COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]

THURSDAY, 18 SEPTEMBER 2008

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 18 September 2008

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Substitute members: Senator Ludlam to replace Senator Hanson-Young

Participating members: Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, Farrell, Feeney, Humphries, Ludlam, Troeth and Trood

Terms of reference for the inquiry:

To inquire into and report on Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]:

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Committee met at 4.06 pm

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs in our inquiry into the provisions of the Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]. The inquiry was referred to the committee by the Senate on 2 September for report by 24 September. However, the committee has now sought to extend the reporting date until 14 October.

The bill, which is a private senator's bill co-sponsored by Senators Troeth and Humphries, was introduced into the Senate on 23 June 2008. The bill seeks to establish an Independent Reviewer of terrorism laws to ensure ongoing and integrated review of the operation, effectiveness, and implications of laws in Australia relating to terrorism. We have received 19 submissions to this inquiry. All of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. We prefer all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. Also, if witnesses object to answering a question then they should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. Of course, if we determine to insist on an answer then you can also request to give that answer in camera.

[4.09 pm]

BUDAVARI, Ms Rosemary, Senior Policy Lawyer, Law Council of Australia

MOULDS, Ms Sarah, Policy Lawyer, Law Council of Australia

LYNCH, Associate Professor Andrew, Director, Gilbert and Tobin Centre of Public Law, University of New South Wales

McGARRITY, Ms Nicola, Director, Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, University of New South Wales

Evidence from Associate Professor Lynch and Ms McGarrity was taken via teleconference—

CHAIR—I welcome representatives from the Law Council of Australia and also, via teleconference, from the Gilbert and Tobin Centre of Public Law. Do you have anything to say about the capacity in which you appear?

Ms Budavari—I am the director of the Criminal Law and Human Rights unit at the Law Council of Australia.

CHAIR—Thank you. We have received your submissions. The Law Council of Australia has lodged submission No. 15, and the Gilbert and Tobin Centre of Public Law's submission has been numbered as 4 for our purposes. Does either of your organisations want to make any amendments or alterations before we go to opening statements?

Prof. Lynch—No, we do not, thank you.

Ms Moulds—Yes, please. It is just a small correction to a confusing statement at the top of page 12 of our submission. The sentence currently reads:

He or she may be eligible for reappointment but not more than twice—

referring to the reappointment provision in the June 2008 bill. This should read:

He or she may be reappointed but is not eligible to be appointed to the office more than twice.

CHAIR—Thanks for clearing that up for us. Let us go to opening statements. I invite the Law Council to go first.

Ms Budavari—If it is okay with the committee, we have discussed this with the Gilbert and Tobin centre and we thought that they might, in fact, go first. Then we will add to their comments.

CHAIR—All right. Thanks.

Prof. Lynch—Thank you for the invitation to give oral evidence to the committee's inquiry into this bill. I shall keep these opening comments very brief. Essentially, we support the passage of legislation which would establish an office dedicated to the purpose of ongoing, holistic and independent review of Australia's antiterrorism laws. In doing so, we accept as compelling the reasons that such an initiative was favoured by both the Security Legislation Review Committee and the Parliamentary Joint Committee on Intelligence and Security, as well as the broader reasons we have advanced in our written submission.

However, we would recommend changes based on our consideration of the text of the bill and also examination of the way in which the Independent Reviewer has worked to date in the United Kingdom. We have stated these with greater precision in our written submission, but basically we think the bill might be usefully enhanced in the following ways: better stipulating those areas of the law or issues which must be addressed in the Independent Reviewer's annual report; better stipulating the purpose of her or his review so as to expressly include the national security effectiveness and impact upon human rights and community relations of the laws relating to terrorist acts; and improving the reporting requirements so that the annual report of the Independent Reviewer is presented directly to the Commonwealth parliament. Certainly, in the case of reports requested by the Parliamentary Joint Committee on Intelligence and Security, we believe that these should be delivered directly to that body. Additionally, we would urge the committee to consider removing any ability in the legislation for the Independent Reviewer's reports to be tabled in anything less than their full form. In light of the amount of potential work and the highly politicised nature of debates about terrorism laws, the job of Independent Reviewer would seem to be best shared by a trio of experts who complement each other, rather than a lone individual, no matter how highly she or he is regarded. Lastly, we think that if the bill is enacted with a single Independent Reviewer then the possibility of reappointment after five years should be removed. Ideally, if a panel of reviewers is appointed then this would enable staggered appointment periods to ensure

optimal variations in expertise and composition. We are happy to expand on any of these particular suggestions or to answer questions about other suggested alterations to the bill as it presently stands.

CHAIR—Does the Law Council want to add to that?

Ms Moulds—Yes, please. As the committee is probably aware, the Law Council of Australia is the peak body for Australian lawyers, and we represent over 50,000 lawyers through their law societies and bar associations. The Law Council has long been involved in advocacy on Australia's terrorism laws. Given the prolific legislative activity in this area and the sporadic and limited nature of past reviews, we are of the view that a comprehensive, independent evaluation of Australia's terrorism laws is urgently needed.

We support the opening comments made by Associate Professor Lynch and just have a few extra points we would like to add. We would like to draw attention to particular components of Australia's terrorism laws that have not previously been subject to review and would benefit from consideration by an Independent Reviewer or review body. Of particular interest to the Law Council is the National Security Information (Criminal And Civil Proceedings) Act which, among other things, creates a system of security clearances for lawyers; and part 1C of the Crimes Act, which contains the terrorist 'dead time' provisions which were used in the Haneef case.

The Law Council is also of the view that independent review, while of great value to the parliament and the community, is no substitute for the implementation of much-needed safeguards within the terrorism laws themselves. In this respect, the Law Council has made a number of recommendations for the introduction of safeguards into Australia's terrorism laws at a number of different forums. In general, these recommended safeguards are characterised by the following features: the need for judicial oversight of the exercise of executive power; full access to confidential legal advice by a legal adviser of the person's choice; access to information supporting applications or decisions that affect a person's liberty and the ability to effectively challenge orders restricting a person's liberty; and independent review and monitoring of the use of executive power.

In relation to this last area, the Law Council has recommended that consideration be given to the appointment of a public interest monitor, particularly in the context of the control order and preventative detention order regime. Bodies such as a public interest monitor are able to appear before decision-making authorities where decisions would otherwise be made ex parte, to represent the public interest and to assist the court in scrutinising the evidence placed before it. This is particularly important where interim orders can be made in the absence of the person who is to be subject to them and where these orders can affect that person's liberty.

So the Law Council would encourage the committee to view the present bill as one of a number of important components of a system of terrorism laws that correctly balances the need to protect the community with the respect for individual rights and the fair trial guarantees underpinning our criminal justice system. Thank you.

CHAIR—Ms Budavari, do you want to add anything?

Ms Budavari—Not at this stage, thank you.

CHAIR—We will now go to questions. I have one. I have been looking at your recommendations, Associate Professor Lynch. In your recommendation 2, you outline what you think the reviewer should put in their annual report to parliament, which I actually think should probably go in section 11 rather than, as you recommend, in section 8. But what would be included in divisions 101, 102, 103 and 104 of the Criminal Code and part III division 3 of the ASIO Act? Why have you specifically targeted those areas?

Prof. Lynch—We have listed those areas in our submission because those are the parts of the antiterrorism legal framework which have received the most use to date in respect of individuals being charged. Divisions 101 through to 103 are the criminal offences relating to terrorism. Division 101 deals with the individual offences. Division 102 deals with those in connection to organisations, such as the trial where the verdicts have been delivered in Melbourne, and division 103 deals with the two financing offences. There are upcoming criminal matters pending on those. Division 104 is the division of the code which deals with control orders and, although there is only one current control order in Australia, it also distinguishes itself—say, relative to a division like division 105 which has not been used—as one where there have been individuals whose rights have been affected by the application of those divisional provisions.

Division 3, part III of the Australian Security Intelligence Organisation Act 1979 has not been used for some time but was used in 2005. That was in relation to questioning warrants and questioning and detention

warrants for the Australian Security intelligence Organisation. Those provisions were particularly controversial when they were originally passed and they were subject to a three-year sunset clause. They have been re-enacted and those are ones which, I think, there is a value in having the Independent Reviewer address, even if only to say they have not been used in the preceding year. I know they are already subject to an Attorney-General report, but if they have been used then it would be useful to have some kind of independent review as to the circumstances surrounding their use.

CHAIR—Your recommendation 4 suggests the report should be presented directly to the Commonwealth parliament. I take it you mean rather than through a minister. Are there any other reports that come directly to the Commonwealth parliament rather than through a minister? I was struggling to find any.

Prof. Lynch—I suppose the reason we have suggested that is based upon, as we have indicated, the issues that have been surrounding the office of the Independent Reviewer in the United Kingdom and the recommendations made by its Joint Committee on Human Rights relating to the timing of the report's tabling. Certainly our core view, which is not reflected in the bill at the moment, is that when the parliamentary joint committee request a report from the Independent Reviewer it should be delivered to that committee. I think we are reasonably flexible on whether the annual reports go to parliament directly or whether they go via the relevant minister. At the moment the bill does not reflect that. If the parliamentary joint committee has requested the report, the report should be delivered to it, and we think that that would make sense.

Senator BARNETT—Thank you very much, Gilbert and Tobin Centre of Public Law and the Law Council of Australia, for your submissions; they are greatly appreciated. Just to follow on from the chair's questioning, what about the situation where confidential information may be presented in such a report? How would one deal with that if it were not first presented to the minister and then presented before the parliament? Are you suggesting that there be two types of report, one that is presented to the parliament and one that is presented to perhaps someone else with confidential information? How would you cater for cases where very sensitive confidential information should be reported and included in such a report?

Prof. Lynch—We appreciate that it is always a difficult issue. As we have said in the written submission, the way in which the Independent Reviewer's reports are formulated in the United Kingdom seems to have avoided that problem by ensuring that sensitive or classified information is not included in those reports in their full and final version. I think one of the advantages of an Independent Reviewer is the transparency and public accessibility of the reports that are produced. It would seem counterproductive for the report to be edited and parts of it suppressed before it is tabled in parliament. That obviously requires the author—or authors if you accept the recommendation that there be more than one Independent Reviewer—to exercise very careful judgement as to what those reports contain. Just looking at the many reports that have been written by Lord Alex Carlile in the United Kingdom—and he has open access to all government departments and agencies—illustrates the way in which it is possible for independent review of the terrorism laws to be informative and yet also completely open and for classified security information not to be jeopardised through a reporting requirement such as this.

Senator BARNETT—To follow on from that, I am interested to know a little bit more about how they undertake this in the United Kingdom. Does the Independent Reviewer in the United Kingdom have an opportunity to present classified information to their security and intelligence parliamentary committee or to the ministers separately, or is it simply presented in a report which is then made available to the public?

Prof. Lynch—It is the latter situation.

Senator BARNETT—And you do not see a flaw in that approach or have a problem with the concerns that, perhaps, full and frank advice has not been forthcoming because it may be classified?

Prof. Lynch—No. I can see that the direction of your question is that agencies might be concerned about being completely frank to the Independent Reviewer knowing that the report is going to be tabled in full, but that does not seem to have been a problem in the United Kingdom. Lord Carlile regularly reports that he has had nothing but complete cooperation from all whom he has talked to. Again, I think it largely depends upon the function that is involved, which is an independent review of the laws. As he said, he is not there to report on operational matters so much as outlining the way in which particular investigations have been handled. So a lot of what the Independent Reviewer will report upon should already be matters of public record: the outcome of terrorism trials, perhaps indicating difficulties with the effectiveness of some provisions, or that there are no particular problems in relation to others. Many of the documents which will be most useful in understanding the operation of Australia's terrorism laws will be those coming from courts.

Senator BARNETT—In general, in terms of the UK experience, are there any special lessons that you could share with us as to the strengths and, indeed the weaknesses of the UK arrangements?

Prof. Lynch—I think the few that we have outlined in the report are that there seems to be a real advantage in having more than one Independent Reviewer. I think that, in an area like terrorism and informing the public and the parliament on the operation of these laws, in order to minimise any risk of the Independent Reviewer being seen as, perhaps, an advocate of one view over others it is very important for that to be a composite body rather than an individual. There is also an issue of how long the terms should be. I note that a lot of the submissions that you have received deal with the possibility of reappointment and the length of the terms. As we have said, Lord Carlile will have served in that role in the United Kingdom for a decade, and it has obviously been a very active decade in antiterrorism law, as it has been in Australia. It seems to be something, I think, to warrant a bit of caution in allowing people, particularly if it is an individual, to stay in that job too long. But overall, as we have said, no-one is calling for the abolition of the Independent Reviewer in the United Kingdom. It is an office which has been a useful addition to the public debate and the legislative development of antiterrorism laws. In a jurisdiction like that, which has had many decades of experience with political violence, the idea that they find an office like that valuable should, I think, be seen as instructive to us, who have had far less experience in creating a legal framework to deal with national security issues of this sort.

Senator BARNETT—I have a final question for both groups of witnesses. Notwithstanding your views with respect to the merit of presenting the report directly to the parliament, the bill as it stands provides in section 11 that the report be provided to the parliament 'as soon as practicable' once it is provided to the minister. Do you have a view on whether, if it is provided to the minister, there should be a time frame applicable? Some people might say that the words 'as soon as practicable' are open ended and may leave it open to the minister to hold on to the report for a lengthy period of time. I just wonder if either of the organisations has a view with respect to the time frame for reporting. Certainly, with other reports that are tabled in the parliament, the ministers have to respond within a certain time frame. I wonder if you have a view on that.

Ms McGarrity—Both Associate Professor Lynch and I would agree that the provision in the bill at the moment for the minister to provide the report to the parliament as soon as practicable is a sufficient safeguard to ensure that the minister would present that report as soon as he possibly could. So we would not suggest that a strict time frame be imposed.

Senator BARNETT—Thank you. Does the Law Council have a view?

Ms Budavari—It is not really a matter that we have particularly turned our attention to in terms of looking at other instances where ministers table reports. So we could take that on notice if you want it. But, 'as soon as practicable' would seem to imply a short time period so we would probably be satisfied with that as an initial response. But we could certainly look at it more closely if the committee would like us to and come back to you.

Senator BARNETT—I will leave that. That is a matter for you. Thank you for your response.

Senator LUDLAM—The Australian Greens have foreshadowed a number of amendments to the bill relating to the Independent Reviewer and a comment on whether the laws are consistent with the International Covenant on Civil and Political Rights. Do you have a view either way on those proposed amendments?

Ms Moulds—The Law Council shares the view of the Gilbert and Tobin Centre of Public Law in terms of the fact that we agree that the content of the reports of the Independent Reviewer should be better described in the act. In that respect we see the amendments proposed by the Greens as being one way of doing that. We are particularly pleased to see a reference to the International Covenant on Civil and Political Rights because we think that the independence reviewer's reports should consider the impact of the terrorism laws on human rights. We are also pleased to see the specific reference to the detention provisions in part 1C of the Crimes Act, and the preventative detention orders in division 105 of the Criminal Code. But we would not like to see that limit the scope of the Independent Reviewer's reports because we believe there are other important terrorism provisions that should be described in the act to ensure that they are reported on regularly in the reports.

Senator LUDLAM—That is certainly not the intention of that particular amendment. Your submission mentioned that the Independent Reviewer should not be a substitute to the enactment of legislative safeguards

to ensure that individual rights are protected within antiterrorism laws. Could you expand on what you mean precisely by that.

Ms Budavari—While my colleague looks for the relevant part in the submission, I think that our main point there is that we would like to see both an Independent Reviewer and also the amendments that we have been advocating for some time in relation to the legislative provisions in other pieces of legislation dealing with terrorism—that it is not an either/or situation.

Ms Moulds—To give a couple of examples: the first is in respect of part 1C of the Crimes Act, which contains what we have described as the 'dead time' provisions in terrorism cases, where periods of time can be excluded from the investigation period with the result that people can be detained while authorities investigate terrorism offences. In that respect we have recommended that a maximum limit be prescribed in the legislation on the period a person can be detained for under those provisions. Safeguards such as that, we think, will remain important, regardless of the appointment of an Independent Reviewer.

Similarly, in relation to preventative detention orders, currently there are provisions that allow monitoring of all conversations between suspects detained and their legal counsel in certain circumstances. We would also advocate that provisions such as that be amended or removed to ensure that people have free access to confidential legal advice.

Senator LUDLAM—I have a question for the Gilbert and Tobin Centre of Public Law. How important do you think it is for the Independent Reviewer to investigate the manner in which enforcement agencies, including ASIO and AFP, are actually implementing the terror laws?

Prof. Lynch—Well, our understanding is that that is when the Independent Reviewer might start to overlap quite significantly with the functions pursued by the Inspector-General of Intelligence and Security. We note that the way the bill is currently drafted requires the Independent Reviewer to work in conjunction, cooperatively, with those other entities, such as the Commonwealth Ombudsman and the IGIS. It is in proposed section 9(3). So we are imagining that the Independent Reviewer would not be looking at that kind of thing directly. But, obviously, when the bill is drafted with an eye to looking at the operation of the laws, these issues do tend to overlap.

I suppose how we see the office operating—in light of what is said in the bill and also in the Sheller committee report and the PJCIS—is just to have a better look at, particularly, I suppose, the offence provisions and whether those are actually working in the way that they are supposed to in the courts. The Sheller committee identified serious problems with several of the offences in division 102 of the code which have not been amended in relation to its report, and I suppose a qualification that the committee gave in 2006 was, 'We might have to wait and see how these offences are applied in the course of criminal prosecutions.' Really, that seems to us to be the main focus of the Independent Reviewer's work: seeing how these laws are applied in affecting the rights of individuals, predominantly in the courts but not exclusively, and I think that will probably take the main attention away from looking at the work of the agencies. So, obviously, that is how these matters will arrive in court.

