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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

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SYDNEY

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WITNESSES

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Friday, 18 November 2005

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Substitute members: Senator Stott Despoja for Senator Bartlett

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Heffernan, Hogg, Humphries, Joyce, Lightfoot, Ludwig, Lundy, McGauran, McLucas, Milne, Nettle, Parry, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Bob Brown, Brandis, Crossin, Kirk, Ludwig, Mason, Nettle, Payne, Stott-Despoja and Trood

Terms of reference for the inquiry:

Anti-Terrorism Bill (No. 2) 2005

Committee met at 1.33 pm

BISHOP, Ms Karen, Senior Legal Officer, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

GRAY, Mr Geoff, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

KOBUS, Ms Kirsten, Acting Principal Legal Officer, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

McDONALD, Mr Geoff, Assistant Secretary, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

CHAIR—Good afternoon, ladies and gentlemen. This is the third hearing for the inquiry of the Senate Legal and Constitutional Legislation Committee into the provisions of the Anti-Terrorism Bill (No. 2) 2005. The inquiry was referred to the committee by the Senate on 3 November 2005 for report by 28 November 2005. The bill proposes to amend various federal laws with the stated aim of improving existing offences and powers targeting terrorist acts and terrorist organisations. The bill's features include: a new regime to allow for control orders to authorise the overt close monitoring of terrorist suspects; a new police preventative detention regime to allow detention without charge where reasonably necessary to prevent a terrorist act or to preserve evidence of such an act; updated sedition offences; amendments to terrorist financing offences; new questioning, search and seize powers exercisable at airports and other Commonwealth places; and amendments to information-gathering powers available to law enforcement and security agencies. The bill will also amend the Financial Transaction Reports Act 1988 to better implement the Financial Action Task Force on money laundering's special recommendations on terrorist financing.

To date the committee has received over 200 submissions for this inquiry which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of those are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee does prefer 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 the witnesses give the committee notice if they intend to ask to give evidence in camera.

The effective process that I suggest we adopt this afternoon is that we take the bill schedule by schedule to enable senators to raise concerns which have arisen out of the last few days hearings or matters upon which they wish to seek clarification with the staff of the Attorney-General's Department. If we do not do that, we run the risk of driving ourselves and the officers to distraction by jumping back and forth all over the bill.

Senator BOB BROWN—It might have helped if we had known that yesterday.

CHAIR—Senator Brown, I have only been thinking about how best to approach it since yesterday. It is not a decision I made a long time in advance; it is just a suggestion.

Senator STOTT DESPOJA—I think that suggestion is a good one, but I am sure you will not stop any general questions—taking the bill as a whole, if needs be—at the end.

CHAIR—Absolutely. I welcome the representatives from the Attorney-General's Department. I 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 and, if necessary, they must also be given the opportunity to refer those matters to the appropriate minister. Mr McDonald, did you want to make an opening statement on this occasion?

Mr McDonald—The only thing that I am very keen to do at some stage, depending on when it suits you, is to elaborate a little bit on the human rights aspects of the legislation. I suppose we could actually do that in schedule 4, but I feel that, given some of what was said yesterday, we need to just touch on a few points there.

CHAIR—Mr McDonald, I think it might be a good idea—and so do a number of my colleagues—to start with that so that it is on the record. Then we can draw from it when we need to.

Mr McDonald—I will make it quick. Just cutting to it, some of the criticism of it from a human rights point of view has been in language that this is arbitrary legislation. We reject that completely. It is not arbitrary. There are issuing officers and courts and the like right through this process. Preventative detention orders will only be made to prevent an imminent terrorist attack or to preserve evidence after a recent attack. An initial order would be made by a senior member of the AFP and a continuing order will only be made by a judge, a federal magistrate and so on in a personal capacity. The test to ensure that detention is not arbitrary in the sense of the criteria is based on reasonableness, necessity, proportion, appropriateness, justifiability or circumstances. Because of this, the government is satisfied that the preventative detention regime needs this test and that it is not arbitrary or otherwise contrary to international law.

Some of the comments were that the legislation had incommunicado detention. This is not correct. Incommunicado detention involves complete isolation from the outside world such that not even the closest relatives know what is happening with the person. This legislation does not do that. Some of the comments were about judicial review and suggest that there is a difficulty here. However, people who are detained under a preventative detention order have the right to contact a lawyer, they can bring an action for the purposes of challenging the lawfulness of the detention in the High Court and the Federal Court. We have the Administrative Appeals Tribunal compensation remedy there, as well.

A person who is detained under a preventative detention order must be given a summary of the grounds on which he or she was detained as soon as possible after that. So they have a basis to challenge the lawfulness of the detention. A person who is the subject of a control order will be able to apply to the court to have the order revoked at any time after the order is served on the person. The person who is the subject of the order can communicate with a lawyer and obtain a summary, which I mentioned before. Because of this, the government is satisfied the legislation is consistent with Australia's obligations under article 9 subarticle 4 of the ICCPR. A person may have a discussion with a lawyer about bringing a complaint to the

Ombudsman and a complaint in relation to the conduct of the police under relevant legislation to proceedings in the Federal Court.

The ex parte nature of preventative detention orders has been focused on by some critics from the human rights perspective. While a person against whom a preventative detention order has been made will not be present when the order is made, they will have the right to seek a remedy in relation to the order in the court as soon as he or she is informed about it. The nature of preventative detention orders and the framework of the legislation demonstrate that it is only on the basis of protecting national security and of necessity that preventative detention orders will be made. Indeed, the issuing authority will need to be satisfied that making the order will substantially assist in preventing a terrorist act.

There is some indication that detailed minimum guarantees in article 14 of ICCPR only apply to criminal charges and protect the rights of persons charged with a criminal offence. The government notes that is what article 14 is about. The government remains committed to fundamental principles such as presumption of innocence in a criminal trial. This legislation is not about a criminal trial; it is preventative detention.

It has been suggested that the ICCPR, as it does, prohibits arbitrary interference in a person's family life. The government is satisfied that restrictions which are placed on communication with family members are not arbitrary as they are necessary and proportionate to the purpose of the preventative detention. The right of freedom of expression under article 9.2 of the ICCPR may be subject to restrictions provided by law and those that are necessary for the protection of national security and public order. The government is satisfied that restrictions on communication imposed by the measures are necessary for the protection of national security.

I should point out that a detainee over 16 but under 18 can also have personal contact with their parents and guardians under section 105.39 of the bill unless the person is the subject of a prohibited contact order, and you can only get one of those if it is relevant to national security.

Regarding the Convention on the Rights of the Child, you can only get an order if it will substantially assist in preventing an imminent terrorist attack, and that is about preserving evidence after a recent one. Article 37(b) of the Convention on the Rights of the Child says:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time ...

The legislation is sensitive to that. It is not arbitrary.

Some have asserted that the conditions of the control order undermine fundamental rights with respect to freedom of movement, but to say that ignores the fact that any of those conditions have to be necessary and appropriate, and that goes back to national security grounds. With the right to privacy, the ICCPR prohibits arbitrary interference with a person's privacy. For the reasons I have mentioned, we do not think it is arbitrary. We have obligations under the ICCPR to ensure that no person is arbitrarily deprived of their life. We point out that our use of force provision involves the weighing up of necessity and proportionality. The use

of force and any loss of life will not occur arbitrarily, so we do not breach the convention on that basis.

Some comments have been made about segregating people under preventative detention from convicted criminals and issues like that. This is an issue about which there is great sensitivity. There will be quite a bit of work done in terms of sorting out the details of that, but we are very conscious of the fact that these people should not be put in with convicted people. The obligation to segregate accused people from convicted people is one which applies except in exceptional circumstances. I point out that Australia has a reservation to the effect that this principle is accepted as an objective to be achieved progressively. The legislation provides specifically that persons detained under preventative detention orders must be treated with humanity and respect for human dignity and must not be subject to cruel and inhuman treatment. Those are the main things.

The other thing I wanted to make very clear—and this has to be mentioned every time we mention human rights and every time we talk about this bill—is that this bill is not targeted at any particular religion or nationality. It is aimed at terrorists, whatever their faith and whatever their race. The government is satisfied that the bill is not inconsistent with Australia's international obligations to prevent discrimination. We are also satisfied that the bill is consistent with the Racial Discrimination Act. Under that act, indirect discrimination is not unlawful if it is reasonable to have a regard to the circumstances of the case, including the government's policy objective of preventing terrorist activity. To ensure the measures are reasonable in a particular case, the bill ensures the criteria for making an order are objective and reasonably related to the prevention of terrorism.

Certainly, as I said at one stage on Monday, it would be a devastating outcome for any of the agencies, if discrimination were to be sheeted home to those agencies. Of course, we have watchdogs in our system, whether it is the inspector-general of security, the Ombudsman or the Human Rights Commissioner, to detect any difficulty of that nature. I hope that assists a little in hitting on some of the main matters that have been raised in relation to this. You might have noticed that I was being fairly careful to read my notes on that. The notes have been provided by the Office of International Law, so they have received fairly careful consideration by that office, as I mentioned earlier.

CHAIR—Thank you very much, Mr McDonald. Mr Gray, do you want to add anything at this stage?

Mr Gray—I was going to make some preliminary comments in relation to schedule 3, but perhaps I will wait until we get to schedule 3 and then I will make a comment or two.

CHAIR—All right. Given the breadth of those remarks, Mr McDonald, it seems to me that there may be questions from senators on those specific introductory remarks, so we will go to those before we move onto the schedules. Senator Stott Despoja has indicated that she has questions.

Senator STOTT DESPOJA—Mr McDonald, I am trying to work out if you owe me a document. Looking at the *Hansard* from Monday—the exchange we had in relation to these matters and the advice from the Office of International Law—I am wondering if you are going to give us any written advice.

Mr McDonald—That is entirely up to you. If you want to work from what I have just given you, that is fine. If you would like us to reduce our position on this into writing, we can do that too in our supplementary submission.

Senator STOTT DESPOJA—I am not talking so much about advice that you can give the committee—and I note in your opening comments on Monday that you undertook to do that, and to all intents and purposes you have done that now—but wondering if there is any chance that this committee can see the advice from the Office of International Law that was provided to government in ensuring that we complied with the international conventions.

Mr McDonald—I see. Do you mean something that was akin to the constitutional law advice?

Senator STOTT DESPOJA—Yes.

Mr McDonald—I think the policy on that is much the same as with the constitutional law advice. However, you will find, as did the PJC on ASIO, ASIS and DSD when we did our written submission to them, that we have provided pretty comprehensive assistance to you in terms of touching on the issues.

Senator STOTT DESPOJA—Unfortunately, you will not be providing that advice to me because there are no cross-party members represented on that Parliamentary Joint Committee, but I want to know what that advice is. Is it secret?

Mr McDonald—What I am getting at is that I will provide to this committee some written material which should assist you. It will not consist of a copy of the advice provided to government, but it will be some written material which can assist you and which reflects some of the sorts of things that I was talking about just a few minutes ago.

Senator STOTT DESPOJA—Thank you for that. You have referred to a number of articles and specific aspects of conventions such as the International Covenant on Civil and Political Rights and, indeed, the Convention on the Rights of the Child. I acknowledge your reference to article 37, part (b) of that convention. I want to talk about part (c) of that convention, which says:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so ...

Obviously you were asked by Senator Crossin and me about this on Monday, and you admitted that there was no specific provision in the legislation to ensure that adults and children were kept separate. Have you reconsidered this and is this something that you would consider enshrining in the legislation now?

Mr McDonald—I have discussed this with the AFP, and we were thinking it should probably go in the protocols and guidelines. We were not thinking of putting it in the legislation.

Senator STOTT DESPOJA—Why not? Would it hurt? Let's specify it.

Mr McDonald—I cannot really give any commitment to put it in legislation here at the moment, but that is something that we can consider.

Senator CROSSIN—On that issue, isn't that a better safeguard? Isn't that an absolute guarantee that we could be satisfied that children between the ages of 16 and 18 would at least be properly treated under this legislation?

Mr McDonald—Many of our international obligations in relation to custody, particularly in prisons, are met by procedures within the prisons. So it is not unusual for these things to be satisfied by non-statutory means. You can do it by non-statutory means. But that is something the committee might want to consider recommending. Obviously it is not my job here today to say, 'Okay, let's stick that in.'

Senator STOTT DESPOJA—I understand that.

CHAIR—The committee needs to explore these issues.

Mr McDonald—Yes, that is right.

Senator STOTT DESPOJA—But you are acknowledging it would not have an adverse effect on the legislation and you cannot see that it would have an operational impact.

Mr McDonald—I cannot think of an adverse effect. One thing is that probably everything we have needs not to be expressed in absolutes because you can have an emergency situation—for example, a cyclone or a fire or something like that—where the only way someone can be safely looked after is with someone else. But, subject to that qualification, I cannot really see any strong reason why not.

Senator STOTT DESPOJA—That is one convention. You have made reference to some of the specifics of the ICCPR. You would have heard questioning throughout the two days of hearings, including that of the group of witnesses who appeared immediately after you, from PIAC. When they gave evidence, one of the questions I asked—and others have pursued it—was on the issue of attaching that covenant in some way. I am not suggesting that is an easy solution or the best solution, but I think HREOC and others have also talked about the development of a protocol or admin protocols, not unlike the way in which ASIO operates. In particular, there is the notion of attaching the covenant to the legislation. What impact, if any, would that have on the bill?

Mr McDonald—The interesting thing about that is that you could attach it to all manner of legislation. I guess I have a similar view to Mr Abraham on this. He suggested that the better approach is probably to ensure that the legislation itself has in-built safeguards, that you have a proper human rights commission, the Ombudsman, the Inspector-General of Intelligence and Security and so on. You are better off just being sure that your legislation complies. So I do not think that attaching it adds anything significant.

Senator STOTT DESPOJA—But if it does not add it does not subtract. It is not harmful to the legislation. It would not be an impediment to government to make it clear that this particular human rights covenant—

Mr McDonald—As much as I always like to say, 'This is a good idea,' I think that with this one I am with Mr Abraham. It is much better to make sure the legislation itself is satisfactory, and that is what we have endeavoured to do. I think that by attaching stuff to legislation, in just the same way as we sometimes put clauses in for an abundance of clarity

and things like that, we sometimes clutter our legislation. So I must say that it does not appeal to me as an idea.

Senator MASON—The flexibility appeals to us.

Senator STOTT DESPOJA—I would not suggest that these things are designed to clutter. Sometimes they act as a reminder of some of our international obligations.

Mr McDonald—I think our human rights legislation reminds us of it, as do the individual provisions within this legislation. I have said before that compared to other countries and, dare I say it, state governments—

Senator BRANDIS—You can say that any time you like, Mr McDonald.

Mr McDonald—the Commonwealth is quite meticulous and careful in outlining in its criminal and other procedures the safeguards and rights that people have. Historically that has been the case for a long time.

Senator STOTT DESPOJA—I have one more general question. This relates to your introductory remarks. You mentioned privacy rights and privacy principles. I asked you on Monday as a question on notice and I do not believe you have answered in the supplementary paper I have seen. Maybe I asked on Wednesday—

Mr McDonald—You mentioned it when you were talking to someone else and said that you wished you had asked me.

Senator STOTT DESPOJA—My question is: with regard to its impact on people's privacy, privacy rights in this country and our international obligations, has this legislation been assessed by the Privacy Commissioner at the request of government?

Mr McDonald—The first thing is that within my own department there is an area that looks after privacy policy issues. Of course that area of the department was involved right through the development of the bill. I briefed the Privacy Commissioner and I understand she is going to make—and may have already made—a submission to the committee. I think she indicated to me that she was going to make a submission. The reality of it is that we are satisfied that the bill—

Senator STOTT DESPOJA—I know. Please, I am not asking for your opinion. I am asking whether the government requested an opinion from the Privacy Commissioner and I am wondering whether she is satisfied with it.

Mr McDonald—I think her submission to this committee will outline her views clearly.

Senator STOTT DESPOJA—Did you request her analysis of the legislation? Did the government request her analysis and her assessment of the legislation?

Mr McDonald—I gave her a copy of the legislation and took her through it. It took several hours and we discussed various provisions in the legislation. The Privacy Commissioner, being a statutory officer, is in a position to outline to you directly what her views are.

Senator STOTT DESPOJA—I am just trying to work out if there was a specific request from the government for the Privacy Commissioner's assessment of the legislation—not to this committee but to give advice to government.

Mr McDonald—Not in the sense I think you are talking about—that is, asking for written advice or something like that. Not in that way.

CHAIR—The commissioner has made a submission to the inquiry which has been accepted but not yet published—it will be—and that of course is available to senators.

Mr McDonald—If there is anything in there that we need to respond to I will cover it in our—

CHAIR—Thanks, Mr McDonald. Moving along, in terms of Mr McDonald's opening remarks, we will go to Senator Nettle, Senator Crossin and then Senator Brown.

Senator NETTLE—I noticed that in your justification for the detention and some other parts of the legislation, you are using the phrase 'national security' as a justification. The International Covenant on Civil and Political Rights uses the terminology 'emergency threatening the life of the nation'. I wonder why you are not using that terminology.

Mr McDonald—I am happy to use that terminology. There is no specific art in my use of the words 'national security'. It has a lot to do with the fact that I head one of the security areas of the department and perhaps I tend to use that language. But, in terms of the security language of the ICCPR, clearly our Office of International Law are very conscious of that. I do not have the same expertise that they have, of course. My background is more of a criminal law background. However, they have looked at this in the light of the parts of the—

Senator NETTLE—Has the government received advice that the definition the government uses for 'national security' complies with the terminology that the ICCPR uses?

Mr McDonald—From the context of my discussions with the Office of International Law, the answer is yes. However, what I will do in our written submission is give you an exact answer.

