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

MELBOURNE

THURSDAY, 20 JULY 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).

WITNESSES

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The committee met at 3.06 pm.

WALTERS, MR BRIAN, SC, President, Liberty Victoria and Vice-President, Free Speech Victoria

THE CHAIR: Thank you very much, Mr Walters, for assisting the committee in its inquiries. For the record, I have to read to you the formal words read to witnesses at the start of evidence at hearings in the Australian Capital Territory.

The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the resolution agreed to by the ACT Legislative Assembly on 7 March 2002 concerning the broadcasting of Assembly and committee proceedings.

Before the committee commences to take evidence, let me place on record that all witnesses are protected by parliamentary privilege with respect to submissions made to the committee and evidence given before it. Parliamentary privilege means special rights and immunities attached to parliament, its members and others necessary to discharge the functions of the Assembly without obstruction and without fear of prosecution.

The committee prefers to hear all evidence in public but, if the committee accedes to such a request, it will take evidence in camera and record that evidence. Should the committee take such evidence in this matter, I remind the committee and those present that it within the power of the committee at a later date to publish or present all or part of that evidence to the ACT Legislative Assembly. I should add that any decision regarding publication of in-camera evidence or confidential submissions will not be taken by the committee without prior reference to the person whose evidence the committee may consider publishing. I am not too sure whether we will need to do that, but you need to be aware of that.

Mr Walters, please state your name and the capacity in which you appear before the committee.

Mr Walters: Brian Walters SC. I am the President of Liberty Victoria and Vice-President of Free Speech Victoria.

THE CHAIR: Thank you for the written documents you have provided to the committee. Is there anything else you wish to say? Firstly, have you had a chance to read the legislation that we are inquiring into?

Mr Walters: Yes. I have had an opportunity to read the legislation, I have read the law society's submission and I have read a good deal of the transcript before the committee already. Could I just say at the outset that I thank you very much for the opportunity of speaking because I think it is an important initiative and it is good that it is being examined closely. I wish to say a few things, if I may, by way of an introductory statement.

I travelled here by tram from the other end of town. In May 2003 I had a phone call from the Public Transport Users Association. They had put out a brochure complaining about Yarra Trams, who had removed seats from their trams to cope with crush conditions. The

brochure had a cartoon on it which said, "Yarra sardines," and so on.

THE CHAIR: Yes, I read that.

Mr Walters: They were in a situation where, as a community group trying to assist with an issue that was of concern to the public, they were threatened with legal action, and quite improperly. At the moment, having read some of the material and so on, there are a few points that, if I could say so, I think I appreciate where we are at. It appears that the government is not supporting the bill in its current form. We have dealt with, as far as probably needs to be dealt with for present purposes, the issue of defamation. So we are looking really at other areas in relation to SLAPP suits. Can I just offer a few brief observations?

THE CHAIR: You say that you have dealt with defamation. The territory now has changed defamation laws. Are you aware of that?

Mr Walters: Yes. Certainly, Victoria has too in the same form. I do not know about every state, but nearly every state has, if not every one. The position is that corporations cannot sue for defamation unless—I think a really important qualification—they have 10 employees or less, which is still a lot of corporations, I must say. But, generally speaking, large corporations do not have that right. So far as anti-SLAPP legislation is concerned, there is a range of models. I am also familiar with the South Australian model that has been discussed already with the committee by Dr Ogle and I have had a look at that as well.

Perhaps I could say this: there are three features that I think are essential for anti-SLAPP suits legislation. The first is a definition of and protection of public participation. The second is a ready means to promptly dispose of a SLAPP suit procedurally. The third is provision for an award of punitive damages against a litigant who brings a SLAPP suit. I see those three as the things that will stop it. I think that within that framework there is, in fact, a wide range of variables as to how one proceeds specifically.

The South Australian model has a different definition of public participation. I take it the committee has a copy of that legislation. The South Australian model has a more objective approach to the question of whether the action has the effect of stifling public participation as distinct from looking at the question of whether the purpose of bringing the action was to stifle public participation. Procedurally it is, I must say, simpler for a court to determine the objective effect rather than the subjective purpose.

Could I say one or two things about the law society's submission, which I have read with interest? As I think the committee will be aware, the bill as I drafted it originally, which is somewhat different because we have changed defamation laws and one thing and another, was drafted well before the Gunns action. Can I also say that I am not going to talk about the Gunns action. I can't talk about it, as I am counsel in it; nor would I say, and I can say this, it has not been said in court that it is a SLAPP suit. One has to be careful saying any such thing with litigation. In the case of the Hindmarsh Island litigation, people were sued for saying actions were brought for the purpose of silencing public participation. That is why one must be circumspect.

There were some things that I found myself reluctantly agreeing with about the ACT law

society's submission. There were other things which, I must say, I did not agree with, and perhaps I could say a few things about them. The first thing is that it is said that there is power of the court to stay proceedings that are brought for an improper purpose, and there is reference to Williams v Spautz. That is almost right, but it is actually not quite right. I have actually been involved in a number of abuse of process claims at a fairly senior level involving cases. In particular, I was counsel for the National Crime Authority when it existed, and we brought an abuse of process application in relation to John Elliott's claim for damages for the investigation into his conduct by the NCA. There was a whole series of issues that arose in relation to that.

