LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

(Reference: Court Procedures (Protection of Public Participation) Amendment Bill 2005)

Members:

MR B STEFANIAK (The Chair)
MS K MacDONALD (The Deputy Chair)
DR D FOSKEY

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 4 APRIL 2006

Secretary to the committee:
Ms R Jaffray (Ph: 6205 0199)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents relevant to this inquiry that have been authorised for publication by the committee may be obtained from the committee office of the Legislative Assembly (Ph: 6205 0127).

The committee met at 9.01 am.

DAVID SNELL,

BRETT PHILLIPS and

PETER QUINTON

were called.

THE CHAIR: Thank you for appearing. You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation, for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter. Do you all clearly understand that? They're all nodding except Peter Quinton.

Mr Quinton: I do, indeed.

THE CHAIR: Thank you. Please state your names and the capacities in which you appear before the committee.

Mr Snell: David Snell, from the Department of Justice and Community Safety.

Mr Phillips: Brett Phillips, Deputy Chief Executive, Department of Justice and Community Safety.

Mr Quinton: Peter Quinton, from the same department.

THE CHAIR: Mr Quinton and Mr Snell, for the record, what positions do you hold in the department?

Mr Quinton: I am the Director of the General Law Group, which deals with civil law matters, and David is the senior officer in that group.

THE CHAIR: David?

Mr Snell: As Peter stated, I am one of the officers in the General Law Group.

THE CHAIR: Thank you. Who would like to lead off?

Mr Phillips: I will begin by giving a short address as to where the government is coming from in relation to the bill. At the outset, I thank the committee for inviting us to give evidence before you this morning. I understand the attorney has submitted a letter to you, Mr Stefaniak, dated 23 February, in relation to the government's position on this bill.

THE CHAIR: Yes.

Mr Phillips: The anti-SLAPP legislation is so named because it is legislation against strategic law suits against public participation. It is intended to provide a mechanism to assist where the litigation against public advocates is bona fide and to deter SLAPP actions. The bill appears to essentially follow the model legislation proposed in 2003 by a Melbourne barrister, which was based on successful North American legislation.

As a close look at that model reveals, the principal target of anti-SLAPP legislation is generally defamation actions. The defamation element has been removed from this bill, as the ability of large organisations to bring defamation actions is dealt with in recent amendments to the Civil Law (Wrongs) Act 2002. In short, it is no longer possible in the ACT, or in Australia for that matter, for large corporations to sue for defamation. The bill appears to have a broader focus. It covers actions in tort, contract, trade practices and conspiracy, aiming to protect the right of participation in public debate of issues without the risk of retribution through spurious actions for damages brought for the sole purpose of silencing public debate.

While the government has decided to oppose the bill, I would like to make it clear that the intent of the amendments is strongly supported. The reason for opposing the bill at this stage is simply that the government wishes to investigate legislative options for better protecting public advocates from litigation brought for the purpose of stifling debate. In addition, a number of other issues and other actions have taken place around the country that have not yet been settled and the results, effects and flow-ons from them are not known at this stage. We would further argue that a national model for this kind of legislation is the preferable way to go. Mr Stefaniak, you would be aware of the considerable efforts over the last 30 years to effect national defamation model law.

The bill would allow a defendant to apply to have an action dismissed if it is brought or maintained for an improper purpose; that is, if it relates to conduct that is public participation; if it has no reasonable expectation of success; and if its purpose is to punish, to discourage or to divert resources from public participation. Members will all be familiar with the content of the bill. There are a few concerns about the effective implementation of the bill at this time, which are summarised below.

In our view, there is a prospect of having the question of improper purpose judicially determined in each case. By passing the bill the Assembly may be committing public advocates to another step in the litigation process. As an example, a defendant who believes they have been improperly sued by a plaintiff can, in my understanding, then apply to a court for an order that the plaintiff is acting in a non bona fide manner. So there is the possibility of that being a set of proceedings to deal with the plaintiff's state of mind and their intentions of issuing the proceedings.

If the court doesn't make a final determination that the plaintiff is acting in a mala fides way, then those issues might be reserved for determination after a full-scale hearing into the issues. Our concern would be that it might mean more costs for the defendant if the defendant starts an action to allege that the plaintiff is not acting in good faith. That, in our view, might assist a blocking plaintiff—one whose objective is not so much to achieve a legal outcome as to ensure that advocates are financially unable to hold their opinion in public. Further, courts may also be reluctant to find that an action is brought for an improper purpose if such a finding would eliminate a plaintiff's opportunity to have a question of law determined in any particular manner. I note that one of the issues

in the bill refers to a plaintiff being able to protect its property rights. A company here might say, "We're taking this action because by not doing so we will lose a huge development, or lose the property rights in our business." The court would be caught between a rock and a hard place in relation to those decisions.

The defamation element significantly present in the Victorian barristers model has been removed because it dealt with a national review of defamation laws that was already under way. It is in fact now in place following the passage of the Northern Territory bill. As a department, we need to examine the impact of the significant omission on the overall effectiveness of the other elements of the bill. That will require detailed consultation and will take some time.

There are two significant overlaps with the current ACT legislation. Part 14.2 of the Civil Law (Wrongs) Act 2002 requires solicitors acting in relation to a claim for damages to certify that their proceedings have a reasonable prospect of success and for a court to impose penalties through costs if those prospects are not substantiated. Also part 9.2 of the Civil Law (Wrongs) Act 2002 provides for the resolution of defamation matters without litigation by giving publishers an opportunity to offer amends, that offer being a defence to any continued action by a plaintiff. It is suggested that these overlaps should be examined and resolved before the proposals in the bill are progressed. National consistency in this area of the law would also discourage forum shopping and provide public advocates with greater certainty about their rights and potential exposure to liability.

There are some technical points that may require attention and possibly amendment. The proposed new section 37I, which will allow parties to make arguments about the question of improper purpose, is considered unnecessary in that the right is contained within the normal evidentiary provisions of the way the court does its business. The Tasmanian Gunns case, which was issued in the Victorian Supreme Court, is a significant current SLAPP case. In that case, as I am sure the committee is aware, Australia's largest forest logging company sued 20 public opponents of its logging activities for $6.36 million, alleging conspiracy, corporate vilification, sabotage, trespass and several other offences. The defendants claimed that the action was brought merely to silence them.

In July 2005, the Victorian Supreme Court struck out the Gunns statement of claim and said that the plaintiff must submit a third and radically altered version of its claim if the case was to proceed. The court said that Gunns had failed to provide the court with a proper coherent and intelligible statement of its case. The court heard submissions on a new statement of claim in March 2006 and adjourned its decision on the question of its sufficiency.

Given the firm stand taken by the Victorian Supreme Court in the Gunns case, it may be appropriate to observe the developments in that action before finalising legislation aimed at discouraging similar actions. It might also be worth noting in discussion that there are other emerging discouragements of this kind of action. Not only has the Gunns writ been poorly received by the Victorian Supreme Court, where Gunns lawyers had the original writ rejected as embarrassing, the Japanese paper producer, the Nippon Paper Group, has also followed its rivals by reviewing its purchasing agreement with Gunns in consideration of the environment and society.

The Gunns case is an important reminder of the significance of judicial discretion in determining what is appropriate to bring to court. The government has indicated that it would prefer to see the progression of anti-SLAPP laws at a national level to parallel the emerging policy developments in the area of defamation. We believe there should be a thorough examination of existing and potential disincentives to SLAPP writs in the ACT and a good understanding of the extent to which this kind of legal action impacts on the ability of our citizens to take part in the public debate.

THE CHAIR: Thank you. Obviously the defamation laws—and we have adopted national laws—wouldn't cover every scenario, would they? This would tend, to an extent, to stop some corporations using that inappropriately but there would be a whole range of other scenarios where there may be some need for groups to be able to take court action. Defamation itself, now that that is ruled out, is only one part of it, isn't it?

Mr Phillips: It is only one part of it. I think we keep coming back to an issue where everything we look at comes back to a defamation scenario where proceedings are issued for loss of reputation or whatever. It comes back to a defamation scenario. There is another form of litigation based on things like copyright, but they are all commonwealth matters and would override any provisions of the SLAPP legislation, I would have thought, with companies suing for breaches of copyright to protect their reputations, and various things like that. That's a different source of proceeding.

THE CHAIR: You mentioned a national model. Has any work been done on a national model in this sort of area? I know national models take a long time but, in terms of the thrust of what I think Dr Foskey is trying to do, is there a national model being worked on? Where is it at?

Mr Quinton: Most jurisdictions have now considered the proposed SLAPP bill. My understanding is that, for similar reasons to those we have put to you, the model in its present form is not receiving favourable attention. Nonetheless, I think it is fair to say that officers are aware of the issue; they're concerned about the types of litigation that have occurred from time to time. The committee will be aware that this is not a recent or new problem—and, indeed, this type of litigation is often referred to more simply as the issuance of a stop writ. The issue of stop writs has been with us for many years. Indeed it was claimed in the ACT that stop writs had been issued on a frequent basis that led to the ACT Law Reform Commission being given its reference on defamation in the 1990s.

The issue of stop writs has been a particular focus of state and territory law officers in developing the defamation writ and in law reform commission consideration of this issue in a number of jurisdictions, including the ACT. Perhaps while on that point it is instructive to go back to what the ACT Law Reform Commission thought about stop writs at the time. I remember this thinking particularly well because I had to do the research in relation to it.

The Law Reform Commission decided that it would get some poor bunny to look at every procedural step ever taken in relation to a defamation action in the ACT to determine the frequency of stop writ issuance in the territory. It had been asserted, up until that point, that stop writs were issued frequently in the territory. After a year of research, I was unable to identify a single stop writ that the empirical research generated

out of that proposal that led on to the other recommendations in relation to law reform, especially those dealing with procedural reform—the removal of the various tactical processes that parties had used to string out defamation matters. The issue of stop writs is one that has received a great deal of attention. It is one that has been specifically addressed in ACT legislation dealing with defamation, it has been the subject of considered thinking in law reform commissions, and that issue motivated much of the underlying thinking in relation to the national exercise on defamation reform.

THE CHAIR: Thank you.

DR FOSKEY: Thank you for your comments, Mr Phillips, and thank you, Mr Quinton, for your recent explanation. The tabling of our bill has led to a very necessary discussion. We've received some excellent submissions which indicate that there is general approval of the intent of our bill. But it seems to me that these committee hearings are an opportunity to refine it. We have already had another model submitted to us—the Bover-Parnell model. That is in the Wilderness Society submission. I commend that to you and suggest you have a look at it. I am sure it is also well known that quite a number of United States jurisdictions also have models, so clearly it is possible to do this.

We have before us Mr Stanhope's letter. He has pretty much said out of hand that the government is going to reject this bill, but he indicates that the government might come back with something of its own. Could you kindly elucidate for me the steps the government will now take in coming up with something else?

Mr Phillips: As I said at the outset, one of the interesting or uncertain things at the present time is how the combination of factors in our defamation laws, the national scheme and the results of the Gunns case will pan out in relation to creating the law or developing Australian common law in relation to things like this. It would be nice if you could look into a crystal ball and say, "In two years time this is what the law will be; these are the tweakings we have to do."

In that case, we will be waiting for or looking at the recommendations of the committee when they are made. If the committee has another model it wishes to examine, we will be looking at that, seeing whether that model is something that is easily accommodated in ACT law. We will be looking at other things as well, such as simple defences to actions, and then advising government and giving government options on a policy way forward. At the end of the day it will be for government to decide what sort of view it will take in relation to the bill currently on the table in the Assembly, any proposed model the committee can make recommendations on and, having considered those, a range of options provided by us.

DR FOSKEY: Mr Stanhope also refers to looking for national consistency. He says, "My department has suggested that this issue be proposed for discussion." Is that something Mr Stanhope has yet put to the Standing Committee of Attorneys-General?

Mr Phillips: I don't believe that at this stage it is a formal agenda item for the forthcoming meeting, which is to be next week.

THE CHAIR: Could you take that on notice and get some updated advice on it?

Mr Phillips: I will take that on notice for you.

DR FOSKEY: This is clearly an area where the states might have different opinions from those of the commonwealth. Do you know whether the commonwealth can block anything happening or override any state moves to outlaw this kind of mischievous or vexatious obligation?