Senator NETTLE—Can I check: an exact answer to which question?

Mr McDonald—Your question was: does the government's definition of 'national security' line up with the references to security or threat to the nation?

Senator NETTLE—'An emergency which threatens the life of the nation'.

Mr McDonald—Based on the context of my discussions with the Office of International Law, I think the answer to that is absolutely yes. But I have not specifically asked them that question, so what I will do is to provide you with an exact answer.

Senator NETTLE—Have the government notified the United Nations that they intend to derogate from the ICCPR? The terminology we are talking about is the justification you can provide for derogation from our responsibilities. Have the government notified the UN that that Australia intends to derogate from the ICCPR?

Mr McDonald—My understanding is that we do not need to. I can talk to the Office of International Law about whether there is anything I need to know about there, but I think the answer is pretty clearly the view that we do not need to.

Senator NETTLE—I asked the question to begin with about whether or not the government's definition of 'national security' lined up because I listened to your opening

statement and you seemed to be using the term 'national security' to justify what is in the bill. That is why—

Mr McDonald—I am very happy to do that.

Senator NETTLE—I ask that point. It would be helpful to the committee to get an answer about whether or not the government has notified the UN that they intend to derogate from the ICCPR on the basis of the definition that you have about what an emergency threatening the life of the nation is in Australia.

Mr McDonald—What I am saying there is that I think we are talking about the same thing and therefore there is nothing for us to be derogating from the ICCPR about. But, as with all things, I will be very careful and ensure that you have a comprehensive written response on that point. But my understanding is that, when we are talking about national security, we are talking about the same thing.

Senator NETTLE—You spoke earlier in your statement about a reservation that Australia had. Can you outline what that was?

Mr McDonald—Australia has an obligation to segregate accused persons from convicted persons, except in exceptional circumstances. Australia has a reservation to effect this principle to the effect that this principle is accepted as an objective to be achieved progressively. That would be a reference to our state based prison system.

Senator NETTLE—Thanks. I was not clear on that. Going back to some of the issues that you raised in relation to judicial review, which you believe is in this bill, you talked about the summary of grounds that people can get when they are on a control order. Can you tell me what information—

Senator BRANDIS—I raise a point of order, Madam Chair. I do not want to be unhelpful, but the way you foreshadowed we would do this was that there would be questions arising out of Mr McDonald's general remarks about human rights and then we would deal with each schedule separately. The sorts of questions that Senator Nettle is now asking relate to a certain issue. Anything in this bill could on one point of view be regarded as a human rights issue, but it might be more efficient if we deal with the detail when we deal with particular schedules. Your issue, Senator Nettle, is one that I was going to come back to as well.

Senator NETTLE—Just to explain: what we heard was that it was not arbitrary because there was judicial review, and Mr McDonald went on to explain why that judicial review was there. That is why I am asking about whether or not it is arbitrary.

Senator BRANDIS—I am not trying to be unhelpful and I am not try to badger you, but I am going to come back to this issue as well and I was wondering whether it might not be better left to the examination of particular schedules.

CHAIR—I must say that I had approached this afternoon's sessions as effectively a working environment where there would be a little overlap and perhaps unavoidably some repetition, given the broader interests of—

Senator BRANDIS—I do not want you to get cross with me, Senator Payne, if I re-raise these issues later in the day.

CHAIR—I am not sure that is an undertaking I can give, Senator Brandis, but I will do my best. I was listening to Senator Nettle's question and I do think it is a loose area but, bearing in mind we will be coming back to the specific issues throughout the schedules, please just stick to the words that Mr McDonald used in his opening remarks.

Senator NETTLE—In your opening remarks, Mr McDonald, you talked about the summary of grounds that people got under a control order as being part of the judicial review under which the nature was not arbitrary. They do not get that if they are on a preventative detention order, do they?

Mr McDonald—Yes, they do.

Senator NETTLE—Can you point out where that is.

Mr McDonald—Could we move on to your next question? I will get back to that, but they do give a summary.

Senator NETTLE—All right. When you were talking with Senator Stott Despoja about the ICCPR and whether or not you had attached components of the ICCPR to the legislation, your answer was that your preference would be to ensure that it complied with the ICCPR. The difficulty for us is that you have indicated that you do not intend to give us the advice that you have received about whether or not we comply with the ICCPR, and only the people who have that advice are able to be assured that it complies with the ICCPR. If there is no damage done to the legislation by inserting the ICCPR in there, would you accept that there is a benefit in doing that because it is clear for everyone that it complies with the ICCPR?

Mr McDonald—It is quite interesting—there has been quite a lot of discussion about human rights conventions and how there are bills of rights and so on, such as in the UK, and that these things all of a sudden are going to magically solve all the problems. In the UK they are locking people up for 28 days, and they have a human rights convention. Ultimately the provisions that you have in your legislation are going to be really where your human rights are protected. I used to be head of the criminal law branch. I think I used to do more to protect human rights in that area than a lot of areas at various levels of government, because it comes down to the safeguards that you include in your legislation that really impact in a practical sense on individuals. I think our friend Mr Abraham said that he did not have a fetish—or something like that—about the ICCPR being attached.

CHAIR—Yes. That was the only mention of fetishes.

Mr McDonald—He said that it is just so much better to get your legislation right. And that is what we are trying to do, that is what we have been trying to do the whole time and that is what we have been doing with the states over the last what seems like six months—it has been about two or three months. The idea that we have been working hard on is to ensure that this legislation in a practical, clean and efficient way protects people's rights. I do not think that attaching the ICCPR to it is really going to make a difference.

To answer the other question, provision 105.32 on page 68 deals with the copy of the preventative detention order and summary of the grounds. An area of that is, let us say, bristling with human rights protection for individuals in terms of making sure that the

detention orders are explained properly to people, and bristling with requirements which are designed to ensure that this bill is consistent with the ICCPR.

Senator NETTLE—In that area that is bristling with human rights, I take you to point 12. It says that the lawfulness of a person's detention under a preventative detention order is not affected by a failure to comply with the entire subsection. So, if you do not tell the detainee what their rights are, the lawfulness of their detention is not impacted on. Is that correct?

Mr McDonald—However, in proposed section 105.45 there is an offence for people that break those requirements. So, for example, if the police do not comply with the requirements which are designed to protect people's human rights then the police are guilty of an offence. You will not find that existing in a lot of legislation.

Senator NETTLE—I will come back to this point when we get to schedule 4. I might take you back to a question that I do not feel I have got an answer to yet, which is the issue about the ICCPR. You said before that you did not see any operational reason that would impact on the bill if you put in the ICCPR. My question was—

Mr McDonald—No, I did not say that. In answer to Senator Stott Despoja's question about having a provision that provided that children should be kept separate from adults I said quite specifically that I could not think of a reason why we would not have a provision that did something like that. That was the answer and I think Senator Stott Despoja would confirm that.

Senator NETTLE—How about if I ask you the same question in relation to the ICCPR? Can you see any way in which the operation of the act will be disadvantaged if inserted into it is the way in which it complies with, as you have claimed to me it does, the ICCPR?

Mr McDonald—I cannot see any practical reason why it would improve this act. Secondly—

Senator NETTLE—That is not the question, though.

Mr McDonald—We all know that the government is being quite clear about there being no need for a bill of rights in Australia. Essentially, by attaching it to the provisions, it might be interpreted by some as putting a bill of rights into the legislation. That is only a thought I have about it.

Senator BRANDIS—That is just the current position of the government, Mr McDonald. There are many members of the government who think there should be a bill of rights.

Senator STOTT DESPOJA—This just gets better and better.

Mr McDonald—What I am saying is consistent with the policy of the government, as I understand it. In this country we give people practical access to human rights. We focus on making sure our statutes do that instead of leaving it to become a lawyers' picnic in the Supreme Court by using a human rights charter. The aim of our legislation is to give people accessible and clear rights.

Senator NETTLE—I do not want this to take a really long time. I was going to move on to the issue of a national bill of rights, but my question was whether you see any operational

disadvantage to this bill if the compliance that you claim it has with the ICCPR is mentioned in the bill.

Mr McDonald—There are many other people involved in the operational side of things with whom I would need to confer before answering that question.

Senator NETTLE—Do you accept that there is an advantage in indicating in the bill how it complies with the ICCPR in that then everyone can see it, not just the people who got the advice about whether or not it complies with the ICCPR?

Mr McDonald—I do not see any advantage in it.

Senator NETTLE—You do not see any advantage in the public being able to see whether or not the legislation complies with the ICCPR?

Mr McDonald—The advantage for the public is what the provisions say. That seems to be the fundamental point. That is what Mr Abraham was saying. I think that his submission on the human rights aspects was very interesting and very informative. Human rights are about practical mechanisms that people can access. That is what we have been attempting to provide through this bill.

Senator NETTLE—How would this bill be affected by a human rights act or a national bill of rights?

Mr McDonald—That is something that, not being a human rights expert, I could not really answer comprehensively.

CHAIR—I am not sure Mr McDonald is in a position to answer a hypothetical question like that, given that we do not have a national bill of rights or a human rights act that he can reference. I think he has answered your questions to the extent that he is able. I want to keep this part of the process moving. There are other senators waiting.

Mr McDonald—Can I point out that it has not worked out too well practically in some other countries. For example, in the UK you can detain people for a lot longer than in this legislation. Some of the requirements are a lot more draconian. For example, in the UK you can lock people up for an initial period of detention of 48 hours. Then you get your extension of up to 28 days—I think that is the latest period. I do not see where the UK Human Rights Act has really assisted anyone in that context. Go to France: wow, it is good! You can have people detained—

CHAIR—I am not entirely sure where this discussion is going.

Senator NETTLE—I am not sure either. I just have one more question.

CHAIR—I must say it is not Mr McDonald's fault.

Senator NETTLE—Did you seek any advice about how this bill would be impacted on if there were a human rights act or a national bill of rights in Australia?

Mr McDonald—No.

Senator CROSSIN—I am not entirely sure if this is related to your opening statement, but it is not part of the schedules of the bill so I am going to have a go at it and see where it leads

me. I am following on from some of the evidence I heard yesterday from a number of people. Can you tell me when the drafting instructions for this bill were first issued?

Mr McDonald—Yes, the drafting instructions were issued very close to the time the Prime Minister made his announcement about the bill. It was around 8 September. The Prime Minister said in his statement that he was announcing the outline of the details of the bill to get the process of consultation with the states started. To have that consultation done properly, we needed to have our drafting instructions sorted. I can remember that we had them sorted at that time. The day after he made that announcement, we met with the states in Canberra and went through a lot of the detail of the bill.

Senator CROSSIN—You met with the states? Who do you mean?

Mr McDonald—The state legal officers or legal officials.

Senator CROSSIN—It was pretty soon after 8 or 9 September—is that right?

Mr McDonald—I think the drafting instructions were completed probably just a couple of days before the Prime Minister made his announcement. It was very close to the time he made his announcement. In the lead-up to issuing those drafting instructions we had a lot of those sorts of discussions, which Mr Lawler referred to yesterday.

Senator CROSSIN—Why was a copy of the bill not available for the COAG meeting of 27 September?

Mr McDonald—If we had produced a bill on that day, they would have regarded it as the most pre-emptive act in the universe. They would have accused us of having tried to pre-empt the whole process. As it was—

Senator CROSSIN—Not even as a draft bill?

Mr McDonald—As it was, when the Prime Minister made his announcement on 8 September—and he made his announcement on that day so that we could meet the next day with the states to talk about the detail—they were complaining for something like two hours that even that was pre-emptive. But the government figured that it had start somewhere. I think we need to remember that legislation is not easy to produce quickly. The process for preparing this legislation started soon after the London bombing. I think I said in my opening that the London bombing was a big influence around the starting of this process. We were working basically flat out from then right up until that time when we finalised those drafting instructions.

Senator CROSSIN—The COAG meeting was 27 September?

Mr McDonald—Yes.

Senator CROSSIN—On 14 October Jon Stanhope posted on his web site a draft bill he had been sent. What version of the bill did he post on his web site? Was it about version 21 or 22?

Mr McDonald—It was interesting. The Prime Minister wrote to them around 7 October with a draft of the bill—

Senator CROSSIN—Do you know what number version that was?

Mr McDonald—I cannot remember what number. I might just say that a lot of silliness—

Senator CROSSIN—Can you take that on notice for me?

Mr McDonald—I can take that on notice, but it is not really that important. If you change one word in the bill, it becomes another version.

Senator CROSSIN—It is important for me. I am trying to track something here. So can you tell me what version of the bill was sent to the states and territories when they first got it? I am assuming it was either immediately before or the day of 14 October.

Mr McDonald—No, it was about a week earlier. He had it for over a week before he did that.

Senator CROSSIN—I would be interested to know what version it was—

Mr McDonald—In fact, the version—

Senator CROSSIN—or what number the version was that you sent him.

Mr McDonald—Yes, okay. It is pretty easy though—it has a little number on the bottom of it.

Senator CROSSIN—When were the drafting instructions received to change the word 'the' to 'a'? What date was that?

Mr McDonald—That was in the original drafting instructions back in September—the ones I mentioned.

Senator CROSSIN—So that was all part of the initial drafting instructions?

Mr McDonald—Yes.

Senator CROSSIN—There was no specific different point in time when drafting instructions were received?

Mr McDonald—No. In fact, that idea came from a discussion I had with the DPP I think on my birthday—30 March.

CHAIR—That is on the *Hansard* now, Mr McDonald!

Senator CROSSIN—So you suggested back on 30 March that 'the' should be changed to 'a'?

Mr McDonald—We first discussed that issue on 30 March as I remember.

Senator CROSSIN—So it took eight months for the country to realise that it was so important and urgent that it needed to have a special convening of the Senate?

CHAIR—That is not a matter upon which Mr McDonald can comment, Senator, and you know that.

Senator BRANDIS—You cannot have it both ways, Senator Crossin—you cannot accuse the government of rushing it through and then criticise the civil servants for being careful to get it right!

Senator CROSSIN—I am not doing that. I am just trying to track the drafting instructions and where this is going or where it has gone.

CHAIR—I understand that, but there are matters upon which Mr McDonald can comment and matters upon which he cannot. The latter was one of those upon which he cannot.

Senator CROSSIN—So the 'the' and 'a' were all part of the original mix from 8 and 9 September—is that right?

Mr McDonald—Yes. It was an issue that did take a little bit of discussion. I think I explained to you when we were talking about the application clause that, when you make changes like that, you have to be quite careful about making sure that it is necessary and what sort impact it is going to have.

Senator CROSSIN—In your opening comments, Mr McDonald, you said that this is not about criminal trial but about preventive detention. What do you mean?

Mr McDonald—What I was referring to there is that some people commenting on the human rights side of it have characterised preventative detention in the criminal context. The point that I am making is that it is not a criminal procedure—it is not actually dealing with the guilt of someone; it is to do with whether the person is dangerous.

Senator CROSSIN—That is based on assumption rather than evidence?

Mr McDonald—No. I will bore everyone by reading the grounds out again. I have read the grounds out enough times.

Senator CROSSIN—We know what they are.

Mr McDonald—Well, they are a standard which is not about assumptions; it is a standard which the issuing officer has to be satisfied about. If the issuing officer gets it wrong, there can be a big award of compensation.

Senator CROSSIN—But assuming he is not going to get it wrong because he has hard evidence to justify his decision, why then is that evidence not able to be tested by the person being detained?

Mr McDonald—This is legislation designed to deal with an emergency situation—esspecially in the early stages, where you are talking about the first 24 hours after an attack or shortly before we what we expect to be an attack. The idea of getting every key police officer who has relevant information in relation to that attack—who should be out there stopping the bombs going off or picking up and dealing with the consequences of the attack—and having them sit around in the corridors of courts dealing with stay applications and other processes is something that the police and the government considered operationally undesirable. Clearly, after the first 48 hours, the government has put in a mechanism whereby the person can seek compensation if the merits did not support the detention. Where a detention is totally false—it is false imprisonment—the person can of course seek an injunction from the Federal Court.

The point here is that the states have a system where they deal with the 14 days part of the detention—the New South Wales bill went in yesterday of course and there is the South Australian bill. They have got a system where from the 48 hours to the 14 days there is a mechanism where they can spend hours arguing it in court. But that is not so bad because that is after the first 48 hours. The Commonwealth part of it is dealing with a situation where it really is in the aftermath of an attack or shortly before one. It is quite deliberately designed to minimise the impact on the key officers involved—from them having to be dealing with the

litigation. Terrorist organisations are quite interested in litigation. They will naturally be using that.

Senator CROSSIN—So might someone who is not being detained with any evidence.

Senator BOB BROWN—I want to ask a follow-up question to Senator Nettle's about your sections that are bristling with human rights protections. I would like to get it clear again: do you have written advice that the ICCPR is consistent with this legislation?

Mr McDonald—Yes, sure.

Senator BOB BROWN—But you cannot give us that advice?

Mr McDonald—No, it is not the policy of the government to hand over legal advice it receives.

Senator BOB BROWN—Yes, I understand that. Is it one bristle too many to put the ICCPR reference into the legislation?

Mr McDonald—I have answered that question before.

Senator BOB BROWN—It is?

Mr McDonald—I am sorry; I have answered that question before and pointed out that that is not desirable.

Senator BOB BROWN—That is right, because it is a bristle too many. You said, Mr McDonald, that keeping people in detention for two weeks—unable to contact their plethora of friends and relatives, and able to tell a person that they are being detained and they are safe but not where they are and what the circumstances are—is not being incommunicado.

Mr McDonald—Not in accordance with the human rights obligation, no.

Senator BOB BROWN—I put it to you that it is out of communication, which is what that term means.

Mr McDonald—Karen has just pointed out to me that you said 'two weeks'. I was thinking that you were referring to state legislation but, of course, this legislation enables a person to be detained for only 48 hours. Obviously some people here keep on saying that this legislation provides for 14 days, but it does not.