One of the problems with relying on Williams v Spautz is that it is not enough to show that there is an improper purpose. The burden of the court's decision in that case did not just require that; it required showing that there was no real intention to prosecute the case to finality. To read from the head note, which makes the point fairly simply, "Proceedings are brought for an improper purpose and thus constitute an abuse of process where the purpose of bringing them is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers."

At the moment, the question of what is an improper collateral purpose is generally a matter that a judge must decide without real guidance from the legislation. One of the purposes of providing a protection of the concept of public participation is to provide legislative guidance as to what that is. I would have thought that that is a helpful and appropriate thing for legislation to do in guiding the outcome of litigation.

It is suggested by the law society that there is this protection by way of the Civil Law (Wrongs) Act and the requirement that lawyers certify that there are reasonable prospects of success before proceedings are issued. Although that is relatively new in legislation, that has actually always been the common law position—that a lawyer has to have that view for litigation to issue. That is an ethical position.

The sanctions for breach of that provision are extremely rarely applied. At a common law level, Flower v Hart, which is referred to, which is a case where a present justice of the High Court was counsel and gave advice in relation to the issue of the proceedings, was one where costs were awarded against the solicitors by Justice Goldberg in the Federal Court. But the fact of the matter is that even where cases are struck out as being an abuse of process, which happens not infrequently, it is almost never accompanied by sanctions against the lawyers involved. I am not sure that that provides a real protection.

The fact of the matter is that, given the instructions that one might have as a lawyer, which might not be the fact—they might be just what you are told is the fact, and you have got to accept that as a lawyer—and given the fact that lawyers, speaking as a lawyer myself, are probably a cross-section of the community in terms of their ethical standards, and some are more gung-ho than others, whilst it is quite appropriate that those provisions exist in the Civil Law (Wrongs) Act, we should not confuse that as somehow providing a real control over this kind of improperly brought litigation. It has not been a brake in the past and it certainly is not a sufficient one.

There are some other things that are said in the ACT submission. I do not propose to answer it entirely, but just a couple of other things. At times, it appears the submission is

asserting that the bill does nothing and therefore is pointless, and at other times it appears to be saying that it does too much and therefore it is terrible. It can't be both; it must be one or the other. It may be that it is neither, in fact; certainly some of the allegations, such as there is an allegation that it is discriminatory. I really don't see that that has got any substance and is rather distracting. And then there is the suggestion that we should allow the concept of abuse of process to evolve. That is one thing. The other thing is that people elect their representatives to assist in the evolution of legal concepts, and perhaps that is what we are here for.

Where I found myself reluctantly agreeing is the argument about the definition of public participation. In the submission, what is said is that subclause (h) of 37D, which is, I guess, the catch-all that a court otherwise considers to be unlawful or unwarranted interference by the defendants with somebody's rights or property, was so broad as to render the definition of no effect. It wasn't intended that way, but I can see that it could be read that way. I am not sure that it in fact adds anything. It is a catch-all provision that one often sees in definitions. Perhaps it has the effect of being too loose. I think that the definition would not suffer if (h) were to be removed. But, interestingly, the definition of public participation in the South Australian model does not have that problem at all and is much simpler. That might be a better model in any event.

There are some things that are, I think, untenable in the ACT law society's submission, and I won't want to go through them all. Some of them deal with procedural matters. For example, there is the suggestion that the term "realistic possibility" in 37F is somehow novel—it is not—and that it implies a different standard of proof. That is actually not correct. What is required to be proved on the balance of probabilities is that there is a realistic possibility of something. That is not a submission of any real substance.

But the procedural issues are really not, in our view, the issues that are probably going to be the most important to deal with. They are matters of drafting that can be dealt with. It is the substance of the three points that I indicated: definition of public participation and protection of it; providing a ready means for disposing of improperly brought litigation of this kind; and a provision for punitive damages by way of deterrent. Just on the punitive damages point, some models have required a counterclaim to be brought to seek that, but the simple thing is to make it available as a remedy that can be pronounced by the judge at the time of striking out, and that is what I would urge. Those are my preliminary remarks and submissions.

THE CHAIR: I think that it is important that this legislation can be used against a government as well as just a private corporation. I note most of the cases deal with local government instrumentalities and private corporations. Are you aware of any cases or any SLAPP incidents where individuals have actually taken a government at least equivalent to a state government or perhaps a federal government to court where a government has SLAPPed on some type of action to stop individuals?

Mr Walters: In the bad old days of stop writs, which may not be completely gone but are not what they were, ministers brought proceedings frequently and they were underwritten by government, but I am not aware of a government actually bringing proceedings of this kind. Generally speaking, when governments take action it is a matter of administrative law or, alternatively, it is a prosecution, which is in a whole different category. No, I am not aware of any examples. I am aware of the ones that you obviously

are aware of, the ones where government instrumentalities have done things. One of the features of the law of defamation at the moment is that—I am trying to remember the name of the case—when a local council brought proceedings for defamation in New South Wales the High Court said, "Bailey, that is just going too far. You are elected representatives. You can't deal with criticism in that way."

THE CHAIR: You have touched on defamation a few times. That seemed to be a favoured way, a popular way, of putting on a SLAPP writ.

Mr Walters: Yes.

