are you? These issues have to be dealt with delicately and looked at—should we do it or shouldn't we do it. He is talking about carrying a large object. If I carry a large object you would see it. Just ask me to get it out. But to strip search someone looking for a large object is a bit much, I think.

Mr LEO McLEAY—There are two types of search in the legislation. The first one is a personal search and the second one is a strip search.

Mr Elgafi—Yes.

Mr LEO McLEAY—The personal search, one would imagine, is what they would do first—that is, just pat a person down.

Mr Elgafi—Frisking them.

Mr LEO McLEAY—You expressed concern, and it is a worrying piece of evidence to me, that there has been a form of identification at airports just based on the way someone looks. I know this from personal experience at the Frankfurt airport, which is a big transit area, where they pick out the two most likely looking terrorists.

Mr Elgafi—That is right.

Senator ROBERT RAY—As minister for immigration, I was one of the two out of 500 picked.

Mr Elgafi—I am glad they did. I can tell you from my own experience—

Senator ROBERT RAY—In that case, I did not mind, because I thought it was random, though I am not sure. The point I wanted to make was that, if this occurs, this is a major worry for this committee. What you cannot be sure of, and I cannot be sure of, is whether in some cases these individuals are specifically targeted on other information. Our problem is how we judge that. How do we judge whether they have just been picked up on the basis of name and the way they look or whether they were on an alert list, a computer list, based on information supplied a long time ago? This is the difficulty we have here.

Mr Elgafi—That is why I brought Mr Elmowy here. I have had the same experience, and I will tell you about it after he speaks, if you will allow me to ask him to tell his story.

Senator ROBERT RAY—Sure.

Mr Elmowy—I travelled overseas in January 2002 to visit my old mum, who is overseas in Lebanon. I booked a ticket, I got to the airport on time, everything was A okay. I then passed Customs, where the computers are and they stamp your passports. I was approached by two people. These two people actually called me with their finger—indicating 'come over here'. I had nothing to hide. I went over there. As my student behind me was getting his passport stamped, there was an elderly lady with me who could not speak the language of English. I had to interpret for her in Immigration because she had overstayed in Australia two days. I was called to interpret for her because I speak both languages. Just before I went inside, I said to the ladies, 'Hold on a moment, these people want to speak to me.'

The people said, 'Hand me your passport.' I gave them my passport. I said, 'There's my passport.' They flipped it page by page twice—first it was by the lady who was there and then by the man who was next to her. They just flipped it. They said, 'May we ask where you are going.' I said, 'I'm going overseas. That's what I'm here for, isn't it?' They said, 'To which countries are you going, why are you going to these countries, how long are you going to stay there and when are you planning on coming back?' I said, 'I might never come back. I might die overseas. No-one knows.' They said to me, 'Okay. You are going to Egypt, we see.' I said, 'Yes, I've got students in Egypt.' I am a master instructor in tae kwon do. One of my students is in Egypt, and I go and do their grannies and that overseas as help. They said, 'Why are you going to the Lebanon too?' I said, 'My mother is in Lebanon. My mother is an Australian citizen. She lived here for about 50 years of her life. She went back overseas to stay with my sisters, and I want to visit her because she is ill.' We are humanitarian people; we do feel for the ill.

They said, 'How long are you going to stay there for?' I said, 'As long as my Mum needs me to be there for. God knows. One month, two months, three months, four months, five months, six months.' She goes, 'Okay, thank you very much.' Then I was passed on to another bloke, who actually asked the same questions. And this bloke was actually standing next to her. I said to the bloke—I was a bit sarcastic—'Seems like you're deaf, because she just asked me the same questions. Did you hear what she said?' They said, 'Fine, okay, thank you very much.' They closed the passport and said, 'Come back and get your passport after you have interpreted for the lady.' I took the lady into the room with Immigration. I explained her situation—why she had overstayed the two days. I came back out. During the time that I was sitting in that room, my student had passed the front desk where the computers are. His name was Maz Helwa. He was also asked, 'Who is this bloke that went in there? Do you know this bloke? What does he work as? Why is he going overseas? Why are you going overseas?' There were all these questions—interrogating him about me.

I am Australian. I do look Arabic. My beard was a lot bigger than it is now, but that does not mean anything. As soon as I got back out they asked me for the passport again and they went through it again. These people had uniforms on and were government workers but I do not know who they were—I cannot really remember; it is a fair way back. They had a name but I did not look at the name because I was shocked. I was really shocked by all these questions. I thought it was funny that I was the only person who was asked these questions. There were

hundreds of people behind me—hundreds—but I was looked at behind the computer, because of my appearance.

If I speak to anyone on the phone, my voice sounds like I am Australian. Until you look at my face, you think, 'This bloke's Australian, but his parents, obviously, were born overseas and he's got different blood.' I was really hurt, because I was asked questions which were totally outside of what I think I am. As an Australian, I regard my rights as those of an Australian. If I am ever to be accused of something, I am innocent before being proven guilty. The way they spoke to me with their nasty words—not nasty words like swear words—the expressions on their faces and the way they looked at me, as if I stank and had not had a shower for 25,000 days, it really hit me hard. I am a person who helps the community daily. I help kids off the street who are on drugs. I put kids into an art which allows them to represent Australia; two of my members represent Australia now in tae kwon do. I do a lot of good things for the community and I think, 'Geez, that's funny, I'm targeted because of that—it is unbelievable.'

They did not actually go back and look at the computer to know who I am. You cannot look at someone and say, 'Oh yeah, he's wearing this, he's wearing that, that is what he believes, that is his mentality, that is his education.' They did not do any research; they did not go back to the computer and look at my records. It was just by the way I looked. As I walked into the area just before you enter the aircraft, there was no security there at all. All of a sudden security turned up. I was shocked. I said, 'Geez, I'm a criminal! What have I done wrong? Why is all this happening for something I didn't do?'

When I was in the aircraft going overseas, there were two people next to me asking so many questions. I did not know who they were and I did not know why they were there. Maybe they were normal people—civilians—who were just asking questions about what was happening and wanted to be friendly with me, but it did not seem like it, because they asked really heavy questions. I was quite distressed.

On the way back from overseas I was again looked at by people. I went to the computer section again and then went further down to where you pick up the luggage. I was helping a lot of elderly people—I like to help the community a lot—to get their bags off. This lady comes up and she grabs the paper asking what you have brought with you from outside the country—'Do you have any food or plants?' and so on—and writes something alphabetic on it—'ADC' or something; I cannot remember. I said, 'I want to ask you why you are writing this down?' She said, 'I don't think it is any of your business why I'm writing it down.' I said, 'Why—it's my paper? I want to know what you are writing on the paper.' Anyway, she walked away and I had the card in my hand—it was actually my student's card—and then she came back again and she got the pen and she crossed the lettering off. I said, as an Australian, 'It is my right to know what you're doing with my paper. This is my paper. This is my information. I am going to the front desk to get my bags searched, because I have some sweets from overseas, but what is all this lettering?' She says, 'It doesn't matter, sir. It's all right, everything is cool now.' I said, 'Fine.' I went and got my bag searched—they did not search it inside out; they just searched the sweets that I had—and I left.

I am an Australian person born in Australia. My father has been here 50 years and has worked on the Harbour Bridge and Australia Square—on all these Australian landmarks. He has

never been charged or interrogated in all of his life. I felt that, as an Australian person, I did not have my rights. It really made me think twice: 'What am I? Australian or non-Australian?'

Senator ROBERT RAY—I think your treatment on the way back in is no different from how all the rest of us get treated, frankly, but the treatment on the way out is. Have you lodged a complaint about that, because I assume it was Customs and Immigration that do these interviews?

Mr Elmowy—No, I did not.

Senator ROBERT RAY—Immigration is usually delegated to Customs—but you cannot remember the type of uniform?

Mr Elgafi—I think most of our people are used to this treatment already. I can tell you from my own personal experience that I have been subjected to the same treatment. Fortunately, it is on the way back where somebody comes and says, 'Give me your passport.' He looks at it and says, 'What have you been doing there? What do you do for a living?' On one trip one of them even asked me for my card to prove that I own a business and all that. I did ask him, 'Why the hell? Is it my colour? What is wrong with you, man? There are millions of these. Go and ask somebody else.' But these things are not serious enough to warrant getting worried about unless an arrest takes place.

My son, who is a doctor, volunteered through Human Appeal International to go to Sudan to work in the refugee camps for three months. I was waiting for him outside for two hours. He was strip searched and his bag was emptied and X-rayed twice. He is a doctor. He worked for a volunteer organisation, representing and giving a good name to Australia. He was born here. But he was strip searched, his bag was emptied twice and X-rayed empty twice, and I was waiting for him for two hours outside the airport. So it is a fact, not a fiction, that we are being persecuted or being treated as suspect. It is not the fault of the Customs people, it is not the fault of the guy who is getting the orders to do it. It is the media that can be blamed—the propaganda that is going around the world. We know it is systematic so we cannot blame just the person who asks us for this information. But what can we do? Like you said, you have been picked up at Frankfurt airport. You look like a Middle Eastern person. That is the trouble. You will have to change your looks.

Senator ROBERT RAY—It must be just the handsome ones that get picked up.

Mr Elmowy—You do look Middle Eastern!

Mr Elgafi—Like I said, the Middle Eastern look, even in Sydney, is being persecuted, whether it is in the airport or in the street. You cannot see many people with ASIO raiding them—you do not. ASIO seem to be very busy watching us. Until now, in the last 40 years or however long we have been in this country, not one Middle Eastern person has been charged with anything against Australia. If you cannot get better proof than that, what else do you want? Why are we being watched at airports and watched wherever we go? This makes us sort of edgy. Are we Australian or are we not? We like to feel that we are Australians like anybody else. It is very important for us to feel comfortable. This legislation will give them that extra power to do whatever they like. This is our opinion. At least at the moment they are only gath-

ering information. Later on, if they have the power of arrest and the power of warrants and the power of this and the power of that, persecuting us for being silent and all this, where is it going to end? Mr Goddard, with your permission, would like to add a few things.

CHAIR—Sure.

Mr Goddard—On behalf of the Supreme Islamic Council of New South Wales, gentlemen, I would very much like to thank you for giving the Muslim community the opportunity to speak to the bill. It is a historical development in terms of the Muslim community speaking up. It does try to speak up in its own small ways, but we would like to see that this is a new relationship developing face to face like this, and we hope that is the case in the future. Specifically to what you addressed about the Customs issue, that certainly sounded good.

My name is David Goddard and I am also known as Dawood. I have been Muslim since 1984 by my own choice and not by anybody trying to trick me into anything that I did not consent to. I am a postgrad trainee in psychology and the public relations officer of the Supreme Islamic Council. I want to focus on a few issues orally to support our submissions. First and foremost, our understanding at the moment is that the DPP has a role in developing the evidence upon which a person such as a federal judge or perhaps the Attorney-General in consultation with a judge would then issue a warrant. If we are mistaken in that perception then please clarify that for us at some stage in the near future.

We understand—and we appreciate Senator Ray's comment—that if we have a senior person such as a federal judge issuing a warrant then such a person is the expert, as compared to a federal magistrate. That is not downgrading the federal magistrates, but they are in a different classification, as we understand it, to a federal judge.

As to the prescribed authority issue, perhaps there are definitions which we have missed, but the impression we are getting at the moment is that 'prescribed authority' could be open to interpretation, perhaps on an ongoing basis—that is, perhaps new offices could be created which could fall under this banner of prescribed authority. It is a little unclear to us at this stage whether that might also include a foreign power—although at the moment, we understand, it is within the Australian jurisdiction.

So we are hoping that the DPP, in cooperation with ASIO, is the main assembler of evidentiary information. ASIO is extremely well known for its capability in preventing events in Australia on the basis of accurate and excellent intelligence gathering. We do not want to see a situation where mere suspicion or responses to personal vendettas or hoaxes against a person are the basis on which action is taken or a warrant is issued.

We have a second request, which is for an official certified copy of any warrant with the person's name upon it to be issued to each person in a situation where a warrant is being executed. We also request that officers who are in control of executing the warrant should also be named on the warrant so that there is no conflict in the chain of command. We were told by police whom we know very well that the current practice is that ASIO officers will report to a local command to identify themselves and the warrant, and either they will then go together with the state police or the state police will then open the premises, so to speak, on behalf of those offi-

cers. It is a little unclear to us at this stage whether we are creating a new police force with this bill which would allow ASIO people to enter premises independently of the local state police.

The third thing we are requesting is that a video camera be running from the pre-entry phase to the exit phase during the execution of a warrant, so that the whole proceedings—from when they go into a property trying to execute the warrant—will actually be videotaped for accountability. This is perhaps what we were referring to, Senator Ray, in terms of public accountability. We believe that any modifications that we are intending here are in the interests of defusing any conflicts between the community and police officers and also of making sure that you have actually got smooth execution of your purpose of getting information by the warrant process. So we hope that a video camera would provide information to a judge or any other senior person—a minister, a politician—who needs to inspect a particular incident such as the one, perhaps, that Mr Elgafi was describing before. Firstly, if a video camera had been present at that incident, it may have warded off the incident altogether, because of the accountability involved; and, secondly, if an incident occurred because of a flare-up or some misunderstanding then it could be adjudicated.

The next point I would like to raise is that the authority which executes that warrant must be clearly defined on the warrant. We have really only one example of a warrant, but it needs to clearly define what that chain of command is: the federal police or the state police but not, in our understanding, ASIO. Any senior ASIO officer present would perhaps be identified on the warrant as an ASIO officer present. But, in terms of the operational order of who is actually in the front line negotiating with the person in the house or on a property or other such thing, that will be the federal police or the state police.

The next point I would like to raise is that any property or money which is taken as per the warrant or taken as being of interest to interpretations of the warrant should be videotaped before being packaged into boxes or whatever is required, and an inventory should be taken. We have information that apparently inventories are being taken and we certainly hope that is the standard practice of the department. But we are insisting that that be the case and also—this may well be the practice but we would like to confirm this—that a triplicate copy be taken of items which have been removed; that the owner of that property be identified to the best of your ability; and that that person receive a copy of the list of objects which are taken.

In particular, we would like to emphasise that, in the case of money, money should be counted in front of a video camera, perhaps stacked neatly so it is easy to see as evidence, and that a departmental receipt should be issued for any cash money taken. We believe that would defuse a lot of misunderstandings in the community, because, as we mention in our submission, with the Muslim community here—as is so with a lot of people from traditional backgrounds, particularly Mediterranean, Middle Eastern and even Asian—cash money of quite large sums—from $10,000 up to $20,000—in a house is not unknown. If officers are coming into a property, they do not need the grief of being accused by anybody else that something is missing from the house. We believe that would protect the departments involved much better.

The next point I would like to raise is that any person taken into custody shall be permitted to notify at least a family member or legal representative as to where he or she is to be located. If a person is to be detained under the current system of prisons in Australia, we are not sure if we are now looking at the creation of a new type of federal penitentiary of some kind. Hopefully,

that is not the case but there is the concept of having people—especially if you started to get large numbers of those people—being held indefinitely. Where would they go? Corrective Services in New South Wales may not be happy to find a whole lot of federal-type people, for ideological, political or religious purposes, being given over to them. So hopefully we are not also looking at the idea of creating a new federal penitentiary system which would go with the policing of a particular law under the ASIO powers.

There was a concern raised with this because the idea that a person could be held indefinitely for questioning did also suggest that a foreign power could be interested in interviewing that person outside Australian jurisdiction. We would like to put that on the record as a concern, because Australian citizens should be interviewed within the terms of Australian jurisdiction. We are a little concerned as to why the ASIO bill seems to have a spirit of disenfranchising people who have come to expect basic rights of law, basic rights as to silence and basic rights for legal representation, as Senator Ray was mentioning before.

So the whole idea of Australians disappearing without close kin's knowledge is not acceptable and we would please request, whatever the operational procedures are, that it be written into the bill or its revised version that a person will be permitted to know via a family member. In procedural terms we can see that could be a problem because to the authority concerned they could be ringing up a fellow terrorist or a fellow person of concern. Perhaps if a family member is unacceptable, then it definitely should be a legal representative who can be identified.

At the moment, it appears this bill allows ASIO to decide who the detained person should communicate with. That was raised by Mr Elgafi before. We would like you to at least consider, in your wisdom, how that should be worked in the fairest and most just manner. Apparently there is currently, as I mentioned, no federal prison in this country, and hopefully that will remain the case although it does look as if departments such as DIMIA are now contracting out to Australasian Correctional Management such facilities. Such types of facilities are emerging on the Australian landscape, so the question that we were asking really is: where would ASIO related detainees be held indefinitely?

Senator ROBERT RAY—They cannot go to Woomera or Curtin because a section of this act says they have to be treated humanely.

Mr Goddard—We are in agreeance.

Mr Elgafi—You are not supposed to say that, Senator.

Mr Goddard—I will not trouble you too much more, but we just have a few more points to make. Regarding the matter of search—just to put a bit more detail on that—we would like to see all searches conducted within existing law and, as far as we understand it, within the existing criminal codes. There are a lot of variations or slight amendments involved in the six new bills going through your particular committee which are security related. This particular bill has some clauses which suggest that existing laws are not strong enough or not potent enough to really get the job done. At this stage we would like to argue that the current laws are adequate. If we could get an answer to that question of why we need to put more strength into the ASIO bill before we leave today, we would appreciate that from you, thank you very much.

Regarding searches, Muslims as a religious group—and there may well be other religious groups who have a similar concern—have a particular concern for sniffer dogs coming into a house. Muslims believe very strongly in the presence of angels. Angels may not be entities well regarded or understood in the modern world but in the Muslim religion angels are taken to be very distinct personalities with quite personal relationships within households. Sniffer dogs or dogs of any kind inside a house or inside a mosque, for example, would be considered to be a complete violation of that space in terms of ritual purity or in terms of just cleanliness. Any Muslim who touches a dog must wash themselves seven times immediately after they have touched the dog. That is the legal requirement. So if a sniffer dog comes into a house there is a very high likelihood of creating panic, particularly amongst women and children, not only if they are not familiar with dogs but also if they feel there is a ritual requirement to avoid dogs. So, if dogs are going to be present, it should be managed in a very sensitive manner, as Mr Elgafi is suggesting.

We are requesting that, if this bill does consider cultural and religious sensitivities, it will reduce the risk of incidents which require forceful response from the officers who have to execute a warrant. Part of the reason we are hoping that the Muslim community is going to be talking a lot more to people in decision making positions is that the more mutual understanding there is the greater the defusion either at the bottom of the system where you are executing actions or at the top of the system. This understanding is mutually beneficial. It will enhance national security, and that is probably the bottom line.

In relation to strip searches, we have actually approached the AMA—we have written to the Australian Medical Association—and in the documents we tabled previously today they have responded in a sense that they have acknowledged receipt of our request and, hopefully, they will deliberate on that. We are not aware at this stage whether the Attorney-General did consult with the Australian Medical Association in relation to saying which medical officers will be involved in this particular legislation and how that will go—whether you have departmental officers or whether you may have medical practitioners who are actually part of the government already as the people concerned. But if that is not the case, if you are looking at seconding doctors at short notice all over Australia anywhere at any time to be part of the warrant and possibly naming them on the warrant, then we would certainly open the subject to be explored by the AMA and the Attorney-General's Department and, hopefully, in consultation with the Muslim community to find the best solution to that particular request of ours. We believe that a medical practitioner is a neutral agent. They are also a witness to an incident and they would defuse any potential misunderstandings or conflicts. I will not say too much more. Thank you very much.

CHAIR—We are well over time.

Mr Goddard—All right. We have a request that all interrogations must be conducted in front of a detainee's solicitor. Nobody should be removed from Australia without any extradition hearing, which their legal representative must also attend. We hope it is not the case but we will certainly put before the committee to consider that the removal of Australians to have evidence taken from them outside Australia is a very questionable practice and, hopefully, we are not going into the area.

