



**COMMONWEALTH OF AUSTRALIA**

# **SENATE**

**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**

**Reference: Administrative Review Council**

**CANBERRA**

**Monday, 7 April 1997**

**OFFICIAL HANSARD REPORT**

**CANBERRA**

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Members:

Senator Abetz (Chair)

Senator Bolkus  
Senator Coonan  
Senator McKiernan

Senator Murray  
Senator O'Chee

Participating members

Senator Bob Brown  
Senator Bob Collins  
Senator Colston  
Senator Cooney  
Senator Ferris  
Senator Harradine  
Senator Heffernan

Senator Lundy  
Senator Margetts  
Senator McGauran  
Senator Minchin  
Senator Neal  
Senator Tambling

Matters referred by the Senate:

The optimal role and function of the Administrative Review Council (ARC) and the relationship between the ARC and other relevant bodies including, but not limited to, the Attorney-General's Department, other Commonwealth departments, Commonwealth merits review tribunals, the Australian Law Reform Commission, tertiary institutions, the private sector, and territory and state agencies, with particular reference to:

- (a) the benefit of a separate and permanent administrative law advisory body;
- (b) the membership structure of the ARC;
- (c) the functions and powers of the ARC;
- (d) the effectiveness of the ARC in performing its functions and any obstacles to that effectiveness; and
- (e) the need for any amendment to Pt V of the Administrative Appeal Tribunal Act.

SENATE  
LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

*Administrative Review Council*

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Monday, 7 April 1997

Present

Senator Abetz (Chair)

Senator McKiernan

Senator Murray

Participating Members

Senator Cooney

The committee met at 9.52 a.m.

Senator Abetz took the chair.

**CHAIR**—On 18 September 1996 the Senate referred to this committee for inquiry and report the issue of the optimal role and functions of the Administrative Review Council. The committee is due to report to the Senate on or before the last Senate sitting day in June.

The committee has programmed only one hearing on this inquiry. This is because most groups and individuals indicated that their submissions adequately reflect their views and that they have no further comments to make. Nevertheless, the committee welcomes the witnesses appearing today, in particular those from the Administrative Review Council, who, I am sure, will be able to respond to issues raised in the 24 submissions to the inquiry.

It should be noted that these proceedings and submissions given as evidence are protected by parliamentary privilege. Parliamentary privilege confers special rights and immunities in order for senators and others to discharge the functions of the parliament.

The committee prefers all evidence to be given in public but, should a witness at any stage wish to give evidence, part of that evidence or answers to specific questions in private, he or she may apply to do so and the committee will consider that request. The committee has authorised the recording and rebroadcasting of these public proceedings in accordance with the rules contained in the order of the Senate dated 23 August 1990.

**TONGUE, Ms Susanne Patricia, Principal Member, Immigration Review Tribunal, 101 Northbourne Avenue, Canberra, Australian Capital Territory**

**CHAIR**—I welcome our first witness here this morning, Ms Susanne Tongue, and invite you to make an opening statement.

**Ms Tongue**—I have made a submission to the committee, but the main point that I would like to make in my opening statement is to point to the diversity of administrative law at the Commonwealth level. Commonwealth tribunals are one important part of the administrative law structure. There are five main Commonwealth tribunals, but they are spread across four portfolio areas. What the council does is provide a link between the tribunals, and takes a whole of government approach to administrative law. In my submission I pointed out and stressed that that is the most important and valuable role that council can serve.

**CHAIR**—Would you like to make comment on the Attorney-General's suggestion—I think it was his suggestion—that the five existing merit review tribunals be merged into a single tribunal?

**Ms Tongue**—It is a decision for the government. It is a response to a council report in respect of the tribunals called *Better decisions*. My tribunal participated in that report. The council did a very thorough gathering of submissions prior to producing that report.

**CHAIR**—Do you think amalgamating those five would remove the need for the ARC, or, if not abolishing it, would it mean that it would need to change its focus in any significant regard?

**Ms Tongue**—At the moment, the only representative of tribunals on the council is the head of the AAT. I argued in my submission that the tribunal representation on the council perhaps could be rotated through the other heads of Commonwealth tribunals so that the council had a spread of representation from different types of tribunals.

In a sense, the ART proposal takes away the need for that. If, for example, the head of the ART were on the council, then the other tribunals would be hearing through that person. Or, perhaps under the new model, the head of divisions could rotate membership of the council. In a sense, the new ART model will not affect the ARC in other ways because the ARC has representatives from other areas of administrative law, such as the Commonwealth Ombudsman, private sector representation and secretaries to departments which have an interest in administrative law. So, in a way, the ART model will not impact in other ways on the council.

**CHAIR**—On page 2 of your submission, you suggested that the ARC ought to have representation possibly from a smaller one of the tribunals. How do you think that

suggestion fits into the proposal of the amalgamation and your suggestion that the head of this new merged body be the representative on the ARC?

**Ms Tongue**—The details of the new body are not yet known. The government has agreed in principle to the formation of an ART but an interdepartmental committee is working on the implementation strategy at present, so it is really too soon to be able to comment on what that model will mean for the divisions of the new tribunals—such as the migration division representing my existing tribunal.

I would expect that the head of the ART, if it follows the model proposed by the ARC, would be representing all divisions, including the existing smaller tribunals. When I say smaller tribunals, I should point out that the volume of decision making in the smaller tribunals is as large or larger than the existing decision making in the AAT.

**CHAIR**—Moving on, would you like to pass any comment on the relationship as you see it between the ARC and the Law Reform Commission? Is it a fruitful one? How would you describe it?

**Ms Tongue**—At the Law Reform Commission, I was Deputy President and for a time I performed the duties of the President and participated in ARC meetings. I was also lead commissioner on the freedom of information reference where the ALRC and the ARC worked closely together. I think it is a very valuable relationship between the ALRC and the ARC.

The ALRC, of course, is a specialist law reform body which is responsible for monitoring law reform developments in Australia and overseas. Having the ALRC on the ARC means that there is no chance of duplication of the law reform effort. Given that limited resources can be applied to law reform, it is very important that the bodies that are doing law reform kinds of work do not duplicate their work. The ALRC has always been an ex officio member of the ARC, as far as I know, and I think that is a very valuable function.

**CHAIR**—The ARC has provided a number of reports. Some of them, as I understand it, are still awaiting a government response 18 months or more down the track. I suppose to a certain extent that may be put down to the change of government that has occurred, possibly not. Do you think it is beneficial to have some requirement that ARC reports, let us say, be tabled in the parliament or that the government respond to them within a specified period?

**Ms Tongue**—The Australian Law Reform Commission has a similar problem, in terms of government response to reports often taking a lengthy time. However, it is not necessarily always bad. At the Australian Law Reform Commission, a five- to 10-year delay in government response or action on a Law Reform Commission report is not unusual.

I would think that ARC reports being tabled in parliament is a very good idea, as ALRC reports are. But whether you can put an obligation on government to respond to a report within a fixed period is a different matter. Sometimes, especially if there is major change involved in law reform, it is a good idea for the report to be absorbed and understood by the community before government responds to it.

**CHAIR**—The Law Reform Commission from time to time engages honorary consultants with particular expertise. There has been some suggestion that the ARC does not have a sufficiently wide representation of interests on it. Do you think the ARC may be able to benefit by engaging honorary consultants in relation to particular aspects that it inquires into?

**Ms Tongue**—I imagine that, by engaging honorary consultants, you have more flexibility with staffing. Engaging a consultant at the staff level to carry a project forward is often helpful, particularly if the project involves specialist expertise. On the council, there is quite a breadth and depth of experience among the existing members. It may be that expanding the council would be counterproductive. There is a maximum limit where a committee can work effectively obviously, so it may be better to employ consultants at the staff level rather than as members of council.

**CHAIR**—Do you consider that section 51 of the act should be amended to confer explicitly on the ARC the function of promoting information flows, or is it satisfactory to leave this as an implied function or incidental power of the ARC?

**Ms Tongue**—I would prefer to see that function legislated. There are a number of bodies that do promote administrative law, such as the Australian Institute of Administrative Law and the Institute of Public Administration. But, as administrative law increasingly impacts on citizens' lives, it is important that there is a broad understanding in both the public and the private sectors about administrative law, and the work the Administrative Review Council has done in promoting administrative law over the years has been very valuable.

**CHAIR**—So just leaving it to the institute and to other organisations is not sufficient, in your view?

**Ms Tongue**—No. I think it is more valuable for other bodies to also be involved in that.

**CHAIR**—And if the ARC develops further its role in promoting administrative law, does that mean it loses its neutral evaluator and adviser role? Or do you think it has never had such a neutral role, but that it has had a positive role to play in the administrative law area?

**Ms Tongue**—The Australian Law Reform Commission has a role in promoting

understanding of law and law reform, and it has never inhibited it in its actual core work to be doing that promotion. The promotion of administrative law generally allows a body to get feedback on the impact of administrative law, which would be a very valuable thing for the council and council members. I do think the council traditionally has had a neutral position in terms of administrative law and I think promotion would not affect that.

**Senator MURRAY**—If, to use the current terminology, the five existing merit review tribunals were put under one house—as a one-stop shop, shall we call it—do you think it would be appropriate for the ARC also to be housed in that one-stop shop and in fact be subordinate to whoever managed and ran the five tribunals?

**Ms Tongue**—I think the ARC's role is broader than just the tribunal aspect of administrative law. Therefore, if it was captured by a tribunal in that sense, even if it was a tribunal that involved all Commonwealth tribunals, it would limit its role and would take away from its current value in being an external body that can provide guidance, advice and input into the operations of tribunals. So I believe it would be counterproductive to have it under the tribunal as such.

**Senator MURRAY**—So you do not see it as a kind of internal auditor; you see it as an entirely separate body?

**Ms Tongue**—Yes, it currently serves a valuable role as a separate body that can basically stand back from the day-to-day operations of tribunals and evaluate in a neutral and objective way the work of the tribunals.