THE CHAIR: That would be rather difficult now with the uniform defamation laws and the fact that the entity has to be one of fewer than 10 people.

Mr Walters: Yes. It is not out of the question. I think there is a range of ways it could be used still.

THE CHAIR: How would that be?

Mr Walters: It would be comparatively easy for an officer of a corporation to bring proceedings based on what was said about the corporation as reflecting on that officer impliedly. That would be still, I think, completely open under the uniform defamation laws.

THE CHAIR: But not with much chance of success, you would think. It gets back to the very point about just wanting to delay.

Mr Walters: Yes. It could not be said it would be out of the question and it would not get struck out on ordinary principles as matters stand.

THE CHAIR: No, but it would delay whatever it was that the corporation might be seeking to delay, I suppose.

Mr Walters: Yes, and it would silence opposition, which is the critical feature. Defamation, I think, is significantly reduced as a result of the uniform defamation laws but it is not out of the picture.

THE CHAIR: I would think that unless someone or some group had sailed a bit too close to the wind with an individual in a corporation, a government instrumentality or whatever, it would be fairly difficult to sustain an action for defamation, but you still see that as quite a likelihood in terms of getting around the laws so that you can use that as a coercive means of stopping people.

Mr Walters: I think it is inevitable that there will be defamation action still of this kind. I do not think it is that hard to do. It is just that there are a lot more rocks and shelves to steer around as a lawyer when you are bringing these kinds of proceedings, but it is still there. But there is a whole raft of other causes of action that have been and are used. Some of them that I know of that have been used are trespass and conspiracy to injure, which, of course, covers things that are not necessarily criminal at all. It can cover conspiracy by unlawful means. It can cover trade practices material, which, of course, is

commonwealth, not a matter for the territory. But, being complete, it is interesting that the Trade Practices Act, which, of course, protects consumers, has been frequently used as a vehicle for SLAPP suits, not usually with success in the sense of receiving a favourable outcome, but nevertheless it has been used. And then there is the whole raft of causes of action such as injurious falsehood and all the other common law torts.

MS MacDONALD: You stated at the outset that you understood that the government's position was not to support the bill in its current form.

Mr Walters: Yes.

MS MacDONALD: I want to ask a couple of questions on the letter/submission from the previous Attorney-General, Chief Minister Jon Stanhope. Have you seen that?

Mr Walters: I haven't seen that. What I have seen is the transcript of—

THE CHAIR: The government officials, yes.

Mr Walters: Yes, where that is referred to.

MS MacDONALD: In his letter he makes the comment that he cannot support it in its current form, although he supports the underlying principles of it. He says, "However, the legislation may not meet its principal objective of enabling early resolution of anti-SLAPP applications because there will always be a need to have the question of improper purpose judicially determined." Do you have a comment to make about that specifically? I have to say that from what I can see, and I am not legally qualified, that view holds merit and, while the underlying aim of the bill is a good one, whether or not it will achieve its purpose is a question that is still in my mind.

Mr Walters: I have just been provided with a copy of the submission. As I understand what is being put in that context, it is that determining whether the proceeding has been brought for an improper purpose creates another step in the litigation which could be onerous. With the greatest of respect, issues like that have to be determined, and the time to determine them is early. It may be that you cannot determine it finally at the first stage. It may be that the evidence emerges later. In the PETA case, the People for the Ethical Treatment of Animals case, which has been brought by Australian Wool Innovations, a strike-out application was brought in the Federal Court before the late Justice Hely last year, and he did strike out the pleading but gave leave to replead.

Mr McLachlan, who has been in the news a bit more recently over another matter, is the president of Australian Wool Innovations, and he actually went on the public record as to the purpose of that. He said that his group would seek to wear PETA down financially. That is a quote from the *Sunday Age*. He also said, "If we have a massive bill, so have they got a massive bill. This industry is extremely well financed and these sorts of crises are catered for. The Australian wool industry is not going to walk away from something it has been building up for 200 years."

This isn't about the merits of PETA's claim or anything like that, but here they had brought proceedings—that is to say, Wool Innovations, which is not the industry itself but it is a promotional group for the industry—and were pretty open about saying, albeit

at a time after they had had their statement of claims struck out the first time, that they were going to wear down the people they were suing financially. That is the sort of information that might emerge, and you want to be able to deal with it later. But I do not understand the suggestion that having to deal with the question somehow makes the thing so complex or difficult that it should not be something that is provided for. Have I answered that?

MS MacDONALD: Yes, I think so. On a different industry, Jon Stanhope, in his letter, also makes the comment that he thinks it would be better to deal with it through nationally consistent laws. Do you want to make a comment about that?

Mr Walters: It is 20 July 2006 today. Today is the day when Victoria's charter of human rights and responsibilities goes into the upper house. There is no doubt who took the lead about this—it came from the ACT's Human Rights Act—and there is probably no way it would have happened in Victoria had not it first happened in the ACT. I believe this is a similar situation. Achieving national consensus is always difficult, especially when it is innovative.

Look, the fact is that the ACT has the headquarters of many corporations. It is an important place for this kind of issue to be dealt with. Whilst one might support national consistency and a national approach, sometimes it is better to do what can be done. I suppose I always believe that if something is worth doing it is worth doing badly. It is sometimes better to do it than to hold off until perfection can ruin any chance of doing it. So, whilst I can understand that hope, I think waiting on every state in this country to come to a consensus about this is going to mean that it doesn't happen as a matter of practical reality, and I think that would be a great shame because I think we have got daily our democracy being compromised by this kind of action.

