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LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

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SENATE**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE****Wednesday, 23 July 2003**

Members: Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Kirk, Knowles, Lees, Lightfoot, McGauran, McLucas, Murphy, Nettle, Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senator Bartlett for matters relating to the Immigration and Multicultural Affairs portfolio

Senators in attendance: Senator Payne (*Chair*), Senators Ludwig and Kirk

Terms of reference for the inquiry:

Australian Protective Service Amendment Bill 2003.

Committee met at 1.11 p.m.

HALL, Mr Evan, Community and Public Sector Union

HAYMAN, Mr Dennis Andrew, Section Councillor (New South Wales), Community and Public Sector Union

CHAIR—Welcome. I declare open this hearing of the Senate Legal and Constitutional Legislation Committee. This is the first hearing of the committee's inquiry into the provisions of the Australian Protective Service Amendment Bill 2003. The inquiry was referred to the committee by the Senate on 26 June 2003 for report by 18 August this year. The bill proposes extra powers for Australian Protective Service officers; namely, to request a person's name, address, identification and reason for being in or near a place that the officers are protecting; to stop, detain and search a person in or near such a place; and to seize things that are likely to cause death or serious harm.

The committee has received four submissions for this inquiry, all of which have been authorised for publication. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I welcome Mr Evan Hall and Mr Dennis Hayman of the Community and Public Sector Union. The Community and Public Sector Union has lodged a submission with the committee which has been numbered 2. Do you need to make any amendments or alterations to that submission?

Mr Hall—No.

CHAIR—I invite you to make an opening statement, and then I am sure we will have a number of questions for you.

Mr Hall—I thank the committee for the opportunity to appear before you. Essentially, the Community and Public Sector Union covers Protective Service officers, and we have sought their advice and views on the proposed amendment. We would like to present to the committee two broad matters. Firstly, we will present a series of what we hope will be practical suggestions to enhance the legislation and, secondly—and perhaps, for us, more fundamentally—we will present some concerns about the changing role of Protective Service officers and the requirement for recognition of that changing role.

The first thing to say is that our members, Protective Service officers, are broadly very supportive of the amendments. They believe that the enhanced powers contained within the amendments will make them more effective officers in their role that has truly emerged over the last couple of years: being on the front line of counter-terrorist first response at Australia's airports, strategic installations and embassies. All of our comments are couched on the basis that the amendments are broadly supported by Protective Service officers.

All of these ideas are contained within our submission, but I would like to summarise the practical suggestions that have come from Protective Service officers as to how to enhance or clarify the legislation. These are laymen's concerns, if you like, rather than legal ones, and perhaps the legislation is sufficient to meet those concerns already, but we will put those issues forward.

In a small degree of detail, the first issue to come from the officers is the issue of seeking the identification of persons of interest. The legislation as drafted contains a limit, where powers are limited in circumstances where an offence is suspected of having been just committed. There is a limitation within the 'just'; we are uncertain of quite what the limitation is in terms of time. Officers advise us that if they get some intelligence as to an offence that may be committed, it could take considerable time to move from one part of an airport to another to identify someone who might be committing an offence—10 to 15 minutes or even up to half an hour. Their concern is that their power to then ask for identification is not lost due to the time taken to locate a person of interest.

Quickly moving on, the stop and search powers which currently include vehicles should be extended to vessels. Protective Service is currently working on a number of sites which are on waterways—Sydney airport, Brisbane airport and Kirribilli—and a vessel approaching by water is just as much a concern as a vehicle approaching by land. We are seeking clarification that the limitations on premises go beyond buildings. We can go into more detail on this but the current powers are limited to very specific areas at the airport, leaving large areas where Protective Service powers do not apply. They are seeking the extension of their powers to all areas within what might be broadly considered the premises.

The limitation in the legislation on the search of things or objects refers to objects 'in the possession or the control' of a person who may have committed an offence. Our concern is that it should be beyond immediate handling. For example, a bag left unattended should not be beyond the powers of a Protective Service officer to search, because it is not under the

immediate control of a person. I can make reference to the clauses if that would be of assistance.

We are also seeking greater clarity and confidence of a Protective Service officer's ability to conduct a vehicle search. Whether or not this needs to be done through the act, we are not sure. The legislation does make reference to lawful searches and examinations. Once again we are seeking clarification that x-rays or a search by an explosive-detecting canine—a bomb-sniffing dog—would be considered valid searches under that part of the amendment.

The degree of suspicion is a fairly significant matter. The wording in the current amendment refers to 'likely' to commit an offence. The view of the officers is that the burden of an offence being 'probable' ignores what their training tells them are significant threats that need to be investigated, and we would suggest 'may' lead to an offence rather than 'likely', reducing the burden for the authority to use those powers where there is a suspicion that an offence may be committed rather than is likely to be committed. It is also suggested that those powers be extended to situations where they do not fundamentally believe that an offence is going to be committed but where the person of interest is suggesting that one is. This is essentially about a situation where a hoax is made, such as where someone says, 'I've got a bomb in my bag'. While it might not lead to serious suspicion, it might cause concern or genuine fears for public safety to the officer or others. If there is a fear for safety, that would be sufficient grounds to make a lawful search.

This leads on to two fundamental issues. First of all, from our understanding of the amendments, the bill certainly enhances the powers of Protective Service officers to undertake searches of persons, things or vehicles. This is a serious extension of powers. It does raise the question as to what would occur should that lawful search yield something which clearly indicates that there is a threat to public safety. What does not clearly exist in the bill is an extension of the powers for a Protective Service officer to detain on the basis of suspicion. They do currently have the powers to arrest when an offence is in the process of being committed or has just been committed, but the ability to detain on the likelihood that an offence may occur is not included. This is moving further and further into policing powers, but it seems to us a logical consequence of having the power to identify that there might in fact be a bomb in the bag to then be able to detain that person who has the bomb in the bag rather than having to essentially either conduct, in layman's terms, a citizen's arrest or to rely on, which is the normal procedure, a state police officer to do the detention. They are our main concerns about the enhanced powers.

I would like to turn to one other matter of significance to us. This goes back to a little bit of history about the Australian Protective Service. Up until 1999 or 2000, the Australian Protective Service and the administration that was managing the Australian Protective Service saw protective services more or less as the government's private security firm and dealt with it largely on a cost-cutting basis. The overwhelming agenda for the Australian Protective Service was to reduce its cost of operations, to be contestable in a market with private security firms, and that market was for looking after airports and so on. In fact, in 1999 and 2000, Protective Service officers had been three or four years without a pay rise. They had the lowest pay offer of the Australian Public Service. That resulted in quite a great deal of industrial action and an unusual award being made by the Australian Industrial Relations

Commission to resolve that dispute, which did yield significant cuts to conditions of Protective Service officers and, once again, pay rises that were considered on the low side.

Whatever its justification or merits in 1999 and 2000, the world has changed considerably since that time, as has the role of Protective Service officers. This is highlighted by the fact that Protective Service officers have moved out of the administration of the Australian Protective Service and under the administration of the Federal Police Commissioner. They are now an integral part of Australia's national security and, as I say, counter-terrorist first response in those areas of major concern. Their ability and capacity to do this was highlighted at the Olympics in 2000 and certainly post Bali and post September 11. Their numbers have tripled. The number of hours in overtime that is being performed is on a massive level. They simply cannot recruit fast enough to meet the demand. What was seen as an expensive security force is now being seen as our frontline defence.

The reason that I raise this issue is that, unfortunately, the Australian Protective Service remains locked into this unusual pay and conditions instrument that came from the Industrial Relations Commission from an early era when, frankly, they did not perform the job that they now perform. The degree of public concern and public safety for which they are essentially responsible has increased dramatically. This extension of powers, while welcomed, is yet another example of how significantly the role has changed.

The point that we would like to raise on this issue is that, given that the role has changed—the level of responsibility, the amount of work and now the enhancement of powers—the Federal Police Commissioner should have, contained within this legislation, the ability to recognise this changing role and to recognise it in two ways. Firstly, the extension of these powers should not be granted unless the Protective Service officer has received appropriate training and equipment. What we are seeking or suggesting is a certification process by which the commissioner delegates those powers only to officers certified to have had sufficient training and equipment to use those powers. Secondly, the Federal Police Commissioner should have the ability to tie into that certification additional remuneration to reflect the fact that they have moved on from a private security force to being now very close to a policing force and that the job has changed dramatically, as should the remuneration that goes with it where it is clear and it has been certified that they are exercising additional powers and have the skills and ability to exercise those additional powers.

CHAIR—Thanks very much, Mr Hall. Mr Hayman, did you wish to add anything at this stage?

Mr Hayman—No.

CHAIR—Mr Hall, in relation to the generalities of the last point that you raised, this committee is acutely aware of the industrial issues pertaining to the APS in recent years, not least the reason for which is that large numbers of members of the APS came to sit at the back of our estimates hearings for extended periods to make their point—and the point was well made. In terms of the bill immediately before us, and the broad of the industrial issues, it does not come so much under the considerations the committee is currently engaged in but certainly we take on board the comments that you have made. We will bear those in mind in our examination of the issues before us.

There are a couple of matters that you have raised that I want to ask some questions about, and I am sure my colleagues will also have questions. You made the point, I think towards the end, about the capacity to detain—that is, what happens to persons of interest after they have given their names and been subjected to a search? I do not have the Criminal Code in front of me but I know that the APS does have some powers of arrest without warrant in relation to certain Commonwealth offences. I imagine that it is envisaged that, if the suspicion that caused the officer to detain a person is borne out, then that power of arrest can be exercised. Is that not your view?

Mr Hall—That is not my understanding of the amendment. The powers of arrest remain unchanged in section 13 and are limited to where a Protective Service officer has reasonable grounds to suspect that the person has just committed or is committing the offence. This is very different from being suspected of committing the offence.

CHAIR—So your concern is the intervening period and what should be done with the individual in the protected place?

Mr Hall—Absolutely. Having the power to seek identification or to undertake a search lawfully but having no ability to do it between that period of suspicion and the actual committing of an offence seems to us somewhat illogical. It is not to say they cannot do anything—my understanding is that they have the power to act, as do I or any of us under straight criminal codes—but acting as a citizen who happens to be wearing a Protective Service uniform is very different from acting under those powers given to you as a Protective Service officer, not least of which is the personal responsibility that an officer is taking, more or less acting of their own accord. They are very well trained in when they can and cannot exercise these powers—it is well drilled into them—but there does seem to be an intervening period where detention is necessary until the likely scenario of a state police officer turning up, who does have the power of arrest.