Mr Phillips: As to the development of the debate in relation to the national defamation laws, the commonwealth indicated when it initially put the national model on the table about two years ago that, under the corporations power in the constitution, it had the power to legislate a defamation scheme in respect of corporations.

DR FOSKEY: New South Wales apparently already has some legislation. Have you had a look at that?

Mr Phillips: No, I haven't.

DR FOSKEY: Apparently New South Wales refers to corporations with more than 10 employees.

Mr Phillips: We have that provision here as well. It is part of the national scheme in relation to defamation that no large corporation can sue for defamation. Initially the commonwealth did not want that provision to be put in as part of the national model laws but has not objected to that being present at the end of the day. That provision is consistent across the country.

DR FOSKEY: Does New South Wales have anything that is particular to New South Wales?

Mr Phillips: I think the retention of juries is about the only thing, isn't it?

Mr Quinton: I think that's about the only real difference.

DR FOSKEY: Do you foresee any insurmountable obstacles to being able to draft legislation that addresses the Attorney-General's concerns?

Mr Quinton: It is difficult at this stage to speculate about the form of legislation that might be required. Let me try and summarise our thinking on this. There are cases, although not necessarily here in the ACT, where stop writs have been used to try and stifle public debate. To date, much of that activity has happened utilising stop writs issued under the law of defamation. We suspect that that has been the case because, up until reasonably recently, it has been fairly simple to frame an action for defamation in some jurisdictions, especially where one did not have to particularise the cause of action at the time the writ was issued.

That practice has been addressed through reforms across Australia, and the Australian law in relation to defamation is now uniform. The capability for a plaintiff intent on stifling public debate to utilise defamation cheaply and effectively for that purpose is largely now denied them. The question arises: if not defamation, is there some other form of civil litigation a large and powerful plaintiff might use to try and stifle public

debate? We detect corporations hunting for such opportunities. We have no particular firsthand knowledge of this so we rely on the allegations of public advocates, who will say that particular sorts of tortious claims are being brought with no real basis for the purpose of stifling public debate. To date, we haven't seen actions other than defamation actions survive any form of scrutiny at the interlocutory processes of court proceedings. It is difficult to answer the question because we do not know what target we're actually aiming for.

If it turns out that in fact the defamation laws have a chink in them and large corporations eventually turn back successfully to utilising defamation law, then a way forward may be to look at the defences available to defendants in defamation actions. In this regard, the implied constitutional safeguard on freedom of speech in relation to commonwealth parliamentary matters or political debate may offer a model. It is far too early for us to speculate about what we might be trying to do, because at this stage we don't have a recent example of the type of evil we are trying to prevent here, given that the model defamation law to date seems to have denied plaintiffs the opportunity of commencing actions that are effectively just stop writs.

THE CHAIR: That wouldn't necessarily apply, though. You could have an individual within, say, a large corporation who could still sue individually. It would have the same effect.

Mr Quinton: I am glad you raised that. The reason why stop writs were issued in defamation cases until quite recently was that, unlike other civil actions, in most jurisdictions it wasn't necessary to set out your cause of action. Accordingly, it was very simple and very cheap to commence the action. In some jurisdictions, one did not even have to identify the particular defamatory occasion; one simply commenced the action. Effectively, the stop writ was simply a writ obtained at relatively little cost with no intention of proceeding further with it. It was a bold-faced attempt to frighten a defendant and prevent them from pursuing an action.

Turning to the case you've put, for a company director rather than a company, in commencing such an action 10, 15 or 20 years ago it would have been relatively easy for such a person to take out a stop writ. Today it is quite different. Today in all Australian jurisdictions, defamation writs have to be matured at the point at which they're lodged. There is really no difference these days between a defamation writ and another writ for damages. One has to set out one's cause of action. You have to identify the circumstances you are taking action in relation to. More than that, though, in most jurisdictions, at the point at which the matter is set down for hearing, the plaintiff basically has to certify that there are reasonable prospects of success in terms of pursuing the matter. So, from a procedural point of view, the use of the stop writ has been largely denied, firstly, because of the procedural reforms that stem from the empirical examination of procedural steps and the types of abuses that used to occur in this area and, secondly, by denying this type of general unspecified action to large corporations.

THE CHAIR: In the late 1990s there was the case of Frank De Stefano from Geelong, who was mayor at the time. He was able to commence an action in his personal capacity.

Mr Quinton: We have seen a number of these types of cases in the past. Many were attended by great controversy because they were, in some cases, argued at the time to

constitute rorts of the system. I think it would be very difficult for a company director to take a similar sort of action today at no cost. In fact, a company director would have to mature the case at the point of the issuance of the writ to a degree not seen 10 or 15 years ago. In your commencing documents you would have to set out the cause of action in the same way that you now have to do in relation to any other civil claim. So the use of this device as a stop writ, particularly in defamation writs, is probably now a thing of the past.

Stop writs were cheap and simple. Commencing civil action is not cheap and simple. One has to have a fairly high commitment to the action because one has to do the research simply in order to get the writ issued. If one doesn't do that, the interlocutory procedures available to a defendant can then be brought to bear. That will result in the case being placed on hold. That may be what has happened in relation to the Gunns case. I cannot say for sure but, if that is the case, then that may well be an example of the law working at the interlocutory level in the way we expect it to.

DR FOSKEY: I would like to intervene here. While all that may be true and perhaps the Gunns case has stalled and will be stalled for an indefinite time, the people who had the writ issued against them are still, of course, unsure and needing to go through the personal angst involved with having a writ worth millions of dollars taken out against them. The intent of the Gunns case and similar types of actions—and I am just using that here as a referent to all such cases—is exactly that. In a sense, what the law does in the end is not really what we're getting at here. I want to say two things before you start to respond. The first is that the ACT's Human Rights Act is meant to guarantee people here the right to free speech; nonetheless, that is not ensured just by the fact that we have an act. We have to implement legislation and measures to ensure that.

Secondly, if, as you said, the defamation laws have a chink in them then we will need to find a way forward to look at defences. The trouble is that that chink will be found at the expense of people's lives—people's ability to speak out publicly against matters of genuine public interest. That is why we need legislation to exist—so that we don't have to find the chink before we have a way of protecting people who are acting as public advocates. I just want to get back to what the bill is really about.

THE CHAIR: That was probably more a statement than a question.

DR FOSKEY: No. There were two questions in it.

THE CHAIR: Perhaps you could repeat the two questions.

DR FOSKEY: Firstly, the Human Rights Act—how to ensure that people have a right to free speech. Secondly, is there a concern that, with the chink in the defamation laws being revealed, we have people who have had their lives and perhaps matters of public interest silenced? That is of concern to us all.

Mr Quinton: Dealing with the "chink" argument to start with, we don't know of a chink. I think what I've been saying is that up until quite recently stop writs were issued under defamation law because the defamation law procedure was quite different from that of the rest of the law relating to civil actions. It was cheap and simple for people to bring stop writs. The reform activity of jurisdictions culminating in the passage of uniform

legislation denies that procedural advantage and the capability of people issuing stop writs. We don't know of any way of circumventing that process.

The human rights legislation in this area attempts to balance two quite strong competing rights—the right of privacy and the right of public participation and freedom of speech. The uniform bill, expressly at the request of the ACT, takes from the Human Rights Act those two concepts and places them as the purposes for the legislation. It is the belief of law officers who worked on the preparation of the uniform defamation law that that balance is preserved in the legislation so that the uniform defamation act, not only here in the ACT but also throughout the other states and territories, reflects the law that is stated at that principle level in the human rights legislation. I think it is the belief of the people who prepared the uniform defamation law that it be a tangible balancing of those two particular rights.

THE CHAIR: Thank you very much, gentlemen.

GREG OGLE and

VIRGINIA YOUNG

were called.

THE CHAIR: Thanks very much for your attendance. You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation, for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth. Giving false or misleading evidence will be treated by the Assembly as a serious matter. Do you both understand that?

Dr Ogle: Yes.

Ms Young: Yes.

THE CHAIR: Please tell the committee your full names and the capacities in which you appear before the committee.

Dr Ogle: My name is Greg Ogle. I am the Legal Coordinator for the Wilderness Society and the author of the submission and report you have before you.

Ms Young: My name is Virginia Young. I am the National Strategic Director for the Wilderness Society. I am presently involved in helping the organisation deal with the Gunns case, as is my colleague Greg Ogle.

THE CHAIR: Is there anything in your report you would like to address briefly? I note the comments on the submission by the law society. They are particularly helpful. You've summarised their submission quite well and added your response to it. Thank you for that.

Ms Young: I would like to open by thanking the ACT Legislative Assembly very much for putting this initiative so firmly on the agenda. I would particularly like to thank the Greens, who initiated this process. I think we're at the beginning of quite an important dialogue for participatory democracy in Australia, and the ACT Legislative Assembly is leading the way. I was heartened to see that the Chief Minister understands the importance of protecting participatory democracy in Australia. I think this legislation can make an important contribution, even though we think some amendments are required, if we are really going to give the kinds of protections this society needs and truly protect participation in democratic processes in Australia.

I am not the legal expert here, so I will be handing over to Greg, who will go through the submission in a little bit more detail. I want to make a comment pertaining to something one of the previous gentlemen mentioned about the court process and whether or not the court process itself will deal with some of these issues. As someone who sits in the middle of all of the defendants in the Gunns case, I have witnessed firsthand the very high level of distress this case is causing to the families of the defendants caught up in this extraordinary case. It has had the effect of making people more nervous, more

cautious and even withdrawing from the campaign to protect Tasmania's forests. That is unquestionably the case.

The Wilderness Society obviously hasn't withdrawn and will not withdraw from the campaign to protect Tasmania's forests, but ordinary families and ordinary people think twice now before expressing their concerns. This is as much a moral, social and ethical issue as it is a scientific one and as it is about the sustainability of Tasmania's forests. People need to feel that they have a right to express their concerns—a right to protest, if you like. Many of the rights we take for granted have been earned through protesting at unjust laws.

If you consider the whaling issue, how did an end to commercial whaling come about? We have seen protests on the high seas; we have seen a high level of protest around that issue. When thinking about some of the recommendations we're making I would like the committee to bear in mind the question: as a democratic society, how many of our current laws are there because people have protested either for the right to vote, the rights of unions or the rights of the disadvantaged in society, let alone the rights of the environment? With that, I'll hand over to Greg Ogle.

Dr Ogle: I want to talk a bit about the report that was launched yesterday, entitled *Gunning for change*, of which you have a copy. I will not go through it in detail. I just want to go through it a bit to say what we're trying to argue there and use that as background before talking more specifically about the proposed bill before us. The first part of the report looks not just at the Gunns case but also at a number of other cases. I think it is important to recognise that the Gunns case isn't the only case of this variety. In fact, what we've seen over the last five years is a sort of shift from largely defamation law being used as stop writs to wider economic torts and trade practices legislation used against what I would say are quite ordinary examples of community participation in public debate.

One example from Canberra that comes to mind is that a couple of years ago the zoo here was planning an expansion. I am somewhat out of touch but I was brought into it from Adelaide. The zoo sent Animal Liberation here a letter threatening them with legal proceedings if they proceeded with the protest against the zoo. Of course that sent Animal Liberation here into a flap because they had never seen anything like this. Because of my involvement in cases in South Australia, they got in touch and we talked about it. As it turned out, they had a protest of about 10 people which got a lot of media attention because of the legal threat. Because they were able to draw on the experience of other groups elsewhere, they were able to make that backfire a bit.

Regardless of the rights and wrongs of the zoo expansion—I've got no idea—it seems to me to be fairly fundamental that a group of people can have a small, peaceful protest about animal welfare outside a facility like a zoo and not have to go through the hassle of legal threats. Beyond the cases I've listed—and if you look at the first dozen footnotes in the *Gunning for change* report, you'll see a range of cases—there are umpteen instances like that one in the ACT of threats to people putting in submissions to council planning inquiries. There's a whole litany of cases.

As I said before, I think that in the last three, four or even five years we've seen a shift from defamation to economic torts. That makes quite a quantum shift, because if you

look at the way the Gunns case is pleaded—and this is explained in the report—the attempt is quite clear to make perfectly lawful activities like lobbying politicians, putting out media releases and even lobbying customers, into some grand conspiracy or some campaign to harm the company. In pleading it as a campaign and a conspiracy, they draw in a whole range of people who weren't involved in some of the acts they object to, such as forest blockades or disruption of forestry activities. They draw in a whole bunch of people who are doing very mild, quite normal, democratic things.