THE CHAIR: So you would see this as something that it would not matter if a state or territory went on its own.

Mr Walters: No.

THE CHAIR: In fairness to your point, it takes about 10 years usually to get something through SCAG.

Mr Walters: Exactly right.

THE CHAIR: In terms of the points that Mr Stanhope has raised—I think you have probably addressed most of them and they have been addressed by the law society, too—are there any other points in his letter in relation to problems with the bill from a government perspective that you would like to address? You have addressed the issue, certainly, of consistency with a national approach.

Mr Walters: Yes.

THE CHAIR: Is there anything else there that you have not addressed already? Some of them might have been taken up in the comments by the law society.

DR FOSKEY: What about the comment from the former Attorney-General that we have

got to weigh up the rights of individuals to protest and the rights of commercial interests to do their business? Do you think that there is a level playing field there now that is going to be thrown out of kilter by this legislation?

Mr Walters: In my book I refer to the Lorne issue, where a big developer gets a lawyer to send a letter. That is all that happened. It never went to court. The letter would have cost a few hundred dollars in legal fees, all tax deductible. It goes to this woman who thinks that she is going to lose her house. What had she done? She had written a letter to the newspaper, which the newspaper published and they didn't get the threat.

She possibly did not get great legal advice, for one thing or another, but at the moment the imbalance is just enormous. I am not sure that balance is always a terribly good analogy for these things. I think the question is: what is it that we are trying to protect? It is not just the interests of protest. I think if a protest is unlawful in any way, prosecution should result in the ordinary course of events. What we are trying to protect is free speech, and free speech is important not just for the person speaking but also for the community hearing. It is that right to be able to be informed. The United Nations passed the Universal Declaration of Human Rights in 1948. The very first freedom that is mentioned in the preamble is freedom of thought and expression, because it is foundational to democracy.

One of the problems, I thought, with the law society's submission is the way it talks about discrimination as if it is already kind of a level playing field. It isn't. The law society talks about, for example, security for costs. Only wealthy people can get security for costs, and wealthy people do not have to pay security for costs because they are already wealthy and they can say, "No, we are people of means; we are not subject to it." This is currently the way it works. Actually, I think security for costs is a major issue in itself, but at the moment there is a huge imbalance in access to justice. Where corporations are bringing proceedings that do not legitimately protect them but do silence the public, I think that there is something to be dealt with there of some importance for our whole system of justice. I don't know if I have answered your question.

DR FOSKEY: Adequately.

THE CHAIR: Are there any particular cases in the ACT that spring to mind?

Mr Walters: The only ones that I know of are the ones that Dr Ogle referred to, which I don't think have gone to court.

THE CHAIR: I can't think of anything that has actually gone to court out of all the jurisdictions. There seem to be others which may have a call for this rather than the ACT.

Mr Walters: Yes.

THE CHAIR: It is not that we are not necessarily litigious, but I tend to think in terms of groups with an issue that it has often been them who have taken the government to court. I can think of two examples. One is the Gungahlin Drive extension, whereby the O'Connor Ridge people took action and in fact raised about $70,000, I think. I think that

it has finally been resolved. The other one was about a group whose school was being closed, the School Without Walls, who took an action and it was discontinued. Actually, I was the minister at the time and I made sure that we did not ask for costs because, whilst they might have been wrong in taking the action, there were a number of issues there which came out in court which were problematic, I suppose, for the school. Anyway, it did not involve much money. I think it cost them about $3,000, everyone paid their own costs and the matter was discontinued, but it was in the Supreme Court. There have been a few others I can think of where individuals or groups have taken the government or, indeed, a corporation to court.

Mr Walters: I think the Black Mountain tower issue went there.

THE CHAIR: The Black Mountain tower case goes back to about 1973 or 1974.

Mr Walters: Yes. I think that was a case, wasn't it?

THE CHAIR: Yes, it was. Did that involve a SLAPP?

Mr Walters: No, it was the other way around, I think it was those protesting who were—

THE CHAIR: My vivid recollection when I was at university was of a friend of mine, Liz O'Brien, who had a big sit-in at Black Mountain tower. She was a famous university activist. I vaguely recall the court action, but you say it was the demonstrators who did it. I note the government hasn't raised it, but it is unlikely to be used in the ACT as an issue, and nor has the law society, so that is probably an extraneous point. You make the point that there are national corporations with offices in Canberra, and Canberra would be a logical jurisdiction to take an action.

Mr Walters: Yes, it is, and the fact is that PR organisations do see the SLAPP suit as a tactic that they use. This probably reached its zenith in the 1980s in the US and has now really dropped away there as a result of the legislation over there, but it is still happening here. In fact, one of the documents released in the recent royal commission apparently has Mr Hockey from the wheat board saying that proceedings would be brought against someone who was, as it were, complaining over in the United States, with a view to silencing the complaint. Mr Hockey, I think, has a background in PR. So, although I can't point to an action in the ACT, the point is that I think the problem is endemic across the country and it will be only a matter of time before someone does.