**Senator MURRAY**—When I read through the submissions, it was clear to me that there was a clear understanding of what the ARC's role had been and what it does now. I did not see as clear an understanding of what it should do in the future. Do you have a view on that, on what its main role should be in the future?

**Ms Tongue**—The council, in my view, is working reasonably well at present. Down the track, it may be that its role will need to change, depending on what happens with the new ART, but I would expect that the establishment of the ART would not have a huge impact on administrative law overall. It will change the way the processes are administered, but the core decision making of tribunals will remain the same and the role of the council in advising on that role should remain the same. I would not expect that there would be significant change.

The council has responded very well to changes in administrative law—for example, the impact of contracting out on administrative law and it has always kept abreast of developments. So it is not as though it is staying back in the dark ages. It is moving as administrative law progresses.

**Senator MURRAY**—Yes, I understood that. I used the word 'auditor' deliberately

just now for two reasons. Firstly, I think the ARC in one respect does a traditional auditing role—in other words, it identifies what is going on, reports on it and qualifies the legal accounts, if you like—but, secondly, it also adopts a modern auditing practice in the sense that the Auditor-General's department does in that it does performance management work and suggests, therefore, changes and advances in that sense.

Really, I am looking for a response as to where in the sense of need it needs to focus itself most in the future. When I look at the check list of its required activities, a check list of its current work and in fact a check list of what people are proposing it does, I do not see a particular focus, a particular emphasis. When I asked you my earlier question, I still did not get that response.

**Ms Tongue**—In a sense, when the new Administrative Review Tribunal comes into being, there will be a range of issues for the council to monitor and audit, I would expect. Any change of the nature proposed will have an impact on the operations of administrative decision making at the review level.

I would expect the council to play a significant role in ensuring that, as the new body gets going and all the different existing tribunals are brought in under that umbrella, there is consistency and the traditional principles of administrative law are applied properly across all divisions of the tribunal. The council would play an important role in bedding down that new system of administrative law decision making, that new era of decision making, that we will be entering.

**Senator MURRAY**—Do you see a time when the ARC would not be required?

**Ms Tongue**—Not really, because administrative law is always changing, and I think it will continue to change as the role of government changes, as operations of government are put out to the private sector and as the community becomes more familiar with administrative law reasoning and decision making. It is hard to imagine within, say, the next 10 years that the council would no longer be necessary.

**Senator MURRAY**—I am driving at a particular direction in my questioning—that is, it is my own perception that, as a result of the ARC's work and other agencies' work, the Commonwealth has reached a particular standard, a standard which is somewhat admired, I understand, internationally. The same could not be said of the states. I am a fan of interventionist government. I believe that it is the function of the Commonwealth to assist in raising the standards of government at every level in this country.

The purpose of my questioning is, therefore, to ask you whether a major role in future for the ARC would not also be to start to examine the standards of administrative law applications in the states, preferably with the cooperation of the states because they have that expertise, the principles are established and a state representative could be appointed by the states to that body and, therefore, start to spread some of that knowledge,

wisdom and experience deeper. What do you say to that proposition?

**Ms Tongue**—I think that is an excellent idea. It is not always true that the Commonwealth is the leader. There have been times, I think, when the states have had—and still do have—aspects of their administration law which lead the Commonwealth. And there is real value in exchange of information between the Commonwealth and the states.

At administrative law conferences, regularly the discussion between Commonwealth and state representatives is very fruitful in terms of devising the best way for administrative law to be administered within each jurisdiction. So if the council could play a role of Commonwealth-state liaison on administrative law, that would be very valuable.

**Senator MURRAY**—Yes, I am probably prejudiced in my remarks by the fact that I am a Western Australian and I am not a fan of their expertise. Are you familiar with the Commission on Government?

**Ms Tongue**—Yes.

**Senator MURRAY**—The Commission on Government reaffirmed a recommendation which was originally put by the Western Australian Law Reform Commission over 20 years ago, that the West Australian government commission an AAT, so they do not even have that. They have in excess of 50-odd tribunals—and I sat on one of them for a while, so I have some experience. Advancing the cause of better administration and better management of administrative law process needs acceleration in a number of states, and I believe it could be done proactively and at lower cost. That is really what I am driving at. I appreciate that some of the bigger or better states may well have expertise, but certainly not all states.

**Ms Tongue**—Yes, I think that is correct. Of course, the New South Wales AAT has not become established yet either, but there have been reforms in Queensland, for instance, and over the years different states have taken a lead in administrative law. So it would very inappropriate for the Commonwealth to assume, I think, in any negotiations that it knows everything about administrative law. It would have to be done carefully, but it would be very useful if it could be done.

**Senator MURRAY**—And from the point of view of your own specialist tribunal you would support that—you would see advantages in your own field?

**Ms Tongue**—Definitely. Of course, my tribunal has registries in every state—

**Senator MURRAY**—Yes, I know that.

**Ms Tongue**—And already senior members of my tribunal cooperate at state level

in administrative law bodies and I speak at administrative law functions in different states. So the groundwork is done already for the Commonwealth and states to work closely together in administrative law.

**Senator MURRAY**—So such an initiative would directly benefit your tribunal and the work of your tribunal?

**Ms Tongue**—Yes, it would to the extent that, for example, legal practitioners or migration agents who appear before us in various states would understand the nature of the job that we are doing. At the moment, for instance, in states where administrative is not alive and well, those people often misunderstand the nature of our work—the non-adversarial approach to decision making and the way that we administer in accordance with administrative law principles.

**Senator McKIERNAN**—Among the submissions the committee has received was one from a very influential individual who has continued to help this committee over the years—Mr Anthony Morris from Queensland. In his submission he has suggested that the ARC has ‘reached its use-by date’—that is quoting Mr Morris. Would you agree with that? It has been in existence now for over 20 years.

**Ms Tongue**—No, I do not agree. I think the work the council is currently doing is important, interesting and useful. No-one else is doing the work it is doing on internal review; no-one else is approaching internal review from a whole of government approach.

You could give a reference to the Law Reform Commission to do that but their lead times are longer and they are not specialists in administrative law. The council is adapting and responding to change in administrative law in a very useful way and I expect that it would go on to do that.

**Senator McKIERNAN**—Mr Morris suggested that the role and functions could be transferred to the Attorney’s department. Do you think that is possible?

**Ms Tongue**—I would be reluctant to see that happen. The Attorney-General’s Department, for example, has experience with the Administrative Appeals Tribunal but no other tribunal is currently in that portfolio, so that the Attorney-General’s Department experience of the kind of high volume tribunal decision making done in the Social Security Appeals Tribunal, the Veterans Review Board, the Immigration Review Tribunal and the Refugee Review Tribunal would not necessarily be understood in that department. The council stands clear of the interests of a department. It is more objective and outside of departmental thinking and reasoning.

**Senator McKIERNAN**—You are saying that with the knowledge that there are at least two departmental secretaries who are members of the council—Mr Skehill and the secretary to of the immigration department?

**Ms Tongue**—Traditionally, the secretaries to departments which have a high volume of administrative decision making going on have been members of the council, and that is a very valuable thing. They do not necessarily dominate the council's decision making; they are a member of a committee and their input into council's deliberations is very valuable.

**Senator COONEY**—Leading on from what has already been said, if the ARC were abolished do you think another body would grow up to replace it, something like the Australian Institute of Judicial Administration? In other words, do you think the need is such that, if this particular body were done away with, another very much like it would arise?

**Ms Tongue**—Not really. It is a fairly unique body in that it brings together a range of people from such different view points. It does not have a particular axe to grind. Another body which was, say, in a specialist area may well become captured by that particular issue aspect of administrative law, whereas the council does not.

**Senator COONEY**—Is the situation with administrative law such that a body like this is needed, or is this simply a body that has been put there by statute and keeps persisting?

**Ms Tongue**—It came from the Kerr committee report. It was always a key integral element of the new administrative law, which is a diverse area with several elements. It is important that the council play that kind of oversight and monitor role in the interests of ensuring that all the aspects of administrative law are understood, encouraged and promoted so that one aspect does not gain ascendancy at any time.

**Senator COONEY**—Just on the matter that Senator Murray was touching on—the relationship between the administrative system at a federal level and at a state level—do you have any figures as to how often people go to the federal bodies and how often they go to the state bodies when there is a choice between the two?

**Ms Tongue**—No. I could inquire. There would not be many areas where there is an overlap. I suppose human rights would be one area. At the administrative decision making level—the state tribunals, the Guardianship Board - that kind of work, the Commonwealth does not participate in.

**Senator COONEY**—Equal opportunity and sex discrimination are areas that may overlap. Would that be so?

**Ms Tongue**—The work of the Commonwealth body is done by states in different jurisdictions—different arrangements for different states. It is hard to imagine an area of Commonwealth law that overlaps with an area of state law where anyone would have a choice about which tribunal they would go to. But I could inquire.

**Senator COONEY**—I would be interested to see whether there was any overlap and, if so, what percentage of matters are brought to administrative review tribunals generally.

**CHAIR**—Thank you very much for your submission. We look forward to your ongoing appearances before us.

[10.26 a.m.]

**BARNES, Mr Jeffrey Wilson, Lecturer in Law and Legal Studies, School of Law and Legal Studies, La Trobe University, Bundoora, Victoria 3083**

**CHAIR**—Welcome, Mr Jeffrey Barnes. Could you give us the benefit of a brief opening statement?

**Mr Barnes**—I was formerly a project officer and acting director of research of the Administrative Review Council. That was in the period 1982 to 1985. I have made a written submission and I would be happy to answer any questions on it. I would like to make three additional points—one in particular to clarify my written submission, now having had the benefit of reading all the written submissions, except the ones which landed on my lap about two minutes ago.