That's the real implication of the Gunns case and it is not the only case where those sorts of conspiracy claims are made. That to me rings very big alarm bells. It is very clear from the quote in my report of what the Gunns' counsel said to the court that the implications are to make what is otherwise lawful activity—like making representations to government—unlawful as part of a campaign. The report details a number of cases. Having gone through the 15 Hindmarsh Island bridge cases over a number of years, they were quite traumatic and made quite chilling public debate. I saw groups fall apart under the weight of the legal activity. We're talking about the right to public participation as opposed to perhaps other rights that the gentleman before was talking about in trying to balance things.

We could do a quick quiz on what we think is suable. Is stating that anybody who wants to put a suburban housing estate in the middle of an estuary must have rocks in their head suable? Is providing accommodation or meeting places to protesters suable? Is writing to a corporation asking them to put environmental conditions on their purchases suable? Is agreeing to actions which would stop work on an industrial site for a day suable if it is done for political purposes? What about manufacturing a product in breach of laws protecting a corporation's rights in manufacturing? What about organising a boycott of a bus line because of travel restrictions on passengers?

Ask yourselves if they are suable. The fact is that the first four of those were parts of cases I've dealt with—either Hindmarsh Island cases or the Gunns case. The second last one, which seems, on its face, to be one of the more serious issues—manufacturing a product in breach of a corporation's rights to manufacture—is a description of Gandhi's salt march which led to Indian independence. The last one—organising a boycott of bus lines because of travel restrictions—was, of course, the Montgomery bus boycott which launched the civil rights movement in America.

These rights and the ability of the community to participate in public debate in these ways seem to me to be crucial for social change. When you look at the report and the experiences of the groups, there's no doubt that litigation threatens that right. The first half of this report simply concludes that we clearly need law reform to protect public participation. Yesterday a statement was launched by 145 lawyers around the country, including a number of people from the ANU law school in Canberra, essentially backing a call for law reform. That suggests that it is more than just the odd community protester; it is a very serious issue if it is recognised by those people.

The second half of the *Gunning for change* report looks at a range of the law reform initiatives which have taken place or been debated, starting with the uniform defamation laws. The report notes that those initiatives have some good points in terms of protecting public rights, but they clearly don't do enough to fully protect public participation. There are a couple of clear reasons for that. One is that small developers and officers of

corporations and government can still sue for defamation. All 14 of the Hindmarsh Island bridge cases were brought by the Chapmans as directors of the development company Binalong. The uniform defamation laws would do nothing to stop that because they simply said, "We are the principals of the developers. Any reference to developers is clearly a reference to us." As I said before, most recent civil cases are not defamation matters so the uniform defamation laws, even though they put in place a number of good steps including statute limitations and stuff, simply will not provide protection against the new range of cases we're looking at.

Similarly, as much as I am a supporter of human rights bills, the ACT's Human Rights Bill is a balancing act. The qualification in clause 28 of that bill gives no guidance as to where to draw the line, no guidance as to how to protect the right of assembly or the right to free speech. The conclusion we've drawn, as argued in the report, is that we need purpose-built laws to protect public participation. The bill before you is one example of a purpose-built law. The other one we've looked at is a proposal from South Australian lawyers Travis Bover and Mark Parnell. It is the appendix to the report. We would strongly say we clearly need law reform and we need purpose-built law reform of that variety.

When we come to look at the ACT's bill, essentially from our reading of it, the core of it is that it provides for strike-out and cost orders against plaintiffs where cases are brought for improper purposes. The *Gunning for change* report provides a number of comments on that, and the printed version, which was launched yesterday and which I think was sent through yesterday, is an updated version of an earlier one. There are a couple of changes where the current bill has dropped the defamation provisions in Greens' bills elsewhere in order to bring it into line with the uniform defamation laws.

The *Gunning for change* report makes a couple of criticisms of the bill, even whilst recognising that it is really important as a step forward. The criticisms are in terms of the definition of public participation being a bit narrow and the requirement on the defendants to prove an improper purpose on the part of the plaintiff. We say that is particularly crucial because, in practice—and I've actually argued this in court—it is very difficult to prove the purpose of the other side. More than that, I guess, it frames the issue in terms of the plaintiff's purpose rather than the community's rights and the defendant's rights. The core issue in terms of protecting public participation is the effect of these lawsuits, not the intention of somebody who brought them, so it seems to me that it is a better model to posit the right to public participation as a positive right, rather than simply trying to limit infringements or intentional infringements on it. If you took it as a positive right and protected that, then you would address the effects of these suits. That seems to me to be the key issue. For that reason we've suggested looking at the model put forward by Travis Bover and Mark Parnell.

We note that the model in the appendix of the report is really just drafting instructions; it is not set out as a full bill. It is in the format of a bill but makes no claim to be a counsel endorsed bill. It is basically trying to set out the sorts of principles you would be looking at, which we would ultimately say could be incorporated into the ACT bill. There are three main elements but, before that, it establishes in a clause that there is a right to public participation. There are then three main elements used to protect that right.

The first element is a court declaration as to public participation. That is useful in

addressing threats as well. Suppose you get a letter on legal letterhead that threatens you for X million dollars because of your activities in a campaign. A chief judge of the Supreme Court in Adelaide once acknowledged that any normal person getting that would die with their legs in the air, because that's scary. What the provision for a declaration means is that you could go to the court and, in a fairly simple cost-effective manner, say, "We want a declaration that this is a matter of public participation." If you get that declaration, it is a major impediment because anybody suing you over the top of that declaration may well have rocks in their head. That simple declaration from a court would give a lot of satisfaction and create a lot more ease in the community.

The second part is the summary dismissal of claims relating to public participation. Again, not relying on the plaintiff's purpose but simply if what you're being sued over is a genuine exercise of public participation, then it is protected and the case is thrown out. That's a long way from where we are in the Gunns case now, where the only way we can get it thrown out is if it doesn't accord with the pleading rules of the court. There's not much provision to say, "I am sorry, this was normal democratic activity and it is not actionable." That is not what the debate is about at the moment.

The third part of the Bover-Parnell model is the introduction of a statutory tort of improper interference with public participation. That's essentially that, where you can prove that there was an improper motivation, you can sue. You can do that now under an abuse of process tort but the law is a bit muddy around it. Bover and Parnell have sought to say it would be better if it were legislated. On the weekend I had a look at the law society's submission and you've got the various responses to it.

THE CHAIR: I will stop you there. The committee notes that one of the two documents you have tabled is a statement. We're going to treat that as an exhibit but we'll treat as a submission your supplementary comments on the law society's submission, which I thank you for very much. Is it the wish of the committee to authorise a supplementary submission—that is, the comments on the submission by the law society—for publication? That means we can give it to people here. Are you happy with that?

MS MacDONALD: Yes.

DR FOSKEY: What about the updated version of the Wilderness Society's submission?

THE CHAIR: That is an exhibit as well. That was just a formality. I think that will help the proceedings today.

Dr Ogle: That would be good. I guess in the medium term we would like to enter into a dialogue with the law society. The reason I responded to their report was because I thought it was very thorough and raised a lot of points that clarified the issues.

THE CHAIR: If you would like to address that now, you're certainly welcome to do so.

Dr Ogle: We've done point by point responses which effectively fall into three categories. One is the category where we probably disagree with the law society, in that the current system simply isn't working to protect public participation. There are strike-out provisions; the lawyers have to sign off on things and they are simply not working. The range of cases in *Gunning for change* make it clear that that system isn't

working to protect public participation.

The bar is quite high when you go in to try and strike out pleadings. The plaintiffs say, "We have the right to our day in court and we have an arguable case." That's based on an assertion where the assumption of fact is entirely whatever they say it is. It is very difficult to get stuff struck out. It is usually about whether it conforms to rules of pleadings rather than issues about rights to public participation. There's a range of responses there which basically say that the current system isn't working. Even if there are issues about the drafting of the current ACT bill, then let's talk about how we draft it, but with a recognition that the current system isn't working.

The second cluster of things is around where we agree with the law society's submission. There are quite a number of points where we say, "Look, we agree," but I am not sure. On the face of it, it would be solved if we amended it to the sorts of things that are in the Bover-Parnell model. Many of those issues wouldn't be in issue, particularly around the issue of improper purpose, because the framing is different. I've identified where I don't think the issues raised by the law society would be relevant to some of the amendments we're suggesting.

The final area is the definition of public participation. Again, I agree with many of the responses from the law society. Some of them I think would be fixed if we started from the Bover-Parnell model but I've got some issues with that as well. I think it would be fruitful to have a dialogue among a number of the stakeholders and ask, "What does it actually mean? How can we get a better definition?"

I can answer questions on any of the specifics, but I will not go into them now. In summary, I guess our position is that, as Virginia said, we really welcome the fact that this bill is on the table and that it is addressing a really important issue which is an increasing problem. First and foremost, we would be hoping that the committee could endorse the need for a purpose-built act to protect public participation—this or an amended version—rather than what I would say is pretending that the defamation laws or Human Rights Act are sufficient in themselves.

I guess we would like the committee to be able to analyse the principles in the Bover-Parnell model and recommend that the current bill be adopted, or recommend a process that some of those provisions, or many of those provisions, could be incorporated into an amended draft of the bill before you, particularly in terms of the definition of public participation and positively establishing a right to public participation. If you were not going down the track of the Bover-Parnell model, it might still be worth relooking at the defamation provisions in the original act and in the act that the Greens in South Australia introduced. That would stop directors and officers of corporations suing for comments about corporate behaviour. Clearly if there are personalised comments, that's a different ball game altogether.

Those recommendations were attached to the letter that was our submission and we would largely hold to those. The concluding point is that what we're suggesting—a purpose-built act to protect public participation, potentially an amended version of this—isn't a radical step; 25 jurisdictions in the United States have it. In Australian law, we've got the defamation laws at least recognising the problem of SLAPP suits and taking what may be a blunt instrument approach to stopping corporations from suing, but we are at

least recognising the problem and taking a step.

We've got the Trade Practices Act, which recognises the importance of protecting behaviour that's there to protect the environment or consumer issues, so that there are exemptions from the boycott provisions of the Trade Practices Act in section 45D. This is the next step. It is not a great radical process but a necessary step to protect public participation. I end my talk there.

THE CHAIR: You mentioned the zoo case in the ACT. Did anything come of that? Did it actually get to court?

Dr Ogle: Not as far as I am aware. They got a hammering in the media and they went away. But the point is that the protestors should not have had the stress and I should not have had to spend my weekend talking to them.

THE CHAIR: How many matters have got to court over, say, the last five years? I note that there have been changes to the defamation law and I note that what is meant to be a uniform law now specifically excludes corporations but not small businesses of under 10 people. You indicate that some other laws have been used in the last five years. We have heard about the Gunns case, but what other cases have got to court in Australia where this has become an obvious issue and a problem?

Dr Ogle: I have been trying to follow them for a number of years. Most of the main ones are listed in the *Gunning for change* report. There were 14 Hindmarsh Island cases and several other cases. Do you have anything on Hinchinbrook?

Ms Young: There were 176 scientists that Keith Williams sent threatening letters to. One individual he sent bankrupt, that I know of, but I am not sure how many cases actually went to court.

Dr Ogle: I am still finding out about more cases and more settlements. A lot of these cases go to court and get settled and I only hear about them years later or not at all. There is a reasonable list that I have compiled but, as Ms Young said, the other issue is the threatening letters. They can be widespread and very cheap.

THE CHAIR: I note that the submission to us from the law society says that our Civil Law (Wrongs) Act has been amended and plaintiffs have to show a reasonable prospect of success before they can go past the first step. There is ample provision for courts to strike things out.

Dr Ogle: That is fine, except when they have to prove a reasonable prospect of success, it is entirely on their version of the facts and their version of pleadings, which the lawyers sign off on instruction. So all it takes is for somebody who knows how to play the game to stick an odd fact in there or an odd pleading that makes the case arguable. The lawyers are following instruction and it is not down to them, so they sign off on them, and the burden of proof is very high to get something struck out under the current provisions, because you have to simply assume that all the other side's pleadings are factually correct and, again, there is an issue about striking it out if it has no chance of success.

