COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

FRIDAY, 22 NOVEMBER 2002

MELBOURNE

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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Friday, 22 November 2002

Members: Senator Bolkus *(Chair)*, Senator Payne *(Deputy Chair)*, Senators Greig, Kirk, Scullion and Stephens

Participating members: Senators Abetz, Brandis, Brown, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Knowles, Lees, Lightfoot, Ludwig, Mason, McGauran, Murphy, Nettle, Sherry, Tchen, Tierney and Watson

Senators in attendance: Senators Bolkus, Kirk, Ludwig, Nettle, Payne and Scullion

Terms of reference for the inquiry:

To inquire into and report on:

i. the development of an alternative regime in which questioning to obtain intelligence relating to terrorism is conducted not by ASIO but by the

ii. Australian Federal Police (AFP, including appropriate arrangements for detention of terrorist suspects, and questioning of persons not suspected of any offence;

iii. the relationship between ASIO and the AFP in the investigation of terrorist activities or offences;

iv. the adequacy of Australia's current information and intelligence gathering methods to investigate potential terrorist activities or offences;

v. recent overseas legislation dealing with the investigation of potential terrorist activities or offences;

vi. whether the bill in its current or amended form is constitutionally sound; and

vii. the implications for civil and political rights of the bill and any proposed alternatives.

WITNESSES

CHAIR—We are finding that the state police force in South Australia are acting in both a preventive and a quick response way.

Mr Cleland—They are here, too, but we want someone who attacks someone arrested, charged and jailed.

CHAIR—On that note, thanks very much.

[12.06 p.m.]

CONNELLAN, Mr Gregory Thomas, President, Liberty Victoria

MAXWELL, Mr Christopher, QC, Immediate Past President, Liberty Victoria

CHAIR—Would one of you like to start off with an opening statement?

Mr Maxwell—As I was the president when we sent in our submission, Greg and I will deal with the issues together. Greg is a criminal lawyer, which I am not. He is particularly well-informed on issues of criminal procedure and investigation. I do not want to repeat what is in our submission, but there are some points we would like to emphasise. I start with a point that Liberty has been seeking to make for almost a year now, since the antiterrorism proposals were first announced by the Attorney-General. There is a serious mischaracterisation regarding terrorism and terrorist conduct as some special, different species of behaviour. This terminological point is important because, when it continues to be referred to as something special and different, that creates a presumption in favour of it requiring something special and different by way of powers and legislation.

We argued unsuccessfully that there was no need for a new offence of terrorist conduct. That remains firmly our view for this reason: what terrorists do is criminal activity. It is murder, criminal damage, conspiracy to do one or other of those things, causing grievous bodily harm, conspiracy to commit grievous bodily harm and so on. What differentiates it from any other criminal activity is the motivation. Whereas a murder committed in domestic circumstances is committed out of anger or jealousy, a murder committed by a terrorist is committed for, let us assume, some fanatical objective. But it is, first and last, murder. We urge the committee to keep that steadfastly in mind because, as we have argued, that would put the onus on those who say that this so-called new kind of activity—which is really just threatened criminal activity—requires new investigative methods and powers.

We have set out in our submission our critique of the Attorney's justification last December about using these powers to swoop on a suspected sympathiser and keep him or her incommunicado so as not to alert the other conspirators. We have argued in our submission that that is what police do all the time. They get intelligence about something in the wind and they impose surveillance, physical or electronic—and there are plenty of powers to do that—and at an appropriate time they swoop. It has nothing to do with the power to detain for interrogation; it has everything to do with effective criminal investigation. We would urge the committee to maintain a healthy scepticism in the face of the kind of language that the Attorney loves to use, which is language such as 'the new terrorist environment', as if that is a self-explanatory statement about the need for something special to deal with it. In our view, as we have said in our submission, the government has conspicuously failed over this whole 12 months to make

out any intellectually satisfactory case for refuting what I have just said about this being criminal misbehaviour or a case demonstrating the inadequacies of existing powers.

The police in every state and the Australian Federal Police in the federal areas operate effectively. They operate within the constraints of the right to silence, which fortunately has remained a fundamental part of our human rights law. They get convictions 75 or 80 per cent of the time without any trouble. Why do we need some bizarre new star chamber situation where you will have somebody incommunicado, not for two, three or six hours but for 48 hours and at risk of going to jail for five years for not answering a question? Let us not forget we are not talking about suspects here; we are not talking about anybody about whom a reasonable suspicion exists. The chairman or one of the members of the committee was making that point before. This is not about suspects; this is about people who just might have information which might, so the bill says, 'substantially assist' in relation to some 'important' matter of intelligence—whatever that value judgment might involve.