I particularly want to raise the question of the membership structure of the council. It is an issue which occurs in practically all the submissions. It occurs on page 33 of the first bundle. I make the point, which others do too, that the legislation establishing the council has a lopsided membership structure at the moment. I emphasise ‘the legislation’; I am not referring to the actual practice of appointments in the past. I say ‘lopsided’ because the reference at the moment is largely to elite representations: government, business, profession, expertise in administrative law, public administration and industrial relations.

There is no reference in the act to what is variously termed the community sector, users of administrative law, representing the community. There are various expressions of this interest in the submissions. On page 33 I referred to the need for the legislation to more directly enable the appointment of persons representing certain organisations. I referred to two organisations: a community organisation representing citizens and a community organisation acting in the public interest.

What I would wish to say in my oral submission is that I would not wish those words on page 33 to be seen as drafting. If you look at the act at the moment, it is not expressed in terms of interest groups. The act at the moment talks about basically either extensive experience or knowledge. I think that if the act were amended to insert an interest group it would jar. It would not sit well with the act at the moment, which is about appointing persons of high calibre, high qualifications and extensive experience.

My experience at the council is that none of the members saw themselves as representatives of particular interest groups. What I am coming to is that, while I see the need for a more direct mechanism to appoint persons such as members of ACOSS, or the RSL or the Public Interest Advocacy Centre, I would see the ARC’s submission as a better drafting way. The ARC recommended on page 135:

. . . the Council considers that the qualifications . . . should include a person with knowledge of the needs of groups of individuals significantly affected by government decisions.

**CHAIR**—Which paragraph?

**Mr Barnes**—Paragraph 161.

**CHAIR**—Thank you.

**Mr Barnes**—I think that is an important point to make because, firstly, it is consistent with the general tenet of section 50 at the moment, which is that persons are not appointed as representatives. Sure, they are members of government or persons with a profession or so forth. First of all, it is consistent with that tenet.

The other thing is that if you literally took my submission as it is at the moment in writing, what we would have is the legislation sending a message that this new appointee would have to represent an interest group rather than draw upon their own personal views and experience and knowledge. I think for those two reasons I would support, in terms of drafting, the suggestion of the council that section 50 include a reference to, I would say, a person with extensive knowledge—because that would be consistent with other references to extensive knowledge in section 50 at the moment—of the needs of groups of individuals significantly affected. I think an amendment of that kind would enable, if the government saw fit, the appointment of persons in the two categories of groups that I mentioned.

**CHAIR**—Could I refer you to submission No. 23 from the Senate Standing Committee on Regulations and Ordinances at pages 330 and 331 of the papers, paragraph (b), and then the last line on page 330 which states:

In respect of other appointed members the ARC would benefit by a geographical basis that does not favour Canberra and by non-lawyer members from commerce and industry.

It goes on to talk to say that ‘the present membership appears to be biased against the smaller states’. How would one expect, if you like, from a consumer of administrative law point of view as such, get extensive experience? Usually it would be lawyers acting for business groups or individuals that would have that extensive knowledge and so it would militate again towards the appointment of lawyers, whereas this committee is suggesting that possibly there ought be a greater focus of non-lawyers from commerce and industry. Do you have any comment to make on that?

**Mr Barnes**—I am not quite sure this answer will satisfy you. I think if the ART is established that one could look perhaps to appointing a non-legal member of the Administrative Review Tribunal. I am not sure that the act needs amending. There is a reference at the moment to a profession, so there is plenty of scope for non-legal appointments. I also think that if there was a direct reference to users you might find

someone with a social science background or social worker background being appointed.

I think that, on the one hand, my reaction is that there is plenty of scope in the act at the moment because of the reference to profession and also the reference to industry, but it would be useful to have this reference to users in the act because that would enable further breadth in the non-legal appointments. I do endorse the suggestion that non-legal appointments are useful. I think that the ARC has been top heavy with lawyers. I have had a brief look at the Attorney-General's submission and they make the point that it has not been concerned with outcomes very much. I think that is a particularly legal paradigm to think in terms of rights, but not think in terms of the impact of those rights.

It would be beneficial to enable reference to users because I think you would be more likely to have someone at the coalface if they are appointed. One ought to bear in mind that there have been appointments in the past, such as Julian Disney, Jill Anderson, Sir William Keys, who have all been at the coalface of users. We are not talking about necessarily changing the practice very much. We are talking about just bringing the act up to date.

**CHAIR**—I have distracted you to a certain extent. I think you told us you had three points you wish to make in your opening statements and we have only covered the first one. Back to the other two.

**Mr Barnes**—Thank you for that. I make the point that the functions of the ARC were drafted well before the whole administrative law system really took off. If you remember, the AAT was established in 1975, along came the ARC in 1976, but judicial review did not take place till 1977 and, most importantly, freedom of information did not take off until 1982. So if you read the functions of the ARC, what you see is a great predominance, in fact an almost exclusive reference, only to certain elements of the administrative law system—namely, external review. There is no reference to internal review, there is no reference to freedom of information and there is no reference to delegated legislation.

The point I make in the submission is that the act ought to refer to the administrative law institutions and processes comprehensively and not just to external review. I support the submission of ACOSS at part 2, page 5, where they say:

The ARC's role in monitoring the operations of all components needs to be acknowledged in the act.

My second point is that in my submission I said that FOI and internal review should be featured, but also delegated legislation—on which a very significant report has been made—should be reflected in the act. This is just another indication that this review is worth while. What has happened since the ARC was established is that the system of administrative law has become a lot more sophisticated. We now consider internal review to be important. We now consider freedom of information to be important. The act needs

to be brought up to date. So basically my second point is that the functions of the ARC need to reflect all the administrative law processes and institutions, including internal review, FOI and delegated legislation.

My third point arises from the debate in the submissions between the President of the ALRC and the ARC about the need for an ALRC ex officio member. I would support the continuing ex officio membership of the ALRC, for two main reasons. I should say that I have worked as a law reform officer for the Australian Law Reform Commission and I was associate to Mr Justice Kirby on that commission.

Firstly, I think the ALRC has been at the forefront of law reform methodologies. What I mean by that is that they have taken a very sophisticated way in seeking out public consultation through public hearings, issues papers, consultants and the like. I think they have been the leaders. I do not think the ARC has been as sophisticated, as highly developed. So I think that the ALRC as the leader, if you like, of the law reform movement—by that I mean law reform outside of mainstream government—has something to contribute to the ARC. It is a full-time law reform body and necessarily it has a lot of experience in law reform.

Secondly, I thoroughly endorse what Alan Rose says about the administrative law content of the ALRC's references. He listed numerous projects of the Australian Law Reform Commission which involve administrative law. So we have not got this system in Australia where all administrative law reform falls into the lap of the ARC and non-administrative law falls into the lap of the Law Reform Commission. It is impossible to devise areas of law reform where this clear dichotomy arises. In other words, there has to be some continuing liaison, as Susanne Tongue said, some continuing cooperation and cross-fertilisation—because they are both working in administrative law. True enough, the ALRC works on it spasmodically because it only works on it when it gets a reference and when the reference throws up issues of administrative law.

So for those two reasons, I think the ALRC, as a body which is permanent and full-time and has a lot more resources than the ARC, will—at least in the foreseeable future—always have some experience to pass on. I think it is important to have membership of the ARC to ensure, on a regular basis, that that occurs. The second reason, in summary, was that both the ARC and the ALRC are administrative law reform bodies and I think they need to cooperate and share information.

**CHAIR**—Thank you for that opening statement. You clearly are an advocate for the ARC continuing.

**Mr Barnes**—Yes.

**CHAIR**—This statement is from another submission, and undoubtedly you have read it yourself:

Surely the process of reviewing and recommending has, after 21 years, taken its full course. Even if the systems which now exist are not perfect, it is hardly to be expected that after 21 years there is sufficient scope for improvement to justify the existence of a permanent review body to recommend further improvements.

Do you have any comment to make on that statement? What would you say, for want of a better description, the cost benefit analysis is of the \$1 million-plus that Australian taxpayers spend on the ARC each year?

**Mr Barnes**—I think you get tremendous value for the \$1 million. I do not know the budget of the ALRC, but I suspect it is a lot more than \$1 million, for example. So if you just consider it in financial terms, I think it is a fairly small amount.

The other thing which I would be highly critical of in that submission is that it does not weigh the benefits. With respect, it goes through in a fairly simplistic manner an attempt at gauging the cost effectiveness of the ARC. It talks about one-third of Federal Court judges and so on. I think that estimating the cost effectiveness of the ARC is a lot more complicated than is attempted in that submission.

**CHAIR**—Is there a kernel of truth?

**Mr Barnes**—There are two kernels of truth. The first kernel is that one should never disregard the need to calculate the costs of any law reform measure. I have already pointed out that I think the ARC, when it makes its report, should give greater thought to the financial impact. In the same way that bills now include a reference to the financial impact of the bill, I think the recommendations of the ARC should also do that.

By the way, one way they could do that is to give thought to an economist or someone with some quantitative background being appointed to the ARC from time to time. I am not aware that that has occurred in the past. So the first kernel of truth is that costs should always be a factor in considering the merits of the body.

The second kernel of truth is that to some extent the ARC's work is drying up. I will tell you why. A majority of the work of the ARC to date has been looking at large areas of primary decision making which have not hitherto been looked at from the point of merits review. So we have had Immigration, we have had Customs, we have had Social Security and we have had the environment. It is true that in certain of those areas there had, at the beginning of the inquiry, been some merits review. There is a very long list of the areas of primary decision making that it has looked at. It has not yet reached, to my knowledge, all the areas of government decision making, but I think in perhaps maybe a decade, at a rough guess, it will.

Does that mean the ARC is spent? No, it will not be spent because, as we all know, in a decade there will be changes to government decisions. There will be new areas of government decision making. We might have more environmental legislation. I specify

on page 32 some of the matters which are unfinished. I point out that, while there is change in government, there will always be a need for the ARC.