DR FOSKEY: Just to follow on from that, one of the ways that I could see it being used is by developers. Some of the developers in the ACT are national and international and some are local. Is it the kind of thing that could be brought against a community group, for instance, that wrote letters to the paper about a particular development?

Mr Walters: It certainly could. That has been a fairly common use of it. Often these things don't result in proceedings being issued. A lot of the contact that we have with Free Speech Victoria and Liberty Victoria has involved letters that are written and people at the moment either back off or get advice and stand up to it, or it is resolved in some other way. But if they could know that if proceedings were brought they would have an appropriate and early remedy, I think it would make them feel a lot less shy. I am aware

of a number of cases where people have given undertakings not to say anything further publicly on an issue as a condition of not being sued.

DR FOSKEY: That is exactly right. So we have no idea what sorts of incidents as you have just described may have occurred because they don't ever go over the public radar.

Mr Walters: On the probabilities, I would have thought that has occurred in the ACT. I am not aware of it having occurred. I just know it happens frequently, monthly, here.

DR FOSKEY: You have largely addressed the law society's submission, I think. I do not know whether you did not have time to address other issues or whether there are issues there that need a little bit more in response from you, such as the idea that the court already has the power to strike out meritless or improper proceedings, which was made very strongly to us in a briefing that we had from possibly the person who drafted the Attorney-General's letter; I am not sure, but it certainly had a similar ring. These are things for me, whether they are actual reasons or they are ways that the government can avoid not being the first to institute things.

Mr Walters: Just on that strike-out point, if I can perhaps approach that in this way: it is axiomatic that a court has a power to strike out a proceeding which is an abuse of process, and a meritless proceeding is by definition an abuse of process because it has no reasonable prospects of success. That is regarded as being an abuse in itself. But what constitutes an abuse, what is an illegitimate purpose in bringing proceedings, is actually a pretty grey area, and different judges approach it on the basis of their own different views. They will use terms like "policy", but it is a subjective approach to policy. The democratic thing is for parliament to tell them what the policy is. That is why it is useful to set out what are the criteria.

It is not completely novel to say that there is a class of cases that are an abuse of process, and it is really building on that jurisprudence that we are trying to do in having this kind of legislation. But at the moment, to bring proceedings or to bring an application to say that something is an abuse of process is not a simple thing at all. There are two ways of doing it. You can either rely on the wording in the statement of claim itself, in which case it is an ordinary pleading summons where you are saying that it doesn't actually make out the cause of action that it is said to, assuming all that is said is correct, or you can swear an affidavit and bring an application saying that there are these additional facts that should be known and deal with it on that basis.

But it is not an area where the courts are comfortable, because often they are not sure of the correct policy parameters for that decision making, and for someone without too much money, being sued by a large corporation, to bring a claim like that in an area of, I must say, some legal uncertainty is to create a burden for them. Courts won't strike it out of their own motion. That never happens. You have to bring proceedings to have it struck out. To suggest that the current regime is enough is wrong, because if it were enough we would not be having all of these SLAPP suits going on and on forever, in many cases. We do have a model which in fact has not worked. So far as the law society's submission, I have a lot of things I could say about it, but it may not necessarily be that I would be answering things that carry weight with the committee.

DR FOSKEY: No; it is fair enough not to use our time in that way.

Mr Walters: For example, paragraph 16 says, "To widen cost provision specifically for defendants and specifically for the type of litigation contemplated by the bill would seem to be iniquitous in that it would not treat all litigants equally before the law. Such inequality could be contrary to section 8.2-3 of the Human Rights Act 2004." I'm sorry, that is just silly. Different outcomes do not mean that the litigants are not being treated equally before the law. Different outcomes are what happens in litigation, and having a particular outcome as a result of a particular kind of conduct is what it is all about. There are different costs treatments involved with different parties in different circumstances all the time. This is a specific remedy for a specific offence, to use that in its non-technical term, and it does not imply treating litigants unequally before the law in any sense that is contemplated by the Human Rights Act. There are things like that through this submission all the way that I could say. That does not mean that all of the submission is wrong. I have already conceded there are some things that I think are helpful in the submission, but perhaps it could have been a little bit more selective in its arguments.

DR FOSKEY: The law society is representing the legal profession in the ACT. Just in a general sense, not in relation to the specifics that have been addressed in this submission, is there is a reason that the legal profession might be uncomfortable with legislation like this?

Mr Walters: I would be speculating and I don't know that that would be helpful. I know that that is not the case in Victoria. It may well be that this is seen as a kind of novel, almost new age, idea. In Melbourne, for example, we have had experience with this kind of litigation, and I think the profession are concerned about trying to clean up the act. Maybe they haven't had experience of it. Maybe they think this is all a bit new and not respecting the traditions of the courts.

MS MacDONALD: Although I do note that Hilary Charlesworth is a signatory to the statement.

DR FOSKEY: The statement in support of the legislation, yes.

THE CHAIR: As are several other people.

Mr Walters: I know practitioners in the ACT who support the legislation.

DR FOSKEY: But we did not get submissions from them, sadly.

Mr Walters: That is a problem, isn't it? They must be busier.

DR FOSKEY: They are too busy responding to the anti-terrorism laws and so on.