A group like ours is not on its own in issues like this in saying, 'What is happening in Australia that we could even be contemplating this?' The Attorney has said repeatedly, including in the second reading speech on this bill, 'There is no known specific threat of terrorism in Australia.' He has kept saying that there is no known specific threat of terrorism in Australia and he deserves credit for having said those things. There have been two specific heightened security issues—one over Christmas last year and one just recently. Those have their own consequences, but again no known specific threat. We urge the committee to come to a conclusion that the case is simply not made out for such a fundamental shift in our system of criminal investigation, which is what this is about. This is about finding out about something that is going to happen before it happens. As I say, that is what police do all the time. They have informers, they have telephone taps and they have plain-clothes police.

I would have thought that if ASIO is serious about getting information it should be doing as the CIA should be doing in Afghanistan, putting people on the ground—infiltrate the groups. As I understand it, that is how security agencies work. That is what they are paid to do: recruit some people from inside the suspected organisations and get the information direct. That is how you do your job. It seems to us to be a confession of failure by ASIO. I have heard the CIA people say, 'It is very difficult to get our men or women into Afghanistan and Iraq because they look Western.' That is not going to be such a problem in Australia—

CHAIR—Not all of us!

Mr Maxwell—One would have thought that it was not beyond the capacities of our skilled intelligence agencies—and we respect their capacities in their fields—to do that. That is a much better way of finding out what is likely to happen.

The last general point is that, as we mentioned in the submission, one has to have a healthy scepticism about demands for new powers when agencies seem unable to make good use of information that is already coming through. If there was credible intelligence about a threat to places where people gathered in Indonesia, one might have thought that Bali would be fairly high on the list. But from what we have read in the paper no Australian authority took the view that any alert needed to be made. How could you give new powers to agencies who could get that so badly wrong?

Mr Connellan—One of the concerns that the council has is that in this issue of dealing with terrorism we have to recognise that it is in a sense a battle for the hearts and minds of people. The terrorist groups, particularly the ones we are now seeing identified, and I note people being arrested in Indonesia, are arguing a case for the action they take. It is not one that we can accept, but they are arguing a case that there is something wrong with the way in which their people are treated. They are arguing in some way or another that the only solution is for everybody else who they consider to be infidels to convert to their form of belief.

Nothing in this legislation, which is not directed at people committing those sorts of terrorist acts but at other people in the community, and nothing that we see the government doing in this country is addressing that issue. Where is the fight for the hearts and minds of people about what is an appropriate society that we should live in? It is no longer just an isolated Australian society; it is an international society. We ought to recognise that, whether or not it suits us to recognise it, there are significant issues out in the community both in Australia and overseas about the way the international society operates. Whether or not those particular brands of terrorists have any interest in human rights or have any interest in equality, and they do not seem to have much of interest, there are plenty of other groups out in the world who at some stage or another resort to violent means because of dissatisfaction with the way in which the international economy and political system works.

When you apply this sort of legislation to those sorts of people, whether they be S11 protesters or whatever, because at some point they have a link to a group overseas who might be involved in what we will define as terrorist activity—there is no proper definition of terrorism in here—then ordinary citizens in this country are likely to be caught up in this sort of legislation. This legislation will give the government executive power to detain people who have political sympathies with causes which may in fact have some basis in pursuing human rights or may have some basis in pursuing greater justice and they will become targeted because some elements of those causes overseas might resort to violence. An example would be the classic situation in Northern Ireland over the last 40 to 50 years, where you have had extreme terrorist activity on both sides of the political equation and many people who have genuine belief in and commitment to the need to pursue greater justice in the community. This legislation will pick up all sorts of people and have them detained for lengthy periods of time, and as a consequence in fact will be the breeding ground for further terrorism.

If we are going to try and fight terrorism at a level outside of investigating the criminal actions of people or the proposed criminal actions of people and look to other people in the community who might have some contact, direct or indirect, with organisations that might at some stage resort to terrorism, then the way to deal with it is not arrest them or bring them in for questioning but to fight the grounds of what are the hearts and minds issues that people need to pursue. Why is it that there is such dissatisfaction with the way in which the international system works in terms of producing just outcomes? This approach does not address that and will in fact run the grave risk of creating the breeding ground for terrorism.

CHAIR—I will start by asking one or two questions, first of all to Mr Maxwell. Given a situation where someone may have some information about a 'terrorist offence', are you saying that there are sufficient provisions in the existing law across the states and Commonwealth to ensure that that person can be brought forward and questioned although he or she may not be a suspect?