It is true that in the future what we will probably see is more letters of advice than reports. Reports have been made because there were these uncharted areas of government decision making. Customs was typical. Sure, there had been some ad hoc merits review available—Health and Community Services was another one as well as Environment—but the ARC had a broad look at the landscape and said, ‘Right, this is what we need.’ In the future the letters of advice will arise because bills will be suggested and the ARC will be expected to comment on those changes rather than look at existing legislation.

**CHAIR**—Why couldn’t the Law Reform Commission do it?

**Mr Barnes**—Because it is not set up as a monitoring body. The Law Reform Commission is a special project outfit. True, it is a permanent body and it is full time, but it is entirely built around a modus operandi of special projects.

**CHAIR**—What about, say, the House of Representatives or the Senate legal and constitutional committees? If there is legislation coming up from time to time, wouldn’t you only need a review body to look at the impact of that on an ad hoc basis, not a permanent body or a permanent structure?

**Mr Barnes**—There are two responses. Firstly, I think those bodies are overworked; and, secondly, with respect, I think they lack the breadth of experience of the ARC. Thirdly, I note that in Senator O’Chee’s submission he supported the need for an independent body, independent of government.

The third point is that I just want to clarify my point about this slight drift in the way the ARC is going. I said it is going more in terms of letters of advice. There will still be a need to engage in project work. This is because our expectations of administrative law are rising. What we have seen in recent times has been, for example, projects on the need for people to be informed of their rights. So we are getting much more sophisticated in our expectations about administrative law, and I see that continuing. I do not think we have reached the end of our expectations. There will always be a need for special projects.

**Senator MURRAY**—Mr Barnes, the view that the ARC is declining in terms of its role is not denied in the submissions before us. The view is that it has a continuing role but not necessarily as busy or as important a role as in the past. Earlier, though, you outlined a number of major areas of new role which essentially answer the line of questioning put to you by Senator Abetz; that is, you said that the act needs to push the ARC into areas which it does not cope with at present, such as internal review, greater access to the freedom of information work, and delegated legislation.

The second area of new activity is the one I alluded to earlier when I was talking to Ms Tongue, but it is also a recommendation on page 43, which is a conclusion of the Australian Law Reform Commission. I will read it to you. It says:

The Commission recommends that the Administrative Appeals Tribunal Act 1975 be amended to provide for a broader spread of stakeholder representation on the Council from outside of the public sector—

and this is the important section—

and for the Council to take on a greater role in encouraging the development of uniform or complementary administrative law among the various levels of government.

In other words, they are specifically saying that its role needs to turn towards the differing standards offered by the various states as well as the desire for harmonising legislation. I would like you to focus, if you can, in an answer as to how you feel about that second area—the states.

**Mr Barnes**—Can I just respond to the first part of your question there? I certainly will be happy to answer that latter point. I think you referred to ‘new activity’ as being FOI, delegated legislation and internal review. My point is that the act should simply be clarified. If the act were amended, it would not be inserting new activity. The ARC has reported on delegated legislation, as you would be well aware—the rule making report; it has reported on freedom of information; and, for example, in Social Security, it has reported on internal review.

My point is not that those amendments would be inserting new work; it would simply be bringing the act in consonance with reality. In the past the ARC has taken a broad reading of its functions and has looked at that those areas.

**Senator MURRAY**—Has it looked at internal review?

**Mr Barnes**—Yes. The Social Security report was very early; it has reported on Social Security twice. If you look, you will see a detailed discussion of internal review in those reports.

**Senator MURRAY**—So why amend the act if it is happening already?

**Mr Barnes**—Because the act should not be misleading. The act should send the right messages. We should not have statutory bodies running around straining the act; I do not think that is appropriate. It is a delegate of parliament, and I think it is just proper and appropriate in a system of—

**CHAIR**—Is it acting ultra vires?

**Mr Barnes**—No, it is not acting ultra vires; I would not think that. If you look at 51(2)—and I think I address this in my submission—I think that ‘internal review’, for example, is closely enough related to ‘external review’ as to be incidental.

**Senator MURRAY**—Let us return then to the second part of the question.

**Mr Barnes**—FOI is closely enough related. With regard to the second part of the question, you have asked me, I think, the most difficult question in this whole review. Administrative law is not like areas of law like censorship, where you can pass an act in the ACT and then have model legislation appearing picking it up. It is not as simple as that, because administrative law is special; it deals with internal operations of government itself. Also, government is always very sensitive about the review arrangements.

I would, however, like to see something like the amendment in the Law Reform Commission Act where I think some reference was given to—Susanne Tongue used the word ‘liaison’—perhaps liaison with other state governments to share information, and so forth. I think it is inappropriate for the ARC to be seen as the law reform agency for the states.

**Senator MURRAY**—Mr Barnes, I think you assume a resistance and negativity from the states which is not there. The states already cooperate with the Commonwealth government on numerous grounds—to try to get uniform legislation, consistent principles. They meet regularly at ministerial, bureaucratic and Premier level.

**Mr Barnes**—Yes.

**Senator MURRAY**—I think they are far from resistant. My point, if I may repeat it, is that you have a body of expertise, and it is possible for states who wish to cooperate to have an interaction which would be to the benefit of both the Commonwealth and the states but which particularly would be to the benefit of the citizens.

**Mr Barnes**—I fully agree with that point, and I think it is broadly reflected in the *Access to justice* report as well. But I would say that what your report, with respect, could say is that this sharing takes place in executive level; in other words, the intergovernmental aspects should be in executive level rather than appear rather presumptively in the act.

So, yes, I would endorse your view that there should be a greater sharing of experience between the Commonwealth and the states, and I think there is no legal impediment to that occurring. I believe that it has occurred, if you look at Queensland; I think they drew heavily on the ARC’s work, particularly the report on judicial review.

**Senator MURRAY**—That is the EARC report, is it?

**Mr Barnes**—Yes.

**Senator MURRAY**—Can I move to the second major area you comment on, being the membership of the ARC? The assumption or the inference behind changing the membership is that you will, in fact, infuse new ideas and a different perspective, with the assumption being that the existing participants have a constraint or limitation in either their experience or their perspective.

**Mr Barnes**—Yes.

**Senator MURRAY**—Are you familiar with the United Kingdom Nolan report?

**Mr Barnes**—No, I am sorry, I am not.

**Senator MURRAY**—What the United Kingdom Nolan report did was to try to address the cancer of ministerial patronage. But it also tried to address the problem that, throughout all government appointments of this kind, there was a lack of criteria specification on an objective basis. It is a very helpful report.

Is it your opinion that the act would be assisted if, in fact, the minister were required to establish criteria in terms of the appointments? I accord with your view that you do not want to be too specific about who should be appointed to this body, but nevertheless there need to be criteria to ensure that all expertise and experience are covered.

**Mr Barnes**—There are two points I could make. Firstly, at the moment the act already does set out certain criteria, although the qualifications for appointment in some respects are fairly broad; reference to profession is certainly broad. I would certainly endorse the recommendation in the *Better decisions* report—that there be much greater attention given to the criteria for appointments to statutory positions in the administrative law system.

I think that what is good for the goose is good for the gander. What is good enough for tribunal members in relation to greater attention to the criteria for appointments is also good for the ARC. Whether you need a statutory amendment, I am not sure. I cannot recall what the ARC recommended in respect of the tribunals there.

I would support the principle that greater openness be afforded to appointment procedures. To some extent, I think that supports my suggestion endorsed in various other submissions—that we need to be a bit more open about users of the ARC. If you look at the number of appointments in the past—for example, we have had Julian Disney, Jill Anderson and Sir William Keys—I think a more open decision making process would have reflected that they were not being appointed simply because, in the case of Mr Disney, qualification in the New South Wales Law Commission but because he was a member of ACOSS. Jill Anderson is a lecturer in administrative law at New South Wales. I am in favour of greater openness in appointments. I think that reference to users would

aid that process as well as the more managerial emphasis that you were giving.

**Senator COONEY**—So you would approve of confirmation hearings?

**Mr Barnes**—I think that would be slightly over the top.

**Senator COONEY**—What do you mean by making it more open, if you did not have confirmation hearings?

**Mr Barnes**—I have referred to the fact that at the moment with the appointments of persons who represent users, you have to find someone who has a dual qualification. You have to find someone like Sir William Keys, Julian Disney or Jill Anderson who is both representing users and somehow fits the act. That is what I mean by a greater degree of openness. In practice, the appointments have tried to reflect, as Lionel Bowen said, representing the community and, as the ARC said, representing the community sector. I think that we need a greater openness in the act about those appointments. Off the cuff, the discussion of appointments in the ARC's *Better decisions* report about principally tribunals should also apply to the ARC itself.

**Senator COONEY**—If you did not have an ARC, is it likely that you would have a voluntary body carrying out its function in any event, something like the AIJA?

**Mr Barnes**—It is true that since the ARC has been established, we now have an Institute of Administrative Law. It is true that certain voluntary bodies have grown up. But the institute is far too loose and unstructured a body to function the way the ARC does.

Basically, my answer is that there is not one around which has grown up in the 20 years which would substitute for the ARC if the ARC were abolished. I see a role for a formal body such as the ARC and voluntary bodies. If you look at the history of the *Better decisions* report, I think you can trace the origins of that report to a meeting of the Institute of Administrative Law, where it was suggested that duplication in the review tribunals should be reconsidered. I think that voluntary bodies do have a role in promoting law reform, but for various reasons, they are not set up to act in a formal way.

**Senator COONEY**—Section 51 of the act is where the functions of the council are set out. Is there any provision there that asks them to carry out law reform functions generally?

**Mr Barnes**—No, because this is a specialist body. I think that its location in the AAT Act and the reference pretty well exclusively to administrative decisions indicates that it is an administrative law reform body. I am not sure whether I am answering your question, but I think that references like adequacy and so on clearly indicate that it is a law reform body. It is an evaluative body. Does that answer your question?