If it is possible, we would not mind returning to the question which was asked in relation to the Greens' suggested amendments. Would it be possible for us to address that now?

CHAIR—Yes, certainly. That is fine. Senator Ludlam is still here.

Ms McGarrity—Thank you. We just have a comment that we would like to make in relation to the suggestion that it be specifically set out in the additional section, 8A, that the Independent Reviewer be required to comment on Australia's compliance with international law, in particular the ICCPR. We believe that possibly a better way of setting that out might be to express it in broader terms so that, rather than expressing it in terms of looking at Australia's compliance with international human rights law principles, there should be some kind of statutory obligation placed upon the Independent Reviewer to consider the human rights implications of the laws and also their implications for community relations. This would obviously include, in some circumstances, a consideration of international human rights principles. But our concern is that, by focusing the attention of the Independent Reviewer upon international human rights principles, this may take away from other areas that would be of interest to the Independent Reviewer in their investigation.

Prof. Lynch—It also requires a certain level of expertise which may or may not be desirable in what you are looking for in a reviewer. And the other point to bear in mind is that there are already several international bodies who have, to date, compiled reports on the compatibility of Australia's antiterrorism laws with

international instruments and presumably will continue to do so. There was a major review in 2006 by the International Commission of Jurists. So in many ways that area of concern has already received significant attention. We do not need to be slavish in our copying of the United Kingdom, but if the office is modelled on or inspired by the United Kingdom model, looking towards international covenants as a yardstick against which to measure national laws seems to be taking the issue at a level of abstraction which may cloud the more direct attention to the domestic operation of this legislation.

CHAIR—Senator Humphries—do you have a question?

Senator HUMPHRIES—Yes. My question is to the Law Council. I just want to clarify something on page 14 of your submission about what the Independent Reviewer should report in the report that he or she delivers. You say:

It is clear that in the course of his or her review the Independent Reviewer is likely to come into contact with, or request the production of, documents or material that is of a confidential or classified nature and that could pose a risk to national security if published.

Then you say:

However, the Law Council is of the view that the Independent Reviewer should be required to reflect this information in his or her report in a manner that can be made available to the public in its entirety.

Are you suggesting by that comment that that material should be used to provide a flavour of what it delivers without revealing information which, of itself, would be a threat to national security? And, if so, are you suggesting that the bill should be amended to reflect that, or are you saying that that is the understanding that you believe can be drawn from the present framework of the bill?

Ms Budavari—I think that is certainly the intention—for the report to, as you have expressed it, include the flavour of the classified information.

Ms Moulds—I think we would probably agree with the earlier comments made by the Gilbert and Tobin Centre of Public Law—that, ideally, the reports of the Independent Reviewer should be able to be reported to the public in full without having to have a separate report that contains classified information, for the same reasons that they outlined. If that were the case, that would probably require some amendment to the bill because it would, as we currently understand it, allow certain information to be withheld from publication.

Senator HUMPHRIES—But do you see that as therefore a constraint on the reviewer in the way that he or she should report—knowing that they would still have, presumably, a requirement to respect any risk to national security—or would you believe that that should not be a consideration for the reviewer and that they should publish and be damned, as it were?

Ms Moulds—I do not think we would say that they should 'publish and be damned' without any regard to national security, but I guess we would reflect as well on the UK experience where they have managed to be able to produce reports that contained enough information for parliament and the public to see the operation of these laws without containing any information that would prejudice national security. But we understand that that would be a challenge in certain circumstances.

Senator HUMPHRIES—You do not actually make any specific recommendations for amendment in your submission. Would it perhaps be useful for you to set out for the committee's benefit what you would specifically recommend should be amended in the legislation? You might want to take that question on notice and make specific recommendations, if that is what you want to do.

Ms Budavari—We could certainly take it on notice, but as a general response I think that we are in general agreement with the recommendations made in the Gilbert and Tobin submission.

Senator HUMPHRIES—Okay. Thank you.

CHAIR—Just before you go, I have one last question. On your submission, Ms Budavari: is there a preference as to why we would have separate legislation to establish this Independent Reviewer? Or should we just simply amend existing terrorism laws, as they did in the UK, rather than have separate legislation? Do you have a preference? Or does it not matter?

Ms Budavari—If it is okay with the chair, I will ask Ms Moulds to address that.

Ms Moulds—I think we would prefer a separate piece of legislation. I think the UK experience shows that that has been very valuable in terms of the way that the role of the Independent Reviewer has unfolded, the role having been first established in the 2000 act and then expanded somewhat or clarified in the 2005 act. But the advantage of one piece of legislation would be that it would provide that comprehensive scope for the

review and reporting process. It would also give a focal point, for the community to be able to understand what this role is and also for the parliament and the parliamentary committees to be able to direct their requests or input into reviews to that single body with clearly stated roles, responsibilities and functions.

CHAIR—Okay.

Prof. Lynch—Can we just come in on the end of that to generally express agreement with it. But if anything the position in the United Kingdom is even more obscure than has been discussed to date. The position of the Independent Reviewer existed prior to the 2000 act in relation to the 'temporary' provisions that were designed to deal with Northern Irish terrorist violence. The terms of reference governing Lord Carlile's powers are actually found in letters patent. If you look at the statute under which he reports there is very little information found there. So a separate bill clearly laying out the powers and reporting responsibilities does not exist at all in the United Kingdom. It is quite a chaotic situation really. The advantage of this bill is that it provides an enormous amount of clarity about this quite unusual office. So we would agree with the Law Council's recommendation on that score.

Senator FEENEY—I apologise at the outset for being late, so if I touch upon something that you have in fact already spoken about, please say so and I will refer to *Hansard*. I wanted to ask you about the appointment of the Independent Reviewer. On page 15 in your submission you refer to how it is that you think a panel might be preferable to the notion of there being a single Independent Reviewer, and you touch upon—to use my own words, not yours—there being something of a phenomenon of institutional capture, or at least a perception that that might be the case. I was interested in hearing your views on that and that perception, perhaps with regard to the UK experience.

Ms Moulds—I think in this respect we would echo the comments made earlier by the Gilbert and Tobin Centre of Public Law—their recommendation of a three-person panel in this regard—but perhaps Professor Lynch will be able to repeat some of his earlier comments.

Prof. Lynch—I am quite happy to if that is helpful or does the *Hansard* record suffice?

Senator FEENEY—I apologise if you have already addressed the point. I am happy to refer to *Hansard*. You are then talking about having three or more persons. Are you imaging that they would still be appointed in the manner outlined in the bill—that is, by the Governor-General on a recommendation made by the Prime Minister of the day after having consulted with the Leader of the Opposition?

Prof. Lynch—We think that that method of appointment is entirely suitable.

CHAIR—Thank you for your attendance this afternoon and thank you to the Gilbert and Tobin Centre of Public Law for your availability here today.

[4.51 pm]

EMERTON, Dr Patrick, Associate, Castan Centre for Human Rights Law, Monash University

BLANKS, Mr Stephen, Secretary, New South Wales Council for Civil Liberties

CHAIR—Welcome. We have your submissions before us. As you have indicated that you do not wish to make any changes to your submissions, I invite you both to make opening statements.

Dr Emerton—It is a pleasure to appear before the committee and I am grateful for the opportunity. Our submission, as senators will have seen, is reasonably brief. It makes three main points. The first point is that the criteria as to which legislation acts are to be reviewed by the Independent Reviewer could be tightened up and expanded in certain respects to capture all the relevant legislation. Having had a look through some of the other submissions that the committee has received, I have noted that some other submissions have made similar sorts of suggestions.

There are various ways of going about it. One would be by listing the relevant pieces of legislation that are subject to review. That would be one possible way of doing it. We have suggested a form of words trying to capture powers and liabilities triggered by their connection in various ways to terrorist acts. It occurred to me since we wrote our submission that probably the National Security Information legislation may not be picked up by the form of words suggested in our submission because the powers under that legislation can be triggered by matters other than those pertaining to terrorist acts. So perhaps the approach involving a schedule of relevant legislation might be a better way to go. But in any event we think that somehow or other it is important to capture the scope of legislation that will be subject to review, and, in particular, not to confine it simply to legislation aimed at prevention, conviction or prosecution because, as our submission points out, there are various relevant legislative provisions that go beyond that purpose, but which are apt to be reviewed.

The second point that we make in our submission—and again this is one that many other submissions have picked up—is that criteria to guide the review process would be desirable and, being a human rights law centre, we have naturally focused on consistency with human rights as a suitable criterion. I notice that other submissions, such as that from the Gilbert and Tobin Centre of Public Law have picked up the notion of community relations. And I think it is the Law Council that has a number of possible criteria indicated in its submission. Certainly, many of those criteria look quite sensible. But we do think it is important that some sort of criteria be adopted, particularly to avoid distractions.

As we note in our submission, the current wording would, for example, potentially invite the reviewer to consider the implications of the legislation for Australia's security cooperation relationships with other countries, but that is presumably outside the intended scope of the reviewer's functions. So some tighter criteria bringing the review down to something like human rights and community relations and, as I think the Federation of Community Legal Centres suggested, community concerns, which would be an appropriate criterion for review. Some form of words or list of criteria like that to focus the review function would seem desirable.

The third thing we pick up on is something that I think Civil Rights Defence has also picked up on in their submission. That is that, as it is currently drafted, the bill would oblige the Independent Reviewer to give regard to the processes and reviews being undertaken by other agencies or office holders. That is with Civil Rights Defence. So in our submission we express a concern that—deliberately, but perhaps more likely inadvertently—this could lead to a certain stymieing of the review function of the Independent Reviewer, which would probably be inconsistent with its intended functions. So we have suggested that the Independent Reviewer be given permission to take account of the activities and priorities of both agencies and office holders, but not necessarily be obliged to have regard to them in order to preserve the full independence of the reviewer.

That is the essence of our submission. As you can see, in some of the details we note that other submissions canvass related issues and we certainly think there are plenty of sensible ideas in those other submissions that could amplify what we are saying.

Given the pace at which we had to prepare our submission there are other matters that we probably could have canvassed but did not. Some of the other submissions do canvass those matters. I think we would also probably support some of them—for example, the notion put forward in the Gilbert and Tobin Centre of Public Law submission and in the Civil Rights Defence submission that particular agencies and/or particular provisions of legislation ought to be mandated as the subject matter of review—if those were chosen

appropriately, focusing on the principal agencies, such as ASIO and AFP, and the principal pieces of legislation, such as the Crimes Act's investigation and arrest powers, the ASIO questioning and detention powers and part 5.3 of the Criminal Code. That would certainly be a desirable feature.

We notice that some of the submissions pick up on what I would call mechanical or procedural aspects, such as the precise details of the Independent Reviewer's access to documents. Then, insofar as they are compulsory—acquisition of documents, powers of compulsion, questioning powers specifying the penalties that might apply for those who do not comply with those powers—machinery provisions of that sort would seem to be a desirable feature of the bill. And we notice that the Law Council and Gilbert and Tobin suggest that reports ought to be unredacted and directed to the parliament rather than the responsible minister. That would seem to us to be a desirable feature of a reporting mechanism that is intended to be undertaken by an independent statutory office holder.

Of the points raised by other submissions, I think the most important—one that is not in our submission but perhaps should have been and one that I would certainly endorse—are the remarks made by the Federation of Community Legal Centres in their submission about processes of community consultation and genuine attempts to discern the impact upon communities of both the formal and the informal or unofficial operations of these laws. It seems to us quite important that that be taken into account. If genuine human rights impact is to be discerned, we have to see how people are being affected on the ground.

I noticed in the Attorney-General's Department's submission that the department said there may still be a need to get a practical sense of the operation of these laws. When it comes to prosecutions and other, more formal processes, that may well be so, but when one looks at the evidence about investigative practices and more informal processes it is clear that there is already a body of knowledge and information about how these laws are affecting various communities in those ways. It seems to us that there is no need to wait for a review process to be implemented to try to learn more about that and feed that into the policy process. It is, rather, that a review mechanism needs to be conceived which can properly get access to that information and to that experience which is already there.

To the extent that the submission of the Federation of Community Legal Centres draws attention to that, I think the Castan centre would endorse that if we are to have a genuine understanding of the human rights impact of this law. Those are our opening remarks. Thank you for listening.

CHAIR—Thank you. Mr Blanks, do you want to make an opening statement? I have a couple of comments for you both. Senator Trood has joined us.

Mr Blanks—Thank you to the committee for the opportunity to make a submission and appear, even at very short notice, as this has been. As you have seen, we have taken the approach which is a bit more absolutist than most of the other human rights organisations that have made submissions. We have suggested that this legislation would be counterproductive. Perhaps I can explain what we mean by that. The ultimate goal of our organisation and the other human rights organisations is to have laws that conform to Australia's international human rights obligations, particularly under the ICCPR. Our perception is that, with the antiterrorism laws that have been passed, a few of the major areas involve significant derogations from the ICCPR rights. That is the subject of a number of shadow reports which have recently been submitted or are being submitted to the United Nations in connection with the review of Australia's performance under the ICCPR.

The question that we want to address is whether an Independent Reviewer is the best means of bringing the unsatisfactory legal situation that presently exists into a more satisfactory position. We think that, on balance, it is not. What we should be focusing our attention on is a process which will lead to the repeal of laws to the extent that they are inconsistent with human rights standards. An Independent Reviewer who is a government officeholder subject to budgetary and other constraints by being in a government position will simply not be the best advocate for achieving the necessary changes.

I just have one more comment. When one thinks about the scope of antiterrorism laws that are being passed, it is not just all the obvious ones that have been mentioned; it extends so far as even the classification act, where works can be refused classification that advocate or, in a sense, praise terrorist acts. When one delves into the area, there is an ever-increasing number of laws which ought to be caught up in a review.

ACTING CHAIR (Senator Barnett)—Thank you very much. We will move to questions. I will kick it off with a question, if I could. Some submissions have put forward the proposition that the Independent Reviewer

should be not a political appointment but from outside of government. What is your view on that? Secondly, do you have a view on the duration of the term of the appointment?

Dr Emerton—I think the independence of the reviewer is quite important. Then, if we take that as a given, there are various institutional models that one can look at to get a guide to proper provisions as to the character of appointment, the duration of appointment, the fixed term of appointment and grounds for dismissal. There are various sorts of grounds—misconduct and so on. I am thinking, for example, of the basis for appointment of officers such as the Ombudsman, the Inspector-General of Intelligence and Security or members of the Administrative Appeals Tribunal. I must confess I am not an especially strong administrative lawyer, so my grasp of the details of those arrangements is not complete, but I think they give us models to which regard could be had. I think some suggestions are made in the submissions from the Ombudsman and the Inspector-General of Intelligence and Security, and those sorts of models give us a way to resolve the issue that has been raised.

ACTING CHAIR—Secondly, a more general question with regard to the UK example: are there any lessons that we can learn from the UK experience that we could take into account here in Australia?

Dr Emerton—Again, I am happy to say something about that. I have had a brief look at some of those reports in the course of preparing our submission. One is hesitant to talk about the capture of an Independent Reviewer by the organisation which is being reviewed, but on the other hand, at least in the abstract, we are familiar with the notion that regulatory agencies can be captured by those whom they are meant to be regulating. I think that the one lesson I took from looking at those reports was that it remains very important that the reviewer get information and evidence in a credible fashion from the widest possible range of people who have information to give.

It seems to me that in carrying out a review function bureaucratic agencies, policy agencies and investigative agencies, which are very well resourced, with a large number of highly educated people with great bureaucratic experience and so on, are very well placed to appear, to give persuasive evidence, to make persuasive submissions and to make a case for the necessity of the powers that they are exercising and even the need for greater powers, unlike the communities who are affected.

I am thinking particularly here, as I mentioned in my opening remarks, of those who are affected by the investigation function of these laws, and when I say 'communities who are affected' I am thinking of those communities who I have had experience with giving community legal education classes in this area of law. I am thinking, for example, of perhaps the Kurdish community in Melbourne or the Somali community. These are communities whose members are often not very well versed in Australian bureaucratic practice, often English may not be their first language and often literacy may be an issue, particularly for migrant communities from Somalia, for example. Many members of that community have not had education even in Somali or in Arabic to any great degree, let alone in written English. These are communities which have a great deal of trouble and a great deal of difficulty in engaging with a review process which is structured in the typical bureaucratic, formal, quasi-legal way that we are used to when review processes are happening. On the other hand, these are the communities which have the actual information and the experiences which would tell us what the impact of these laws is upon Australians.

A lesson I would take from the UK experience is that it would be ideal if mechanisms could be devised in a review function to make sure that the voices of these communities were heard. I am thinking that would mean that, for example, certain sorts of outreach would be required—going out into communities in certain ways and not simply waiting for them to come forward and participate in quite complex and, in some ways, alienating processes. As an example of a complex and alienating process I am thinking of, for example, the Sheller committee process, which I think did a very good job of getting input from academics and government agencies and so on but which I am not sure was very successful in actually reaching affected communities, because of the way it was structured. From reading the UK reports, I do not get a sense that the reviewer has fully successfully engaged in that sort of reaching out to these very affected communities themselves.

For an Australian Independent Reviewer, it would be ideal if a model could be found. When I talk about a model that is based on outreach and on actually hearing the voices of affected communities, I am thinking that some of those HREOC inquiries provide perhaps a better model for us to look to for how that can be done than some of, say, the Sheller committee processes—or even perhaps the parliamentary committee process, which plays an important role but has a different model for gathering evidence and for hearing the voices of affected people. I hope those remarks make some sense. That is one thing I would say, having looked at the UK process.

ACTING CHAIR—Thank you for that.