CHAIR—Mr Hayman, from your experience what would be the literal approach that would be taken in such a situation? You said you were an officer at Sydney airport.

Mr Hayman—I will have to clarify here. Under the circumstances that I am here, I am able to assist Mr Hall but I am not able to directly speak to senators on the committee. I am sorry; I should have made that clarification at the start.

Mr Hall—The instructions he has been provided from his management is that he should not make comments to the committee. We should have made that clear at the beginning. Our apologies.

Senator LUDWIG—Who is that a direction from? Mr Hayman, is it the case that you do not want to talk to us, or is it a direction from your employer?

Mr Hayman—It is a direction from senior management within the APS.

Mr Hall—We were advised that he could attend the committee but that he was unable to wear a uniform or to answer questions directly from the committee.

Senator LUDWIG—That is helpful. Thank you.

Mr Hall—It is not impractical from our purposes that he is here to—

CHAIR—Let me make it clear that this is no reflection or comment on Mr Hayman. It does put the committee in an interesting position at a number of levels, none of which have anything to do with you, so do not misunderstand us. We are grateful that you are here to assist Mr Hall, if not the committee.

Mr Hayman—Thank you.

CHAIR—I have one further question, and I know that Senator Ludwig has some questions in this regard as well. Mr Hall, at the end of your remarks you talked about training and equipment and suggested a certification process for officers who were appropriately prepared to carry out these extended functions. Does that mean you would end up with two classes of officers in the APS—those who were certified to do this and those who were not—or do you envisage that all members of the APS would be so certified?

Mr Hall—If that proposal were to go ahead, that possibility would remain. From my experience of the Federal Police to date and how they are now managing the Australian Protective Service in, I have to say, a far better manner, they do believe in flexible deployment, and I imagine that their decision making would be that everyone should be capable. Certainly a precedent exists, Chair. Not all officers in the Australian Protective Service have been certified at what is known as advanced first response, which is a degree of training and certification which goes to firearms use and physical capacity. That is a recognised process. Part of that is simply risk assessment and where those resources are needed.

From experience, I doubt that the Federal Police would limit who would have that training. Many of the Protective Service officers have been around for a considerable period of time and are evolving with the evolving role, and we certainly see that a training process would be appropriate there. It is also part of the recognition and perhaps it is a cultural thing for the Protective Service, but certainly that would be well regarded. It does give us a sense that there is an attachment of responsibility and competence that goes along with the enhanced powers that to our mind seems appropriate. It is not unlike what is already contained in the current act—that is, powers cannot be granted to or exercised by someone who has not taken the oath of office.

CHAIR—Sure.

Mr Hall—It is not that different from having a requirement of competence before this extension of powers is granted. I would imagine that an option would be available to the Federal Police Commissioner as to whether or not it was necessary or appropriate for a power. That is the same as what is contained in the bill at this point in time. Just because the power exists does not mean the commissioner will delegate it to every officer. All we are saying is that delegation should be accompanied by certification that the officer is in fact competent and capable.

CHAIR—I understand. Thanks, Mr Hall.

Senator LUDWIG—Without more, if the bill were to become law, would all APS officers have those powers?

Mr Hall—If delegated by the Director of the Australian Protective Service.

Senator LUDWIG—So there is that point. Is there any understanding that all APS officers will have that power delegated to them or will only certain APS officers have that power delegated to them?

Mr Hall—I do not know. I imagine that other speakers who are to appear before you might be better placed to answer that question.

Senator LUDWIG—I am just wondering if they have consulted you about that issue.

Mr Hall—No. We have not had an opportunity to consult.

Senator LUDWIG—What about more broad consultation in respect of the provisions? Has the AFP, the Attorney-General's Department or whoever consulted you about the provisions and given you an opportunity to respond? I notice that in your submission you go through some quite specific recommendations in detail.

Mr Hall—Yes.

Senator LUDWIG—Have they been conveyed to the relevant drafters of the legislation or have you had the opportunity to consult them about them?

Mr Hall—They have not been conveyed to anyone apart from your committee at this point. I would not want to give the impression that we are in an environment where consultation does not exist between the CPSU and APS management. There was some limited consultation when we first heard that the bill was likely to be on its way, but the timing of the bill has left us with a very limited window and, frankly, those who are responsible have been tied up. I accept that there has been no deliberate attempt to avoid consultation, but the strict answer to your question is no. We have neither had the chance to hear management's view on the legislation nor the ability to put our view forward at this point.

Senator LUDWIG—Just as an aside, I was looking at the issue of the searching of vessels. If there was a vehicle in the grounds towing a boat, as you understand it in your submission, you can search the vehicle but you cannot search inside the boat.

Mr Hall—To be honest, we are not sure and hence we have raised the question about it.

Senator LUDWIG—That is what I was trying to clarify.

Mr Hall—So do we know if the search of vehicles, as mentioned in the amendment, mean the search of trailers and stuff on the roof-rack?

Senator LUDWIG—Yes.

Mr Hall—We do not know. These are the things which we really wanted to put forward in one forum or another. Certainly Protective Service officers believe that the boat in tow or the set of skis on the roof-rack could in fact be included in the search. We are not sure whether or not that requires changing the draft amendment. What we can say with confidence is that we are quite sure that vessels—water-going vessels, sea-going vessels—are not included in the amendments and certainly should be.

Senator LUDWIG—I notice that in your recommendations you use the phrase 'a community policing role'. Is that a change or is that a matter that you have included? I did not understand that—and I am happy to be corrected—that was the role of Australian Protective Service as provided for in the act.

Mr Hall—As for the community policing role, I will use layman's terms. You are at the airport, you are walking around and, as you do, you walk past the newsagent and the newsagent comes out and says, 'Someone's stealing my *Sydney Morning Herald*s.'

Senator LUDWIG—So it is in that context?

Mr Hall—Yes. There is a degree of tension as to how much they should ignore such requests from shopkeepers or any other members of the public thinking, 'He's policing.' Obviously, the public does not make that great a distinction between a state police officer and a Protective Service officer, however different their uniforms may be. They think, 'Here's a uniformed officer. Someone is doing something and I'm going to report them to that officer.' There is a degree of tension as to how much a Protective Service officer should respond to that community policing role, which is ultimately a state police officer's role. It is a distraction from what they should be there for, which is being permanently alert for a counterterrorist first response. To our minds, the powers in here are not limited to counterterrorist first response and would extend to any offence under state code, so the powers would exist. Whether or not Protective Service management and the Federal Police want them to use that power and to engage in that role is a different matter. Often these are at least semifunded roles and the degree to which an airport is paying for that service to be provided, for example, would go a long way to deciding whether Protective Service officers are in fact advised to take on that role or they simply say, 'You're going to have to go and see a state police officer and here is the phone number.'

Senator LUDWIG—That leads me to the issue that I wanted to get to so I understood what the breadth of your work was. There are two elements to the work. One is as an Australian Protective Service officer looking after Commonwealth property and undertaking those duties. The other is in a private capacity in a user pays system where someone contracts you to perform a service. Would those people that contract you to perform a service have the opportunity to use the broader powers that are contained within this bill?

Mr Hall—My understanding is yes—once the power were invested in the Protective Services officer, they could use it. The only limitation would be any limitation that the commissioner put on when delegating that power in the first place. My understanding is that the commissioner would have the ability to say, 'Here are the powers, but they only exist in this part of the airport or for these offences.' Certainly the breadth of power could be narrowed down by the commissioner. I can only state an opinion here: we would be looking at a situation where the use of those powers might enter into the contract negotiations. But I must admit that this is a little out of my area of competence.

Senator LUDWIG—I was thinking about the scenario where a private company could use the powers to service their needs—in other words, in a user-pays system—rather than the primary duties under the act. I will not go over them; I am sure you know them.

Mr Hall—Protecting and guarding.

Senator LUDWIG—The act goes more broadly to the protection of property. In subsection 6(2) 'Functions of Protective Service', the act states:

(a) the protection of property in which:

(i) the Commonwealth, a foreign country or an international organisation has an interest; or

(ii) an authority of the Commonwealth, of a foreign country or of an international organisation has an interest;

So the powers could be utilised more broadly—for example, the newsagency scenario. But that is not what it is directed for.

Mr Hall—I certainly do not think that that would be the intention. My understanding of the legislation is that it could be used. Ultimately that is not a bad thing. We are, after all, still talking about the policing of offences. To be honest, I think it is highly unlikely that Sydney Airport Corporation would spend money on Protective Service officers fulfilling a role which could be done far more cheaply elsewhere. So I am not sure and I have to couch my comments in that this is not an area of expertise for us.

Senator LUDWIG—I was only after your view, and I will take it up with the Australian Federal Police as well. It would be helpful to get an understanding, from a working perspective, of a what goes on.

Mr Hall—From a working perspective I understand it is a real tension on the ground. You are there, you have a certain degree of power and you are clear as to what is your primary role, but none of that is going to stop the shopkeeper from coming up to you and saying: ‘There’s something going on. Can you keep an eye on my shop?’

Senator LUDWIG—And the nature of the exercise of those powers might change depending on the client. In other words, if you are carrying out consular duties under a Commonwealth requirement, your powers will be clear and broad—or in Parliament House, for argument’s sake, closer to home. But, under a user-pays system further afield, where the delegation might be circumscribed, the Australian Protective Service officer has to be able to differentiate where they might be going and what the circumscription of the power is in a scenario where it might change if they get rotated in the afternoon to somewhere else. Is that a possibility?

Mr Hall—Legally, I believe, it is. But these are the decisions that you are faced with, and cope with, every day.

Senator LUDWIG—It seems to be a lot to cope with, because you might overstep your mark and then be held accountable—you were within your mark in the morning and you were outside it in the afternoon.

Mr Hall—We believe that is an absolutely fair comment about the situation—of course, with enhanced powers that would be an enhanced issue. Under the user-pays system on a Commonwealth premises, such as the nuclear facility at Lucas Heights, what is done is very much a matter of contract negotiations. People are not rotated from one station to the next on a daily basis, but there is certainly the capacity for flexible deployment at any time. You have to understand the ‘rules of engagement’—using a different expression, and probably an inappropriate one—for each station and the fact that they may well be slightly different. Those pressures occur on a day-to-day basis. Even if you are clearly advised, ‘This is what your job is here,’ it does not in any way prevent the public from coming up to someone in uniform to seek assistance.

Senator LUDWIG—I note you used the word ‘police’ in your earlier response. Do you think the Australian Protective Service is moving towards being a type of police force? Is that

why you used the term? I am just trying to get an understanding. The act provides an idea of what your functions are, although not as clearly as I would like, but the way you described them seems to indicate more of a policing function.