**Senator COONEY**—Yes.

**CHAIR**—Mr Barnes, thank you for appearing before the committee today, for your written submission, your additional verbal submission and the answers to our questions.

**Mr Barnes**—Thank you for the opportunity.

[11.06 a.m.]

**NEAVE, Professor Marcia, President, Administrative Review Council, GPO Box 3422, Canberra, Australian Capital Territory**

**ROBERTSON, Mr Alan, Member, Administrative Review Council, Canberra House, Marcus Clarke Street, Canberra, Australian Capital Territory**

**SKEHILL, Mr Stephen, Member, Administrative Review Council, Canberra House, Marcus Clarke Street, Canberra, Australian Capital Territory**

**CHAIR**—I welcome the President of the Administrative Review Council, Professor Neave, and members of the council to the committee and invite Professor Neave to make an introductory statement.

**Prof. Neave**—As members of the committee will be aware, the Administrative Review Council was established in 1976 as an integral part of the administrative law reforms which came into operation as a result of the reports of the Bland, Kerr and Ellicott committees. That administrative law system has two main goals. The first goal is to enable citizens and others who are affected by administrative decisions to make complaints and have mistakes corrected.

The systems for judicial and merits review which exist in this country apply in a very broad range of areas. For example, people can use those systems if they are a small business person concerned with a Customs complaint, if they are a taxpayer who wants to challenge a tax assessment, if they are a student who wants to raise issues about Austudy eligibility or if they are a social security recipient with a concern about eligibility. As I said, the first goal is to respond to complaints and rectify mistakes.

The second goal of the administrative law system—which I think is often overlooked—is to improve the quality, efficiency and effectiveness of government decision making. That is what is often called the normative effect of administrative law. In effect, it is a system of quality assurance and continuous improvement.

It is interesting to note that in recent years companies in the private sector have increasingly begun to establish systems of complaint handling and dispute resolution and so on which, to some extent, are modelled on the administrative law system. It is not uncommon now to have, for example, an industry ombudsman who performs the same function in the context of a particular industry as does the Commonwealth Ombudsman in the case of government administration.

Some business surveys show that for every complaint made there are actually 10 to 15 complaints out there. That is being increasingly recognised by the private sector. Similarly for the public sector, the systems that are set up to respond to complaints

provide an opportunity for improvements in government administration to ensure that that system works more cost effectively and that generally we have a better administrative system in this country.

Sometimes people argue that administrative law is an expensive luxury. I think people who make that argument often overlook what is called the normative effect of administrative law. They overlook its quality assurance aspect and the extent to which giving people an opportunity to complain, to have errors rectified, is a means of ensuring that those problems do not arise again in the future and is a means of improving primary decision making in government.

Obviously senators will be familiar with the main features of the Australian administrative law system, so I will refer to them only briefly. For example, they include provision for judicial review to ensure that decisions are made according to law, provision for merits review to ensure that decisions are both correct and preferable, provision for an ombudsman to examine complaints of maladministration, a requirement that reasons be given for decisions covered by the ADJR Act, and provision for access to and correction of personal information.

Our council was set up to maintain an overview of, and advise upon, the administrative law system. At the time that it was introduced, Mr Ellicott, then the member for Wentworth, saw the council as ‘enabling a permanent and informed consideration of the process of administration and judicial review’, which could obviously propose alterations and finetuning and respond to changes in government administration from time to time. The idea was never that the current system would be set in stone as it was conceived in 1975 and that it would need to respond from time to time to changes in government administration in response to new challenges.

I now turn briefly to the terms of reference for this review. I will take them slightly out of order. Term of reference (c) refers to the functions and powers of the council. Mr Barnes referred to section 51 of the AAT Act. I think the drafting of that section reflects the early focus of the council’s work, which was primarily to look at the decisions which were appropriate for merits review and judicial review and to look at the procedures which should be adopted for the various forms of review.

Of course, that function continues in existence. When new legislation is introduced which involves new administrative decisions, council often has to examine the question of what forms of review should exist for those new sorts of decisions. Although some core of that work remains, I think it is now the case that both the government and the community broadly accept the need to have some procedures for handling complaints and correcting incorrect decisions. So the focus of the council’s work over time has moved to some extent. We now place greater emphasis on the quality assurance aspect of administrative law.

We mention in our submission that we had a retreat in 1996 in which we charted the future directions of the council—the sorts of work in which we would be increasingly involved. I think there are two implications for our work in the future from the various changes that have occurred since the administrative law system came into operation. One is the need to place greater emphasis on primary decision making and improving the feedback loop between merits review, judicial review and decision making within departments. Consistent with that, we have a project on internal review which is under way.

The other area that we identified as an area that we needed to place greater focus on was the need to respond to changes in government administration—trends like contracting out and a greater reliance on government business enterprises and so on. Some years ago we reported on government business enterprises. We have also recently published a discussion paper on contracting out which looks at what administrative law implications exist and what responses should be taken to deal with the fact that many services will be provided not by government directly but through various forms of outsourcing.

I might say that, in that area, what we are trying to do is anticipate some of the issues that are likely to arise down the track. Rather than wait until problems arise, we were trying to think about the problems that might arise and what sorts of changes and systems needed to be put in place to deal with them.

I might also say that that paper has had an incredible response. It is probably the only report we have ever published which we had to do a reprinting of within a very short time.

In our submission we suggest that it might be timely to amend section 51 of the AAT Act to reflect our change of emphasis. As a result of the government's announcement of its intention to implement Chapter 8 of our *Better decisions* report—which was also a report about finetuning the administrative law system—presumably the AAT Act will have to be either substantially amended or repealed. I think at that point it would be timely to look again at the functions for us which are stated in section 51. In our submission we suggest how section 51 should be redrafted to reflect that change in emphasis.

Another term of reference invited us to comment on our relationship with other bodies. I should comment that we have enjoyed a constructive and cooperative relationship with both the Australian Law Reform Commission and the Attorney-General's Department, and we are confident that those relationships will continue. However, in our submission we argue that our functions will be most effectively fulfilled if we remain a separate independent body.

We do not support merger with the Australian Law Reform Commission, both

because we are a body with an emphasis on an expertise in one particular area of the law—that is, administrative law—and because we also do things other than write major reports. We provide letters of advice. We make cabinet coordination comments. We monitor, evaluate and educate. We interact with tribunals. Those functions are quite different from the sorts of functions that the Australian Law Reform Commission discharges.

Nor do we support merger with the Attorney-General's Department. We think that would be inconsistent with our systemic overview function. Our role is to look at the interaction between government departments to identify problems which cross portfolios. Also, I think our status as an independent body has been very important in establishing relationships with a wide range of groups and individuals, ranging from the users of the administrative law system, to the tribunals themselves and so on.

We were asked to comment on our membership mix. As senators will be aware, we have three ex officio members—the President of the AAT, the President of the ALRC and the Commonwealth Ombudsman, and there is a provision for the appointment of not less than three or more than 10 part-time members. Under section 50, those people should have experience at a high level in industry, commerce, public administration, industrial relations, practice of a profession or service of government.

We have always had a mix of members from the government, the private sector and the community. Members are not appointed as representatives of particular sectors, but rather because of their experience at a high level in those areas. We believe that mix of membership works well. We think it gives the opportunity for the government to get advice from a range of stakeholders in the administrative law system. My experience as a president is that a very broad range of views are expressed both within council meetings and outside. We have lively debates, but in the end we usually get a synthesis of a range of views.

So I think the membership mix is about right and the number is about right. I feel that if the number grew to much more than 13 it would be difficult for us to operate effectively, because a lot of our work is not just done in council meetings, it is also done outside them.

We expressed the view in our submission that it would be helpful perhaps to recognise the need to have a person with knowledge of the needs of groups of persons significantly affected by government decisions. We have from time to time had people with that knowledge of users' needs. The sorts of users who might be relevant are small business users, consumers, welfare groups and so on.

As for effectiveness, because of the diversity of the functions which the Administrative Review Council fulfils, I do not think there is any single measure by which our effectiveness should be gauged. We have referred to a variety of different measures in

the submission. Senators will recall that we provide letters of advice to the Attorney-General, we from time to time make cabinet coordination comments, we do major project work, we liaise with departments, we liaise with tribunals and so on. So in relation to all of those different functions, one would have to come up with different measures of effectiveness.

Implementation of reports is one measure that is often used. That is obviously an important measure, but it is not the only measure. We have had a relatively good implementation rate. I think it also has to be recognised that some of the things that we do—for example, formulating guidelines—can have an influence on administration which does not take the form of legislation. Quite a lot of the work we do does not necessarily end up as legislation. In terms of things like making cabinet coordination comments, in the past we have shown our ability to provide practical, speedy advice on such matters.

To conclude, I think in Australia we have an administrative law system which is widely admired throughout the common law world. It is a system which has gained acceptance among both citizens and government. It has been said that imitation is the sincerest form of flattery and, if that is true, I think the tendency of the private sector to pick up and adapt some features of the administrative law system—such as the Ombudsman, complaint resolving systems and so on—indicates that the administrative law system has been successful.

Our influence in shaping that system has been significant, particularly in light of our size. It is not true to say that we have simply supported retention of the status quo. Over the years in which we have been in existence, we have been involved in the finetuning and changing of that system to respond to changes in government and in the needs of the community. In the future, I think we have a continuing contribution to make to ensure that the administrative law system can respond effectively to the needs of government for greater efficiency and cost effectiveness and to the needs of the community for a fair, accountable and transparent system of government.