Senator HUMPHRIES—I was struck, Mr Blanks, by the—well, I suppose, very cynical view that you take in your submission about this legislation. Could I summarise what I think you are saying to us about it: I think you are saying that you regard Australia's terrorism laws as being so odious at the present time that any attempt to file off their sharper edges is futile, and it is much better not to take those edges away or shave them off and instead to let the laws themselves, at some point in the future, sink, by virtue of their being so odious. Have I summarised what you are trying to say in your submission?

Mr Blanks—I am trying to put it in a way that is not quite so cynical. It is not so much that the best chance of building public support for repeal of the laws is to leave them so exposed to criticism that there is no alternative; it is more that the existence of the laws themselves, irrespective of their operation, involves the breaches of the human rights standards that we ought to be concerned about. I think that the discussion we have just had from Dr Emerton in a sense demonstrates the problem of creating a bureaucracy involved in examining this area. If you properly funded it and gave it appropriate powers it would be quite a sizeable organisation, yet it would quite likely lead to no substantive change in the laws themselves, nor would it necessarily lead to any better practices amongst the agencies involved in administering the laws. I hope that is not being cynical.

Senator HUMPHRIES—So you are saying that you do not believe that any recommendations of the Independent Reviewer to change the laws to reflect, for example, the human rights obligations of Australia are likely to be taken seriously by any government or parliament and, therefore, the exercise is not likely to remove some of those elements of the legislation that you regard as being unacceptable?

Mr Blanks—That is right. Basically, these laws came in with bipartisan support by and large for most aspects of them. The only way in which to seriously address the issue in my view is to put brakes on the ability of parliaments to pass laws which so plainly infringe human rights standards.

Senator HUMPHRIES—How would that occur?

Mr Blanks—Through a charter of rights which required before laws could be passed clear identification or clear discussion of the ways in which the laws derogate from human rights standards so that the discussion takes place in Australia in the same universal human rights language that it does in every other country in the world which is facing the same threat. Australia was able to get away with implementing these laws to some extent because it could do so in a language that did not have the human rights standards built into the discourse.

Senator HUMPHRIES—You do not think that until such a charter were to happen, if it ever did, it would be better that the civil liberties of individuals who might be adversely affected by these laws were potentially mitigated by an exercise such as this?

Mr Blanks—It may be better to have the Independent Reviewer in place than not have it in place, but the question really is: should we be directing our limited resources into setting up such an office instead of substantively reviewing the objectionable laws?

Dr Emerton—I am on record I think before this committee—certainly before the Joint Parliamentary Committee on Intelligence and Security—as supporting to a large extent the repeal of a number of these antiterrorism laws. That is not a Castan Centre position; that is my position as an independent academic, and I do not resile from that. To that extent I can see the force of some of Mr Blanks' remarks. Despite that degree of sympathy with what Mr Blanks has to say, one reason that I do nevertheless see considerable virtue in the possibility of an Independent Reviewer is that, if the agency is structured with the right sorts of priorities and with the right sorts of orientation in the carrying out its review function, as I was describing at some length beforehand, then it has the capacity to draw attention not so much to the human rights consequences of the laws just as they are drafted but to the particular human rights consequences of the laws as they are applied and again particularly in the carrying out in both formal and various informal ways by agencies of the investigative functions.

Even if a government or a parliament were to disregard recommendations about legislative change, the mere act of bringing to light, listening to, recording and drawing to the parliament's attention particular experiences that individuals have had as a consequence of the application of these laws by agencies could on its own have quite a significant effect. An example of that would be to my mind the quite significant consequences of the remarks made by Justice Adams in his judgement in the Izhar Ul-Haque case. I am

thinking about his remarks about the conduct of ASIO in that case and particularly its criminal conduct in relation to Mr Ul-Haque.

For me, the value of an Independent Reviewer, even if its recommendations were not necessarily taken up, is that it has the capacity to shed light on and to expose certain things that are taking place. In this area, which is often shrouded in secrecy, it often involves communities who are in some sense on the periphery rather than at the centre of public debate in Australia. That capacity to bring things to light and to make known what is presently secret is a very important role that this office could potentially play. That is why it could be an important office despite, nevertheless, my having sympathy with a number of things that Mr Blanks has said.

Senator LUDLAM—If we could carry on in that vein, I direct this question to Dr Emerton. Some of the submissions obviously have indicated that the Independent Reviewer should be reporting on whether the terrorism laws are consistent with the ICCPR. Do you have views on that and, specifically, do you have any views on the foreshadowed amendments by the Australian Greens to this bill?

Dr Emerton—On the question of consistency or inconsistency there is a fairly plausible argument that, in many respects, they are inconsistent with the ICCPR. International legal questions of that sort are notoriously slippery, so I do not know that my view would be the universal view, but I think it will probably be the majority view of most international human rights lawyers that our laws are not in conformity. Again, from my point of view, making that decision then raises the issue of whether the laws should be repealed or amended in certain ways to bring them back into conformity. As a long-time serial participant in these various review processes in relation to these laws, I must confess I am a little pessimistic that that particular sort of repeal or amendment is going to happen in the immediate term, which is not to say therefore that I think it is an unworthy thing to think about. If that was all the Independent Reviewer were to produce, I might be more sympathetic to Mr Blanks that that is an output of little practical value because, in effect, we already know these laws are inconsistent and nobody is doing anything about it. So would another office holder once again saying, 'Look, these are really inconsistent,' make the difference? I am not persuaded that it would.

To me, another important aspect of international human rights law is not just the way that it judges the soundness of laws but the way that it can judge the soundness, appropriateness and legitimacy of particular administrative actions. Again, that goes back to my view as to what the Independent Reviewer could usefully do to review actions undertaken by agencies exercising powers conferred upon them by these laws and triggering liabilities in others that arise—therefore, to produce documents, for example, of questions that again are triggered under these laws. It is that analysis of administrative action to determine its conformity with human rights requirements that I think is important. To that extent, referring to the Greens amendments, I would say that the person reviewing laws in Australia must report on whether they are consistent with the ICCPR. That should not extend just to the laws, because my view is that most international human rights lawyers think the answer to that question is already well-known.

Is the way that the operations of agencies and other office holders, the exercise of powers and the triggering of liabilities is happening under those laws consistent with the ICCPR? Because that then invites the Independent Reviewer to get down onto the ground and see what is going on. This notion from the Attorney General's Department that we do not yet know what is going on is refuted by anyone who actually gets out and talks to affected communities. We know a great deal about what is going on, but that information is not making its way into the policy debate for some of the reasons I have already tried to explain.

Senator LUDLAM—I will direct this question to you, Dr Emerton, and then I would not mind hearing Mr Blanks's opinions on matters as well. To paraphrase, it was almost as though you were suggesting that we did not want the Independent Reviewer to be asking those questions in case we heard something that we did not want to hear. What would you think of perhaps foreshadowing further amendments to the bill that did allow the Independent Reviewer or reviewers to propose amendments or indeed repeal aspects of the laws that were found to be inconsistent?

Dr Emerton—I certainly think it must be within the scope of the Independent Reviewer's powers to recommend amendment or repeal. I certainly would agree with that. I do not want to say that we would be hearing something we do not want to hear. My concern is that if all the Independent Reviewer were to do was to recommend amendments or recommend appeal then that could be important, but those recommendations in various ways have been made multiple times since 2002 and have, for various reasons which I guess we are all fairly familiar with, fallen on deaf ears. I have no objection to the Independent Reviewer adding to that chorus of voices. I would think it wonderful if the Independent Reviewer tipped the balance—if that turned out to be the key voice to bring about appropriate amendment and, in some cases, repeal—but I think that the

investigation of particular actions in the exercise of powers and the generation of particular liabilities in identified individuals under these laws is an area where the capacity of the Independent Reviewer to do really worthwhile work and actually increase the degree of practical human rights enjoyment in Australia would be very significant.

Speaking frankly, from my own experience working with affected communities in this area, individuals in Australia here and now are suffering in all sorts of ways under these laws due to the activities of various agencies and the exercise of their powers under these laws, which is not well known in the public policy debate because these are not communities at the mainstream of that debate. That rarely is articulated very clearly in the bureaucratic inquiry process or the parliamentary inquiry process into these laws. For various reasons, HREOC has been unable to capture all those voices and bring them up. If the senators were interested I could elaborate on why that is. I think the Independent Reviewer potentially will offer a new possibility to have those voices and experiences heard. For me, that would be the most valuable thing that could come out of this bill. Certainly, vesting in the reviewer the power to recommend amendment or appeal should go without saying.

Senator LUDLAM—Thank you. Mr Blanks, do you have a view?

Mr Blanks—I think I would draw a parallel with the obligation given to the Ombudsman to report on people in immigration detention for more than two years. I think that the community concerned about asylum seekers ultimately was very dissatisfied with the way in which that played out. The Ombudsman's reports ended up not being a significant catalyst in demonstrating the wrongness of long-term immigration detention, and ultimately it is only a matter of political will that has brought that to an end. I think there is a great danger of the Independent Reviewer falling into the same sort of category, which will become a bureaucratic style of reporting that ultimately does not result in much change. Does that answer your question?

Senator LUDLAM—I suppose I was trying to draw out your views on whether the Independent Reviewer should be empowered to recommend amendment or repeal of parts or all of the laws.

Mr Blanks—I think that it would be best for the Independent Reviewer to be unlimited in what he or she could recommend. They certainly should not be prevented from recommending amendment or repeal.

Senator FEENEY—I have one question, which goes to how you would envisage an Independent Reviewer dealing with security questions. Obviously, civil libertarian questions have been at the heart of your submission, but clearly an Independent Reviewer would have to deal with matters which are sensitive and matters that have not been subject to public scrutiny and would presumably have to remain as matters that were not subject to public scrutiny. How would you envisage an Independent Reviewer dealing with that tension?

Mr Blanks—If I can comment on that—

Senator FEENEY—Please do.

Mr Blanks—I think that one of the great problems has been the use of the security cloak to protect information which does not genuinely need to be kept secret. I would expect that the Clarke inquiry on the Haneef affair is going to provide some support for that view that there has been a cynical exploitation of security classifications by agencies to excuse themselves from proper scrutiny. Unless there is some clear authority given to the Independent Reviewer to make his own decisions on whether or not security information can be released—and, firstly, he should have access to it, but he should have the power to release security information if he believes there is no justification for it to be kept secure.

Senator FEENEY—Does that mean you would have a preference for an Independent Reviewer to be a person who has experience in the handling of matters of national security and intelligence? Or, in fact, would you conversely see that as risking institutional capture?

Mr Blanks—I think it risks institutional capture. The better model that appears in some of the submissions is that, in fact, it would not be a single individual; it would be a panel of people with a mixture of backgrounds who could bring their own individual expertises to the task.

Dr Emerton—Broadly, I would want to endorse what Mr Blanks has just said. I think the issue of access has to be resolved in favour of the Independent Reviewer; otherwise, the issue of security classification would then in effect render the reviewer hostage to the classification priorities of agencies which may well be under review by the Independent Reviewer. As to the issue of release, again I think that is something which should be in the hands of the Independent Reviewer, again for similar sorts of reasons.

I am not by any means an expert in the international security field, so I cannot think off the top of my head of a wide range of models that could work, but I think currently there are models for the handling of national security information in trials set up under the national security information act, and they do not begin from the assumption necessarily that counsel are precluded from seeing all the relevant information. They give the court a high degree of leeway. So that is one example that we have in which classification issues come under the scrutiny of bodies other than the security agencies themselves. Yet another model we have is the Parliamentary Joint Committee on Intelligence and Security, which plays a particular role in its representing the parliament in its dealing with those security agencies and classified information and plays a sort of mediating role.

So, without myself having any very concrete suggestions, because I must confess that it is not really my field, I think that it should not be beyond human ingenuity, given that we have other models already in operation, to conceive of ways in which the reviewer can maintain control of her or his access to information and use and release of that information but nevertheless it be perhaps mediated or advised or determined in certain ways which allow all the relevant questions to be canvassed and a rational solution to be reached.

Senator FEENEY—Finally, clause 9(3) of the bill requires the Independent Reviewer, before commencing a review of legislation, to have regard to various officers and agencies—the Inspector-General of Intelligence and Security, ASIO, the Australian Federal Police and so forth. I wonder if you have any comments or remarks about that—that is, I wonder whether you think that might constrain the work of an Independent Reviewer.

Dr Emerton—Our submission comments on that provision and expresses the view that, at a minimum, the word 'must' should be rewritten to read 'may'. So in effect that provision, instead of imposing an obligation which could potentially constrain the independent exercise of the functions of the office by the Independent Reviewer, should confer a power of consultation with those other agencies and a power to have regard to their activities and priorities. I think that change in wording is really required to preserve the independence of the reviewer. Particularly, it would be a very unhappy outcome if the reviewer were obliged to constrain her or his activities due to activities being undertaken in an agency which was the very subject matter of the review. So, yes, our submission was quite clear on that. We think that the word 'must' should read 'may'.

Senator FEENEY—So, not to be overly cynical about it, you are anxious that in fact such an agency could commission a review of legislation so as to effectively take it out of the jurisdiction of an Independent Reviewer?

Dr Emerton—Yes. There is the possibility of that being done deliberately, I guess, although I suspect that that would be unlikely. I do not want to impugn the agencies in that way. I would be more worried about issues of inadvertently stymieing. What I have in mind, for example—and this elaborates on our submission—is that, if there were a particular case or pattern of practices by a particular agency that was drawn to the attention of the Independent Reviewer and the Independent Reviewer wanted to inquire into that, it might well be that the relevant agency was also looking at that, because agencies are frequently reviewing their practices and their processes and policies, and then there could be an inadvertent collision of reviews. The bill as it is currently worded seems to suggest that the Independent Reviewer would be obliged at that point to give way to the other review, although the other review, being an agency internal review, might not be giving weight to the considerations that are to govern the Independent Reviewer's review function. It is not so much deliberate interference or stymieing, which is a conceivable threat but in practice one would trust is not going to come up very often; it would be more inadvertent collisions of reviews that we would be concerned about.

Senator FEENEY—To my mind that is a little unclear in the bill, isn't it. I find the wording of 9(3) unclear as to whether the activities of one agency thereby prohibit the Independent Reviewer from looking at the same activity.

Dr Emerton—I would agree with that. Our submission makes the point that there is a sort of tension and lack of clarity between that provision and the provision which says that the reviewer is to be free to set her or his own priorities. Again, that is why we suggest resolving that ambiguity by substituting the word 'may' for 'must' to then make it clear that this is conferring an additional power and matter that the reviewer may take into account but is not intended to fetter the reviewer's setting of priorities and undertaking of that core review function.

Senator FEENEY—Thank you very much.

Mr Blanks—If I may, I will just add a comment on that matter. I think the words at the end of 9(3), 'with a view to ensuring a cooperative approach' with the agencies, might also cause a problem and involve compromising the independence of the reviewer. It may be the situation where—

Senator FEENEY—It does not prohibit conflict, though, does it? It does not prohibit the Independent Reviewer criticising an agency.

Mr Blanks—It does not prohibit, but it lessens the likelihood of appropriate criticism.

Senator FEENEY—Thank you.

CHAIR—I thank you both for making yourselves available this afternoon. We certainly appreciate your time.

Dr Emerton—Thank you very much for the opportunity to be heard.

Mr Blanks—Thank you.

[5.41 pm]

INNES, Commissioner Graeme, Australian Human Rights Commissioner

SIMMONS, Ms Frances, Lawyer, Australian Human Rights Commissioner

McMILLAN, Professor John, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

Evidence from Mr Innes and Ms Simmons was taken via teleconference—

CHAIR—I welcome the witnesses. Would you like to mention anything about the capacity in which you appear?

Prof. McMillan—I am Commonwealth Ombudsman, and also Law Enforcement Ombudsman in relation to the Australian Federal Police.

CHAIR—Thank you. We have two submissions before us: the Australian Human Rights Commission is submission No. 9; the Commonwealth Ombudsman's submission is No. 12. Does either party wish to make any amendments or alterations?

Mr Innes—No, Senator.

Prof. McMillan—No, thank you.

CHAIR—Mr Innes, would you like to make a short opening statement?

Mr Innes—Yes. Thank you for inviting the Australian Human Rights Commission to appear before the committee today. The commission welcomes the bill to establish an Independent Reviewer of counterterrorism legislation. As the Human Rights Commissioner, I was a member of the Security Legislation Review Committee chaired by the Hon. Simon Sheller. As you know, this committee was established to conduct a one-off review of six security and counterterrorism acts passed by parliament since 2002. Our first recommendation was that the government establish an independent body to review the operation and effectiveness of Australia's counterterrorism laws. We suggested that the independent review could be conducted by a panel like the Security Legislation Review Committee. We also observed that the United Kingdom has an Independent Reviewer. The parliamentary joint committee agreed we needed an ongoing and independent review of Australia's counterterrorism laws. The committee favoured the appointment of a person of high standing as the Independent Reviewer rather than review by committee.

There is room for debate about whether it is appropriate to have more than one reviewer. However, whatever form of reviewer is established, the review mechanism must be adequately resourced and supported. The Sheller committee recommended establishing an independent review mechanism in 2006. There are three observations that I would make about reviews of counterterrorism laws to date: (1) reviews have been ad hoc and fragmented. The Sheller committee's 200-page report did not cover what are arguably the most controversial aspects of the security legislation, such as questioning and detention powers, control orders and preventive detention orders. While there are some provisions for review of other aspects of Australia's counterterrorism laws, key legislation like the National Security Information (Criminal and Civil Proceedings) Act and part IC of the Crimes Act are not subject to review; (2) reviews of counterterrorism legislation to date have found that antiterrorism laws impact most on Arab and Muslim Australians, who feel under greater surveillance and suspicion. There is considerable concern among these communities about the operation of counterterrorism laws; (3) formal government responses to all major counterterrorism reviews, including the Sheller report and the ALRC report into the sedition offences in the criminal code, are still outstanding.