We would say that there is actually more to it than simply no chance of success; there is whether what you are being sued over was actually an exercising of a right of public participation, a right to free speech. You can be exercising your right to free speech and be sued. In the Hindmarsh Island cases, the conservation council was sued over 18 defamation claims. Seven of them were defeated or withdrawn prior to trial. Eleven went to trial. We won eight at trial. We won another two on appeal. So, of the 18, there was one defamation case, one claim, that stood up under appeal. That means you had something like six different judges all disagreeing with each other about what was defamatory.

How is the community supposed to know if the judges don't know? We could not get most of that struck out at the interlocutory stage, including the eight that the judges found at trial weren't defamatory. We could not get them struck out as not being defamatory in the interlocutory stage. Again, the bar is so high that it simply is not appropriate for issues of free speech.

THE CHAIR: Do you see the need for national legislation? I think that even the Attorney-General's Department's submission has indicated that they see a need not only for further work, but also certainly for a national working body to look at all of this.

Dr Ogle: Yes. I would really hope that the attorneys-general in each state could cooperate and take it to whatever the committee of attorneys-general is, but it would also be useful in individual states. With the American model, you have got 25 states. You could do it state by state but clearly, alongside that process, we would also hope that there would be cooperation.

THE CHAIR: Apart from the zoo case, can you think of any other cases in the ACT—off the top of my head, I cannot—where that was an issue?

Dr Ogle: No. I don't have great connection to the ACT, although obviously the first defendant in Gunns v Marr & Ors is a resident of the ACT. As I say, I am quite sure I just don't know the extent of cases. I know the ones I know about because I am in particular networks; hence I know more about South Australia than elsewhere. I could not tell you of more from Canberra.

DR FOSKEY: Thank you very much for all the work that you have done. It is not only timely in terms of our inquiry, but also doing what I think the Greens wanted to do, which was to start a public conversation about this issue. Also, my congratulations to Brian Walters for putting the first thing up there. Everyone knows that the first draft is the hardest one to write but the easiest one to correct, so you have to start there.

Just to explore your submission, it is very interesting that you really question the whole way that the bill is framed and what it is actually looking at. I think you are suggesting that we change the focus from protecting the property rights of the plaintiff to positively defending the rights of citizens. So it is taking a much more positive, a broader, approach which, no doubt, ties in better with our own bill of rights. Could you just expand a little bit more on how you think that is a more resilient model?

Dr Ogle: I guess it is more resilient in a couple of ways. Firstly, in a sense, philosophically, because you assert a positive right rather than wondering if you are

protected from attack. As a user, as somebody who has been in a number of groups who have been sued, I would say it is more useful because what I have to prove to get protection from the law is then that I was exercising a right of public participation, I was doing something that was a genuine act of public participation. It was for a political purpose. It wasn't blowing up buildings or anything; it was within the bounds of democratic behaviour.

But it is much easier for me to prove that about my activities than to prove the plaintiff's intentions or motivations. It is very hard with any legal burden of proof to actually prove what the other side's motivations were. They may be deluded, they may have genuinely mistaken facts, or they may simply have a different view of the world and genuinely believe that they are entitled to compensation for something I have said or something I have done. It is much more in my ambit to be able to say why I did something and that that fits democratic behaviour than it is to say why somebody else has done something. So, in terms of how it plays out in court, it is much more resilient to be resting on a positive right to public participation. As I said, philosophically it is about having a right as the core approach rather than having protection from an attack. It just sits better with me, I think, particularly in a state where you have got the Human Rights Act.

DR FOSKEY: Thanks. That was really well explained. Do you think that criticism of corporate behaviour is not caught by the current draft of the bill? Pages 19 to 20 of the original report—I am not sure how it goes with this one, but it is mentioned in the submission—says that our definition of public participation would need to be widened. The definition in the bill refers to communication or conduct aimed at influencing public opinion or promoting or furthering lawful action by the public or by a government body in relation to an issue of public interest, but it explicitly excludes a range of activities. You go on to say that most of the actions in the Gunns case would not actually be protected by our bill. That is a really important criticism that needs to be taken on board. Do you have a definition? Is there a definition in the Bover-Parnell act?

Dr Ogle: There is; I am just looking for it now. The crucial difference is the head paragraph of what you just read. The Bover-Parnell model, under definitions, is very similar in wording, promoting further action by the public, and it includes the words "or corporations or by any government body", specifically naming corporations, because obviously, as we know, corporations are hugely powerful, for better and worse, in society and it is a legitimate exercise of public participation to actually be holding them accountable and engaging with them.

There are two issues identified. One is that we would certainly be recommending that the definition in the Greens' bill here include the words "or corporations" to make it clear that it is actually legitimate to engage with the corporate sector as part of your democratic right. Secondly, the reason the definition in the bill as it currently stands would not protect in terms of the Gunns stuff is as the law society has picked up in its last point, point (h), which talks about non-interference with any other right. Gunns actually claims interference with a variety of rights to private property, et cetera. I think there is another clause. I haven't got it in front of me but, just off the top of my head, there is another subclause there that does not involve breaches of the law, but quite simple, standard, things, potentially annoying but nonetheless hardly $1 million lawsuit material.

A banner drop might involve a minor trespass. Under the criminal law it might be a small fine, whatever, but suddenly you can be sued for hundreds of thousands of dollars for it. There just seems to be a mismatch there. Similarly, there is the global rescue station in terms of the Tasmanian forests. It was erected in one of the logging coupes in the Styx. There was this huge tree that was hundreds of years old and people erected in the tree, some 60 metres up, a couple of platforms. People were camping there and used it as a focus for media attention on that logging coupe. That, according to the Gunns writ, is the erection of a dwelling or a structure on public land and therefore would be illegal and therefore would be outside of the protection afforded by the act. But that did not harm anybody; it did not interfere with anybody.

Ms Young: They were never asked to leave by anybody.

Dr Ogle: Yes. It provided a focal point for visits by various politicians and community leaders and it was in a coupe that the Tasmanian government and the commonwealth government have now agreed to protect. The definition seems to me too narrow if it excludes that sort of activity. It may be that the Bover-Parnell model is too wide. That, again, is something we would like to be part of a debate about.

Ms Young: That is why the dialogue is so important.

DR FOSKEY: To your knowledge, are any other states currently discussing the Greens' bill or something akin to it? I know that it is planned to be on the table, but I do not believe that it has got to this stage anywhere else. Do you have any further information?

Dr Ogle: I am not sure. I know it was introduced in Tasmania and South Australia. I am not sure that it went further in South Australia but, with the new parliament, I think it will certainly be debated again because the mover of the bill, Kris Hanna, was re-elected at the last election and Mark Parnell was elected. He is a strong supporter of his ideas.

DR FOSKEY: Is that the Mark Parnell whose name is on this document?

Dr Ogle: Yes. Certainly, one of the things we will be doing in the next month or so is writing to and trying to talk to the attorneys-general around the place. I think the ACT Assembly is ahead of the game by having the discussion we are now having, and that is what is great about this, but it will certainly be around elsewhere.

Ms Young: Certainly, the forest and free speech tour that was completed late last year had as its focus the call for law reform, and several thousand letters and submissions have been sent to the various state attorneys-general, so we are in the process really of putting this issue firmly on the public agenda and, hopefully, developing the opportunities for dialogue with governments all around the country.

DR FOSKEY: Do you think a bill such as our bill or the Bover-Parnell model would also protect union activists, for instance, engaged in picketing or the other kinds of activities that we expect from active unionists?

Dr Ogle: It would depend on the drafting and the definition of public participation, I suspect. It may well do in terms of being an attempt to influence corporate behaviour and it would depend probably on the nature of the picket as well, what activities took place

there. I think that potentially it could protect at least some of those activities and I think that it is probably something that needs to be considered and discussed with the union movement and others, employer bodies, about how you might draw up a definition as to whether that sort of activity is in or out.

DR FOSKEY: Certainly, while the impetus has come from the environment movement, there are other community organisations, consumer groups for instance, that are potentially the targets of SLAPP suits. I think that it was our intention that the bill be broader. Reasonableness tests and the notion of clean hands extend throughout the common law. Do you think these proposed laws merely extend the concept of reasonable behaviour to political expression?

Dr Ogle: I am not sure. That is probably more technical than I would be confident to argue. The concept of reasonableness is at the heart of the Lange judgment of the High Court and therefore the implied freedom of speech in the constitution. I guess I would simply say that it seems to me that it should be possible, given that the High Court has grappled with it, to get a definition in a bill as to what is reasonable public participation. Blowing up things clearly is not reasonable public participation, even if it is for a political cause. Causing any property damage probably falls outside the bounds. I am not sure of the legal technicalities there, but it seems to me that it is a reasonable starting point just to look at what is reasonable behaviour that we want to protect.

DR FOSKEY: Have you had a look at some of the American legislation?

Dr Ogle: Not hugely. Mainly I have drawn from Bover's and Parnell's work on that and from Pring's and Canan's original work which put SLAPP suits on the agenda. I have not done as comprehensive a study as Bover and Parnell did. I just looked at the original Pring and Canan version. The 25 acts in America are not uniform. They vary quite markedly in terms of the approach they take. What Bover and Parnell attempted to do was to pick what they thought was the best of them or the best aspects of them, and I guess we have an opportunity here to do a similar sort of cherry picking between Brian Walters' starting point, Mark Parnell's starting point and the submissions that you have got from the other people.

DR FOSKEY: In the United States, would a corporation be able to forum shop—a term the Chief Minister likes to use—so that they could avoid bringing actions in those 25 states and go elsewhere? How true is this idea of forum shopping, how reasonable?

Dr Ogle: In terms of the American legislation, I am not sure. There is certainly no end to forum shopping in America between state and federal jurisdictions; I am not sure in terms of across-state. I suspect it would be similar to the situation here, where it is very easy and quite possible to forum shop.

DR FOSKEY: Is that why Gunns chose Victoria?

Dr Ogle: Again, I do not know what Gunns' intention was. We could accuse them of forum shopping, but that is exactly the problem we have with bills based on guessing their intention. It could be because their lawyers just happened to be in Melbourne. It could be because the law is different in Victoria. Interference with trade and business as a tort has only ever been declared in one case in Victoria. It could be because they did

not want it in Tasmania for political reasons. There could be any number of reasons. But, clearly, there is an ability to forum shop there. They brought similar cases in some of the actions in the Gunns case over Triabunna 2003 and Triabunna 2004, some protest there. They actually sued other activists in Tasmania for the same thing and suddenly they brought this case against us in Victoria.

DR FOSKEY: Do the Tasmanian people who are targeted then have to travel to the courts in Melbourne or is the case being conducted by lawyers?

Dr Ogle: The case has been conducted by lawyers at this stage because there are technical legal arguments about the rules of pleading, but I would say two things: ultimately, if the case comes to trial, the defendants obviously will have to travel to Melbourne and, given the estimates of trials are anything up to three years, that could be a major impact on the defendant. But the other thing is that it is well enough to say that the case is being run by lawyers, but if as a defendant you actually want to understand what is going on in your own case, to try to understand what the other side is alleging and get some sort of idea whether your lawyer is actually doing good work or whether he is a bozo, you actually need to be there, and it is an impediment to those people actually understanding the processes. It seems to me to be something that should be quite crucial to a justice system that it be transparent, and people have the right to understand the processes that they are involved in. That is difficult if it is in Melbourne.

Ms Young: And the judge in the latest round of strike-out hearings expressed deep concern about whether or not you could have a fair trial, given the complexity, length of time and expense involved in this particular case. That estimate of three years, 600 days of court time, to actually hear this case was a kind of moderate estimate of the amount of time likely to be involved. Probably all of the defendants in the case would end up being unrepresented in a trial of that length. There is simply no one that would have the financial resources to deal with a case of that length, other than the plaintiff.

Dr Ogle: And no lawyers. Lots of times with these issues we have pro bono lawyers, but lawyers cannot afford to take three years out of their practice in order to represent defendants.

DR FOSKEY: That is three years pretty much full time.

Ms Young: Yes, 600 court days was the estimate that came up at the last hearing.