**CHAIR**—Thank you, Professor Neave. Do either Mr Robertson or Mr Skehill wish to make an opening statement?

**Mr Robertson**—No.

**Mr Skehill**—No.

**CHAIR**—I will try to keep questions as brief as possible and I ask the panel to try to keep their answers as brief as possible. We have about one hour and a bit to go and there are a number of matters that we would like to explore with you. I suppose the first broad heading is whether there is still a need for the ARC. I think to a large extent, Professor Neave, your written submission and what you have told us would suggest that you believe that there is a need and an ongoing role for the ARC. However, have you read

the submission of Mr Morris QC?

**Prof. Neave**—Yes, I have. I would like to make some comments on that, and I think my colleague Mr Robertson would also like to.

**CHAIR**—As you are aware of the comments, I will not bother reading them out. In responding, can you also comment on whether you ever envisage a day when the ARC's role will have been completed, or has your original role largely disappeared and, as a result, you are looking for new territory to keep a reason for being? Some of those suggestions have been made to us and it is only appropriate that you people be given the opportunity to directly respond to those suggestions.

**Prof. Neave**—I think that the flavour of Mr Morris's submission is to the effect that the administrative law system has burgeoned and that we are responsible in some way for that burgeoning. The first comment to make is that we are an advisory body and that the decision to expand review, which we may well support, of course, has been a decision of government. We cannot be held liable for that.

Nevertheless, I think it would be true to say that, in a number of our reports, we have made proposals for change to the system which would respond to some of his criticisms. For example, in the *Better decisions* report, we argued that the system would work better if, instead of having a proliferation of tribunals, which we have consistently spoken against, we had a single Administrative Review Tribunal with a number of divisions in it. So I think that would be my main comment.

There have been, and will continue to be, changes in government and I think that it is important that there be some body that can take an overview of the way in which the system should evolve in response to those changes, referring again to our contracting-out project. My impression is that some of the issues that are raised in our contracting out paper are issues that a number of people are concerned with, but there is no one body that has systematically dealt with them. If we had not existed, no other body would have done so. In fact, a number of the other bodies that have written on contracting out, outsourcing and so on have referred to the need to consider how government accountability should be maintained in this new age of contracting out.

With regard to the hypothetical—that is, will there ever be a day when there is no need for an administrative law system?—I would have thought that government would be interested in continuing improvement in efficiency, cost effectiveness and responsiveness to citizens. While that is so, while government continues to change and evolve, I think there is a continuing role for a body that can oversee what the effects of that might be and what changes might need to be made to the administrative law system.

**Mr Robertson**—Can I just add one thing to that. I was looking at Mr Morris's submission, in particular at the foot of page 11 where he summarises his approach. He

says:

. . . the time has now been reached—if it was not reached some years ago—that the ARC has achieved its "use by date". Assuming that there remain some isolated pockets . . . that have not been reviewed . . .

That all stems from an idea that there is a fixed or static set of statutes. So you look at the statute book as it stood in 1977, start at the letter A, review all the acts till you get to the letter Z, if there is one, and then the ARC has served its function and it can be sent on its way. But, really, it misconstrues, in my view anyway, what public administration is about. It is not static.

We all know that the number of acts of parliament, the number of regulations and other subordinate instruments, are not static but, even if they were, within the system which looks as though it is fixed there is a constant change. Public administration is dynamic. A new government comes in and decides to have different emphases in terms of delivery of services, or the same government is there and decides to have different emphases, and contracting out is a prime example. I would agree that that really is in substance the answer to the question of whether the ARC's role would ever be completed.

**CHAIR**—Can I just ask on that specific point: what is so unique about administrative law? I think some people would argue, for example, that the criminal law is always subject to change and development. I would have thought every area of law is subject to the evolution and change that you are talking about, but each specific area of law does not seem to have, for want of a better term, an equivalent Administrative Review Council. What is unique about administrative law that requires the ARC?

**Mr Robertson**—It may not be unique about administrative law, but public administration is different from, say, the state of the criminal law on one day or in one year. This is partly the difference between the ARC and the ALRC: one is not looking at an area of law and saying whether there should be a change in terms of who can give evidence in a criminal trial or whether there should be some change to the conveyancing act where you are actually looking at something objective. Really, we are looking at a system. No doubt the system has its objective components, and that is why there are reports on the operation of the judicial review act.

In that aspect, it has some similarities with, say, the criminal law or conveyancing or some other aspect of private law. But really what we are talking about here is not so much administrative law, although that is part of it, but the system of public administration—how that develops in particular areas as new areas are opened up but also how the very nature of it changes as governments strive to deliver services more efficiently, more effectively. And that is a very important part of the Administrative Review Council's role. In other words, you identify a tendency, say, contracting out, and then the Administrative Review Council looks at how that can best be achieved from the

point of view of maintaining accountability in the other administrative law values.

So although it has something in common with other areas of substantive law, it is partly because we are looking at how to maintain the operation of a system as such. Maybe another part of the answer to your question is that perhaps the criminal law in certain aspects could do with better and more frequent review than sometimes it has had.

In my view, if the system ever were to become fixed, then one could well perhaps see the day arrive when the Administrative Review Council had finished its work. But the idea of public administration ever becoming fixed is perhaps a difficult one to contemplate. So really the difference between what I am saying and what Mr Morris is saying is that he has this mental picture of a fixed series of acts, you read them all through, you ask whether there should be more merits review here or there, you finish the task and then that is the end of it. But really it is not.

**Senator McKIERNAN**—He is not actually saying that. He is not actually saying it is the end of it. Pardon me for intruding. He is actually recommending in his final line of the submission that it could all be done within Mr Skehill's department, isn't he? He is saying that it could be and ought to be done.

**Mr Robertson**—Yes.

**CHAIR**—That was in fact the basis of my question about the fact that the Attorney-General's Department generally overviews a whole host of legislation that is in place already, and that is why I was asking about the uniqueness of administrative law to justify its own body. Mr Skehill, you are wearing two hats on this occasion? Do you have a conflict of interest to declare?

**Mr Skehill**—No, there is no conflict of interest, Senator, just my usual schizophrenia. I think Mr Morris's submission is very useful to the committee. In a group of submissions that are generally very supportive of the council it stands out as one that raises doubts, potential criticisms and certainly puts a contrary view. I think that is useful to the committee.

Having said that, it is fairly uninformed on a number of points. One is the type of view that Mr Robertson is tending to characterise as a fairly static view of public administration. Public administration certainly is dynamic. Particularly at the moment over the last few years with moves out of a Public Service standard environment into GBEs and into contracting out, that is very significant for the relationship between government and citizen, and the council has been quite at the forefront of adapting to that. I think that is very important.

It is uninformed in a number of areas in its assertions about the workload impact

that administrative law has in the Federal Court, in its assertion that every department of the Australian government now has a substantial section just to deal with the Freedom of Information Act and matters of that nature. Having said that, yes, it is undoubtedly the case that one could conceivably abolish the ARC and leave the—

**CHAIR**—Just before you go on, can I take you back. Is there not at least a kernel of truth in Mr Morris's submission? You have sort of dismissed it as uninformed but are departments now not concerning themselves to ensure that if there is a freedom of information inquiry they can meet it appropriately, that there are no embarrassing matters on the file, so to obviate that you pick up the phone rather than write a letter—things of that nature? There is some basis for Mr Morris's submission, isn't there, rather than just being dismissed as uninformed?

**Mr Skehill**—Let me tackle that a little more deliberately. I am not wanting to be dismissive of it. The statement as made is incorrect. All departments, I believe, have clearly an obligation but also an intention of honouring their obligations under the FOI Act, but most of us do not need to run substantial sections to do that. We can build that into our day-to-day processes.

Some of us get very few FOI applications, because we do not deal often with individuals, because our dealings do not generate FOI requests or because our ordinary way of doing business is fairly open. In other departments there is a higher volume and there will be a section or identified staff—I do not know whether there would be a section—who would deal with FOI requests.

On the issue of abolishing the ARC and simply transferring the function into the Attorney-General's Department, I would say a couple of things. Firstly, this area of the law is not alone in having a dedicated body dealing with it. There is the Family Law Council, the Companies and Securities Advisory Committee, the Copyright Law Review Committee, there is an industrial property committee—and so it goes.

There are a series of bodies that are not dissimilar dealing with specific areas of the law. There is a joint Commonwealth-state—albeit officers—committee dealing with criminal law. If you go through a number of areas of law—and I could not do it for you categorically—you will find that there are mechanisms whereby people outside the Public Service policy officer framework are brought together to provide advice to government.

If this function were transferred into the department, I would very much want to continue to have access to the type of expertise that we have on the council—expertise from user groups, from academics, from the practising bar—because, frankly, we cannot emulate that within the department. To some extent, the council is already part of the department—the staff are officers of the department, the department provides the corporate support and so on and so forth. I think if I had my druthers and the council were abolished I would be wanting to create an ad hoc advisory committee of pretty much the

same type of configuration to get access to that input that we cannot provide as officers ourselves.

**CHAIR**—What about a cost benefit analysis? About \$1 million a year is spent on the ARC. If you were to do what you have just suggested, would that mean any saving at all?

**Mr Skehill**—I suspect not. We would still have the staff. We would still provide the support service they need. I would like to think we would still pursue the publication of a discussion paper to gather greater community input. I would like to think we would still provide a report that government could deliberate upon and, again, seek its own input on. I think the chance is that there would be in fact increased costs because the sitting fees we currently pay to the members would in many cases be significantly below the consultancy fee that they could otherwise charge. I think it is a relatively well recognised phenomenon that people who might otherwise earn significantly more are often prepared to discount to an independent advisory body where they would not discount to the great unwashed bureaucracy.

**CHAIR**—I would like to ask Mr Robertson if he shares that view and if he were a consultant he would be charging more.

**Mr Robertson**—I think it is true that there is a very great interest, certainly in the legal profession, in the Administrative Review Council. I think it is regarded as a body of such a status that to be on it is something that you would aspire to and you would obviously be prepared to do work on a continual basis, whereas you either would not have the time or you could not organise yourself to otherwise fit it into a schedule or whatever it might be. It is regarded as a very high powered body. The fact that it is a permanent body assists that, rather than getting a letter from Mr Skehill saying, ‘I am going to set up an ad hoc body to look at such and such a topic. Would you be interested in participating?’ I think it does have that element of continuity and status.