In light of these observations, I make the following suggestions about the bill that this committee is considering. Firstly, the bill should be supported as the first step towards implementing many of the important recommendations that have been made to improve the operation of Australia's counterterrorism legislation. Secondly, the bill should be amended to require the reviewer to consider the human rights impact of counterterrorism legislation. The commission has always recognised the need for laws which protect the community from terrorist activity. However, these laws must be clearly framed and comply with Australia's human rights obligations. Ensuring counterterrorism laws are consistent with Australia's human rights obligations is often a complex issue, which involves properly identifying when human rights can be legitimately restricted. The question of whether our counterterrorism laws go too far and intrude upon fundamental rights and freedoms is the focus of public debate and the cause of anxiety among sections of the community who feel targeted by these laws. An Independent Reviewer should be required to explicitly consider and address the human rights implications of Australia's counterterrorism laws. Thirdly, the

Independent Reviewer's reports should be considered seriously and promptly responded to. There is little point establishing an Independent Reviewer if the government does not seriously engage with and respond to the reviewer's recommendations. This is why clause 11(2)(b) of this bill, which requires the minister to present a report to parliament in response to the Independent Reviewer's report as soon as possible, cannot be watered down. If anything, the committee might want to consider amending the provision to read 'as soon as practicable and no later than 90 days after the report was presented.'

Finally, I would like to make a brief comment about the accessibility of submissions on the Senate committee's website. When I visited the committee's website to read the submissions of others who are appearing before you today, I could not do so. Despite the fact that it is well known that PDF format does not provide equal access for people who, like myself, are blind or have low vision and does not comply with international guidelines, it remains a popular format for the distribution of government documents. This creates an unnecessary barrier to participation for people who are blind or have low vision. Fortunately, the solution is simple: make submissions available in Word format. I hope I will have no such issues reading the reports of the Independent Reviewer. Thank you for your consideration of our statement.

CHAIR—Thank you, Commissioner Innes. Professor McMillan, do you want to add some words to that?

Prof. McMillan—Yes, thank you, Chair. I will make a brief opening remark. Thank you also for the opportunity to appear. I too, like Commissioner Innes, was a member of the Security Legislation Review Committee.

There are two issues before the committee. Firstly, there is whether there should be a regular and independent review of terrorism legislation and, secondly, if so by whom and how that review should be undertaken. I will not spend any time on the first issue of whether there should be a regular and independent review other than to note that arguments are put strongly, in many of the submissions, which point to the controversial and sensitive nature of the terrorism laws and the issues they raise about heavy penalties, about the balance to be struck between protecting the community and intrusion into individual freedoms and about the concerns that some groups within the community hold about those laws. All of those concerns add up, I think, to a need for a regular review of laws of this nature in a liberal democracy.

I will comment more on the second issue of by whom and by what mechanism an independent review should be undertaken. That in itself breaks down into three issues: which person or body should do the review; what aspects of the law or of administrative practice they should be looking at and what procedure or mechanism should be established to ensure that the report of an Independent Reviewer is considered by government and that there is a formal response on the public record.

As to the person or body best suited to undertake the review process, there are a number of credible options that have been mentioned. They include a parliamentary committee, such as the Parliamentary Joint Standing Committee on Intelligence and Security, existing agencies such as the Ombudsman or the Inspector-General of Intelligence and Security, a committee with statutory officers and nominees—much like the Security Legislation Review Committee—an individual appointed as an Independent Reviewer or a panel of people appointed as the Independent Reviewer. There are other variations: for example, to have Commonwealth and state membership of a body; to have input from different bodies, such as the Ombudsman, into a review conducted by an independent panel; and whether the committee is standing or is elected every three years or every year. So there is a variety of options to be considered there.

Without arguing that an existing agency like mine should necessarily be used, my submission has simply drawn attention to some of the practical considerations that incline in favour of that option being considered. As I have said in the submission, agencies such as mine and the Inspector-General of Intelligence and Security's already have the staff, corporate structure, facilities, premises, work systems and security classifications that are necessary to do a task of this kind. My office has facilities around Australia. Very importantly, we have an ongoing responsibility in these areas, so we are able to ensure that, if a report dealing with administrative practice is presented, then there can be follow-up by our agencies into whether there is an appropriate response by policing and intelligence agencies and by executive agencies generally.

Importantly too, a matter that is often overlooked is that offices such as mine and the Inspector General of Intelligence and Security's can essentially set our own terms of reference for an inquiry. A controversial issue that often arises when independent inquiries are appointed is that midway through an inquiry there is a large debate about whether the terms of inquiry are too narrow. Well, we have the power to set our own terms of reference and, equally, we have the independent statutory discretion to decide when and how to publish.

The optimal model is influenced in part as well by the second consideration I mentioned: which aspects of the laws or administrative practice should be reviewed in this process. Many of the submissions identify some of the law that should be reviewed, such as provisions in the Criminal Code and provisions in the Australian Federal Police Act and in the Telecommunications (Interception) Act. But there is the further question of whether the review is principally focused on the administration of those laws or on the terms of policy that lie behind the law. If the review is principally focused on the administration of those laws in, say, the last year or two, then the argument inclines strongly towards using or at least involving agencies such as mine which have experience with the policing and intelligence agencies.

On the other hand, if the desire is to have a review focused principally on the terms or the policy of the law, then agencies such as my own are not as suited to doing that individually—indeed a parliamentary committee is often the ideal forum for a review of that kind—although, as a body like the Security Legislation Review Committee illustrates, you can have statutory nominees together with other nominees on such a body and it then can look at the administrative practice as well as the policy issues. If the body is to look at the international dimension of these laws or the human rights dimension, then that opens up other questions about who or what body is best suited to undertake the review.

Finally, I express my agreement with the point made by Mr Innes. It is a point that has been overlooked in many of the submissions yet it really is the most important point of all. It is that if government does not consider or respond to the report of an Independent Reviewer it becomes largely academic as to which is the best model for having an independent review. It is a matter of disappointment that there has been no formal government response to the three reports that have been presented on the terrorism laws by the Security Legislation Review Committee, by the Parliamentary Joint Standing Committee on Intelligence and Security and, more narrowly, by the Australian Law Reform Commission on sedition offences. Something may be planned but there is no response yet to those reports. This is more a matter for the committee, but I urge the committee to propose, in its report, that a mechanism or a principle of some kind be established inviting a formal response on the record to the report of an Independent Reviewer whatever that process would be. That concludes my opening remarks.

CHAIR—Thank you, Professor. We will go to questions.

Senator FEENEY—My questions are really for you, Professor McMillan. I am interested in the areas of potential duplication between an Independent Reviewer and your office. Let us take your points about the existing capabilities and expertise of your office but put those aside for one moment. Let us imagine that the Independent Reviewer is in fact created in the terms set out in the bill. Am I right in imagining that there are then some areas where you and the Independent Reviewer would both have powers? I am thinking in respect of the Australian Federal Police and the fact that you are at present the person responsible for dealing with complaints about how the Federal Police use their powers in relation to terrorism laws. Would we then find ourselves in a situation where you and the Independent Reviewer were essentially patrolling the same beat?

Prof. McMillan—It happens that there are often, even at present, multiple options for investigating an issue. For example, it would have been open to my office to have conducted an investigation into at least some aspects of the Haneef matter that would have paralleled the investigation conducted by the Clarke inquiry. But I decided at the time that I had not received a complaint and that, as there was constant discussion in and around the election about establishing an independent inquiry, it was best to wait. As the committee would know, at an earlier time the government initially chose to establish an independent inquiry to look at the detention of Cornelia Rau and then initially decided that 248 other cases should be referred to that inquiry but then decided that the better option was to refer those 248 cases to my office. So there are choices that can be made.

My view is that our jurisdiction is enlivened more by complaints than by own motion inquiries. If I receive a complaint on a matter that, say, an Independent Reviewer is looking at, then, as a general rule, I would exercise the jurisdiction to investigate that complaint. On the hand, if there were scope for an own motion investigation into some aspect of policing in relation to intelligence laws and it was clear that an Independent Reviewer that was separate from my office was conducting an investigation and had adequate powers for that purpose, then I would often defer to that process, although I would offer myself for consultation and discussion with that inquiry.

Senator FEENEY—Can you give me an example of where that has occurred? Has there been an occasion when you have proceeded with an inquiry irrespective of the activities? I imagine this must arise for you a lot.

Prof. McMillan—Yes, it does arise a lot. It arises particularly in the immigration area at the moment because we have additional functions and resources and roles to perform in that area. But when critical incidents occur, particularly in detention centres, the department will often choose to appoint a person to conduct an inquiry and report to the department. On some occasions I have then said that I will formally commence an own motion investigation and ask that that person consult with me about the terms of reference of the inquiry and about the inquiry that is being conducted. Then I become involved in varying ways.

The same happens with the Australian Federal Police. We tend to be notified about critical incidents, particularly in the ACT about deaths arising in police chases. There have been occasions on which we have conducted a partial investigation that has paralleled a much more intensive investigation being conducted by the professional standards area in the police. So it is a familiar practice, and I suppose it brings me to the point that I often emphasise that whenever one is framing proposals for a new method of review, scrutiny or whatever, it is always important to take account of the fact that there is already a large system in place and it can become involved in these matters in ways that are unpredictable. So it is important to address the issue upfront about what the relationship between any new body and existing oversight agencies is going to be.

Senator FEENEY—That is quite right. A number of submissions have made the point that there is anxiety about the extent to which this proposed body would be resourced and have the capacity to undertake its work. Your submission at least redoubled that anxiety in my mind in the sense that this new agency would need to go through the normal, customary processes of establishing an office, finding staff et cetera, and yet many of those capabilities already exist in government. Although you did not put it as starkly as perhaps I just did in that precis, is it a critical concern of yours that this agency is effectively going to be the new kid on the block and will duplicate existing capabilities? Do not let me put words into your mouth.

Prof. McMillan—I can see that there are arguments for having an Independent Reviewer process, particularly if the intention is to have a person who will be looking broadly at the policy of the law and maybe holding public hearings on that, although that is exactly what the Security Legislation Review Committee—of which I was a member—did. But I do have a concern that the practical considerations are often understated. Realistically, it takes a matter of many months to establish a new office, to recruit staff, to acquire premises, to get security clearances. There is the annual process of being audited, of having to do annual reports—and they are very time consuming. I had that experience recently when I was Acting Integrity Commissioner to establish the Australian Commission for Law Enforcement Integrity. Even with a budget of $2 million, it was very difficult in the early days to work out how a small agency of nine people could establish its own security system, its own human relations capacity, and we had to draw heavily on other agencies to do that.

Individual inquiries often take a while. I make no criticism of other inquiries, but we look at some of the inquiries established in individual cases and they often take nine months to a year. My office investigated 247 immigration cases in just under two years. We prepared an individual assessment on every case and we prepared nine public reports that drew out all of the issues. It was a very efficient process.

Senator FEENEY—You have an ongoing monitoring role there, too.

Prof. McMillan—Yes, we have an ongoing monitoring role. We drew heavily on our own expertise on problems in government. Part of the ongoing monitoring role is that senior officers and I spend quite a deal of time giving presentations to other agencies, and publicly, about the lessons to be learnt from experiences like this. It is a very efficient process for embedding cultural change in government practice and in community affairs.

Senator TROOD—Just on that theme, if we were of the view that the Ombudsman could undertake this review role, would you see yourself as having enough resources to do that, given what you have said about the demands that that makes on any agency?

Prof. McMillan—The answer is, no. My office has a budget of $19 million and 150 staff, but we are approached by over 40,000 people a year. We conduct about 4,700 investigations a year, publish about 20 reports and have a large inspection function and other functions. It is always very difficult if a large issue comes along. An example recently was that we did a large investigation into certain aspects of one Defence incident—a fire on the *Westralia*. I had to take one senior officer off line for over nine months to work solely on that matter, supported by others. Now the kind of function that would be involved in doing a review of many laws, involving quite a deal of consultation, and considering ministerial practices and so on, would be a large task that would require independent resourcing.

One of the problems with the Security Legislation Review Committee was that it was established by legislation without any mention of resourcing. The short answer is that it was partly subsidised by own office, the Human Rights Commission, the Privacy Commission and Inspector-General, since we provided our services and facilities free for that purpose.

Senator TROOD—Commissioner Innes, I wonder if I could have your reaction to Professor McMillan's evidence with regard to the possibility that we do not necessarily need to set up an Independent Reviewer, but that we could use an existing agency of some kind. Do you see that to be a virtue?

Mr Innes—I think the arguments for the need to conduct a review of counterterrorism legislation are overwhelmingly persuasive. I should say that first. I do not have a lot of comments on how the reviewer operates—whether it is a panel or a single individual and whether it is placed in an existing organisation or set up as a separate office—except to say that it is a major piece of work in terms of the review of many pieces of complex legislation and policy. Professor McMillan's comments about the complexities of establishing a role, either in an existing or a new organisation, are absolutely correct. There was a further point that I was going to make but it has just gone out of my mind.

I do not have a strong view as to where the function might be placed, except to say that, clearly, based on my own experience in the Human Rights Commission and on my experience as a member of the Sheller committee, it could not be done without allocation of appropriate resources.

Senator TROOD—I will go to your submission and the point that you make in paragraph 18 about the need for the generality of counterterrorism laws to be reviewed. In other words, you say counterterrorism laws are working as a whole. You have made a suggestion as to an amendment to the bill in paragraph 22 and it was not clear to me whether that amendment that you have suggested there was intended to meet this concern that you have. I wonder whether or not it was the intention or whether or not you expected that there might have to be another amendment to the bill beyond those that you have recommended in your submission?

Mr Innes—I might let Ms Simmons respond to that question.

Ms Simmons—I have the numbered submission before me at paragraph 22. My concern is that you mean the recommendation that the Independent Reviewer be subject to a statutory requirement to consider the human rights impact of laws relating to terrorist acts.

Senator TROOD—No, it is not that point. Your paragraph 22 goes to that point and I understand the force of that suggestion. But in paragraph 18, you make the point that the Independent Reviewer, under the existing bill, may not have the capacity to review the whole range of terrorism laws, in other words, the way in which the counterterrorism laws are working as a whole. If that concern is a real one, then I am wondering whether or not we are to take any of the recommendations that you have made as an effort to try and rectify that problem?

Mr Innes—I see. I think the answer to your question is that paragraph 18 relates to a different point to paragraph 22.

Senator TROOD—That seemed to me to be the case. In other words, you have not suggested an amendment that might go to the problem that you were alluding to in paragraph 18.

Mr Innes—No, I do not think that we have.

Senator TROOD—I see, good.

Ms Simmons—If I can clarify, paragraph 18 is supportive of giving the Independent Reviewer a broad mandate. Clause 8 of the bill would appear to give the Independent Reviewer a broad mandate to review the operational effectiveness and implications of laws relating to terrorist acts. In addition to that, the commission submits that the Independent Reviewer should also be required to consider the human rights impact of laws relating to terrorist acts.

Senator TROOD—I understand that.

Mr Innes—Sorry, senator, I think what Ms Simmons is saying is that we are not suggesting an amendment to the bill following paragraph 18 because we are of the view that the bill achieves what paragraph 18 is suggesting but rather that it is an important requirement that the bill should allow a review of the laws in broad and general terms.

Senator TROOD—Thank you for clarifying that because I read paragraph 18 and it seemed to intimate that you were concerned that the powers given to the Independent Reviewer were not broad enough to accomplish that wider review that you are referring to in paragraph 18.

Mr Innes—I am sorry for that confusion. We were trying to stress the importance of the capacity of the reviewer to carry out that function.

Senator TROOD—Do I take it that the recommendation you have made in relation to human rights underscores the view that you have that there is no necessary need under the existing bill to try and align the counterterrorism laws with Australia's human rights obligations?

Mr Innes—I think, on the contrary. We would say that that is where we are recommending an amendment to the bill to ensure that the reviewer—whatever form the reviewer takes—has the specific capacity to, when reviewing counterterrorism legislation, take into account Australia's international human rights obligations.

Senator TROOD—Professor McMillan, are you of the view that the bill adequately suggests a range of powers that the Independent Reviewer needs to properly conduct the review?

Prof. McMillan—Yes, the bill gives the Independent Reviewer certain powers. There is no mechanism there for recalcitrance. It is not made an offence. If the documents that are sought are being obtained from government agencies, my view is that you can probably expect that there will be cooperation, although there is often give and take, as I understand it. In terms of the definition of the scope of the laws, the more certain way of doing that is to have a schedule to the act that lists all the provisions in it that are subject to review.

There are not any extensive immunities in the bill for the Independent Reviewer. That may not be an issue if the Independent Reviewer is doing the kind of review that the Security Legislation Review Committee did or that Lord Carlile did in the United Kingdom. But, if the Independent Reviewer were to penetrate a little more into individual cases, it would become more a question of having a proper framework with powers, protections and immunities. I think that would need rethinking.

Senator LUDLAM—Professor, in your opening comments you drew a distinction between whether the reviewer's role was seen to be reviewing the administration of how the laws are operating and whether the reviewer is looking at the policy behind the laws and suggesting structural amendments, repeal or so on. Would it be safe to say that you would see less likelihood of duplication with your office if the reviewer were focused more broadly on the structural operations of the laws and propositions for review?

Prof. McMillan—In theory, yes, because that is the area in which my jurisdiction is often exercised. As I mentioned earlier, my work is generally complaint driven. A reviewer of this kind would really be doing more of a self-initiated review of areas. Certainly it is my experience that a self-initiated review turns up quite different issues to what complaints do. Complaints will quite often provide you with a window on larger issues, but with individual complaints you can sometimes miss the broader systemic problems and patterns. Though there is the possibility for duplication, I think you could come to a happy accommodation.