Senator BOB BROWN—We know that.

Mr McDonald—We are talking about a period of being incommunicado—if it was incommunicado, and it is not—for 24 or 48 hours. But, of course, you are not incommunicado if you can contact everyone—

Senator BOB BROWN—You said that.

Mr McDonald—from your landlord and your employer to your brother, sister or parents and tell them that you are okay and even ask how the cat is going—you can do all those things. That is not being incommunicado, in accordance with the human rights obligations, I am afraid.

Senator BOB BROWN—That is your opinion.

Mr McDonald—It is not—the advice of the Office of International Law is that it is not.

Senator BOB BROWN—I am just pointing out that it is.

Mr McDonald—I disagree.

CHAIR—Senator Brown, I do not think this is advancing this issue.

Senator BOB BROWN—The words I have to ask you are: is it not a fact that a person held for two days under the Commonwealth law will not be able to communicate certain important personal details about that detention?

Mr McDonald—The restriction is on them talking about the detention, but that is not being incommunicado. Incommunicado is when you are completely isolated. I think it is a bit sad that, when we have places all over the world where people are actually held incommunicado, we try to suggest that a piece of legislation in this country is doing something like that. There has been a lot of care from a lot of people in this room—and my state colleagues—to ensure that it is reasonable and within human rights constraints.

Senator BOB BROWN—A lot of people from outside this room with a great deal of legal experience do not agree with you, and we have to listen to them as well. Because you say that not being able to communicate about certain important pivotal matters regarding a person's circumstances is not being incommunicado does not mean that I or other senators have to accept that. We are listening to your opinion but we have to weigh it with other people's opinions as well, Mr McDonald.

Mr McDonald—That is good. That is the democratic system and I think it is great.

Senator BOB BROWN—Exactly. We agree. You also said that this is not about a criminal trial; it is about preventative detention, which is different because a person is being detained without all the checks and balances that a person who is being charged with a criminal offence has—including, for example, the right to communicate with their lawyer in secret and many other circumstances. So when you say that this is not about a criminal trial—it is about preventative detention—it is a fact, isn't it, that in preventative detention you do not have many of the time-honoured legal rights that you have if you are being charged with a criminal offence?

Mr McDonald—Let me explain the difference between the two. When you are being detained for the purposes of being questioned by the police—for example, if you have been arrested and you are being questioned in relation to a criminal offence—the answers to those questions can be used in a criminal trial to convict you and can result in your detention for many years, if it is a serious offence. Consequently, with a criminal trial, we do things like tape the questioning and there are rest spots to ensure that the person is as alert as possible to answer questions carefully. There are a whole heap of safeguards which are relevant to questioning. The lawyer, of course, is very important in the context of questioning because the questioning is a lead-up to litigation in relation to the criminal proceedings. With a preventative detention, you might notice that we do not have questioning. Questioning is not part of it. The only questioning that is allowable with preventative detention is to do with the person's wellbeing and ensuring that the detention is appropriate—that you have the right identification and you have identified the right person and stuff like that. The purpose is entirely different. The purpose of preventative detention is about preventing attacks; it is not about questioning. So it is both correct and sensitive to all the considerations that go into this

that we have a different procedure for preventative detention from the criminal justice process.

Senator BOB BROWN—It is detention without charge and detention with the contention remaining in the air that it is going to prevent an attack, because that has not been tested in court. That is the concern which many senior legal minds have brought to this committee—that that is trespassing on time-honoured legal rights that people have in this country. It is trespassing into territory where those rights are removed, even though the person is detained.

Mr McDonald—We do not work out that it does not involve detention, and it is not an unusual law. It is a question of worrying about protecting the community and ensuring that there is adequate security, in the same way that we have other procedures. Of course, in the context of control orders we often talk about domestic violence orders. In the same way that we have some restrictions on our freedoms if we are considered to be a threat to the community—there are restrictions—this is an extension of that sort of restriction. It is not about the criminal process.

Senator BOB BROWN—When talking to Senator Crossin, you said that the 'a' to 'the' shift in the instruction was in September but you had had discussions first with the DPP on 30 March. Who raised it then, you or the DPP?

Mr McDonald—My recollection is that it was the DPP. They raised it. I had quite a few discussions then and after. I think my initial thought about it—I know I am being very open here, and why not?—was that it was probably something that we would send to what is now called the Sheller review because it was looking at the terrorist act definition. My initial thought was that we were not intending to put it into legislation straightaway.

Senator BOB BROWN—Why not?

Mr McDonald—However, after the London attack there was a review of all the measures that we had in place and the DPP reminded me of this issue and said, 'We would prefer that this be dealt with now rather than waiting for the Sheller review.' We then devised a way in which it could be done and put it in the bill. You will find it sitting there in the bill that Mr Stanhope put on the web site.

Senator BRANDIS—So this came from the DPP, not the government. That is a very important fact, Mr McDonald, that I do not think anybody was aware of.

Mr McDonald—I am sorry if people were not aware of that.

CHAIR—It is on the record.

Mr McDonald—That is a fact: the DPP raised the issue with me.

Senator BOB BROWN—Four months before the London attack?

Mr McDonald—Yes, that was 30 March.

Senator BOB BROWN—Thank you.

Senator LUDWIG—When you referred this to the Sheller review, was consideration given at the time to dealing with it in a separate piece of legislation?

Mr McDonald—No. I recommended we get Sheller to look at it because I was concerned that if we started amending the terrorism offences, the terrorist act stuff, we would be seen as pre-empting the Sheller review. That was my main concern. At the time, the DPP were content with that. I will not talk about what they probably would have preferred, but they always prefer that things be done quickly. It did not have the same priority at that time as it did later. By the time the London attack occurred, we got drafting priority—we have to compete for drafting priority for legislation. Once we got the necessary drafting priority, no-one argued about putting this in the bill. It was something that was appropriate to put in a terrorism bill. I knew that I would be able to explain to Mr Sheller why we had done it. Earlier on, when it did not have the same priority, I thought that it might be interpreted as trying to pre-empt that review. I did not want to do that. Also, as I have said, we obviously got more drafting priority after the London bombing.

Senator LUDWIG—Did the DPP come back to you at any stage between 30 March and the London bombing to indicate that it was a priority for them to have that definition changed?

Mr McDonald—We have a little committee through which we try to work out our legislation program and how we use the limited resources we have. We discuss issues. I think that committee meets roughly every five or six weeks. I am sure that we discussed more about how we might go about doing the amendment and how we would go about what we would put to Sheller. But I will say that, at that time, the DPP were most focused on, and were giving greater priority to, the video link legislation, which is a wonderful little reform that I was very keen on, from the previous year. The DPP were very keen on that. That was their priority, and I think Mr Gray has successfully got that bill completed.

CHAIR—With respect, it is not the subject of this legislation committee hearing, Senator Ludwig.

Senator LUDWIG—I did not raise it.

CHAIR—No, but you did pursue it.

Senator LUDWIG—You also indicated in your remarks to Senator Nettle, and subsequently to Senator Brown, words to the effect that you can look at the 28 days and that is in the context of a detention regime. You then went on to say the UK can detain people for a lot longer and the extension is a lot longer. You then went on to talk about France, but you were clipped at that point. In the comparative sense, were you talking about preventative detention orders in this bill or control orders in this bill? The reason I want you to explain the difference is, as you can appreciate, in the UK legislation it only allows a control order for a terrorist suspect. I am keen to make sure we are actually comparing apples with apples.

Mr McDonald—They have got a very soft definition of what is a suspect. It is dressed up in the language of 'suspect', but in fact a suspect is someone who you reasonably believe to have committed to an offence. If you read their definition, it is 'reasonable suspicion', which is quite a significant difference. Of course, you can see how you can grammatically use the same word 'suspect'. We have used different language, but the people who are covered by the UK control order are very much in the same category. In the UK, with their detention—I know that will be your next question—I want to point out that they can question people willy-

nilly during this period as well. Notwithstanding their Human Rights Act, they do not have the same sensitivity that we have to the purpose of the detention. I think some people were suggesting their legislation was very good; it is pretty unusual legislation as well.

Senator STOTT DESPOJA—That is the point we were making yesterday.

Senator KIRK—I wondered whether or not legislation has been drafted in the states. We know that New South Wales has at least drafted its legislation. I am unaware as to whether or not the other states have drafted legislation. Are you aware of that?

Mr McDonald—It is starting to happen. The ACT has not given us a draft of their legislation yet. We are looking forward to that. The states give us a draft of their legislation after they introduce it into parliament. That is another practice that is not really consistent with ours. Yesterday the New South Wales government introduced their legislation, I have checked that, and I think Victoria is not a long way off. The others are always a bit slower, but it will happen. From what I can gather, I think it is South Australia, Victoria and New South Wales who have the same perspective as the Commonwealth about the need to get this in place before Christmas. It remains to be seen whether some of the others do the same. However, you will appreciate that obviously each government has to make its assessment of the risk. Even between South Australia and New South Wales they have differences. They have done pretty well with consistency between those two acts and the Commonwealth act, but both of those have already got a few differences in the way that they have done it.

Senator KIRK—You have seen the South Australian legislation?

Mr McDonald—Yes, and I tabled it yesterday. If you like, I can table the New South Wales legislation today.

Senator KIRK—My actual question was whether or not there has been any formal process of the legislation coming to the Attorney-General's department, to your department, for some kind of checking process prior to it being introduced in the state parliaments.

Mr McDonald—I think I answered that. They quite like checking our legislation but are not very keen on us checking theirs.

Senator KIRK—You mentioned the ACT legislation. Mr Stanhope mentioned yesterday that they are in the process of getting it ready. He also assured us that it would comply with their Human Rights Act, including the ICCPR.

Mr McDonald—There was some criticism on 7 October of our draft being a little bit underdone. The point that I want to make is that it is a little bit disappointing that we have not been able to see drafts from all the states at this stage.

Senator KIRK—He told us that it is in process. My question was whether or not—

CHAIR—That is an interesting summary of what he said.

Senator KIRK—Was it part of the COAG agreement that it be done by Christmas? Was that actually part of the requirement? You keep saying that that is what you wanted but was it part of the terms of the agreement?

Mr McDonald—I am pretty certain that the COAG agreement did not mention Christmas. I will get my colleague to check that. I think that the Prime Minister and Mr Bracks and Mr

Rann and the New South Wales Premier have mentioned Christmas because they are concerned about the security aspects of things. I think that in South Australia they do have a fixed term election but I think that in Victoria they have got the Commonwealth Games coming up or something like that and so they are a little bit worried down there about that.

Senator KIRK—If the ACT legislation is not in accordance with the Commonwealth legislation and not to the Commonwealth's liking, I am wondering whether the government has sought any advice from your department as to whether it would be appropriate to use section 122 for the Commonwealth to legislate for the ACT.

Mr McDonald—I have not got any request for advice of that nature.

Senator NETTLE—I have a question on the New South Wales legislation.

CHAIR—Does it pertain to the bill that we are discussing?

Senator NETTLE—Senator Kirk has just gone to the issue of comparable legislation being introduced in the states. I was going to save my question on the New South Wales legislation until later but if we are in that area now I thought that I could do that now.

CHAIR—No, we are not in that area now but that has not actually stopped senators previously, so why don't you ask it—

Senator NETTLE—Thank you. I note that the legislation tabled in parliament last night by New South Wales in relation to disclosure of somebody being in preventive detention, that they are able to tell their parents that the preventive detention order had been made, that they are detained and the period for which they will be detained. This is of course different from the Commonwealth legislation, under which they can say, 'I am safe and I cannot be in contact with you for a while.' I also asked Mr Stanhope yesterday whether similar provisions would be introduced into the ACT legislation and he said that they would—

Mr McDonald—Similar to the Commonwealth's?

Senator NETTLE—No, to the New South Wales legislation in relation to disclosure. How will that operate, given that New South Wales and the ACT will have different provisions? It strikes me that there is now an argument for the Commonwealth to lift that restriction on disclosure because it has been lifted in the New South Wales and—from Mr Stanhope's comments yesterday—in the ACT legislation. Do you have any comment on that?

Mr McDonald—I do not think the Commonwealth generally follows New South Wales on many things, or the ACT—

CHAIR—For good reason, Mr McDonald.

Mr McDonald—There are a couple of things to be noted about this. Commonwealth preventative detention is for 24 hours or 48 hours at a time when there is a threat of a terrorist attack or immediately afterwards. So the need to have the restriction concerning the disclosure about preventative detention is arguably stronger at that earlier stage in the process. The New South Wales preventative detention can go from 48 hours in one big step to 14 days detention. There is no review along the way or anything like that, just the big step.

Senator NETTLE—Is that what the Commonwealth proposed to the states that they should enact?

Mr McDonald—No, the agreement at COAG was that there be 14 days state detention. There was no agreement on the detail, whether you break it up or anything like that. That was something that was left for discussion. However, what I am driving at there is that in terms of restriction on communication, if the states have exactly the same time as what is in the Commonwealth provisions, it is over a much longer period of time. However, South Australia has kept the restriction in the legislation and no doubt South Australia is concerned, as we are, that the lack of the restriction could cost some people their lives. It is as simple as that.

CHAIR—Thank you for dealing with those matters. We will now go, as I indicated, to schedule 1.

Senator BRANDIS—Mr McDonald, what do you call these provisions when they are in schedules? Are they properly called clauses or items?

Mr McDonald—The dark numbers are called items.

Senator BRANDIS—Item 9 in schedule 1 concerns the inclusion of a definition of 'advocates'. You will recall some discussions in another context on this matter. Proposed subsection (c) is:

the organisation directly praises the doing of a terrorist act.

I understand that you are constrained by the chair's ruling that you cannot speak to matters of policy—and I am not asking you to—but may I remind you that we have heard from some witnesses a concern which I myself have that that definition is too wide.

I put to you that no violence would be done to the evident legislative purpose of proposed subsection 1A(c) by having some qualifying words. I suggest to you that, in substitution, those qualifying words could be: 'The organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise may have the effect of leading another person, regardless of their age or capacity, to engage in a terrorist act.' I make the qualification 'regardless of their age or capacity,' because one of the concerns that has been expressed by many prudent commentators is the advocacy of terrorism to the young or mentally impaired, who might be more susceptible to being impressed by the praise of terrorism and incitement to perform a terrorism act than people of full age or sound mind.

Mr McDonald, if you did not like those words, you could add these qualifying words, which Senator Mason and I have been discussing: 'Where the praise is made with the intention, or is made in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring.' You might like to think about those words and, to finish off in an interrogative form, what is wrong with that? Would that do violence to the evident legislative purpose of this, were we to include words along those lines, especially having regard to the evidence we heard yesterday from Dr Ali, the leader of the Muslim community.

Mr McDonald—I think that the first one you read out still addresses the sort of policy objective that I stated at the beginning. Obviously, any qualification limits the provision—

Senator BRANDIS—I am not sure that it does.

Mr McDonald—but those words do address the main policy objective. Consequently, the suggestion you had in A is something that we can give thought to. Usually, I have to go away and think about it.

CHAIR—We understand that you are constrained in that regard.

Mr McDonald—I think that that is within the sort of scope of the policy of the provision. In regard to the second one, because you have intention—

Senator BRANDIS—As an alternative—intention or likely effect.

Mr McDonald—Yes, and you talk about likelihood and I think you talk about substantial risk, you are actually getting right into criminal law language there. You are saying, 'Why don't you just charge them?'

Senator BRANDIS—Will you think about that?

Mr McDonald—As usual, you have given very careful thought to language and the language looks pretty good.

Senator BRANDIS—Can I rejoin on that observation you made on the way through, that we do not want it too qualified. It seems to me that one thing that has been forgotten about in this whole debate about terrorism laws is that, when we are dealing with offences, these are criminal offences to which the criminal standard of proof applies—that is, beyond reasonable doubt. If we actually catch someone and charge them, you want to get a conviction. The looser the language before a jury, which has to be satisfied beyond reasonable doubt, it seems to me the harder it is to get a conviction; whereas the more targeted the language, the more confident a jury is likely to be in being satisfied to the criminal standard of proof.

Mr McDonald—I think that is right in a lot of cases and obviously I am still thinking about what you have said. You also mentioned Mr Ali. I think that this might be an area where refinement of the type you are talking about could provide that sort of reassurance that you mention.

Senator BRANDIS—Thank you. That is all I had on schedule 1, Chair.

CHAIR—In item 9, subclause (1A), where it refers to the organisation in (a), (b) and (c) and in the introductory sentence, is the definition of organisation the one that is used in part 5.3 of the Criminal Code?

Mr McDonald—I think the answer is yes.

CHAIR—How does the organisation take the action referred to in (1A)? Is it required to issue a press release? Is its titular head required to make a statement? Do they make that statement once? Do a number of members need to make a statement?

Mr McDonald—You would have to prove that it was an organisational position. So a mere statement from the leader would generally not be enough. Of course, if you have someone like Saddam Hussein as leader, you have someone who is a total autocrat, and no-one falls out of line in that organisation, you could prove that that individual has such control that what they say is literally the organisation's position. You might want to run some argument like that, but I think that would be—and I will not use the word 'fanciful' again—pretty hard to demonstrate. You would have to have quite a bit of evidence. You might have

telecommunication interception; you might have surveillance devices; you might have other monitoring of communications; you might have witnesses at meetings. You would need all that type of evidence to show that it was an organisational position. It is like people in the corporate sector. When you try to prosecute any organisation in the corporate sector, it is not always easy to show that it is an organisational position.

CHAIR—So if an organisational head made repeated comments which were regarded as falling within the description in item 9 (1A)(a)—counselling or urging the doing of a terrorist act—but concluded those remarks by saying, 'Of course, this is my personal opinion and I do not make these remarks on behalf of the organisation I represent,' then the organisation and that individual would not fall within that section.