Regarding 48-hours detention or an extension to the minister or to the senior approving officer of a prescribed authority—and 34F is the section that looks at that—we really advocate that no person shall be held in custody unless he or she is officially charged by the appropriate authority within 48 hours of their arrest. We would advocate a maximum for being held of 48 hours, unless they are charged. What is unclear to us and what you may be able to clarify for us is that this bill does not seem to clearly identify the charging process. We are assuming the Federal Police may perform these processes. Any information you could give us about the nature of the charges being laid on a person would be of great assistance. Thank you for listening.

CHAIR—Thank you very much indeed for giving us your time and your input today.

Mr Elgafi—I seek permission to type this up and give it to you later on.

Mr BEAZLEY—You do not need to do that. Everything you have said has been recorded and transcribed. You can certainly submit anything you like but your evidence has been taken down. Some of the questions that you have raised with us have been canvassed by this committee in its hearings yesterday as well as today, and it probably would be a good idea for you to secure from Hansard the record. You will see a lot in there, some of which may set your minds at rest and some of which may alarm you very severely.

Mr Elgafi—We do not want to be alarmed any more.

CHAIR—Thank you.

[11.43 a.m.]

CARNE, Dr Greg, Lecturer, Faculty of Law, University of Tasmania

HOLLAND, Mr Keith, Assistant Secretary, Attorney-General's Department

CHAIR—Welcome. Is it the wish of the committee that the additional submission by Dr Greg Carne, dated 30 April 2002, be accepted as evidence and authorised for publication? There being no objections, it is so ordered. Although the committee does not require you to give evidence under oath, I should advise you that hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Dr Carne—Thank you for your invitation to appear before the committee. I have distributed to committee members a detailed paper I prepared over the weekend. There are four major parts to the paper and I understand I have five minutes to give a brief summary then we can go to questions.

I have divided it into four parts that deal with a legal analysis of the bill. The first part deals with the terrorism offence. The key to understanding the nature of, and the extensive powers given to, the ASIO detention regime is understanding what is a terrorism offence for the purposes of the connected legislation. Terrorism offence, in my reading of the bill as a lawyer, is a fairly open-ended concept. It is fairly vague and indeterminate. Technical breaches of lawful advocacy, protest and dissent or industrial action can, if they satisfy the criteria in the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2], technically constitute a terrorism offence. Similarly, proscribed organisations' powers in that bill also potentially create another tier of terrorism related offences. These are, in fact, even wider than the initial phases of the initial terrorism offence. For example, in relation to proscribed organisations, there is no safeguard in relation to lawful advocacy, protest and dissent or industrial action—there is no exception in that. So you can have a range of different proscriptions being made in relation to organisations that are supposedly terrorist and which would not ordinarily be thought to be terrorist within the meaning of that particular term.

The other point I make in relation to that is that this provision seems to undercut most of the Hope 1985 royal commission reforms, and it does so in a manner which, basically, opens up once again the nature of what constitutes politically motivated violence and moves it away from a very tightly defined concept, which Justice Hope was interested in in that report and which was subsequently enacted in legislation to bring the offence or the nature of politically motivated violence into a fairly tightly confined space.

The second part of the paper simply looks at some of the international law aspects of terrorism and human rights. The Secretary-General of the United Nations, Kofi Annan, said only three weeks ago in a United Nations press release that:

... States must take the greatest care to ensure that counter-terrorism does not, any more than sovereignty, become an all-embracing concept that is used to cloak, or justify, violations of human rights.

The way the United Nations is now starting to look at these matters—apart from resolution 1373 and other prospective conventions in relation to terrorism including the general convention on terrorism, which is still in preparation—is to address or integrate human rights concerns with the nature of terrorism and to make sure that human rights, at the end of the day, are still maintained in some form. In Australia's case, the International Covenant on Civil and Political Rights becomes relevant because the international covenant is able to address terrorist and national security matters. It does so on very strict criteria relating to proportionality of the response to the actual terrorist matters and also relating to the legitimacy of the subject matter being dealt with. I have set out some materials in the paper I prepared for you.

The third thing I had a look at was—and it is a very detailed document—the terrorism legislation in the United Kingdom. One thing that struck me, as a very general principle—and I am talking in generalities here—is that the Australian bill confers substantially broader powers with less specificity, less precision and far fewer safeguards than the United Kingdom Terrorism Act in relation to the specific aspects or specific subject of detention in relation to ASIO powers. The extracts of this are at pages 4 to 8 of the handout I have provided to members of the committee. There is also an extensive attachment to my submission, basically extracting relevant sections of the UK Terrorism Act, which I have extracted electronically.

The UK experience is very instructive and seems to have been largely ignored in the drafting of this legislation. The fact of that ignorance is very unfortunate. The United Kingdom is subject internationally and domestically to the European Convention on Human Rights which, in many cases, is similar in the articles to the International Covenant on Civil and Political Rights. The drafting of the United Kingdom legislation was an attempt—some would say successful, some would say partially successful but, nonetheless, it was an attempt—to meet legal obligations for antiterrorism measures to conform with absolute minimum standards of human rights. It is a much more detailed and extensive framework of accountability and protections than is provided in the Australian bills.

The remarkable thing is that, at the time of the passage of the United Kingdom terrorist legislation, it was actually seen as an exceptional or extreme measure. The Australian bills go well beyond the scope—it seems to me from a reading of them—of the UK powers. For example, from my reading of the bill—and I would like a second opinion from another lawyer, perhaps—it appears that there is no general detention power in the United Kingdom legislation any more. This was a constant bugbear before the European Court of Human Rights, and I have set out various documents in the submission, which basically now show that there is a bona fide attempt by the UK parliament or government to actually comply with the European convention. The derogation that has actually been made has been made in relation now to an international terrorist, which stands outside the sorts of things we are actually discussing or submitting today. The Australian bill seems to ignore the experience of 30 or 35 years of Northern Ireland terrorism, the responses and abuses that have been picked up by the European court, and the structural basis for actually balancing or integrating national security with other rights that need to be protected in any liberal democratic society.

I then go on in part (d) to make some general observations on the Australian bill. Some of these are actually contained in an article that was published in the *Canberra Times* a couple of

weeks ago, but I have since picked up other matters which are highly important. I simply go to pages 8 to 11 of my submission to briefly highlight some of the key points. As I have already mentioned—starting on page 8 of the submission—there are very significant departures from the UK legislation. The drafting of the Australian bill has largely failed to replicate the human rights compliance dimension of the United Kingdom legislation. As previous people making submissions have no doubt pointed out, there is no evidentiary basis or requirement of reasonable suspicion in the Australian bill. Those interrogated and detained under the bill could include, for example, journalists, legal representatives and religious or ethnic leaders, but the startling thing is that those people actually have fewer rights under this proposed bill than those who would be charged and arrested with actual terrorist offences under the Commonwealth Criminal Code, on my reading of the bills. The Commonwealth Criminal Code integrating with the Commonwealth Crimes Act provides for arrest provisions and reasonable grounds and a regime of protection and investigation and forensic protections in relation to persons committing or having committed an offence against the law of the Commonwealth. There does not appear to be any attempt in the bill to actually restrict or narrow the application of warrant detention and interrogation powers for terrorism offences to truly exceptional circumstances where they might genuinely be justified—for example, in response to a clear and present danger of an imminent terrorist attack.

The power of the prescribed authority to issue warrants is also of great concern. The obligations of the federal magistrate's prescribed authority are likely to collapse on the basis of a constitutional challenge. They seem to exceed the chapter III protections embedded in the Constitution. They will be challenged, I am quite certain, on chapter III grounds as exceeding the principles set down by the High Court in the Grollo case. Secondly, the AAT appointees, as prescribed authorities, largely hold fixed term appointments. The lack of independence and the lack of security of tenure must surely impact upon their independence and their ability to resist pressure in executing the various warrant authorities and supervisory functions under the bill. Furthermore, the Administrative Appeals Tribunal's track record in relation to, for example, the Freedom of Information Act requests or Archives Act requests where national security issues have been raised can, with great restraint or great conservatism, be said to embody a great sense of deference towards the interests of the executive as against the competing statutory based claims for disclosure of information.

Mr LEO McLEAY—That is probably why they chose it.

Dr Carne—Mr McLeay may be right. The prescribed authority has no specific personalised legal obligation to ensure the welfare and fair treatment of the detainee. As you all know, there are no rights of access to an independent lawyer. Serious issues may arise as to the accuracy and context where a person attempts to comply with the requirement to disclose information, the right of silence having been removed, and evidentiary reliability questions will arise regarding improperly or illegally obtained evidence given the secrecy, circumstances and lack of independent witnessing of detention and interrogation.

The bill does not even contemplate a measure which might be a solution in some respects: that is, to have an independent panel of security cleared lawyers provided, for example, by state or territory law societies or legal aid commissions who can be present at all times during the interview. This is a technique that I believe from memory is being used in Canada in relation to evidentiary and access to information matters before courts where sensitive national security

issues arise. Access during detention to the Inspector-General of Intelligence and Security simply takes the narrow form of the right to be provided with written or oral facilities to make a complaint; that is all it involves.

The 48-hour time limit for detention is also misleading. The concepts of custody and detention are differentiated. The previous person who was making a submission seemed to confuse the concept of arrest. There is no power of arrest under this legislation: we have a power of custody and we have a power of detention. The 48 hours detention does not commence until the police, who are charged with bringing the person into custody, bring the person into custody before the prescribed authority. That is when 48 hours begins to run.

Senator ROBERT RAY—If you put the word 'immediately'—as we suggested in our dialogue yesterday, which you would not have read—before 'brought before the prescribed authority', would that solve it? I am sorry to interrupt your flow.

Dr Carne—No. My recollection of having taught criminal law in Victoria is that a similar thing came up in the 1980s in relation to the Victorian Crimes Act. There was a whole lot of toing-and-froing in the Supreme Court as to what 'immediately', or a very similar phrase, actually meant. The parliament then had to go away and redraft the legislation.

Senator ROBERT RAY—What the clause says at the moment—and, again, ASIO said to us yesterday that this was not intentional—is that once the warrant is issued, the person will be immediately detained. They assumed that that 'immediately' then also applied to being brought before a prescribed authority, but the clause does not say that. I am suggesting to you that 'once the warrant is issued, the person will be immediately detained and then immediately brought before a prescribed authority' might solve it.

Dr Carne—It may solve it. One way of looking at it would be to look at the comparable provision in the UK Terrorism Act, which puts down much more precise time limits and requirements in relation to this whole detention regime, and these are contained in the documents.

Mr LEO McLEAY—Would it be better to say that the clock starts to tick on the 48 hours as soon as the warrant is issued? That would ensure that they get them before a prescribed person pretty quickly, wouldn't it? It puts the onus back on them: if they want to get the warrant—

Senator ROBERT RAY—What if they are not detained then? It might take you a week to find them.

Dr Carne—28 days.

Senator SANDY MACDONALD—Under the legislation, it can run to 28 days once the warrant is issued.

Senator ROBERT RAY—I move to that more general point. We have to now fess up: you did not just have five minutes, but we are hoping you discipline yourself to that. You mentioned the UK act. There seems to be a total lack of precision in this act. From the moment the warrant is issued and the person is brought before a prescribed authority—and you mention this in point

E on page 9—apart from one reference to being treated humanely, there seems to be no rules governing how long you can interview a person or where you detain them in periods when you are not interviewing them. What do you do? Do you take them to a jail? Do you take them to a hotel room under guard? There seems to be a total vacuum in that 48-hour period, which, as you know, could become 96 hours or 144 hours.

Dr Carne—It is quite striking. You are perfectly true in what you are saying, from my reading of the bill. But it is also more striking in the fact that the United Kingdom legislation was regarded as being at the extreme edge. There were complaints, and I have detailed those concerns about the UK legislation, but this goes far beyond that. At least the UK legislation attempts in some form or another to comply with ultimate basic human rights standards in the European convention. To a degree, these are largely replicated in the International Covenant on Civil and Political Rights. As you probably know, Australians have a right of access, through the optional protocol process, to the Human Rights Committee in Geneva.

The UK legislation sets out a detailed regime for going about the investigation of terrorism related offences. It operates on two key points: firstly, it requires the basis of arrest, not detention—this is my understanding as a lawyer; again, I would like a second opinion—and, secondly, it does so on the basis that there must be a series of checks and balances at every step of the process. With respect to this piece of legislation, if you were setting a drafting exercise for this particular bill, you would basically mark it 'fail'.

Senator ROBERT RAY—What about the proposition—we have used this technique before; I am only testing it with you—that in this legislation we require ASIO to develop a protocol from the moment of the issuing of the warrant to when the person leaves, as to how they behave, and that that be subject to clearance by the Inspector-General and notification to this committee? Trying to legislate every particular point of the process may not be easy, but what about having a protocol that ASIO commits to abide by, which may say, 'You can interview for eight hours on end and there must be six hours rest,' and all the rest of the details? Do you think that is feasible?

Dr Carne—I would have to check this, but I think some of these provisions are actually provided for in the UK Terrorism Act—the minister can provide a code of conduct which then has to be tabled before parliament. The basic structure of the UK Terrorism Act, as you will see in the attachments, if you get time to read them later, is that it sets out a very detailed regime. The reason is that there are constant complaints to the European Court of Human Rights about breaches in relation to Northern Ireland. Thirty years of experience has suggested that it is both better for national security and better for the state's reputation to set down these things in clear terms for minimum compliance with these human rights provisions and to ensure the reliability of evidence. So there are benefits on both sides. I take your point: that would be an improvement. But there is already a template or a model, even though you will see I have mentioned some articles that are strongly critical of the weakness of the UK act. But it is a vast improvement upon what we have got here.

Mr LEO McLEAY—I would like your opinion on this: one of the problems that concerns me with this legislation is that if the Attorney-General is willing to continue to sign requests to a prescribed authority and the prescribed authority continues to grant the request, the 48 hours becomes a revolving door. We had the people who drafted the legislation tell us yesterday that

you can hold someone indefinitely under this legislation. It seems to me that you have got to give someone an appeal system to get out of that circumstance—if you are locked in a room and someone else has got the key and no-one knows you are there.

It occurred to me yesterday that maybe one should have the option of going to the Federal Court and appealing against one's continued detention. Some of my colleagues thought that might mean that the person then puts themselves at risk from other people who might think that these people have given evidence against them and they might decide to eliminate them. I guess that is why I am saying it could be an option that someone had, and at least they would be allowed to take up that option. Do you think that is an option or do you have a suggestion for some other option that would allow a person to get out of this 48-hour revolving door which could keep them locked up indefinitely?

Dr Carne—You are quite right in the sense that there is basically no time limit upon the length of detention, providing you keep renewing the warrants. Once you hit 96 hours, you have to go to a deputy president of the AAT.

Mr LEO McLEAY—They can make as many of them as they like.

Dr Carne—Precisely. The more I have looked at this, the more I have thought about it, and then I had a look at the UK legislation. The problem arises where you have detention instead of arrest. Arrest is based upon reasonable suspicion. If you look at the basis of reasonable suspicion in the UK legislation—my understanding is that it is on page 6 of the submission—reasonable suspicion of being a terrorist has to be 'concerned in the commission, preparation or instigation of acts of terrorism'. That does not mean that, at the time of the actual arrest, the person has to have a specific terrorism offence in mind, but at least there is some connection with actual commission, preparation or instigation of a terrorism related matter rather than it simply being an open-ended information finding process.

There are other provisions which seek to both protect information and the disclosure of sources in the UK legislation, and also the obtaining of information. It is actually an offence in the UK legislation to withhold information that would prevent a terrorist attack. So there are different ways of going about it which in these sorts of extreme situations do not offend civil liberties and human rights so much. You will actually find throughout the UK legislation that there are different warrant processes, all of which are judicially supervised at various points in time. There are also rights to a lawyer and rights to inform. The starting point of the UK legislation—it appears on my reading—is that there is a starting point of a right to a lawyer and a right to inform a friend or relative. Then there are exceptions where that right can be withheld for a period in the initial 48 hours, but by the end of the 48 hours that right must be exercised. So you are starting from an entirely different—

Mr LEO McLEAY—Where I was going to get to in my second point was: I can understand why the security service might have some fear that some terrible thing is going to happen and that I know the answer to that. Maybe they should be able to pull me in and ask me questions about that, but it strikes me that the balance is all in their favour in this, in that they can then hold me forever. If I do not tell them the answer they can put me in jail; if I do tell them the answer they can prosecute me. Is it an option that, at the end of the 48 first hours, they have either got to charge the person or release them?

Dr Carne—That would be one option. That is leaning much more back to the UK model, in the sense that you are actually presuming you can arrest on a basic reasonable suspicion and then there have to be reviews at a particular time—48 hours onwards or whatever—and in the UK it is actually done by a judge. There are chapter III constitutional problems, and that is why you have got the AAT bobbing up in this particular situation because—as I said, it is likely that the federal magistrate, who is a judicial officer under chapter III of the Constitution—that will be seen as an infringement of chapter III independence. That will collapse on a constitutional challenge and then you are left with AAT members. I had a conversation on the phone with a former AAT member this morning, and my reading of his sense of independence of AAT members in relation to executive or indeed—more disturbingly—internal pressure within the ranks of the AAT did not calm me down in relation to this legislation whatsoever.

Mr LEO McLEAY—One of the tracks down which some of the members of the committee were attracted was that maybe a Federal Court judge ought to be the person who is stuck in the middle of this to issue these warrants. Are you saying that your understanding is that that would get struck down by the High Court?

Dr Carne—It is likely. My understanding of the constitutional framework is simply this: the High Court, in a case called Grollo and Palmer—Palmer being the former Commissioner of the Australian Federal Police; Grollo being Bruno Grollo, the Melbourne property developer—in relation to phone interception warrants said that the judiciary can, under chapter III of the Constitution, issue these warrants but that they must do so in their personal capacity; that is, in their persona designata they act as persons who happen to be judges. When you actually go beyond those parameters—

Senator ROBERT RAY—Sorry to interrupt you. AAT members and magistrates do so under this legislation in their personal capacity. Is that to get around this section?

Dr Carne—The AAT thing is because they are not judges or judicial officers under chapter III. You have to appoint judges under chapter III of the Constitution, and that gives them security of tenure. That is why you have got the AAT, because they are not judges and they are not required to be appointed, to my understanding, under chapter III of the Constitution.

Mr LEO McLEAY—But 34B(5) says:

> If a Federal Magistrate has under this Division a function, power or duty that is neither judicial nor incidental to a judicial function or power, the Magistrate has the function, power or duty in a personal capacity and not as a court or a member of a court.

Dr Carne—That is right. A federal magistrate has the same status and equivalence of a Federal Court judge in constitutional terms. That is why they must be appointed under chapter III of the Constitution. But the High Court has said that there are limits upon which they are prepared to tolerate the capacity of Federal Court judges to engage in these sorts of nonjudicial activities, and the principles are set down by four judges in the Grollo case. I think that is why the AAT has been put up there as a sort of back-up in case this power actually collapses on the federal magistrate, the Federal Magistrates Service of course being only a couple of years old.

Mr BEAZLEY—The personal capacity element, rather than judicial capacity, is an effort, you think, by Attorney-General's to escape the consequence of those High Court attitudes?

Dr Carne—One might read it that way. The whole supervisory thing about the magistrate or the AAT member having to sit in on the ASIO interrogation also raises issues about the status and standing and just practical issues about availability of persons to actually do it. But, as far as I am aware, the actual capacity in relation to personal designation limits of magistrates has not been tested yet.

Senator ROBERT RAY—You can see it from our point of view: we think that High Court judgment now is a nuisance, now you have explained to us, because most of us would like to eliminate the AAT out of this process, to initially involve magistrates and, when you get to the 96-hour point, involve a Federal Court judge so that you have got experience and tenure.

Dr Carne—I believe Professor George Williams will be filling you in on this this afternoon, but certainly there are limits upon what the High Court seems to be able to tolerate even in relation to the personal capacity. What they have done is set up this principle about breaches of judicial authority under chapter III. They have set out an exception to that under the personal designation rule, so you have got an exception to the general rule prohibiting judges getting involved in these things. Then they have set out a further exception called the incompatibility doctrine. There are certain things that they have set down in dicta, which are not strictly binding but they are instructive for future cases. They have set down certain things in dicta which may raise a situation where there is an incompatibility with the exception that they have granted.