Mr Hall—No. What I described is a spectrum of law enforcement powers that go from very the minimal powers that you see for private security firms under state legislation, all the way through to the powers of the state police or Federal Police. There are greater degrees of responsibility in law enforcement, but I would say clearly that the Protective Service is moving up the spectrum. Would I describe APS officers as police officers? No. But they are certainly no longer the true private security force that the government happened to own in 1999—at least that was the prevailing view of management in 1999. That is the changing nature of the security need and the changing nature of managerial emphasis that the former APS management and now Federal Police management expect APS officers to work in. So they are moving up the spectrum of law enforcement powers. I guess our point was that, in having that greater responsibility and greater power, they ought to be moving up the spectrum of greater certification, recognition and remuneration.

Senator LUDWIG—As a consequence of the introduction of the bill and the new and enhanced powers, do you expect to have to meet the physical fitness requirements that AFP officers have to meet? In other words, as I understand it—and please correct me if I am wrong—there are requirements for levels of fitness, training and those sorts of issues that differ from those of the Australian Federal Police officer. With the enhanced powers, do you expect that to change and that a more onerous requirement will be placed on Australian Protective Service officers to meet those levels? Is that an issue you have considered as part of the introduction of this bill?

Mr Hall—Absolutely. Frankly, we would be seeking a greater degree of training certification, which is what our comments were going to. I do not believe the amendment would have any impact on the need for physical fitness. There is already a regime in place for annual physical fitness testing—we also have issues about that but we will leave them aside at this point—but I do not think the legislation as proposed would impact on physical fitness needs. Certainly if you have greater powers on a daily basis, and I think you have already discussed some of the complexities of those, training will absolutely be required in the use of those powers, even if it is simply understanding the legal rights and responsibilities that you have as an officer.

Senator LUDWIG—So you would expect that, as a consequence of the introduction of this bill, the relevant authorities will be talking to you about training, certification and those sorts of issues?

Mr Hall—I would certainly hope for and expect that.

Senator LUDWIG—And if not you will be?

Mr Hall—I am sure we will be raising those issues.

Senator KIRK—Thank you for your submission. I have one query in relation to the point you raised about paragraph 18B(1)(b), which is where you talk about the use of the word 'likely'. That paragraph in the bill states:

b) the thing is likely to cause, or is likely to be used by the person or another to cause:

And it goes on. Your suggestion is that perhaps the word ‘likely’ should be substituted with the word ‘may’. Is that correct?

Mr Hall—Yes.

Senator KIRK—As I read it, if the word used is ‘may’, that will create a situation where the powers can be used on a more regular basis because a lower threshold needs to be met before the powers can be exercised. Would you agree?

Mr Hall—Certainly it is a lower test before the powers can be exercised but, from the perspective of Protective Service officers, it is a far more pragmatic and realistic test. How do you know that an offence is likely, as opposed to being possible? How we are to seriously expect officers to make that distinction and to have their powers limited to that distinction is a bit beyond us. Inherent in here is an assessment of risk that these powers are warranted only if it is likely, not if it is just possible. Once again, we do not think that is appropriate.

An example given to us is that of an explosive detector dog identifying a bag as having an alarming scent, if you like. Would that fall into the situation of ‘likely’ to be an offence, or would it be a situation of ‘may’ be an offence? The detector dog handlers know full well that, while that scent might be the result of an explosive, it could also be the result of that bag having passed through previous hands, having been through a mine or some other environment where it could have picked up the same scent. So in that situation are we saying that it is ‘probable’ or just ‘possible’ that the bag contains an explosive? I guess in part we are not sure, but certainly we would like to see any limitation that seems to us a little artificial about the probability that the bag contains a bomb being reduced to the fact that the possibility that the bag contains a bomb should be sufficient for the power to be used. I would point out that this is a power to search; it is not a power to arrest. It is the same as the seeking of identification. We think the threshold is a little high and that it should be reduced. We are not talking about the most significant of law enforcement powers, which are detention and arrest, we are talking about the power to search.

Senator KIRK—I am thinking about the consequences of this. You talked before about the spectrum of law enforcement and the fact that APS officers will be moving up that spectrum, which is the way you described it. It seems to me that the lower threshold, using ‘may’, would increase the powers of the APS and put them on a similar basis as police officers.

Mr Hall—Once again using that analogy, certainly it would move them further up the spectrum. Secondary to our analysis is how on earth would we know whether it is probable or just possible, and how can we be in the situation of making those judgments about search based on that? A suspicion is a suspicion, and the ‘probable’ test or the ‘likely’ test seems unnecessary and, frankly, very difficult for an officer to carry out.

As to moving up the spectrum, clearly there is an enhancement of the law enforcement powers, but that still would not make APS officers police officers. We are not talking about an investigative role here at all. At the end of the day, APS officers are static or within set premises. They are there to prevent and respond in a particular area, and it is certainly nowhere near the role that the state police or Federal Police have.

Senator KIRK—From what you are saying, if the word ‘likely’ were to remain, the amount of training required of the APS officers would be greater, for the reasons you just said—the subtlety of the distinction and the difference between ‘may’ and ‘likely’.

Mr Hall—I will be quite interested to see the training manual on how one differentiates between a possible and a probable offence. That is moving into the territory of specialisation, and certainly the general orders that the director of the Protective Service may issue under the current act will no doubt clarify those matters. Even if there is matter of difficulty in making that distinction, I think a more important matter is the risk assessment contained in the bill that these powers are warranted only if the risk is assumed to be probable rather than possible. I put it to the committee that public safety at our airports and at Parliament House ought to be at the level of the possible not the probable.

Senator KIRK—Thank you.

CHAIR—Mr Hall, in the submission you make a reference to extending the definition of the word ‘premises’. Would you go through that again in a little more detail for the committee? Having had a look at the bill and the head act I am not sure what you are seeking by making such a suggestion. I would have thought that the premises that the APS were charged with ‘protecting’ would be defined in some way per premise, if you like, and that that would cover those activities.

Mr Hall—The core issue coming from the officers—and you may be right, Chair, that this might not be a matter for amendment of the legislation—is that the existing powers that APS officers have at the airport, for example, are restricted to the sterile areas—that is, once you have passed through the first X-ray. They have absolutely no powers in the public waiting areas and in the queue to get a Qantas boarding pass, although they do move through those areas and the community policing role kicks in immediately in terms of the public’s expectations. What is being sought here by the officers is that those powers should not be limited to the sterile areas at the airports, that their powers should extend to the public waiting areas, the car park and anything on the airport or the public areas of infrastructure, and that there should be no doubt that their powers extend to those areas. We are uncertain whether or not this is a matter for the legislation or for the delegations, but we did want to bring to the committee’s attention that the powers do end at the end of the sterile area and certainly the expectations of officers is that they should continue beyond those areas.

CHAIR—I think that deals with most of the issues that the committee wanted to raise out of the CPSU’s submission. Mr Hall and Mr Hayman, on behalf of the committee, I thank you both very much for your assistance this afternoon. We are very grateful for your assistance. If we have any other issues to raise with you, the committee will come back to you.

[1.57 p.m.]

HUNT-SHARMAN, Mr Jonathan Kirkness, National President, Australian Federal Police Association

SHANNON, Mr Craig Anthony, Principal Industrial Officer, Australian Federal Police Association

CHAIR—I now welcome Mr John Hunt-Sharman and Mr Craig Shannon of the Australian Federal Police Association. The AFPA has lodged a submission with the committee, which we have numbered 3. Are there any amendments or alterations that you need to make to that submission?

Mr Shannon—No.

CHAIR—I invite you to make an opening statement and then the committee will direct questions to you.

Mr Shannon—I thank the committee for making the time available for us to give our oral submission today. As committee members would be aware, we have made several submissions prior to this hearing with regard to many of the issues touched upon by this proposed bill. The crux of the submission by the AFPA is with regard to the broader context of this legislation, particularly flowing from previous amendments to the Australian Protective Service Act in the last 18 months which were to effect in a longer term process an integration of the APS function into the Australian Federal Police. On the basis of that proposed move, we have obviously put in context to the committee what we see as the landscape that this current bill has come forward within.

Where there are deficiencies within the current legislation, largely identified by the previous parties here today, we tend to concur with the basic premise of most of those submissions. But on the premise that this is, in a sense, a pathway piece of legislation with regard to the further legislation which we understand is to come forward in the latter part of this year to give effect to the APS integration into the AFP, we would actually reserve our right to deal with some of the more fundamental issues of this current bill in the context of that further piece of legislation.

In our current submission we have identified deficiencies with regard to the current bill and its proposed extension of the powers of the APS, while colleagues who have spoken earlier today have identified what are substantially issues of jurisdiction between the policing role and the current role of the APS. We believe that our proposal to bring forward further legislation to effect an integration with the AFP will provide an opportunity to address a substantial part of those concerns. Given that we have been here before a number of times and possibly bored the committee with many of the statements we have made in the past on similar subjects, I think we are happy to throw it open to questions now.

CHAIR—Having left so much to next time, we had better hope that there is a next time, Mr Shannon!

Mr Shannon—We are praying that there will be.

CHAIR—What if the bill is not referred? What if it is magically spirited through the parliament with great cooperation and enthusiasm?

Mr Shannon—On the premise that it is a good piece of legislation, we would be thrilled to see that happen. We are all praying that that happens. In effect, as the committee might know, this legislation, combined with the Australian Protective Service Amendment Bill 2002, inherently gears the APS towards a translation to the AFP. If that process did not conclude, I think it would leave a fundamental flaw in the fabric of the relationship between the AFP and the APS and in the broader national interest with regard to security concerns.

CHAIR—In general terms, from your submission and from those introductory remarks, is it fair to say that, notwithstanding your reservations about where the current process finds itself, you are reasonably comfortable with the provisions of the bill as they stand and in fact would regard some of the new proposed powers as long overdue?

Mr Shannon—Yes. That would be in the context that we expect the APS and the AFP to integrate as one entity. For instance, the concerns we have raised in the submission about the integrity framework that would underpin the operation of this proposal are mitigated by the fact that we have some surety that the integrity framework of the AFP would overlay the outcomes designed to be implemented by these bills. As we have said in our previous statement, if that integration did not happen, we would be very concerned that a number of those issues would not be addressed. With regard to its operation, the integrity framework that currently applies to the Protective Service—and we have given the committee submissions on that—does not lend itself necessarily to the protection of the employees or even to the interests of the Commonwealth, and we would not like to see them exposed further down the path by the way these matters would operate. But, on the premise that there is a translation through to the APS under the fabric of the AFP arrangements, we think that those concerns could be accommodated.