Senator LUDLAM—Mr Innes or Ms Simmons, could either of you comment on the proposed Australian Greens amendments. You mentioned in your opening comments the importance of the reviewer considering the terror laws against our human rights obligations internationally. Do you think the proposed amendments go some way towards achieving that?

Mr Innes—Yes, I think the best way for the reviewer to consider Australia's human rights obligations would be to define what those are through section 3 of the Human Rights and Equal Opportunity Commission Act, which among other things lists the conventions, covenants and declarations which Australia has chosen to put under that act. I suggest that because, if Australia were to add further international instruments to that list—such as the convention against torture or the Convention on the Rights of Persons with Disabilities—then they would automatically come into the purview of the reviewer as well. That would be a neat way to encapsulate that.

Ms Simmons—The definition of 'human rights' in section 3 of the Human Rights and Equal Opportunity Commission Act would be our preferred approach.

Senator FEENEY—To refresh my memory: as I understand it, Professor McMillan, you wear several hats simultaneously, do you not? You are not only the Commonwealth Ombudsman; you also have several other—

Prof. McMillan—Yes, I also have the separate designations of Immigration Ombudsman, Law Enforcement Ombudsman, Taxation Ombudsman, Defence Force Ombudsman and Postal Industry Ombudsman. That is recognition that some of those hats have other functions added to them apart from

individual complaint handling. In the law enforcement area, for example, I have quite a lot of inspection activities in relation to police records relating to telecommunications interception. I also do regular audits of police complaint handling.

CHAIR—Mr Innes and Ms Simmons, thank you very much for your availability for our committee this evening and this afternoon. Professor McMillan, we appreciate your time and your attention to our committee's work.

Proceedings suspended from 6.21 pm to 7.02 pm

PATEL, Mr Ikebal Mohammed Adam, President, Australian Federation of Islamic Councils; and Chair, ACT Muslim Advisory Council

WOOD, Mr Asmi, Board Member, Australian Muslim Civil Rights Advocacy Network

CHAIR—I reconvene this meeting of the Senate Standing Committee on Legal and Constitutional Affairs for our inquiry into the provisions of the Independent Reviewer of Terrorism Laws Bill 2008. I welcome representatives from the Australian Muslim Civil Rights Advocacy Network and the Australian Federation of Islamic Councils, Mr Wood and Mr Patel. To date we have received no submissions from either of you; is that still the case?

Mr Patel—We have an extension till the 19th.

CHAIR—I see. We look forward to those and to your presentation tonight. Do you want to make a short opening statement? And then we will go to questions. Mr Patel, are you going to go first?

Mr Patel—I will go first. We have chosen to split the responsibility: one part from a technical perspective, which Asmi Wood will do, and the other part I will do from more of a general community perspective.

CHAIR—Thank you very much.

Mr Patel—I will introduce Islam. The Arabic word 'Islam' means peace and submission. Anything related to peace is a part of Islam and anything contradictory to peace is against the very nature of Islam. Islam is about obeying Allah, the true god, and one of his attributes is Al-Islam—the peace. Muslims by default are workers of peace, and that is what history tells us. However, the consequences of some events of the last century and what we have been observing in recent years have totally misrepresented Islam and Muslims. This has not been to the benefit of Muslims and other faiths alike, or peace.

Blaming a religion that has a brilliant track record of peace for everything evil on earth is unfair and counterproductive. Hiding the real causes of evil under political convenience may only worsen the situation. Condemning and opposing any oppression, injustice or harm to any innocent person is the responsibility of every Muslim, regardless of the identity of the victim or the perpetrator. In the light of the current world situation, the following observations and proposals may be considered seriously to improve community relations and to build strong bonds amongst various segments of our society based on knowledge and shared experiences.

The spread of fear and terror, whatever form they take and wherever they may be, is of great service to the terrorist. It is equally true for any individual citizen or government. It is essential to evaluate the measures that are in place to combat, stem or stop terrorism. Are they working? Has the fear or the chance of terrorist attack decreased as a result or not? Will the doctrine of killing the attacker succeed if a new generation of attackers is not in short supply? How do we stop the breeding of a new generation of attackers? Do we resolve the issues, injustices and the occupation that have generated the violence and extremism, or give them more weapons to produce and recruit more terrorists by pretending that the issues, injustices and occupation are just not there?

Also we need to examine who the beneficiaries of terrorism are, or who benefits the most from the war on terror. Often, people who benefit from certain events are the ones behind the events. Are some people securing their grip on power by keeping the issue of terrorism alive at the expense of the lives of ordinary citizens? Should these people be made accountable or treated as heroes? Are the regimes that control world power willing to give up their main means of staying in power by correctly addressing the root causes of terrorism? Who do we blame: the ones who are behind the creation of terrorists and reaping the benefits, or the ones who are playing into their hands? What about the ones who are caught in the crossfire on both sides? What is the economic cost of the war on terror, and what is the outcome of that war? How much money has been spent and committed to this unwinnable war? How much money is being spent to prevent terrorist attacks? Is that working? Would it not be a lot cheaper and easier to deal with the causes of terrorism than to wage a war on terror that has very little chance of achieving its goals? Have the regimes been too busy with the war on terror, using it as an excuse while ignoring more important issues of national and global importance? Has there been a growing trend to curb civil rights in the name of preventing terrorist attacks? Are they in a race to show their toughness against terrorism by compromising basic rules of law?

There is no way to stop people from doing what they want to do when they are determined to kill themselves out of desperation and despair, and no weapons seem to be able to stop them other than addressing the issues that led them to that state of mind in the first place. It has very little to do with their faith but

everything to do with the occupation, the oppression and injustice, and the lack of attention to these issues by the powerful nations.

To remove ignorance, and distress to Islam and Muslims, both the wider community in Australia and Muslims have to work together in partnership. We have to provide good-quality Islamic books in public libraries and in schools, colleges and universities. Support from the community and government are equally essential for any such project. The initiative for the success of the project may well be taken through the department of education, for instance.

A vigorous exchange of views between religious leaders and scholars within the community is long overdue. Church leaders and priests should address gatherings of Muslims in mosques or other places of meeting. Similarly, imams and Muslim leaders should speak to gatherings in churches. This is an attempt to reach the entire community, not just the leaders, preachers and politicians. Opening mosques and Islamic centres to the community should be encouraged. We should find means of attracting the wider community to gatherings of Muslims and ways of enhancing interactions among the various parts of our society.

Also, the wider community needs to take an interest in what is happening in the Muslim community. Leaders and people in government need to take initiatives to encourage the rest of the community to interact with Muslims, both formally and informally, and stop blaming the Muslim community for the current state of affairs while making no real effort to stop the stereotyping of Muslims. We need to face the extremists, both within our society—those who promote hate against Muslims—and within the Muslim and other sections of the community. We also need to face the extremists within the Muslim community or any community who are in any way engaging in terrorist acts. The role of the media in spreading the evil of racism, hate and often provocation against Muslims needs the attention of the government and appropriate action needs to be taken to educate them.

Do not put the Muslims in the situation of being constantly on the defensive all the time. This will not only put extra stress on the members of the community but also generate fear and distrust. Why should they be judged on and held responsible for the acts of others? On the other hand, I acknowledge that Muslims should also get out of this victim mentality, move on and be a part of the initiatives of the various governments and members of civil society to try and bring everyone onto a talking level.

Imams and Muslim community leaders should be involved in social work to widen their participation beyond their own community. They need to get involved in the volunteer services—in the royal fire brigades and the like. This will also give more much needed exposure to the social issues and problems that the community faces today. It is not expected that any community will do any kind of spying for anyone, but we all need to work together to protect Australia. In closing, I would like to say that, having consulted the community, the word I am getting is that we are Australians, we have chosen to come to this country, our children are born here and we want to be very much part of the community and make sure that the country is safe for everybody, but at the same time we want to be accepted as citizens of the country on an equal footing.

CHAIR—Thank you very much. Mr Wood?

Mr Wood—Thank you very much for having me here. On behalf of AMCRAN I would like to thank the committee for inviting us to present our position. My presentation will be in two parts: a general summary followed by some specific comments on the clauses in question. AMCRAN generally supports the position of and the oversight provided by the office of an Independent Reviewer within the meaning of the bill. AMCRAN believes that having a comprehensive view of the operation of the terrorism laws in general is a desirable outcome. One of the reasons is that the terror laws have been used in practice in ways not envisaged by the framers of the legislation. The creation of a position of an Independent Reviewer has been recommended by both the Sheller review and the PJCIS, and AMCRAN endorses these recommendations.

We realise that the intention of the bill is to cover the broad operation of the legislation in question as a whole, but it would nonetheless be an opportunity to provide a complaint driven mechanism which covers matters currently under investigation or in train and thus not likely to be taken up by the Ombudsman or the IGIS. There are some specific points that we have related to the provisions, such as clause 4. We think that the definitions in general could provide the Independent Reviewer more guidance on the intent of the framers. We could not actually find an explanatory memorandum to this.

Senator TROETH—No, there was not one.

Mr Wood—Okay. Thank you. We referred to your speech, which was helpful in—

Senator TROETH—Another Senate committee, the Scrutiny of Bills Committee, did comment on the fact that there was no explanatory memorandum, but they felt that my second reading speech covered it. Nevertheless, I realise that there should have been an explanatory memorandum.

Mr Wood—The definition of terrorism laws within the bill is quite broad in scope but might not cover all the relevant terrorism legislation in question, so AMCRAN recommends retaining the broad definition but also including an additional mechanism such as 'the minister to make regulations specifying the inclusion of a particular act' as in the prescription regime that we have. The Customs Act, for example, touches upon these issues, so it might be included so that it comes within the purview of the Independent Reviewer.

Turning to clause 6, we recommend that the Independent Reviewer be a lawyer, preferably an ex-judge or chapter III judge acting as persona designata.

We note that the phrase used in clause 8, 'operation, effectiveness and implications', is similar to the words used in the SLRC. Again, we presumed that 'effectiveness' in this context meant with respect to national security. That is the assumption that we worked on. In terms of the word 'implications', we believe that, in addition to the broad implications of the legislation, there needs to be some specific, non-exhaustive areas, such as implications for human rights, community relations or Australia's international obligations explicitly examined as part of the broader implications when reported by the Independent Reviewer.

The implications of the operation of the legislation on community confidence and relations is really important. I think Mr Patel has touched on the issues of community relations. For example, AMCRAN monitors community reactions to the operation of particular terrorist legislation. We have a webpage where people can comment. But we also believe that it will be both effective and pragmatic to provide a legislative mechanism that would provide concerned individuals or groups the ability to trigger such a review by the Independent Reviewer. At the moment that option does not seem to be open to us.

Muslims and others have participated in such reviews and exercises and there is a view that some Muslims are sceptical about these processes, unfortunately—particularly after the Haneef and Izhar ul-Haque cases—partly because the outcomes and the benefits in many instances are neither clear nor tangible. Thus, if the Independent Reviewer's report highlighted specific impacts on human rights, individual liberty and community impacts this would be a useful yardstick in terms of the Independent Reviewer's own work, would be seen by the broader community and improve community relations from that perspective.

We as a group have fruitfully cooperated with the IGIS, though we recognise the IGIS's limited role in this and therefore the importance of having a position such as the Independent Reviewer. Some legislative guidance to the Independent Reviewer—again, a non-exhaustive list but providing specific criteria for his own action ideally linked to international legal instruments such as the universal declaration or the ICCPR—is also recommended by AMCRAN. If the report provided to the minister could include a statement on the legislation's compliance with respect to Australia's international obligations, we believe that that would provide a useful yardstick for members of the community to gauge the impact of the operation.

We also believe that it would be good if the Independent Reviewer, where necessary, should be able to refer questions of law to the Federal Court on the legality of the actions taken by the agencies or the particular exercise of executive power. The Independent Reviewer should have a specific law reform role in helping promote legislative cure for executive excesses, if that be the case.

Finally, regarding part 3 of the act, we think that the position should be a full-time position. It seems that a part-time position can raise a particular impression in the community.

Senator TROETH—It is intended to be a full-time position.

Mr Wood—Okay. It needs to have adequate resources, including staff cleared to the highest security clearance level so that they would have access to all the relevant material without any impediment. Finally, regarding subclause 10(1) and (5), we would like to see some sort of penalty for non-compliance. Thank you very much.

CHAIR—Thank you, Mr Wood. We might go to questions now, if that is all right.

Senator LUDLAM—I wonder whether you have considered the Australian Greens' amendments, or similar proposals, to benchmark the work of the independent commissioner or commissioners against international human rights standards. Do you think that would be useful?

Mr Wood—Sorry, could you repeat your question?

Senator LUDLAM—The Australian Greens have foreshadowed a couple of amendments to the bill which suggest that the work of the independent commissioner should include benchmarking or testing the operation of the Australian terror laws against our international human rights obligations. I am just wondering whether you have a view on that.

Mr Wood—We take a similar view—that our international obligations, particularly with respect to the ICCPR in terms of detention and particularly regimes like that, should be reported upon to parliament.

Mr Patel—I would just like to make a comment on that. I think Mr Wood talked about the international obligations that should be taken note of, but as a response to that question I think we should not forget in this that some of the human rights—and especially here in Australia human and civil rights—that we have achieved over time have been achieved through a lot of struggle. There has been a lot of goodwill on the part of a lot of members of the community and some of it has been through pure acts of struggle. I acknowledge that those benchmarks should be accepted and we should strive to be always above that.

Senator LUDLAM—Okay, thank you. You may have addressed this in your opening remarks—I am sorry I was a little late getting back—but do you believe that the appointment of an Independent Reviewer will result in increased community confidence in the counterterrorism regime in Australia?

Mr Patel—It really depends on the terms of reference for the Independent Reviewer and what that position is made out to be. Hopefully the Independent Reviewer is somebody who is quite open to community consultation on their own part—someone who is willing to use the resources of the government to reach out to the community. If they are then I can assure you, on the part of the Australian Federation of Islamic Councils as the peak body for Muslims—and, I am sure, the National Council of Churches and others with whom we have talked and consulted—that we will all be very supportive in our magazines and our advertisements or year bulletins or whatever. So I think it is an important aspect of this work. As my colleague here, Mr Wood, said, you want to go beyond the sceptics within the Muslim community—or any community for that matter. I think the real test is that we do reach out to the community so that we can include them on this journey of trying to protect the country.

Mr Wood—One of the issues that I raised in my presentation was that we would like to have a community trigger to be able to trigger the action to follow up a particular sequence of events. At the moment that does not seem to be open within the legislation.

Senator LUDLAM—I think that is an interesting suggestion. What would your view be on having an Independent Reviewer—one or more—examining the operation of the terror laws? Do you think that something like a federal charter of human rights could sit side by side with standing human rights laws in Australia? Do you think the two processes could complement each other? Perhaps I should not be trying to lead that opinion, but do you have a position on the introduction of a charter of human rights in Australia?

Mr Wood—We have not addressed that particular issue in this because the legislation did not seem to cover that in its area. What we were looking at particularly were the operations of people like the Ombudsman and the other people referred to in the legislation, and we were looking at how the oversight provided by the Independent Reviewer could complement what was happening at the moment. Having a separate bill of rights is probably a different issue, and we would leave it to you legislators to decide upon.

Mr Patel—I agree. I think that would open a big can of worms. I know the ACT government has worked in that area and taken the lead. The Muslim community would be totally supportive of a charter of human rights. I think it is a good thing but whether it is within the bounds of this I am not sure. But I acknowledge the point.

Senator TROOD—Mr Wood, you have made the point that it is desirable that the review be broad in relation to the terrorism laws, as I understood it. Are you pressing the committee with the view that the bill as written is not broad enough, or do you think it meets your concerns as it is?

Mr Wood—I think it is broad. But the question is how it would be interpreted if it ever got through the two houses—how it would be interpreted by the judges. If there were some guidance provided as to the scope of what it could cover, without being exhaustive, I think that would aid the process of interpretation.

Senator TROOD—It has been suggested to us that one of the ways in which you could perhaps deal with that problem is to have a schedule to the legislation that listed the particular pieces of legislation that the Independent Reviewer would be required to review. Would that meet your concerns?

Mr Wood—A schedule would be part of the legislation and therefore amending it would be problematic, I think, at the rate at which we are having legislation that seems to cover the field in this area. We have suggested a process such as that which you have for proscription, where it can be done by regulation.

Senator TROETH—You made the point in relation to clause 8, I think it was, that the reference to 'effectiveness' you interpreted as being an effectiveness with regard to national security. I took your remark in that regard to mean that perhaps that was too narrow a definition of effectiveness—that in fact you wanted 'effectiveness' to be more broadly defined. As I understood your remarks—and please correct me if I am wrong in this—effectiveness should also include the impact that the terrorism laws would have on the community as a whole. Is that what you are saying to us?

Mr Wood—That is exactly right. You put it much better than I did. I went over it very quickly because I was not sure of the time constraints, but clearly yes. We all want to live in a safer society and we realise that there is a trade-off between stringent legislation and the basic freedoms that we enjoy. But 'effectiveness' could encompass matters concerning particular minority groups—for example, though the legislation itself is not targeted to any specific faith, community or racial group, because of world events as they have transpired it happens to draw its attention to one group more than the other and that particular group, whatever it might be, from time to time might feel perhaps more hard done by. If there were mechanisms to ensure that the law was seen to be fair, was applied fairly and that there was no interference and all of those things—perhaps it is being a bit idealistic—it certainly would help things from where we see it from the ground up. We see the effect on individuals and families and the fear that it creates—the sort of siege mentality reactions from particular members of the community.

Senator TROOD—I can see the point you are making and I am probably sympathetic to the point you are making, but precisely how you achieve that in a piece of legislation is a bit more challenging, unless you have a set of criteria in the legislation that might relate to not just effectiveness but operation, effectiveness and implications, and I am not sure that that legislative scheme is possible in this kind of bill.