Mr Walters: I can say that the people who have drawn this up have drawn it up, I would have thought, in good faith. I happen to disagree with a lot of the things they have said, but they are clearly trying to assist. I don't think that it is venal. I don't think they are saying that they are going to lose business because of it or anything like that.

DR FOSKEY: No. I am just interested to hear whether it is something we could just

expect from the legal profession per se, so I was interested to hear that there might be a different view from law societies in other states, and that is of importance.

Mr Walters: I think there would be here.

DR FOSKEY: You did mention the Parnell model, the South Australian model, which incidentally, I think, is being tabled this week.

Mr Walters: Yes. Someone emailed me a copy and I have it here. It is clearly a draft because it has track changes marked on it.

DR FOSKEY: It is a useful document, but still a working document, as is ours, by the way. The committee process is really a way of doing exactly what the law society has done and finding the areas where it needs tightening up or better explaining. It is all a process which may take some time, certainly to get national legislation.

Mr Walters: Yes.

DR FOSKEY: I am interested in whether you think there are really appreciable differences between the two models and how we should approach the fact that there are the two models and, assumedly, many states in the US which have legislation of this nature, about 30.

Mr Walters: At least 30. Let me just give you a list.

THE CHAIR: I am told by the committee secretary about 26, which would be half of them.

Mr Walters: This is not an exhaustive list by any means, but Delaware, Georgia, Hawaii, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Tennessee and Washington. It is not on this list, but I know California has. So they all have. I am not sure of the exact number, but a large number.

DR FOSKEY: Yes. It is up to us to do the work and look at the different sorts of models that are proposed.

Mr Walters: Can I just say of the South Australian model what I said earlier; that is, that I think there is some merit in the idea that, instead of focusing on what the plaintiff's purpose was in bringing the proceeding, it focuses on the effect of the proceeding. Can I just say, though, that if a court is going to award punitive damages, I think it ought to do that on the basis of the intent of somebody, not just on the basis of the effect. It might be an unintended effect and I think it would be wrong to impose punitive damages in those circumstances.

DR FOSKEY: There was a case in the ACT where an MLA—actually my predecessor, Greens MLA Kerrie Tucker—was threatened with legal action because she questioned Actew's commitment to sourcing renewable energy, obviously outside the house, where it would not be privileged. She hadn't mentioned any individuals by name, but an individual made this threat. Would the version of legislation that I tabled or the Parnell

model offer protection to MLAs speaking out on such issues, which would seem to be their job, really?

Mr Walters: I think it would. Someone had told me of that example but it hadn't come to mind. That is an interesting example. Actew is privately owned, isn't it?

DR FOSKEY: No, it is a government-owned corporation.

Mr Walters: I see. So it is a corporation but it is government owned; is that right?

MS MacDONALD: It is a territory-owned corporation, which means that the shareholders are the Chief Minister and the Deputy Chief Minister.

Mr Walters: So it would have a right to sue, probably.

MS MacDONALD: That is right. Dr Foskey was about to add, I think, that ActewAGL is separate from Actew.

DR FOSKEY: Which is the electricity and gas.

Mr Walters: Is it a subsidiary?

DR FOSKEY: It is a strange combination.

MS MacDONALD: Yes. Chair, your government was involved in actually creating it, so you can explain it.

THE CHAIR: Actew is a territory-owned corporation, I think.

DR FOSKEY: ActewAGL has private shareholders.

THE CHAIR: Actew pays the government a dividend and it appoints people to it.

MS MacDONALD: ActewAGL is a corporation which the ACT government has no control over.

DR FOSKEY: Except as governments do.

Mr Walters: Here we have a situation where they are involved in providing what is an essential service, the provision of power. In Victoria it used to be the State Electricity Commission. Gone are those days. These things are now increasingly corporatised, privatised, whatever it might be.

THE CHAIR: ActewAGL is corporatised.

Mr Walters: The problem with that is that they still must be accountable to the public.

THE CHAIR: That's right.

Mr Walters: The public are not just their customers, not in a normal sense where there is

any choice about it. They really must have the service and they have got to be accountable, and they have got to be accountable for their representatives in some way. If parliamentarians, whether in the chamber or, more importantly in this case, outside the chamber, are calling them to account in some way, it ought not to be the case.

THE CHAIR: I think the Chief Minister and the Treasurer are shareholders. We will find out.

MS MacDONALD: That is what I just said. But you are saying that ActewAGL, even if they are not a territory-owned corporation, do not stand outside the law.

Mr Walters: That is right.

THE CHAIR: It is the same as the point I made about a government or a government instrumentality trying to put on a SLAPP action.

Mr Walters: Yes. Arguably, under the current law, they would be allowed to bring the action, and there is a whole range of issues. They might well be able to satisfy the exception of more than 10 employees, depending on which branch of the company is in fact the plaintiff, because often there are other ways of doing it. But the principle is pretty clear, it seems to me: people ought to be able to talk about them robustly and hold them accountable. ActewAGL, whatever it might be, will be able to answer criticism. It is unlikely they would be able to be stopped. One can think of extreme situations where there might be a legitimate reason.

Let me give you the example of a developer building a set of units and a parliamentarian standing outside Parliament House and saying, "This 10-storey block of units, I'm going to tell you now, don't buy one because they are going to fall down, they are dangerous". I am trying to think of an extreme situation. You may think, "If that is right, great, it is very responsible to say it, but if it is not right, that is pretty darn serious." But that is malice. That is a situation where you are not allowed to say that and it would be damaging to say it. This would not stop it being acted on in the courts.