This seems to push far beyond what they have actually been prepared to tolerate so far, because the magistrate involved, the judicial officer involved in these activities, is constantly exercising discretions and supervisions in the actual interrogation. It is not simply like going into a magistrate's office and getting a warrant and reporting back two weeks later or something like that.

Mr LEO McLEAY—The magistrate seems to become like one of these European investigative magistrates.

Dr Carne—Exactly—much more on the European model. Certainly justices like Justice McHugh on the High Court will feel very uncomfortable with that matter.

Senator ROBERT RAY—I did not ask you a question on the panel of lawyers. We have raised it, and some of us have already formed a view on that. Do you think it would be easy to take a clause or a series of clauses on self-incrimination from other legislation and include it in this bill? Do you know of any legislation we could look to where self-incrimination is covered?

Dr Carne—In general terms, because I am not an expert on evidence law, I found on a browse yesterday through the relevant sections of the UK Terrorism Act that it seemed to be repeatedly reinforcing protections for legal professional privilege—that is, protection of lawyer-client communications.

Mr LEO McLEAY—No, that is not what we are talking about. One of the points we put to the security people yesterday was that, if this exercise is about getting information, you are more likely to get information from someone if they are not able to incriminate themselves in the answers they give you, if the information they give you will not be used against them, whereas this legislation says, 'It can't be used against you in a criminal matter but it can be used

against you in a terrorism matter.' It occurs to some of us that, if you want to get the information and get it quickly, you say up front to the person, 'Whatever you tell us here is not going to be able to be used against you.' So we are looking for information about people not incriminating themselves. In most royal commissions, for example, you give evidence and that evidence cannot be challenged elsewhere.

Dr Carne—That sounds like quite a good idea. Again, you would have to check that with somebody with a background in evidence law. My impression from the UK Terrorism Act was that they set up a couple of offences which made it an offence to withhold terrorist related information, but they did not go the full bore and basically put in place that you could drag people in on a warrant and hold them, effectively on renewed warrants, indefinitely. You had to arrest them, there had to be reasonable grounds, even basic reasonable grounds, and there would be other offences created, quite separately from that, for withholding information that might avert a terrorist attack or might expose a terrorist offence. These are in the attachments.

Senator ROBERT RAY—There is a requirement on the Director-General on 34C(2) that there be ample grounds given to the A-G before the A-G applies or gives authority to go to a prescribed authority. There is that slight defence, isn't there? It cannot be done on a whim. There have to be ample grounds. I think that leaves the D-G's activities here—we are not sure about the A-G's—as reviewable by the Inspector-General.

Dr Carne—Technically from my recollection—and I would have to check this—the High Court asserted in Alistair's case back in the 1980s that the ASIO Act is reviewable. I have a faint recollection here only. The question is of the very high barrier that has to be crossed.

Senator ROBERT RAY—I am not talking about a court review here.

Dr Carne—Right.

Senator ROBERT RAY—You were referring to the UK legislation where there have to be grounds. I am saying that within 34C(2) there is a requirement in the legislation that the Director-General must give the Attorney-General ample grounds before the Attorney-General can authorise an approach to a prescribed authority. I would think that step is at least reviewable by the Inspector-General. We are uncertain whether any act by the Attorney-General can be reviewable, but at least that act by the Director-General is reviewable by the Inspector- General.

Dr Carne—I am not sure about that, Senator Ray.

Senator ROBERT RAY—It is just that ample grounds seemed a little different from—

Dr Carne—The more practical issue then would simply be: when is the review going to take place? This is the problem with this sort of window-dressing aspect, where you can communicate with the Inspector-General, you can communicate with the Ombudsman, but all of that is ex-post facto. It is all after the event.

Senator ROBERT RAY—Well, we took the Inspector-General through that yesterday. At least we got his view that he is going to sit in on the first few interviews and maybe all interviews, which helps a bit.

Dr Carne—That was reported in the *Australian* today. He said he would sit in on the initial interviews. But he may have a problem with the interviews being conducted in Perth when he is in Sydney. That is as quoted in the *Australian.*

Senator ROBERT RAY—Not only that. We do not know yet whether, having sat in, he can intervene there or only intervene by way of communication with the Director-General. All that is to be sorted.

Dr Carne—Yes, his powers would be simply those prescribed under his own act.

Senator ROBERT RAY—Unless we put further powers in this act.

Dr Carne—Exactly. And unless he is resourced and staffed to do those sorts of things.

Senator ROBERT RAY—We have been through that. He is resourced and staffed at the moment.

Mr BEAZLEY—Just to pick up the general theme that has been run here, I am in the odd position of having gone into the last election on an undertaking that I would introduce something like the UK terrorism act but nobody noticed. We are also conscious that there would be modifications required in this country of the UK Terrorism Act for a couple of elements. The first is, of course, that the constitutional structure in the UK is very different from ours here. The structure of the security forces, while having some similarities, also has some important differences. Special Branch in the UK police forces are much more potent than any equivalent in operation in the Australian Federal Police here. With the questions of jurisdiction, there is a shared jurisdiction across all the criminal elements related to terrorism type offences between the Commonwealth and the states. The same situation does not obtain in the UK.

The thing that troubles me about this legislation is that it has fallen between the stools that it was meant to sit on. This is not really a counter-terrorist operation in the sense of it has been proposed here by ASIO to use this piece of legislation to place a person picked up under arrest for terrorism offences. It seems to me that this is an attempt by ASIO to get to grips with what is now a substantial problem. It is probably more of a substantial problem than it was at the time the UK Terrorism Act was put in place. The growth of the capacity of intelligence services to effectively surveil those who would commit terrorist activities, particularly after 11 September, means security agencies are getting better and better in both exchanging information between themselves and also in the means of collection. They are getting to a point where they may well be able to predict a terrorist act that will occur.

Having seen so dramatically the effect—in terms of the loss of life—where there were the traces of it prior to it being conducted but nothing drawing those threads together, they are now attempting to draw threads together. It seems to me that this is more an exercise in trying to get in place a mechanism by which they can question an individual who may have information which is pertaining to an act, which has either just been committed or will be committed and trying to get the information out of them for preventative purposes, than it is in trying to get somebody and nailing them. In the light of that, do you believe that this legislation is capable of being reconstructed that goes to effectively gathering that information, without massively offending the rights of the people who are picked up for a discussion because it is reasonable to

assume that the information they have may lead, if it was not divulged and people acted on it, to a massive breach of civil rights, like the comprehensive breach of the civil rights of the 2,800 people who died on 11 September?

Dr Carne—There are a couple of points. One is that the UK Terrorism Act is the UK Terrroism Act 2000. They passed a subsequent amending act in 2001 called the Anti-Terrorism Crime and Security Act which makes amendments to the UK Terrorism Act. The copy you have has been electronically updated, according to my best capacity to check the thing in the last couple of days. The issue is that the UK seems to have still persisted—even after 11 September—with these grounds of reasonable suspicion addressing the human rights issues arising in the European Court of Human Rights and the European Convention on Human Rights. They are slightly more fluid than mere standard reasonable suspicion in the sense that a terrorism offence is broadly defined.

What I keep having to emphasise—friends and colleagues ask me about this—is that the nature of a terrorism offence, as it is currently defined in the other bill, is incredibly open-ended. It means that the minister has the power, particularly with the proscription powers, to delegate to another minister—who could be the industrial relations minister or the defence minister—for groups to be proscribed who threaten 'the security integrity of the Commonwealth or of another country'. They are open-ended concepts. Security of the Commonwealth today includes, presumably, economic security so does that mean, no matter what you think of the wharfies who are on strike, they are threatening the economic security. Whether you disagree with them or agree with them or whatever—

Mr LEO McLEAY—That would probably apply to those people who are strike in Victoria at present.

Dr Carne—Yes.

Mr LEO McLEAY—Because they are endangering a very large export order.

Dr Carne—Exactly. So the starting point seems to be that there is a problem about the scope of the actual terrorism offence which then forms the platform for the exercise of these powers. Secondly, where do you go from there in relation to ways of obtaining information? Surely you would go for the less intrusive means at each and every step of the way. When you get to intrusive means you make sure that everything is accountable, that there are checks and balances galore, you get the information but there is no opportunity to sense an abuse of power.

Senator ROBERT RAY—When looking at all of this, a lot of critics come along and say the definition of terrorism in the other bill, which will apply to this one if it is adopted, is too wide-spread. I dare say members around the table here might be sympathetic to that. No-one has been able to point us to a nice, tight, tough definition as an alternative. Do you know if one exists somewhere?

Dr Carne—I have tried doing a search on the UN web site because this matter has been debated in General Assembly debates. In October last year, shortly after 11 September, there was a week of debates in the General Assembly, and states around the world were troubled by

the nature of what 'terrorism' meant. If you go to the UN General Assembly web site you will see that they all agree it has to be more tightly confined or narrowed somehow.

What strikes me here is that you are actually saying—I suppose on a conceptual level—terrorism has to sit above existing politically motivated violence. It is something over and above that. But the way the thing is being communicated—or what has been left open in these bills—is that it is basically to throw out the tightness of the definition of politically motivated violence. You are actually trying to implement something that stands over and above that, is much more serious in terms of loss of life in relation to politically motivated violence, but you have an incredibly open-ended definition. The whole tenor, as I have mentioned before, of the Hope committee in 1985 was to say that, whilst politically motivated violence can mean a whole range of different things, we need to define it very tightly. If Justice Hope were still alive he may have the answer. That lack of precision is a real concern. One of the things I mentioned in the newspaper article was that you could normally associate terrorism with some sort of political motive and its massive and wide-scale effect, but there is none of this being communicated in the actual legislation. It is just open-ended.

Mr BEAZLEY—Have you tried your hand at it?

Dr Carne—It is like one of these things with the International Law Commission. You could spend 50 years trying to draft a particular article and still not have a satisfactory outcome. But something needs to be done about the definition.

Senator ROBERT RAY—Isn't the trouble that we all know what it is but none of us can say what it is?

Dr Carne—The other approach would simply be to ask: what are the sorts of criminal activities that you associate with terrorism? The model that was used by the New South Wales parliament when it was looking at burglary or home invasion offences—and I just use it as a very loose parallel—created a graduated series of offences so that you had standard burglary, then you had the aggravated offence and then the specially aggravated offence. One way of defining terrorism might be to identify all of the criminal behaviours that it embraces—extortion, blackmail, massive serious destruction of property, murder and manslaughter—and create in that regime of offences specially aggravated offences to give a further sentencing power or a further investigatory power subject to checks and balances based upon that. Then there would be fewer concerns because you are actually building upon what terrorism actually is—massive breaches of criminal law—but you are structuring it within a framework of existing criminal law and practice. That is just a suggestion.

Mr BEAZLEY—That is as good as any that we have had for a while.

Mr LEO McLEAY—The Director-General, when he wants to get one of these warrants, has to go to a magistrate or a member of the AAT. How does that mechanism occur? It does not seem clear from reading the bill. In your reading of it, do you think that it would mean that he goes to the head of the jurisdiction who farms it out to whomsoever he or she decides on that bench, or would they be able to go directly to a particular magistrate or member of the AAT that suited their purposes?

Dr Carne—I am not sure how to answer that, Mr McLeay, but I can probably make two observations. Firstly, I think the number of federal magistrates is still relatively small. It is still a small jurisdiction although it is predicted to be the growth jurisdiction in law in the next 20 years. Secondly, I have some knowledge and understanding of AAT involvement in national security matters in relation to archives and FOI hearings to release documents. What you find there is that you consistently have a very narrow band of AAT members who sit on these cases. I am not sure why that is. It may be because they have a particular background or it may be for some other informally communicated reason. The concern might be that a certain band of AAT people might be the ones who issue the warrants. I am not sure if that helps you at all but I cannot provide any clearer focus on the question. It is just a surmise, in a way.

Mr LEO McLEAY—It seems unclear to me to because it is not the sort of things that they normally deal with. So what is the process that it ends up on Joe or Sue Blogg's desk? If it is a random selection, then maybe the people who are involved as the detainees get a fairer shake. But if it goes to a particular person who is a hanging judge, they will never get out of that dark room.

Dr Carne—Certainly in relation to AAT matters dealing with attempts to have Archives Act material released or FOI applications that have a national security element there seems to have been three or four AAT members who have consistently sat on these cases.

Senator ROBERT RAY—The other problem here is not the hanging judge. You might be involved intermittently for 48 hours sitting in on this interview so it is only those with a massive boredom threshold that will be able to or willing to volunteer for the job.

Dr Carne—I mention this in the paper. There is that element of co-option, even unconsciously or quite undeliberately, in the process. There is also a lack of independent review so that when you actually need to go and get the second warrant, you do not get a second AAT person necessarily. The legislation seems unclear on this point but you do not need to get a second AAT person who has not been involved in sitting in.

Senator ROBERT RAY—I think the argument there goes both ways. You are right: the person may become a captive of the process and automatically grant a tick-on. The other problem is you go to a second authority and they do not have all the knowledge that has happened in the previous 48 hours. It may well be that by going to the same prescribed authority, they will say, 'Well, you are not going to get any more information. There is no more to be got. You are probably doing this for other motives. Throw it out.' So it is a very hard judgment, isn't it?

Dr Carne—I would agree. It is very hard whichever way you go on that one.

Mr BEAZLEY—We talked about it a bit earlier on but would you like to chance your arm on how the High Court might treat this bill, if we extracted the AAT from it and left it at Federal Court and federal magistracy, albeit acting in a personal capacity. Do you think that the High Court would take a dim view of that, or what do you think their response would be?

Dr Carne—I think the chances of the federal magistrate power in relation to the warrant authority surviving a High Court challenge would be appreciably less than those circumstances

that survived the challenging Grollo's case. The reason for that is that the High Court is concerned that the exercise of judicial power—or what looks to be judicial power even when it is exercised under the persona designata rule in the personal capacity—is seen to be independent, both perception and reality, in every sense of the word from the operations of the executive, or indeed even the parliament. They are very protective, particularly Justice McHugh on this point, about the nature of judicial power.

You have the persona designata rule created in Grollo's case where, I believe from memory, there were intercepts from warrant involved, and a personal capacity exercised. Here you have actually got a federal judicial officer, the magistrate appointed under chapter III of the constitution, intrinsically and intimately involved in the ongoing process. This raises some of the concerns that were raised in Kable's case in relation to detention orders by New South Wales Supreme Court justices, but corrupting effectively the federal judicial power because New South Wales courts can, under certain circumstances, exercise judicial power on behalf of the Commonwealth. There was that problem of perception in relation to that, so you might want to ask George Williams about it this afternoon. I think he has actually got a section in his paper on this. I think it would be much less likely to survive challenge, and that may be one of the reasons why it is backed up, as it is in other legislation, with the AAT appointees.

Mr LEO McLEAY—If it suited other members, I would be interested in Mr Holland's view on this. Could we hear that?

Mr Holland—The question of whether or not the provisions relating to the magistracy would survive a High Court challenge were not discussed in any great length. There was a realisation which clearly was borne out by the views of those who appeared before this committee yesterday that the highest possible level of judicial oversight would be the objective that everyone would be striving for. The question was: at what level did we think that we would be able to set that benchmark at?

There was no doubt that there was not a problem with the AAT. Clearly, there was going to be a problem on a practical level, I have to say, and this was the point that I was making yesterday in terms of the federal judiciary. I said yesterday that I did not know whether the Attorney-General had spoken to the Chief Justice or to any of the judges of the Federal Court but that I certainly had not, nor had officers of my area, primarily because we knew, from our experience of TI warrants where they had expressed their views, that it was unlikely in our view that they would say, 'Yes, we will do it'. But there was some expectation that the magistrates would be prepared to take on this responsibility in a persona designata role. On the extent to which we thought about a challenge to the High Court over their capacity to do this: that had not been explored in any great detail, and I was certainly proposing to go back at lunchtime to some people in the department and say, 'Look, can you have a look at this and let us know what the expectation would be?'

Mr LEO McLEAY—At the same time, can you look at what the expectation might be if it concerned Federal Court judges?

Mr Holland—I think the point that is being made is that it would not matter whether it was the magistracy, the Federal Court or the High Court: it would still be the same principle. The point that I was making yesterday is that, even putting that to one side, the difference between

the magistracy and the Federal Court is a practical one; that is, they will not do it and that other group might do it. But I am happy to take that up.

Dr Carne—Could I say something just for the benefit of the record: the reference is in Grollo and Palmer, 1995/184 *Commonwealth Law Reports* at page 365—I am reading from another submission here which you probably do not have yet—according to Brennan CJ, Deane, Dawson and Toohey J on that page. They then go on and talk about the incompatibility doctrine and they set out certain circumstances of a judge even acting in a persona designata role—and a judge in this case you would read as being a federal magistrate because they are all appointed under chapter III; they have to be given security of tenure to age 70—and how that judicial capacity would be impaired and would be an impermissible infringement of the exception—that is, the persona designata rule—and therefore would be struck down.

Mr LEO McLEAY—Mr Holland, you would have had a bit to do with the Grollo case, wouldn't you?

Mr Holland—Only to the extent that our legislation was the legislation that was in question in those proceedings. Just to comment on what Dr Carne has said: the interpretation—and I will confirm this for the committee—that we had at the time of the outcome of the Grollo case was that that decision did not automatically preclude any of those judges of the Federal Court from exercising the responsibilities under the TI act if they had agreed to do that. Indeed, my recollection was that what started the ball rolling, in terms of the judges saying they would not do this, was a decision of the Federal Court judges in the ACT. In Mr Justice McHugh's judgment, he made the point that you could, in a small jurisdiction, end up with the possibility of those who actually issue the warrants at some later stage being the judge who has to sit at first instance. Clearly, in the ACT, that was a distinct possibility which then led to the ACT Federal Court judges saying, 'We will not do it', which then had a snowballing effect. I will confirm that. But I think the point that Dr Carne is making goes one step beyond that because there is a difference, it could be argued, between simply authorising the issue of the warrant and sitting through the process. Even though they are not seen as being a decision maker in that set of circumstances, nevertheless they are drawn more tightly into the administrative function.

Dr Carne—That is exactly the point I am trying to make.

Mr BEAZLEY—So, Dr Carne, you would say it would probably have a better chance of being sustained in the High Court if the warrant were issued and the people disappeared and somebody else conducted the interrogation or it was before someone else?

Dr Carne—That would be more or less consistent with the boundaries of the interception warrants, from my vague recollection of Grollo's case. Professor George Williams will no doubt have an intimate and intricate knowledge of this matter.

Senator ROBERT RAY—Is there any possibility here that you can leave the power to issue warrants with the AAT but then involve a magistrate as a prescribed authority, or is that equally difficult?

Dr Carne—It probably still creates the problem. The problem then essentially says you have an absence of legal representation, you have persons, inadvertently perhaps, being coopted into

a process, which the High Court would have concerns about, so in relation to your actual involvement the nominally independent person becomes no longer truly independent. So you have a real problem, both evidentiary and also in a human rights sense. The phrase about humane treatment is actually picked up from the International Covenant on Civil and Political Rights. It is also in the Commonwealth Crimes Act in relation to Federal Police investigations. To actually give that flesh on the bones and to head off a challenge in the Human Rights Committee in Geneva, you have to do a lot more than simply put in, from my reading of the thing, simply a clause like that.

CHAIR—We are about half an hour over.

Senator ROBERT RAY—We could go another hour, but we had better not.

Dr Carne—Thank you for giving me the opportunity to make this submission.

Senator ROBERT RAY—Thanks for your work.

CHAIR—Thank you very much indeed. That was very useful. We will adjourn until 1.15 p.m.

Proceedings suspended from 12.41 p.m. to 1.15 p.m.