Mr Wood—We recognise the difficulties within the legislative framework, but perhaps the explanatory memorandum could make the intention of the framers fairly clear so that in terms of actually interpreting it there is some guidance.

Senator TROOD—The point you make about human rights has been put to us in other evidence we have received, so I will not canvass that; I understand the point you are making about that. I am less clear on the point you were making about the need for a reference to the Federal Court.

Mr Wood—It is similar to the Ombudsman's legislation, I guess. As I understand it, the reference has been made once to the AAT, so I am not entirely sure whether the mechanism would prove more useful in this case. But if there were an issue on the legality of a particular executive action perhaps it could just clarify the law on that. It could be a binding decision from a—

Senator TROOD—Yes. As I said, I think it would be open to the Independent Reviewer, on examining the effectiveness of the legislation, to make recommendations that the government recommend a change in the law or an amendment to a piece of legislation, which might meet the concerns that you are expressing here.

Mr Wood—Yes. I think that would work as well.

Senator TROOD—You make a final point about the penalties for noncompliance. A couple of other people have mentioned the need to strengthen the bill in some respects so that agencies and others involved could be compelled to give evidence, to undertake responsibilities.

Mr Wood—The wording seems to provide the power to compel but there does not seem to be a penalty for noncompliance, so it seemed a bit of a paper tiger.

CHAIR—Do you think the Independent Reviewer should be a political appointment—that is, there is a proposal in the legislation that the person be identified by the Prime Minister of the day and the Leader of the Opposition—or do you think the Australian Human Rights Commission should be responsible for identifying that person?

Mr Wood—Being a lawyer, I guess I have more confidence in judges and hence have a preference for a judicial officer. A lot of this law is quite complex and convoluted. I can see the advantages of having somebody who is close to the seat of power so the views would get across—

CHAIR—I am talking not so much about the person but about the appointment method—that is, whether the appointment should be a political appointment, decided upon by agreement between the Prime Minister

and Leader of the Opposition, or whether the person should be identified and appointed by the Human Rights Commission.

Mr Wood—We were quite happy with what was presented here.

CHAIR—I also wonder whether you have had a look at the way in which the Independent Reviewer is operating in the UK and whether you want to provide us with any comments or reflections on the way in which the United Kingdom is using its legislation.

Mr Wood—We thought that it was based on a similar sort of thing. Professor George Williams has addressed this issue, and I have not thought beyond what he has said about this issue. That is a failing on my part. It is something that I intended to do, but to be honest I ran out of time.

CHAIR—That is all right.

Mr Patel—I might take on the question of the appointment of the Independent Reviewer. On that point, I might slightly disagree with my colleague here—and he is a true lawyer. I think there may be some scope for a body—like the Human Rights Commissioner—or at least some input from the process. I know that the suggestion is quite clear that it is a political appointment, but I think it might send much stronger, open signals to the community if it is an appointment that is seen to be independent. That is something that I would like to express on behalf of the community.

Senator BARNETT—I have a question. You talked about the powers and the scope of the Independent Reviewer in your opening remarks—and please correct me if I am wrong. I am interested in your response to the Attorney-General's Department submission where it says that the Independent Reviewer should focus his or her review on the laws that have been enacted or in fact implemented during the year, in terms of litigation flowing from legislation and the like. I presume you have a different view to the Attorney-General's Department. To be more specific, I will read what they say:

The Department considers that any annual review of the counter-terrorism legislation concentrate on those laws which have been used in the reporting year.

Then they say:

… such a review could take into account the operational and judicial experience with the legislation through cases and terrorism related investigations.

Do you disagree with that, and, if so, could you explain why?

Mr Wood—I do not disagree with the scope of what they are saying, but we feel it is too narrow. The Haneef case is a case in point, where, if only the operation of the terrorism legislation was in, the Independent Reviewer would have provided nothing in his report. So I think the breadth of what appears to be covered now is something that we would encourage, rather than narrowing the scope to only legislation that has been exercised.

Mr Patel—Each case would be different, you would expect. But then, I am sure that, if a particular law were used, there would be some linking with other legislation, and this would be a great opportunity in an annual review process to be able to look at everything and to see where there could be some refinement to make things a lot better for everybody. I think I agree with Mr Wood on that.

Senator BARNETT—Finally, in terms of the Independent Reviewer, do you think it is better to have just the independent person rather than some sort of committee of review? Which do you prefer?

Mr Patel—I refer to my answer to Madam Chair's question earlier about the appointment of the Independent Reviewer. I would very strongly suggest that an appointment committee made up of the Human Rights Commissioner, the High Court Chief Justice and maybe somebody from the government—a panel of reviewers—would be a better way to go.

Senator BARNETT—That is what I was asking.

Mr Patel—I support that, yes.

Senator BARNETT—Would you support just the one Independent Reviewer or a sort of panel, committee or whatever, with a number of people, as the reviewer?

Mr Patel—Absolutely. More than one I think gives a little bit more, a wider approach, maybe, to the issue. This after all goes to the core of the confidence of the people, the citizens, in the country and its legislation and how it is enacted.

Senator BARNETT—Mr Wood?

Mr Wood—I think the key point that we made in our submission was about the resourcing of the office so that there are sufficient resources to actually carry out the functions. In terms of the actual reviewer position itself, I have not turned my mind to that particular question, but, thinking about it, an independent person would be good if it were a person like an ex-judge. But if you had a person from each side of politics plus somebody from the Greens or something like that—I am not sure how it would work in practice. I think committees tend to work very well. As we know, in our system, although we talk so much about parliament, the guts of the work happens in the committees and the best work happens in committees. Democracy works in committees, I guess. Being partial to that idea, I think perhaps it has something to commend it.

CHAIR—We have finished our questioning. I thank you both very much for making your time available on a Thursday night to appear before the committee. We appreciate it very much.

Mr Wood—Thank you very much.

Mr Patel—Thank you.

[7.44 pm]

DIAS, Ms Marika, Convenor, Anti-Terrorism Laws Working Group, Federation of Community Legal Centres (Victoria) Inc.

LYNCH, Mr Philip, Director, Human Rights Law Resource Centre

Evidence was taken via teleconference—

CHAIR—I welcome the witnesses. We have your submissions before us: the Human Rights Law Resource Centre has lodged submission No. 5, and the Federation of Community Legal Centres submission has been numbered 20. Would either of you like to amend or alter your submissions?

Mr Lynch—No.

Ms Dias—No, thank you.

CHAIR—I invite you to make a short opening statement, and then we will go to questions. Mr Lynch, would you like to go first?

Mr Lynch—Certainly. First of all, thank you very much for the opportunity to give evidence this evening, and congratulations also to the senators, particularly Senator Troeth, on the introduction of this important bill. Our centre is a specialist human rights legal centre. Over the last number of years we have developed substantial expertise in relation to counterterrorism laws and measures, through both our policy work and our case work, including before the UN Committee against Torture and in relation to advocacy for and on behalf of individuals who have been subject to antiterrorism and counterterrorism laws and measures.

As we note at paragraph 15 of our submission, quoting from Chief Justice Spigelman of the New South Wales Supreme Court, the particular nature of terrorism has resulted in a special and in many ways unique legislative regime. You would no doubt be aware that since the events of 2001 Australia has enacted over 40 pieces of counterterrorism legislation. While I think it is debatable whether those various pieces of legislation are necessary or overbroad or, alternatively, do not go far enough or have been effective in responding to the threat of terrorism, one thing that is incontrovertible is that many provisions of those pieces of legislation substantially limit or interfere with fundamental human rights. By way of example, control orders, preventative detention orders and also prohibited contact orders of their very nature substantially limit fundamental rights and freedoms, including, among others, the right to freedom of association, the right to freedom of movement, the right to respect for private and family life, and even in some instances the right to a fair trial.

In that context it is absolutely critical, therefore, that this legislation is subject to ongoing scrutiny and review and also that we ensure that it remains demonstrably justifiable and that any limitations that it does impose on human rights—and there may be circumstances where such limitations are permissible—are reasonable, remain necessary, are proportionate, adapted and appropriate, and constitute the minimal impairment or intrusion on human rights available to achieve the legitimate legislative ends.

Having regard to those issues, we set out, at paragraphs 17 to 20 of our submission, that such scrutiny and review is also necessary to ensure that there is transparency and public confidence in the way in which such laws are interpreted and administered. We note that failure to ensure such transparency and scrutiny will, over time, result in the diminution of public confidence in these laws and undermine their very purpose. For those reasons, the centre strongly supports the bill in principle subject to the condition that we iterate throughout our submission that it be amended to explicitly require the proposed Independent Reviewer to assess the operation, effectiveness and implications of terrorism laws against relevant international human rights instruments and Australia's obligations under those instruments.

We note that the bill is based in part on the UK's reviewer model, but we also note in our submission that there is one significant difference between the functions and obligations of the UK Independent Reviewer and those proposed under the present bill. That is by consequence of the operation of the UK Human Rights Act, which requires the reviewer, as a public authority, to interpret and apply all laws consistently with human rights—that is a requirement under section 3 of the Human Rights Act—and to act compatibly with human rights in the discharge of his or her—in this case his—obligations and functions, pursuant to section 6 of the UK Human Rights Act. The UK Human Rights Act also explicitly requires that any limitation on human rights be in accordance with law, that it pursue a compelling aim and that it be reasonable, necessary and proportionate in a democratic society.

Because Australia is the only Western developed democracy without comprehensive legislative or constitutional protection of at least civil and political rights no such function or obligation will be implied upon the reviewer under the bill as it is presently proposed. It is for that reason that we set out at paragraph 26 our view that the bill should be amended to expressly require that the Independent Reviewer, in conducting a review, have regard to relevant international human rights laws, including at least the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, both of which Australia is a party to. That is the end of my formal statement.

Ms Dias—I will just make a brief formal statement. Firstly, I would like to thank the committee for receiving our submission and allowing us to contribute in that way, and also by way of this hearing this evening. I am appearing on behalf of the Federation of Community Legal Centres in my capacity as the convenor of the Anti-Terrorism Laws Working Group. That working group was established in 2004 in response to the raft of legislation relating to terrorism. The working group is comprised of members from various community legal centres as well as academics and members of other non-government organisations.

In the course of the last four years we, as a working group, have contributed to a number of reviews and inquiries relating to antiterrorism laws. We have also done a lot of work quite closely with ethnic and religious communities that have been directly affected by antiterrorism laws and policing. In particular, we have done a lot of community legal education work with these communities—that is, to inform communities about the content of these laws and implications of them. In doing that work we have tried to get feedback from communities regarding their experiences of the laws and of counterterrorism policing with a view to gauging the impact of those laws.

We have also worked with community groups to assist them and facilitate their contribution to the various reviews and inquiries that have taken place in relation to the laws that we have seen. We have also done quite a bit of case work in the area. That has included assisting people in relation to their contact with ASIO, including assisting people to make complaints to the Inspector-General of Intelligence and Security. We have assisted people in their dealings with the Federal Police. We have advised community organisations about financing offences and terrorist organisation offences. We have also assisted people who have encountered problems with passports and visas due to national security issues. So it is in the context of this work that we have responded to the Independent Reviewer of Terrorism Laws Bill, and this work has really informed our response.

So without completely reiterating everything in our submission I would like to make a few key points. The Federation of Community Legal Centres broadly supports the establishment of an Independent Reviewer but, having said that, we have a number of concerns about what is proposed in the bill. Firstly, we are concerned that the appointment of the Independent Reviewer and the exercise of its functions should not replicate some of the flaws that we have identified in the existing review and inquiry mechanisms. For example, in our submission we have pointed out that publicity is very important in the exercise of review functions, and engagement with affected communities in particular. To that end we have made some suggestions about making available plain language explanations of laws, making available translations, and networking and consultation with peak and community organisations that work very closely with affected communities to make sure that those communities are able to have some input into the review processes. We have also suggested that there be some processes for non-written contributions to reviews, given that, particularly in this case, the affected communities tend to be of non-English speaking backgrounds.

Secondly, we have made a recommendation relating to timeframes of reviews, in the sense that we have identified that up until now many of the reviews that have taken place have involved very tight timeframes that have impeded the community's capacity to contribute to those reviews.

Thirdly, we have made a recommendation that the Independent Reviewer should be required to conduct reviews. In terms of what the Independent Reviewer will review, based on our experiences of doing case work in this area we think that it is imperative that the Independent Reviewer look at both official and unofficial uses of the laws.

In terms of the criteria for review, we would support the recommendation made by many, including Mr Lynch, about the fact that the laws should be looked at with respect to their consistency with human rights standards. We also recommended that the discriminatory application of the laws should be reviewed and also their impact on civil liberties.

Also, we have made a point about the adoption of recommendations that are made by the reviewer in light of the fact that to date, particularly from the Sheller committee's inquiry and the Security Legislation Review

conducted by the Parliamentary Joint Committee on Intelligence and Security, we have not seen a lot of take-up of the recommendations from these reviews.

Finally, I would just like to indicate the federation's support for a number of recommendations that were made in other submissions to this inquiry. Firstly, in terms of the definition of terrorism laws that is relied upon in the bill we are, as others have expressed, keen to ensure that that does include laws relating to ASIO and Federal Police powers and possibly that it would be better to specify which legislation needs to be reviewed.

We also are keen to support the recommendation that the Independent Reviewer report directly to parliament as opposed to reporting to the responsible minister. We also feel that the Independent Reviewer should not have the power to exclude parts of the report. Notwithstanding all of these concerns and provisos that I have expressed, the Federation of Community Legal Centres is broadly in support of the establishment of an Independent Reviewer. However, having said that, we are very keen to see that, if it is done, it is done right. That concludes my formal submission.

Senator TROOD—On page 6 of your submission there is a heading assessing the operation, effectiveness and implications of anti-terrorism laws. Do I take it that you regard the functions of the Independent Reviewer as set forth in the bill as inadequate?

Ms Dias—I think we feel that it is not adequately clear in the bill what those functions will be. In the bill it indicates that the reviewer will review the implications, operation and effectiveness of the laws but we feel that there should be more detailed criteria so as to guide the reviewer in the conduct of reviews.

Senator TROOD—The criteria you suggest are the ones that are listed at the end of that page—at the bottom of that page—is that right?

Ms Dias—Yes, but without limiting ourselves, certainly they are some of the criteria that we feel are important to consider when conducting a review. I suppose, in some ways that ties in with our recommendation about community consultation. To date, in some of the reviews, many of the contributions are made by bureaucratic organisations, law enforcement agencies, intelligence gathering agencies et cetera. The criteria that are detailed at the end of page 6 of our submission are perhaps the kind of criteria that effective communities may be more interested in.

Senator TROOD—It seems to me that they are rather unbalanced criteria because they are all directed to issues of discrimination, civil liberties, human rights et cetera. But, presumably, this legislation that is being reviewed is, in part at least, a matter of protecting the national interest. Would you agree that one of the appropriate criteria there would be the extent to which the bill or the reviewer should take account of the operation, effectiveness and implication of terrorism laws with regards to the national interest?

Ms Dias—I do not have any doubt that that would also be an appropriate criterion. As I said, our submission is very much informed by the work that we do, and so the criteria that we have enunciated there are criteria that stem from that work and, while there may be other criteria—as I say, it is not limited to what we have suggested there—we are certainly keen to see that those particular criteria are considered, and that may be amongst other criteria as well.

Senator TROOD—So, if we decided to recommend that there be criteria in relation to these functions, you would not have any objection to there being a set of criteria which relate to the original intent of the legislation?

Ms Dias—No, I do not think we would have any objection to that. I think that, if there were to be criteria, we would expect that that would be included.

Senator TROOD—Mr Lynch, can I ask for your view on this matter as well, because on page 5 of your submission, where you talk about the role of the Independent Reviewer, you equally mention matters of human rights but you also mention, in paragraph 25, 'expressly defining the functions of the Independent Reviewer'.

Mr Lynch—Yes. We do not go so far as the federation does as to iterate the range of factors. We would submit that it is sufficient that the bill explicitly require an assessment against Australia's international human rights obligations without necessarily including those other factors, because by definition the reviewer will have regard to the aims and the objects of the bill itself in discharging their very function—which is to assess the implications, operation and effectiveness of the bill—and it is surely only against the aims and objects of the bill that one can assess its effectiveness. So I do not think there is a need to define further the aims and

objects, but what I do think is necessary is that there be some counterbalance that ensures that the reviewer takes into account human rights implications, which, I should also say, in many aspects and contexts will correlate with the national interest. The International Covenant on Civil and Political Rights not only protects the right to freedom of movement and association but also protects the right to life, liberty and security of persons; that is just one example.

Senator TROOD—I see, yes. I would ask both of you to consider this question, which reflects a view that has been expressed by other witnesses: would it be possible to have an Independent Reviewer where that person or institution was not necessarily a stand-alone institution, a separate agency? It could perhaps be attached to the Ombudsman's office or the inspector general's office. Would either of you care to comment on that particular proposal?

Ms Dias—I am happy to comment on that proposal. From the perspective of the Federation of Legal Community Centres, in relation to the operation of terrorism laws and intelligence gathering and counterterrorism policing, we have had contact with the Inspector-General of Intelligence and Security's office and that of the Commonwealth Ombudsman. In our experience, at the moment, as it stands, those officers have not necessarily responded to the types of matters that have been raised by our clients in a way that we would envisage an Independent Reviewer might be able to—and that may be for a multitude of reasons that I cannot necessarily explain here and now in terms of resources and funding and all sorts of things. But certainly we would hope that an Independent Reviewer, whether that is a person or a body, would be a separate entity so as to complement the work that is being done by the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.

Mr Lynch—I have one brief comment. As I noted in my opening statement and as has been noted by Chief Justice Spiegelman, these are unique laws, and I think that therefore there is a unique response required, in particular the creation of an office that has the particular function of reviewing the operation and effectiveness of counterterrorism laws, and that that function should not be subsumed by other functions or subordinate to other functions that that office may undertake.