Mr Hunt-Sharman—Put in a short way, I think the issue here, as Senator Kirk mentioned earlier, is that, as you keep increasing the powers, you also have to increase the accountability and integrity regime surrounding them. What we are seeing is a move, appropriately, toward increasing powers. We have mentioned that they are overdue. In fact, if you go back into history, that function did have those powers before. So there have been changes over time. Now history is repeating itself, and we are seeing the importance of having those powers. But, again, with the importance of those powers must come a higher level integrity regime. We have submitted before that having the Australian Protective Service as a true division of the Federal Police would allow that to occur through the Complaints (Australian Federal Police) Act and other commissioner's powers.

CHAIR—It may be that that comes together in the next manifestation of this process. Some of the points that you make in your submission, particularly on the relationship between private providers at airports and the APS, are of interest to the committee in the context of the extension of these powers. I think one of the issues that you raise is the role of private firms conducting X-ray screening points and their interaction with the APS. Can you expand on what you see as the problems with that arrangement?

Mr Shannon—Largely, given that the functions of security are geared on a commercial premise, part of our concern is that the operational outcome is being mitigated by the commercial imperatives of the private providers. I believe it was Mr Moore-Wilton, at the

conference they had in Tweed Heads recently, who admitted that there were deficiencies in their capacity to offer guarantees with regard to the provision of security at the airports.

I think it has been identified regularly, and recently by the secretary of the LHMWU—the Liquor, Hospitality and Miscellaneous Workers Union—which currently has coverage of that function, that there are deficiencies in the training, the remuneration et cetera of the employees who are responsible for the performance of that function. In fact, the LHMWU frequently advocate an expansion of that role, from a private sector point of view, that would move the function directly into a role that would likely be performed by either the APS or the AFP. We see that as some vindication of our concerns, in the sense that to have a total fabric, if you want a seamless garment with regard to the delivery of the operation outcomes at the airport, there are too many stakeholders in the pie.

An example of that would be the contracting of the APS function at Sydney airport, where a fundamental part of the contract was a series of what are called key performance indicators. They are largely arbitrary, quota-type arrangements—attendances at certain doorways et cetera—that in effect define the operational direction of the APS security function when ultimately the function, on an operational basis, should be governed on best practice operational principles on a day-to-day and emerging needs basis rather than locked into some commercial contract for delivery of a function.

I suppose a multitude of concerns we have relate to the number of stakeholders in the process. The American government noticed very quickly after September 11 that, in order to effect governmental outcomes with regard to the delivery of the airport security function, they had to recapture most of the privatised commodity back into the province of the government. We are concerned that the provision of commercial user-pays funding for the delivery of the security function undermines the operational delivery on the premise that an example of the advanced first response training model for the APS is determined largely station by station on a client-prepared-to-pay basis rather than on an operational competency basis.

CHAIR—Could you clarify what you mean?

Mr Shannon—Depending on whether, for instance, an airport operator in a small airport is prepared to move the status of the employees up to an AFR status, that may or may not happen—rather than an operational assessment being made as regards to whether or not it should be an AFR station. Parliament House is a classic example of exactly what I am talking about. It was noted in the parliament, in both houses, that there were deficiencies in the delivery of security at Parliament House; unless I am mistaken, it is still not currently deemed as an AFR station and the majority of the employees here are not qualified to AFR standard. The Commonwealth Parliament is obviously a key terrorist target, and the decision seems to have been largely predicated on the preparedness of the parliament to pay for the provision of the training and the deployment. I am prepared to be corrected if I am incorrect there, but—

CHAIR—It is an interesting and vexed issue which was the subject of much discussion at Senate estimates in the recent budget round.

Mr Shannon—I think the point is quite clear, even to the parliamentarians who have an interest in this, that you should not have commercial imperatives overhanging the delivery of your security.

Senator LUDWIG—As I understand it, the enhanced powers are for specific purposes. How close are those powers to the powers of the AFP? There was a significant difference between the powers that could be exercised by an Australian Federal Police officer in the course of their duties and those that could be exercised by an APS officer. Are the new enhanced powers drawing them closer together in terms of the actual powers that they can exercise—although in limited circumstances as far as the APS are concerned?

Mr Hunt-Sharman—Yes, they are. Certainly it is more limited with the Australian Protective Service, but I suppose this becomes the secondary issue with regard to, for example, airports and who is actually responsible for a community policing issue. Colleagues speaking earlier mentioned the issue of something happening in a public area and the perception by the public that Australian Protective Service officers are actually police.

Currently they are under the umbrella of the Australian Federal Police Commissioner, and as they move more towards the AFP that perception is going to become greater and greater. It then becomes an issue of what their jurisdictional responsibility is. Basically it is the Commonwealth's jurisdictional responsibility versus the state's jurisdictional responsibility. The question is probably: who should be policing the airports? If you do not have state police present or if they are present only on a very ad hoc basis, when an incident does happen in the airport on the non air side, the general public expect the police to attend and for an arrest to be made or a search of something to occur. This is where it gets very difficult for the Australian Protective Service officers because they are crossing over the line of civilian arrest powers. Of course, that opens them up to legal countersuits and so forth that they may well not be protected for because they have gone outside the role requirements of their strict function.

Mr Shannon—We believe that this legislation in effect recognises the fact that, regularly and for years, APS officers have in effect been delivering a quasi general duties function of policing at airports without the necessary training, protection and powers or the appropriate remuneration. This legislation still does not resolve the question of who has that responsibility. The members of this committee obviously travel extensively in their role. At the majority of airports you would be hard-pressed to see a state police officer present in any form. Anecdotally, the only airport where I have ever seen regular patrols of police officers is Brisbane airport. Other than that, Melbourne airport in Victoria has a part-time station with a buzzer that goes through to Dandenong or somewhere if you need help. The simple fact is that there is a response issue with regard to that. As Mr Hunt-Sharman has pointed out, members of the public will refer to the nearest person who looks as if they are in a position to assist in a policing context. This legislation does not necessarily provide a policing solution to the concerns that we have identified.

Senator LUDWIG—The bill has also not addressed the training issue either. It does not address any of the issues you mentioned.

Mr Shannon—That is right. In a sense, we hope that part of that will be resolved in the greater consideration of the relationship between the AFP and the APS with regard to the integration element. Obviously those issues have to be resolved.

Senator LUDWIG—Do you expect that as a consequence of the introduction of this bill, should it pass, private companies would be able to access, for their use on their premises and

for their purposes, the broader powers that the APS now has? I just wondered whether you had considered that.

Mr Shannon—A de facto extension of the private contracting of the role is that, in effect, you could interpret that outcome. Our submission identifies that operational activities are being directed by private contractual relationships. If the question you are asking is whether the extension of these powers lends itself to a contemplation that it is an expansion of powers exercisable by private sector interests—

Senator LUDWIG—For a private sector purpose.

Mr Shannon—then that is, I presume, potentially correct. I do not think we could answer that question with certainty, but this grey area is a concern for us as an organisation. We have put it to this committee previously that there is no room for the contracting of police functions by the private sector in the way that the APS could potentially integrate that relationship into the AFP.

Senator LUDWIG—I am only asking you to comment on it in the sense of how it would affect your members.

Mr Shannon—You cannot serve two masters, particularly with the establishment of an effective integrity framework. I believe that even the AFP Commissioner in one of the submissions to this committee with regard to the Australian Protective Service Amendment Bill 2002 raised concerns about the contractual base of the APS in certain functions. I understood that that was one of the issues which underpinned the relationship with the DIMIA contract at one point. We support the commissioner with regard to the need to retain the environment of operational and organisational integrity, and we would not like to see that diluted with these contractual elements blurring the debate.

Mr Hunt-Sharman—I think a good example of that is that the Australian Federal Police contract out their services to island territories and, of course, the Australian Capital Territory to the ACT government. There is no interference in the police structure performing the police function. It is clearly an operational function and it is independent of the contractual employer. What we have at the moment here with the Australian Protective Service is this blurring across where it is not as clear—for example, what powers does an airport manager have in directing Australian Protective Service officers to carry out or not carry out certain functions; that is, to declare a suspect parcel safe?

Senator LUDWIG—But they could be effectively delegated within the contractual arrangements that are entered into to utilise those powers and therefore they become more of a quasi policing function of a Protective Service officer rather than a requirement for a police officer to be present as part of the contract. Is that a possibility, or am I going too far?

Mr Shannon—You could be going too far.

Senator LUDWIG—What you have been saying, though, is that the community policing in those airports is in fact a role that is now falling to the APS by default. So, even though they may not either be required to perform that function or have the necessary powers to perform that function, there is that expectation that they will undertake that role.

Mr Hunt-Sharman—That is right.

Senator LUDWIG—It might be an expectation of the public but it might also be an expectation of the management of the organisation for those officers to undertake that role.

Mr Hunt-Sharman—It should be remembered that those functions were performed by the Australian Federal Police some years ago. So you again have this difficulty that the community policing function was carried out by the Australian Federal Police. Even back in those days—a long time ago—there was still the difficulty of who was responsible. When the Australian Federal Police focused more on the antiterrorist function, the ports watch function and so forth at the airports, this blurring arose again—who has responsibility for dealing with an incident happening in the airport? All that really happened with the Australian Federal Police being removed from that function and with the creation of the Australian Protective Service was that the APS inherited the same problems that existed back then.

Mr Shannon—An extension of your question is answered in some ways by that statement, but I could name—but I will not—two airports that I specifically know of where I have been notified by APS employees that they have had representatives of the private ownership interests of the airport directing what they are to do with regard to the conduct of their responsibilities. Because of the historical need to pursue the interests of the client when the APS—as I think was referred to in previous submissions here today—was largely seen as the Commonwealth’s private sector security service, they did the client service thing and did what they were told. A bit of a culture had developed that saw officers in charge of stations second-guessing the commercial imperative that they were tasked with against the delivery of the operational outcome and defaulting to responding to the directives of private interests rather than potentially better practice.

Senator LUDWIG—Were you consulted about the bill?

Mr Shannon—No, not in advance. Given the timetable that this all hit the deck, we actually aspired to most of this being resolved in the new beaut legislation we keep talking about here that has not yet come forward. This seems to have been one of those issues that has been brought forward in response to the emerging environment and possibly has not contemplated some of the broader elements at this point.