THE CHAIR: It might be rather hard with the defamation law if it is a corporation of more than 10 people which is building the building and someone is maliciously doing that. They could not sue for defamation under the current defamation law.

Mr Walters: They could probably sue under the cause of action of malicious falsehood.

THE CHAIR: Yes.

Mr Walters: You would have to prove falsity and you would have to prove damage, both of which you have to prove for that cause of action, but it would be there still. But these are extreme situations. We have got to keep them in mind, otherwise you can have legislation which has unintended consequences, but, generally speaking, it is really important for community representatives to be able to speak about the performance of public instrumentalities.

DR FOSKEY: The uniform defamation laws have been the result of a long process at the national level.

Mr Walters: Yes.

DR FOSKEY: The Attorney-General suggests that we go through such a process for this legislation as well. Indeed, I hope that the ACT government will take the lead, and it suggests it will, and initiate that process. I was wondering whether you had watched the process of developing the uniform defamation laws at all, how long that took and what compromises were reached that may have reduced the robust nature of the intent of the laws, and consequently use that as a process that the anti-SLAPP legislation might encounter?

Mr Walters: I followed it closely and I certainly made submissions and helped others make submissions. The last round, if I can use that term, of the uniform defamation laws took a couple of years from the time the federal Attorney-General put his foot down, but it really went for 20 years. It was like the tide coming in and going out, coming in and going out, and eventually we got somewhere. In all of that process, inevitably you would have to look at what the law is now, you look at the different models in the different states, and to this day I don't think there has been a comprehensive look at the principles underlying defamation law and I still think we've got a dog's breakfast. I think it is a lot better than it was, but I will give you an example.

In the United States, because there is the First Amendment which protects freedom of speech, if you sue someone for defamation, saying that what they said is false, you've got to prove it is false. Here, even with the uniform defamation laws, if you sue someone for defamation it is assumed that the statement is false and the defendant has to prove it is true. It is one thing to say something in public that you believe to be true. It is another thing to say something in public thinking, "Not only do I believe it to be true, but I've got to be conscious that I've got to be able to prove that it is true and, not only that, I've got to be able to pay the expense of proving that it is true if I'm going to say it."

That is a big brake on free speech and there isn't, apart from the ACT's Human Rights Act, a national recognition of the right of free speech. Free speech is a residual right. It is what is left after everything else is taken away in Australia, and we are the only Western nation for whom that is true. We are the only one. I think it would be great to have a national approach and so on, but it is essential to see this as part of some kind of national protection of free speech or, indeed, of other rights in some future time. But maybe, again, we are biting off more than we can chew.

DR FOSKEY: What do you think about the Attorney-General's comment that corporations or plaintiffs will go forum shopping? It was actually one that was raised against the ACT itself in regard to our version of the commonwealth's antiterrorism legislation.

MS MacDONALD: It is also raised in a variety of instances that people will go forum shopping. I think the chair of this committee might have said it on occasion.

Mr Walters: Forum shopping is a fact of life in a federation and it is not going to go away. When Abbott and Costello bring proceedings in the ACT they do it because they see certain procedural advantages to doing that. You can't forum shop unless there is at least jurisdiction within the forum. If you are suing a corporation, the home of the

corporation becomes important. If it is a statement or act, where that happened becomes important. The fact that defamation has allowed forum shopping in the past has really been because newspapers, radios and televisions publish beyond state and territory borders, by and large, so that enables that to be done.

For a long time, people were suing for defamation much more readily in New South Wales than Victoria because they got bigger verdicts there and that wasn't necessarily a result of different laws, although the laws were different. It was a result of the cost of living being higher in Sydney and you got more money there. Forum shopping is unfortunate but it is a fact of life. I guess uniformity is always good, but bad uniformity is not to be preferred to diversity which is good. Good laws which may not be the same I would rather have than one bad law. I think it requires some assessment but, for my part, I think the ACT is well placed to take a leadership role.

DR FOSKEY: If it did, it would mean the ACT was one place where plaintiffs could not come.

Mr Walters: Yes. I think it would have an inevitable knock-on effect across Australia.

DR FOSKEY: I am wondering whether this bill would need to be extended in any way to cover trade union activity, especially where it seeks to protect activities aimed at influencing corporate behaviour, like strike picketing, where such actions do not fall under the commonwealth industrial relations laws. I am thinking of community campaigns like the fair wear campaign, for instance, about the use of sweatshops, union participation in peace and environmental protests and unions moving motions at corporate AGMs, which the FSU is currently being sued for. Does the bill as it exists cover these kinds of exigencies or would it need more work done on it?

Mr Walters: As it exists, I am not sure that it would alter the situation within a workplace, but, insofar as a trade union, like any other lobby group, is attempting to alter the law or deal with some issue not in the workplace, not an immediate industrial issue, I think that at the moment this legislation would cover that situation. The South Australian model in the definition of public participation, at least in the version I have, which, as I have indicated, is a draft, has, as one of the excluded areas of communication or conduct, communication or conduct that is within an industrial dispute between an employer, their employees or former employees. In other words, it is saying, "We are not trying to cover industrial disputes in this legislation." It is worth thinking about because there are already fairly complex and differing regimes in relation to that which probably you do not want to interfere with too much. So I think that is worth considering. But where a trade union, a political party, a lobby group or whatever is trying to influence public policy, I think that would be protected by the legislation, and that is something to be applauded. That is all good. Whether it is the National Party, One Nation, trade unions, whatever it is, we want those inputs, even if we disagree with them, because they enrich our society.