Senator TROOD—Right. Thank you.

CHAIR—I will go to Senator Ludlam so we have got a bit of balance.

Senator LUDLAM—A couple of the previous witnesses have drawn a distinction between a reviewer who is focused on the administration of the existing laws which could sit within the Inspector General of Intelligence and Security, the Ombudsman or so on. On the other hand, if a reviewer were focusing on the laws themselves and the policies behind them, they would potentially be recommending for significant amendment or wholesale repeal of some of the laws. Could you give us your thoughts because I have found that a useful distinction to draw?

Mr Lynch—I am not clear as to the distinction. Could you repeat it?

Senator LUDLAM—It is about whether this function could sit within an existing office that reviews the ways the laws are administered and that is sort of part of the existing legal machinery as opposed to a body that would comment on the fundamental operation of the laws including whether we need them and whether there should be repeal. That was a distinction that was drawn by one of the previous witnesses.

Mr Lynch—So the administration as against the substantive content.

Ms Dias—I have a view on that. Based on our work it would be our view that it would be more useful to have an Independent Reviewer that was able to focus on both simultaneously, so to speak. The administration of the existing laws should be a key consideration in evaluating the existence of the laws per se. Ideally, we do have officers who are able to look at the administration of the existing laws in a capacity of their own as it stands, such as the Inspector General of Intelligence and Security and the Commonwealth Ombudsman, for example. But it would be useful to have an independent body, in addition to those officers, that is able to focus on both the administration of the existing laws and in light of that administration also the existence of the laws themselves.

Mr Lynch—I share that view. I think that the administration and the content of the laws are so inextricably related as to make their separate review practically impossible. I also think that a human rights approach certainly calls for an ongoing scrutiny of the substantive content of the laws and the policy underpinning of the laws. It requires constant scrutiny of the justification, the necessity, the proportionality, the reasonableness and so on of the laws having regard to the ways in which they can substantially burden human rights.

Senator LUDLAM—In that vein the Australian Greens have foreshadowed some amendments that went to the idea of benchmarking the laws against Australia's international human rights obligations. Do you have any thoughts on those amendments?

Mr Lynch—I have seen the amendments and I would strongly support them subject in addition to them referring explicitly to the International Covenant on Civil and Political Rights and also to the convention against torture which many aspects of these counterterrorism laws and measures engage.

Ms Dias—The Federation of Community Legal Centres has also seen those suggestions and similarly supports them.

CHAIR—Could you follow up on the first question Senator Ludlam asked you? Do you have a view about whether this person would sit within the Ombudsman's office? Could it be the Ombudsman that has another arm of its work or is it better that an independent office or person conducts the work?

Mr Lynch—My answer remains the same, which is that I think it should be a totally independent office and officer to ensure that they have the necessary focus to maintain a high degree of scrutiny of these laws and that that focus is not in any way diluted by other functions and obligations that the office may have.

Ms Dias—I would support what Mr Lynch has just said. We concur.

CHAIR—Thank you.

Senator BARNETT—Ms Dias, I want to look at page 5 of your submission where you talk about the protocol to guide the Independent Reviewer's inquiries. You say in your last paragraph:

These protocol could regulate the conduct of reviews as well as the criteria for review.

I am getting a sense that you are very keen on a very broad scope, which is different to some other submissions, including that of the Attorney-General's Department. Could you describe to the committee the types of criteria that you would use and what sort of protocol you are referring to.

Ms Dias—When we referred to a protocol I suppose it was simply a suggestion, but it may also equally be appropriate to include the kind of guidance that we are recommending within the legislation itself. Having said that, in the criteria for review we are very keen to see that the reviewer conducts reviews based on at least minimum standards—that there are some minimum criteria that must be explored—and there may be additional ways of assessing the effectiveness, operation and implications of the laws. We have identified a number of key issues that we see in the operation, effectiveness and implication of the laws and used them as a basis to formulate the criteria which are detailed on page six of our submission—that is, relating to discriminatory impact, the impact of the laws on civil liberties, community concerns and consistencies with principles of criminal law. That is not an exhaustive list by any means. It may be that there are other criteria. Presumably, as has been discussed earlier, there would be criteria relating to the stated aims of the laws—that is, prevention of terrorism, protection of national security interests et cetera. There may be additional criteria that could be added to the suggestions that we have made.

Senator BARNETT—The criteria are very wide-ranging and contrast with the advice of the Attorney-General's Department where they say that the reviewer should report annually on those matters that occurred during the past 12 months, including litigation and operational matters that were active during the 12 months but not otherwise. What is the argument against that?

Ms Dias—We have seen in the years since many of these laws have been introduced that things do take some time to unfold, in particular relating to criminal trials. Obviously, we have seen a recent verdict in Melbourne, and there will possibly be an appeal stemming from that. That matter in itself took a number of years to come to verdict. We have also seen the introduction of laws which are, as Mr Lynch says, in many ways unique and unprecedented in some ways in Australia. In that sense, we think that it is very important that these laws be reviewed in a reflective sense, looking back over the period since their introduction. It does take time to assess these laws and for the full extent of their impact to become apparent, and it would be useful to be able to look back over the last, say, four years and ask: 'This is when X piece of legislation was introduced, and what have we seen over that time?' It may be that there has been a particular event in the last 12 months which is very clear-cut and easily able to be identified, but it may be that there are broader trends that need to be observed.

Senator BARNETT—Noted. Thank you very much for that. I have a final question to both of you. Are you wedded to the idea that the Independent Reviewer should be an individual or would you be open to

considering the merit of perhaps having some sort of committee to be the Independent Reviewer? What are the pros and cons of each?

Mr Lynch—We would be open to the office being either an individual or a committee. What is critical, in our view, is the independence and the process of appointment, which will then obviously go towards the composition rather than whether it is an office held by one or multiple people.

Ms Dias—We concur with that view. In our submission we did not address the question as such of whether it should be a single Independent Reviewer or a panel. However, we did contemplate this issue and, at that stage of writing our submission, were not able to come to a definite conclusion as to whether one is preferable over the other. Having said that, we were more concerned about the independence of the Independent Reviewer and that the process of appointment ensures that independence.

CHAIR—Thank you very much for your submissions and for making yourselves available on a Thursday night to allow us to complete our work under the timetable that we have.

Mr Lynch—Thank you very much and thank you for considering the bill in such fulsome detail in such a short period of time. We support its speedy passage subject to the recommendations we have made.

[8.17 pm]

CARNELL, Mr Ian Gregory, Inspector-General of Intelligence and Security

CHAIR—Welcome. You have lodged a submission with us, which we have numbered 13. Before I invite you to make a short opening statement, do you want to make any changes or amendments to that submission?

Mr Carnell—No.

CHAIR—I invite you to make an opening statement.

Mr Carnell—I thought it would be most useful if I did not repeat things that are in the submission but rather touch on a couple of issues which have been drawn out in some of the discussions you have had to date. The conceptual distinction between the laws, the policy underpinning them and the administration of them is a useful one. It is clearly not a sharp division, but it is at least conceptually useful for explaining why there is a very important role that an Independent Reviewer could play that is separate from the role that my office plays and the role the Commonwealth Ombudsman plays. I believe that the policy and some view of the laws, broad as they, are a necessary part of responding to what are a very unusual set of laws. In my submission I briefly tried to list the several points of great sensitivity that the laws touch on.

I support the concept of an Independent Reviewer. Attachment to my office or the Commonwealth Ombudsman's office need not dilute the independence of the activity. It could simply be an attachment essentially for rations and shelter. Rather than create a new FMA agency with all the obligations that that would then place on the Independent Reviewer, you could simply create the office itself with its specific role and have it serviced by one of the existing agencies, either the Ombudsman's or mine. He and I have not tossed a coin or arm-wrestled over this, but either of us would be happy to do it.

In giving that support, it would not involve a capacity to direct or otherwise interfere with the way the Independent Reviewer went about their business. However, close consultation would be very valuable because it would assist an Independent Reviewer to know the activities the Ombudsman and I are carrying out in looking at the actual administration of those laws, and the Independent Reviewer could take that into account—not be bound by it, not be limited by it. It would be valuable input for the Independent Reviewer.

I have been interested in some of the discussion about criteria and thought I would venture a stab which attempted to be comprehensive, picked up some of the particular concerns, but which nonetheless might be a suitable formulation. This may not be ideal, but I really wondered if a formulation that talked about the sorts of considerations that the Independent Reviewer should apply is that the law or laws are necessary, proportionate, effective against terrorism and contain appropriate safeguards. That picks up at a high level the human rights issues of necessity and proportionality but is arguably better done as those principles rather than getting into arguments about how you balance out those competing rights.

I was also interested in some of the discussion about section 9(3) which talks about consultation with a range of bodies. I thought that that might be usefully dealt with by breaking it into two. The list is of six entities. Four of them are the watchdog bodies—of which I am one—where the need is for the Independent Reviewer to consult with those watchdog bodies but also to receive cooperation and assistance from those bodies, because the four of us have important input to give. The other two organisations are ASIO and the AFP. I really think it is not an issue about cooperation and coordination assistance but more involves issues about notification to agency heads—and that can be agency heads beyond simply those two agencies—and notification of review that the Independent Reviewer intends to undertake.

Lastly, I will say that I know some of the discussion—and I did not touch on it in my submission—is about reporting or the appointment requirements. I can talk about the arrangements that apply to me. That might assist the committee. But I will stop there. I think the best use of the committee's time is probably for you to be able ask questions of me.

CHAIR—I want to follow up the issue you raised about locating this person or this office under the umbrella of the Ombudsman. Can you still do that even if it is established by separate legislation? So it would not report to the Ombudsman but would just simply co-locate in offices?

Mr Carnell—No. If necessary, you would amend the Ombudsman Act to provide that one of the Ombudsman's office's functions is to provide administrative support to the Independent Reviewer. But—yes—you could simply have it as a statutory office but not an FMA agency, I believe.

CHAIR—FMA being?

Mr Carnell—Sorry. Financial Management and Accountability Act.

CHAIR—I see.

Mr Carnell—Basically to find a financial—

CHAIR—That was going to be my next question. Do you mean it would get its operational support through a budgetary allocation through the Ombudsman's office?

Mr Carnell—Yes, for support. Basically, the Independent Reviewer will need a personal assistant, will need travel to be booked, will need printing to be done et cetera. That is the sort of support I have in mind.

CHAIR—So it could be a line item in the Ombudsman's budget?

Mr Carnell—Yes, but obviously quarantined, only to be used for that purpose, not to be diverted to other purposes of the Ombudsman. For the remuneration of the Independent Reviewer I have recommended in my submission that it be as with the Auditor-General, which is an automatic appropriation from the parliament, and I would have the remuneration set by the Remuneration Tribunal. Therefore, no issues will ever arise about government reducing or otherwise influencing the Independent Reviewer through questions of remuneration.

CHAIR—Sure.

Mr Carnell—But I think that model would work. I think it has the attraction of being quite a streamlined approach, not having to create a new agency but nonetheless having a very important independent player about the policy on the laws.

CHAIR—Turning to the functions and the reporting requirements: you said to ask you about your reporting requirements. This bill goes some way to suggesting that the reviewer would report annually to the federal parliament, probably either to a committee or to both houses of parliament. That is the first thing—how to report. The second thing is whether this office should have a mandatory obligation to review laws on an ongoing basis—so a mandatory review—or whether they should just pick up issues and review them, or whether they should do both?

Mr Carnell—I think they should do both. I think they should produce, as Lord Carlile does, an annual report that is an overview. Much of that report will have derived from monitoring rather than intensive examination of a particular area. But I think that, for the purpose of that review, there would also be some intensive review of particular areas—perhaps those that are most current because of some particular events or court decisions or whatever. But there also ought to be scope for the Independent Reviewer to look at some particular topics.

One topic that calls for attention in the short term is the National Security Information (Criminal And Civil Proceedings) Act. Courts now have some experience of using that. A number of the judiciary clearly think it is a complicated and difficult piece of legislation to work with. Justice Whealy, for example, has published an article criticising it in the *Australian Law Journal*. So that is an area for immediate attention.

Another issue is the interrelationship, or lack thereof, of several mechanisms: control orders, preventive detention orders, the ASIO questioning warrants and police questioning powers. I expect some things will probably come from the Clarke inquiry into the Haneef matter, but I still think there is a need for a policy look at whether those things fit together, whether there are gaps, whether there are overlaps and whether they cover all the relevant scenarios.

So there are some good, meaty, specific topics. But I still think it is important for the Independent Reviewer to be able to go as widely as they feel they need to across the many bits of the legislation that have been amended as part of the response to terrorism. That will not mean that they intensively study every one of those many pieces of legislation. In my submission I made some suggestions about the definition of 'terrorism laws'. I thought that an indicative list—not an exhaustive but an indicative list; that indicates that it is meant to be broad—might be the best approach to drafting there.

Senator TROETH—I would be interested in your views on what I have indicated in the bill which is that the Independent Reviewer would report to the minister who would then table the report in parliament as soon as practicable. Do you have any thoughts on that particular wording?

Mr Carnell—I did not see any great difficulty in it, to be honest. I think it highly unlikely in practice that a minister would delay tabling a report. I mean, that itself would become the subject of controversy. But it would be possible to insert additional words that said, 'as soon as practicable, but in no case'—you could

either have a choice of 'no less than' or 'within at least' 14 sitting days, or I think the Human Rights Commissioner suggested 90 days. Using 14 sitting days certainly exists in legislation. I cannot tell you off the top of my head exactly which bits of legislation, but it is a formulation I have seen a number of times. My own legislation simply says 'as soon as practicable', and no issue has arisen. The general expectation that reports be tabled by 31 October would probably in practice be seen to apply to the Independent Reviewer's report. You could tighten it up. I am not convinced it is necessary, but you could, if it were thought appropriate, make it more specific.

Senator TROETH—Thanks.

Mr Carnell—My act provides for a maximum five-year term, although one reappointment is possible. That is something that I have reflected on in the context of my position. I have thought that there are arguments that there ought not to be the capacity for reappointment—that it ought simply to be a five-year appointment. Having been in the job for 4½ years now, I think you get to the stage where you run the risk that you are too close to some agencies. Equally, you may have developed an adversarial relationship with others which is no longer productive overall. I am not sure that would be as sharp with the Independent Reviewer, because they would not be looking closely on a continuing basis at operational matters. It may be that, because there is an emphasis on policy, that issue about one period of reappointment might not arise.

Senator BARNETT—I am interested in the comments you made earlier about how it could work—whether the Independent Reviewer could work as an adjunct to your office or the Ombudsman's office. In your submission, at item 32, you say:

My office could play a role in providing input to the work of an IR, as could the Commonwealth Ombudsman.

Do you think you can guarantee independence of the Independent Reviewer in that way? Secondly, is it possible for you in your role, for example, to perform some of the roles of the Independent Reviewer?

Mr Carnell—By 'input' I really meant that we should be free. I have pretty restrictive secrecy provisions, so it would be worth thinking about whether the legislation ought to facilitate my provision of information to the Independent Reviewer about things that my activities have found, because I think that is relevant to what the Independent Reviewer would be doing. I did not see it in any way as a steering role. I think in a practical matter, though, the Independent Reviewer would find the four existing positions—the Ombudsman, the Inspector-General, the Privacy Commissioner and the Human Rights Commissioner—to be naturally cooperative, if not collegiate. Amongst the four of us we have very strong working relationships and catch up regularly and exchange ideas. It is in fact comforting to have some support from people who are playing a similar role. We are quite cooperative and collegiate, and I would see that the Independent Reviewer ought to be able to enter into the same sorts of relationships.

Senator BARNETT—But you do operate independently and separately from those other three.

Mr Carnell—Yes.

Senator BARNETT—You said that the Independent Reviewer could almost be cohosted under your umbrella or under the umbrella of the Ombudsman. I am just wondering if that would send a message that it was not independent—or are you not concerned about the independence issue?

Mr Carnell—I do not think it would impact on the independence. I am not talking about them coming under my or the Commonwealth Ombudsman's legislation; I am merely saying that we help out with rations and shelter. We would not have any role in relation to what the Independent Reviewer reviews and how they go about it. That would be their independence.

Senator BARNETT—In your submission, at item 29, you talk about the merits or otherwise of a specialist committee. You talk about that as an option. Can you share with the committee your views on the pros and cons of having a specialist committee rather than a separate, independent person?

Mr Carnell—Our experience to date of specialist committees is that they have been held as a one-off. The Sheller review—I was a member as well—was a one-off. I think what is needed in our framework is that there be regular review. You could have an arrangement whereby there was a specialist committee every three or four years. You would not, though, get the sort of continuity that one Independent Reviewer would give. There is a positive in that you are bringing a number of minds and perspectives to bear on it. You would probably, though, have some members on that committee who were not security cleared and therefore there would be limits to the information they could see. I think, on balance, the advantages of the Independent Reviewer are stronger.

Senator BARNETT—Being a person?

Mr Carnell—Being a dedicated person, there on a continuing basis. There is a risk of course: you are relying very much on one person, so your choice of the person is absolutely vital. Do we have an equivalent of Lord Carlile? I have met him, and he seems to be very well respected in the law in the UK and very well respected in the parliament. He is accepted as bipartisan in dealing with these matters. To some extent his success is a factor of his qualities, which, while not unique, are not common. So, yes, you are resting heavily on finding the right person.

Senator BARNETT—What do you say to the submission from the Attorney-General's Department which says that the scope of the Independent Reviewer should be limited to those activities that have occurred in the previous 12 months—and they refer to litigation and operational activities during that time?