Mr Maxwell—No, I am not saying that. I am saying that it is our view that there are sufficient powers already available to police forces and to ASIO to immediately intensify the surveillance of the person thought to have information. It seems to me that the power of telephone interception is enormously important. Let us say that I am thought to be someone who has information about a terrorist plan. That must, by definition, mean that I have been talking to somebody who is involved in it, or in some way communicating with them. ASIO can go to the Attorney and get a warrant to tap my phone and my email—and, I assume, to open my mail, but that would be a cognate power, if it does not exist. One could see why that should be conferred. Secondly, they could put a tail on me. That is all within the existing range of what is now long established. I think the telephone interception legislation went through in 1979. Yes, it is subject to executive control and a degree of parliamentary reporting.

What cannot be done under existing law is to haul me in for questioning beyond a certain time unless charges are laid—Greg is better on this point than I am—and, of course, I can decline to answer questions. That is what the right to silence is about; and we happen to think that that is such an important bulwark of our society. The argument you see looming is what one heard articulated by congressmen in the US saying, 'If only we could torture these people and make them answer.' It is frustrating if you think somebody knows something, but, fortunately, as a civilised society, we have always stopped short of that. We have always said, 'We have lots of ways of finding out things' and we do believe, at the end of the day, that, if the prosecution cannot prove it beyond reasonable doubt, we do not want to force or, in the worst scenario, torture people to confess. We think that is where the line must be drawn.

So we say that there are ample powers to pursue leads—that is what intelligence collection is all about. We have not heard the Attorney or the Director-General of ASIO say, 'Look, we have discovered a significant gap in our intelligence collection abilities because we do not have this generic power,' whatever it might be. Let us take the case of email. I think the legislation I read in here was conferring that power. You would say that checking emails I am sending is a logical extension of telephone tapping. But for this to be put forward as if it is some solution to an undefined problem of incapacity—that is the problem.

CHAIR—To be fair to them, they have actually said that there is a need to focus on people who may have information and intelligence, and to be able to try to get access to that information and intelligence rather than a material object. So they have identified that as a need. Would you not consider having a couple of offences—like the Canadian or UK experience—where having information and not passing it on would be an offence? You do not think there is a need for that?

Mr Maxwell—No, we do not—seriously. I do not know if I can say more than I have just said, other than that, if I have intelligence/sensitive information, then the overwhelming likelihood must be that I will write it down or pass it on to somebody—it is possible that I will be a mute repository of it, but it seems to me that that is pretty unlikely—and that I will therefore be communicating it or be communicated with about it. If I am going to be in that level which it is thought would be the threshold for this bill—substantial assistance in an important area—that means that I am in touch with somebody who is planning the punitive bombing. As we put in our submission, there are all sorts of ways of finding out what I am being told and what I am telling—there are lots of ways of doing it. Think of the way state police set themselves up in jail in order to engage in conversations with persons who are suspected of murders—and sure enough somebody brags and it is all on tape. That happens

regularly in our state criminal justice system, amazingly enough—I read a report in the Victorian reports recently—and presumably you do the same, where—

CHAIR—Even in Victoria?

Mr Maxwell—Even in this sunlight state. The other thing is that it is not a very high threshold before you would have a reasonable suspicion that I was knowingly concerned in something. I would have thought one could get a warrant from a magistrate quite quickly to search my house on suspicion. You might not have that suspicion straightaway but, once you have listened to a few of my phone calls and you have watched the meetings that I am going to, you would quickly build up a body of evidence. If this is the kind of person who is going to be worth detaining for 48 hours under this proposal, I am going to be behaving in a way which will give you enough, I would have thought—and Greg can say whether this is feasible as a matter of criminal procedure—to go and get a warrant, search my house, arrest me, question me for six hours—

Mr Connellan—A reasonable time.

Mr Maxwell—and then decide whether you lay a charge or not. You can lay charges of my being an accomplice; you do not have to accuse me of being a primary conspirator. It is enough that I have knowledge of the plan.

Senator PAYNE—Mr Maxwell and Mr Connellan, thank you for your submissions. I appreciate that in this process we are perhaps coming from a slightly different perspective—which is that, at the very least, in the last discussions on security legislation, the Labor Party and Liberal Party agreed that we needed to go down that road. You have indicated that you do not concur with that.

Mr Maxwell—No, we do not.

Senator PAYNE—But, given that we are dealing with the bill before us, in your submissions you make some specific comments in relation to two or three issues which particularly interest me. The first is the role of the AAT member and the question of independence from the executive of the AAT member if they are placed in the environment of being the prescribed authority. The second is the question of approved lawyers. Then I want to ask you briefly about the reversal of the onus in 34G(3) and 34G(6).