Mr McDonald—No, they would get charged with sedition.

CHAIR—They might.

Mr McDonald—That is, if sedition is acceptable to the parliament.

CHAIR—Why wouldn't they be charged with incitement, under the existing provisions?

Mr McDonald—Incitement—and I have been looking forward to clarifying a few issues on this after some of the remarkable testimony yesterday—

CHAIR—Yesterday was remarkable in a number of ways! I am not sure which one you mean.

Mr McDonald—With incitement, not only do you have to prove that a person urged the commission of a criminal offence; you also have to show that they intended that that offence would be carried out. In doing that, you have to dig right into the offence.

Senator MASON—There is a connection to a particular terrorist act.

Mr McDonald—That is the key. If it is the terrorist one, you might want to go for the one I did in my submission, which is urging the killing of a Commonwealth official.

CHAIR—I am sure we will come back to this in some detail in schedule 7.

Senator BRANDIS—It is not an element that the thing happens, only that they intend that it should happen.

Mr McDonald—It is that they intend—

CHAIR—We will come back to that.

Mr McDonald—commission of the elements of those offences.

Senator CROSSIN—Following on from what Senator Payne said, what if the person does not qualify his statement? What if a person who is the head of an organisation says, 'I encourage people to do X,' or 'I want people to do X,' but does not go on to say that this is not on behalf of the organisation, that this is a personal statement. What if he does not say that? What position does that then give the organisation and members of the organisation?

Mr McDonald—It does not affect the members at all until you list the organisation. Before you list the organisation, you have to show it is an organisational position. So a mere statement on its own, even if it is not qualified, may well not be enough to list the organisation. In fact, you would need to be looking at the whole conduct of that organisation.

Let us say that you have a leader who is repeatedly saying it—and you have all these viceroys and other hangers-on sitting around the table—

Senator BRANDIS—Viceroys?

Mr McDonald—I do not mind being a little bit disrespectful towards organisations that might be sympathetic in that way. If he is sitting at the table and they are all sitting around nodding their heads, you might be able to show that it was an organisational position. On the other hand, if he is making this statement in another context, that might not be the case. You have to look at all the circumstances. One thing is for sure: it is something that would require very careful consideration.

CHAIR—Do the actions which are described in 1A need to occur on more than one occasion or is once sufficient?

Mr McDonald—I think you would be on pretty thin ground if you just did it from one occasion.

Senator BRANDIS—Why? If it was explicit enough, why? One would be enough.

Mr McDonald—The context of the question was just about the leader saying something. If you wanted to base this listing on one statement on one occasion by the leader and you had absolutely no other evidence, it would probably be pretty hard to satisfy people that that was the position of the terrorist organisation. However, provided everyone agrees, we have an individual offence called sedition—that is, the sedition offence that is in this bill—which would deal with individuals if that was the problem.

Senator LUDWIG—Dealing with item 22 in schedule 1, you say in the explanatory memorandum:

This is justified because the provision merely clarifies what was originally intended.

As I understand it, this is a substantive expansion of the law in this area, because what was not criminalised before is now criminalised. In my mind, you would need at least clear words to do that. How do you say it is a clarification rather than an expansion and not in clear words?

Mr McDonald—As we did in the second reading debate and in the debate on those particular amendments in the Senate and the House, I think we made it very clear that the intention of this legislation and the way everyone interpreted it, including me, up until then—and I think there were people who were arguing the amendment was not necessary and so on at the time; some lawyers were arguing that it was not necessary, others were saying it was—was that, if someone was a suicide bomber or something like that, you did not have to prove what their specific target was. So our argument is that it is not going to have a retrospective impact. There is a policy reason why retrospectivity is not desirable, and that is where it impacts on someone in a way whereby they can honestly say that they did not know what the law was and that they would not have been culpable if this had not happened. But the reality is here. It has a minuscule impact of that nature, because that is the way the bill was always intended to be interpreted—in a way anyone would have understood it.

Senator LUDWIG—So you are saying it has a retrospective effect. It is clear and it does. So the original No. 1 bill had that effect and this merely clarifies the intention of the No. 1 bill.

Mr McDonald—No. The No. 1 bill is not retrospective. This bill would make those provisions that were in the No. 1 bill apply to that earlier time. I explained this in some detail the other day. The idea here is to deal with conduct that may not have come to the attention of the authorities to date that goes back before that amendment, because the worry is that the very amendment itself will result in people interpreting the earlier provisions more restrictively that they otherwise would have. When you make these amendments there is always a danger that people will actually use the amendment as confirmation of what we would consider to be the wrong interpretation. The things to say about it are that it is absolutely at the margins in its impact on the culpable nature of the behaviour and that it was basically what I am sure everyone would have thought was the intention of the legislation in the first place.

Senator LUDWIG—And that is why you used the word 'clarify'.

Mr McDonald—Yes. And it genuinely does.

Senator NETTLE—I want to ask about an organisation advocating committing a terrorist act. We have been talking, with the examples in this committee, about a terrorist act as in a bomb or something that goes off that threatens people's lives. I want to draw your attention to a comment that I think was made by Ms McIntosh from the Attorney-General's Department in April 2002 to this committee.

Mr McDonald—Was that Sue McIntosh?

Senator NETTLE—I don't know; I just have 'Ms'.

Mr McDonald—Sorry, I thought you said 'Liz'. I could not work out how who it was.

Senator NETTLE—Yes, it was Ms Susan Mary McIntosh. I will read from her evidence to this committee. In response to a question from Senator Scullion, she said:

If a person who was involved in the political, religious or ideological cause used the bolt cutters to involve serious damage to property—

And this was in the context of refugee protests at Woomera—

and so on, then that person may be committing a terrorist act ...

I wanted to check that, in this section where we are talking about an organisation praising a terrorist act, that you do not believe a leader of that organisation praising a terrorist act would be covered by this. For example, if you had an organisation like the Refugee Action Coalition, who encouraged people on their web site to attend a protest at Woomera, would that organisation be covered as advocating or directly praising a terrorist act and therefore covered under this clause?

Mr McDonald—Let us get it all clear here. When we were talking about the leader, we were talking about the leader in the context of the advocating definition. My answer was about what would need to be done to show it was an organisational activity. So it was in that context that we were talking about that. With the 'terrorist act' definition, I am not going to

get into an argument with someone from the past without actually seeing exactly what they said and the whole context. I think someone else might have done that. How about I read out what the definition of 'terrorist act' is. Section 100.1 of the Criminal Code states that a 'terrorist act means an action or threat of action where' the action falls in with a whole list of things in subsection (2). Those include 'serious harm' to people. Subsection (2) also includes:

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life ...

(e) creates a serious risk to the health or safety ...

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including ...

(i) an information system; or

(ii) a telecommunications system—

So it is all those things. It also has to be done with the 'intention of advancing a political, religious or ideological cause'. And the action has to be done:

... or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

So I do not really see taking bolt cutters or something like that as being in the same ballpark. But the DPP—

Senator BRANDIS—It could be trying to coerce the government—that is what these people do.

Mr McDonald—It is certainly not serious damage to property. On the coercion of the government front, believe me, the DPP are cautious and they have to prove it beyond reasonable doubt. I know I have been accused of hiding behind—

Senator MASON—We have had this discussion before—it is the exercise of discretion power.

Mr McDonald—It is not even exercise of discretion. It is a legal thing. It is part of the elements of the offence—the fault aspects. Mr Walker might not like the clarity of the code in relation to fault but—

Senator MASON—We just do not want you to be able to hide behind the DPP's exercise of discretion, that is all.

Mr McDonald—They are exercising their discretion. I am not hiding behind their discretions; I am saying that they have to prove beyond reasonable doubt all the elements of the offence and the fault elements are part of the elements of the offence. I am expressing a view that any DPP would take care on this. The idea of the bolt cutters does not get there in terms of the seriousness of the harm that is being done. You will probably have an argument that it was not really intimidating the Commonwealth government. That is one you could argue about. You do not really want to prosecute someone for a terrorism offence when there is room for argument. You might recall Mr Walker talking about the sedition offence. He said

that no prosecutor in their right mind would prosecute the sorts of people you were talking about.

Senator BRANDIS—That is a different argument.

CHAIR—And not one we are going to have right now.

Senator BRANDIS—That assumes goodwill and good faith, but there have been bad Australian governments and bad attorneys-general in the past, of whom that level of assurance that they would do the right thing could not have been held.

Mr McDonald—The thing that we did not have in the past was an independent director of public prosecutions and the big combination that we have now. You made a very correct point the other day when you pointed out that perhaps even the role of the Attorney has evolved to where the Attorney is a political safeguard on the DPP and the DPP is a safeguard on the Attorney. So where you have the Attorney's consent it is a dual process. The thing that we did not have in the past with those old cases is the level of independence that we have with the DPP. We have had an independent DPP since 1983.

CHAIR—Let us see if we can get back to Senator Nettle's questions.

Senator NETTLE—Why do we not have the independent DPP being the consent authority for the control orders?

Mr McDonald—It is not a criminal process. It is not the sort of thing that the DPP would do. There is a senior police officer and the police are independent from the government, which cannot direct the police.

Senator NETTLE—I will go back to this advocating of a terrorist act. I am trying to understand how that will be used. In evidence three years ago the principal legal officer from the security, law and justice branch of the Attorney-General's Department thought that that may be committing a terrorist act. I am trying to understand how that would work under this. The web site of the Refugee Action Coalition called on people to 'bring down the fences' at a protest at Woomera. Would that be seen as that organisation directly praising the doing of a terrorist act and therefore would enable the Attorney-General to list it as a terrorist organisation, from which membership would then be an offence with a penalty of 10 years or 25 years?

Mr McDonald—I do not think what you described there was praising a terrorist act; it was more like counselling or urging activity. And then you ask: what is it that they are asking them to do? You have moved away from the bolt cutters to tearing down the whole fence, haven't you?

Senator NETTLE—Yes.

Mr McDonald—Clearly, the more significant the action, the more damage that you do, the closer you get to it being regarded as serious damage. Whether you would still get over the line of coercing or intimidating the Commonwealth government—obviously it is closer than the bolt cutters; I should not really be getting into hypotheticals—you have to look at all the facts. Clearly it is closer than the bolt cutter one.Mr Gray, like me, is a criminal lawyer, and he agrees with me about bolt cutters.

Senator NETTLE—So you think it would come closer to applying to a Woomera protest if there were advertising saying 'bring down the fences' rather than 'bring along your bolt cutters'?

CHAIR—I think Mr McDonald answered that question.

Senator NETTLE—Yes. I am just checking that I got it right and that I understand what he said.

Mr McDonald—If you were comparing those two things, then the latter is closer to it. You would also get into difficulty with the offences that Senator Brandis was talking about the other day—that is, plain good old-fashioned incitement—because it could be shown that you intended that they commit offences in the Crimes Act to do with damaging Commonwealth property, which carries 10 years imprisonment as the maximum penalty.

Senator BRANDIS—Damaging Commonwealth property would be what you would prosecute for in reality, would it not?

Mr McDonald—In one of our terrorism cases we prosecuted a person for some terrorism offences but also for threatening Commonwealth officers. In the end, the person was imprisoned for the threatening the lives of Commonwealth officers offence. Quite often, you get a situation where they will consider a range of charges; you always prosecute the charge that is most appropriate. I think you are right. In that situation, the more applicable offence would probably be incitement to commit the offence of property damage. You would have to show—and there is virtually enough here to—that the person intended that that offence be committed. The penalty for that would be—I will not go into it—significant.

Senator NETTLE—Yesterday we had evidence from a number of witnesses that this part of the bill might refer to the praising of a terrorist act. For example, somebody saying it is good that the Americans are having difficulty in Iraq would be construed as praising a terrorist act. They also talked about support for the resistance in Iraq or Palestine. They were the two examples that we had yesterday.

Mr McDonald—Both of those are very general statements. The first one would absolutely not come anywhere near praising a terrorist act. You may remember that I read out what a terrorist act is.

Senator NETTLE—Yes.

Mr McDonald—Both of those are very general statements. The first one would absolutely not come anywhere near praising a terrorist act. In fact, remember that I read out what a terrorist act is. It has actually got to be praising something that amounts to those things I read out. If you say, 'I support the resistance in Iraq,' you could be supporting them in many ways. You could be supporting them politically. There is a democratic process and you could be supporting them in that context. You could be supporting them in terms of housing, and goodness knows what else. It would have to focus right on it. 'I think it was a good thing the other day that they blew up that hotel with 80 people in it': that is supporting or praising a terrorist act. 'A good thing, and there should be more of it': that is praising a terrorist act.

Senator NETTLE—I am looking for the specific wording of the example given yesterday, which was about recognising it as legitimate that people in Palestine resisting an occupation

might use non-violent means to show support for the resistance to that occupation in Palestine.

Mr McDonald—'Terrorist act' is about violence. So any non-violent activity in Palestine is not included anywhere in this. Supporting resistance is a general concept which might be political, a mix of some military activity—that sort of thing. Even in a very broad sort of way like that, it would not come under this. This is focusing on praising terrorist acts. The example I gave is much more the sort of thing we are talking about: in Palestine today, if a busload of children was blown up, the organisation puts out on its web site, 'That was great, there should be more of it.' That is the sort of thing we are talking about.

CHAIR—Senator Nettle, if we go through every example of everything that comes to your mind, that would be very hard.

Senator NETTLE—I will finish by giving this example. It was actually supporting resistance to the occupation of Palestinian land: 'Palestinians are entitled to fight for an independent state and non-violent means of achieving a just arrangement have failed.' So it did actually have reference to other than non-violent means.

Mr McDonald—It is still not specifically talking about a terrorist act. It is still quite general, and it is supposed to be direct praise of a terrorist act. You might notice that we quite deliberately use the term 'direct praise'. I still do not think it is direct praise of a terrorist act.

Senator BRANDIS—Can you reassure me, Mr McDonald, that there is a consequential amendment to the existing section 100.1(3)(a) which excludes advocacy from what may be capable of being a terrorist act, so as to accommodate the substantive change proposed by item 9?

Mr McDonald—You are referring to how you cannot show—

Senator BRANDIS—The definition of a terrorist act means it has to be within (2) but outside (3), but (3) includes 'advocacy'. So that scheme is not going to work with the proposed new amendment unless there is a consequential amendment—

Mr McDonald—I see what you are getting at.

Senator BRANDIS—to section 100.1(3)(a) of the Criminal Code. Is that done by this bill?

Mr McDonald—The amendment that you suggested may require consequentials, so—

Senator BRANDIS—No, but that is not arising out of my proposed amendment; this is arising out of a whole scheme of item 9 in schedule 1, the proposed definition of 'advocates'. Do you see what I mean? You cannot commit a terrorist act unless you do one of the things in subsection (2), as long as they are not also one of the things in subsection (3). And one of the things in subsection (3) which eliminates it being classified as a terrorist act is advocacy. So is there a consequential amendment?

Mr McDonald—No.

Senator BRANDIS—Well, there should be.

Mr McDonald—The exemption of advocacy there only relates to non-violent advocacy. What we are talking about here is terrorist acts. All that does is take out the non-violent stuff. We had this discussion before.

Senator BRANDIS—I don't think that is right, Mr McDonald.

CHAIR—Mr McDonald, Senator Brandis has an extant concern on this matter. Would you mind taking that on notice and coming back to the committee on it?

Mr McDonald—Yes.

CHAIR—Thank you.

Senator BRANDIS—If it is not a controversial issue, I would have thought that, out of abundant caution, 100.1(3)(a) should be amended with words like 'provided that it is not otherwise governed by the new clause'.

CHAIR—Or, if not, would you come back to us with why not?

Mr McDonald—Okay.

Senator MASON—I want to return to the issue raised by the chair before, which is item 9—evidence that a terrorist organisation advocates. I heard your evidence, and what you seem to be saying is that a terrorist organisation has to meet, there has to be a quorum, minutes taken—

Mr McDonald—I didn't quite go that far.

Senator MASON—No, but due notice given. That is not how it works. I am not satisfied with that provision and the evidence required.

Mr McDonald—I haven't said that. I haven't said they have to have a meeting and stuff like that. I said you use surveillance. You would be looking at the group of people involved and you would be gathering that evidence to find out whether there was a similarity of mind about a particular organisation.

Senator MASON—Among the majority of quorate members, perhaps.

Mr McDonald—Well, you would look at the power structure of the organisation, just as we do with corporations.

CHAIR—You wouldn't want to confuse the People's Front of Judea with the Judean People's Front, though, would you, Mr McDonald?

Senator MASON—On a more serious aspect, Senator Nettle flagged this, in a sense, before and it has been flagged by Mr Wood in another context—that is, we are talking about an organisation inciting or advocating violence. Why don't we add that to item 9 or create another item and include individuals advocating violence? I am going to have to trespass on sedition here, but stay with me, Madam Chair. Excise schedule 7, which is all to do with sedition, and leave in place 24A and 24E, which are the current sedition laws in the Commonwealth Crimes Act 1914, and review them, as the Attorney-General has said he would. Then, in a sense, you would have your broader offences regarding individuals inciting violence. You would get rid of all the problems that we have discussed over three days now regarding sedition—and I think all members have expressed concern about that. In a sense, wouldn't that be a neat answer to your problem?

CHAIR—That is a matter of policy and I am not sure Mr McDonald can respond to it.

Senator BRANDIS—He can be asked whether it is possible to approach the policy issue from a drafting point of view in that way.

Mr McDonald—I think the No. 1 problem is that many of the issues people have been raising about the defences for sedition—with sedition there are a number of defences—people are saying do not go far enough. To turn this into an individual offence just like that would require just as much consideration about the defences that apply as would the urging of violence offences that are involved in sedition. So I think there could be quite a few difficulties in designing an offence like that.