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

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

CHAIR—The committee welcomes members of the New South Wales Council for Civil Liberties to the hearing. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Murphy—Yes. I would just like to say that this legislation goes against the grain of every basic liberty that we hold dear in Australia. It has no place in our nation. What sets us apart in Australia from oppressive, undemocratic regimes is the value we place on principles such as human rights, liberty, natural justice and judicial independence. This bill seeks to remove all of those basic principles and, if successful, will see that our nation is no better than apartheid South Africa, communist Russia, Pinochet's Chile and other regimes that have no regard for rights, liberty or the rule of law. This legislation is reminiscent of Argentina's 'missing people', or the Malaysian Internal Security Act.

A lot of claims have been made by government, even by ASIO in the last few days, that these powers are necessary, but there has been no evidence provided to substantiate those claims. To the contrary, the government have consistently reassured the Australian public that there is no direct or indirect threat to Australia from terrorists. When you are proposing to severely restrict or remove basic human rights and liberties in the way that this bill does, the onus of proof must be on the government to demonstrate that it is both necessary and useful. It is unreasonable to expect that we should be giving up fundamental liberties and rights for nothing more than the mention of September 11. There has been no case presented yet that these powers will help to prevent future events like those of September 11. In fact, there is a strong argument that they will do exactly the opposite.

People held against their will, without contact with family or a lawyer, under threat of imprisonment if they do not cooperate, will ultimately say anything—even a lie and even if it incriminates them—to please their jailers and set them free. This process will encourage people to say whatever ASIO want to hear in order for them to obtain their freedom. This power is not only unprecedented in Australia's history but dangerous. There is no power anywhere else in Australia that would allow a person to be arrested and held indefinitely without charge, without legal representation and without outside contact.

It is more dangerous to give this power to an agency that is secretive and, in many regards, above the law. Our intelligence agency is already the subject of a litany of complaints over search warrants, interviews and other matters that demonstrates its incompetence in assuming any sort of policing role. Indeed, one only has to remember the disgraceful events of the Sheraton Hotel in Melbourne in 1983 for a concrete example of the way in which our intelligence agency's powers can be misused and abused. The form demonstrated by ASIS in its antiterrorism exercise is the last thing we would like to see the repeat of. I might remind the

committee that no agent of ASIS has ever been charged or convicted of a criminal offence arising out of that episode.

ASIO has obtained a position of privilege in Australian society due to its role as an intelligence gathering and reporting agency. Its privilege has placed it above the law in many respects. Agents of ASIO are protected from identification, ASIO warrants are not reported and there is a lack of accountability of ASIO compared to other government agencies. These powers will fundamentally change the nature of ASIO from its current intelligence role to that of a secret police force in many ways resembling the KGB. By its very nature, the information that ASIO relies upon is dubious, and intelligence is a misnomer. It is often nothing more than unreliable and unconfirmed innuendo, speculation and rumour.

The bill will create a two-tiered legal system in Australia. Someone could be arrested without charge, denied legal representation and held indefinitely and in secret by ASIO. But, if they happen to be arrested by Constable Plod of the New South Wales Police Force for exactly the same offence or to get the same information, they will retain all of their rights. They will be afforded legal representation, contact with their family and they cannot be held without charge. This bill will create a subjective and selective process that is above the law and where, if you are a target of ASIO, you may be hounded by them without redress.

History shows us that these sorts of laws have been used most effectively and unfortunately against legitimate activists. Amongst others, Nelson Mandela, Gandhi, Xanana Gusmao and Daw Aung San Suu Kyi have all been held without charge and have all been considered to be terrorists. In Australia, we should not make the same mistake in an era of uncertainty and insecurity of setting up the mechanisms now that are going to be misused in the future. It is inevitably activists, dissidents and agitators that are going to be the targets of this legislation in the future, not terrorists. If we are going to be interviewing people in relation to terrorism then we must use an appropriate body to do so. The Australian Federal Police are experienced and they are more than capable of interviewing suspects and obtaining relevant information under existing laws. They are readily identifiable and they are infinitely more accountable when they breach the law.

We must also give those interviewed protection from prosecution to ensure that the evidence they provide to us is accurate and reliable and, above all, we must ensure that there is a process that retains basic liberties. No-one should be detained without charge indefinitely or otherwise, which this bill will allow. The worst thing we could do to combat terrorism in Australia is to set up a system that removes the cornerstones of our democracy and weakens it by doing so. If we remove the value we place on our liberty, we are doing nothing more than destroying our democracy in order to protect it. Benjamin Franklin once wrote in his historical review of Pennsylvania:

> Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.

If we pass this legislation in Australia, we are going down exactly that path that he warns of. I will pass over to my colleague David Bernie, who will outline some of the main points that we want to address today.

Mr Bernie—You will all be aware that the power to arrest and detain at common law has always been on the basis of reasonable suspicion and under judicial control. Indeed, it has been one of the cornerstones of English law that we have inherited in this country and one of the most important traditions of our common law. But, as a common law right, we have no bill of rights in Australia, and that is a very important thing to bear in mind. The passing of this legislation will sweep away that common law right forever. We will be giving the most sweeping powers of arrest ever seen in this country to the least accountable body to carry them out. Indeed, I have seen nothing in any of the material put forward why these powers should be given to a secret body rather than to a publicly accountable body such as the Australian Federal Police.

No similar detention powers exist for US citizens, despite the fact that the United States has been the subject of direct terrorist attacks. US citizens have their rights under the Bill of Rights and their powers to be detained are subject to that Bill of Rights. This legislation gives fewer rights to Australian citizens detained under this legislation than are given to non-US citizens detained in the US under their legislation. This legislation would provide that a journalist or a politician, for instance, who was detained under this legislation would have fewer rights than a serial murderer like Ivan Milat, who has been charged with serial murder by the New South Wales police. They would have no rights of contact. Remember, these provisions do not apply just to somebody suspected of a terrorist offence; they also apply to people who are suspected of having information about a terrorist offence. This seems to me to put particularly journalists and politicians very much in the firing line of this legislation. It would seem to me that, if a journalist writes an article speculating about the strength of forces in Afghanistan, Pakistan or anywhere else, it would provide a basis for a warrant under this legislation. If a politician gave a speech to parliament commenting on issues regarding terrorism, it would give the basis for a warrant under this legislation.

Senator ROBERT RAY—How does that override the Parliamentary Privileges Act 1987? There is no provision in this act to override that. It does not.

Mr Bernie—But there is no provision to make a saving for it either.

Senator ROBERT RAY—Nothing adducible that you say in parliament can be used in any other area of the judiciary or the law—you should know that.

Mr Bernie—Is there any saving in this act for that act?

Senator ROBERT RAY—No, but to have set aside parliamentary privilege they would have to specifically do so in this act.

Mr Bernie—No. A later act has the effect of overriding an earlier act.

Senator ROBERT RAY—Not in terms of parliamentary privilege. That is one thing I do know something about. I did not mean to interrupt you, and I should not. I am sorry.

Mr Murphy—If I could make a comment to clarify perhaps. I think the point is that anyone could be arrested that may have information that could be useful in relation to a future terrorist act—

Senator ROBERT RAY—I am sorry, I did not say a politician—

Mr Murphy—and that includes a politician.

Senator ROBERT RAY—Of course a politician can be detained, but not on the basis of what they say in parliament.

Mr Murphy—Where is the exemption in the bill for that?

Senator ROBERT RAY—There does not have to be an exemption in the bill. It is in the Parliamentary Privileges Act, which specifies that this is not impeachable by any other act before or after unless it specifically says so in that new act.

Mr Bernie—But there is also a principle of statutory interpretation to say that a later act, if by necessary implication, can repeal an earlier act. There is no specific exemption put in the act in relation to that so it makes it open to interpretation.

Mr LEO McLEAY—There is no exemption put in other acts about that either.

Mr Bernie—That is the problem we have in this country because we have no entrenched provisions of rights.

Mr LEO McLEAY—There is entrenched provision about parliamentary privilege. No-one has ever managed to strike that down, let me tell you.

Mr Bernie—It is only in a bill; it is only in an act of parliament.

Senator ROBERT RAY—Let the record show that you are right that a politician can be detained under this and that privilege would not cover them, unless it was in relation to something they said in the parliament which cannot be adduced. So you are half right—that is the point I was making.

Mr Bernie—I think it was conceded yesterday that this bill has the effect of providing for indefinite detention because there is nothing that prevents redetention. In that sense it provides for indefinite detention in similar terms as the Malaysian Internal Security Act. It also provides offences such as section 34G where, again, the common law right of presumption of innocence is taken away. Indeed the onus is put on you to prove that you do not have information. The onus is put on a defendant to prove a negative. How does a defendant prove a negative? This is almost an impossibility to achieve.

Turning to our specific recommendations on page 3 of our submission, we state:

1. That the Parliament reject this bill in its entirety ...

2. That any proposed powers of arrest and interrogation be given to an appropriate policing body such as the AFP.

3. That there be regular reporting to parliament of the issuing and reasons for any warrants for the arrest and questioning of individuals.

4. Any requirement for give self incriminating information be given protection ...

As we point out in our submission, if you do not have that requirement in you are not likely to get information which is of any use. One of the successes of royal commissions in this country has been that people have been able to give evidence about their involvement in illegal affairs knowing that that evidence would not be used in prosecution against them.

We further recommend that members of parliament, both state and federal; the judiciary, both state and federal; and journalists be exempted from the operation of these provisions. The way that they are drafted seem to put both politicians and journalists very much in the firing line.

Senator ROBERT RAY—What about solicitors, people in the law, who have a privileged relationship with their clients? Do you put those in that category too?

Mr Bernie—Yes. I am sorry but we had to do this in a hurry. I think there should be reason for exemption for lawyers as well. There should be an express statutory prohibition against redetention. I understand, if you read the legislation, that you have a 48-hour period and then possibly two extensions allowing up to six days. We suggest that if, for instance, you are held for six days there should be no other warrant issued for six days.

Mr LEO McLEAY—If you read the legislation properly they can hold you forever.

Mr Bernie—I know. That is what my earlier submission said.

Mr Murphy—What we are saying is that there is nothing in the legislation that would prevent a concurrent warrant from being issued for the same person. Someone could be held, for example, for questioning in relation to the bombing of the Opera House and then when that is about to expire another warrant could be issued for questioning of the same person in relation to another event, say the bombing of the Harbour Bridge or something like that.

Senator ROBERT RAY—The only saving grace in that is that that second warrant has to refer to and mention the details of the first one.

Mr Murphy—We pointed that problem out. I agree with Mr McLeay. In an effort to try and prevent that, we say that in terms of any warrant that is issued and any extension given there should then be a free period, an express statutory free period. That is one way of dealing with it to try and stop exactly that problem of continuous or indefinite detention. We further recommend:

7. That the rights of access to a lawyer and family/friends be granted and only restricted upon successful application to an independent judicial figure such as a magistrate or judge ...

As it presently stands, a person could be taken off the street. My friend has referred to the missing persons in Argentina who could be taken off the street and the family, children, spouse need not even know where he or she has gone. Again, there is no provision for compensation of people who are detained by mistake or detained simply because they have information. Those are our major recommendations.

CHAIR—One of the areas that you did not mention in your run-down but you made mention of in your submission was public reporting. I am wondering how far you take that? You made reference to reporting to the parliament; there are reports that go in to ministers at the moment.

Mr Murphy—We would seek public reporting through the parliament—say a tabled list of all warrants that are issued for secret intelligence agencies or the DSD, even if it is in general terms. At the moment there is no requirement for public reporting, as I understand. So no-one in Australia would know how many warrants have been sought, how many warrants have been issued, what the duration is. That is information that could be provided publicly in general terms, but I cannot see how it could possibly have a national security impact or anything else that would prevent it.

Senator ROBERT RAY—This committee has considered that in terms of telephone warrants, has given it serious consideration from your point of view and has rejected it. However, yesterday ASIO said they saw no difficulty in having these particular types of warrants—that is, to detain people and report it publicly to the parliament through their annual report or any other way. So I think they have conceded that there is not a problem here.

Mr Murphy—We would welcome that. Frankly, I would like to see it extended to all types of warrants. One of the problems with this entire process is that information that is used to substantiate reasons for not providing public information is usually in camera or private, and so the public do not get any information about how many warrants are sought or issued and then we do not really know the reasons that are being used to substantiate an argument that it stay that way. It is a catch-22.

Senator ROBERT RAY—We cannot give you the reasons why we back up ASIO in this but we think that is very sensible.

Mr Murphy—This is part of the problem. So we are saying that before we give them more power we should have some form of public accountability and evidence to substantiate why they need it.

Senator ROBERT RAY—It would make some difference if, for example, ASIO were suddenly reporting that over the three-year period six people were detained. Whilst you would not be relieved by that, you would be much more relieved by having that public knowledge than by knowing that 300 were detained.

Mr Murphy—Maybe it is just me, but the reason why that information may not be released could be that it might show that the powers that they have got are completely ineffective and unnecessary—I do not know.

Senator ROBERT RAY—However, irrespective of that they are now saying to us that they do not mind publicly reporting that, whether it be embarrassing or otherwise.

Mr Murphy—We would welcome that. I think that is a basic minimum provision that should be in place.

Senator ROBERT RAY—You mentioned something that surprised me and that I did not find in your submission: you referred to a 'litany of abuse' by ASIO.

Mr Murphy—Yes.

Senator ROBERT RAY—Where is that?

Mr Murphy—I do not think there is time now to go into the detail, but we as an organisation have accepted a large number of complaints about ASIO's conduct—

Senator ROBERT RAY—How many of those have you have referred to the Inspector-General?

Mr Murphy—We have referred several of them to the Inspector-General. They have come through us and they have also gone through people who are directly representing those people. In some cases it has been action that we have taken ourselves. To give you an example, we represented someone in the Administrative Appeals Tribunal only a short time ago about an adverse security finding. Our problem with ASIO is that the regime in place at the moment makes it such a secretive body that it is virtually impossible for someone to take action or overturn a decision that they make.

Senator ROBERT RAY—It seems to me that the better evidence to give would be either a litany of complaints or several complaints, rather than 'abuse', because you have not put—

Mr Murphy—I can detail some things now if you want me to.

Senator ROBERT RAY—Where abuse has been found, it is usually reported in the Inspector-General's report. There are cases there, but it hardly constitutes a litany of abuse.

Mr Murphy—That may be a subjective point. In our view—

Senator ROBERT RAY—I am sorry, but I think it is a bit more than that. Our role here quite often, of course, is to be inquisitorial. I beg your pardon if it sounds adversarial, but we are just trying to get to the facts and so we ask the questions based on your submission. Having been on this committee for five years and on the security committee for six years before that, I have not found ASIO guilty of a litany of abuse. They have made some mistakes, but I do not see a pattern of abuse there; if I had, I would be extremely angry.

Mr Murphy—Perhaps I can provide you with some information that you can take on board about the sorts of complaints we have had. They range from issues about passports being seized in the course of the execution of search warrants and being held for months so that people are effectively on bail to issues about the way in which people have been interviewed and about the sorts of adverse security findings that ASIO has made against people and the process that one has to go through to overturn that; and there are also issues about warrants travelling.

There are obvious problems with ASIO exercising warrants, because they are not able to be identified under the legislation. It is a serious problem where someone turns up at your door and

claims that they are from ASIO and that they are entitled to exercise a search warrant, but you are not entitled to find out who that person is and whether they really are working for ASIO. They are the sorts of complaints that we have. The main basis of our complaints is adverse security findings, and the regime that is in place at the moment makes it virtually impossible to overturn a finding.

Senator ROBERT RAY—You don't think that there is anything that inhibits the Inspector-General though from taking up and investigating complaints?

Mr Murphy—I think the main factor is that any evidence that is turned up cannot really be effectively made public. One of the problems is that I do not think that even the Inspector-General can determine whether information is being withheld. Certainly it is not a public and transparent process. The Inspector-General can look at things but, because ASIO itself is not public and transparent, it is very difficult for members of the community to see whether or not they are exercising their powers properly and appropriately.

Senator ROBERT RAY—That is a difficulty in perception, whether they are doing it or not. It is a little different from saying that they are guilty of a litany of abuse. But we will move on.

Mr LEO McLEAY—When ASIO executes a warrant wouldn't the warrant be executed by the AFP on their behalf?

Mr Murphy—It is in some cases. The problem has been—

Mr LEO McLEAY—And the AFP officers identified?

Mr Murphy—The problem is that when they do, the AFP officers, as I understand it, are covered by the same provisions of the ASIO Act so they may not be identifiable in the course of the warrant. The other issue is that when warrants are provided to people, as they are supposed to be under the act, in some cases they have not been or they have been provided at a later date and they are blacked out. So the person who is the subject of the warrant cannot determine at the time the scope of the warrant that is being exercised against them. In one case last year we had a warrant that had apparently travelled from premises to premises. That is something that we are putting in a complaint about that is not there yet. These are the sorts of examples that come to us.

Senator ROBERT RAY—You mention in your submission that warrants should only be issued by magistrates and judges, and that is something we have been canvassing here. A previous witness, Dr Carne, suggested that may be struck down by the High Court. Have you a view on that?

Mr Murphy—Our view is that it should be someone that has got a level of judicial independence, preferably a judge. A magistrate does not have the same security that would give them the independence to act. I also think it is important for that person to have the ability to alter the terms of the warrant that is being issued. At the moment the process under the legislation seems to make the magistrate someone that just rubber-stamps whatever is being asked for. We would like to see a role where a judge can intervene and can alter the terms of a

warrant. So if they think it is unfair, there is something wrong or there is a gross miscarriage of justice occurring, a judge can intervene and alter those terms to limit or restrict the warrant.

Senator ROBERT RAY—Can we go to my question now? I accept that—

Mr Bernie—Sorry, Senator. I think your question was directed at whether the High Court would use the doctrine of separation of powers to knock it down, saying that it is not within chapter III of the Constitution. We do not have a concluded view on that; we have not researched it. I suppose that is a possibility. I note only that traditionally, certainly under state law—and I have not researched chapter III today to come along to answer this—there has always seemed to be some inconsistency in regard to the High Court's decisions on what is judicial power and not judicial power, with the greatest respect to the High Court. It is a bit of a difficult one to answer. For instance, they knocked out a lot of the powers of the interstate commission so that it became virtually a defunct body. But they have held that courts martial, which you would think were clearly judicial in their power, do not somehow breach chapter III of the Constitution even though they are not chapter III courts.

I just note that traditionally—certainly under state laws—judges and magistrates have been involved in the issuing of warrants and it does seem that this sort of traditional approach has influenced the High Court in the way they approach their interpretation of what is judicial or non-judicial in the scope of chapter III judicial power. So I do not think it would breach chapter III. That is my view. I am not giving a concluded legal opinion in relation to it and I have not had the chance to research it for today, but I do not think that giving that power to independent judges is in breach of chapter III, just going on that. It has often been traditional to do that with judges at a state level and in other common law countries like the UK and the US as well.

Senator ROBERT RAY—One of the suggestions knocking around over the last two days is that there is no automatic right in this for a detained person to have legal representation. That is not ruled out, but clearly the intent is not to allow the detained person to ring up their local solicitor as a terrorist might want to. What about the possibility of an independent panel appointed by the law society of each state being able to be requested to go in and represent that person for the entire hearing?

Mr Murphy—In the absence of any other position, that is a basic minimum standard that could be applied. We have discussed this point of having a panel of people, who are cleared by ASIO in terms of their reputations, to deal with matters of national security. However, one of the problems is that, if you create that environment, you may get someone who is not going to look after the best interests of the person because they are in a compromising position: if they do that, they may have their security clearance rejected or revoked.

Senator ROBERT RAY—I do not think that people are very strong. Most people think that senior counsel probably would not have to go to the point of having a security clearance per se. We talked yesterday to one fairly experienced legal representative who has a good reputation. He seemed to think that quite a few of his colleagues would be keen to serve provided it did not become a week-in, week-out proposition. However, he thought they would be keen to serve if they were called on to assist once or twice a year.