Mr Maxwell—I will deal with the AAT because that is more the area that I know as a lawyer. The Commonwealth AAT is an envied administrative review structure. In the common law world we have had since 1975 a system of administrative review of a very high calibre. Although, as we say in the submission, constitutionally it is part of the executive, its role in practice is quasi judicial. When one appears before the Commonwealth AAT to review a decision of the Australian Taxation Office or a decision of the minister for social security or whatever, and even though we know that government funds the tribunal, you expect and get fair independent decision making. That is a precious part of our legal system. We think, for reasons entirely separate from these criminal law issues we have been talking about, that it will be a disaster if the AAT members are enlisted to be instruments of the executive in this operational sense.

It is one thing to say that things are going to happen in front of them. That would make them real-time scrutineers of the executive, which they never are—as judges are not. You do not have people observing and saying, 'That's okay; that's not.' That is just a different function. But it is not even that; it is the fact that they have a power to detain which, in our view, seems to irrevocably change their character. The decision will have to be made by the AAT member—within the framework of the warrant, true, but that is only a limitation. It is still a discretion to be exercised by the AAT member whether detention should be continued or whether a person not detained should be detained. We think that would corrupt the integrity of this very important part of public accountability.

Senator PAYNE—You do not suggest an alternative in your submission. Do you have any suggestion to make today?

Mr Maxwell—No. Frankly, I do not know whether having somebody present matters. Greg may have a different view. It seems to me that the videotaping of police interviews, which occurs in the ordinary criminal justice system, is a very important protection. There is certainly, I think, no evidence in Victoria that you need an independent person there to make sure the witness is not bashed up, for example, because if it is going to be on video that is probably not going to happen. Then when it comes to trial you have issues about voluntariness and again, presumably, the video and audio record will enable the judge to decide whether the confession, if there is one, is admissible. So I do not understand why it is thought that you have to have somebody there performing a distinct function from that of the Attorney who starts the process or the relevant issuing authority. That, if anywhere, is where you make a decision about detaining and questioning, and if there is to be a change or an extension you go back to that same authority. Why embroil the AAT in it at all?

Mr Connellan—I would agree with that.

Senator PAYNE—It is interesting. Other people have made a range of alternative suggestions about how that matter might be dealt with by having a prescribed authority.

Mr Maxwell—The question is: what function is it thought that the prescribed authority performs by being there? If it is keeping an eye on the process, I think that is unnecessary. If it is being an instrument in the process, that is really splitting the instrumental function into two halves. The issuer and the continuer should be in the one spot. If there is executive power to be exercised in relation to detention and so on, keep it in one place; do not coopt the AAT into that process.

Mr Connellan—I agree with what Chris says. In addition to that, under the legislation the AAT member is expected to give advice to this person. I have no doubt that the person needs to get advice, but they should not be getting from the AAT member advice on, for example, their right to go to the Federal Court, which is one of the areas in which advice would be given. Rather than having an AAT member brought in to oversee the conduct of the whole matter, make discretionary decisions about how much longer it might continue et cetera and also to give them advice, the appropriate thing—leaving aside that we disagree about whether there should be any legislation of this sort at all—is to give the person access to their own independent legal adviser. You should not expect a person who, as a member of the AAT, performs a quasi-judicial duty in keeping the government honest to also make discretionary decisions about how long a person is going to be detained and the conditions of detainment, advise them about their rights

and give them or deny them access to a lawyer. It totally confuses the whole mechanism and is, in my view, fraught with potential to bring the AAT into serious disrepute.

Senator PAYNE—Given that the framework we are presented with currently has the individual being potentially—not necessarily—without access to a lawyer for at least the first 48 hours and that the questioning will proceed notwithstanding that, the suggestion of the legislation is that the prescribed authority would, as you have said, be able to observe and provide what my colleague referred to as—

Senator SCULLION—An air of legitimacy.

Senator PAYNE—That is right, an air of legitimacy to the proceedings and ensure that the person being detained is getting advice about their rights, opportunities and so on. If we are working within the framework of a detained person without access to a lawyer, you probably do need a prescribed authority, don't you? Even if it is not the AAT.

Mr Connellan—Again, we would say that the best mechanism for assuring that a person is protected is to give them free access to their own legal adviser who is independent and will advise them according to the instructions that they are given. That is the only way of guaranteeing some sort of integrity in the system. Let us look at what happens in Victoria. Under Victorian legislation, if you are arrested you have a right to get legal advice but—unless you have an intellectual disability, are suffering from a mental illness or are a child—you do not have a right to have anybody sitting there with you during the questioning. Even in those circumstances where you do have a right to have a person sitting there during questioning, there is a great dispute about what role that person should play. If you put that in the context of an AAT member who might run into conflict with the other investigating authorities as to what role they should play and who has the upper hand in holding the power—not in terms of what the legislation says but in a very practical sense about as things go on—then, as far as I can see, it is just fraught with problems.

Senator PAYNE—Which is why Dr Gavan Griffith has suggested that perhaps a panel constituted of retired Federal Court judges might be called upon to act in that capacity.