Dr Ogle: The estimates vary, but if it is only half that, 18 months, the same applies.

DR FOSKEY: I guess what we are talking about here is using law to provide a balance or a counterbalance, to use the word "balance" again, in a society where corporations have increased power and influence over governments and there must be some reason that some governments are interested in protecting public participation and others less so. You are stating that the Bover-Parnell model really works in the context of a bill of rights or the right to public participation rather than the right to free speech, which is what our Human Rights Act is about; it is a civil right to free speech. Do you feel that a bill of rights would be adequate protection, so that we would not need to have a particular piece of legislation, a bill of rights such as a broader one?

Dr Ogle: I think the American experience is helpful here, which is that they have a bill of rights that is certainly stronger than the right found by the High Court in the Australian constitution. They have had a bill of rights for a long time. It is core to their political culture, if you like, but they also became the SLAPP suit capital of the world. They invented the term. So I think, just looking at the American experience, you would have to say that a bill of rights is useful in a whole variety of ways but it actually needs still a bill of this nature, or the sorts of things we are talking about, in addition to a bill of rights. That, I think, has got to be the lesson from America.

THE CHAIR: Thank you very much for your attendance here today, your assistance to the committee and your submission.

Meeting adjourned from 10.35 to 11.01 am.

STEVEN RUSSEL HAUSFELD was called.

THE CHAIR: I need to read out to you the general caution which is given to all witnesses. It is highly unlikely to be relevant here. You should understand that these hearings are legal proceedings of the Assembly, protected by parliamentary privilege. That gives you certain protections, but also certain responsibilities. It means that you are protected from certain legal action, such as being sued for defamation, for what you say at this public hearing. It also means that you have a responsibility to tell the committee the truth, because giving false or misleading evidence will be treated by the Assembly as a serious matter. Do you understand that?

Dr Hausfeld: Yes, I do.

THE CHAIR: For the record, please give your full name and the capacity in which you appear before the committee?

Dr Hausfeld: My name is Steven Russel Hausfeld. I appear as a representative of the ACT law society. Since I am a member of the ACT bar, perhaps I should explain that. I am the bar association representative on the law society's civil litigation committee and I took to that committee a submission that I drafted on this bill. That was ultimately picked up by the law society and they asked me to come to talk to it.

The submission is substantially against the bill in the sense that it suggests that it is unnecessary and likely to be ineffective. Lest there be any doubt about it, I probably should explain some of my background. I am actually a committee member and a board member, as it were, of the Environmental Defenders Office, and last year I spent a fair amount of time defending a number of the demonstrators against the GDE who were charged with various criminal offences. Those charges were successfully defended in about 13 out of 15 cases, and the other two were pleaded to on a pragmatic basis.

THE CHAIR: A very good result. I am told by the committee secretary that you have some amendments to your submission.

Dr Hausfeld: I do.

THE CHAIR: You can put those on the record and talk to them.

Dr Hausfeld: I should read those. For paragraph 39, there is a simple amendment; that is, in the fourth line delete the first appearing "not". I should also resile from the example mentioned in paragraph 19 which follows on from "For example". Essentially, cross that out, I suggest. The issue is that the example ignores the fact that the words "public participation" appear right at the end of each of the subsections or paragraphs.

THE CHAIR: What do we cross out, starting from the words "For example"?

Dr Hausfeld: Just cross out to the end of that paragraph, I suggest.

THE CHAIR: Is there anything else?

Dr Hausfeld: Not by way of change, no.

THE CHAIR: Would you like to talk to your submission on particular points that you think are relevant to the committee's deliberations? Also, given that you have had the benefit of hearing other witnesses, as indeed they did of previous comments, by all means address those too if you think that it is relevant to your submission to do so.

Dr Hausfeld: The submission goes through the bill in some detail and, unless the committee particularly wants me to rehearse that, I will take that as being substantially covered in the written material. It is fairly detailed stuff.

THE CHAIR: Yes, sure.

Dr Hausfeld: Broadly speaking, as I said, it seems to me that the bill as proposed is likely to be unnecessary and ineffective—unnecessary because the existing common law and the existing court rules, despite what the prior witness said, do provide substantially for staying proceedings in certain circumstances, and that can be indefinite staying, and striking out proceedings, which the earlier witness focused on. What is actually more important is dismissing proceedings, the distinction being that a strike-out essentially is about pleadings. Sometimes it can turn on a technical pleading point, as the former witness said, but mostly it is about whether there is a serious cause of action revealed. A strike-out, though, because it is about the pleadings, means that the matter can be repleaded, so it does not finish the matter necessarily, whereas a dismissal is a judgment and finishes the matter.

A court can take action if there is an abuse of process. An abuse of process is defined quite widely, but it includes bringing a proceeding for a collateral purpose other than getting a judgment; for example, preventing someone from undertaking otherwise lawful activity. I have listed some of the Supreme Court rules that are relevant for those sorts of powers in paragraph 6 of the submission. There is a quite serious problem, it seems to me, if I can take the committee to the paragraph after paragraph 22 of the submission, in the definition of public participation that appears in the bill.

I think the earlier witness, the immediately preceding witness, agreed with the problem that is highlighted in the discussion in the two or three paragraphs following that. Public participation is broadly defined and does not include publication or conduct, and I understand we are concentrating primarily on conduct today, given the changes in the defamation law; so it does not include activity where there has been a prosecution started, where there is a breach of a territory law, where it contravenes a court order, and so on, or that a court—and this is jumping now to (h)—otherwise considers to be unlawful or unwanted interference by the defendant with someone else's rights or property.

The submission I make is that, broadly speaking, if there has been some interference with a right it cannot be public participation, so the bill has no operation. If there has been some interference with or breach of the law or interference with someone else's rights, then a court would generally find now that there was a cause of action that the plaintiff could have. That would generally prevent a dismissal or a strike-out. So the existing law and the proposed bill would come up with the same result. If there has not been any breach of law or interference with someone else's rights, then the matter might be a matter of public participation; but, if there has not been any unlawful activity or any

interference with someone else's rights, then a court would now strike it out, or would dismiss it, because there is no cause of action revealed.

Again, the bill might be effective in those circumstances, but you do not need it because the existing law is already covering it. I will come back to make some comments about the newer proposed bill that the Wilderness Society is bringing forward, because I think there are some countervailing problems that crop up with it, but that is at the heart of the unnecessary and ineffective that I am suggesting.

Broadly speaking—rather than running through the details, I am going to take a broad-brush approach—the legislation has the potential to be improperly discriminatory. It discriminates against certain classes of litigation only and it discriminates against types of litigants. In that respect, I wonder whether there would be circumstances in which it would be adversely commented upon by the Supreme Court under the Human Rights Act.

I have raised there a number of points where the bill proposes that there be a standard of proof other than on the balance of probabilities or beyond reasonable doubt, to pick up the criminal standard of proof. It is actually in conflict with the commonwealth Evidence Act. The commonwealth Evidence Act, which applies in the ACT, says that there are two standards of proof, in effect. There is the criminal standard and there is the civil standard, and the civil standard is beyond reasonable doubt.

THE CHAIR: That is the realistic possibility parts of bill.

Dr Hausfeld: Yes. Under the self-government act, because we are a territory, we do not have a direct section 109 of the constitution problem of conflict, but we have the equivalent provision in the self-government act and we cannot be in conflict with the commonwealth Evidence Act. I understand that there is some consideration still happening for the ACT to adopt its own evidence act and that may resolve some of that, although I would expect that that evidence act would in fact have those two standards of proof in it as well.

One of the other broad things that arise is that the upshot of the Wilderness Society submission earlier was that there should be a right of public participation and there should be a statutorily defined tort of interfering with that right. Looked at in the broad, that in effect creates a human right of public participation and says that that right can be sued upon individual against an individual. This is a personal view that I have not, because it is a new matter that was raised immediately before me, discussed with others in the law society, but can I say that I frankly applaud that.

The idea that ACT human rights might be sued upon individual against individual is a very good idea and it is one I have previously published on. The only question I have is: why don't we make all ACT human rights able to be sued upon individual against individual? Why would we pick on this one right only? I note that the model of the ACT Human Rights Act follows the human rights legislation model in New Zealand, the UK and Canada. The model that has, as far as I am aware, human rights that can be sued upon is the US model. I think that, strictly speaking, the UK model has to be regarded as a little bit of a hybrid because, as I understand it, the Europe-wide human rights legislation does provide rights that can be sued upon by individuals and that is imported

into the UK legislation by their participation in the European community. But what I have said about that international context, I have to say, is the full extent of my ignorance or knowledge about them. I am not expert on them and I cannot take that much further.

I probably should turn to some quick comments on appendix 1 to the *Gunning for change* paper—that is, the Bover-Parnell model bill—which I have had a few minutes to look at. I take the committee to what is numbered as page 31, section 3, definitions. The definition of public participation was alluded to by the Wilderness Society witness. It avoids the sin that I pointed to by having the general paragraph (h) definition that is in the current bill that the committee is considering, which is a general breach of other rights or laws.

It avoids the problem that I raised about that clause and it therefore gives some meaning and use to public participation. However, it has the potential problem that public participation can then justify, and be a defence in effect to, trespass, nuisance, negligence and potentially other tortious behaviours. The assaults and such things are excluded nicely, but I am not sure that the ACT would want to allow public participation to justify trespass, nuisance and other tortious behaviour.

Section 5, if I can move on to that, is an interesting one because it deals with people against whom threats of legal proceedings are brought. It is a concept that does not appear very much in our law in that sort of way, threats of legal proceedings. Threats of physical action—that's an assault; it is not a problem. It is already dealt with in the law quite nicely. Threats of legal proceedings—"Get off my front lawn or I am going to sue you." Is that a threat? Does it have to be in writing? Does it have to be serious? Does it have to be such that a reasonable person would expect that the threat would be carried out? I am not sure what to make of it all.

I noted on the way through—I haven't got chapter and verse with me on this one, but my recollection is a fairly strong one—that there is a rule covering solicitors that they may not threaten legal proceedings that they do not intend to proceed with, and to do that would be a breach of the solicitors rules. Those solicitors rules will soon, once the legislation has passed the Assembly, have the force of law, being delegated legislation, and breach of them would constitute professional misconduct at least on the part of the solicitor.

Section 5 (3) (b) raises an issue that is also in the current bill; that is, that the court may make an order awarding damages to a successful applicant, and so on. This model bill and, indeed, the bill the committee is considering, mention damages in such cases. That is new law and it is something that the bill adds. Because it is new law, it seems to me, especially in the context of the Civil Law (Wrongs) Act, which sets out clearly a number of things which may be included in damages and others which may not, that the law should specify what sorts of things are intended to be covered by damages.

There was some discussion earlier this morning about, for want of a better word, the aggravation caused to defendants when they are confronted by a multimillion dollar suit. I do not think anyone would have difficulty understanding the aggravation, but the aggravation falls short in most cases of a definable psychiatric or psychological condition. The common law has been for some time that unless you reach that threshold

you do not get damages. That same position is reflected in the Civil Law (Wrongs) Act now. To put it in another way, as the common law had previously put it, sorrow does not sound in damages, a psychiatric condition will. So mere aggravation is generally not going to produce damages.

The only exception to that that I am aware of is a very small number of cases which are not fully followed, so they have not been regarded as a general precedent, concerning aggravation caused to people who have suffered a wrong under the Trade Practices Act, I think in particular under section 52, a fairly defined range of cases. It is a while since I looked at it. At the time I last looked, I think there were about half a dozen cases, and there were lots of cases going the other way. So, because it is a new sort of damage, in effect, that is sought to be got at, I think there needs to be some attempt, if the ACT is going to do anything about that sort of damage, to address what should be counted in the damage, otherwise the only thing I can see that is going to be counted in the damage is costs, and unless the bill or the act does something different from what it does now the courts will apply the normal rules for costs.

That means self-represented litigants get very little by way of costs and costs will be normally assessed on a party and party basis, which means that even if you have employed a solicitor you are probably not going to get all your costs back. You might only get 70 per cent, 65 per cent or something like that back. It is feasible. The courts currently have power to award either solicitor-client costs against a party or indemnity costs, in which case essentially all costs are recoverable. So some attention needs to be given to that area for the awarding of costs under this act but also for the awarding of damages.