Mr Bernie—We understand that that is the position in the UK. They have lawyers for security clearance cases who are cleared so that they can act for parties in those cases. One of the problems we had in the security clearance case that Cameron was referring to was that some of the evidence was given in secret and even the lawyer could not attend the hearing of that material. It has certainly come to my attention that that is the practice in the UK, but I do not know how effective it is. If that were the case, I would prefer that the vetting or nomination of those people was made in the first instance by the professional bodies such as the Law Council of Australia, the Bar Association or the Law Society.

Mr LEO McLEAY—We are not suggesting that ASIO should nominate them. That is an important point.

Senator ROBERT RAY—You might ask who vets ASIO officers. They get vetted by the Defence Security Branch. In order to have a separation here, you could get the Defence Security Branch to vet the senior counsel rather than ASIO per se.

Mr Bernie—In that right to access to a lawyer, we have said that we think the legislation should have a prima facie right to access to a lawyer. That is recommendation No. 7. It is putting it around the other way and saying that restrictions should only be given in special circumstances. However, with regard to security cleared lawyers, there is a proposal which, as an organisation, we have not considered. I have to say that we have no position as an organisation in relation to it, but I am aware that there is some process in the UK. As the Hon. Leo McLeay said, we do not want ASIO nominating the lawyers. I can give you an example. In the US, the appointment of what are effectively public defenders has resulted in a very low quality—if I may say this with respect to my American colleagues—among American defenders. In the US, a lot of convictions have been overturned, even in death penalty trials, because the quality of the lawyers appointed at the initial trails was so low. If you are going to move in that direction, it is important to make sure that it does not end up like that.

Mr BEAZLEY—I do not think that you would want to think that you had been defended by an idiot. There has been a lot of discussion here over the last day or so about how the people who are the prescribed authority should conduct themselves and how they should be appointed. The suggestion has been made that this is going to end up being pretty unsafe in front of the High Court given their contemporary attitudes, and that it may be made a bit safer if the prescribed authority did not then move from approving the warrant to sitting in on the interviews. I know for certain that the drafters of the bill see that as a protection—the fact that the prescribed authority would sit for the interrogation—for the person who has been brought before ASIO. If it were to make it a bit safer in terms of the High Court's position on this and if the person who is the prescribed authority did not sit in the investigation, should the lawyer be the person from that panel representing instead?

Mr Bernie—Yes definitely, particularly if you are talking about the prescribed authority being a judicial officer. Mr O'Gorman who is President of the Australian Council for Civil Liberties was unable to give evidence.

Mr Murphy—It is one of the points that he made in his submission, that there should be a public interest monitor. It is a concept that is used in Queensland, where there is someone who sits in through the entire process, so they will be there while the warrant is issued, they will be

there while they are detained and then questioned and they will act in the public interest to make sure that the process is genuine.

Mr Bernie—That would probably make it less likely to be subject to a chapter III type attack.

Senator ROBERT RAY—We have also grappled with what we see as a problem at the moment where a warrant is issued, a person is detained and the 48-hour period starts before a prescribed authority. There are no rules or guidelines, other than a vague reference to treating the person humanely, as to how they can operate over that 48-hour period. What we have suggested, which has worked on other occasions but is not quite analogous, is a requirement on ASIO to develop a protocol of questioning and other behaviour; for instance, do they detain them in a jail in the intervening time or do they go to a hotel room or something? And they should have to have that cleared by the Inspector-General and also notified to this committee for examination. I know you would not say that is the ideal solution—

Mr Murphy—Absolutely not, but all these points are things that move it forward from the position the legislation is currently in. There are very few considerations or protections in place and anything that can be added is of benefit. I do not think it changes the overall concept that it is a bad idea to be going down this path, but it certainly will provide some form of protection. The only other thing I would add is that there should be some reporting on that as well, so, if you do put a protocol in place, it should be done with some form of community involvement so that it is wider than just ASIO and you have got people that do have a greater degree of knowledge about human rights, and what is fair and what is not, involved in the process. There should also be some sort of reporting to see how they are abiding by it, so in the case of each person that is detained there is some form of reporting, whether it is to parliament or it is made public, so that you know it is being followed.

Senator ROBERT RAY—But that would go back to the point you make about compensation, wouldn't it?

Mr Murphy—It may, but if ASIO are not doing anything wrong then what do they have to fear?

Senator ROBERT RAY—I was not raising it in that context, but you could link your views on compensation as to whether they followed the protocol.

Mr Bernie—Sure. But all that goes back to needing a certain amount of accountability about that, and in some cases, as Cameron has referred to, at present we find that when powers are used by ASIO, or even AFP officers seconded by ASIO, they often get the benefit of the secrecy provisions of the ASIO legislation, which makes it a little bit difficult then for a person to seek that sort of review. That is why we say the AFP would be the better body to have any sorts of powers in relation to detention.

Senator ROBERT RAY—Except that when we look at special branches and why they have operated we take a big step back, I have got to tell you.

Mr Murphy—One of the points is that, if you are looking at it from a point of view where you are out in the public, one of the problems is that in any of these processes all that has to happen is that an organisation just mentions national security or that this is going to be damaging to our national interest and all of a sudden it is thrown into a system of secrecy. That does not seem to have to be proved through any formal structure or with evidence, it just has to be alleged, and then you are in a system that is stacked against you. Hopefully at some point in this process we can make it more open and accountable where the public can see what is going on. Then I think you get a lot more trust in the process.

CHAIR—As there are no further questions, may I thank you both very much indeed for being with us today and for your contribution.

Mr Murphy—Thank you very much for the opportunity.

[2.00 p.m.]

RANSOME, Ms Kay, Registrar, Administrative Appeals Tribunal

CHAIR—I welcome Ms Kay Ransome who is representing the Administrative Appeals Tribunal. Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make any introductory remarks before we proceed to questions?

Ms Ransome—No, thank you.

Senator ROBERT RAY—I have a very simple question. It is a factual question and you can give me a ballpark figure. How many members of the AAT would be available to act as prescribed authorities given the definition in the bill?

Mr LEO McLEAY—Which is basically how many legally qualified AAT members are there?

Senator ROBERT RAY—With five years experience.

Ms Ransome—There are 34 at the moment.

Mr LEO McLEAY—Are all deputy presidents legally qualified?

Ms Ransome—Deputy presidents have to be legally qualified in the same terms as in the proposed section 34B of this act: they have to have been enrolled for five years as a legal practitioner in the same way that federal magistrates also have to have that same qualification.

CHAIR—Did you have any role in the drafting of the legislation?

Ms Ransome—No.

CHAIR—Were you consulted at all about it?

Ms Ransome—We were advised by the Attorney-General's Department that this was proposed, but we were not consulted on the form of the legislation.

CHAIR—What was the general reaction?

Ms Ransome—The AAT does not have a view, one way or the other, as to the appropriateness of AAT members undertaking the role of a prescribed authority. All the AAT says is that, if AAT members are made prescribed authorities, they will carry out that function to the best of their ability.

CHAIR—Can you give us your understanding of the authority that you would have in the bill?

Ms Ransome—In terms of issuing the warrant?

CHAIR—Can you go through the process with us?

Ms Ransome—As the bill presently stands—and of course we recognise that there may be some changes through the parliamentary process—our understanding is that the first thing a prescribed authority who is an AAT member would know about anything would be when they were asked to issue the warrant, which had been through the process set out in the bill before the Attorney.

Mr LEO McLEAY—Let us go back a step. How would that member of the AAT get that matter before them? Would it be given to that person by the president or would ASIO go directly to a particular member?

Ms Ransome—We have had some very preliminary discussions with ASIO and also with the Attorney-General's Department on the practicalities of this whole process. At this stage, given that we have not seen the final form of the legislation, we have not formed plans or views over those things. What I can say to you, Mr McLeay, is that in relation to telephone interception warrants we have administrative arrangements between our registrars and the various law enforcement agencies whereby that is the first point of contact and then the registrar will contact the member of the tribunal who is available to issue the warrant. So it is, in the first instance, an administrative arrangement. It may well be that, for example, I am the liaison point between the tribunal and ASIO, and contact would initially be made through me, but those issues as I say have not yet—

Mr LEO McLEAY—Let us assume that it is you. How would you decide? Would you just pick up whoever was free at that moment or would you have a smaller group of people who you thought were more experienced than others?

Ms Ransome—I am not quite sure how to answer that. I would assume that the process in which members of the AAT are nominated by the Attorney would be gone through at an early stage with the president of the tribunal. Our experience in relation to telephone interception and other warrants is that the Attorney or in certain cases the Minister for Justice and Customs will not nominate an AAT member unless that member consents to be nominated. So the process of vetting, if you like, would have been gone through at an earlier stage. I would assume that once a member is made a prescribed authority that it will then go on availability.

Mr LEO McLEAY—A member would be made a prescribed authority?

Ms Ransome—I am using 'member' as a generic term, as a member of the tribunal.

Mr LEO McLEAY—Clarify this for me: are you saying that you would envisage that some members of a tribunal would become people who would be called upon to be prescribed persons and that others would not be?

Ms Ransome—There may well be some members who do not want to be prescribed authorities; I do not know.

Mr BEAZLEY—This is very different from telephone warrants, isn't it? This actually involves the prescribed authority and the member of your tribunal that is given or takes the guernsey and makes them part of the interrogation process. They sit through the interrogation process and, while obviously they would not be interrogators, we are talking about a situation where there probably would not be more than three or four people in the room—maybe the odd one or two more—and the persons are in a position of considerable and intense engagement. In fact, they are presiding; they are holding the ring. If you were to get this power, would you not assume that you would be obliged to actually set up a separate panel in your operation de facto? You may not do it formally, because I would think this is way beyond anything that the appeals tribunal has ever come anywhere near in its history to this point.

Ms Ransome—That may well be true, and that is what I was trying to allude to before: that that process, in terms of the people within the AAT with the requisite qualifications who are nominated, would be sorted out between the president, the Attorney and those members who do consent to be nominated at an early stage. I agree with you and recognise entirely that the types of warrants and the issues that we are dealing with are very different from, for example, telephone intercept warrants. But the process of nomination of the members is the same, and that is the process that is gone through in relation to the telephone interception warrants. So, in effect, yes, there is a panel of people within the AAT. At the moment, in terms of telephone interception warrants, there are only 17 members of the tribunal out of a possible pool of 34 who issue those warrants.

Mr LEO McLEAY—What would be your current predisposition about how this interrogation would occur? Would it occur in a courtroom or in an office somewhere or in a prison cell?

Ms Ransome—As I said earlier, we have had some preliminary discussions with ASIO, and this is one of the matters that we have raised as to where the questioning would take place and whether it would be on the AAT's premises or other premises. That, I should imagine, will be dictated by what security arrangements do need to be put in place. The AAT itself does not have facilities to detain people. We are in commercially rented premises in most places around the country. But at this stage these issues have not been resolved.

Mr LEO McLEAY—Where do you think it is going?

Ms Ransome—It is going to where I have just said. At the moment we are in the very early stages. I would hope and would imagine that the tribunal would enter into some form of protocol with ASIO—perhaps ticked off by the Attorney-General's Department or the Attorney himself—in relation to the arrangements that would be put in place.

Mr BEAZLEY—This is just for the record so that you can clear up any points or so at least you can express a view on behalf of your tribunal members on the points that have been made either overtly or by implication in remarks that have gone to discussing this point about whether or not you should have such a role. A suggestion is made that the fact that your members are available for reappointment—and may indeed desire it—puts them in a situation where they

may well be subject to pressures or feel subject to pressures to conform to a particular requirement coming forward from the Director-General and/or the minister and that therefore they might not necessarily be reliable in exercising an independent judgment on the value of the application for the warrant. What is your view?

Mr LEO McLEAY—Or just your perception of that.

Ms Ransome—The members of the tribunal regard themselves as being, and indeed they are, quite independent of the minister and of the government. Members of the tribunal regularly overturn decisions of ministers et cetera. My firm belief, and the firm belief of the president of the tribunal, is that members of the tribunal would not issue a warrant for the detention in custody of a person simply because they thought that was what the minister wanted.

Mr LEO McLEAY—What are the terms of members of the tribunal?

Ms Ransome—They are variable. Some members of the tribunal have tenure to an age.

Mr BEAZLEY—Is that right?

Ms Ransome—A number of other members are on term appointments, mostly for up to a maximum of seven years.

Mr BEAZLEY—Is the tenure to an age a grandfathered position?

Ms Ransome—Prior to about 10 years ago, all full-time appointments to the tribunal were made on a tenured basis, although there was provision for term appointments. The practice over about the last 10 years has been to move away from tenure to term appointments, but we still have a few deputy presidents and senior members who are tenured.

Mr BEAZLEY—Do you know how many?

Ms Ransome—We have one who retires today, so that is one less. We have three deputy presidents who are tenured to age 70. I am sorry; if you want precise figures, I would have to get back to the committee.

Mr BEAZLEY—It would be small numbers.

Ms Ransome—Yes. Five or six senior members.

Senator ROBERT RAY—Is there still a proposal to go to a mega-appeals tribunal?

Ms Ransome—Our understanding is that the government is still considering what it is going to do in relation to what was to be the Administrative Review Tribunal.

Senator ROBERT RAY—So we could be faced with another bill with a much bigger and more varied tribunal that has these powers.

Ms Ransome—That is a possibility.

Senator ROBERT RAY—All of which would be appointable, or reappointable, by the government.

Ms Ransome—Yes. You might recall that this issue was raised at the time that the tribunal members were given the telephone intercept powers as well.

Senator ROBERT RAY—Yes. Do you feel any concern that, in the bill as it currently stands, an AAT member, as the prescribed authority, may issue a warrant on someone brought before them, but that there are no guidelines as to what happens in the next 48 hours; there are no guidelines as to how long the questioning can last or where the person is shifted off to in the non-questioning period et cetera?

Ms Ransome—Again, that is one of the issues that we have discussed in a very preliminary way with ASIO and the Attorney-General's Department. We see that, in relation to these aspects, it would be highly desirable for there to be some protocol or code of operation in force between the tribunal and ASIO. As you are aware, there are some directions powers under the proposed legislation for the prescribed authority to give some directions as to the method of detention and also to bring people back for questioning et cetera. But we would hope that, rather than using those powers in an individual case—particularly in relation to the length of time of questioning; people have to sleep some time—

Senator ROBERT RAY—Not under this they don't.

Ms Ransome—I think our members would like to go to sleep at some point.

Senator ROBERT RAY—If there isn't that protocol, there is going to be a massive disincentive for your members to participate.

Ms Ransome—Yes; that could well be true. Certainly, the development of a sensible and fair protocol in relation to all parties would be something that we would see as a priority, once the final form of the legislation is known.

Mr BEAZLEY—Do you think it would assist you in that process and that your tribunal members would feel better if the person who was subject to an interrogation had a representative there, directly for himself or herself?

Ms Ransome—It is very difficult for me to comment on that. I am not quite sure what would be in the mind of the members. My understanding of the role of the prescribed authority is that they are really there in a supervisory way to make sure that the questioning is conducted in accordance with the warrant, that it does not go outside of that, that there is no prejudicial treatment et cetera. In certain circumstances a legal adviser can be present, if that is provided for by the warrant. It may well be, in the interests of safeguarding the interests of the person who is under questioning, that a legal representative could be there.

Mr BEAZLEY—Do you think your members participating in this would be more comfortable if they knew that there was some limitation on the number of times that the warrant they

originally provided was going to be reissued—in other words, that they were not at the starting point of a cat-and-mouse game with a particular individual? I think this is a very improbable scenario, but it is a possible scenario under this legislation that the Attorney-General, if he is minded every couple of days, can keep this person in detention. Would your members prefer to see some time limit on all of this?

Ms Ransome—As you are aware, once there have been two consecutive warrants then the matter has to go before a deputy president of the tribunal. The deputy president can refuse to issue the warrant. They cannot vary the content of the warrant. They can issue it or they can refuse to issue it. I would imagine that would be a matter that would be taken into account by the deputy president in deciding whether or not to issue the warrant.

Senator ROBERT RAY—It would be a lot easier to process, though, if they had a legal representative there to argue before the deputy president at that stage.

Ms Ransome—That may well be.

Senator ROBERT RAY—This act requires an interpreter to be present in certain circumstances.

Ms Ransome—Yes.

Senator ROBERT RAY—Do you have interpreters available to you?

Ms Ransome—We use interpreters regularly in relation to our normal work. We use appropriately qualified interpreters through various interpreting agencies around the country.

Mr LEO McLEAY—You just mentioned that the deputy president does not have to agree to the warrant. That is true, but I seek your opinion on this because I was going to ask the people from Attorney-General's about it later on. Clause 34F subclause (f) says that the prescribed person can issue a direction that the person be released from detention, but then you go on to subclause (2)(b) of that same section where it says that the prescribed authority is only to give a direction that:

has been approved in writing by the Minister.

If the minister has not said the person can be released—maybe the minister has said the person cannot be released—how could the prescribed person issue a direction that the person be released from detention?

Ms Ransome—My understanding of that particular provision would relate to circumstances where yes, a person who has been detained under warrant has been brought before a prescribed authority for questioning. The questioning is over, there is no further questioning to be undertaken, so the prescribed authority in those circumstances could direct that the person then be released from detention. That is my preliminary understanding of that section.

Mr LEO McLEAY—What do you think is the import of (2)(b), then?

Ms Ransome—I think that would really relate to circumstances such as envisaged in (1)(d)—for example, if the person is held incommunicado in detention. If the prescribed authority were of the view that the person really ought to be allowed to have contact with, for example, a legal adviser, while (1) says that a direction can be made by the prescribed authority to that effect; (2) means that that direction could not be made because it would be inconsistent with the warrant and there would be no minister's approval. In those circumstances, the prescribed authority would need to contact the minister and say, 'For x and y reasons, I believe that this person should be able to contact this other person. Will you give your approval?'

Mr LEO McLEAY—Would the minister then have to change the warrant?

Ms Ransome—I do not think so. I think that this section would then, once the prescribed authority has approval in writing from the minister, act as authority for the direction to be made under subclause (1).

Senator ROBERT RAY—You cover a wide range of legislation. Does anything under that legislation give you the right to issue a warrant to detain and strip search a 10-year-old?

Ms Ransome—No.

Mr BEAZLEY—You do not actually operate under the Customs Act? Is there no Customs Act material referred to you?

Ms Ransome—Not in terms of detaining people. Again, warrants under the Customs Act are listening device warrants.

CHAIR—Ms Ransom, can I thank you very much indeed for giving us of your time today. We very much appreciate your evidence. Thank you.

Proceedings suspended from 2.20 p.m. to 2.37 p.m.

LEWIS, Mr Rodney, Council Member, Australian Section International Commission of Jurists

MARK, Mr Steve, Chairman, Australian Section International Commission of Jurists

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Lewis—Yes, I do.

CHAIR—Please proceed.

Mr Lewis—This bill contains a proposal which could be summed up with the phrase 'arbitrary detention and arrest'. The right to freedom from arbitrary detention and arrest goes back more than 370 years—I counted it—in fact, 373. So it is a very long tradition that the parliament is dealing with. Without freedom from arbitrary arrest and detention there can be no freedom for exercise of religion and worship, assembly and movement, or speech and expression. All of them are at risk if arbitrary detention is abroad.

Despite the 11 September attack on the United States, the threat to Australia has not been demonstrated. You will see in the ICJ submission a reference to a recent report of the United States State Department on the situation and security assessment in relation to the Olympic Games and assurances which the Australian people were given in the course of the last election about the security position in this country.

Similar measures such as these have only ever existed in this country during wartime—and by that I mean the First World War and the Second World War. Reference is also made in the ICJ submission to cases which have come before the High Court under the defence regulations—I think one is in relation to the First World War and two arise out of the Second World War.

We submit that the bill is poorly rationalised and explained by the government, certainly in relation to the Attorney's second reading speech. Again, this paper addresses the matters which the Attorney used in rationalising the introduction of the bill. The bill, if it becomes an act, will breach our obligations under the International Covenant on Civil and Political Rights. This bill is an unprecedented affront by Australia, if enacted, to the instruments to which we have adhered over generations and which were promulgated by the United Nations.