**Prof. Neave**—I do think the existence of a council as a permanent body is a way of accumulating a set of wisdom which is revisited from time to time. It does not mean that we stick with our earlier positions always but it means that where issues have been discussed there is an institutional memory. I think it would be harder to maintain that if you were doing ad hoc consultancies. It is easier to see how something that you do over here in relation to this issue relates to something that was done over there in relation to another issue that was dealt with two years earlier when you have a permanent body.

The other matter that I should have mentioned is that one of the issues that is raised by Anthony Morris in his submission related to the amount of Federal Court time. I did seek to check the accuracy of that. I would like to table a letter I received in response.

**CHAIR**—Thank you. That would be most helpful.

**Prof. Neave**—The information that has been provided to me by the Federal Court is that around five per cent of Federal Court judge time is spent on administrative law matters. So that is significantly lower than is suggested by Mr Morris. I think he suggested 25 to 30 per cent. So I will table that for the committee.

**Mr Skehill**—One other comment, which I think is of importance, about the suggestion as to whether the ARC's work will ever be done is that I agree with what has been said that whenever we have dynamic public administration I think it probably will not. Having said that, I think we as a council ought to work as though we were trying to put ourselves out of business—that is, we ought to try and work as part of the administration with a view to making the administration so good that citizens do not feel the need to seek recourse to review mechanisms.

If you have that as a focus it does influence the way the council goes about its work and where it puts its priorities. I believe that a very significant priority for the council at the moment, which it has recognised, is to work back into primary decision making and to work with departments and agencies with a perhaps idealistic but nevertheless a strong view of trying to make the first decision the right decision.

**CHAIR**—Thank you for that. Can we move on to a certain extent to the future role of the ARC. Would you like to comment on that briefly? In particular, if the decision to merge takes place or is implemented, how will that impact on the ARC's work? Behind that question is: how much of the ARC's time, if any, was spent in trying to harmonise, to assist, the existing tribunals, cross-pollinate information, et cetera? Can you shed any light on that for us?

**Prof. Neave**—Certainly. At the moment the main functions that the ARC has discharged in relation to tribunal coordination has been through hosting an annual tribunals conference, through regular meetings with heads of tribunals and, increasingly, through doing things like running workshops for tribunal members. Some of that work will not need to be done. The heads of tribunals' work may no longer be necessary. I would have thought that the training that we provide for tribunal members would continue to be important.

Assuming that what comes into effect is something like what we recommended in chapter 8—we recognised in chapter 8 that it would not necessarily be the case that all divisions of the tribunal would have identical procedures; we thought there was some room for diversity—that means that the need to cross-pollinate continues because you would want to have divisions not operating as mini-empires but actually coordinating and talking to each other. There will still be some work that we have to do in that area.

The tribunal liaison work that we do is important, but of course it is something that

we do along with a lot of other things and it would not affect our major project work and our work in terms of cabinet coordination comments, letters of advice and so on. What it may do is give us a little more time that we can spend on some others things that are important. But it certainly will not render us redundant.

**Mr Skehill**—The other thing to say is that if the merger takes place there will be a need to monitor and evaluate whether the objectives of the merger are being achieved. I think the council will be well placed to do that.

**CHAIR**—Can I move on further in terms of the cost effectiveness of the ARC. Do you think sufficient emphasis is given to that, if you like, public policy consideration question of cost effectiveness? Would it be of any assistance to have a member of the Department of Finance on the ARC or ex officio to assist in that regard? Do you have any comments to make on that?

**Prof. Neave**—Yes, I think it might well be helpful. I think, however, that it would be a mistake to think that we have not historically looked at issues of cost effectiveness. In fact, for the purposes of preparing myself for this committee, I went back and read a number of reports written before my time as President. I was interested in the extent to which we had actually discussed those issues.

That being said, there are some areas where it is difficult to put a precise financial cost on some things. If you are talking about the merits to the citizen of having somewhere where you can go and complain or have a mistake rectified, then the costs of that are, in a sense, immeasurable and I do not know that an accountant could put a precise figure on that. I think that it might well be helpful to have someone with some expertise in that area.

**Mr Robertson**—Could I add one thought to that. From my experience, one of the major contributions of the members of the Administrative Review Council who are senior officers of the departments is that they are very sensitive to the efficiency of the proposals that are being discussed.

**CHAIR**—That is refreshing to hear.

**Mr Robertson**—Others of us might be less aware of the implications in terms of Public Service systems or the cost or how it might best be implemented. One of the very great virtues of having—and I know there are criticisms from time to time as to whether the weighting is right or not—two, three or four senior officers of departments, whether it is Attorney-General's, Prime Minister and Cabinet or so on, is that they do have that efficiency perspective in terms of the proposals that we are considering.

**CHAIR**—Are you people consulted as much as you think you ought to be by government departments or generally? Do you feel sometimes that you are left out of the

loop? Do you want to make any comments on that?

**Prof. Neave**—I think it would sometimes be helpful if departments consulted us at an earlier stage when they are formulating proposals, because sometimes things come to us rather late in the process. This is another function of having heads of departments on the council. People who are conscious of the work we do may be more amenable to that earlier consultation process than people who are less aware of it.

Historically, also we have been involved in making cabinet coordination comments, and I think that is a process that is important and should continue. It would be unfortunate if that loop did not continue to apply. Obviously we cannot be consulted on and respond to all issues but on issues that have a significant administrative law component or aspect it is very important that we are involved in that consultation process.

**CHAIR**—Is the ARC's view on matters being sought on a more regular basis? Has it been slow to be a port of call for government departments?

**Prof. Neave**—As I said, I think practice has varied over time. Stephen might want to comment on that. I think that it fluctuates. Historically, in some areas we have been consulted a lot and in other areas less so.

**CHAIR**—Can you explain the reasons for that in some way? Do some departments, for example, think that you people are brilliant and therefore want to seek your advice and others think you are not so brilliant and therefore do not want to seek your advice, or is it more ignorance that departments do not really know of your existence and the support and advice that you might be able to provide them?

**Prof. Neave**—It may be that we need to do more to bring to the attention of departments what we can add to their process. I think we probably need to work on that. We would have a concern if in areas where we had historically given advice that advice was no longer sought. So it is important for us that we should continue to have that input in the future.

**Mr Skehill**—I think that there is a fairly healthy degree of interchange and consultation, particularly at officer level, between staff in departments and the council secretariat. In an ideal world it could always be better. I think to the extent that it does not occur when it should have done, that is probably reflective of a few things. One would be personal networks, because that tends to drive quite a bit. Probably the council does need to be more active in showing that it has an important role to play at that point. That is reflected in the change of direction that we took at the retreat last year, which was to try to work back into primary decision making much more and in that sense try to bring about less need for recourse to administrative review. That is an important change of focus for the council.

**CHAIR**—Just to confirm it, the council secretariat is provided by your department?

**Mr Skehill**—Yes.

**CHAIR**—Following on from that line of questioning, there has been, I suppose, a common theme through a lot of the submissions that there has been a lack of response to some ARC reports. Do you want to provide any reason as to why you think that is the case? Is it too difficult, or is it that government cannot be bothered, or do the culture changes that you are suggesting take some time to gain acceptance and permeate through the bureaucracy and government? What is the answer?

**Mr Skehill**—I probably should seek to respond to that, wearing my other hat. I think there is always a lag between the receipt of a report by government and the delivery of a government response. If you look at the council's reports over the years, some of them have been reports where you would look to other than the Attorney-General for the response. There have been some portfolio specific responses, and I cannot speak for those other portfolios.

Within the Attorney's portfolio there has generally been a response to most of the reports. There are a couple of notable exceptions at the moment; I think they are 32 and 33 on the AD(JR) Act. The reason for that is that they have simply been reports that are very difficult for government. The previous government had got up to the point of consideration and possibly deciding and found that there was still more thought that it wanted to give to the matters. The present government, to some extent, found similarly.

The FOI report has not yet been responded to, although that is a little more recent. While that would be more than 12 months old, it is one that is under active consideration but other priorities have prevailed. There has been an in-principle response to the *Better decisions* report. Other responses, like GBEs, are largely a matter for consideration within other portfolios and so on.

It is an imperfect measure, but by and large I think that the ARC has had a pretty good track record of either having its reports adopted in whole or in part or in it having significantly influenced decisions that have been taken in a particular area. But at any point in time, it will be a matter for priority decisions by government as to how a report should be responded to and when it should be responded to and what other things are on the agenda for government.

In that schizophrenic sense, this is one of the issues on which I take a slightly different view from that taken by my colleagues on the council, where there is a suggestion that there should be a government response in 12 months. I think that would be counterproductive, but that is something on which we just agree to disagree.

**CHAIR**—Have you seen the submission of the Senate Standing Committee on Regulations and Ordinances? On page 2 of their submission they suggest that the act ought be amended to require the minister to respond to ARC reports. We have heard that Mr Skehill is not necessarily supportive of that approach, but he has indicated to us that he is not necessarily reflecting the ARC's view on that. So what is the alternative view?

**Prof. Neave**—The ARC's view is that we think it would be appropriate for the government to respond within a specified period.

**CHAIR**—What are the benefits of that, just to put them on the record?

**Prof. Neave**—I suppose they are that it seems to me to be wasteful of resources to have a body which produces a great deal of work, goes through a consultation process. It raises perhaps expectations that something will be done about an issue not to have an indication whether the government thinks it is thinking in that direction or not. And the government response may of course be that it does not support the ARC's recommendations. But I think that if you go through a lengthy process of public consultation and so on, it is appropriate for the government to respond to a well-considered, thought out report.