Senator MASON—It strikes me as a much neater option than the current proposal. It is a much neater answer to dealing with incitement to violence than the current—

CHAIR—You may put your view on the record but I do not expect Mr McDonald to respond to your policy suggestions.

Mr McDonald—No, I won't.

CHAIR—We do need to deal with schedule 7. We are not going to get there if we stay on schedule 1. I am not terribly numerate, but even I can work that out.

Senator BRANDIS—It seems to me, Mr McDonald, that what Senator Mason has said—subject to a qualification I will come to in a moment—would be a very elegant solution. There is concern—I am one of the people who have raised this concern—about what may be the expansion of the reach of a crime which has been lying dormant on the statute books since at least 1958. According to the evidence we had from your officers that was the last time it was prosecuted.

There is concern that perhaps to revive this dormant crime to respond to a new security situation might be a case of legislative overreach, but I do not think many members of the community would doubt that the incitement or advocacy of terrorist violence should be a crime. If one then looks at item 9 of schedule 1—and this is a point that you will recall was made by members of another place in another place in recent meetings—it seems to miss the point. You have to find an organisation that is advocating terrorism. Does it matter if an organisation is advocating terrorism? What you want to do is grab the person who is advocating terrorism.

Senator MASON—Stop them from inciting violence—whether it is an organisation or individuals.

Senator BRANDIS—That is right. If it could be approached in that way, perhaps you could avoid what I think is becoming a dangerous issue about reagitating and perhaps expanding the sedition laws while still fulfilling the legislative purpose, which is obvious from what you want to do with item 9 of schedule 1. Before you respond, can I just add that the qualification I would make about the elegance of this solution is your point about the defences not being good enough whereas we have these slightly expanded defences to the new offence of sedition. I cannot immediately see why those defences could not be imported as defences to this new offence. That would be a much more direct way of addressing the issue you are concerned about, without reagitating this rather contentious issue of sedition.

Senator LUDWIG—Let me enjoin that, at least to the extent that schedule 7 should be deleted. But while you are doing that, if we are talking about repeal you could also take unlawful association out, because the way it now interacts with schedule 7 may also cause you some problems.

Mr McDonald—Mr Connolly mentioned this business about dormant defence—dead letter law—but that was witchdoctor law.

Senator BRANDIS—That was just his opinion.

CHAIR—Senator Brandis, I am going to ask Mr McDonald to respond. We do have quite a deal of the bill to traverse this afternoon, and we do not have a lot of time.

Senator MASON—This is critical, and Senator Nettle took 20-odd minutes.

CHAIR—Please do not interrupt me, Senator Mason. Because it is critical, I will ask Mr McDonald to respond to the issues raised by you, Senator Brandis, and by Senator Ludwig and other senators. In time, we will come to a full discussion on schedule 7 which will enable you to ventilate this further.

Mr McDonald—This business that we were somehow or other refreshing part IIA, that all of a sudden it was a more real law than it was before, is just total fantasy. The reality is that that has been on the statute books for the whole time. It could have been prosecuted at any time. Don't be misled by that. It is a mere flux.

Senator BRANDIS—Mr McDonald, your response to me—

CHAIR—Let Mr McDonald finish, Senator Brandis. Is that clear?

Senator BRANDIS—Yes. I don't want time to be wasted, Senator Payne.

CHAIR—I want to hear Mr McDonald's response, Senator Brandis, and I am not interested in hearing it being interrupted.

Senator BRANDIS—I have more questions on this issue, Senator Payne.

CHAIR—And we will come to them in schedule 7.

Senator BRANDIS—No, on this issue on item 9.

Mr McDonald—What you are proposing is to start an offence from scratch, to start a new, individual offence in this area, and to then try to get the approval of the states of that offence, because we rely on a reference of power whenever we refer to a terrorist act. With sedition, of course, that is within the Commonwealth's power and we do not need to get their approval for that. So it would be very difficult to meet the Prime Minister's and the Attorney-General's timetable to have adequate laws in place before Christmas by starting from scratch with the individual offence.

I think that, at least with the sedition offence, we had the benefit of Sir Harry Gibbs's consideration of the issue. Sir Harry Gibbs is a criminal lawyer with 50-odd years experience and a former Chief Justice of the High Court. I have read his report, and in it he discussed many of the issues that were discussed yesterday and he concluded that there was still a need for a sedition offence in the context of 1991. I guess the argument is that, as time has gone by, with the growth of the internet since 1991 there are arguments that I have put forward that

sedition may be even more relevant now that it was then, and certainly than it was before then.

The simple answer is that anything can be considered and developed. The Attorney has said that there will be a review in this area and that in that review there could be fuller discussion of these issues. With the sedition offence that we have put together, we got our drafting instructions in early September and we have developed it over that period. People feel that we should have given it a bit more time. Trying to do this individual offence on the run in the next week or so would be very difficult. A lot of the issues that we were talking about with sedition would still be live, although I agree that the terrorist act target is a more limited area. There is also the whole issue with sedition more generally.

CHAIR—Thank you, Mr McDonald—

Senator BRANDIS—Sure, I understand that, but—

CHAIR—Do we have further questions on item 9?

Senator BRANDIS—Yes. I understand that, Mr McDonald. But, with respect, that seems to me to be largely a process issue. Can I make bold and say that almost everybody in the country thinks that people running around encouraging other people to commit terrorist acts ought to be a crime. It is a question of how you go about it.

Mr McDonald—I saw people the other day that did not seem to think it mattered.

Senator BRANDIS—I said most people. What we are doing is putting into the definition of a 'terrorist act' a definition of 'advocates', so that advocacy can be a hook for a criminal liability. But then we are not using that to approach directly the mischief the legislation seems to be directed to. Rather, we are saying that not only do you have to show advocacy but it has to be advocacy by an organisation, and you have to show that an organisation—in the other part of the definitions at 100.1—is a body, and you have all these legal issues about what a body is.

Mr McDonald—Yes, but—

Senator BRANDIS—Let me finish. Then you are saying, 'Instead of doing that, what we will do is reawaken the sleeping giant of sedition.' That seems, with respect—and I am not blaming you for this—to have raised a whole lot of concern—and I dare say that most of it is misplaced—about sedition, whereas, as Senator Mason said, I thought rather elegantly, you could deal with the mischief perfectly well by expanding 'advocacy' so that it is not limited to operating upon organisations but also operates upon individuals, and then just wait for the review of the sedition laws announced by the Attorney-General in a few months time, and just leave them as they are for the time being. What is wrong with doing that?

Mr McDonald—Sedition is about urging violence.

Senator BRANDIS—Terrorism is violence.

Mr McDonald—It is, but quite clearly—

Senator BRANDIS—You are going to catch the same conduct.

Mr McDonald—Anyway!

CHAIR—I do not think there is anything further to be said on that precise point.

Senator CROSSIN—You might need to take this on notice, Mr McDonald. Have you had an opportunity to look at the *Alert Digest* 13/05 from the Senate Scrutiny of Bills Committee? They make a comment about the retrospective operation in schedule 1.

Mr McDonald—I must say that I have not read it, but I briefed the committee and I am not surprised that it is one of the things that they draw to the attention of the parliament. What was their comment?

Senator CROSSIN—They leave the substantive debate about this to the Senate but they do believe that the retrospectivity trespasses unduly on personal rights and liberties. I do not think that they believe that your explanatory memorandum sufficiently justifies the retrospective nature of the legislation. They highlight that in your explanatory memorandum you simply substantiate or support the retrospectivity as being on the basis that the provision merely clarifies what was originally intended. The memorandum goes on to assert that the retrospective operation is necessary because it will create an incorrect implication. I suppose what they are alluding to is that the explanatory memorandum is insufficient—

Mr McDonald—I would agree wholeheartedly that it would have been desirable to have a more substantial explanation in the explanatory memorandum. Some of that was due to the urgent circumstances. Senator Nettle will remember well that the larger bill was being introduced at the same time as we were debating the smaller bill in the Senate—and I think that you commented on it at that time. Because we had pulled out provisions to put in the smaller bill, the explanatory memorandum was put together very quickly. I will be writing back to Scrutiny of Bills and saying that next time we will do better. We have got the explanation. I have explained to Scrutiny of Bills and I will no doubt be preparing a letter for the Attorney to consider. That will explain it in more detail and they will then put that in their report. It is their job to identify these matters and they do a very good job.

Senator CROSSIN—As the previous chair of the committee, I know we are always on case of making sure that explanatory memorandums are as explicit as they can be, and this is another example where it was not.

Mr McDonald—You will find that most of the EM is of a high standard but that part was written by me, so we will not try to blame it on anyone else.

Senator STOTT DESPOJA—I want to follow on from some of the questions from the chair and Senator Brandis to do with item 9. Some of the issue might have been dealt with by Senator Brandis's very helpful suggestions.

Senator BRANDIS—It was Senator Mason's idea.

Senator STOTT DESPOJA—Some submissions—and in particular I refer to the Gilbert and Tobin submission—expressed concern that because of the actions of an individual, a group may be punished. I am sure that you have heard the evidence and you have seen their reference in particular to item 9, specifically (c), in relation to the definition of advocates. They argue:

... since it is an offence to be a 'member' of a terrorist organisation ... or to 'associate' with one ... a member or associate could be imprisoned merely because their organisation praised terrorism. This

could occur even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the organisation praising terrorism did not intend to cause further terrorism.

Are you confident with these provisions? Are you confident that individuals or a group will not be harmed as a consequence of these individual actions? It goes to the issue that the chair raised in the very beginning about the breadth of these particular statements and clauses, which could be a bit of a catch-all.

Mr McDonald—The reason that Senator Brandis has suggested the change to the legislation is all because this definition does feed into offences to do with listed terrorist organisations. Once an organisation is listed in the regulations as a terrorist organisation and that is gazetted, if you are a member of that organisation you need to cease that membership—it is over—otherwise you do find yourself committing an offence.

It is true that this is a very serious provision; serious offences apply to being members. Of course I did not get around to answering the question about why we are going after organisations, but that is what this whole segment of the Criminal Code is about—organisations. We have listed 18 organisations in the several years that we have had this in place.

Senator STOTT DESPOJA—I understand that. I am trying to get to the issue of unintended consequences. I do understand the point of Senator Brandis's ideas and the need for specification. I am curious about this point: do you believe it is possible under the legislation now that an organisation could be banned because of the advocacy or the comments of an individual, even when—

Mr McDonald—I did not quite understand your question. I thought you were asking whether I realised that, if an organisation was listed, the individuals could be prosecuted for it. I have already answered the other question about whether I thought just the comments of an individual could result in an organisation becoming listed. It is my view that you need more evidence than the comments of an individual; without further evidence that it is an organisational thing means it is just the comments of an individual. I can assure you and others that it is just not that simple.

Senator STOTT DESPOJA—Good.

Mr McDonald—I also must remind everyone that no organisation gets listed unless there is consultation with the states and it is put in regulations. We also have to consult with the parliamentary joint committee on ASIO and ASIS, so there is quite a process. You can get something within the scope of this; it is another thing to actually get it listed.

CHAIR—Schedule 2 is headed 'Technical amendments'. Are there any matters arising from schedule 2?

Senator STOTT DESPOJA—No.

CHAIR—Schedule 3 is 'Financing terrorism'. Are there any matters there, Senator Ludwig?

Senator LUDWIG—There is one matter. I am still following up on that issue about penalties. If you go to the explanatory memoranda, it says:

The offence in section 102.6 of the *Criminal Code*, dealing with providing funds … or receiving funds from … or on behalf of a terrorist organisation, clearly comes within the ordinary meaning of 'financing of terrorism offence'.

That is where it is from. It continues:

Section 102.6 should have originally been included in this definition and this amendment corrects this oversight.

When you look at 102.6(1) and 102.6(2), they deal with penalties of 25 years and a maximum penalty of 15 years. And yet 103.2 in the explanatory memoranda provides for life; it seems to be the justification for why you have got life. This has obviously been raised in submissions as well, but it is inconsistent with that earlier provision, which seems to split the difference between intention and recklessness. It also provides, in the case of intention, 25 years rather than life, while 103.1 has life but it then splits it with recklessness of 15 years. It seems to be that for the financing of terrorism there are penalties ranging from 15 years for recklessness, life for recklessness and similarly 25 years or life for intention, depending on the standard. They might all be different. To save time I am happy for you to take it on notice, but can you at least provide a simple justification for why there is a requirement to have those different penalties provided to those standards? Maybe you were not seeking coherency?

Mr Gray—I am not sure that it would be possible to provide an answer to that. Life imprisonment under 103.1 is where the money is going directly to a terrorist act, and 102.6 has an organisation interposed, so you could justify a difference in penalty level. But the second part of your question is: why are there differential penalties under 102.6 and not under 103.1? I cannot see any logical reason why there would be that difference.

Mr McDonald—With organisational offences, clearly the awareness of the organisation comes into it a bit. That is actually quite a big factor, which is probably why historically it has become a bigger focus in the context of the organisation.

Mr Gray—I am sure that is the reason.

Mr McDonald—They have been there for a while anyway.

Mr Gray—I am sure that is why imprisonment for life appears in 103.1, but I really could not offer an answer off the top of my head as to why there is not the differential in 103.1.

CHAIR—Would you like that to be taken on notice, Senator Ludwig?

Senator LUDWIG—I did suggest they could take it on notice.

Mr Gray—I am not sure we will find the answer.

CHAIR—Would you do that, because it is best to try and explore it properly by taking it on notice and responding to the committee one way or the other.

Senator LUDWIG—The purpose obviously is to provide some coherency or provide an explanation or justification as to why you would not actually then break up this schedule to ensure that there is a difference between intention and recklessness with the penalty. That is an alternative.

Mr McDonald—It might even have been recommended by a parliamentary committee.

Senator LUDWIG—That could be the case.

CHAIR—It would be of limited utility to keep saying may be or might be.

Mr Gray—I would just point out, and I am picking another provision totally at random, that under 104.1—this is murder of an Australian citizen—intention and recklessness has the same penalty. So I suspect, without going through all these provisions, that 102.6 is the odd one out, not 103.1.

Senator LUDWIG—I suppose you can tell us which one you are going to correct!

CHAIR—That deals with schedule 3. I am not in any way diminishing the importance of schedules 5, 6, 8, 9 and 10 but it does seem that schedule 4, which pertains to control orders and preventative detention orders, and schedule 7, which pertains to sedition, are ones which will take greater time for examination. I seek some consensus in the committee that we do those and then return to 5, 6, 8, 9 and 10.

Senator LUDWIG—I have only one question on schedule 9 and it probably relates to a confidential submission, so I will put that in writing.

CHAIR—That will remove schedule 9. There is a suggestion from Senator Brandis to deal with schedule 7 before we deal with schedule 4. I think it is easier to proceed in order, so we will start with schedule 4 and, as far as possible, we will return to 5, 6, 8 and 10 in due course. I am not sure there is anything we need to pursue in 10, given our direct questioning of Mr O'Sullivan yesterday. We will move now to schedule 4, control orders and preventative detention orders.

Senator STOTT DESPOJA—Mr McDonald, I was curious that in your earlier remarks when we were talking about the international obligations and the issue of the ICCPR, for example, you were very keen to say that we should not deal with absolutes. Obviously you were putting forward the need for presumably a degree of flexibility in the legislation.

I think this legislation has a number of absolutes that could probably cope with a bit of flexibility. I note you were here yesterday when I asked the AFP about judicial authorisation in relation to the initial preventative detention order, and I should find the *Hansard* rather than paraphrase but they did not seem to suggest it would be problematic, for example, provided there was an emergency or there was an exception to the legislation in the case of urgent applications. There would not really be a problem changing, say, 105.8, for example, to make it perhaps more akin to the process of getting a control order, and that is allowing for judicial authorisation, unless there is an exception. Do you have a response to that notion?

Mr McDonald—The first thing I should say is that, with preventative detention, the grounds talk in terms of there being an imminent attack, and the whole thing is an emergency. As for what the police said, I think we do need to check the transcript on that, because the police have been pretty keen all along to have the simpler sort of process that I mentioned earlier on. I would probably like to check the transcript and talk to the police about what they were talking about there. But this is an emergency situation and, consequently, to have an emergency on an emergency is probably conceptually difficult in this context.

If we go to the grounds, which are in 105.44, we are talking about the order having to substantially assist in preventing a terrorist act occurring, and detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the

purposes of the application—and they are all to do with the terrorist acts. Then in subsection 5 we say that the terrorist act that is the focus of this application has to be an imminent one.

Senator STOTT DESPOJA—I understand that, and I do not seek to detract from the notion of an event or incident being imminent.

Mr McDonald—I know that.

Senator STOTT DESPOJA—But I also, as you may recall, asked Federal Agent Lawler about the time frame in which urgent interim orders were obtained, and I note that we are going to get more advice from him and perhaps some examples tabled. I do note that he referred the question to the department, but I thought he was quite positive in his response. He did point out the issue of, obviously, it being urgent and important, but he did say: 'It is a good question; it is one we probably should refer to the department.' So you are going to have to provide an answer somewhere down the track. He said, 'We can provide you with some scenarios, I believe—

Mr McDonald—I think my answer, though, was that this is an imminent situation. That is my answer.

Senator STOTT DESPOJA—Okay. He says: 'We can provide you with some scenarios, I believe, where we feel that the immediacy of the situation requires us to act without the added pressure of ...' et cetera. And I said, 'But not every time, is it?' and he said, 'No. I think that is quite fair. It would not be on every occasion. Every occasion would be different.'

Mr McDonald—In those occasions where it is not imminent, legally, under this, he is going to have trouble getting preventative detention.