The proposal embodies measures which were not required by the United Nations' covenant on the prevention of terrorism to which the paper refers. Not even the United States has gone so far as this government has in its measures in dealing with the question of arrest and detention in the context of a terrorism threat. Their legislation addresses non-citizens; ours makes no distinction. Why is it that the United States did not take its legislation quite so far? That is a

rhetorical question, by the way, because I do not know the answer. We could put some theories, but that is all they would be.

We concede that the United Kingdom and Canada have legislation which is probably more draconian than the legislation proposed. But, having conceded that, we would urge upon you that that is not by any means a sufficient reason for us to enact a similar piece of legislation. 'Forty-eight hour detention' is a misleading phrase. Again, in the paper, we address some of the clauses which seem to permit an open-ended detention regime. The measure will patently not assist in preventing any further determined murderous attacks like those of September 11. How could it possibly be imagined, if it has been by the proponents of this bill, that the people who gave their lives in those aircraft on that day or their associates would have informed on their plans within a period of 48 hours and against the terrible threat of being detained for 48 hours. It does not make sense.

The measure is open to extension. Statute creep is what our paper calls it. It is a concept which will doubtless be familiar to you all. One is led to wonder, if a real threat emerged in this country or an attack actually took place, what sort of proposals would follow once the wall had been breached. Will we extend detention indefinitely, will we make answers admissible in evidence during interrogation of this kind, will we remove the right expressly to habeas corpus? Again, statute creep leads to the proposition that the states and the territories will be put under great pressure to extend similar measures in relation to other heinous crimes such as drug supply, murder, paedophilia and so on. One can only imagine what the talkback jockeys would do with a proposal like this, or a law like this once it is enacted, once the next round of demonising takes place.

We would say that the bill is an affront to the rule of law in Australia. It is indeed the most egregious attack, at least in my experience, on our democracy for over 50 years. Last Thursday I happened to be listening to the radio to a couple of children being interviewed on Anzac Day. The gist or the drift of what they said in response to the question by the interviewer, 'What do you understand by Anzac Day,' was the reply, 'Well, the Anzacs gave their lives, and they gave their lives for our freedom.' To that all one could say, I think, is 'Lest we forget'.

The Australian section of the International Commission of Jurists rejects without reserve the proposed bill and what it represents. It is shocking to realise that 44 years of striving to promote and protect the rule of law—we were established in Australia in 1958—in our region may be undermined and our rule of law in Australia subverted by this bill. That is our opening statement.

CHAIR—Thank you very much for that. You did mention some breaches of our international human rights obligations. How serious do you think that is, especially in light of the fact that there are many countries around the world which are also putting in specific antiterrorist legislation at the moment? Do we have to give a bit to get that security?

Mr Lewis—There are two propositions in there: the first, do we have to give a bit, and the second, how seriously are our obligations affected. You will find, indeed, in the submission a quote from the founder of the Liberal Party—a reference to what happens if, in defending our freedom, we lose it.

Senator ROBERT RAY—Was that in his second reading speech on the Communist Party Dissolution Bill?

Mr Lewis—I believe that may be. I am not sure about that.

Mr BEAZLEY—No. It was 1939, 7 September.

Mr Lewis—But what prescience, speaking as a former chair of the Liberal Party's law committee—what great prescience. How are our obligations affected? Well, egregiously. We have not just signed, we have not just ratified the covenant; we have signed and ratified the optional protocol, and we have touted this as evidence of our credentials in human rights for over a decade. The International Commission of Jurists has gone around, at least in Australia, and taken the lead for the ICJ around the world in this region, and exhorted governments to do the same. We, of course, have not been the only ones. So it is a bit like somebody pulling the carpet from under you. I know how this will affect our reputation on the international scene amongst those countries which hold highest the ideals which are expressed in the covenant.

Senator SANDY MACDONALD—You mentioned that you thought the UK and Canadian legislation was more draconian. In what way? I think that is the first we have heard that that was the case. In what way is their legislation more draconian?

Mr Lewis—In relation to the UK legislation—

Senator SANDY MACDONALD—And, further, in connection with what you have just said, in the sense of our international reputation being held up. Surely they are two countries we would like to be admired by or be comparable to. Is their legislation more draconian than ours? It is a rather unusual comment.

Senator ROBERT RAY—Coming from a country, Canada, that is the biggest NGO in the world.

Mr Lewis—I can take you to some of the provisions of the Canadian law. I cannot take you to the provisions of the United Kingdom law because I did not bring the document with me. That, of course, has been in place, as I understand and recollect it, since about 1977 and arises from the problems in Northern Ireland. So the United Kingdom had a specific terrorism issue which it addressed by way of that legislation. Whether they did the right thing is debatable. I would be very happy to debate that, but the fact is that they did it and there is no gainsaying it from a distance of about 12,000 miles. As far as Canada is concerned—

Senator ROBERT RAY—Can I interrupt you for a moment. I think the reason Senator Macdonald asked that question was that a previous witness, expressing a lot of the same concerns as you, said that the UK bill was less draconian and we should think of picking up some of the provisions of that and putting them into our bill. That is where he is coming from.

Mr Lewis—I have no immediate response to that. I would be happy to look at it. Senator, was that person referring to other legislation and not this particular legislation?

Senator ROBERT RAY—No, he referred to the security bill as updated post September 11, but I think he agrees with you that the Canadian bill is more draconian.

Mr Lewis—I am sorry; I cannot respond to that in a specific way. I can refer to the Canadian bill, if that would be helpful.

CHAIR—That could be very helpful.

Mr Lewis—A paper dealing with it may be found on a web site of the Canadian Association of University Teachers. There is a paper titled 'Civil liberties, human rights and Canada's new national security legislation'. The web site is www.caut.ca. The paper reads:

> The legislation creates "Investigatory Detention" which allows the police to detain an individual suspected of having information related to a "terrorism offence" and compel that individual to answer any questions put to them.

No difference. The paper continues:

> Should that individual refuse to surrender their right to silence, there is no limit on the amount of time that he or she may be detained.

I think our bill makes provision for a penalty of five years in the case of somebody refusing to answer, so there is a subtle difference. The paper continues:

> The legislation also provides for "Preventive Detention" that allows the police to detain an individual suspected of planning to carry out a "terrorist activity". An individual arrested under this section can be held for 72 hours without charge.

The paper goes on to describe how that person could be held in perpetuity without charge or trial. To that extent it is a runaway from ours.

Mr BEAZLEY—I think that makes your point.

Senator ROBERT RAY—I think you're safe because the ASIO people at the back of the room didn't take notes then, so they don't intend to follow!

Mr BEAZLEY—With respect to the call you made about the character of this and rolling back decades of reputation, is it directed at this bill or at the package? It struck me as a little bit florid for the bill itself.

Mr Lewis—In the paper which we presented it is confined to this particular bill and to that provision. Justice John Dowd, who is our president, has addressed another committee and has also made public statements about other aspects of the security package. With me, by the way, I have Mr Steve Mark, who is the Legal Services Commissioner for New South Wales. I beg your pardon for not introducing him.

Mr Mark—I am here as the Chairman of the ICJ, Australia section, not as Legal Services Commissioner.

Mr Lewis—Indeed. I was about to say that.

Mr BEAZLEY—You said there was no identifiable threat to Australia per se—that we have had no terrorist acts—and the constant briefing that we have had in public has been that a low level threat exists and no more than that in our environment. This legislation is part of an international response in many ways to a perceived changed level of threat and to a conviction on the part of our security authorities and others that there is not simply a problem of a domestic threat in any particular country, that the organisation that is being confronted by these efforts around the globe now operates transnationally and, whilst there may be no threat emanating from a particular country from the activities of Al-Qaeda, it is conceivable that a safe haven or operations could be supported financially or in other ways from a country in which no threat exists. So we are not just dealing here with problems internal to Australian security; we are dealing with problems which may emanate from Australia for other people. We are not just addressing our domestic need; we are addressing our international responsibilities here. Ignore this legislation—I am not asking you to defend this legislation. In the circumstances of the events of September 11where that has become a common perception—and there is now a clear-cut picture that there is a substantial international terrorist threat, irrespective of anything in Australia—do you think there is anything in Australian law that needs changing to address it?

Mr Lewis—There may be a need to address conspiracies to commit terrorist offences in other places outside of Australia. Moreover, the International Criminal Court will exist for the purpose of dealing with these sorts of issues, and for that reason alone Australia should be fully supporting its establishment. Although that is a fairly short reply, does that answer your question?

Mr BEAZLEY—It was very unfair of me to confront you with that particular question. We have been hearing for the last couple of days views about this particular legislation, about 90 per cent of which I happen to agree with—at least, if I do not agree with it in totality, I can see the problems and the problems simply have to be dealt with—but there does not seem to have been much addressing the fact that there is a changed situation internationally and a much closer relationship developing between intelligence authorities to try and deal with that, and a view now that what you are dealing with here is not a phenomenon confined to one country which is impossible to be understood outside the context of international cooperation between those engaged in terrorist activities. So I thought I might try it on somebody who had a real objection to this legislation—that is, whether they thought there was anything we ought to be doing about it.

Mr Lewis—Without addressing the legislation itself, because you have invited me not to do that, we all have memories long enough to remember the post-Second World War Cold War period. The first attempt on the part of an Australian government to legislate in relation to that perceived threat of ‘reds under the bed’ failed. The Cold War continued for decades after 1951, yet we seemed to be able to cope with the possibility of imminent invasion and war. Terrorism was around, of course, and well and truly alive in those days. I do not think that we should be carried away by what was the most visible, murderous attack in history. Let us put it in context and let us deal with it in context. Let us not surrender to Osama bin Laden and his associates by subverting the very thing they wish to subvert.

Mr BEAZLEY—How far removed from our international obligations do you think it would be were we to—for example, take this legislation that we have, remove provisions related to self-incrimination—protect any information given by individuals that can subsequently be used

in the charges against them—assure them of some degree of legal representation and put some limits on the amount of time they can be detained?

Mr Lewis—No, they are still detained without charge. They are still detained without any trial or any thought of a trial. This is interrogation for its own sake and, for that reason, it is a complete departure from what we have been used to and what those who went before us a very long time ago fought very hard for. We should not concede that easily. To do it because other nations are doing it is just simply not a sufficient reason, from our point of view, because one obviously needs perspective. One needs to look at it in the totality of history and geography. There is no sufficient reason, in our view, for legislation of this kind, where you have interrogation for its own sake: where there is no charge, there is no allegation of criminality and there is no allegation that a person who is under interrogation has committed any offence. As I said, that goes back to 1629—the power of the king to detain at his pleasure, for no particular reason, was overcome.

Senator SANDY MACDONALD—There are powers of interrogation, surely, where there is no charge, in quite a range of things. Royal commissioners and ICAC commissioners have a power of interrogation. But what you are saying is they do not have the power of detention at the same time.

Mr BEAZLEY—They do if they find you in contempt.

Senator SANDY MACDONALD—Yes, that is right.

CHAIR—Mr Mark, if you would like to come on the record, please feel free.

Mr Mark—I support very much what Rodney has been saying and I do think that it is important to keep everything in context. What Mr Beazley said is that we have to look at this slightly differently after September 11 and I think everybody is looking at the world differently after September 11. Does that mean that we have to redefine the very basis and the core of who we are and the structures under which we live, to be able to deal with the world post September 11? I do not think we do.

We have mentioned royal commissions. Certainly, royal commissions have powers of interrogation without charge, but if you object, you get charged. Then you have a charge to answer and you have an appeals system et cetera. What we are saying is that that is the use of the rule of law. Here we do not have that at all. I remember practising law in England during that time when the antiterrorism laws first came in. And they were supported by another series of laws in England, called the ‘sus’ laws, where you could be arrested on the suspicion that you might be going to commit a crime.

You can imagine how useful those were in trying to control the movement of people around England, which was really what it was all about. Those laws were vehemently objected to and I was a part of the process that fought them in England, successfully. And we see these coming up occasionally when society feels that it needs powers to deal with a threat that is still undefined. It is understandable but, in our view—very strongly—it is not understandable enough to obliterate the building blocks of this society in which we live, based on the rule of

law and the building blocks of a pluralist, democratic society. We think it is that serious when you start attacking these rights.

Senator ROBERT RAY—Do you think there is a risk to ASIO in this legislation? It is seeking substantially increased powers. And if there is a terrorist act that they do not detect in Australia, can these laws then rebound on them?

Mr Lewis—If they are not enacted, do you mean?

Senator ROBERT RAY—No, if these laws are enacted. People always go to the bona fides of ASIO—'Oh, we don't really trust them'—but I think there is a bit of a risk involved for them. They seek extra powers and they get extra powers. We all know that not all terrorist acts can be detected by a security agent. There might be a risk to them through not having detected it with these increased powers.

Mr Lewis—Indeed there would be. As I have already observed, there would be no way the September 11 attack would have been deflected by a provision like this—

Senator ROBERT RAY—I think we could contest that. It is possible. I think we would agree on the assumption that if any one of the 24 were pulled in—

Mr Lewis—They would have said nothing.

Senator ROBERT RAY—They would have said nothing. Had 20 of the spouses or mothers been pulled in, then it would have been a possibility. I am not advocating that, but I am just saying that I think the jury is out on it.

Mr Mark—The jury must always be out on it because you cannot make the determination until after you have made the determination—and you do not have that opportunity.

Mr BEAZLEY—It is a hard one, but, if you actually look at what has happened since September 11, it is quite obvious that cooperation between national intelligence communities internationally and the transfer of information have grown exponentially. Two very serious terrorist activities have been disrupted—one in Singapore and one in Italy—that we know of. There may well be others. Both of those were a product of timely information passing between a multiplicity of intelligence authorities which then caused that to occur. I do not know which particular intelligence authorities made a contribution, but it would have been unlikely not to include at least either the UK or the US in those circumstances.

In the case of the UK, intelligence authorities are operating with powers which you identify as somewhat more draconian, while others identify them as somewhat less so, but which are nevertheless different from the powers that now exist in Australia. It is not presented to us by ASIO and others as part of an evidentiary trail to lead to the prosecution of a particular individual for an act of terrorism; it is part of the collection of information which may in a timely way stop something like September 11 or the destruction of the Australian embassy, perhaps, or related facilities in Singapore—perhaps the American embassy or whatever, in that particular instance. In the case of the Italians, it was the poisoning of the Rome water supply or a part of it. That is the sort of context in which it is being introduced—that is, the passage of

timely information—not the evidentiary base of a prosecution. To your mind, if you made the law reflect that character, would that in any way militate against the strictures you are offering?

Mr Lewis—Not from our point of view.

Senator SANDY MACDONALD—You have to share with us the balance that we have to find. Mr Beazley gave you a range of concessions to this legislation and asked if it would be acceptable, and you said no. But then when asked what would be acceptable and what changes to Australian law are necessary, you did not have any suggestions. We share this response; it is not something the Australian government shares as a whole, not just on a party political basis. We have to find the balance and we need people like you, the International Commission of Jurists, to be a part of that. But you say, 'No, this is not acceptable—period.'

Mr Mark—We are happy to be a part of it; that is one of the reasons we are here. But we are here for a specific purpose, not to answer the wider question. We are very happy to provide you with submissions and our views on what might be appropriate or what we might be able to do. That is not beyond our capacity at all. I think it would be just a bit much for us to be expected to do it off the cuff here.

Senator ROBERT RAY—Sure.

Mr Mark—We are very happy to do that. But in terms of the questions you ask about the sharing of information, of course we understand that. As you quite rightly say, the intelligence agencies of the world have been sharing information since they have been around, and sometimes they share it more than others. I understand that the unofficial sign of ASIO—the scorpion—was given to them due to the fact that it was their call sign during the Second World War. It is not on their official crest. It is all about relationships, and these relationships are really important relationships. It is almost like the Australia card: to what extent do we go to get information for a purpose that is undoubtedly laudable? To what extent do we balance those things? All we are saying in relation to this particular piece of legislation is that it goes too far.

Senator ROBERT RAY—It is 15 years later and private institutions hold a thousand times more information on me than the Australia card ever would have done.

Mr Mark—Of course. We are not denying that. But the issue is if you make a political statement and if you pass a law then, as Rodney says, you can open the floodgates as well—state law et cetera.

Mr LEO McLEAY—Mr Beazley put to you a proposition concerning one of the things that we are grappling with. If this legislation is about gathering timely information that may prevent a catastrophe—if that is what the legislation is about rather than setting up a regime to prosecute people for terrorism or for thinking about terrorism—then can we not organise a set of arrangements which will protect people's civil liberties, allow the security service to attempt to acquire this information if they need to and have an appeals system which will allow people to not be the prisoner in the locked room, which you probably could be under this legislation at present? We can see a lot of the flaws in it like the fact that there is no judicial review, the fact that if a prescribed authority and the Attorney-General are willing to continue to sign warrants

then you can lock a person up forever, and the fact that people do not have any legal representation.

Some of the things that the committee was thinking about were, for instance, on the issue of legal representation. What would your view be about what ASIO says—that one of the problems you might have with legal representation is that the lawyer will alert the people who are in the game together? Maybe the answer to that is that there could be a panel of lawyers who are nominated by the Law Society or by people like yourselves, who ASIO gives a tick to as well, to provide the legal advice. There could be a provision where, if you are at the end of the first 48-hour period, you could make an application to be released. If the Attorney-General or the prescribed person will not release you, you could make an application to either an open or closed court to do that. If the mechanism is to get timely advice which can help prevent a catastrophe, can we put safeguards in to allow us to get the timely information and also to protect people's rights?

Mr Lewis—Mr McLeay, we could be sitting here debating the need for such a measure in relation to something like the Port Arthur massacre. Indeed, if ever there were another such incident, consistent with what we have put, no doubt the whole community would be inflamed and would demand such a measure in every state and territory.

Mr LEO McLEAY—The outcome of the Port Arthur massacre was that we banned guns, which you could never get done before that. The outcome of a lot of the September 11 stuff is that there were trails around and, if they had noticed them, they might have averted the catastrophe. If a bunch of politicians in the future do not notice those trails, they will be the ones who get burnt as well. That is where you are getting a political reaction to this, which is that no-one wants to be fingered for letting this happen twice.

Mr Lewis—In that case this is mild compared to what might be done, isn't it? Where do you draw the line? We are here to submit that we draw the line before this particular measure, not after it. The measure is obviously designed to interrogate, and probably to intimidate, people who may be prepared to give information about the whereabouts of others: wives, daughters, uncles, aunts, grandmothers and grandfathers. Mr McLeay, you mentioned that you have this responsibility. If indeed these sorts of interrogations take place and the outcome is not as ASIO intends, then there will be blame sharing and blame shifting and there will be a lot of political agitation from the little people who have been pushed around by the board. It is absolutely clear—nobody in the room would have any doubt—that for terrorists and their associates this is obviously not a deterrent. It is only the people who are almost certainly disassociated from terrorist objectives—

Mr McARTHUR—You are making a lot of presumptions in those statements. Mr McLeay is asking you a question. You are opposed to the legislation but you have not compromised any view as to what the parliament of Australia might do in confronting this political reality. You say you are against it and then you make a whole lot of suppositions about who might be the suspects and what sort of people they might be, but the parliament will be responsible if we do have another September 11 type disaster in Australia.

Mr Lewis—Mr McArthur, the reason we are not ready with responses and with suggestions for other measures is because our job is supposed to be to put the issues concerning the rule of law. But had we been prepped or had we anticipated that kind of question, and we did not—

Mr McARTHUR—You are really saying that the bill will be opposed. You have not talked about an amendment, you have not talked about an adjustment and you have not given any helpful suggestions as to how the bill might be improved. You are just saying: 'We oppose it. Finish of argument. It is quite clear: the bill is opposed.'