The other thing that I would say about the section 5 sort of approach, if someone seriously wants to take this up, is that there needs to be a very clear provision that allows a court to order that an unsuccessful respondent to a section 5 cause of action is precluded from launching proceedings in the matter without leave of the court. If there is an improper threat against someone taking public participation, you actually want to make it stick. You don't just want a declaration that the person was engaging in public participation; you want some stay or some bar to the respondent proceeding.

There is a provision in there at the top of page 32 about denying the representative of the unsuccessful respondent the right to charge for the services of making improper threat and so on. That is, essentially, a costs order against the lawyer. That is already provided for in the Supreme Court rules and will be provided for in the new uniform rules, and it will be an order that is available under the new rules to both courts. It is also provided for in the Civil Law (Wrongs) Act in the section surrounding section 188, which requires the declaration by the lawyer filing proceedings that there are reasonable prospects of success.

Lest there be any doubt about those sections, I think there were some misleading comments about that by the preceding witness. Those sections require that the lawyer who is filing the proceeding certify that, upon a reasonable view of the evidence and the evidence available to them at the time, there are reasonable prospects of success. So it is not just the instructions given by the client; it has to be based on the evidence. There are penalties for someone who falsely makes such a declaration. Those penalties include disciplinary action, including being found to have engaged in unprofessional conduct and

so on, and a personal costs order against them is possible. So a solicitor doing that may have to pay the costs wasted in the proceeding.

In the largish paragraph in section 4 on that page immediately after the (b) there is a reference that the court shall require only a prima facie showing of facts which, if true, would support the applicant's claims. Depending on what exactly is intended with that, again there may be a problem arising with the commonwealth Evidence Act and inconsistency with that act, given the standards of proof that are specified in that act.

There are a number of other provisions, like subsection 6 on that page, a couple of subparagraphs down, and then the beginning part of section 6 where existing court rules would provide essentially the same sort of thing. In section 6 over the page—that is, on page 33 of that submission—I comment with regard to subparagraph 5, which repeats a provision that was in section 5 as well. It says, "No determination, nor the fact that such a determination was made under subsection (1), will be admissible in evidence at any later stage of the case or in any other case."

I would have thought that was the wrong way to go if you were serious about this. It prevents someone from going to court and saying that it has already been decided that this is public participation. You want that matter to be covered by the principles of res adjudicata, already addressed by the court, and you want to be able to rely on that finding, I would have thought.

A matter that is relevant to both the new model bill that the Wilderness Society puts forward and the existing one is in section 7, the reference to punitive or exemplary damages. Broadly speaking, I think the bill or the act would need to spell out the basis on which they are awarded and how they are going to be assessed—perhaps not how they are going to be assessed, but the basis on which they are going to be awarded.

If you want the courts to do something different about those forms of damages which are currently available to the courts, then I think it behoves the drafters to say what is different that is wanted. In that context, in the Civil Law (Wrongs) Act and in corresponding legislation around Australia there has been increasingly over recent years limits put on exemplary and punitive damages. Those limits are mostly restricted to personal injury sorts of matters or other specific areas, and it may not impact directly on this, but it is an area in which I think some caution is required.

Short of wasting the committee's time by running paragraph by paragraph through the written submission, I think that is all I need to say.

THE CHAIR: Thanks very much for that. I am interested in the statement in the law society's submission that in a number of areas the draft bill actually breaches our own Human Rights Act. I would like you to comment on that.

Dr Hausfeld: Let me flick through and make sure that I pick up the main ones. First of all, proposed new section 37A (c) says that, consistent with the Human Rights Act, the bill is attempting to better protect the right of peaceful assembly, the right to freedom of association, the right to freedom of expression, and the right to take part directly in the conduct of public affairs. It is quite unclear, it seems to me, that the bill actually achieves those ends. The main area where it seems to me that there is a potential problem with the

Human Rights Act is that, despite the fact that the Human Rights Act says that all parties are going to be equal before the law and—I am misquoting, but broadly—all parties have the right to have matters tried fairly in court, this act attempts to make special damages provisions and special cost provisions for a very limited class of defendants in a very limited type of action, and that potentially, it seems to me, breaches the broad protections that are provided for in the Human Rights Act. The Human Rights Act allows, as it were, such breaches but only to the extent that they are the minimum proportionate response required to fix some particular mischief, and I am not sure that that can be argued for properly with this bill.

THE CHAIR: I understand that.

Dr Hausfeld: At paragraph 20, there is a similar reference to the very restricted way in which improper purposes are defined, and that again may be faced with the same problem vis-a-vis the Human Rights Act, although I can see the beginnings of an argument as to why, because it is all linked to public participation, you might be able to argue that it is a proportionate response that otherwise would be discriminatory under the Human Rights Act but may be permitted. I think it is nevertheless a problem area.

As I was saying earlier, looked at in the broad, this is almost an area that is better dealt with as a human rights thing, because when you unpick what the Wilderness Society people were saying earlier, they are saying and to some extent the bill is trying to say that there is a human right of public participation, at least in our sort of society. The Wilderness Society's bill goes on to say that this one is special and requires a whole special set of legislation. I do not buy that second step of the argument. I think there are equally important, if not more important, human rights specified in the Human Rights Act and that, if something special is required to protect that human right, why not the others as well? I think that is all I need to say on that.

THE CHAIR: Thank you very much.

DR FOSKEY: Thank you very much for the detailed attention that you gave to our bill. It certainly needed that kind of analysis. I note that a previous witness from the Wilderness Society also values your input. I commend a dialogue between you. Perhaps you spoke at the morning tea break. It seems to me that, while you said initially that we do not need this bill, some of the things you said later contradicted that. You will have a different opinion, but that is what I heard. Your submission is written on behalf of the law society?

Dr Hausfeld: My submission has been adopted by the law society.

DR FOSKEY: In your introductory remarks, apparently you felt it necessary to say that you were the lawyer who defended the protestors against the Gungahlin Drive extension. I was wondering why you thought that was relevant.

Dr Hausfeld: Purely because I did not wish to come here and be seen as an apologist for big business or any other particular anti-environment groups. My initial reason for having a look at the bill in detail is that, when I looked at the bill and saw it was before this committee, it seemed to me that it required a sensible legal analysis, which I tried to provide, lest it get enacted—to be perfectly honest.

DR FOSKEY: I appreciated that that was probably why, but I just wanted to expand on that. You clearly support the right to participate that this bill attempts to protect, although you have concerns—

Dr Hausfeld: I do not know that I would say that. To the extent that there are rights to participate in our society, there are some rights already recognised by the law and I am happy to support them. This bill tries to take it a step too far without having thought through exactly all the consequences of taking that step and the mechanisms for doing it.

DR FOSKEY: You expressed concern at some of the activities that the Wilderness Society bill, the Bover and Parnell bill, would aim to protect, such as trespass. There might be areas in the ACT where we might not be willing to go as far. I remember, in my years in East Gippsland, one of the ways that the forestry commission, as it was then called, used to stop what had previously been allowable was to make it a crime of trespass to enter a logging coupe.

We cannot assume that law, despite its impartiality, et cetera, is always something that is introduced for the good of the whole of society. I wanted to make that point, especially about a law like trespass and especially where public property is concerned, as distinct from private property, for instance.

Dr Hausfeld: Without wishing to be too impertinent, can I suggest that, for one of this community's lawmakers to say that laws are not always made for the good of the community, is a very surprising thing for me to hear.

DR FOSKEY: There is an imputation there, but I am talking about a particular law in a particular context. Law is made within context.

Dr Hausfeld: First of all, the trespass I was mentioning was a civil one. Different considerations apply to criminal trespass. The other thing is that there are a number of interesting cases about those trespass-to-logging-coupe cases which end up turning quite importantly on small procedural details in the legislation and have managed to get demonstrators off because the powers that be had not issued the right warrants or the wrong person had issued the instructions to get out of the area and all of that sort of thing. Those rules cut both ways, to some extent.

DR FOSKEY: The Human Rights Act currently does not have the ability for people to demand the rights that are covered within it or to protect their rights. The way that it currently exists in the ACT—I am not sure that there are any proposals to extend it—is that a person could not claim that the Human Rights Act protected their right to public participation at the moment. Would you have a different view?

Dr Hausfeld: No. I agree with you on that. There are a couple of minor provisions that an individual can sue for wrongful imprisonment or something like that. That is one of them, but by and large the Human Rights Act model that is adopted in the ACT does not provide individual remedies. As I said, I have previously published elsewhere that it seems to me that it would be better if the act did.

DR FOSKEY: The last sentence in your paragraph 13 states that, to the extent that the

bill proposes an entitlement to damages from proper proceedings, it raised a problematic issue without providing guidance to courts on how to implement any such provision and goes well beyond existing law. Do you think there would be any insurmountable difficulty in drafting legislation or explanatory statements which contain such guidance?

Dr Hausfeld: I am not a drafting expert but I imagine it could be done. The issue that I raised earlier is that, if you are going to specify and be awarded new types of damages or damages in new circumstances, it is probably incumbent upon the drafters to give some guidance to the courts about that.

DR FOSKEY: You say that the bill as it stands is likely to be ineffective. How could the bill be amended to make it more effective, and would you be willing to enter into a discussion with the Wilderness Society and any other interested parties, like my office, to work at drafting a better bill which will address the concerns that the bill attempts to remedy?

Dr Hausfeld: First part first: I do not know how it can be done better. I do not know whether it can reasonably be done better than the way it has been attempted. It would be a very simple amendment, frankly, but a very large one—large in impact, small in numbers of words—to the Human Rights Act to simply make human rights able to be individually sued upon. It is a relatively minor matter, if the Assembly were minded to, to write in public participation as a human right. Otherwise, you end up trying to run over a whole lot of existing common and general law and existing court procedures and, when you try to put in place a bill that tries to displace them, that can produce some quite iniquitous results, it seems to me. That is where the problem comes up.

In terms of discussing things with people, I would not be here if I were not interested in the topic. I am happy enough to discuss it with people.

DR FOSKEY: That is good. Regarding your criticisms in paragraphs 32 to 38, would implementing a sliding Briginshaw standard get over your concerns?

Dr Hausfeld: No. The Briginshaw standard is no different from the balance of probabilities test. It is a part of the balance of probabilities test. The Briginshaw standard is, in effect, already written in, without naming it, the commonwealth Evidence Act. It is already in and it does not overcome the problem.

DR FOSKEY: In an interlocutory proceeding—this relates to paragraph 39—does the Evidence Act allow evidence which does not relate to a claim made by a party in the proceedings?

Dr Hausfeld: It depends what you mean by "a claim made by a party in the proceedings". It would be possible that evidence was relevant—that is, related to a matter in issue—in the interlocutory proceeding but not in the substantive proceeding, or vice versa. As a matter of law, in the interlocutory proceeding there should only be evidence which is relevant to the matters in the interlocutory proceeding. Sometimes that would mean, because of the interlocutory proceedings about dismissal or strike-out, one might have to go to the merits of the substantive proceedings. Then the availability of evidence relevant to that might be canvassed in some circumstances.

DR FOSKEY: If you were talking about a bill that establishes a right to public participation strong enough to be equal to or greater than minor trespasses and property rights, would your submission still be that it is unrealistic or unnecessary?

Dr Hausfeld: I think so. Our comments are on the bill as it stands. It is unnecessary because the bill as it stands does not add enough to the law or, to the extent it adds in a couple of places, it is too unclear. It is ineffective, again for a similar reason. It really adds nothing of substance to the existing law. However, write two sections and add them to the Human Rights Act and you have got yourself a good partner. One section—it is a paragraph or a subsection—says that there is a human right of public participation. The second says that all the human rights specified in whatever part of the act it is can be sued upon, individual against individual, or person against person. My point is that that avoids elevating the right to public participation any higher than the other human rights.

DR FOSKEY: I see what you mean there.

Dr Hausfeld: It is a big ask.

DR FOSKEY: That was what I was going to say.

Dr Hausfeld: Politically, it is a big ask.

DR FOSKEY: Which is more politically achievable and still achieve the end—

Dr Hausfeld: My point is that, unless you go the whole hog, as it were, and put it where it belongs in the scheme of things, you end up with a bit of a bandaid or patchwork thing that has got too many holes in it.