Senator STOTT DESPOJA—Getting preventative detention in the first place.

Mr McDonald—That is the legal position. I think what that really shows, if anything, about Deputy Commissioner Lawler is that he is a person who is very measured and would not want to be using this unless it was for very good reasons. But, legally, if he was not able to establish that, he would not be able to—

Senator STOTT DESPOJA—I am not questioning the character of the deputy commissioner, only the intent of the legislation.

Mr McDonald—I appreciate that. I know that you are not.

Senator BRANDIS—It is not a comfort at all that the current occupant of the position is a good man—of course, I have no doubt he is.

Mr McDonald—That is why, legally, it has to be in there.

Senator STOTT DESPOJA—In relation to the ASIO questions, the department's understanding is the same as ASIO's that, even though someone or, in particular, a minor—for example, a 16- to 18-year-old—cannot be interrogated or questioned in preventative detention, once they are released they can be released to ASIO for questioning. That is under this legislation and the ASIO Act. That is a position the government is obviously aware of and comfortable with?

Mr McDonald—Yes.

Senator STOTT DESPOJA—I asked earlier about the treatment of minors in detention and the issue of whether or not they would be alongside adults and whether that should be provided for specifically in the legislation. I note that my colleague Senator Allison asked some questions of I think HREOC about the mental health of people who were detained. In particular, the disclosure requirements may not be sufficient for someone who had a mental illness. That seemed to be backed up, from what I saw in the *Hansard*, by HREOC. Do you believe there could be flexibility or some provision built into the legislation to deal with the issue of people with mental illness?

Mr McDonald—I might take that on notice. I am very conscious of this issue because there was a time when I was a lawyer in a health department and I was responsible for looking after these issues. I will look at that carefully. I have a brilliant assistant here who has pointed out that, of course, under clause 105.35(1)(f), police always have the capacity to contact another person. This would clearly be a circumstance where that would occur. Quite clearly, the protocols that we have been talking about would be very careful in this area. I might add that this is not an unlikely scenario. The chances of there being someone falling within that category are there. In fact, the Australian control orders, as opposed to the United Kingdom control orders that have their Human Rights Act behind them, specifically provide that you can build in a counselling component. If someone did have that sort of difficulty you would be able to build into the order something sensitive to that person's needs.

Senator STOTT DESPOJA—It is not just sensitivity to their needs. I think the HREOC proposal put forward by Mr von Doussa, which I think is a good one, concerned the fact that, at the moment—and I am paraphrasing here—there is no provision for applying, at least within the first 48 hours of a preventative detention, to have the matter reviewed on mental health grounds or really on any other grounds. Is that issue of revocation something that you are willing to consider?

Mr McDonald—Clearly, when I say 'sensitive to their needs', that might sound wishy-washy—

Senator STOTT DESPOJA—I was not dismissing that; I was just saying—

Mr McDonald—but, clearly, in that communication provision—and also in the other provision talking about control orders, because it is a relevant issue there too—if they were aware of the person having a mental illness problem, that would be something that would be factored in very carefully.

Certainly, that counselling condition with control orders could include very regular contact in that sense. With preventative detention, the same can be the case. And, of course, thanks to the suggestions of some people, we have a separate senior police officer monitoring the whole thing, someone separate from the person who organised the preventative detention, and that person monitors it from the perspective of recommending the revocation. As soon as the police officer is aware of a circumstance which makes preventive detention not appropriate, they can organise for the person to be released. So I think that, legally, all of the mechanisms are there to deal with that issue very carefully. Of course, the protocols and the practice are very important, and that will be part of this—in the aftermath of this we will be looking at it.

Senator STOTT DESPOJA—I have to pick you up on an issue. You talk about the UK legislation and the Human Rights Act being behind it—and, Chair, I will finish on this note to facilitate other questions. Can I make this very clear: I do not suggest that the existence of a bill of rights, a charter of rights or a human rights act necessarily has an ameliorating or even a panacea effect, and I am certainly not suggesting that in case of the UK. I am suggesting that it at least provides a reminder and something against which we can assess our obligations. I know that you have referred a number of times to people who think that—and you have heard my questioning on this. On that note, one of the recommendations—or at least advice—from HREOC, from Mr von Doussa, was the idea of attaching it to the explanatory memorandum. I am not quite sure how we go through amending an explanatory memorandum, but—

Mr McDonald—I have clearly said that one time too many!

Senator STOTT DESPOJA—Indeed, but it is Friday afternoon, it is getting late and I think—

Mr McDonald—It comes back to this: at the end of the day, it is what is in your legislation that matters. It is what the cops are reading and using in their procedures that is really going to make a difference on the ground. Here is an example, under our legislation, where I believe the person who is mentally impaired is facilitated better by our legislation than by that of the UK. Not everything from overseas is better than what we can produce. We can do better.

Senator STOTT DESPOJA—Thank you. Quite.

Senator BRANDIS—I have a couple of topics. First of all, thank you very much indeed, Mr McDonald, for your letter, your answer to the questions taken on notice, which we received the day before yesterday. You address the question I put to you about whether or not evidence offered to the court issuing a control order might be hearsay evidence or whether—to put it more precisely—hearsay evidence would be allowable, because those proceedings might be regarded as interlocutory proceedings. You say basically that they would not be interlocutory proceedings and hearsay evidence therefore would not be allowed.

Mr McDonald—I think my letter corrects that.

Senator BRANDIS—You say, 'A proceeding for the confirmation of such an order'—

Mr McDonald—The confirmation, yes.

Senator BRANDIS—All right, I will take it step by step.

Mr McDonald—The interim one is interlocutory.

Senator BRANDIS—Yes, that is indisputably true. I was not going to waste time on that.

Mr McDonald—The confirming one we think is not interlocutory.

Senator BRANDIS—All right. I see that you say that in your letter. I have thought about it, I have looked at it and—with respect—I think you are wrong. I am fortified in my view that you are wrong and that it is interlocutory by the views of Mr Justice von Doussa and Mr Walker SC, who both expressed the same view yesterday. It is an area of the law that I am familiar with. I do not think a confirming order which is capable of a wide jurisdiction to revoke or vary could be regarded as a final judgment or order, which is the test for whether or

not something is interlocutory. Nevertheless, if this is not an issue for you, surely it would do no violence to the legislative scheme to have some clarifying words to say, 'Hearsay evidence is not receivable in these proceedings'?

Mr McDonald—I do not see any problems with making it clear.

Senator BRANDIS—Can you stop there? That is the end of the issue as far as I am concerned.

Mr McDonald—I just wanted to say that, on that particular issue, I have conferred with the areas of my department that are more responsible for that. I noticed that, in New South Wales, in their preventative detention act they provide a clarification.

Senator BRANDIS—Okay. If you are happy to do that then let us do it.

Mr McDonald—They also provide clarification in the other direction.

Senator BRANDIS—But what I want is no hearsay on confirming orders. I am happy to have hearsay on interim orders because of the intrinsic urgency of the situation. One would expect that one would need it.

Mr McDonald—I think that is the way we see it.

Senator BRANDIS—If that is the way you see it, let us have a clarifying amendment, because there is a long, technical debate between lawyers about whether an order is final or interlocutory.

Mr McDonald—In my point there, in agreeing to that, it has been pointed out to me that there are many exceptions to the hearsay rule in the Evidence Act, so when I am agreeing to that—

Senator BRANDIS—In *Cross on Evidence*, there are 14 listed.

Mr McDonald—I am talking in the terms that—and I am sure you are operating on that basis—it would operate under the Evidence Act as though it were any other proceeding before the Federal Court.

Senator BRANDIS—That is fine. I think we both understand each other—

Mr McDonald—We are on the same wavelength.

Senator BRANDIS—and I am pleased to see it is not an issue for you. Secondly, in relation to the provision concerning control orders that the person subject to the order is to be furnished with a statement of grounds—and you will recall we discussed this earlier in another place as well—it would not do violence to the scheme of the bill, would it, to also have the person furnished with the material on the basis on which the order was made—in other words, the evidentiary material—so long as the appropriate excisions in relation to national security matters were made? I do not understand it to be controversial with anyone respectable that those excisions should be made. We could do that, couldn't we?

Mr McDonald—Can I take that on notice? I would need to confer with people.

Senator BRANDIS—Thank you. In doing so, would you particularly have regard to what I thought was Mr Walker's helpful suggestion that the criteria listed in the AD(JR) Act in relation to AAT decisions might be imported into the bill?

Mr McDonald—I will review that.

Senator LUDWIG—On that point, does that include reasons or details of the substance of the information? Or, if you say no to Senator Brandis in that sense, can you look at the iterations of that below that?

Mr McDonald—I think you are starting to drag us into an AD(JR) type thing. But let me take all of that on notice and I will have a look at it. I found that part of Mr Walker's presentation very interesting.

Senator BRANDIS—I am not necessarily adopting what he said, but I thought it was interesting too. I would not have thought that the policy issue here is controversial. We want a person who is subject to one of these orders to have as many rights as they can possibly have, conformable to an ordinary person before the courts, to give them the capacity to challenge those orders, but we also do not want to prejudice national security issues by disclosing evidence that might be so characterised. Thirdly, in relation to preventative detention orders, help me if I am wrong about this, but I do not think the bill has a similar requirement that the grounds—and, by extension, a statement of non security-sensitive evidentiary material—is required to be given in relation to preventative detention orders. Am I wrong about that? If I am, can you point me to where we say that?

Mr McDonald—It is proposed section 105.3(2). There is a mention of the NSI there.

Senator BRANDIS—Okay.

Mr McDonald—You have seen too many different drafts!

Senator BRANDIS—I know. I dream about this bill. Can the same consideration be made of the statement of the non security-sensitive evidentiary material in relation to preventative detention orders as well as control orders?

Mr McDonald—I will take that on notice as well.

Senator BRANDIS—Again on preventative detention orders, do we make an express stipulation proportionality of the kind we make for control orders in proposed section 104.2(42)?

Mr McDonald—In section 105.4(4)(c), we have certainly got it there. It says 'detaining the subject for the period for which the person needs to be detained under the order is reasonably necessarily for the purposes referred to in paragraph (b)'. Paragraph (b) is the reason, so you have your proportionality there designed for this particular provision.

Senator BRANDIS—Thank you for pointing that out to me, but that is quite different and less specific statutory language than that which imposes a proportionality requirement on control orders.

Mr McDonald—It is different, because with control orders you have many different conditions. With this, it is just detention. It is getting detention that is appropriate in that context.

Senator BRANDIS—I am satisfied about that.

Senator LUDWIG—I think that area is section 105.28(2)(a) where, under the preventative detention order, there is a summary of grounds that have to be provided. I am interested in the

same issue that Senator Brandis raised. I want to know, if you were not going to accept Senator Brandis's suggestion, whether or not it could include the reasons or not simply the facts themselves.

Mr McDonald—Let me take that on board. I think I said earlier with regard to the other one that—

Senator LUDWIG—I take it that your answer is the same—that is, that you will have a look at it.

Mr McDonald—Yes.

Senator LUDWIG—I refer you to section 105.37, the restrictions on access to a lawyer and monitoring of client-lawyer communications. I think I have raised this with a number of witnesses and again with you. In practice, is it the case that a person's ability to appeal to the Federal Court or lodge a meaningful complaint with the Commonwealth Ombudsman could potentially be adversely affected by the lack of reasons for the order or the evidence upon which it is based? The difficulty is where you have both the restriction and the monitoring, which might then also curtail the ability for the client to talk to the relevant respondent about these matters.

Mr McDonald—The Ombudsman has quite extensive powers. I think we spoke to the Ombudsman yesterday to follow up and investigate on this. The Ombudsman has even more flexibility than trying to get a remedy in the court. The Ombudsman would get on the ground, go down and have a look. It is more inquisitorial almost, so I do not think there should be a practical problem with the Ombudsman; ombudsmen can open any door in the AFP. It is not the Ombudsman.

Senator LUDWIG—The Federal Court still remains.

Mr McDonald—Certainly you could make an application. A lawyer can take action.

Senator LUDWIG—But that is the point, isn't it? You could make an application but I am not sure what you would do in terms of setting out the facts and circumstances and the grounds upon which you rely. Yes, they overlap, I know.

Mr McDonald—Some of what you are talking about is being addressed by what Senator Brandis has suggested, but—and this is why I have taken some of those questions on notice—we have been quite deliberate in trying to give the police a bit of a free run at dealing with the terrorist incident itself.

Senator LUDWIG—That is, you close that sentence.

Senator BRANDIS—That is fine, Mr McDonald—

CHAIR—Please do not interrupt Senator Ludwig, Senator Brandis.

Senator BRANDIS—May I just say this, Senator Ludwig, because I think it will help you. May we constantly bear in mind that Deputy Commissioner Lawler of the Australian Federal Police said yesterday, in response to a question from Senator Mason, that he did not care how many safeguards there were as long as they did not interfere with police operations.

Mr McDonald—That is what I am talking about.

Senator BRANDIS—Speaking for myself—but I am sure others would agree—those of us who are persuaded that the powers are needed, and I am one, are very concerned to make sure we have as many safeguards as we can so long as they do not inhibit operational imperatives.

Mr McDonald—That is all I was referring to.

Senator LUDWIG—Were you going to take that on notice and have a look at it?

Mr McDonald—Yes.

CHAIR—In the evidence given by the Inspector-General of Intelligence and Security yesterday, and by the Ombudsman, the IGIS tabled a document containing some procedural comparisons of detention safeguards. A number of those that are attractive to members of the committee as safeguards might be in place particularly for preventative detention and, in some cases, control orders. I do not know whether you have had an opportunity to look at that, and I do not have any expectation that you did, but they may be issues which you wish to turn your view to. There were also suggestions made by the IGIS in his submission in more detail on those matters which the committee will have some interest in. Specifically and briefly regarding interim control orders, and particularly in section 104.5 in schedule 4, is there a maximum duration of an interim control order?

Mr McDonald—Yes. I was rather disturbed when I saw someone suggesting that they thought it might go for the whole 12 months, and of course it would not be an interim control order if that were the case. But there is not a time period specified; it is left to the discretion of the court. I think I answered this before when I said that it was something that we thought that the court could appropriately determine. The problem with setting a very rigid period is that there could be circumstances where the court itself would want an extra day or so, but I think it was being suggested by some that you could put in the words 'as soon as practicable' or something like that. That is what I would expect.

CHAIR—Okay, because there is also no requirement or indication to the court that the hearing should be expedited to enable the person who is the subject of the order to bring evidence on their own matter.

Mr McDonald—Yes, that is fair enough. I have just been reminded, of course, that, if someone did do something as weird as trying to make an interim order last for that sort of period, we have all sorts of provisions there concerning applications for revocation. So, practically, it is not really going to make a difference either way if the committee is minded to recommend that. I cannot see a legal problem.

CHAIR—Thank you very much.

Senator LUDWIG—That compares with preventative detention and control orders, in the sense that, when the preventative detention order is a maximum of 48 hours, you expect the states to come in with the extension to the 14 days. What about successive preventative detention orders in that instance where it is not a—

Mr McDonald—Where it is a different state?

Senator LUDWIG—Yes. What is your view there? You are working with the states to come up with an overall solution so, if the states then have a provision, what would you expect the states to have?

Mr McDonald—The two states that have legislated have provisions that recognise the period that the person is detained. If the person has been in Commonwealth preventative detention, the court is informed of that and the state can have access to all the details of the Commonwealth material. I think we have that pretty well covered. In South Australia there is an 'as soon as practicable' formula for this, I think.

Senator LUDWIG—Yes.

CHAIR—We were talking about that the other day.

Mr McDonald—I think Senator Crossin mentioned that one.

Senator CROSSIN—I raised that originally.

Mr McDonald—I gave you the reason why we have done it, but—

Senator CROSSIN—I think I originally raised the issue of the delay between the interim control order being made and the confirmation hearing.

Mr McDonald—It is a bigger issue with control orders than with the Commonwealth preventative detention because it is for a short period. I think the point that Senator Ludwig was making was that at the state level it is a big issue too. I was just saying that the state of South Australia at least, and probably New South Wales—New South Wales has incredible trust in the courts—but in South Australia it is 'as soon as practicable'.

CHAIR—In relation to some aspects of preventative detention, in proposed item 105.12, subclause (2), the issuing authority can consider afresh the merits of making the order and so on, but as I understand it the bill does not have any capacity for the detained person or that person's lawyer to provide any information for the authority to consider at that point in time. I think they can make representations or provide further information to the nominated AFP member who is overseeing the order, but the AFP member is then under no obligation to present that information to the issuing authority.

Mr McDonald—This question was asked by one of the states, and we intended to put something in the second reading speech to make it clear that there is no restriction on that. I am not 100 per cent sure. I will have to check the second reading speech just to be careful about that. However, there are obligations on the police to present any material that is put forward.

CHAIR—Where is that obligation? In 105.19(8) (d), (e) and (f), the AFP member can receive representations, but there does not seem to be a subsequent obligation on the AFP member to pass those representations on, particularly in relation to 105.12.

Mr McDonald—I am just looking at 105.11, which is where I expect to find this. I will go through it. The application—

CHAIR—Do you want to take it on notice?

Mr McDonald—I will take it on notice. There is all sorts of material there. There is an obligation on the AFP in here, as I recall, to put up stuff that is not only in favour of their case but also against their case. We will take it on notice, but it is there, I can assure you.

Senator CROSSIN—You have clarified for me the term 'as soon as practical', but there are just a couple of things that I want to address. Regarding the control orders in the bill, the

issuing authority does not seem to have the power to amend the summary of grounds that is provided to the detainee. Should they have that power?

Mr McDonald—I heard that suggestion. I think there could be some sense in clarifying that. I thought that was something that could be—

Senator CROSSIN—Otherwise, if they do not have that power, I assume that the preventive detention order would be quashed. You would have to start again if you do not have the power to amend it.