Mr Mark—And it is. Mr Beazley made a range of suggestions. I could easily have said yes to every single one of them—they are very good suggestions—but then we have to ask if that is enough. We have to say no, because it does not get to the very basic issue of: are these people under charge or not? That is where the question of rights and the question of detention without arrest comes in, and that is the basic premise. You can walk around the outside of it and make it more acceptable. You can give people more opportunity, varying degrees of things happening—

Mr LEO McLEAY—So you reckon this is just a bad law and that no amount of tinkering can fix it?

Mr Mark—Not in relation to that aspect of it; I do not believe that.

Senator ROBERT RAY—The other proposition is whether this is inevitable; that is, you jump the threshold that this bill will be passed in one form or another. We have been able to tease out of other witnesses that are of a similar persuasion to you their reaction to the rule on detainees and the rule on self-incrimination et cetera, all the way through, which may, depending on which way we want to go, help us make recommendations to the Attorney General and the parliament.

Mr Lewis—Against our opposition to the proposal, if you wish just a comment on those sorts of ameliorating provisions, that would be fine, given our opposition.

Senator ROBERT RAY—Do not assume that, once you do, we will assume you are not opposing the bill any more—we do not.

Senator SANDY MACDONALD—We probably expect a little bit more from the International Commission of Jurists than your just saying that you oppose it. That is my feeling.

Mr LEO McLEAY—I expected that response from you. I would expect you to take a black-letter law approach to this. It is either a good law or a bad law. If it is a bad law, do not tinker with it and fix it: come up with a good law.

Mr Lewis—Mr McLeay, I have spent 25 years with the ICJ, going around the region observing subversion trials, railing against internal security acts, telling the Malaysians, Singaporeans and Indonesians all about their laws and how they breach—

Mr LEO McLEAY—I am not being critical. I am saying I would have thought that would be your position.

Mr Lewis—I did not suggest that. But picking up on that, the organisation has had a very long experience in going around the region sticking its nose into the business of the military and other authoritarian governments of the region, over that period of time and before, and it has all been based on principle. It could not be otherwise. That is our raison d'etre: the rule of law and the promotion of human rights. As an organisation, I am sure we would be very happy to have constructive input, given that everybody understands that we have this in-principle opposition.

Mr BEAZLEY—The guts of your objection, in the end, to all the caveats and the qualifications that are put on, is the idea of detention for a period of time without a charge.

Mr Lewis—Including arrest, of course.

Mr BEAZLEY—If you have fixed the lawyer problem and the self-incrimination problem—if you have effectively dealt with all those issues—it is the fact that a person is being detained for a period of time without being arrested and charged. Most people are detained at least for some time before they are arrested. I do not know what the provisions are here—is it 24 hours or something like that?

Mr Lewis—Four hours, under the Crimes Act.

Mr BEAZLEY—Okay. So there is a capacity to hold someone before you lay some charges on them. I do not ever anticipate that this would occur—given that the Attorney-General would have to confront it every 48 hours and if we put in some caveats about the Leader of the Opposition being informed and all the rest of it—but in a set of circumstances where the Leader of the Opposition was being routinely informed and the Attorney-General was for several weeks extending by 48 hours the detention of a particular individual, sooner or later any Leader of the Opposition would say, 'Hang on. That is not on.' If you put something in here that brought to a conclusion the period of time in which somebody could be detained without charges being laid and arrest being effected, how long would you consider to be acceptable? As you say, it is four hours now, in the criminal jurisdiction. How long would you say was acceptable?

Mr Mark—That would raise exactly the same problem. You bring us back to the principle that no time is really acceptable. When you are talking about the practicalities, we know because we have been around and all the people in this room know that people are presently interrogated and questioned for criminal offences and are often held for more than four hours without being charged. It is what the law allows that gives the guidance here. We are against the principle of having that written into the law. It seems to me that the practicalities of what you do are almost a different thing, but the statement of law is absolutely essential for society to continue to have a really tight rein on.

If you were to hypothesise about, as you say, what might happen in certain circumstances, I am sure that you could come up with a system that would make it less draconian and would make it harder to keep a person incommunicado under interrogation for weeks. It is hard for me to imagine that in Australia one would ever want to do that or that that would be a likely outcome, but maybe that is because I am looking at it with a little bit of optimism.

It seems to me that a person who has information or may have information wants to give it to you, or they may or may not even know that they have it. How do you have those conversa-

tions? How do you have those interactions with somebody in a way that is useful? We are not police, we are not ASIO people and we do not know what the principles are that they act on. They may be extremely honourable and high principles that are very useful for a society and that we have for all to actually support the rule of law and make sure that it does not deteriorate.

CHAIR—As there are no further questions, I thank you both very much indeed for your time today.

Mr Mark—Mr Beazley, if you would like us to come up with some suggestions about other laws which are outside the ambit of this direct inquiry, we would be quite happy to take that on notice and get back to you.

Mr BEAZLEY—Thank you.

[3.27 p.m.]

WILLIAMS, Professor George John (Private capacity)

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Prof. Williams—Yes. I wish to speak for five minutes just to give a brief outline of my position.

CHAIR—Please proceed.

Prof. Williams—I started examining this legislation from the point of view that Australia does need specific laws targeted towards terrorism. That was a starting point and a recognition, if nothing else, that the community would see such laws as necessary and important. I also started from the position that it is understandable that ASIO will have to play a role in any tackling of terrorism; it obviously has an important national security role in that. However, in assessing the legislation and weighing up those concerns, obviously they must be balanced against the need to take account of the need not to undermine the democratic system and also the need to safeguard the basic liberties of the Australian people and also important public values. Unfortunately, in analysing this legislation I found that it clearly does not achieve a satisfactory balance.

My submissions will be directed more to some of the constitutional issues rather than the public policy issues, but after carefully examining the legislation I have come to the conclusion that it does breach in very fundamental ways the separation of powers that is entrenched by the Constitution. Indeed it breaches the separation of powers to such an extent that there is a very real possibility that if the legislation is passed in its current form it will be struck down by the High Court. Indeed, even if it is passed in a slightly amended form, in essence it is likely to be constitutionally suspect.

I reached that conclusion under a couple of different headings. The first is that the High Court has declared that the capacity to detain Australians involuntarily is, in its words, an ‘exclusively judicial function’. That is a finding of a majority of the High Court in the Lim decision of 1992. It is a finding that has been reaffirmed some time since then by a majority of the High Court. The High Court has recognised that there are some exceptions to this notion of it being exclusively judicial, but those fall into very well accepted categories—for example, anything to do with infectious disease and mental health; they are the sorts of exceptions. The High Court has left open the merest possibility that perhaps in time of war it might be possible for the executive to detain Australians involuntarily, but my view is that this is not likely to be seen as a time of war. Indeed, if you compare this to the situation in the early 1950s when an attempt was made to ban the Communist Party, the High Court said at that point, during the height of the

Cold War, that it clearly was not a time of war. I think a similar conclusion would be reached today.

It leaves us with a situation on that first point that the High Court has said that the executive cannot detain people, except in narrow circumstances; yet, that is exactly what this bill does, and it does so without a proper judicial process. Indeed, I think there is a strong possibility that the High Court would find that any form of detention, other than as part of a trial or as an adjunct to a trial such as pending a bail hearing, is unconstitutional and, therefore, is bad law.

The second constitutional problem I have identified again comes to a very basic clash with the separation of powers as set down in the Constitution. It relates to the apparent safeguard of the prescribed authority mechanism. Firstly—not a constitutional point but a policy point—the Administrative Appeals Tribunal is obviously one of the possible bases to give a prescribed authority warrant. I simply make the point that the AAT is not an appropriate body to be giving such a warrant. It is part of the executive itself. It has clearly been identified as not being a judicial body. Members of the AAT are appointed for fixed periods. They lack independence, they lack tenure. Indeed, if a member of the AAT wants to be reappointed, quite clearly they are dependent upon the favour of the government of the day.

Mr LEO McLEAY—We heard evidence earlier today that some of them do have tenure.

Prof. Williams—Presidential members have tenure, but presidential members are not prescribed authorities for the purposes of the legislation.

Mr LEO McLEAY—The evidence we had today from the Registrar was that a number of the DPs had tenure and some of the senior members had tenure. They are hangovers from 10 years ago when they were first appointed.

Prof. Williams—I apologise then, because my reading was simply based upon the act. I will have to amend that to say: under the current act, any person appointed would not have the tenure and would be dependent upon favour. That means—even taking away the tenure point—that a warrant could be issued by a member of the executive on the request of a member of the executive. That does not seem to me to provide any adequate safeguard, given the nature of the warrant. The other possible basis for the granting of a warrant is that a federal magistrate might grant that document. However, I think this is another area where the bill clearly runs into constitutional difficulties. The High Court has identified as a principle that no judge can be given any power that is seen by the High Court as being incompatible with the judicial process. They mean by 'incompatible' anything that might compromise judicial integrity, anything that might bring the judiciary into public disrepute, or anything that simply might diminish the community's confidence in the judiciary.

In the earlier case of Grollo, the High Court decided that telephone tapping was not incompatible, that could be a source of power given to judges. However, I think in this instance, particularly given the criticism that has been levied at Grollo since it was handed down, there is a strong possibility that this goes much further than that and, indeed, would be seen as distinguishable from that circumstance. A judge in this case would be giving a warrant that would amount to a far higher degree of intrusion into private rights; it is also a situation where judges being involved in this process might be seen as more likely to bring them into disrepute,

given the involvement with ASIO and the nature of ASIO as a different type of organisation from the police who are involved otherwise in different types of telephone tapping. I would leave it at that to say that, even though it mentions federal magistrates, there is a strong possibility they would not be constitutionally permitted to give warrants of this type.

The last point that I would raise relates to whether ASIO is an appropriate body to undertake functions of this kind, in any event. ASIO is understandably a largely secret organisation, yet the nature of the powers that are being given are more police-like. They are the sorts of powers that you would expect a high degree of scrutiny—indeed, public scrutiny of anybody that could exercise powers of this type. You would expect that people might be able to have a forum of some kind where they might be able to have a public examination of the work of a body that has these types of powers. Clearly, I would argue that, if powers of this extent are to be granted, ASIO must fundamentally change as an organisation and, in doing so, that may ultimately compromise its broader mission, which has an understandable secret element to it. To give these powers to this type of organisation may ultimately compromise ASIO, and that would be far more detrimental than even the sorts of issues that this legislation is directed at. On the other hand, if these powers are to be given to ASIO, then it must change in structure and accountability in ways that this legislation does not deal with.

Finally, when I first looked at this legislation I did start from the point of view of trying to be constructive. When I gave evidence before the Senate Legal and Constitutional Legislation Committee, I came with a variety of suggestions to say, 'Here are ways that that legislation could be remedied.' Unfortunately, I think there is a fundamental flaw with this legislation: that is, as long as it authorises executive detention, there is a strong possibility that it is unconstitutional. As long as that remains, no matter whether you provide for access to lawyers or otherwise, there is a strong possibility that it could be struck down in the High Court. If that is the case, we may well end up with a terrorist law that gives ASIO powers that, in a time of extreme crisis, ultimately do not stand up to the test. For that reason, I suggest that the legislation needs to be quite fundamentally redrawn. It needs to be re-examined, and, indeed, we must question whether ASIO is the appropriate body to be exercising powers of this kind.

In terms of the broader civil liberties issues, we also ought to take account of the fact—and this is something that concerns me—that the legislation says that people detained must be treated in a humane manner, yet there seems to be no penalty attached to that provision. That obviously must be fixed. It is quite at odds with the rest of the legislation. When I initially examined this legislation and saw just how far it goes, and when I looked at legislation from other countries, I thought it was some sort of hoax. What we have here is the essential apparatus of a police state, given the way these powers are given to detain people for indefinite periods, including children, with charges not being laid, without any penalties being maintainable against the people being detained, and without there being any possibility of legal advice for some people when they are detained. Clearly it is not the government's intention to do that in this instance, but I would simply ask: do we really want legislation on the books that could be used by an unscrupulous government down the track—assuming it is constitutional—when we simply cannot guess at the wisdom of those people in 20 or even 50 years time? I will leave it at that.

CHAIR—Thank you. You made reference to a possible reshaping of ASIO to match in with legislation such as this. What would that envisage?

Prof. Williams—I would look to the sorts of accountability mechanisms we have for state police forces. If you think of police integrity commissions, if you think of higher degrees of ministerial control, the fact that the ASIO legislation gives a far higher degree of independence than, say, other police legislation, is a significant factor. You also have to look at whether we would need to identify ASIO officers who might have breached the condition that people be held in a humane manner. Those are the sorts of accountability mechanisms we would need to examine. You would essentially need to transform ASIO into an organisation that could be safely entrusted with these powers, because we would know that there is the possibility for a full and frank examination of its exercise of those powers. Clearly the legislation does not provide for that, for obvious and strong reasons. That is why I think there is a mismatch here.

Mr BEAZLEY—What sort of accountability mechanisms? You do not think the inspector-generalship is enough insofar as running a thumb across any powers ASIO have and the extent to which they exercise them appropriately?

Prof. Williams—I do not think so, in the same way that I do not think the community would accept that merely trusting the Commissioner of Police would be good enough. I think there is a need for outside accountability mechanisms—

Mr LEO McLEAY—Isn't that the wrong simile? Shouldn't it be whether the public trusts the Police Integrity Commission?

Senator ROBERT RAY—That is the equivalent of Inspector-General.

Prof. Williams—Sorry; yes, that is true. I think that is an important accountability mechanism, but it still does not go far enough, when you look at the way this legislation does not provide penalties for, for example, inhumane treatment. Also, there might not be adequate public information available, and people expect there to be a general and open accountability mechanism—one that the community can actually see working.

Mr BEAZLEY—From a civil libertarian point of view, I would rather have the Federal Police as they are now and ASIO as it is now, as opposed to a special branch and an MI5. A special branch in the Federal Police force would be entering into the security area with a vast array of enforcement powers. It would deal with your particular problems, but I do not know whether civil liberties in this country would be actually advanced.

Prof. Williams—I agree, and that is when I started thinking, 'Would there be another body that could exercise these powers?' and I ran into an intractable problem. I just cannot see that these powers are ever appropriate in a country like Australia—particularly when you look at the experience of other countries with such powers.

Mr BEAZLEY—Let us just take a couple of your specific, very helpful criticisms. You have a real problem with whether or not the legislation is going to be safe, given the people who are given powers as a prescribed authority. On the one hand, you seem to be arguing that the magistracy or the Federal Court, which is the same thing, would operate in this fashion and be struck down by the High Court. On the other hand, if the Administrative Appeals Tribunal were to exercise that particular function, it is insufficiently independent of government. How do you deal with that intractable problem?

Prof. Williams—It is intractable. We cannot give it to a judge even though we might trust a judge, because of the separation of powers. I think the reason we get into this bind is essentially that the High Court would view this as the sort of power that could never be given to a public officer such as a judge without bringing that office into disrepute. The only way of dealing with it is getting back to the underpinning power in the first place.

Senator ROBERT RAY—There is one part I have not followed. You seemed to be also inferring that giving the power to the AAT might also be struck down in the High Court, or am I misinterpreting that?

Prof. Williams—No, I would not say that. I cannot see any problem with the executive giving a component of itself the power to grant a warrant. It is just that I do not see that as an appropriate body for public policy reasons.

Senator ROBERT RAY—That is okay then.

Mr BEAZLEY—Let us go back to that point. In the act as it stands at the moment the magistrate would be exercising a supervisory role in relation to the interrogation. If the power were simply that of issuing a warrant, full stop, and was not obliged to enter into that process, would that make it safer with the High Court?

Prof. Williams—Yes, I think it would. I would have to say that, if they were less involved in the process and were more simply a gatekeeper in that type of situation, that would make it safer. I think it still would be questionable as to whether you could even allow them to do that. The criticism of the Grollo decision, where telephone tapping was allowed, suggests that it is a little unclear how the High Court of today, a very differently constituted court, would regard something that is not telephone tapping—still like that but regarding more coercive powers in terms of how the warrant would actually be used.

Senator ROBERT RAY—It is a bit ironic, isn't it, that we may take the attitude, the same as you, that the AAT do not have sufficient judicial independence and, in taking that attitude, may make this bill unconstitutional because we are seeking a higher, more mature legal appraisal by the Federal Court of these warrants?

Prof. Williams—That is correct. That is my constitutional analysis. Of course, the underlying issue I started with is that it is questionable whether you can ever have executive detention of this kind, in any event. Whether or not you have a judge or the AAT actually being the prescribed authority, it is not clear whether you can ever have detention in this form without there being a proper judicial process. The judges have essentially said that means a trial or other type of process.

Senator ROBERT RAY—That is a judicial process, not acts by the judiciary. There is a distinction, isn't there, in the act?

Prof. Williams—There is. A judge being a prescribed authority is not a judicial process that would save this. You would actually have to have a judge essentially acting according to judicial criteria and reporting legislation in an open, accountable process—perhaps it could be in

camera in some circumstances. But you would need that type of process, which I also recognise would be quite problematic in some cases in terms of having a very speedy process.

Mr LEO McLEAY—What seems to be coming through with all this is that we are trying to say, 'Let's put judges in here to get a bit of integrity in this system.' If you want to do something like this don't you end up with some sort of security court? I think that is pretty horrendous but does that solve the problem? Could you set up a division of the Federal Court that you said did this job?

Prof. Williams—That would be difficult in itself, because here we are dealing with people who are not being charged with any offence; we are simply seeking to question them and detain because of what they might know. I think you would even find it hard to set up a security court, as you would call it, in those circumstances, because, where there is a court, the High Court has said that that court must operate according to judicial criteria, and this does not.

Mr LEO McLEAY—What about other bodies? In New South Wales you have a crime commission which is headed up by a judge; at the federal level, you have the NCA, which originally was headed up by a Federal Court judge; and you have royal commissioners which are often headed up by practising judges. All those bodies have coercive powers.

Prof. Williams—At the state level, you are right. There is a far higher degree of leeway in a case such as this, but that is because the High Court has said that the separation of powers is not entrenched at the state level. So you can give a lot of examples of things that you could do, including, for example, potentially a state law using a state judge in a case like this without running into the same problems. The federal constitution is a very different matter.

The other thing with royal commissions is that even post Grollo there have been a number of High Court cases where now it is quite questionable as to whether federal judges can now sit in royal commissions. I think, for example, of Justice Jane Matthews in the Hindmarsh Island commission. The High Court struck that down and said she could not act as a commissioner under that act because of exactly this concern. Grollo, if you like, has led to a lot of other cases since then, so now any time federal legislation gives a judge a job to do, apart from a judicial job, you must question whether it is getting very hard to allow them to do that. That has been criticised because people said we ought to have judges as royal commissioners, but you have to question whether you can get away with it now.

Mr BEAZLEY—To move on to another part of your concerns here, which is a very difficult and relevant area that we have been dealing with: the question of the representation of the people concerned. Assuming the act were to go through, I take it you would have no particular problems with the idea of these folk getting automatic representation from a panel that is security cleared to be able to handle it.

Prof. Williams—As long as those people were chosen, say, in consultation with the Law Council of Australia or some other appropriate body to make sure that there was outside input that seems like a very sensible thing to do.

Senator ROBERT RAY—One thing that really concerned me about this is that, if a warrant is issued and a person is detained and brought before a prescribed authority, there is no guidance

whatsoever at the moment for what happens in the next 48 hours. If they are interviewed for 48 hours straight or in between time—let us say there is an in between time—where are they detained? Do they go to a jail or a hotel?—all this sort of thing. Incorporated in this is the suggestion that we have been floating around of a panel of lawyers. Surely that is an enormous gap in the legislation that has to be filled somehow?

Prof. Williams—It is filled only by the provision which says that these people cannot be treated inhumanely and they must be treated in accordance with dignity. That is the best—

Senator ROBERT RAY—It says that they have to be treated humanely, not that they cannot be treated inhumanely, because we have all found it easier to define inhumanely than humanely.

Prof. Williams—Yes, and there is no penalty there.

Senator ROBERT RAY—Correct. But there is no penalty anywhere in the bill though, is there?