THE CHAIR: I note the time. If you have got more questions, Deb, we will go till 10 to 12 with this witness. We are running a little over time.

DR FOSKEY: I have only got one or two more questions. Sometimes bandaids are necessary to staunch the bleeding. If this bill does not get up, do you see merit in amending court rules to clarify where punitive costs orders are appropriate?

Dr Hausfeld: Not really, because I do not think that, in the general run-of-the-mill cases, there is terribly much doubt about it. It is not all in the court rules anyway these days, because the civil law (wrongs) and the civil liability acts around the country limit the scope for awarding such damages in some cases.

I do not know that it would be effective because I do not know how you would write it in, short of a silly provision like "if they turn up in jeans and are barefooted and they smell like they have been in the forest for the last three days, they are okay". Unless you have got vastly discriminatory provisions, which would be quite improper, I am not sure how you would possibly implement it.

DR FOSKEY: You could have corporate executives dressed up in jeans and barefooted, looking as though they had been in the forest for three days.

THE CHAIR: If anyone has any further questions for any of the witnesses, I hope none

of the witnesses mind if the committee sends them to you as supplementary questions. Thank you very much for that and for your assistance to the committee, Dr Hausfeld. If we need to send you a few additional questions that people might think of, I certainly hope you do not mind answering those.

Dr Hausfeld: That can be done.

TRISH HARRUP was called.

THE CHAIR: You should understand that these hearings are legal proceedings of the Legislative Assembly, protected by parliamentary privilege. That gives you certain protections but also certain responsibilities. It means you are protected from certain legal action such as being sued for defamation for what you say at this public hearing. It also means you have got a responsibility to tell the committee the truth because giving false or misleading evidence will be treated by the Assembly as a serious matter. Do you understand all that?

Ms Harrup: Yes. Thank you, Chair.

THE CHAIR: If you would indicate your name and the capacity in which you appear before the committee.

Ms Harrup: My name is Trish Harrup. I am the Director of the Conservation Council of the South East Region and Canberra. The conservation council put in a brief letter of submission in response to the public announcement of this inquiry. I am very pleased to be here to speak to our key concerns and interest in this area. I flag at this point that we would be interested in making a further submission, particularly having now seen the subsequent submissions from the Law Society and the Wilderness Society.

THE CHAIR: No problem.

Ms Harrup: I speak in my capacity as the director of an organisation that participates in public campaigning; it is an active public participant. I put on the caveat that I am not a lawyer and I do not wish to provide detailed legal wording or drafting advice.

As an organisation that campaigns on matters of public significance, the conservation council recognises the importance of protecting the rights of citizens to speak and act freely on matters of public interest; that is, protecting the right of the public to engage in and participate in their democracy. Therefore, I am very pleased to have the opportunity to speak to the members of the Assembly Standing Committee on Legal Affairs on this issue.

Our sister organisation in South Australia, the Conservation Council of South Australia, was subject to a series of lawsuits in the mid 1990s designed to limit their participation in a matter of public interest. That was the development of a marina and bridge in a culturally and environmentally significant area. Whilst the legal actions were brought mainly under the defamation laws, they could also have been brought under civil tort law and so are relevant to the issues we are discussing today. Other tactics were also used to deter participation. For example, participants at a rally were photographed and sent letters threatening legal action.

The legal case went on for about a decade and was a drain on the financial and emotional resources of the conservation council. They were ordered to pay a sum of around $150,000 in damages plus costs, which is a very significant amount of money for a conservation council. It is certainly greater than the financial resources we have at hand. All this stemmed from activities that we would regard as normal to the process of public campaigning: a rally outside the parliament, an open letter from the president of

the conservation council to a corporation that was involved in the project, and an article in the conservation council's newsletter.

In the United States, multimillion dollar lawsuits have been filed against individual citizens and groups for exercising their democratic rights of activities such as circulating petitions, writing to representatives, speaking out at or attending public demonstrations, organising boycotts, engaging in peaceful demonstrations. Many of these actions are not intended to win in court but to deter citizens from speaking out, to distract people from campaigning and to scare other people into silence or into apologising and backing down.

As Sharon Bedder, an Australian academic who has examined the North American experience in detail, describes, the people bringing these cases win the court cases when their victims are no longer able to find the financial, emotional or mental wherewithal to sustain their defence. They win the political battle even when they lose the court case if their victims and those associated with them stop speaking out against them.

To overcome this, many jurisdictions, as we have heard, in the US have introduced specific anti-SLAPP legislation. Australia has not yet addressed this issue; thus the ACT has an opportunity to introduce legislation that could form a model for all the states and territories to adopt. The ACT has introduced defamation laws that go some way towards addressing this issue, which is terrific. However, we still think it is worth looking at what else needs to be done to prevent the use of SLAPP suits.

Public participation is a fundamental right in a free, democratic society and we believe it should be protected by legislation. We support the principles enshrined in the objectives of the bill; that is, encouraging public participation and dissuading people from bringing or maintaining proceedings designed to stifle public participation. The conservation council fully supports the introduction of legislation in the ACT which aims at encouraging public participation by protecting the right of the public to participate in social and political activities on a range of issues.

The broad principles which we believe should be incorporated into the legislation are: to establish public participation as a positive right; to provide immunity from civil litigation for all public participation that is exercised genuinely, not motivated by malice or personal gain, is non-violent, respectful of property and does not constitute vilification. Specifically, we think the legislation should provide appropriate deterrence measures; a means by which a proceeding which unjustifiably interferes with a right to public participation can be summarily dismissed, expediently and inexpensively; and a means by which damages can be recovered when a person's right to public participation is unjustifiably interfered with.

These three points go to the heart of the intention behind many of the lawsuits against public participation, to tie people up financially and emotionally in lengthy legal proceedings. Whilst these issues remain unaddressed specifically in legislation, the ACT cannot claim to be a jurisdiction where citizens are encouraged to speak and act freely on matters of public interest; that is, to engage in and participate in their democracy.

We welcome the Greens' bill and are pleased the government supports the intent of the legislation. We have only had a brief opportunity, as I said, to look at the law society's

submission and the Wilderness Society report. We will be seeking the advice of the ACT Environmental Defenders Office on the legal arguments raised by the law society. We seek permission of the committee to provide additional comment on these.

THE CHAIR: There is no problem there.

Ms Harrup: In addition, we believe there are some aspects of the South Australian EDO model that could enhance the current bill. We want to be sure that the legislation will effectively stop Gunns type litigation and protect public participation; so we believe some amendments may be required and look forward to entering into that dialogue.

THE CHAIR: There has been some work done on a national level. Would you support a national approach to this? Do you see that as being important or otherwise or necessary?

Ms Harrup: We would certainly support a national approach to anti-SLAPP suits. We believe that the ACT, as often is the case, has potentially an important role in leading the way towards a national approach.

THE CHAIR: You may not know this, but are you aware of any cases in the ACT that are relevant, where this has been a problem?

Ms Harrup: I am not aware of any specific cases. The Wilderness Society mentioned the case of the zoo. One of the insidious aspects of SLAPP suits is perhaps the ones that we do not hear about because they do not get to court. There is quite significant analysis of these experiences in the US undertaken by Sharon Bedder, the academic I referred to. Brian Walters in Victoria has discussed many of the Australian examples.

It would seem that the experience of many members of the community upon receiving a letter threatening legal action is to contact a lawyer. They are then given the advice that their house, their livelihood and their emotional wellbeing are under threat; apologise; back down; settle; do not go to court. It may be that in the ACT there have been instances where people have been silenced without that issue coming to court. I believe, though—and I mentioned the South Australian experience—that there is certainly the potential for that to happen in the ACT.

DR FOSKEY: A subsidiary comment is that, apart from the person who directly gets the letter, other people are silenced on that issue. Certainly my experience when we first heard about the Gunns writ was that immediately people were very careful about how they reacted to that, because of the concern that they might be included in it. It has a ripple effect, would you say?

Ms Harrup: I agree with that. Our experience with the high-profile Gunns case is that it caused concern amongst our membership as to whether or not what we do could also be subject to litigation. It would seem the experience in other campaigns has been that the threat of legal action towards some individuals has had a wider impact in that other individuals have backed down from participating in public issues.

THE CHAIR: I do not know—tell me if you can—how you could possibly stop people sending other people a legal letter.

Ms Harrup: It may not be possible, but having specific support of public participation enshrined in legislation would be a helpful way for people to know and be advised that the threat may just be a threat and what they are doing is positively protected.

THE CHAIR: An empty threat. You are not suggesting any limitation on the right of people to send legal letters, which would have severe ramifications, I would imagine.

Ms Harrup: No, absolutely not.

THE CHAIR: I understand what you are saying.

Ms Harrup: If, for example, there were that positive protection of public participation in ACT legislation, we could refer any member of our organisation, or of other organisations who brought to our attention a legal threat, to that positive protection of their public participation. It would seem that that does not happen at this stage.

THE CHAIR: This may be more a question for someone like the government officials, but do you see the converse: if we went down this path, would there be the need for checks and balances and then something in the legislation to protect bona fide groups? I am thinking of a converse situation, of having the pendulum swing too far the other way, so that it makes it difficult for corporations or groups to undertake legitimate actions.

Ms Harrup: I am not sure of the question but, as we said, the public participation needs to be exercised genuinely, not motivated by malice or personal gain.

THE CHAIR: You have understood the question.

Ms Harrup: I reject the notion that public participation is akin to self-interest.

THE CHAIR: There seemed to be quite a good judgment in the document you sent with your submission. The Ballina council could have simply said, "That sewage is treated; it is quite all right," rather than take the action it did. The court case said that public participation, even if it is ultimately proved to be wrong-headed, is reasonable, provided it is not excessively or recklessly wrong-headed. I am worried about, perhaps, "excessively or recklessly wrong-headed" participation, which might have an adverse effect. How would you see that being countered, if at all?

Ms Harrup: As an organisation, we certainly do not encourage or endorse unlawful behaviour. However, we believe that that should be dealt with under the criminal acts rather than under civil litigation. There is also a concern that, by association, someone who is genuinely interested in the public discourse on an issue could be caught up in litigation because other people have perhaps engaged in something such as trespass.

THE CHAIR: We all understand criminal behaviour. Totally unrealistic; almost impossible; no chance of succeeding type of action which might tie up a department, another individual or a corporation; totally unnecessary—do you see that as a problem? Do you think there is sufficient delineation? Obviously it cannot be criminal. There would be other mechanisms in place for the actions a corporation is taking. That would

be seen as quite reasonable. The opposition to this is not a fair dinkum use of proper public participation. It is one or the other. It might not be criminal but it is right at the other end of the spectrum. "Vexatious" is probably a reasonable term.

Ms Harrup: Sorry, Bill, I do not think I follow the question.

THE CHAIR: That is fine. I am thinking of public participation which, whilst not criminal, is probably vexatious; it is totally unreasonable; clearly there is very little merit to it; and there would be every reason for the other side, be it a corporation or whatever, to attempt some legal action to stop it. Do you see this legislation or similar legislation as a bit of a problem in terms of stopping that?

Ms Harrup: No. I believe it could be drafted to properly define public participation.

Short adjournment.

DR FOSKEY: Given that you are not a lawyer, and I am not either—

Ms Harrup: We can have a normal conversation!

DR FOSKEY: I am going to ask you a lawyer's question. Do you foresee problems with the fact that the uniform defamation laws do not stop corporate directors and other officers suing for defamation?

Ms Harrup: Yes. I understand that could be a problem. In the case brought against the Conservation Council of South Australia, it was two individual directors of a corporation who brought the proceedings. It was quite a small corporation.

DR FOSKEY: With fewer than 10 in the corporation?

Ms Harrup: Yes, a corporation with fewer than 10 is, from what I understand, still able to bring the proceedings.

DR FOSKEY: In other words, you do not think that the uniform defamation laws have solved the problem?

Ms Harrup: There would be merit in a specific address of defamation under anti-SLAPP or public participation legislation.

DR FOSKEY: You are a person who is in the hot seat as far as this kind of action goes. It must be something that you think about every day. What would happen to you, do you think, as an officeholder, and to the conservation council as an organisation, if you were subject to a writ for the actions of your supporters, a member group, for trying to highlight certain breaches, depending which organisation it was? How would you then deal with that? What would be the impact upon you or your organisation?