Senator LUDWIG—Were you surprised you were not consulted in relation to the bill?

Mr Shannon—Somewhat, given that it would be hard to assume that we do not have an interest and have not been up here beating our pathway on that interest for some time.

CHAIR—Stop hiding your light under a bushel!

Mr Shannon—I am unsure how many of the stakeholders were actually consulted about the detail of this bill, I must admit, given the short timetable that even the committee has had to consider it.

Senator LUDWIG—I guess we will find out in a moment.

CHAIR—Have you looked at the CPSU submission to the inquiry?

Mr Shannon—No. None of the submissions were available to us prior to today’s hearing.

CHAIR—They are now published and available and I would invite the AFPA to look at the CPSU submission in terms of some of the specific recommendations it makes in relation to

the bill and some issues it raises from a practical on-the-ground aspect of the CPSU's consultation with their membership. If you have any comment to make on that, we would appreciate hearing from you. As there are no further questions, Mr Hunt-Sharman and Mr Shannon, I thank you very much for your assistance this afternoon and for your submission, which is as comprehensive as ever. I carry the AFPA's glossaries around with me for committee hearings such as this. We look forward to seeing you at a future occasion.

Mr Shannon—Thank you very much.

Mr Hunt-Sharman—Thank you.

Proceedings suspended from 2.21 p.m. to 2.32 p.m.

[2.32 p.m.]

FAGAN, Federal Agent Audrey Ann, Executive Director Protection, Australian Federal Police

JACKSON, Federal Agent Stephen, General Manager Protection and Guarding, Australian Federal Police

BISHOP, Ms Karen, Senior Legal Officer, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

SEEBACH, Mr Anthony, Principal Legal Officer, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

McDONALD, Mr Geoff, Assistant Secretary, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

CHAIR—I welcome representatives of the Australian Federal Police and the Attorney-General's Department. We have a submission from the Australian Federal Police. Mr McDonald, there is no submission from the department.

Mr McDonald—We basically put our submission in the second reading and the explanatory documents.

CHAIR—That is fine; it is normal practice. Before we commence, I would remind senators that under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. I understand Ms Fagan has some brief remarks to make. Mr McDonald, you are more than welcome to make any comments if you have any, and then we will move to questions.

Federal Agent Fagan—Firstly, may I record an apology from Commissioner Keelty who is unable to appear personally before the committee. He is en route to farewell the Australian Protective Service and the Australian Federal Police officers in the first contingent on the Solomon Island's regional assistance mission. Commissioner Keelty provided a comprehensive written submission to the committee outlining his support and the AFP's support for the bill. The proposals in this bill will enable Protective Service officers of the APS to take proactive measures where suspicious circumstances arise in or near a place where those officers are protecting. It equips those officers with intermediary powers enabling them to intervene quickly in certain circumstances. It does not necessarily mean that the Protective Service officer would automatically rely on the power of arrest; it means the APS officer will have the power to intervene in certain circumstances that may lead, without that intervention, to a situation resulting in death or serious harm to a person or serious damage to a thing. It is important to note that such intervention can only occur within the meaning of the performance of their functions within the Australian Protective Service Act 1987.

The AFP is of the view that the authorisations in this bill are appropriately limited to the functions of a Protective Service officer where that officer normally operates—that is, at or in the vicinity of a place where the Protective Service officer is performing duty. The additional powers are intermediary. The APS already has arrest and seizure powers and is required to hand over arrested persons and property forthwith to police. Nothing in this bill alters that

situation. These powers are actually focused on events prior to the use of the existing arrest and seizure powers. They are not reactive and they are not investigative.

The bill focuses on equipping officers to act to determine the bona fides of a situation earlier than they are presently able to do. It offers the opportunity of detecting serious incidents earlier, thus raising the prospect of minimising serious damage or death. Furthermore, it raises the prospect that a set of circumstances which present on face value to be suspicious can be established to be benign upon examination. These powers are complementary to the existing functions and powers of the APS and, as such, existing accountability mechanisms currently in place within the APS will provide appropriate safeguards.

The proposed powers provide for the obtaining of personal information by Protective Service officers. Information is already collected by Protective Service officers in the course of their duties, and the protection of this information is subject to the safeguards prescribed by the Privacy Act. The training requirements for these powers are not onerous since they fit within existing competencies for Protective Service officers. As with any potential change to legislation, officers will receive additional in-service training and guidance.

As this committee is aware, the protective security functions of the Australian Federal Police and the APS are being integrated in a staged approach. There are already increased examples of joint operations between the AFP and the APS, which are articulated in the written submission. This bill's focus is upon the Protective Service officers. However, the AFP notes that the government is currently drafting legislation to address equivalent police powers as part of that wider legislative amendment to effect the integration of the APS and the AFP.

This bill equips Protective Service officers with intermediary powers, enabling them to act quickly in circumstances that may lead to a situation where serious damage or death occurs. Preventative measures form a key component of antiterrorist strategies where early intervention is critical. The proposed amendments reflect the changing requirements placed upon Protective Service officers in the heightened security environment.

CHAIR—Thank you. Mr McDonald, do you have any remarks to make at this stage?

Mr McDonald—Yes. I will focus on some of the safeguards contained in the bill. The bill does all the things that have just been explained by the AFP. Some of the safeguards come out of our consciousness of the need to balance individual rights with effective provision of protective services in our current security environment. Before exercising the powers conferred by the bill, an Australian Protective Service officer must have reasonable grounds to suspect that the prescribed circumstances necessary for the exercise of those powers exist. Accordingly, the exercise of powers is based on an objective standard, not a subjective one.

In the case of a request to a person to provide their name or other details, the APS officer must suspect on reasonable grounds that the person might have just committed, might be committing or might be about to commit a relevant offence. In addition, the power is exercisable only if a person is somewhere where the APS officer is performing their protective security functions. If a person is unable to provide their name and address, evidence of identity and the reason for being in the vicinity of a certain place, the penalties do

not apply if a person has a reasonable excuse. This could occur where there are language difficulties or where a person is unable to produce evidence of identity through no fault of their own.

The search provisions under the bill provide that an ordinary or frisk search must be conducted by a person of the same sex of the person being searched. The bill specifically states that an APS officer or a person who conducts the search must not use more force, or subject a person to greater indignity, than is reasonable and necessary to conduct the search. These are the sorts of safeguards which you will find elsewhere in Commonwealth legislation. We have been careful to make sure that these extra powers are subject to them.

Where an APS officer seizes an item under the new seizure provision, the item seized must be delivered into the custody of a police officer as soon as practicable. When an item is seized from someone other than its owner the police must take reasonable steps to ensure that the item is returned to its owner. When an item is seized from its owner the police must return the item to the person at a later time unless the reason for its seizure still exists. The bill was developed in conjunction the Office of the Federal Privacy Commissioner, and we took into account comments that he made during the development of the bill. We are in a position to answer questions.

CHAIR—I am very happy to hear that, Mr McDonald. Ms Fagan, would you thank the commissioner for his apologies, which we of course understand, and for his submission on behalf of the AFP. As is always the case these days, it contains a number of useful practical and anecdotal examples of the manner in which the legislation would work. Mr Jackson is aware that earlier in the hearing this afternoon we thought we had an opportunity to discuss with a member of the APS his perspectives on how the bill might impact on their day-to-day working roles. The committee was advised that on this occasion it had been indicated to him by a superior officer that it was not possible for him to give that evidence. I have indicated to the officer concerned that in no way is the committee concerned with him in that regard. We have always previously welcomed the assistance of the AFP, and therefore the APS, in providing us with officers to whom we can speak across the committee table to get a very clear impression of how legislation is going to impact on them and on the Australian community, and it is disappointing that that was not the case this afternoon. I have spoken with Mr Jackson about it. He has assured me it will not happen again, and I would appreciate a confirmation of that.

Federal Agent Fagan—I was not aware that there was a Protective Service officer attending—I just met him during the break. We can certainly look at that in future where we have a practical application for appearances. I would need to get clearance from the commissioner to do that.

CHAIR—I understand that, and that has always been facilitated in the past. I would just like to make sure that it does not happen to the point where an officer is embarrassed, as may have been the case today. This committee would never intentionally cause an officer to be placed in such a position. Your assistance in assuring it does not happen again would be gratefully received.

Federal Agent Fagan—Take it as read, Chair.

CHAIR—Thank you very much. I will now turn to some of the issues which are raised by the legislation and by the AFP's submission in particular. For example the commissioner says on page 2:

Part of APS core business centres on counter terrorism first response ... at security designated airports around Australia; this has recently been upgraded to an advanced first response ... level—

which we have come to know as AFR. In practical terms, what does that mean at the airports which are security designated as far as the APS is concerned? Does that mean that all those APS officers who are deployed at those airports are trained to AFR level?

Federal Agent Fagan—Yes, that is correct. That was a program introduced after the post September 11 review. There was budget funding provided for advanced first response training and a roll-out of upgraded equipment. All 400 staff at airports are now AFR trained, and that includes a mix of commercial and budget funded staff.

CHAIR—My understanding from the evidence we have received today and from some submissions that we have read is that those APS officers essentially exercise their roles in what is known as the sterile area of the premises when we are talking about airports—that is, beyond the X-ray point.

Federal Agent Fagan—That is correct.

Federal Agent Jackson—The air navigation regulations prescribe a body called the uniform security force, which is presently performed by the Australian Protective Service. The precise deployment within an airport community is very much a function of agreements underscored by contracts with the airport operators. You have heard previous submissions relate to their view of those contracts being too prescriptive in terms of the powers over the Australian Protective Service that the airport operators do impose. There is no legislative impediment for an Australian Protective Service officer, should the deployment be consistent with the command control prerogative of the commissioner, to be deployed kerbside, as we call it, of the sterile area.

CHAIR—Kerbside as opposed to airside?

Federal Agent Jackson—Absolutely.

CHAIR—In the example that the submission uses on page 25 about Brisbane airport, officers located—and I am reading from the submission—a male with a backpack, pacing the fence line at the southern end of the terminal. It then goes onto a number of other descriptions in relation to that incident. Does that, as the current arrangements stand, come within the area that APS officers can operate? Is that in the sterile area?

Federal Agent Jackson—Yes, however it is understood that more often than not those who choose to try to evade the normal security screening processes may, if I can use the vernacular, jump the fence and obtain access to airside, which is outside the normal screening template as applied by the airport operators. What this particular example demonstrates is that, whether it be airside or kerbside, from an operational perspective the perimeter fence is clearly within the vicinity of where an Australian Protective Service officer provides those roles and functions. It may very well amount to acts in preparation of a criminal offence, as trespass often does. Under those circumstances, these enhanced powers will enable the

Australian Protective Service officers to take those intermediary steps to establish whether the presence of a person in a place where they should not be is in fact acts in preparation or is perhaps more benign—where it is simply just a trespasser for not too sinister a reason.