Prof. Williams—No, not for any of this type of conduct. That means that you have got that type of provision filling that gap very inadequately. Let us say there were some real concerns about what happened in that period and a newspaper or a radio station wanted to identify the person—say, the ASIO officer who might have allegedly broken that type of provision—there might be real problems in doing so because of section 92 of the ASIO Act which makes it difficult to identify ASIO officers in that circumstance. So you do not have criteria; you do not have rules; there are no penalties; and maybe there is not even an outlet for appropriate public disclosure.

Mr BEAZLEY—There are no acts around here which have the absolute equivalence of it; nevertheless, there is an accepted practice and words like ‘humane’ and ‘inhumane’ have some meaning in a judicial process. What do you think would need to be added to this act specifically that would give some guarantee that somebody who breached a protocol or breached the right treatment issues could be brought to book for it? What would you need to add in?

Prof. Williams—Firstly, a penalty and perhaps also an obligation for that action to be reported to the relevant authorities. That might be an obligation placed upon the Inspector-General or someone else within the apparatus to do so to ensure that there is an appropriate prosecution. Perhaps also you might have some sort of process such as this committee or some other body to make sure that each time the power is exercised there is the capacity to examine the way the person was treated, that video evidence or other material can be examined by a parliamentary or other like body, and that that is simply a clear and identifiable process every time this power is used. But in the absence of that, why would these things necessarily ever come to light except via someone making an allegation, which may be hard to test.

Senator ROBERT RAY—I do not know whether you have caught up with the fact that ASIO under questioning has no objection—I do not think that I am verballing them here—to the number of warrants issued each year being reported. As you know, we have always had difficulty with telephone intercepts for other reasons—giving the numbers. But they are saying in their annual report that they are happy to put down how many warrants were sought, how many were agreed to, et cetera. Do you think that is at least an advance for the public record?

Prof. Williams—Yes, it is an advance but it is a fairly small advance. I would prefer a far higher degree of scrutiny of every case. It really is an extraordinary power that is being used here. If it is to be granted, every time it is used there must be an appropriate accountability mechanism rather than something that we might find out about some months after the event, for example, and then only in the form of statistics. If we are told, for example, that it was used 10 times, that really does not tell us very much. But I would suggest every time it is used we ought to ask ourselves how the person is being treated—

Senator ROBERT RAY—I think if it is used five times in three years, as opposed to 500, that tells us something.

Prof. Williams—True. It is very hard to imagine that this power is likely to be used at all, except in extreme circumstances that might never arise, and that is my underlying problem: are we really drafting a law that will be used in 20 or 30 years time and, if so, do we really want to bet on the wisdom and sense of those people at that time?

Mr LEO McLEAY—Have you any comments to make on the self-incrimination provisions in this, and, if you want to do something to make them less draconian, how would you do that?

Prof. Williams—It is difficult to do so because it is an absolute statement: you either have the protection or you do not have the protection. In general people ought to have the protection. Of course, it cannot be used in a way that might ultimately lead to the conviction of the person. There are some safeguards at least built in in that regard.

Senator ROBERT RAY—Not in this act. I would like to know where.

Mr LEO McLEAY—No. In this act you cannot be prosecuted for a criminal matter but you can be prosecuted for a terrorism matter.

Prof. Williams—That is right. That is what I am referring to. That is right. I recognise, of course, there are other ways it can go further, but I was going to say that there are some limited protections. In terms of how you would deal with it further, I think the obvious thing to suggest is that if you are forced to incriminate yourself that it should amount to a blanket protection against any form of court proceedings. That would strike me as a more appropriate balance in the circumstance. If you are going to force someone to give the information against their own interest, then it should not be used in any sense except in order to get the people who are actually committing the terrorist acts other than the person who has been forced to give the information in the first place. If you get the information you need, you have to get the incriminating information from someone else, if you like, if you ultimately want to bring charges against that person.

Mr LEO McLEAY—I suppose when a fellow comes in and says, 'Yes, it is true; I made the bomb'—

Prof. Williams—It is the danger of this type of process in that you can potentially compromise a proper judicial process of dealing with these things. That is why it is better to have a proper police investigation, go through the channels, arrest the person and give them their just desserts. That is how it should work. But forcing information out in this sort of context where it

is well regarded as not an appropriate way of forcing someone into some form of conviction might end up compromising the very process that we all agree should happen to that person.

Mr BEAZLEY—To give ASIO its due, I do not actually think that is the context in which they are seeing this. They are seeing this not as a transitioning into law enforcement; they are seeing this as another way of getting intelligence. The classic situation that they are looking at is not, 'Okay, we have got Fred Smith over here—known bomb thrower. We have all these pieces of evidence against him; we just need one bit extra. If we can put him in a quiet room with a rubber truncheon for 48 hours without too much scrutiny he will fess up.' They are looking at it like this—again being purely hypothetical: Fred Smith in Canada phones Betty Smith in Perth, said wife of or friend of or whatever, and says, 'We have been around with our friends in the course of the last little while. You reckon that September 11 was good. You should wait to see the sorts of things that these fellows have got in mind, and it is going to be on some time in the next two or three days.' ASIO have picked this up by perfectly legitimate means, or it has been passed on to them by another intelligence agency by perfectly legitimate means. Betty Smith is sitting there. There will be death and mayhem from a source that has actually been monitored for a particular period of time. There is an indication that Betty Smith might know something about it. What they want to do is not find out whether they are going to convict Betty Smith of some sort of terrorist offence. They want to know who is it, what is it going to be, where is it going to be—'We want to save some lives.' That is all they particularly want it for. I do not actually think that they need the power of self-incrimination to get that particular information at all. Right now, if they go and pick up Betty Smith, Betty Smith will say, 'You can stick it right up your ear. If you want to talk to me about that, out the door, mate. As far as I am concerned I am never talking to you.' This is to get Betty Smith, or Bill Smith or whoever, to sit down and talk to them. That is what they are particularly aiming at.

Again, it is not law enforcement; therefore, all the stuff that might be clever evidence gathering can be eliminated from this act without diminishing its capacity. What we are actually looking at here in this circumstance, which we now know is a real one, is to try to get some way of properly protecting a person whom they want to have a conversation with knowing that unless there is some provision like this they probably cannot have a conversation with that person at all. We have seen all the difficulties and obstacles to that. Can you think of a better way of being able to hold a conversation than what is proposed in this legislation?

Prof. Williams—It is clearly difficult under our current system, primarily because our current system, even in dealing with the most horrendous of crimes, does not recognise a power such as this as being legitimately given to any member of the executive. You can take the example of someone who is intending to commit mass murder and someone else knows something about it: even at that stage our law does not recognise a power such as this as being capable of being vested in a member of the executive. The reason our legal system has taken that approach is because history has tended to show that often there is a greater threat in the executive possessing such a power than there is in terms of a threat that is actually posed to the country. Obviously, the policy question is: is terrorism somehow different? So the balance changes and more draconian powers are justified in this area.

I cannot think of any obvious way of enabling that to happen. We have 100 years of constitutional law stacked up against that type of process, not only in Australia but in countries around the world, and it has developed that way because of the fear of those powers being misused. The

only possible outlet I can think of is to set up a wide range of offences, which this legislation does—which in themselves are a little problematic in how far they might go—and to give the police a very high level of investigative power to actually deal with those offences, including the threat to undertake an offence, and perhaps even to give them stronger powers in terms of who they might question in order to actually lead to some form of conviction.

Mr BEAZLEY—I am trying to think of past precedents. I suppose the nearest to it is the change that occurred in international law and the law of the sea when they decided they needed to go after the Barbary pirates.

Prof. Williams—I must admit I am not aware of that.

Mr BEAZLEY—All sorts of issues in relation to state sovereignty were overthrown.

Senator ROBERT RAY—Tell us about it, Kim.

Mr BEAZLEY—No, I have more respect for my colleagues than to go over that. If it is without precedent that people would sit down in the context of a different threat having emerged in the international order—a new threat or a threat that goes beyond state boundaries that is short of war—and devise systems which actually trample on a few judicial principles that happen to be around the place, how do you properly caveat those?

Mr LEO McLEAY—You are talking about matters that happened here in Australia. Port Arthur is probably a good example. The Tasmanian police were probably never going to stumble across that. They had no reason to tap that fellow's phone or listen to his mother's phone or that sort of thing. The security people now are dealing with people both inside Australia and outside, and they are scooping up all this information from outside Australia that they never would have had before. I think a bit of the bind therein is that they now can be in possession of information that they cannot act on without talking to someone here in Australia. Currently, there is no provision for them to do that. If the information that they have turns into a catastrophe the people we will go after will be them, and their answer will be, 'Hang on, I could not do it.' But that will not matter; they will be the ones who will be the scapegoats. I might be wrong, but I suspect there is a little bit of covering their own positions in this as well.

Prof. Williams—You have to ask whether they, as an intelligence gathering organisation, are the right body to have these sorts of powers. It might be that it is recognised that obviously they do get this type of information but that, if there are offences to be committed, then the police are the body to take that further. It might be unrealistic to ever expect ASIO to fulfil the sort of function you are suggesting, particularly since it will not have the accountability mechanisms that are likely to be satisfactory. Equally, you can imagine ASIO being compromised as an organisation in the public eye by misuse of these types of powers. If people came to believe that ASIO would use these powers to hold them incommunicado—that they would abuse these powers—there would be nothing more damaging to public confidence in that organisation. It could easily go the other way.

Mr LEO McLEAY—Which is why the committee were looking at confidence building measures like having a judge rather than an AAT person and having the right to a lawyer rather than to be held incommunicado. But it all takes you down the track of saying, 'Whether you like

it or not, things have changed since September 11, and international security organisations are sharing a lot more information with each other than they did.' These people can tap every other phone in the world—except for phones in Australia—without asking anyone. A lot of that information starts to pile up. I do not know whether anyone really wants to turn the AFP into an Australian FBI—the FBI has got so much baggage. If you look at comparable times in history, you might not have liked Brigadier Spry, but you certainly would not have liked J. Edgar Hoover.

Prof. Williams—I would settle for Spry.

Mr LEO McLEAY—That is the sort of worry you have.

Prof. Williams—Maybe I can put it in this pithy way: even if I accept that the world has changed fundamentally since September 11, the Constitution clearly has not. Maybe that is the nub of this problem. There is nothing to suggest that the High Court would interpret the Constitution differently. Indeed, if you look to the equivalent era where there was fear of communism—and, indeed, there were a range of similar issues there—the High Court at that point struck down legislation which did not go anywhere near as far as this in enabling detention and other related matters. I am not sure there is an easy way out of this. The only other thing I can add in response to the question of Mr Beazley from earlier is that there is always the option of considering involving the states in these issues. They are not subject to the same constraints.

Mr LEO McLEAY—But it is worse.

Prof. Williams—Well, you have got problems about national legislation, and the High Court itself has often made it difficult to achieve cooperative schemes.

Senator ROBERT RAY—Have you ever looked at state special branches and they way they operated?

Prof. Williams—No, I am not a criminal law expert.

Senator ROBERT RAY—We just shake any time we think of state special branches because they operated without anything near the restrictions that ASIO has got.

Mr LEO McLEAY—They kept files on politicians and on judges; they lent on people—the whole lot. These people are paragons of virtue compared to them.

Prof. Williams—Otherwise, all I can suggest is that, if we are to operate within the constraints of the Constitution—and that is obviously the playing field—then you need to think about a process that is consistent with what has been regarded as a fair and open judicial process, allowing, of course, secret hearings if national security information demands it; that is, requiring a process where judges give incredibly short turnarounds on the capacity to fine people, perhaps even to be convicted of offences in some circumstances, and giving broader police powers to investigate information that might be relevant to the commission of offences. But that is the constitutional framework within which we operate and obviously that is a constraint that we cannot change. In passing legislation of this type—as I said earlier—you are just setting up

the danger that it will get struck down at exactly the point you need it. I cannot say definitely that it would be—I have not seen any advice on this. All I can say is that, the way the High Court has gone, it is at least arguable that it would be, and I would have to say there is a real possibility that it could be. That is not good enough.

Senator ROBERT RAY—Let us put this proposition to you: what if we were to say that the first detention order could only be issued by a federal magistrate and the 96-hour point only by a Federal Court judge? What if we put that in the legislation and also put in the legislation that the Attorney-General may, by way of regulation, appoint another prescribed organisation—a disallowable instrument, in other words—which would mean they would have the fall-back to go to the AAT? If the High Court did not interfere, we get a much higher legal input; if it did, the Attorney-General could put in a prescribed organisation. If that is an unacceptable prescribed organisation, the House of Representatives—but more likely the Senate—could then disallow it.

Prof. Williams—That would make sense. Certainly in terms of trying to save what you might have, yes, I could see that that would be a sensible approach.

Senator ROBERT RAY—That is terrific! You have made our jobs so much easier!

Mr BEAZLEY—You have been enormously helpful with a few good suggestions about how we might put a provision of penalty for abuse of this legislation in it somewhere. We have talked through ideas—they have been batted around here—of legal representation and the like. There is one other area which we tried with the people who came before you. Already in the Crimes Act there is a period of time in which you may be held prior to charges being laid against you. I thought it was 24 hours, but I am a legal manque. The fellas that came up here told me it was four, not 24. But in the United States and the United Kingdom I understand it is 24 hours before you are charged. What would be a provision that would satisfy to the extent that this would not be so open-ended but would bring to a closure people being held without charges actually being laid against them which would at the same time give some capacity to ASIO to conduct a reasonable interrogation of a person in this emergent situation?

Prof. Williams—It is a very hard question because ultimately it is like, 'How long is a piece of string?' How long does ASIO need to undertake their investigations? It strikes me that 48 hours is a disturbing and long period of time for any person to be held under these circumstances. Clearly I think it is far too long. It is out of kilter with the four-hour period that is currently in our law. I would need to be convinced on an individual case as to why any period should be longer than four hours, which is the current level. If perhaps there was a justification for four hours then there might be a reason to extend that, but four hours is a very long period for someone to be held in these sorts of circumstances and to be questioned intensively. If information is not got in that period then perhaps the person should be released or if there is a special reason why it should be longer then perhaps that should be looked at. But I do not see how we get to 48 hours when four hours is the accepted maximum in Australia at the moment.

Senator ROBERT RAY—One of the criteria that has to be jumped—that the Attorney-General jumps but not the prescribed authority—is that it requires a minister to be satisfied that, if the person is not immediately taken into custody and detained, that person may alert a person involved in a terrorism offence. That is only jumped by the Attorney-General. I think, appropri-

ately, it cannot be jumped by the prescribed authority. They cannot have that knowledge as they cannot have the knowledge of the other criteria relating to what other collection methods are available. It seems to me you get to a point in this where that takes over. It is not said in the legislation. Clearly ASIO wants to detain someone not to squeeze more information out of them but to stop them alerting others to the fact that that information has been squeezed. It is not actually in the act.

Prof. Williams—Not in that form. If there is a real consideration, my suggestion would be to start with four hours as the normal maximum and potentially extend it from there. You would have to make out a very strong case to really justify that argument, and maybe it can be in some circumstances. But, as you say, it should not drive the whole thing to lead you to a normal 48-hour period. Two days is a long time for someone to be held potentially without sleep or in other circumstances. It cannot be justified as the normal rule.

Senator ROBERT RAY—One of the suggestions that we made to other witnesses as a floated idea is that we amend this act to require ASIO to develop protocols for this 48-hour period, and then have them ratified by the Inspector General and notified to this committee, specifying how long you can continuously question, in what circumstances someone can be detained et cetera—all defining 'humanely', I guess, but fleshing it out.

Prof. Williams—If that was to happen then you would need a process following that where ASIO would need to demonstrate that they followed their protocols and indeed that this committee perhaps, or the inspector, could actually examine to see whether that occurred.

Senator ROBERT RAY—I think it is quite clear that the Inspector-General, if those protocols are made with him, has every right to enforce every one of them.

Prof. Williams—Personally I do not think that is good enough. Yes, that is important, but there needs to be some sort of process like this committee. There must be some sense that the community can have confidence because they know that there is a more open process even if it is done without revealing information or names but simply described in a way so it is clear that people can see what happened. If people cannot see how these people are treated then I think that is of great concern. The other thing that is relevant to a lot of this and that I know is a little outside the committee's brief is that you have to look at this legislation in the context of the terrorism legislation looked at by the other Senate committee.

Mr LEO McLEAY—Which is embedded in this legislation.

Prof. Williams—Which is embedded. You have to look at it not just from terrorist offence—which obviously is directly relevant but which plainly is too broad in that it would enable environmental and other groups that engage in unlawful protest to be caught within the web; that is quite problematic—but also from the position of dealing with someone who might actually be a member of a proscribed organisation or in some way connected with a proscribed organisation. Anyone assisting that person can be jailed for a period under the other bill, and that might actually cause difficulties with legal advice. I know a number of lawyers are concerned about the capacity to give advice to such a person, even if they are held, say, by ASIO, without breaching the letter of the law. The conjunction of those two things is of great concern, if somebody falls under both of those.

Senator ROBERT RAY—The chances of the proscribed organisation section going through is pretty remote.

Mr LEO McLEAY—The legislation is mad to say that you will have a proscribed organisation, because, as soon as you proscribe an organisation, they all dissolve themselves and become the local prayer group or something.

Prof. Williams—The only real justification you can put for this is that this is something that we have just discovered, it is an emergency and it is happening now. You proscribe an organisation very quickly. The person does not even need to know it is proscribed before being caught. You pick someone up who is a member of the organisation. In some way, people are then concerned about assisting the organisation. You have a problem where it becomes very murky as to what somebody's rights are in this context, except that there is an overwhelming ability of the executive and the government to trample upon those rights in a way that is not safeguarded by penalties or any other balancing factors. As I said, when we think about that being used in 50 years time by a government whose wisdom we do not know, the sort of law we are putting into the books concerns me greatly.

Senator ROBERT RAY—There are a lot more protections on abuse of executive action in this bill than there are in the proscription bill.

Prof. Williams—That is true.

Senator ROBERT RAY—You could have the Attorney-General waking up one morning and saying, 'X is bad.'

Prof. Williams—Without any effective form or review at all. I agree. It is when you put that with this. If the proscription does not go forward, maybe that is a solution. Here we have a package of legislation and the package itself needs to be assessed.

[4.12 p.m.]

HOLLAND, Mr Keith, Assistant Secretary, Attorney-General's Department

MARSHALL, Mr Steven, Legal Adviser, Australian Security Intelligence Organsiation

Mr LEO McLEAY—What is the longest period you can recall in the federal sphere that a person can be held without being charged, other than this piece of legislation?

Mr Holland—Unfortunately, I cannot help you on that one, Mr McLeay. That is not my area of expertise, but we can find out for you, if you would like to know.

Senator ROBERT RAY—Thank you.

Mr LEO McLEAY—Does a lawyer from ASIO know the answer to that?

Mr Marshall—Not off the top of my head, I am afraid. I am aware of other circumstances where persons can be held without a charge being laid in Australia.

Mr LEO McLEAY—Are you an ASIO officer in terms of the act?

Mr Marshall—Yes.

Mr LEO McLEAY—You have just identified yourself.

Mr Marshall—With the authority of the Director-General. I think under the Crimes Act, it is four hours and there are some provisions for extension. The only other legislation of which I am aware, admittedly, is a slightly different sort of regime from this one because that is designed to give effect to persons who are charged or convicted of overseas laws. My understanding is that in those circumstances a magistrate acts as a persona designata and may order a person to be kept in detention, pending the receipt of an extradition request. The timing for that can go up to 30 days, 45 days et cetera. But that is a slightly different legislative scheme from this one.

Mr LEO McLEAY—They can apply to get out, can't they?

Mr Marshall—There are provisions for persons to seek various forms of review, habeas corpus and so on—yes.

Mr LEO McLEAY—Thank you. Mr Holland, you will find out for sure for us, because I know that you know everything!

CHAIR—Thank you very much indeed, Mr Williams, and everyone involved today.

Resolved (on motion by **Mr Jull**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 4.15 p.m.