Mr Connellan—Again, it seems to me the problem there, and it will come up when we talk about the role of the lawyer, is that the person who is the non-suspect being interviewed and forced to answer questions—and in that very vulnerable position where they could go to jail for five years for mucking it up—needs to get access to their own independent legal advice. No substitute, in our view, is adequate.

Mr Maxwell—I would like to comment on that point. With respect to Gavan, I would not agree with that proposal at all. I think retired judges do a very good job doing commissions of inquiry. The ASIS inquiry, in which I was involved as counsel assisting, was a splendid example of Justice Samuels doing exactly that.

Senator PAYNE—He mentioned Justice Samuels's name today.

Mr Maxwell—He and Michael Codd did a terrific job as commissioners in that inquiry. I had not really appreciated this until this discussion, but there is a real confusion in the concept—not in the committee—of what this authority is supposed to be doing. As we have been talking

about it now, it seems as if there are incompatible functions. The first is to be a monitor of fair play and the second is to be an instrument of the executive power of detention. Those two seem to be fundamentally incompatible. How can you be both the detainer and the monitor?

CHAIR—Don't judges do that ordinarily in criminal cases, where people can be kept during the court process, for instance?

Mr Maxwell—I agree with that, with respect. However, I think the functions would normally be separate. In other words, if Greg's client wanted to apply for bail, you would go to the practice court judge, who it is true is exercising the power of the state but is not the trial judge in relation to fair play in the process of bringing the charge and is certainly not involved in the investigation. To use a different example, the prosecutor who is about to arrest the suspect has no power to detain.

CHAIR—Sure, but the trial judge can make a decision that a person be kept in detention overnight or for a week or so.

Mr Maxwell—Except that typically—that is the point I was making—that normally does not arise in the trial context, because the accused is either in custody or on bail. But it does seem to me that you are asking the AAT person to be an independent monitor of a process in which he or she has active power to participate as a decision maker. Ex hypothesi, you are monitoring your own decisions about whether it is right to keep this person detained or not. The third incompatible function is to give some kind of advice.

CHAIR—Let us presume someone else was giving the advice. Let us presume there was a lawyer there from the bounce of the ball. Can you then see a role for maybe not an AAT but a retired judges panel as was suggested by Gavan Griffith earlier?

Mr Maxwell—If we leave the advice function—and I would like to come back to that in the context of the ASIS inquiry, where lawyers were involved within the cloak of secrecy—then you have got the question of the two other functions we have talked about: the active power to detain, which is given to the authority, and the power of monitoring. Our argument is that the power of monitoring adds nothing if it is being video taped and there are legal constraints on how the questioning is to be conducted, and that it is inappropriate for the tribunal member or judge—lest still a retired judge—to be an arm of the detention. So when you analyse it like that, if the lawyers are going to do the advice, I suppose there is no objection to having an independent third person. It could be anybody sitting in just to keep an eye on the process, but I do not think it needs to be a judge or an AAT member. It could just be the secretary of the Prime Minister's department, for example, someone who could just—

CHAIR—A terrible thought.

Mr Maxwell—The detention is the key thing. The only person who should extend the detention is the person who granted it in the first place.

CHAIR—Can I just shift the focus a little bit to the criminal process.

Mr Maxwell—Before you do that—because Greg will deal with the criminal stuff—could I just talk about the lawyer point again. In the ASIS inquiry, there were lawyers acting for

complainants and for the service and, of course, there was me and my instructing solicitor. We were security cleared. Why? Because we were looking at classified material. The question is: what is the basis for requiring pre-vetting of lawyers for this process? Is there some presumption that most lawyers will breach the confidence? If you are in a confidential session, any lawyer is bound by his obligation of confidence. I do not need to swear an oath to that effect, but of course I can be required to sign a confidentiality undertaking. I am bound by that. If I breach that, then I do that at very great risk.

Senator PAYNE—Great professional risk.

Mr Maxwell—Great professional risk. If I am about to see an ASIO report on my client, then I might need to be security cleared, and that is an issue. But ordinarily, in this sort of questioning, assuming you disagree with us and are content for it to happen at all, you are not going to be looking at that sort of material. I am here to advise my client whether he needs to answer the next question or not—except if he has no right to silence, that will not arise either.

Senator PAYNE—I am not sure you need to turn up, Mr Maxwell.

Mr Maxwell—You as the interrogator will be asking him questions like: why were you at that meeting and what did they tell you and so on? There is nothing very security sensitive about that, and I need to be able to hear that in order to advise him about whether he is going to be liable for some offence. I am just urging that, again, the case is not made out for pre-vetting, and our case—and I think the Law Council say the same—is that there should be an exception rule. If I have just returned from being involved with Jemaah Islamiyah or something and I was nominated as Greg's lawyer, you might think twice about it. But 99.9 per cent of Australian lawyers are straight and abide by confidentiality and are not a security risk, and it is really an insult to the whole profession to say that we have all got to be prevetted before we can do a normal thing of representing someone who is under questioning.