Mr Carnell—I do not doubt that a significant portion of what the Independent Reviewer might be doing, at least in the early years, is looking at those criminal offences in part 5 of the Criminal Code and the NSI Act. I do think breadth of view here is important. Another—in a sense, unsatisfactory—feature of the review that has been done to date is that it has all been very topic-specific and limited. In my submission I pointed out that there were boundaries on what we did in the Sheller committee. Each of the other reviews has boundaries.

I think it is a pity that the COAG review scheduled for 2010-11 is relatively narrow and specific. I would like to see, in addition to an Independent Reviewer, the scope of that review broadened and the Independent Reviewer participate on the review panel. So you can have something of a mixed model here. You can have the advantages of an Independent Reviewer—particularly if you have gone for a streamlined model, as it were. But I also see a lot of value in COAG review. The states are really key stakeholders in this area; you need them involved. If you broadened the 2010-11 COAG review and scheduled another one probably for 2014-15—that would be useful because you would have a couple of sunset clauses coming up—but also had the Independent Reviewer providing continuity along the way, then I think you would have a good framework.

Senator TROOD—Just on that point, I thought your submission was particularly valuable in drawing attention to the fact that much of this counterterrorism legislation is actually state and federal—and state referred powers, as I understand it, in relation to some of the federal legislation. In that context, as I recall, when that legislation was going through the parliament there was not actually a designation as to who was to undertake that review. Is that correct? There is a reference to COAG but, obviously, COAG does not undertake reviews; it is a government body.

Mr Carnell—They made the decision to have a review in September 2005, and in the February 2006 COAG meeting they fleshed out the shape of that review. They were talking about a six-person panel et cetera. I could give you the reference, or another copy—rather than the one I have scribbled things on—of that outline of the COAG review. They talked about probably six people being on the review, which would be chaired by somebody with extensive knowledge of and experience in the administration of criminal justice, for example a retired judge or the current chair of the Australian Law Reform Commission, and which would include two accountability members—perhaps someone from the Ombudsman or someone in my role—two law-enforcement members and one prosecutorial member.

Senator TROOD—I had not realised that. That is helpful. Is that kind of review something that the Independent Reviewer could undertake by herself or himself rather than creating that kind of structure?

Mr Carnell—I think for a very broad, significant review it is better to have more than one person involved. This also has the advantage that it would include consideration of some of the state laws. In particular, the preventive detention order regimes and the state police stop-and-search powers are within the scope of this review. It certainly does not pick up all the amendments to state legislation that relate to terrorism but it picks up a couple of very significant ones.

Senator TROOD—You may not feel competent to answer this question. If we were to set up an Independent Reviewer—it would be a federal agency or a federally created body or individual—would that person, in your view, have any difficulty constitutionally in reviewing state legislation? Would there be any restriction that might prevent that?

Mr Carnell—No. Authority to look at that springs from COAG. But it would obviously be limited to what the COAG approval covers. There certainly would not be any capacity beyond that.

Senator TROOD—On the matter of criteria, thank you for the suggestion you made; I thought that was helpful. But I suppose the question really is whether or not we actually need criteria. Some witnesses have suggested that we do indeed need criteria for making judgements about the effectiveness of these laws, but are

you persuaded that in fact we need to go down that road? You have made some helpful suggestions as to what we could do if we were persuaded that was the case, but are you persuaded that that is the case?

Mr Carnell—No necessarily. I specifically did not address that in my submission because it did not strike me, on reading the bill, that it was a deficiency. I think 'operation, effectiveness and implications' has an attractive breadth but it works as a formula. I consider it worked in the Sheller context, so I think that is a good formulation. I would certainly be wary of attempting criteria that in themselves created argument about what the reviewer could or could not deal with or recommend. Any criteria should be either open or at the level of principle, which is why I was trying to pitch that in a—

Senator TROOD—I agree with that completely. I was very uneasy about the specific suggestions made which were very narrow and left out a range of things which, on immediate examination, one would have thought would have to be included. The list then becomes extraordinarily long, I would have thought.

Mr Carnell—I shared that reaction, which is why I was looking for principles. I suspect that in practice whoever is appointed as Independent Reviewer will be considering questions of proportionality and so forth. But if it were felt necessary to give some assurance about the principles that would apply, the formulation that I offered might do it.

Senator TROOD—With regard to the point you were making in paragraph 33 about an indicative list, what do you see to be the argument in favour of an indicative list as distinct from an exhaustive list?

Mr Carnell—An exhaustive list would need some amendment from time to time—not that that is an insuperable obstacle. But there are potentially a very large range of pieces of legislation which might relate in some way or other to how we deal with terrorism—both its prevention, the immediate response to it and recovery afterwards. That is the policy dimension that Australia has had to come to grips with fairly quickly after September 11—that it is no longer siege-hostage situations, where you really consider immediate response and negotiation et cetera. Suddenly prevention is most important of all and, if necessary, recovery after a terrorism incident. At the Commonwealth level there are at least a couple of dozen organisations which may have some role in relation to the prevention of terrorism or responding at or after a terrorist incident.

CHAIR—Is that why you are suggesting that the bill should be changed to say 'relating to terrorist laws' rather than 'terrorist acts'—because it provides a much broader scope for examination?

Mr Carnell—Yes, even though, as I said, the Independent Reviewer would not be intensively looking at each piece of legislation each year. I think a key utility in the role is to have a broad look when they need to.

Senator LUDLAM—Maybe you could take us back to where you began in your opening comments. In your submission, at paragraph 32, you note that your role is strictly operational. In your words, your office is 'not resourced or structured to perform a continuing review of the body of tourism laws from a policy perspective', which is quite distinct, I suppose, from the role that is envisaged within the body that is being set up by this bill. Some of the previous witnesses have expressed a concern that, if the Independent Reviewer were parked or embedded somehow within one of the existing offices such as yours, there could be a perception of an absence of independence, because you are not there to provide that policy function.

Mr Carnell—Obviously the Ombudsman and I do get involved at a certain level of policy, and both he and I have elements of that in our background, but the nature of the staff we have is not geared to high-level policy review. I do not think, though, that that really impacts on the perceptions or the actuality of the Independent Reviewer's independence. They would have their functions and they are not subject to direction as to how they carry them out. I certainly would not see it as a concept of embedding them in our office. If I were the one providing administrative support, I would consider that I have my duties under my act and I will carry them out, and the Independent Reviewer has their responsibilities and they will carry those out. We will cooperate as necessary. I will ensure that, if money is appropriated to my office to assist the reviewer, that will all be spent properly assisting the reviewer. But it is that sort of a relationship. It is not placing them in my office, putting them under my umbrella or embedding them. It is merely a practical way of avoiding the cost and difficulty and the diversion of the Independent Reviewer from their task to not require them to create their own office.

The Ombudsman talked about the difficulties of setting up an office from scratch. The office would only ever be tiny. I have nine staff. It is a very difficult thing to meet all your reporting and other obligations and your financial management responsibilities under the legislation in a small agency—very difficult. The bureaucratic red tape is alive and well and it would distract the Independent Reviewer. Let them not be bothered about those sorts of things. Let then strike, in a sense, at the gap in the framework, filling that gap.

Senator LUDLAM—It has been noted that, while the Independent Reviewer would have the power to seek documents and information and require the production of materials, there are no apparent penalties for people who refuse to comply and produce materials. Did you have any thoughts on that that were not picked up in your submission?

Mr Carnell—I thought that was a good suggestion. I would put penalties in there—not that I would expect in a day-to-day sense the Independent Reviewer would be necessarily resorting to their coercive powers first up. They would only be resorting to them if they needed to. But yes, if they need to, there would need to be full authority behind them, with penalties to ensure that information is provided.

I think I saw other suggestions in the submissions about giving the Independent Reviewer the capacity to take oral evidence on oath or affirmation. I do not think that is necessary. I do not think that is consistent with the sort of policy role that the Independent Reviewer would have.

CHAIR—Mr Carnell, thank you very much. Your evidence has been very helpful in clarifying a couple of issues. You have our absolute gratitude for making yourself available on a Thursday night outside of estimates—very commendable.

[8.51 pm]

SMITH, Ms Catherine, Acting First Assistant Secretary, Security and Critical Infrastructure Division, Attorney-General's Department.

WILLING, Ms Annette, Acting Assistant Secretary, Security Law Branch, Attorney-General's Department.

CHAIR—Welcome. You have lodged a submission with the committee which we have numbered 17. Do you want to make any amendments or changes to that?

Ms Smith—No, we do not.

CHAIR—I remind senators that, in protection of our public servants, the Senate has resolved that an officer of the department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy but does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I remind the officers of the department that any claim that it might be contrary to public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis of the claim.

I invite you to make a short opening statement; otherwise, we can go straight to questions.

Ms Smith—I had not intended to make an opening statement; however, I thought it might be useful to clarify a question that Senator Barnett has raised throughout the hearings this evening regarding our submission. He has asked a number of people about their views on the perceived limitations from our submission, and I thought it was appropriate to explain that it is the department's view that any review mechanism should effectively consider the relevant provisions against their operational use. The department is suggesting concentration but not limitation to the previous 12 months to make a review relevant to current policies and practices. We are not saying that a review should be limited to individual investigations but should be relevant to current practices. All the principles which have been identified during the hearing tonight, such as proportionality, balance and other such concepts, certainly would be subject to review or form part of any review in considering the previous 12 months use of these particular laws. In saying this, I note Sheller's recommendations that there was a need for practical experience in this area to have an effective review. It is the department's view that by focusing on the practical is not to exclude other aspects, and a reviewer may, in fact, choose to consider anything in reviewing terrorism laws.

CHAIR—In your submission, you mention the Sheller committee and the joint parliamentary committee on intelligence. We have had some evidence tonight that those reviews in fact were limited and had boundaries. Nevertheless, both of those reviews have made recommendations about appointing a person or a body to undertake ongoing reviews. But in your submission you say:

> While not opposed to an Independent Reviewer, the Department submits this issue should be considered in the context of those reviews.

Those reviews do say an independent person should be appointed. Could you explain that last sentence in your first paragraph, because the full stop seems to come before you have explained in what context of those reviews you would support an Independent Reviewer.

Ms Willing—The idea is that those reviews have made recommendations and the government is currently giving some consideration to them. Our point was that, in determining if an independent review model would be appropriate, it is appropriate to consider that in the context of all of the other issues that have come out of those reviews.

CHAIR—So the department submits this issue should be considered in the context of those reviews which are currently being considered by the government.

Ms Willing—That is right.

CHAIR—When is a response to those reviews anticipated? Are you working to a time line?

Ms Smith—We are working to government policy and developing some scenarios and some options for the Attorney-General, but we do not have a specific time line.

CHAIR—And one of those options may well be a piece of legislation like this.

Ms Willing—The idea of an Independent Reviewer was something that was recommended by those reviews, so that will be something that the government gives consideration to in determining its response to those reviews.

Senator TROOD—In your submission you refer to practical experience being required, and I think that is a useful point to make. How much practical experience would we need before we think it appropriate to undertake a review?

Ms Willing—In order to assess the effectiveness of the legislation and its implications, our view was that it is necessary to look at how those laws are being applied. I do not think it is a question of how much experience. Use of the laws gives the opportunity to examine if they are effective and what implications they have.

Senator TROOD—So it is not a matter of the time the laws have been in place. In your view, it is matter of whether or not the particular elements of those laws have been applied to an operational set of circumstances.

Ms Willing—That is right. That is the best way of determining the effectiveness of the laws and whether there are any implications that need to be considered.

Ms Smith—And that is quite consistent with normal criminal laws or other types of laws that national security and law enforcement agencies are currently using. In the department we are constantly reviewing the operational use of the laws. Agencies will come to us and say that particular provisions are not how they may have been envisaged by them, or they will talk to us about operational issues. What we are saying is that any independent review would be consistent with the ways that laws are currently—and always—reviewed within government. There is always ongoing review of laws that are used by both law enforcement and national security agencies.

Senator TROOD—But the point here is that you had the laws drafted. That is as it should be, but this bill obviously is directed to the fact that we have an independent body of some kind which should examine the effectiveness and operation of those laws. That of course is the main thrust of this proposed piece of legislation. So, whatever you may do inside the department—and we all welcome the fact that you are undertaking reviews—that is not meeting the needs of this particular bill.

Ms Smith—No. As we have said in the submission, we are not opposed to the idea of an independent review. We think the important thing is that any reviewer is independent, appropriately qualified and appropriately resourced so that they could effectively review such legislation.

Senator TROOD—The strongest way that you seem to be able to put it is that you are not opposed to an Independent Reviewer. Does it follow from that that you have not turned your mind to some of the details of this legislation of the kind that we have been discussing tonight? These are things such as whether or not there should be a schedule of legislation to be reviewed. There is the question of the definition and the question of criteria that was discussed. I noticed you have been sitting in the back there listening to some of the questioning which has been detailed with regard to particular parts of the bill. Does the Attorney's department have a view on some of those issues that we have been looking at?

Ms Smith—I am not sure that we can comment. We have not formed any particular policy approach. Mr Carnell's comment that the bill should not be focused on terrorist acts is a valid point that we would agree with. There is a whole suite of legislation that surrounds this area and we think that it would be very important to actually define what the reviewer was considering as part of the independent review because there are other pieces of legislation that are used in the investigative stage that have been around for a very long time. There is a question as to whether they would be subject to independent review or subject to other review by currently the Ombudsman or the IGIS himself. We agree that those sorts of issues need to be considered and how that is done, whether there is a scheduling of the types of laws that are subject to the review or the concepts that are subject to the review, is important. Again, we said earlier that we do not necessarily think it should be limited to a particular operation but should cover all aspects that come into play in the course of that operation. A lot of the evidence that we have heard tonight concern the many types of issues that we think would be subject to any reviewer's consideration.

Senator TROOD—Just on this matter of the schedule, for example, you heard Mr Carnell say there are arguments for it being indicative of the acts or the legislation that should be reviewed. The alternative is that it could be exhaustive. Do you have a particular view on that?

Ms Smith—I think that a lot of what has come out of tonight and a lot of what we have read in the submissions are things that we are going to go away and consider in putting proposals to government, but we

have not formulated a particular view on that. We think there is a broad scope of what could be considered. I think we have to be careful not to make the job too difficult by making it too broad. We have to consider what other powers law enforcement and national security are using in this area and whether they are more appropriately already reviewed in other contexts because there are a lot of independent reviews in other legislation that sits outside the particular terrorism offences.

Senator TROOD—I do not want to press this now, Ms Smith, but can I invite your department to turn its mind to some of these specifics? I think that the situation with which you are faced is that if you do not have a view on these things then of course the committee cannot take them into account in its report. So if there is a strong preference for a particular kind of legislative framework in this regard then I think we would be helped by having your views on it so that we could consider it against the other evidence we receive this evening. If you do not present us with those views then we will assume you do not have a view and that you are either indifferent to it or you are not unhappy with the suggestions that have been made.

Ms Smith—I am more than happy to take that question away. We will discuss it and get back to the committee as soon as we can appreciating that you have a very tight time frame.

CHAIR—Can I ask whether there has been some consultation with the range of groups such as we have had submissions from for example in this inquiry? When I say public consultation, I do not mean broad, sweeping consultation but have you been involved with specific groups who have an expertise or knowledge in this area in forming where you might go?

Ms Smith—In the reviews that have already taken place, definitely—the reviews that are currently on foot. The Clarke inquiry certainly has a public forum on Monday, this Monday coming. However, in relation to this issue we have not yet formulated a position to which—

CHAIR—Are you waiting for the outcome of the Clarke review of the Haneef case?

Ms Smith—Yes.

CHAIR—You are waiting for the outcome of that before you take the next step; is that what you are saying?

Ms Smith—No, what I am saying is that in the reviews that have taken place already and the current review, the Clarke inquiry, there is that sort of consultation. I am saying that in this particular area the government has not yet given us something to consult on.

CHAIR—Okay. So are you saying the consultations under the Clarke inquiry are the department's de facto consultations as well?

Ms Smith—No, no. I am suggesting that as part of any consideration of this area there will be always be consultation; however, this particular issue has not got to the point of any consultation because we are yet to go to government.

Ms Willing—But, of course, a lot of those interested groups would have had an opportunity to provide input into the Sheller report and the—

CHAIR—Yes; that was some years back, though.

Senator TROOD—Do we have a deadline by which we would need to get any further advice from the Attorney-General's Department, Chair?

CHAIR—We are reporting on the bill on 14 October.

Ms Smith—We could certainly get back to you very early next week.

CHAIR—Yes, we would need something by the middle of next week, I think.

Ms Smith—I would say Monday.

CHAIR—Okay.

Senator LUDLAM—In addition to the matters that Senator Trood has asked you to take away to ask your minister for opinion, I wondered whether you see a role for benchmarking the operation of Australian laws relevant to these matters against our international human rights obligations and the various treaties that we have signed—whether you have an opinion as to whether or not that would be an appropriate thing to do.

Ms Smith—Did I understand that you wanted us to take that away to the Attorney-General to ask him? Because I think that is a question for government; it is certainly not a question that I could answer.

Senator LUDLAM—Yes. That is understood. It is a matter that I think would be helpful.

Ms Smith—We will certainly take that question away.

CHAIR—Ms Smith, we think that getting back to us by the end of next week would be all right.

Ms Smith—That is very generous. Thank you very much. I think the *Hansard* would help us, actually.

CHAIR—Yes—so, certainly by the end of next week. We have got plenty of other stuff to keep us busy on Monday and Tuesday, as you are probably aware. I do not think we have any more questions for you tonight, so thank you.

Ms Smith—Thank you very much.

CHAIR—Thank you for making yourselves available on a Thursday night.

Ms Smith—It is a pleasure.

CHAIR—Again outside of estimates—we appreciate your availability. I want to formally thank the witnesses who have given evidence to the committee today. I declare this meeting of the legal and constitutional affairs committee adjourned. Thank you, Hansard and Broadcasting.

Committee adjourned at 9.08 pm