CHAIR—That leads me to the next question: then what? It was raised with us by a previous witness that it may be a situation of having been axed in preparation, as you say, or that the individual may be in possession of a thing which is deemed to be a security risk under the act. However, the act does not change the APS's powers of arrest, as I understand it, so what does the APS officer do who detains someone for search with a thing that they then decide is a security risk? What do they then do with that individual, given that apparently we currently do not have state police officers regularly cruising any of Australia's airports except for Brisbane?

Federal Agent Fagan—In that situation, the next point is the existing powers of arrest. On the continuum, if they go from a suspicion to a belief, they can exercise that power of arrest and there is the provision within the current provisions of the APS Act to hand that person to a police officer. The role of the APS, as per the air navigation regulations, is counterterrorism first response. They are not a police nor investigative body, so they would call state or Federal Police to come and assist and take over for the investigation. Effectively, the Protective Service officer becomes a witness for the prosecution.

CHAIR—Are you confident, Ms Fagan, that in such a situation a call to the state or Federal Police at KSA or at Tullamarine airport would result in a sufficiently immediate response that the Protective Services officer did not find themselves detaining somebody for an extended period?

Federal Agent Fagan—The examples we have had in recent times demonstrate, and the national counterterrorism plan articulates, the roles of the AFP, the Australian Protective Service and state and territory police in situations such as that. The practice is that they will call, and there will be a response.

Mr McDonald—The situation is that the arrest and the handover to the police aspect of the powers has been part of the legislation for over a decade.

CHAIR—Subsection 13(1) of the APS Act?

Mr McDonald—Yes.

CHAIR—Looking at that, there are quite a narrow number—relatively speaking, and I am not suggesting it is inappropriately narrow—of grounds and defences to which it applies. In fact, the powers themselves are restricted to a belief on reasonable grounds that the person has just committed or is committing an offence, or the arrest is necessary to bring the person before the court for the offence. So, as I read section 13, an offence needs to have been committed.

Mr McDonald—That is intended. To arrest someone we have to have a standard of suspicion. The main thing to point out that we have not mentioned so far is that there is a capacity in this new legislation to seize any dangerous weapon or item. You could have a situation where they were not able to reach the belief, but they had something on them that could be used—

CHAIR—And that can be taken?

Mr McDonald—There is the capacity to seize dangerous items. It is consistent with the protective objects of the legislation. If there are sufficient grounds to arrest the person, they can arrest them. The arrest powers of the APS are an extension of what we understand to be a citizens arrest, but the bill is quite prescriptive about what they can do. It puts into it the necessity to be handing the person to the professional law enforcement officer.

CHAIR—On a practical note, where in the premises concerned do the APS officers conduct such a search? Where do they secure an item that they may have seized? How does that work for practical purposes?

Federal Agent Fagan—Where something is seized, there is the requirement to hand it over to police. Procedures have now been developed, in anticipation of the bill, for that to take place. The search procedures are a training issue that will need to be worked out in relation to the bill being passed. The Protective Service officers are required to do searches with dignity and in a situation that is not going to embarrass a person, which is normal policing practice as well. You have to assess that situation case by case. Most of the training takes the form of case-by-case scenario, given the emergency situation that they may be faced with. So there will be some judgment calls that will need to be exercised in that situation.

Mr McDonald—At the airports, of course, we have Customs and Quarantine. We have the whole apparatus there, so there would be the ability to use the facilities at the airport.

CHAIR—So we are not suggesting that somebody is searched to the extent of the removal of items of clothing, for example, as is nominated in the bill, in the middle of the public thoroughfare?

Mr McDonald—If you were to simply ask the person to remove their coat, operationally, I would not want to rule out—

CHAIR—When you use the word ‘operationally’ and I look at the police, I get very concerned, with respect.

Federal Agent Fagan—The dignity, privacy and respect of people are paramount in these situations. The other thing the Protective Service officer has to have in mind at the time, for any court matter that might be likely, is the continuity of possession of whatever they may be seizing. So there are a couple of issues that will be running through their minds: the dignity of the person, the safety of the community within which they are operating and the seizure of whatever they may be seizing and placing it in a register for any potential court hearing, because that is something that the courts will look at very closely to establish that it came from the hypothetical person and was seized, registered and handed to police. That continuity of possession must be maintained.

CHAIR—I understand.

Senator LUDWIG—I was trying to ascertain in my own mind the current powers in terms of this bill and in comparison to the AFP’s powers. Has there been any analysis done on the model used to develop these powers? Are the powers akin to the AFP’s powers of search, seizure and arrest, or have they been developed separately from that?

Mr McDonald—Clearly, when we developed this, we looked at and examined the provisions that are in the Crimes Act in relation to emergency search of a vehicle for drugs. That is the main purpose of that. Essentially, we included the safeguards that were in that act which were relevant to this. There are also other search type powers which we referred to.

Federal Agent Fagan—There would be similar powers in the Customs Act and the Motor Traffic Ordinance that police can use for stop, search and detains. So they would be two more examples.

Mr McDonald—I will give you an example with regard to the nature of the searches. With the frisk search, or ordinary search, we found that there were good definitions already in the Crimes Act which were sufficiently descriptive. We used those definitions, and they are definitions which have been operating for some years. People are familiar with them and they appear to have worked fairly well. The Customs Act provisions were other ones that we looked at. I recollect, but do not have it written down here, that we may have looked at some provisions in other legislation. I seem to recall us examining some New South Wales legislation as part of this process.

Senator LUDWIG—I was trying to ascertain how different the powers of the APS would be compared to the AFP's powers should the bill pass.

Mr McDonald—The fundamental difference is that they cannot arrest and charge someone and they cannot really question the person in the sense of conducting a record of interview—that type of situation. So the powers are quite limited. They are limited to basic identification and assessment of a threat. They are focused on protective security.

Senator LUDWIG—How long can they detain a person for?

Mr McDonald—There is no specific period nominated, but clearly the legislation anticipates that they can only keep the person insofar as it is necessary to perform the functions under the legislation—that is, to get a person's name, address and the reasons that they are in the area—which would obviously be quite a limited period.

Senator LUDWIG—If they were to detain them for the purpose of arrest by a police officer—that is, to pass them over—there is no time limit for that detention is there?

Mr McDonald—There is no specified time limit in the existing legislation, and it is something that we have not looked at putting a time limit on.

Senator LUDWIG—Why is that? It could be as short as five minutes while a police officer runs to their aid but, in an adverse situation, it could happen at eight o'clock or nine o'clock or midnight in an area under contract by DIMIA in ostensibly nowhere, because one of their detention centres are there, and therefore it could be eight, nine or 10 hours. There are no rules for the detention—that is, where they should be detained, how they should be detained and what comfort should be provided for them for their detention.

Mr McDonald—I guess the situation is that the provisions we have in relation to that have been in operation for over a decade. We have never had a situation where it has been drawn to our attention as being a problem. Of course, there is the overriding requirement that this be done as soon as practicable. The period could vary, but I do not think we have had a situation where there has been a problem.

Senator LUDWIG—They have not had to do this before though, have they?

Mr McDonald—The arrest aspect of it has always been there; it has been there for over 10 years.

Federal Agent Fagan—If we get to the arrest situation, the act is currently quite clear, in section 17, that they are to deliver forthwith to police. Then we have to remember that the air navigation regulations articulate that they are counterterrorist first responders—that is their role—and so the priority is to get back to that role. The new power is about assessing a suspicion that could either elevate the situation or establish bona fides. I would anticipate that in most practical scenarios that I could imagine it would be a very truncated time in which they would be making these assessments.

Mr McDonald—The point that Senator Ludwig is making is that you could have a scenario where, in delivering the person forthwith, there could be variations in how long that would take. However, the statutory obligation upon the officer is to do it forthwith—as soon as practicable.

Senator LUDWIG—How would they deliver them forthwith? What is contemplated?

Federal Agent Fagan—In practical terms, when the call was made there would already be communication occurring. As first responders they would radio back and get the assistance, and the police would be arriving there. From an integration point of view, we have AFP at the majority of the airports as well, if we just use that example. Here in the ACT we have the ACT policing component as part of the AFP and, of course, the states and territories, through the national counterterrorism plan, are ready to respond.

Senator LUDWIG—And if the person of interest chooses to walk away, what happens?

Federal Agent Fagan—You have already arrested them, so you use as much force as necessary on that continuum to detain them.

Senator LUDWIG—How would they detain them?

Federal Agent Fagan—We probably need to get to an explicit scenario. Handcuffing is a practical example.

Senator LUDWIG—So the APS officers will carry handcuffs?

Federal Agent Fagan—Yes.

Senator LUDWIG—They could handcuff them; that is not going to stop them running away, I assume.

Federal Agent Fagan—There are holding rooms at airports.

Senator LUDWIG—I was just curious as to how they are going to do it.

CHAIR—Senator Ludwig appears to be advocating leg irons at Australian airports.

Senator LUDWIG—I was going to suggest that it depended on how big the officer was.

Federal Agent Fagan—You start with communication; that is what was talking about when I talked about the continuum. You exercise your power of arrest and then you use as much force as necessary for the rest.

Mr McDonald—At its worst, this is dealing with a situation where there is a potentially dangerous person who could harm other people in the airport, just members of the public.

Senator LUDWIG—Yes, I understand that. I was just looking at practical issues and the training that would go with them. Although the APS are not integrated with the Australian Federal Police, even though they are part of it, there has been some evidence today that in this bill there are no direct training requirements or enhancements that might then provide the APS with the necessary skills and knowledge and the ability to carry out these new functions. Although it is not in this bill, can you tell me that the necessary training, accreditation, skills and knowledge for the APS officers will in fact be provided to allow them to then exercise those functions?

Federal Agent Fagan—What we have now is an eight-week training program, and they are trained with arrest powers, search powers and detain powers as is currently provided for in the act. The act talks about matters of dignity, conducting those searches in an appropriate manner and use of force et cetera. There is a proposal for a bill to amend these intermediary powers, which will include training. The training is being developed as we speak, and we will be ready for roll-out mid-August—depending, obviously, on the passage of the bill. That will then remind officers of their current powers but will then bring practical examples and training on these new powers into each station. So developing the program is well in train with our national training centre. They are well equipped now—they have the training—and then it is a step back to these new powers as far as ‘suspicion’, which is a lower threshold than ‘reasonable grounds to believe’. It is about establishing the bona fides of that person.