CHAIR—Gareth Evans used to think that we were all security risks. Sorry, Mr Maxwell. Mr Connellan, can you go through the process that you may anticipate under this legislation, drawing on your experience in criminal law? When someone is brought in, a number of circumstances might flow. They may decide to assist or they may decide not to. Have you thought through the process in how the law would apply and whether in fact it would be a productive process one way or the other?

Mr Connellan—I have thought about it in this context, and it is not quite the same context that you have put to me. We had recent examples of raids on people's homes—by those wearing balaclavas and by all sorts of things—supposedly because they had either attended a lecture of JI or in some other way had a connection with JI. There was a lot of publicity around it, and everybody knew it had happened. I am sure that, if there are people in this country associated with JI—which there probably are—they all heard about it. The consequence was that, as a result of the process being used, anybody who had something to hide presumably sought to hide themselves.

Mr Maxwell—They went to ground.

Mr Connellan—This process seeks to take people into custody who are not suspected of doing anything—it is only suspected that they might know something—and, invariably, people

are going to know that they have disappeared. It may not be that they are taken by people wearing balaclavas and using guns, but somebody sooner or later will miss them. There is a very strong possibility that it will become apparent that they are in custody under this provision. So, again, that information will be broadcast presumably. Even if it is not on the media, it will be broadcast at least in the circles where it counts. So at this point in time, even if the person has information, then the integrity of the information might already have been compromised by the fact that it is known that they are in custody.

The next step in the process is that that person may or may not be prepared to divulge what information they have. If they are prepared to divulge the information they have, then they may well have been prepared to do it without being brought to task under this legislation, without the threat of five years in jail. If they are reluctant to disclose the information, then no matter what sort of threat you hang over their head, short of torturing it out of them, they are not going to give it up. If these people are so close to the action of people who are so fanatical that they can kill hundreds of people and thousands of people in single events, they are not going to readily give that information up, I would not have thought.

So the process itself, it seems to me when you get to that point, may reveal nothing. It may mean that a person is confronted with the prospect of proving a negative, as I would call it—that is, that you know something but in fact you do not know it, which can be a very difficult thing to have to prove. It may be that they will be placed in that situation, but that will not tell any authority whether they in fact had the information and are just refusing to disclose it and are prepared to go to jail for five years because of it—because they want to see the terrorist act completed—or whether in fact they never had the information. So it seems to me that the whole process of trying to bring force to bear on people who are not actually suspects—in the sense that they can be charged with anything or that, if they were investigated, regardless of whether they answer questions or not, you will have enough material to warrant laying charges against them—does not guarantee the outcome that the government hopes it will, because I am certain if people are really committed to their cause and are that fanatical that they are prepared to commit mass murder, they are not going to give up information readily.

Mr Maxwell—Can I just add to that. You can compare the example of the guilty accused who really only has to be got to the point where he or she is asked the question and the confession comes with the contrasting example of the Silk-Miller criminal trial which is on at the moment. Painstakingly, the police have assembled a case against the two defendants who have never said a word and are in the category that Greg has referred to—they would not say a word; they would rather go to jail for six months than help the cops with the investigation. But bit by bit, using the techniques that we were talking about before, the intelligence has been gathered. Telephone taps, bugs in their cars, those sorts of things—that is where you are more likely to get the kind of information that this bill is directed at.

CHAIR—Just following on, Mr Connellan: in those circumstances where evidence somehow is extracted under this regime in any way, I suppose—in either a short or a lengthy way—have you considered questions of the admissibility of such evidence in respect of that person or anyone else down the track?

Mr Connellan—Within the context of the legislation, as I understood it, that was not admissible to be used against them. Whether it is admissible to be used against another person, raises a whole different question. Normally, in our law, there is a discretion to exclude

confessions that are not gained voluntarily—it is a discretion. Here, though, you are not talking about a confession; you are talking about somebody else's information and you are talking about an argument that the information is—despite the legislation—obtained unlawfully. As a matter of prima facie fact, if the legislation goes through, it is not obtained unlawfully; it is obtained lawfully. It seems to me that it is then merely evidence in the same nature as any other evidence that is not confessional evidence—it is either admissible or not admissible because of its relevance.

Senator NETTLE—I would like to talk about approved lawyers. We had other people who gave evidence this morning saying similar things to you—that is, that they found it offensive that there should have to be a security clearance process. Do you know if that process is followed anywhere else in any other similar style legislation in other countries—that they have a process of vetting lawyers? Are you aware of that anywhere else?