Ms Harrup: The impact could potentially be very significant. I have certainly observed the impact on some other organisations. The experience, it would seem, with these sorts of cases is that they go on for a great length of time. They can be very expensive. It is quite frightening to believe that one's small accumulated assets—and they are always

small if you work in the community sector—could be under threat and that the organisation itself, having been an important part of the community for decades, could be under threat.

DR FOSKEY: After undergoing that trauma of having a writ issued, if you were successfully sued, would that mean the end of the organisation potentially, because of financial—

Ms Harrup: Potentially, yes. It would seem that the damages that can be awarded can be substantial. In the case of the Conservation Council of South Australia, it was only through a great deal of effort and fundraising and the public donating money to help cover costs that they were able to survive.

DR FOSKEY: In the Bover and Parnell submission, it is pointed out that civil rights that we take for granted, like universal suffrage and so on, were won by civil disobedience and minor interference with property rights. Do see your ability to perform your functions compromised in the absence of the protection of laws like the ones we have proposed or that Bover and Parnell have proposed?

Ms Harrup: Non-violent protestors played an important part in many of the environmental campaigns that have been conducted in this country, and non-violent protest has been an important part of protecting significant environmental assets, some of which are now our major tourist destinations. But the fact is that litigation has been used in a strategic manner overseas and, it would seem, is emerging in Australia to stifle public participation and to scare people off from exercising their human rights. Our concern is that, if we continue to go down that path, we will severely limit the opportunities for the kinds of organisations that I represent to participate in public debate and the kinds of activities that they historically have participated in.

DR FOSKEY: It is a check on the ability of corporations to silence critics. Do you see that as one part of a challenge that organisations like yours are facing, not just from corporations at the moment, and that this is just one of a series of things that could have the impact of quietening public participation and concern?

Ms Harrup: Yes. It is a very important one, though, because it has clearly been used as part of the strategy to silence members of the public who wish to participate in matters that should be open for public debate rather than merely subject to debate in court.

THE CHAIR: Have you seen a situation in the ACT courts where this has happened?

Ms Harrup: In my own experience, I have not, no.

THE CHAIR: Thank you very, very much for your assistance to the committee. We look forward to receiving your updated submission.

Ms Harrup: Thank you.

BRETT PHILLIPS,

PETER QUINTON and

DAVID SNELL

were recalled.

THE CHAIR: Gentlemen, the previous caution applies, of course. Restarting from where we left off, I have got a number of questions. Mr Snell has been sitting in for the whole of the proceedings. Are there any particular aspects of any of the evidence you have heard which you wish to comment on? That might negate a couple of questions I have. I give you that opportunity while they are fresh in your mind, or would you like me to ask you a few questions?

Mr Snell: Broadly, there are a number of matters that have been discussed this morning that we have taken some considerable interest in and will continue to do so. Our preference at this stage would be not to directly address most of them. Some of them are technical issues, as you heard, but some of them are fairly significant policy issues such as the proposal that you might insert provisions into the Human Rights Act making the rights dealt with in that act able to be sued. We would need to have a think about the ramifications of that and come back to the committee at a later stage, if that was acceptable.

THE CHAIR: I note that one of the matters mentioned by the law society rep was that a simple amendment to the Human Rights Act to have public participation written in as a human right was a possibility. Do you have any preliminary views on that? Is that something that is—

Mr Snell: I do not think we would define it as a simple amendment, not for a second.

Mr Phillips: In relation to the Human Rights Act, if you remember all of the consultation that went on, they had a bill of rights committee. The bill of rights committee recommended a dialogue model. The way the legislation has been enacted reflects what the recommendations were and what the government perceived the recommendations to be. To put in other rights outside of the review processes that are contained in the act and that might move the act from dialogue to something else would be something on which there would need to be significant policy work done.

THE CHAIR: That is a major step?

Mr Phillips: That would be a major step.

THE CHAIR: An even more major step, I imagine, would be the witness's comment on the right to sue for individual breaches of human rights. That would seem to be a huge difference or addition to the current act.

Mr Phillips: That is right. It would be something that would move the flavour of the act as it currently is.

DR FOSKEY: Am I right that there is a review of the Human Rights Act proceeding at present? There was, of course, always in the legislation that provision that it would be reviewed. I believe that we are experiencing some kind of review at the moment, although I have not had a direct invitation to be involved in such.

Mr Phillips: There is preliminary work that has been done in relation to the initial review of the Human Rights Act. There is another more substantive review, I understand, after five years of the legislation.

THE CHAIR: You are doing the one-year preliminary study?

Mr Phillips: We are doing the one-year preliminary study.

THE CHAIR: You heard the conservation council indicate, I think in answer to a question by Dr Foskey, that they felt—and I appreciate that neither the witness for the cons council nor Dr Foskey is a lawyer, but you guys are—that the defamation laws, even as amended, may not be sufficient in relation to people suing for defamatory statements that might not be all that bad anyway. My understanding of the act was that it specifically excludes corporations—a corporation being any business over 10 people. I would have thought that that area was probably fairly well covered now.

I would like your comments on that. Would you agree with Trish Harrup, who gave that evidence? If not, could you indicate your interpretation of how the changes to the defamation act by themselves alleviate some of the problems that Dr Foskey's bill is seeking to address?

Mr Quinton: There are four planks. The first is in relation to the substantive defence. The defence in the ACT and around the country now is truth alone, so it is possible to engage on the question of whether the information published satisfies an objective test in relation to truth rather than having to also meet secondary tests about whether it is appropriate that that information be put into the public arena.

Secondly, at a procedural level, the past, very simple procedural process that applied around the country in relation to the commencing of the defamation actions has disappeared and, in its place, defamation actions now have to be commenced in much the same way as any other civil action for damages is taken. That means very simply that, before an action is contemplated, the plaintiff is put to a very large degree of effort. It is unlikely, given that single procedural change, to see these actions being used in the way that stop writs have traditionally been used.

Thirdly, in relation to the structure of defamation actions, the ACT model, based on the UK reforms in the 1990s, has now been adopted in New South Wales and all other parts of Australia. There can be a dialogue between the defendant and the plaintiff in relation to an offer of amends so that, after the initial quarrel is raised with the publication, it is possible for the defendant to come back and say, "We got it wrong; we can act together to minimise the damage that you have suffered." If the plaintiff pursues the case, without attempting to engage in that process of reconciliation, the defendant ends up with an actionable defence.

Finally, the law has changed in relation to who can commence actions. It is now only

a personal action or an action that can be taken on behalf of corporate bodies that have a public purpose or small companies with fewer than 10 employees. That would tend to exclude most of those companies that had previously commenced actions overseas in the form of a stop writ. We would say that, in terms of the changes to the defamation law undertaken on a uniform basis, there are fairly substantial, coherent protections.

In addition, changes to civil law over the past three or four years have seen the introduction of significant procedural safeguards that are designed to prevent writs that have no merit proceeding. Most significantly is a reform that came out of New South Wales, which has been adopted here, whereby at the point at which matters are set down for trial the legal practitioner responsible for drafting the claim has to certify that there are reasonable prospects of success. This is a significant safeguard and one that raised significant concerns around the country with legal practitioners in a number of places arguing that this was going way too far. There is no evidence to suggest at this stage that legal practitioners do anything other than treat that with respect and caution.

THE CHAIR: One thing I ask most witnesses, including you fellows, is: have there been, to your knowledge, any cases before the ACT courts along the lines of what Dr Foskey is trying to legislate for? Have we had any instances? We have heard about the zoo case, which I do not think went to court. It is fine if you do not know, but can you recall any cases?

Mr Quinton: I am not aware of any, from a general examination of the media, but, on behalf of the Law Reform Commission back in the 1990s, I did that very detailed empirical work which has been published in the Law Reform Commission's report on defamation.

THE CHAIR: It is not necessarily just defamation, but other cases under civil law where a corporation or some individual took an action basically to stop an individual or group pursuing a public benefit or arguing a public benefit.

Mr Quinton: I guess we are in the same position as the other witnesses, in the sense that it is not something that has in particular been brought to our attention.

THE CHAIR: I assume that is so, given that everyone said that. I cannot think of any anyway. If you could double-check that in case we are all missing something there.

My other question relates to the law society's submission. There are a number of references to this limited type of new action and that a new tort would infringe on our Human Rights Act as it currently stands by the very act of creating, I suppose, a new tort, albeit probably a limited one in terms of the probability of giving a limited class of people an extra right. That in itself would be a problem with our Human Rights Act. I would like your comments on that.

You have heard in the law society's evidence a number of points in relation to where the provisions of the draft bill would be contrary to our Human Rights Act. Have you any comments on that?

Mr Phillips: No, we do not have any comments on that. We would have to give that some more consideration.

THE CHAIR: I would be grateful if you could. That would be helpful.

DR FOSKEY: I have a couple of things, mostly in terms of how we might proceed from here. Would you be willing, if the government gave you the okay on it, to enter into discussions with the committee and perhaps some of the witnesses we have heard today to draft laws that might be effective in achieving the objectives that we have tried to tackle in our legislation? The Attorney-General has indicated he supports it.

Mr Phillips: Can I say that that is subject to the attorney's views and the government's views on that.

DR FOSKEY: Through you, we are indicating a willingness to do that.

THE CHAIR: We cannot be involved. I am sorry to interrupt, but the committee is not the appropriate vehicle to enter into discussions with you and other groups in a roundtable discussion. We are here to hear evidence from witnesses and then report to the Assembly as a result. Obviously, we will get a government response. I imagine there is nothing to stop any groups who appear in front of us on any particular matter to engage in their own discussions with each other.

We are, strictly speaking, here to look at this particular matter, hear from groups, hear from individuals, assess what was put before us and make a recommendation or recommendations to the Assembly. Perhaps correcting something Dr Foskey said, there would be no way we would be involved in anything you did there.

Mr Phillips: Certainly.

THE CHAIR: We certainly can ask further questions of any other witnesses or recall witnesses if further matters crop up, for whatever reason.

DR FOSKEY: I understand that you are willing to come back after you have given some thought to some of the matters that were put before us today. Is that so?

Mr Phillips: If the committee requests us to return in relation to answering specific issues, then we will do that.

DR FOSKEY: That is good. Do you know of other countries that have bills of rights and/or human rights acts that have the sorts of provisions that we have anticipated today?

Mr Phillips: My knowledge extends to the provisions of the United Kingdom legislation and the European convention. I am not aware that they have specific rights that would address that, other than the rights to freedom of speech and various things like that that are also contained within our Human Rights Act.

DR FOSKEY: And not the right to an individual pursuing the—

Mr Phillips: I cannot tell you offhand. I am sorry about that.

DR FOSKEY: That is okay. We would be interested in knowing that, if there is any

chance of your coming back to us on that.

Mr Quinton: I wonder if I could perhaps tease that out just a little. In the defamation legislation, the states and territories have conferred a form of limited immunity, in relation to a list of parliamentary or judicial bodies, through the use of absolute privilege. In addition, they have also conferred a qualified privilege to a far wider group of organisations, including organisations that conduct their business at public meetings. Our understanding is that that legislation mirrors largely the types of directions that we see in New Zealand and the United Kingdom in relation to the conferral of the specific exemptions or privileges in relation to the conduct of public affairs.

As to the introduction of legislation based on the type of structure you have suggested, this is a uniquely Australian model, as we understand it, based on the work of the Victorian barrister. Whether it has resonance in other jurisdictions, I cannot advise you.

DR FOSKEY: I was more interested in the Human Rights Act, on which Mr Quinton was privy to the earlier discussions.

Mr Phillips: Can I clarify that? Are you looking for a right to participate in public discussion debate? Is it a specific right?

DR FOSKEY: Yes, that one. There were two aspects that were specifically mentioned. The second one was the right of an individual to sue under that act. We have a dialogue model here, as you are well aware.

THE CHAIR: A couple of the European countries might have something like that.

DR FOSKEY: More questions have been raised than answered today, I suspect, but that is the nature of these things.

Mr Phillips: Yes.

DR FOSKEY: It is obviously not going to happen overnight.

THE CHAIR: Gentlemen, thank you very much for your assistance to the committee and for your ongoing assistance on this one. I close the public hearings.

The committee adjourned at 12.36 pm.