DR FOSKEY: One of the criticisms made of the legislation is that we already have the Civil Law (Wrongs) Act and we have defamation law. Again I refer to a briefing that we had in which we were told, "All the law already exists and you don't need this law." That is very hard for someone like me who does not know the ACT legislation back to front. Even if I did, I probably would not be able to see things as clearly as that person. But it

makes it a little daunting in terms of legislation like this whether it does require every other bit of legislation that might have an overlap to be studied or whether that is something that the drafters can deal with.

Mr Walters: The legislative principle is that parliament is presumed to know the law and, when courts look at legislation, they presume that parliament already knew the law when it passed the act. There is no doubt that it can be extremely hard in looking at the impact of one piece of legislation on a whole lot of other pieces of legislation. However, in this case, I do not think it is that complicated. I do not think that we already have the law at all. We might already have the law that some people would like us to have, but, in terms of dealing with this problem, no, there isn't a means of dealing with it. That is why we need it. One of the problems, I think, with the law society's submission was that it was saying, "We have already got all this and yet this does all these things we don't want it to do." I just think that is inconsistent. The procedural provisions in the Civil Law (Wrongs) Act certainly deal with the new defamation law now, don't they? That is all in there.

THE CHAIR: Yes, it does.

Mr Walters: So that is good. We have got that and I think the defamation stuff is already taken out of the bill that I originally drafted some years ago. But it is just not correct to say that we have dealt with this. The whole idea of striking out and so on has always been around. There is nothing new on that. What we are doing here is refining that and saying, "Yes, you've got the power to strike out, you all know what that is, but here is specifically a basis upon which you will do it and here are some new remedies that you might have when you do it." That is new. It is not in the Civil Law (Wrongs) Act.

DR FOSKEY: It is new because it is actually giving this as a tool to judges and magistrates.

Mr Walters: Correct, yes.

DR FOSKEY: Who currently do not have it.

Mr Walters: They do not have it and they would be treading in uncharted waters to go there.

DR FOSKEY: How would that impact on the whole idea of the separation of powers, for instance?

Mr Walters: That is what parliaments are there for. The legislative arm of government passes laws which have an impact on the judicial arm of government. I will talk about Victoria because I know it better. We've got a Supreme Court act which sets up the Supreme Court, but the Supreme Court has common law powers as well because the Supreme Court act says that. The Supreme Court then sets up its own rules of court which have a certain force of law, but the Supreme Court act has been amended from time to time and a number of specific pieces of legislation give specific powers and so on. For example, there are whole classes of action that are brought where new rules of court have to be brought into being to deal with this new legislative class of action.

When freedom of information, for example, was brought in, you had to have an appeal from the tribunal hearing the freedom of information to the Supreme Court. You had to have new rules to deal with that. That sort of thing happens all the time. That is the separation of powers working properly. Where parliament provides guidance as to specific policy factors, that is good, that is how the democratic system should work, and I do not see any difficulty with that.

DR FOSKEY: How easy is it currently to get punitive damages from corporations? You might be able to remind me of the percentage of cases in which the SLAPP suit eventually is defeated. Currently, how easy is it for courts to award against the plaintiff damages beyond the legal costs, perhaps for the wear and tear on a person's life?

Mr Walters: At the moment, the only way that happens is if the defendant either counterclaims or, more commonly, takes a separate action against the original plaintiff seeking damages for abuse of process, bringing the proceedings improperly. That is extremely rare, because who wants to use up their life doing that once they have already gone through it? But there is an entitlement in an appropriate case to punitive damages. It has just never happened that I have ever heard of.

DR FOSKEY: It has never happened.

Mr Walters: Not that I know of, but it could happen.

DR FOSKEY: You would think it would have a deterrent effect because you did stress earlier that—

Mr Walters: It is the one thing in the United States which has stopped it, in my view, because at the moment when people bring these actions, when corporations particularly bring these actions, they are in an absolutely no-risk situation. They stand to gain if they win. All they've got to pay is some costs if they lose. All of those costs are tax deductible anyway and they are not losing their houses, they are not having their time churned up in the same way. They have got people doing all that for them and there isn't a downside for them. The aim of this is to bring one and make them think about it. In the US, that has been decisive, I think.

THE CHAIR: There being no further questions, I thank you very much for that, Mr Walters. I hope you will not mind the committee secretary contacting you just to run a few things by you if we need any clarification.

Mr Walters: Certainly.

THE CHAIR: We appreciate your expertise in this area and we may need to call on a bit of it again in terms of maybe a few clarifications as we work through this issue.

Mr Walters: Thank you very much and good luck with all your deliberations. I really appreciate the time that has gone into working on this subject. I think it is important.

THE CHAIR: Thank you. I thank all the Victorian officials and the other people who assisted us in taking evidence here today.

The committee adjourned at 4.27 pm.