Mr Maxwell—I am not.

Mr Connellan—Not that I am aware of.

Mr Maxwell—I suppose I should make it clear that when I say 'offensive' it is not put as some hurt dignity of lawyers. That really is not the point at all. It is a word that one perhaps should not use because that is not what it is about.

Senator NETTLE—Other people used it this morning.

Mr Maxwell—That is not the case we are making. It is not that it is an affront to the dignity of the legal profession—that is neither here nor there—it is just that I think it is an imagined concern. If it were the case that there were lots of lawyers who were a security threat, then pre-vetting might be justified. But since there is no such evidence—on the contrary, all the evidence is that most lawyers are just plain tradesmen who go about their business—then you do not need to do it.

Senator PAYNE—I did want to follow that one point. Although popular opinion may disagree with you about what sorts of lawyers are around, Mr Maxwell—I say that with similar qualifications, if not experience—

Mr Maxwell—With all due respect, I am sure, Senator.

Senator PAYNE—Yes, indeed—qualifications, not experience, I hasten to add. I want to go to one more point that you make in relation to approved lawyers. You give an interesting suggestion which I am surprised about, given the other evidence that you have brought forward—that is, that you could provide by legislative criteria specific reasons why contact might be fettered. I am surprised that you suggest that.

Mr Maxwell—We, as in all things—and this is not meant facetiously—try to take reasonable positions. One can very well contemplate legislative provisions which might say that the person under detention shall be entitled to access to the lawyer of his or her choice unless there are reasonable grounds for suspecting that that lawyer has been engaged in conduct prejudicial to security. That is what we mean. That would address what we say would be the exception rather than the rule—that is, the presumption will be that I will get access to my lawyer but, if ASIO

can show that my lawyer has engaged in or has knowledge of conduct prejudicial to security, then I lose that right. And, as a matter of policy, we would not object to that.

Senator PAYNE—Slightly tangential to that is the suggestion by the Attorney in the summary of the second reading debate—not about an approved lawyer per se but access to a lawyer in the first 48 hours—that access could be delayed if the Attorney-General is specifically satisfied that a terrorism offence is being or is about to be committed. He describes the delaying of access to a lawyer as a measure of last resort designed to protect the community from a terrorism act. That is establishing a pretty high bar.

Mr Maxwell—Yes, and again I would not say anything in opposition to that.

Mr Connellan—In fact, that is similar to the sort of bar that is set under the Victorian Crimes Act, where you have a right of access to a lawyer and to family members, as in ordinary criminal investigations, but that right can be denied if there are reasonable grounds for suspecting that access would lead to harm to other persons, the destruction of evidence or something along that line, which is similar to what is being put there. As Chris says, we would not have a problem with that approach because there are very clear grounds of a fairly narrow type—

Mr Maxwell—Where an overriding right comes into play—that is, the right to public safety. We are not going to insist on a lawyer if it is going to mean that the bomb will go off.

Senator SCULLION—Mr Maxwell, you spoke in your opening remarks and your submission about terms like 'the new environment of terrorism', and you spoke about there being 'no known specific threat' and the Attorney-General making those remarks. Is it reasonable to extend that argument to say that, if this is a principle on which you are disinclined to support this bill, there may be the potential for some sort of level of threat in which you would say that this perhaps is reasonable? Is it reasonable to assume that?

Mr Maxwell—No, with respect, it is not. We make the reference to there being no specific threat really to underline what we think is the lack of necessity for any change. But even if there were a heightened threat, we do not think that would change any of the need for intellectual rigour in relation to the character of the conduct. If it is right to regard it as criminal conduct of a nasty kind and having a wide impact but nevertheless criminal conduct, then you have to ask, 'What is wrong with current criminal investigation processes?' The fact that the threat was higher would just mean that you would be cranking up those processes more energetically rather than necessarily having new powers provided.

Senator LUDWIG—We were talking earlier about the Royal Commissions Act and whether or not you would have an issuing authority and a prescribed authority being one or whether you would dispense with that altogether and have an executive decision maker be the examiner and the issuer and so on. Then we were talking about the role of the judge and specifically when we go to a chapter 3 judge, a retired judge. Some earlier evidence suggested that a mechanism that could be used was the Royal Commissions Act with a retired judge being able to be the examiner. That does not question whether they would be the issuer of the warrant but rather says, 'Let's look at the role of the royal commissioner as the examiner.' Is that distinct, or do you still have an objection to that?

Mr Maxwell—No, that seems to me to make more sense. I thought the reference to the Federal Court judges was as the monitor or the observer. Given that a royal commission is inquisitorial, then I can see for myself a retired judge having the function of being the examiner. I want to make the point that the role of the examiner must be separate from the role of the issuer. Just as if police want an arrest warrant, then that issuing authority is the magistrate and the questioner will be the policeman, and there I think should be that distinction.