Mr McDonald—I heard that comment and it sounded like a good idea. It is something that I would like to take away and think about. I will get back to you quickly. It sounded like a good idea, because it is a bit unclear. The summary was something that was negotiated late in the piece.

Senator CROSSIN—The other thing I wanted to ask about is that there is an implied common law obligation for the issuing authority to give the subject an opportunity to be heard before making the decision. Is that correct?

Mr McDonald—That is the creation of statute.

Senator CROSSIN—I wonder whether it should really be expressed in the bill in more straightforward terms.

Mr McDonald—Let me think about that one, too. It is getting late in the day and I am taking more and more on notice.

Senator CROSSIN—These are just areas that I am flagging that may well have amendments come before you.

Mr McDonald—Yes. Because these powers are a creature of statute, often there is not common law.

Senator CROSSIN—When you look at this *Hansard* and you see a possible amendment coming forward, you will know that I am flagging some ideas. Should the Family Court or the Federal Magistrate's Court be used in the preventive detention orders?

Mr McDonald—Do you mean people from the Family Court?

Senator CROSSIN—Yes—judges.

Mr McDonald—We have certainly put the Family Court in with the control orders because we think that, with the control orders, it is comparable to some of the things that the Family Court judges do.

Senator BRANDIS—I think your case for having the Family Court there was rather weakened when Mr Justice Nicholson said something about this bill and the Attorney-General said, 'What would the Family Court know about terrorism?'

Senator CROSSIN—Senator Brandis, that is the exact transcript I have here with me, so welcome to the Labor Party if you want to come and join us.

Senator BRANDIS—I do not want to join the Labor Party—it is full of ratbags.

Mr McDonald—That was in an entirely different context. What they are used to issuing are protection orders under section 114 of the Family Law Act. In that, they are looking at the sorts of restrictions. So in a control order—

Senator CROSSIN—So could you take that on board and think about it?

Mr McDonald—I will answer your question. Regarding a control order, I think it is totally appropriate that we have the Family Court involved. Regarding preventative detention, I do not think there is anything that the Family Court judges do that is similar to detaining someone. We have a very good range of jurisdictions there. Anyway, we will take that on notice.

Senator CROSSIN—Going back to the control orders: the subjects of control orders are now entitled to receive a summary of the grounds for the order, but this is composed only by the police, as I understand it. Would it be preferable to require the court to approve the summary so that it accurately reflects the grounds to the maximum extent consistent with national security?

Mr McDonald—That goes back to the question you asked before. I will deal with it in that package.

Senator CROSSIN—All right. The reporting by the minister is 12-monthly rather than three-monthly reporting, isn't it, under the preventative detention?

Mr McDonald—Yes.

Senator CROSSIN—There is no consideration for reducing that to, say, three monthly or six monthly?

Mr McDonald—I do not think it is a good idea to reduce it. We think that this will be used extremely rarely. Twelve-monthly reports were part of the COAG agreement. You will remember that, with the ASIO detention and questioning regime, in the middle of the year they had only used the questioning eight times in the whole period. So I think it is unnecessary.

Senator CROSSIN—I want to go back to the scrutiny of bills report. On the non-reviewable decisions under the prohibited contact orders, I notice that, on application by a member of the Australian Federal Police, they can make a prohibited contact order in relation to the same person. Does that apply to 16- to 18-year-olds as well?

Mr McDonald—The prohibited contact order can apply to someone who might want to contact an 18-year-old or a 16-year-old or whatever. These contact orders—

Senator CROSSIN—I do not mean someone who would want to contact a 16- to 18 -year-old but rather a 16- to 18-year-old who might want to contact somebody.

Mr McDonald—Could you have one against them?

CHAIR—I assume Senator Crossin is asking about contact with a parent.

Senator CROSSIN—That is why I am asking—it is not clear. In proposed section 105.15 and 105.16 of the Criminal Code, to be inserted by item 24 of schedule 4 to this bill, the officer who issues a detention order may also, on application by a member of the Australian

Federal Police, make a prohibited contact order in relation to the same person. Is that right? That applies to 16- to 18-year-olds as well as adults, does it?

Mr McDonald—Yes.

Senator CROSSIN—Thank you. I just wanted to clarify that.

CHAIR—I now call questions from Senator Nettle, at the conclusion of which we will go to schedule 7.

Senator NETTLE—I have questions for schedules 5 and 6.

CHAIR—When you were, unfortunately, out of the room, we indicated that we would deal with schedule 4 and schedule 7 and then, if time permitted, come back to 5, 6, 8 and 10 if there were any questions. We have dealt with 9.

Senator NETTLE—Is there anything in the Commonwealth legislation that would prevent the states from extending the period of detention beyond 14 days?

Mr McDonald—No. There is nothing we can do to stop them from doing what they want to do, but the states have agreed it would be 14 days.

Senator NETTLE—I asked some questions on Monday about whether eyewitnesses to a terrorist attack could be detained under this legislation. I want to point you to 105.4(6)(b), because that is the clause that, in submissions to the committee, people have pointed out they understand to mean that eyewitnesses to a terrorist attack could be the subject of a preventative detention order. I just want to ask you that question again, having pointed out that clause.

Mr McDonald—My answer is still the same. You still come back to the order having to be reasonably necessary for the purposes of it. If the eyewitness were under threat or something like that, then you would put on witness protection. It would not be reasonably necessary to have preventative detention. So I think the answer is much the same. I was thinking about that provision.

Senator NETTLE—What would happen if somebody working in the Attorney-General's Department rings and says, 'I can't come into work. I'm safe, but you can't contact me for several days.'

Mr McDonald—They do it all the time.

Senator BRANDIS—Are you speaking from personal experience!

Mr McDonald—It is not an ideal situation. I am pretty dismayed by what New South Wales has done regarding this. It is a question of weighing up the family considerations of someone who is assessed as 'likely to be involved in some terrorist activity' and protecting people. It is a balancing act, and this is one of the parts of the process which is being cut in that way. If someone rang, it could be for any number of reasons. Sometimes people ring because they have some illness and they do not want to go through their illness with me. There are plenty of occasions where people have said, 'I can't come in, I have a problem. I'm okay, but I do need a couple of days off.' You do not ask what they are doing. It could be they are having trouble with their family, it could be a marriage break-up or something like that. In the context of 24 hours or 48 hours, any employer has situations where people have to have a

couple of days off. I do not think it is that incredible. A lot of people thought it was very incredible. I point out of course that this proposed legislation is more considerate of family than, say, ASIO detention where there is no right of this nature.

Senator NETTLE—So you do not think it would impact on people's employment?

Mr McDonald—No, not for a day or two.

Senator NETTLE—What about 14 days, which is what the provision provides?

Mr McDonald—That is a matter for the states. New South Wales has chosen to allow them to tell employers that they are in preventative detention. Quite frankly, I do not think I would want to tell the boss that I was in preventative detention. I think I would rather be telling the employer that I had some personal problem.

Senator NETTLE—In circumstances where somebody might be detained under a preventive detention order and is receiving welfare payments and are not able to meet their mutual obligation, would the Commonwealth notify Centrelink?

Mr McDonald—With something like that, there would be incredible privacy issues. Before blurting out an answer on that, I would want to think about it. My initial thought is that to tell Centrelink that the person is in preventative detention might be not be very good. In the event that there were some consequence for the person after 24 or 48 hours, it probably would be best to deal with it at that time, with the consent of the person. Clearly, these are the sorts of things for the senior police officer who is monitoring what has been put into the legislation to be watching out for. I was asked about the privacy side of it. I think the police obviously have to be very careful about the way they deal with that, but they understand that. They understand that, administratively, this will be something that will require quite a bit of care.

Senator NETTLE—Do you want to take any of that on notice and get back to me?

Mr McDonald—I think that is the answer. I have probably taken too much on notice, but if there is something that makes me want to change that answer—

CHAIR—Then you will respond further to the committee. Thank you.

Mr McDonald—I will respond, just as I have done with something else.

Senator NETTLE—There is a provision for people telling their parents that they are detained; what about telling their children?

Mr McDonald—The provision enables them to contact any of their close family. So, for example—

Senator NETTLE—I recall the provision now. In circumstances where, for example, the kids are at child care and are not picked up, would the Commonwealth notify community services? We saw that Vivian Solon's child was not picked up when Ms Solon was deported. If the kids are not picked up, consequences may follow from that in relation to offences or custody of the children. How do you imagine that would be dealt with?

Mr McDonald—First of all, let me get it on the record that you are dealing with the Australian Federal Police here. That is just my comment about the example you gave. Secondly, the police are quite used to dealing with situations where they have to make arrangements of this nature. When they arrest people who have child-care commitments and

so forth, the police have to make these arrangements. They already have the infrastructure to do these sorts of things. If you go 105.35, there is scope there for even the person themselves to make contact with the child-care organisation. I think this provision has been a bit maligned. It actually provides a lot more flexibility than has been suggested.

Senator NETTLE—It is unclear whether the person running the child-care centre would be able to interpret someone saying, 'I'm safe and can't be contacted for several days.'

Mr McDonald—The idea here is that the prohibition is on detainees telling people that they are in preventative detention. The reason we talk about this safety thing is to sort of point to the purpose of the contact. As I said earlier, it does not stop you saying to the boss, 'For personal reasons I won't be in for a few days.' The same can apply to the child-care centre as well. In fact, New South Wales has given detainees—those who would want to tell people—the capacity to tell people that they are in preventative detention.

Senator NETTLE—In your comment before about the Australian Federal Police, were you suggesting that the Australian Federal Police were more competent than officials from the department of immigration?

Mr McDonald—No. I am just saying it is not appropriate to be talking about that matter in the context of the Australian Federal Police.

CHAIR—If there is nothing further on schedule 4, we will now move to schedule 7. I also indicate in advance that, depending on what happens in relation to schedules 5, 6, 8 and 10, senators might need to think about putting some questions on notice. Senator Nettle, did we deal with schedule 10 to your satisfaction with ASIO yesterday?

Senator NETTLE—At this stage, I do not have questions on schedule 10.

CHAIR—That helps, because that brings us back to schedules 5, 6 and 8. We dealt with schedule 9 before Senator Ludwig left. We will move on to schedule 7, which deals with sedition.

Senator MASON—Mr McDonald, I think it is fair to say that there has been a lot of discussion about schedule 7 and many problems with the legislation have been rehearsed. I do not want to rehearse them again. I want to ask some very specific questions.

Mr McDonald—I have some responses to some of the rubbish that was put down yesterday.

Senator MASON—I understand that. I do not want to go through that again and have a debate. I think the time has well and truly passed for that. Yesterday, Senator Brandis asked ASIO whether they had sought the sedition provisions. They said they had not. I asked Deputy Commissioner Lawler specific questions relating to this: if schedule 7 were excised, how would that inhibit or compromise your operational capacity to fight terrorism? I think it is fair to say that he gave general answers rather than specific ones. I do not think I am verballing him; I think that is right.

Mr McDonald—I think he said in his opening that he thought sedition was an important part of the package.

Senator MASON—He did, but I asked for some specific operational concerns he would have, and he did not enumerate any. Can you do that now?

Mr McDonald—First of all, I think he did enumerate.

Senator MASON—I do not mean to verbal him.

Mr McDonald—It is for him to enumerate on the operational side of it. As Lord Carlile, who was eulogised quite a lot yesterday, said—

Senator MASON—Upper houses are very useful.

Senator BRANDIS—We hear more about Lord Carlile in this debate than we do about Mr Beazley.

Mr McDonald—There is all this discussion in the UK about indirect incitement, glorification and so on. They have even chosen the same penalty for their encouragement provision, of seven years imprisonment. It is interesting—

Senator MASON—My question is specific to operational issues. We do not have much time.

Mr McDonald—To get specific, Lord Carlile said:

> In my view this proposal in its revised form is a proportionate response to the real and present danger of young radically minded people being persuaded towards terrorism by apparently authoritative tracts wrapped in a religious or quasi-religious context. The balance between the greater public good and the limitation on the freedom to publish is no more offended by this proposal than it would be by, say, an instruction manual for credit card fraud were such to be published. I believe that it is Human Rights Act compatible.

It is very much tied up with the same operational rationale. It is a preventative thing. I think John Lawler talked about it in that way.

Senator MASON—I just want to be specific. I do not want to be unfair, but let me put the question as simply as I can: aren't the existing laws of treason, sedition and inciting to violence sufficient to fight terrorism? What does this do to add to that fight operationally? That is a very clear question.

Mr McDonald—Let me cut right to it on this. This came up in discussions about particular activity. We had various discussions about the advocating provisions and so on, and everyone was involved in this process. This committee has representatives from various organisations. In discussing the particular activity with the agencies, we talked about incitement to commit offences and the existing sedition provision. The incitement to commit specific offences was ruled out fairly quickly because of the proof requirements. I thought that the existing sedition offence had some possibilities, but one of the things that ruled it out was the observation that the courts were likely to read down violence between classes of people. Quite rightly, the comment was made that it could be between social classes and not between different political, racial or religious groups—

Senator BRANDIS—If I can just jump in: Senator Mason's question was not about a comparison between the new and the old sedition laws; Senator Mason's question was about the comparison between the new sedition laws and the other laws that are available for enforcement.

Senator MASON—And how they impact on operational imperatives to protect us from terrorism.

Mr McDonald—I have said that we were talking about specific matters.

Senator BRANDIS—Give me an example of conduct which the new sedition laws would catch which would not be caught by either or more of the existing sedition laws, the existing treason laws, the existing law of incitement of violence and the new proposed law in relation to praising terrorism.

Mr McDonald—First of all, on the new provisions about praise—

Senator BRANDIS—No. Give me an example of conduct that would not be caught.

CHAIR—Let Mr McDonald get to the point.

Mr McDonald—First of all, the praise stuff is completely out of the picture because that is about organisational conduct.

Senator BRANDIS—Let me expand my question to include if the praise were not limited to organisations but extended to individuals, which was Senator Mason's suggestion. Give me an example of some conduct that would be caught by the new sedition laws but would not be caught by any of the other laws, including praise laws—

CHAIR—Okay, he has got the drift.

Mr McDonald—It is something along the lines that all people of a particular racial group should be kicked out of Australia—something like that.

Senator BRANDIS—The Racial Discrimination Act would catch that, I suppose.

Mr McDonald—I love these hypotheticals.

Senator BRANDIS—It is not a hypothetical; in fact, it is the opposite. You are being asked for a specific example of conduct. I understand that it is not you, but the government is saying, 'We need these laws to deal with certain conduct.' That is fair enough. That argument cannot logically be made unless it is a given that the existing laws or other proposed laws elsewhere in the bill do not deal with that conduct.

Mr McDonald—How about I deal with it in this way: I will prepare some examples for you.

Senator BRANDIS—That would be good.

Mr McDonald—I will not comment any more, but I will certainly be reviewing some of the matters that I have looked at before.

CHAIR—The committee is really seeking some clarity on those elements which Senator Brandis and Senator Mason set out. I think it is fair to say we do not think we have received it and come to that point yet.

Mr McDonald—What I am driving at is: there is absolutely no doubt that this offence will be easier to establish than the incitement to commit an offence.

Senator BRANDIS—Is that largely because 'recklessness' is now going to be sufficient?

Mr McDonald—I can deal with that issue quite thoroughly. I have seen the human rights commission opinion, where some people have got mixed up. There is no question that it is the intention to urge force and violence—that is the conduct. The recklessness only applies to whether it is to do with the Constitution or something like that.

CHAIR—I am sorry; I did not hear you because people were speaking over you.

Mr McDonald—Let us look at the provision. That might be the easiest way to go. On page 111, section 80.2 states:

(1) A person commits an offence if the person urges another person to overthrow by force or violence:

(a) the Constitution; or

(b) the Government of the Commonwealth, a State or a Territory; or

(c) the lawful authority of the Government ...

It then states:

(2) Recklessness applies to paragraphs (1) (a), (b) and (c).

If recklessness were to apply to the description of the urging conduct—urging another person to overthrow by force or violence—if it were to cover the force or violence bit then why did we bother isolating (a), (b) and (c) as the recklessness fault element of it? The conduct element of this is in relation to urging another person to overthrow by force or violence.

Senator BRANDIS—Let me get this clear, Mr McDonald—

CHAIR—Could I interrupt here. Mr McDonald, perhaps it is too late in the process for me, but when I read a bill which says 'recklessness applies to paragraphs (1) (a), (b) and (c)', I assume it means that you read it as follows:

(1) A person commits an offence if the person urges another person to overthrow by force or violence:

(a) the Constitution ...

That is the first concept to which recklessness applies?

Mr McDonald—No.

CHAIR—That is not what you are saying?

Mr McDonald—No.

Senator BRANDIS—It is not very well drafted.

Mr McDonald—The reason that we have mentioned 'recklessness' there is to isolate where the recklessness applies. Recklessness applies to whether the force or violence is directed at the Constitution, whether that is what it is actually about—whether you are aware of the substantial risk that this is directed at the Constitution, whether you are aware of the substantial risk that this is directed at the government. I kept saying, 'It's intentionally urging.' When I am thinking of 'intentionally urging', I am thinking of the whole thing. But when I read that advice, I thought, 'Oh, hang on.'

Senator BRANDIS—Before you go on—

CHAIR—Can Senator Brandis ask you a question?

Mr McDonald—Can I please explain it. With respect to proposed subsection (7), where we go to urging another to engage—

Senator BRANDIS—There is no recklessness.

Mr McDonald—With that one, you will see that it says 'the person urges another person to engage in conduct'. If we wanted to isolate the 'intentional' bit and then make recklessness apply to violence, we would have put the 'recklessness' earlier in the provision. You could, for example, redraft this to make recklessness apply to the violence, if you wanted to. The way you would redraft it would be something along the lines of the human rights advice, which urges someone to engage in conduct reckless as to whether that urging was about violence or use of force or reckless to do with the Constitution. That is the explanation.