Senator LUDWIG—Will the new training be provided to all the APS officers or only those designated?

Federal Agent Fagan—The training will be applied to all Protective Service officers. The powers work to all sworn officers.

Senator LUDWIG—In respect of the commercial contracts that the APS meet, will that power then be available to the private firm that contracts the APS to undertake a particular function?

Federal Agent Fagan—No, the power is conferred only to Protective Service officers. The air navigation regulations provide for their role of counter-terrorism first response and put the obligation on the airport owners to have either a uniformed force or a police service doing that role. This act applies only to the APS.

Senator LUDWIG—We have heard some anecdotal evidence about the APS being in the invidious position of wondering whether to intrude in respect of a domestic or a local policing issue that occurs in an airport. What is the view of the department in respect of that?

Mr McDonald—The powers in terms of being able to arrest someone in relation to an offence are, as Senator Payne indicated, limited to offences that are relevant to security issues. It would certainly be outside their capacity to deal with matters that were not relevant to that—for example, if someone committed a littering offence or something like that, which is outside that scope, it would not be the sort of thing they would be able to arrest someone for. You have situations where it is not always apparent what all the circumstances are. One example I can think of is a child running off through the security barrier, the parent running

after them and the officer did not see the child. The officer might ask the parent what they were doing. So you are interacting with the public, and there will obviously be scenarios like that, where the person has a reasonable excuse for running through the barrier.

Senator LUDWIG—Is it made clear in the contracts with the private organisations the specific powers that the APS have and their role are not to extend to police work as such—offences like stealing or local police work—which is required to be done outside of that?

Mr McDonald—The APS does not have that statutory function; it is as simple as that.

Senator LUDWIG—And that is made clear to the providers in the contracts?

Mr McDonald—I have not personally seen the contracts.

Senator LUDWIG—Who has? Has Ms Fagan?

Federal Agent Fagan—Yes. The contracts articulate the counter-terrorism first response role. I think we need to be careful and recognise that Protective Service officers are well trained. They are looking for counter-terrorism first response reactions. There may be acts in preparation and there may be diversions, so there will be times where they need to pay particular attention and be in a sense proactive in their role as counter-terrorism first responders. We are currently looking at developing a concept of operations that builds more greatly on a proactive approach. Federal Agent Jackson recently attended an industry consultative meeting with all airport owners to look at moving into a more proactive model of counter-terrorism first response.

Senator LUDWIG—You might like to explain what that means by giving an example. I do not understand what you mean, though the committee might. Can you give it some concrete basis?

Federal Agent Fagan—We are looking at a means to enable and ensure that Protective Service officers working at airports are exercising appropriate judgments and using potential intelligence to be in certain places and be proactive if there are particular threats or risks exposed. It is a concept that is currently being developed. So I am now trying to explain something that we are working with an industry group to develop to put it on a more proactive footing.

Mr McDonald—I have seen an example of this working in Miami in Florida. A lot of it is about being alert to security issues and making sure that all the various people in the airport are very alert to these issues and making sure that they report back.

Senator LUDWIG—Don't they do that?

CHAIR—Call me unreasonable, but I thought that was what they did anyway.

Mr McDonald—Absolutely, but there is always room for improvement.

Federal Agent Fagan—They do do that, but I think the point that I heard the tail end of was that some of the arrangements had got quite prescriptive. What we are trying to develop is a concept that meets all the needs of the airport environment, particularly, that is outcome based—providing a secure environment—that levers off the AFP intelligence that came about from integrating. There is a greater sharing of information now. That is the approach that we are working towards—to develop a more proactive approach.

CHAIR—When you say ‘working with industry groups’, I assume that means you are talking to airport owners.

Federal Agent Fagan—Yes, airports.

CHAIR—So you are talking to airport owners about being more proactive in terms of the counter-terrorism first response role of the APS? Is that right?

Federal Agent Fagan—About the role of Protective Service officers in counter-terrorism first response being more proactive within that environment.

CHAIR—I think that just reversed my sentence.

Federal Agent Fagan—Sorry about that.

CHAIR—I think we are in heated agreement.

Federal Agent Fagan—Yes.

CHAIR—From the information that you just gave us, Ms Fagan, that means that the AFP, for example—and we are always grateful for examples that show us what you mean working on the ground—would be regularly meeting with or conferring with at least those APS officers deployed in the airport environments that we are talking about now to give them early information about possible threats and to make sure that they are well prepared to do their job. How do they do it now if not on that basis?

Federal Agent Fagan—They do. That has been evolving, and that is what we want to articulate into what we call a concept of operations—to move that contract more into an outcome based approach. That is what we are working on with industry now. I cannot give you the detail because the consultation started only about five weeks ago.

Mr McDonald—It is really about continuous improvement, which is something that we always have to focus on. Obviously, after September 11, there was a great focusing of governments on security at airports. It is something that will clearly be an ongoing thing, whether it is in relation to the legislation or the procedures.

CHAIR—I do not know about other members of the committee, but I think that, if there is a way to provide an example to the committee of how this proactive approach that you are describing has been developing and is going to work that is different from where we have come from, it would be of benefit to the committee.

Mr McDonald—One of the things that really comes out of it is that if someone does see someone doing something suspicious the airport staff will at least know, if this bill gets passed, that the APS have the capacity to ask these questions and assess the person. It gives a little bit more assurance that they have that capacity and therefore will hopefully, with all these procedures, be more confident about doing that and understand the need to do that.

CHAIR—The committee would also be pleased to receive any information that outlined for us the relationship between the policing that happens at airports, both state and federal, and its interaction with the work of the APS. After the previous evidence and the previous two sets of witnesses, my observation is that there are, for practical purposes, some gaps that concern them and their members. I would be interested in the department’s/the AFP’s

perspective on that. It might mean a quick look over the AFPA and CPSU submissions. They identify some of those issues.

Mr McDonald—I am happy to do that.

Senator LUDWIG—Following up on that point, can you provide not so much an assurance but perhaps an explanation that the new, enhanced, role will not allow an expectation not only, for example, on the part of the airport owners but also on the part of other private users that the APS will not fulfil a quasi-policing role on their behalf? It is about the expectation that they will and that, as a consequence, the APS will be put in a more invidious position. As I understand both of your submissions, they are not quasi-police, they are not going to intervene on those issues and the police are the appropriate authority to do that. That seems fundamentally clear to me. But the way you then interact with private users provides a new and different dimension. From the submissions that have been made earlier, I am concerned that the new enhanced procedures might in fact create more interaction as a consequence of being proactive, which then feeds an even greater expectation that they will fulfil a quasi-policing role for minor offences such as stealing.

Mr McDonald—I can see what you are driving at.

Senator LUDWIG—What, then, are the AFP/Attorney-General's Department doing to ensure that it does not become an expectation and that it is not fulfilled in that way so that the APS do not have the more onerous task of trying to explain to the public, 'No, this isn't my role'? Perhaps in the answer to the chair you could include that information. That would be helpful.

Mr McDonald—Yes.

Senator LUDWIG—Briefly, in respect of the example that you provide of the person who is wandering around Parliament House, what has changed now? Won't the person still say the same thing—that is, that the person is not a police officer and that they cannot detain them?

Federal Agent Fagan—With the passage of any amendments, what will change is what is operating in the mind of the Protective Service officer as far as suspicion goes. In the example, we did not go to describing what level of suspicion was in the officer's mind, but we are creating this power that allows for the Protective Service officer to ask for names and details to establish bona fides where suspicion exists.

Senator LUDWIG—But to take your example literally, the person that is being questioned is still going to answer, 'You're not the police. I'm not going to provide you with my name.' Their mind has not changed, I suspect, about their view of the APS and their role. How are you going to address that?

Mr McDonald—In the legislation itself, one of the things that the Privacy Commissioner was particularly concerned that we do was to ensure that it is made very clear to the member of the public that the APS do indeed have that power. In explaining the role of the legislation he was very keen that we do that and that has been provided for in the legislation at his request. In proposed subsection 18A(2), it says:

If a protective service officer:

(a) makes a request under subsection (1); and

- (b) informs the person of the officer's authority to make the request; and
- (c) informs the person that it may be an offence not to comply with the request;

Then the person must not fail to comply with the request. Built right into it there is a statutory requirement to make sure the person is informed.

Senator LUDWIG—I understand that bit. Have you given consideration to other practical ways of ensuring that the public understand the role of the APS, especially when they are being utilised by private providers? I think people understand when they are out on Commonwealth property—I would imagine they do if they are within the gate—but in other areas where they are interacting with the public, what steps do you intend to take, if any?

Mr McDonald—That is something which will probably be elaborated more in the procedures.

Federal Agent Fagan—To clarify, you are asking what we would communicate as far as the new powers go?

Senator LUDWIG—Yes.

Federal Agent Fagan—Going into industry itself, at airports there is a means of communicating what powers have been changed, through the industry consultative body. We would then need to contemplate how we do that with the public more generally. The training itself, if I am on the right track here, is about the officers being clear with their powers and then when they exercise those powers being able to articulate to the person what they are doing. That is all captured in training.

Senator LUDWIG—It is also the public themselves. If I was at an airport and a APS officer came up to me and said, 'Put that newspaper down,' I might look to see whether they were a police officer first before I did that.

Mr McDonald—The interesting thing about it is that they are uniformed and they have identification. Probably many members of the public would actually be, if anything, more mistaken about how much power they had rather than the limits.

Senator LUDWIG—That is one of the other problems that you are going to explain to me later.

Mr McDonald—The legislation outlines in the statute itself very clearly that their authority has to be described. In their training and procedures, special effort will be taken to ensure that that is communicated in the best manner possible. I imagine, from discussions I have had with him, that the privacy commissioner will be quite interested in the way that it is intended to be communicated. We have been working with him.

Senator LUDWIG—Was that a contract you had with him to provide that information?

Mr McDonald—I think he would like to have a contract with me. I have brought in DNA laws and goodness knows what—

Senator LUDWIG—So this was free of charge was it?

Mr McDonald—which has created an untold amount of work for him.

Senator LUDWIG—I will ask him at estimates.

Mr McDonald—I am afraid I do not have a budget.

Senator KIRK—Will those sorts of matters be detailed in the procedures for the APS officers? In other words, in the example that Senator Ludwig gave—the newspaper example—would the APS officer then have to explain to the person concerned what his or her authority is?