The only other point I want to make is that our legal system is not very strong on inquisitorial experience, because judges tend to sit back and have the adversarial system go in front of them and are not required to be the primary questioners. But they are perfectly good at doing it—as we were saying, with Justice Dawson with the gas inquiry in Victoria or Justice Samuels in the ASIS inquiry there were counsel presenting the material but they showed themselves to be perfectly capable of pertinent questioning in order to find things out.

I suppose the difficulty with that is that, if it were going to be effective, I would want ASIO doing the questioning. In other words, it seems to me that you would want the expert asking questions. Otherwise the security briefing has to go to the judge who is going to do the questioning. That is why judges have counsel assisting in royal commissions—for example, I had to learn all about ASIS so I could ask questions of the witnesses in order to assist the judge. In this scenario, any retired judge is going to not know the first thing about a particular terrorist threat. He is going to have to be briefed in order for the questioning to be effective. Therefore, that seems to me to be, with respect, a silly idea. What you need is someone, whether it is a policeman or an ASIO person, who knows the stuff and can say to this person, 'We understand you have been doing this, that or the other and want you to tell us about it.' I do not think a judge is in a position to do that at all unless they are briefed at great length, and what is the point of doing that? Have the questioning done by the person who is interested in finding out.

Senator LUDWIG—Thank you.

Mr Connellan—Having read lots of transcripts of tape recordings of interviews and so on, conducting normal criminal investigations—

Mr Maxwell—With police doing the questioning.

Mr Connellan—with police doing the questioning, it does not take you long to pick up on which police officers have taken the time to study their material and understand it before they start the questioning and the less experienced police officers, generally, who rush in and do not get the results. I support what Chris says. From the point of view of an investigating agency—and bear in mind we never agreed to the legislation at all—I would have thought that the appropriate examination would be done by officers of the investigating agency.

Mr Maxwell—In the same way, leaving this legislation aside, if I were an ASIO officer and thought you had some information—and in the first place I would see whether you would give it to me voluntarily—I would be the obvious one to ask the questions. I have the background, I have been doing the research, I have the intelligence information about you and I would sit down with you and ask you to tell me. If you were refusing to answer, then I would still be the right person to ask the questions. I may need extra powers to carry it out. I just do not see any benefit in shifting that questioning function to someone else.

CHAIR—Thank you very much for your submission and your evidence this morning.

Mr Maxwell—As we said, we appreciate the committee having come to Melbourne. It is very much appreciated by the many interest groups you have been hearing from. Thank you.

CHAIR—We could not proceed on this issue without coming to Melbourne. Thank you very much.

[1.09 p.m.]

MAHON, Ms Claire, Member, Young Lawyers' Section, Law Reform Committee, Law Institute of Victoria

NASH, Ms Yvette, Co-Chair, Young Lawyers' Law Reform Committee, Law Institute of Victoria

PALMER, Ms Karyn, Co-Chair, Young Lawyers' Law Reform Committee, Law Institute of Victoria

RODAN, Mr Erskine, Councillor, Law Institute of Victoria

CHAIR—Welcome. Would you like to make an opening statement?

Ms Palmer—I thank the committee for allowing us to appear here today to address this important legislation. I want to briefly summarise the Law Institute of Victoria's position in relation to the detention of children under this bill. Our submission addresses points 1 and 6 of the terms of reference, and basically we submit that the development of any alternative regime involving the AFP, the Australian Federal Police, should mirror the Crimes Act in relation to the detention, questioning and strip searching of children. This should also occur within the principles enshrined in the Convention on the Rights of the Child.

We would like to say that we are encouraged by the report of the Parliamentary Joint Committee on ASIO, ASIS and DSD and the government's amendments to ensure that warrants are not to be issued for the detention and questioning of children under the age of 14. However, the application of the legislation to children between the ages of 14 and 18 still raises serious concerns for the Law Institute. Children under the age of 18 should not be subject to detention and questioning under the regime at all, as recommended by the parliamentary joint committee's report under recommendation 10.

It is inappropriate that the bill provides less protection for young people than that provided under the Crimes Act. This is highly inappropriate, given that the Crimes Act applies to people suspected of committing an offence, whereas this act applies to people who have information that may substantially assist the collection of information in relation to a terrorism offence. Our concerns in relation to the bill fall broadly into three categories: providing information under proposed section 34G; the circumstances of interrogation; and strip searching of young people under proposed section 34M.

Firstly, in relation to providing information, proposed section 34G(3) provides that a person must not fail to give any information requested in accordance with the warrant or they will