Senator BRANDIS—It is still not clear to me what you are trying to do, Mr McDonald. Are you saying that the element which has to be intentional is the urging to engage in violence but, if that is intentional, then the offence is committed even if the person is reckless as to the outcome or consequence of their urging, so that if the violence happens and they are reckless about whether or not the violence is going to ensue from their intentional urging of violence, they have still committed the offence?

Mr McDonald—This is focusing on the urging. It is not focusing on whether or not violence happens.

Senator BRANDIS—Did you understand my question?

Mr McDonald—No.

Senator BRANDIS—Let us get to the bottom of this, because it is pretty critical. Take subsection 80.2(1). As Senator Payne has pointed out, subsection (2) is, 'Recklessness applies to paragraphs 1(a), (b) and (c)'. But you seem to be saying, and correct me if I am wrong, that recklessness applies only to the words in the subparagraphs, not to the words in the stem.

Mr McDonald—That is right.

Senator BRANDIS—That is what I thought you were saying. So, if that is the case, as I read this what it means is that the conduct—that is, 'urges another person to overthrow by force'—the urging of violence has to be intentional.

Mr McDonald—Absolutely.

Senator BRANDIS—But then the consequence of that conduct—that is, the Commonwealth or the Constitution or the lawful authority does get overthrown by force or violence—is reckless. Is that what you are saying?

Senator BRANDIS—That is what I thought you were saying.

Mr McDonald—Yes. That was beautifully done, and that is fundamental in the Criminal Code; that is, it is normal when you go to—

CHAIR—We understand.

Senator BRANDIS—I do not want to you add any words that might put a gloss on what is a perfectly and pellucidly clear answer, Mr McDonald.

Senator CROSSIN—Does that mean the bill is badly drafted?

Mr McDonald—No.

Senator BRANDIS—In section 5.4 of the Criminal Code, which deals with recklessness, a distinction is made between a person being reckless with respect to a circumstance, which is subsection (1), and a person being reckless with respect to a result, which is subsection (2), and then it goes on to subsection (3), which states: 'The question whether taking a risk is unjustifiable is one of fact.' Concentrating on the distinction between recklessness with respect to circumstance and recklessness with respect to result, are you trying to say that, in relation to proposed clauses 80.2 (1), (3) and (5), the recklessness applies to a result? If that is the case, shouldn't it be limited by invoking only the operation of section 5.2(2) of the Criminal Code?

Mr McDonald—Under the Criminal Code you can modify things to require intention in relation to a result or a circumstance. You are absolutely right: 5.2, which is to do with intention—

Senator BRANDIS—I am sorry. It is 5.4(2). Did you understand my question? Do you want to take this on notice?

Mr McDonald—I understand what you are getting at. I think the first one is a circumstance.

Senator BRANDIS—It sounds to me, with respect, Mr McDonald, that, following on your earlier answer, what you are trying to do is apply only section 5.4(2) to subsections (1), (3) and (5) of proposed section 80.2. If that is your intention I think it should be said much more specifically.

Mr McDonald—We are saying that it is actually the circumstantial side. But, anyway, this is the way that many provisions in the code are drafted. We have a system where we do not have to state the fault elements in every paragraph of the code. It was designed by the Model Criminal Code Committee to free up the language. However, the code does not preclude inserting the fault elements if that is what people want to do. There is no question in my mind that this will work fine.

Senator CROSSIN—Mr McDonald, in section 80.2 'Sedition', would you entertain an idea that you could insert the word 'intentional'? Could it be, 'A person commits an offence if the person intentionally urges another person'?

Mr McDonald—I have just said that, if the committee recommends doing that, it will not cause any drama to the legislation.

Senator BRANDIS—And that observation would apply to subsections (3) and (5), presumably?

Mr McDonald—Yes. It is quite clear—

Senator BRANDIS—As well as to sedition?

Senator CROSSIN—Yes.

Mr McDonald—We did it with some sexual offences in the model criminal code committee. We put it in not because it would not have worked but because we thought it

would prevent very sensitive offences. Given what we have seen in the last day or so, maybe that would be more helpful.

Senator MASON—To use the wording of the act, can I 'urge' you—

Senator BRANDIS—Intentionally.

Senator MASON—I have also urged Mr Lawler—

Mr McDonald—You cannot recklessly urge. It is logic.

Senator MASON—All right; thank you. I have urged Mr Lawler, as well, to consider precisely why schedule 7 is necessary to enhance law enforcement capacity to fight terrorism, because that would be vital evidence in this committee's consideration.

Senator BRANDIS—May I ask one more question—one last question?

CHAIR—I had indicated that Senator Nettle would have the call but if it is a promise that it is your last question, Senator Brandis—

Senator BRANDIS—It is the last question I intend to ask.

CHAIR—It is your unintentional questions that bother me.

Senator BRANDIS—Mr McDonald, I am not persuaded that schedule 7 is necessary, so what I am about to say is because I have reserved my position in relation to that. Let us say the bill were to be enacted with schedule 7. I take you to page 30 of the Human Rights and Equal Opportunity Commission's principal submission. At the foot of page 30 is recommendation 21, which offers some proposed further amendments to strengthen the defences to the proposed expanded offence of sedition, including expanding the defence in relation to encouragement of the discussion on matters of public interest, which is in recommendation 21(a), and broadening the defence in relation to performance, exhibition and artistic work, which is in recommendation 21(b). You might want to take this on notice: were those proposals to be adopted and the defences expanded along those lines, would it do violence to the legislative scheme? It does not seem to me as though it would, but it might settle the concerns of a lot of people.

Mr McDonald—We will take that on notice. Providing that this attempt to encourage discussion on matters of public interest does not get stretched out to enabling people to think they can—

Senator BRANDIS—Well—

Mr McDonald—Providing 80.3(2) is left in place, which provides that the court take into account—

Senator BRANDIS—Nobody is suggesting that it not be left in place, so that is a given.

Mr McDonald—Let us take it on board. Personally I think that the artistic work one is unnecessary. These are things that—

Senator BRANDIS—You take that on notice—the question being: would it do violence—

Mr McDonald—The real worry is that if you start picking out one class of society—an elite class like journalists—and exempt them from—

Senator BRANDIS—Mr McDonald, you are here as a lawyer and those sorts of comments should not be coming from you.

CHAIR—Let him finish.

Mr McDonald—No, I should not say that. What I am saying is that if you start picking out one class, it can just accumulate, when, in fact—

Senator BRANDIS—Except that the law does acknowledge in other areas of the law specific protection of artistic works, in particular the law of copyright and the defences in relation to copyright.

CHAIR—Please let him finish. I think Mr McDonald has something to add.

Mr McDonald—I note that the language of that is certainly quite constructive and worth giving particular consideration.

Senator BRANDIS—On this issue, which I have raised with a number of the witnesses, what on earth do the words 'good faith' add here and where do they come from? Couldn't we just lose those three words 'in good faith' and still have coverage of the defences, as you intended?

Mr McDonald—I was a little bit confused about what Mr Walker was trying to say, but I would have thought that the good faith defence would have provided some of the people—

Senator BRANDIS—It is not a 'good faith defence'; good faith is a limitation on the operation of the defence.

Mr McDonald—I thought that good faith would be something that might have given the jury some sort of yardstick, so I was a little bit surprised that we would want to take that out. I point out that former Queensland Chief Justice Sir Harry Gibbs, in his report, wanted to simplify this. This was what he was suggesting: an expression, in good faith, of dissent from a decision of government is not to be regarded as incitement referring to the new provision.

Senator BRANDIS—That is fine, but—

Mr McDonald—What I am getting at is that even Sir Harry Gibbs, who had all those years of experience, saw the sense of putting good faith in there.

Senator BRANDIS—Sir Harry Gibbs was a great lawyer but he was not an experienced criminal lawyer—he used to boast that he had never run a criminal trial in his life. He was a commercial lawyer. He was a great criminal lawyer when he was a judge; nevertheless—

Mr McDonald—Yes, and he was a judge for a long, long time.

Senator BRANDIS—He was. But I do not think we should fetishise Sir Harry Gibbs.

CHAIR—That is the second time that word has been invoked in these hearings. I really think it is two times too many.

Senator BRANDIS—My point is, Mr McDonald, that in a liberal democracy people are entitled to do things in bad faith. What is wrong if a person tries in bad faith to show that a person responsible for the government of another country—let us say President Bush—is mistaken in any of his policies? It might be in bad faith; the person might be motivated by the purest malice. But that should still, in a liberal democracy be permissible speech, should it

not? I am repeating myself, but I will finish here: it would not do violence to the scheme of these defences not to have the limits of permissible speech so limited that there be a requirement of good faith. To the ear of most lawyers, therefore, that defence could be defeated by a proof of malice, as it is in a defamation case. You will think about that, won't you?

Mr McDonald—I will think about that one.

Senator BRANDIS—Thank you.

Mr McDonald—But, if you take the words 'good faith' out of that, I don't know whether you are suggesting that it would just be the bare defence—'tries to show that any of the following are mistaken'. So you urge violence and you do so trying to show that they are mistaken.

Senator BRANDIS—No, that is a mismatch. That is not right. It should be a defence if you urge what is merely political speech without urging violence. The good faith is a gratuitous but perhaps mischievous qualification, which I imagine is drawn from the law of defamation. These provisions seem to have been inserted in 1920 in the William Morris Hughes amendments to the Commonwealth Crimes Act then. I think that they are inapt.

CHAIR—If you would examine that, Mr McDonald, we would be grateful.

Senator NETTLE—We had an example yesterday about the comments made by ACTU Secretary Greg Combet that he would not pay a $33,000 for asking people to be treated fairly and will be asking other union leaders to do the same. The suggestion from the witness yesterday was that that may fall within the seditious intention part of this legislation by urging a person:

... to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth;

Mr McDonald—First of all, the seditious intention definition relates to declaring organisations to be unlawful associations. There are some offences that apply to unlawful associations. An organisation declared to be an unlawful association has to be approved by the Federal Court. There is no declared unlawful association that I am aware of and I do not think it has been used for a long time; I am not even aware of when it has been used. I will take your question on notice, but that provision is a provision which, if you removed schedule 7, would continue to be on the statute book. Removing this from the bill would mean that the existing provision would stay there because it would not be repealed. If someone could, in theory, be caught under part 2A under this or what was there before, it would be much the same result, that is all I can say. All this stuff about this definition re-enlivening this law is total bunkum. It is what they talk about in New South Wales because they have all these old offences in their Crimes Act. On one count we did there was something like 150 theft and fraud offences in the New South Wales legislation. So they often talk about dead law in New South Wales because they have so much of it. The reality is that anyone can be prosecuted under one of these old laws. That is why they need clean up their Crimes Act and do what we have done progressively with ours.

Senator NETTLE—I would appreciate it if you could take that on notice. It did not relate to bits being removed or not being removed; it related to whether or not it was covered.

Mr McDonald—I probably should have said that it is not really our role in Attorney-General's to comment on specific cases. My answer might be, 'I can't really comment on a specific case.'

CHAIR—But if you would just explore that.

Senator NETTLE—I am giving you the opportunity because it was raised yesterday. If you want to—

Mr McDonald—When I can completely dismiss something, I do.

CHAIR—I understand.

Senator NETTLE—Verso Books in Britain have just announced that they will publish the collected writings and statements of Osama bin Laden and that they will be distributed in bookstores in Australia by Macmillan in December. The AFP said yesterday that sedition laws were in place to stop writings that promote violent jihad. Is that an example of something that would fall under the sedition laws?

Mr McDonald—The existing ones or the new ones?

Senator NETTLE—Either.

Mr McDonald—I think the answer has to be the same: I would have to look at the facts. It is not really my role to say whether or not people are committing offences under the existing law. But what I will try and do is to give you a helpful answer. I cannot go around and say that people have committed offences. It is really for the police to decide whether they should be charged, and then it is for the DPP and so on. So I have to be a little bit careful about that. I will try and give you a helpful answer.

CHAIR—Thanks. We cannot ask any more than that.

Senator NETTLE—That was the AFP's suggestion yesterday. Schedules 5 and 6 have powers that relate to non-terrorism offences. I note that in the United Kingdom—and the government talks about this being modelled on their law—such stop and search powers have been used to detain peace marchers and to detain the guy in the Labour Party conference—

Mr McDonald—Sorry, I gave you an incorrect answer. It has just been pointed out to me. Schedule 5 is about terrorist related offences.

Senator NETTLE—The subsection is about serious offences.

CHAIR—And serious terrorism offences. Both are categorised in the schedule, actually, Senator Nettle.

Mr McDonald—Yes, that is right.

CHAIR—See proposed section 3. It also concerns offences called 'serious terrorism offences'.

Senator NETTLE—Yes, but my question is about the ones that relate to non-terrorism offences, so that has the serious offences in it and later—

Mr McDonald—I will just explain. With schedule 5, you have seen the definition of 'serious offence' there and you are wondering how it relates to these powers to stop and question. Where it comes in is that you have to be doing the stopping and questioning and so

on in relation to a serious terrorism offence. However, if you find something when you are doing that questioning that relates to a serious offence then there are some provisions that deal with what you may do with that evidence.

CHAIR—And that is where your questions go to, Senator Nettle.

Senator NETTLE—Yes. I do not understand exactly how it is being used in the United Kingdom, but my understanding is that they are using terrorism powers to stop and search. It appears that, as with the section in here, there are offences that follow on from that. Those terrorism powers in the UK are being used to stop and search protesters.

Mr McDonald—I see.

Senator NETTLE—My question is about whether that is also provided for in this legislation.

Mr McDonald—Just protests?

Senator NETTLE—Yes. That is what they are stopping and searching in the UK under terrorism powers.

CHAIR—Would you like to take that on notice, Mr McDonald?

Mr McDonald—I do not think that is covered by this. I will absolutely double-check for you, but I do not think it is covered by this.

Senator NETTLE—Maybe I can ask the same question in relation to schedule 6, with the powers to detain. That is even more explicit in saying that it is the power to obtain documents that relate to serious offences.

Mr McDonald—As questioning earlier indicated, this does cover serious offences that are not terrorist offences. I point out that the scope of the notice power is limited to travel details and stuff like that.

Senator NETTLE—You said in your statements earlier today that this bill was about emergency powers before or after a terrorist attack. That would not apply to this section, would it?

Mr McDonald—I was talking about emergency powers in the context of preventative detention. It was mainly focused on that. Of course, control orders are a step back from that. The stop and search one that we talked about is an emergency related power. The power to obtain information and documents where they are related to a terrorism offence is properly characterised as an emergency type power because it is about a terrorism offence. However, this second leg, which is about obtaining documents in relation to serious offences, is less of an emergency power. In fact, it has a magistrate authorising the issue of this notice, so it is more of a general criminal justice type aid.

CHAIR—Which is just dropped in here for convenience of drafting?

Mr McDonald—I think the police explained the background to this. The police have been very keen to have this particular—

CHAIR—We are used to the police being very keen to have all sorts of things, aren't we, Senator Mason?

Senator MASON—We are.

Mr McDonald—I guess there is a connection in the sense that some of the serious offences in here can be mixed up with some of the terrorism offences. However, to answer the question very honestly, the emergency power component really is about the terrorism offences rather than these offences. These powers are more about enabling the people who have these documents to have some sort of reasonably accessible legal authority to hand the documents over to the police. The documents cannot be used against the person who hands them over, so you could not use these powers effectively to target someone who had the documents. You would have to get a search warrant in that case. There is no way that you would be able to use this for all the sensitive stuff that you would think of—medical records and stuff like that. This is a limited class.

CHAIR—In relation to Senator Nettle's question from schedule 5 which she wished to apply also to schedule 6, and the capacity of these powers to deal with matters of protest and the sorts of things that she enunciated, will you examine the schedule on that basis for us as well, please?

Mr McDonald—Yes, I will.

Senator NETTLE—Chair, in relation to questions on notice, is it possible if I find there are things that have not been asked of Attorney-General's to put those questions on notice on Monday?

CHAIR—It would be very helpful if you could do that over the weekend. The secretariat will be working on the weekend, and I will be providing them with material on the weekend. That is the time frame in which we are working.

Senator NETTLE—If there are more I will hand them in on Monday.

CHAIR—No, can you email them on the weekend?

Senator NETTLE—We will try to, but I am not going to promise.

CHAIR—Well, that will really have some impact on the capacity to produce answers.

Senator NETTLE—I understand.

Senator MASON—Mr McDonald, I know the chair will thank you but I also want to thank you very much, and the other members of the department, for your assistance over the last few days. It has been excellent. I also want to thank you, Chair, for chairing this volatile committee for three days. On behalf of everyone on the committee, thank you very much.

CHAIR—Thank you very much, Senator Mason. It is my happy duty to indicate that we have completed the public hearings for this inquiry. I thank the witnesses for the 2½ days in which we have been sitting, and most particularly for this afternoon. Mr McDonald, you do more than yeoman's service and, whilst not all committee members agree with you let alone with each other, you do it with good grace. You are of assistance to the committee and we appreciate that very much.

Mr McDonald—Thank you.

CHAIR—We also know there was some concern that you might not have been able to be present this afternoon. It may reassure you to know that the committee relies on you so much that panic did set in when it was thought that that was the case.

The hearings have been very intense since Monday, for both senators and witnesses and for those attempting to deal with the process, including particularly for my secretariat and Hansard. I thank all those officers concerned as well as my colleagues. I particularly thank Hansard: we have *Hansard* from Monday and from yesterday, and it does make the committee's job extremely easy when you are able to do that for us.

Committee adjourned at 5.56 pm