Federal Agent Fagan—We use case by case examples for our training so that we can pass on that information to the PSOs. As I said at the beginning, they have had eight weeks of training and experience in exercising judgments so this is a short course to hone in those skills for the exercise of a suspicion power. Of course the training is the way that we do it, and on the ground guidance through their supervisors who will also be getting a level of training.

Senator KIRK—On the question of suspicion powers, in the CPSU submission there were some issues raised in relation to section 18B(1)(b), that is, the stopping and searching power in relation to a thing that is likely to cause or is likely to be used by the person or another to cause substantial damage, et cetera. The CPSU made the point that the word ‘likely’ puts quite a high threshold on how much danger there has to be before they are able to exercise the powers, and they suggested the word ‘may’. Has that been considered in the drafting? What is the reason for the selection of the word ‘likely’ over the word ‘may’? It may be something you wish to take on notice in view of the time.

Mr McDonald—We have seen that. We have put some thought into the width of these powers. We are obviously quite concerned that they be seen as powers that are not used unless it is necessary, and ‘likelihood’ was certainly something that we thought appropriate. It is a stop and search capacity and, flowing from that, items can of course be seized. We have approached this with some care, and the reason we chose ‘likelihood’ is that we think that needs to be the requirement.

The other thing is ‘suspects on reasonable grounds’, so you need to look at the total test, which is similar to the tests in other legislation. We have used language that is common and that has been commonly used successfully. We like to try to follow those models. We can consider it further, but we certainly were not persuaded that it should be widened much more than it is.

Senator KIRK—The point was made by the CPSU representatives that, as practical matter, it is very hard to distinguish between the two and that day to day, on the ground, the word ‘may’ better describes the circumstances in which they would need to exercise the powers.

Mr McDonald—Yes. We can consider that, but the word ‘may’ can be interpreted as being much more permissive than we might want in this context. We might want them to really think about probability, and using ‘likelihood’ gets people to think in that way. So that was the motivation.

Senator KIRK—I would tend to agree; I understand that. If the word ‘may’ were to be used, then in almost any circumstance there may be some risk.

Mr McDonald—Yes.

Senator KIRK—Finally, subparagraph 18B(1)(a)(iii) in the bill states:

iii) has a thing in a vehicle operated or occupied by the person;

It was raised with us whether 'vehicle' would extend to 'boat'. Is that common usage of the language, or would that need to be specified? You may wish to take that question on notice.

Mr McDonald—I think I know what the answer is, but I will check.

Senator KIRK—You can take that on notice, then.

CHAIR—In fact, Mr McDonald, we are going to ask you to have a look at the suggested amendments that the other submissions have made and to comment on those for the committee. There are a couple that seem to the committee to be useful suggestions.

Mr McDonald—We have looked at every one of them and we have answers, so we will be able to provide that quite quickly.

CHAIR—Thank you very much. Ms Fagan, from your responses it seems as though the training process is well under way. Would you, or Mr McDonald, advise the committee what the proposed commencement date of the bill is. I understand that it is 28 days after assent. Is that an adequate time for the training that you have envisaged for your officers to be completed?

Mr McDonald—In terms of the adequacy of training—

Senator LUDWIG—That sounds operational.

CHAIR—Yes, it does sound operational.

Mr McDonald—Yes, very operational. One of the tensions on the legislative front is that we are obviously concerned that there be sufficient powers at the airports and that they be delivered fairly quickly. We have the legislative process that we are going through and so, in recommending the 28-day period, we considered that if you take into account the parliamentary process, royal assent and the 28-day period, that would be an adequate period while at the same time providing the protection. I think you are right: it is an operational matter as to how long the training will take.

CHAIR—So, really, you should not have said all of that, Mr McDonald.

Senator LUDWIG—Does it mean 28 days after the sitting?

Mr McDonald—It is quite a while away.

CHAIR—Ms Fagan, would you like to add to that?

Federal Agent Fagan—Thank you, yes. As I explained earlier to the committee, training is being developed and is due to be rolled out by 15 August. In order to have the training in place for use of the powers, we anticipate the required period to be to about 1 November.

CHAIR—Thank you for advising us of that. Clause 18A of the bill indicates a penalty for failure to comply with a request to provide a name. From my brief reading of the bill, in relation to stop and search there is no penalty for a failure to comply; was that intended?

Mr McDonald—The situation is that, if it involves obstructing a Commonwealth officer, there are offences under the Criminal Code that would apply. Within the Criminal Code we have tried to centralise our offences and not duplicate them all over the place.

CHAIR—Indulge my desire for consistency in this, Mr McDonald. Having said that, why would you then put a penalty in 18A but not in 18B?

Mr McDonald—Mainly because the penalty for obstructing an officer is primarily focused on the physical obstruction of an officer, while the failure to provide a name usually is an offence with a monetary penalty just to emphasise the fact that it is more appropriate to have a monetary penalty for not providing a name. From time to time it happens that the parliament indicates that a subset-type conduct should not be given more onerous penalties. One example of this would be false misstatement offences. They are a subspecies of fraud offences. There will be occasions where a person could be prosecuted for fraud or where they could be prosecuted for a misstatement offence, and, clearly, the parliament's intent in that case is that the misstatement offence is used. So we envisage that the requirement to provide the name would be prosecuted under this offence. So if someone resisted by pushing the officer away, we have other offences under the Criminal Code for that sort of behaviour.

CHAIR—Is the officer required to advise the individual who is being approached of the offence of obstructing a Commonwealth public official in the performance of their duty?

Mr McDonald—We certainly have that advisory in relation to the name situation. Perhaps you have found something that we need to put into the legislation.

CHAIR—Oh, happy day!

Mr McDonald—We certainly responded to the need to mention the offence in the context of providing the name. In what you have targeted there might be a situation where you do not use the request for the name before you do the stop and search.

CHAIR—They do not appear to be sequential, or there is no requirement for that.

Mr McDonald—Normally you would suss the situation out. You would ask for their name and address—that is in the legislation—and you are required to tell them it is an offence not to cooperate. I think your point is that you might have a situation where you do not go for that procedure, in which case there might be a need to state—

Senator LUDWIG—You might have to act immediately, especially under the yet unknown proactive—

Mr McDonald—Yes. I am sure that, under the procedures, they would do that in any case, but you are right.

CHAIR—We will be looking forward to seeing the procedures; and I am grateful for that concession, Mr McDonald.

Mr McDonald—I am always willing to make concessions.

CHAIR—Could I seek your advice in terms of the consultation that was undertaken on the bill. Clearly you have consulted with Mr Crompton, because he has got strong views, but in relation to stakeholders, what level of consultation has there been?

Mr McDonald—‘Stakeholders’ is a very broad term.

CHAIR—How about the APS?

Mr McDonald—Yes, certainly.

CHAIR—The AFPA? The CPSU?

Mr McDonald—I have not conducted consultations with the associations. I do not know whether there has been contact on the part of the police. I think the answer on that is that I cannot point to consultation that I have been involved in.

Federal Agent Fagan—The AFPA have not been consulted.

Senator LUDWIG—Why? Aren't they on your list of people that you should consult in relation to a bill, or do you just go and talk to the people who might pay?

Mr McDonald—We see this as a very important part of the process, but the situation with it is—

Senator LUDWIG—I do not want to interrupt you, but isn't the process that by the time you get to here—you have said it is a very important part—you know one of our questions is always going to be, 'Have you consulted the stakeholders?' I have got to say that I do not know of a hearing where we have not asked that question, but I am happy to stand corrected. The stakeholders usually come along and explain; we ask them about the consultative process that they have gone through, because that is an important step in the whole process. We are not then resolving issues here which would normally be resolved through consultation between you and the relevant stakeholders before you get here—or at least there is an opportunity. That way, it does sometimes narrow the points of differentiation that are brought here. People then say, 'We have resolved these issues, although they were matters that we had an opportunity to speak to the department or the relevant authorities about. Are you saying that it is now our job to ensure that consultation takes place?'

Mr McDonald—No, I am not suggesting that. We have had a fairly busy program with legislation, and this bill is one that the government was very keen to introduce. Usually, especially with a lot of other legislation projects that we have, there is an exposure draft and public consultation processes—particularly with our larger projects, like proceeds of crime and theft, fraud and the like. With this one, basically there was not the time to have a wider process.

Senator LUDWIG—But even a narrow process. I can accept that you did not have a wider process, such as those which were dealt with under the proceeds of crime legislation. I understand, in some instances, the need to bring forward legislation in a short time. We are in the middle of recess at the moment. This reference was given to us on the last day of the last sitting, and 22 days or more have already elapsed since then. So you have had a period to be able to rectify that in any event, and you have chosen not to. I understand that the associations are not so distant from you that you could not have private consultations with them in any event—and I would expect that you do that; I really would. Now you are saying to me that you do not. Do I have to write to you every time, in advance, and say, 'Can you ensure that consultation takes place?'

Mr McDonald—No, you do not have to do that. Let us just accept your point on that, and it is something that we will take more care about in the future.

CHAIR—I appreciate that undertaking, because the committee is concerned that the witnesses that come before it—no matter where they come from—have an opportunity to

participate in this process. But Senator Ludwig is most correct in saying that it is at the outer end of the process; we are hardly at the commencement. In relation to the integration of the APS with the AFP, this committee is acutely attuned to the history of that entire process. As I alluded to earlier, in the past we have had the experience of dozens of concerned APS officers sitting in our estimates hearings as an industrial statement. That was an unfortunate period which we think has been significantly ameliorated in recent times but if, as other witnesses have alluded to today, there is to be more legislative change in this area—which we all expect—it would be good to have those people come to the table saying they have been part of the process, even if they do not agree at the end of the day.

Federal Agent Fagan—In relation to integration, the consultations that we have articulated to this committee in the past have continued and will continue. We will take that up as a point that we will continue on.

CHAIR—Thank you; I appreciate that. This has been a very comprehensive discussion on a reasonably small piece of legislation compared with what often comes before the committee. We are grateful for the department's and the AFP's assistance in that regard today. You have taken a number of matters on notice. Although it is not a large number, it will assist the committee to draft its report if you can respond as soon as possible. I do understand the pressures that are on both agencies at this point in time, and the level of activity that is occurring, but we have to report by 18 August. The committee has conducted three legislation hearings in the past day and a half, so we have a fairly heavy program of our own. Your assistance in responding on those matters as soon as possible would be gratefully received. There being no outstanding questions, I thank the witnesses for your assistance today and all other witnesses who appeared before the committee this afternoon.

Committee adjourned at 3.42 p.m.