**CHAIR**—Which all of your reports of course are.

**Prof. Neave**—Of course; that is right. The argument against which is made by Stephen—he and I have discussed this at length—is that if you require a response you may have a response that is not as considered as it might be, if you simply have to respond in terms of a timetable. To me this is one of the ways in which you ensure efficiency, that you do respond, you do think about the issue. I accept, of course, that the department has many priorities that it has to balance, and that is always difficult. But I believe that if you have an expert advisory body which is making reports after a lengthy process, then it is appropriate that you have a response to it.

**Mr Robertson**—I would like to add a couple of things to that. One is that a lot of the reports are to do with current matters so that when the reports are written they do have a particular currency. I think it is a result of what we referred to before about the changing scene; if you leave a report for too long you will then have to have a further report on whether the first report is still current, which obviously is not efficient.

The other thing is that if you do have something in a statute then it means that that report has got to be given a certain priority. Obviously the Attorney-General's Department has got all sorts of other things that it has to do and no doubt a lot of them are very urgent. But at least if you have got something in a statute then that means that it has got some sort of a red tag on it that it has to be dealt with within a particular time. It is really the parliament saying, 'I know you have got a lot of other work to do, but you have got to do something with this within this particular time frame.' It becomes important, because if

you do have a changing scene what is the point of having a report which is not incorporated in legislation if that is the appropriate response or it is not decided whether or not to incorporate it in legislation until maybe a year and a half to two years after the event?

Some reports have a continuing relevance. I would include the FOI report in that, because there are a lot of structural things in there that are not overtaken. But there are other reports—for example, the judicial review act reports—where there may be some things in there that need to be revisited. In a sense, perhaps that is adding to the department's workload because they need to ask themselves a further question. They need to ask not only, 'What is the government's response to this report, if we had been looking at it when it was written?' but also, 'Has anything changed in the meantime?' So I think it has an efficiency component to it as well.

**Senator MURRAY**—I will butt in there with a question. The legislation on that basis could say, 'We want a report or a reaction to the report within 18 months.' Another way to deal with it might be for the legislation to say that they do require it to be reported on or reacted to by government, but the time frame would be specified by yourselves, because there would be instances where a report might be urgent. You might consider it to be a 12-month response, whereas in other instances you might take advice and say, 'Well, a three- or four-year period of proper examination could be appropriate.' Is that another way to deal with it?

**Mr Robertson**—If I can say so, with respect, I think it certainly has its attractions. So if you had two categories in the legislation, and the ARC said, 'We think in a non-binding way maybe this is within category A'—that is, the shorter time frame—'because it has a lot to do with current events, things that need to be fixed now or whatever,' then that at least would be an indication. I think at the moment reports are reports. There is nothing in them, from recollection anyway, that ever says, 'We think this should be,' if it is to be implemented, 'done within a particular time frame.' Obviously one does not want to put too much rigidity into it because of the competing priorities that Stephen Skehill has been talking about.

**Mr Skehill**—Can I just say that it seems to me that these are all valid views, but it is an issue that gives precedence to form over substance. If there is a requirement to give a response within X period and the government, because of the way in which it chooses to order its priorities, has not been able to consider the matter in depth, it will give a response because it is statute bound to do so. The response will either be ill-considered or favour the status quo, when better consideration might favour change as recommended. Or it will be a response that says, 'We have not made up our minds. We are going to take our own good time but, nevertheless, we have had a response.'

I would have thought the far preferable outcome was for the council to be working on matters that are so closely aligned with the needs and priorities of government that they

necessarily attract attention of government when a report is lodged and that the reports are so well done that the government says, 'Look, there is a package that we can largely pick up and run with.'

**CHAIR**—So is that a reflection on those reports that are still awaiting a response 18 months down the track?

**Mr Skehill**—Yes and no, and that is a very two-handed response. Members of the committee will be aware of the debate that has gone on in relation to the Legislative Instruments Bill and how that has gone to and fro as people really got into the detailed implementation and how it would impact in particular types of instruments, in particular portfolios and so on. That has, in one sense, been a frustrating process, because a very good report has not yet seen practical implementation, but in another sense it will mean that the implementation will be that much better when it is there. It will be properly thought through. The outcomes will be more certain.

If there is a requirement for there to be a response, there will be a response, but it may not be the best response. Equally, I totally agree that reports should not be produced at considerable cost and left to gather dust on the shelves. I think our mutual aim in all of this is to have useful reports that lead to progress at an early date, and there is no argument with that.

**CHAIR**—I suppose there are always the political factors as well. In the annual report you, Professor Neave, could undoubtedly make certain comments about the lack of response to reports. If there is a fair degree of community support for the suggestions in the reports, then professors of law or other people or consumers or whoever it may be who is affected could undoubtedly write articles and letters to the editor or whatever or get on to the Attorney-General or the minister involved and try to agitate for a response to the suggestions made.

I want to move on to the membership of the council. That has been a theme as well and, as I recall, part of our terms of reference. How is attendance at the ARC meetings? Do you have 80 per cent or more?

**Prof. Neave**—I would say it is slightly less than 80 per cent. I think one of the penalties of having busy people in prestigious positions appointed to the council is that they sometimes have difficulty in attending. I think it would be a mistake to think that the work of the council is done mainly in meetings, because an enormous amount of work is actually done outside the meetings in terms of consultation. Material is sent to people for comment—often for comment very speedily. My experience has been that council members are very good at doing that, and you get a very quick turnaround often. So, although it is regrettable—

**CHAIR**—So there are no passengers on the council?

**Prof. Neave**—No, I do not think so.

**CHAIR**—They are all very active participants?

**Prof. Neave**—Yes. Although it is true that we do not get the attendance at meetings that—

**CHAIR**—That is understandable.

**Prof. Neave**—Yes.

**CHAIR**—If the membership of the council is to accommodate a different variety of interest groups, what would have to give? Would you make the council bigger; or would you say that the relatively small size of it at the moment makes it a very efficient unit and, therefore, you would replace certain people to make room for these interest groups; or do you think that the concept of interest group representation on the council is not a good idea?

**Prof. Neave**—No, I do not think it is appropriate to have people there as representatives of interest groups. I think it is important to have people with expertise and experience in a range of areas who can bring to bear that experience on the particular issue we are considering. Most of the council business results are achieved through consensus in the end. It is rare for us to take votes. As I said, there is a lot of vigorous argument and people yield one way or another, but we do not usually take votes.

In our submission we have suggested it might be helpful to have a head of tribunal. That has been overtaken by events because, if the ART goes ahead, we will not need to do that. We also referred to or suggested, without supporting, the possibility of having the Privacy Commissioner on there. As I said, we do not strongly argue for that.

In the submission we said that, if there was a need to keep the membership at about the same level, the one person we think we possibly could do without is the President of the Australian Law Reform Commission. But we have not fervently argued for that proposition. I think that having the President of the Law Reform Commission there is helpful—not essential, but helpful.

So I think 13 is about right. Within the existing three to 10 part-time members, one could accommodate the sorts of interests that we have referred to, and there is already a fairly broad description of interests.

**CHAIR**—Has the use of consultants or coopted members been undertaken or explored? For example, if you were to do away with the position of the President of the Australian Law Reform Commission, there would undoubtedly be occasions, as you say, where that person's advice would be of great benefit.

**Prof. Neave**—Yes.

**CHAIR**—Is there a mechanism whereby they could be coopted into the discussions on a particular project to ensure that you have access to the benefit of that person's views?

**Prof. Neave**—Yes, and we have done that informally in the past. In particular situations we have had subcommittees that have had members who have not been council members. I think we will probably increasingly use paid consultants to provide us with expert advice on specific issues. That is because of difficulties sometimes in filling staff positions quickly. So we will do that to some extent.

I do not think I would support the broad honorary consultant system that the Australian Law Reform Commission uses. I do not think we have the need for that to the same extent that the Law Reform Commission has, because it is dealing with references on a very wide view of issues, whereas we are dealing with administrative law and public administration issues—and our members are selected for that purpose.

**Mr Skehill**—There is not, though, a mechanism where you can at present formally coopt somebody to membership of the council for a reference. That could be a useful way around. We can coopt people to work with us on a voluntary or a paid basis, but they do not become members of the council for the purpose, and they are not signatories and they are not voters.

The other thing just to reinforce is that I think there is still scope, whilst still keeping to around 13, to add into the qualifications for membership experience in the 'user community', if I can call it that, or in the other tribunals if the other tribunals do continue. Quite often we have had the former capacity—for example, people like Clare Petrie—who have very good knowledge from within the user community, particularly the welfare community, and it has been very useful to the council. So you do not necessarily have to add numbers to formally require the type of additional expertise that is spoken of in quite a lot of the submissions.

**Mr Robertson**—Could I add one thing? I do not think that senators should have a mental picture of the membership as having been constant. We all have not been there for 20 years labouring away. I have been there, I think, longer than everybody, except for Alan Rose, who has been there in different capacities. I have been there for about 4½ years, and I think my appointment is due to expire in September.

But the point is that the membership is always changing—I do not know what the figure is—something like every six months or so, because the terms of appointment are staggered, presumably on purpose by the Attorney-General when he appoints people or extends their appointment. Every six months or so there is, in fact, new blood on the

council. I only say that because I think one of the questions to Mr Barnes, who previously gave evidence, started on the assumption that there was a fixed body and it was always the same old tired faces; whereas, in fact, there are new faces all the time either as appointed members from outside the bureaucracy or even within the bureaucracy with people coming and going on the council.

So there is a constant change in perspective, even by virtue of the personalities. Of course, some of the people come from different functions, different parts of professions; they have different knowledge, and so on. So I think that is important to bear in mind.

**Senator MURRAY**—You would be well aware that we have 18 million people and nine governments, which is an extraordinary state of affairs. But the result of that is that our citizens are often oppressed, confused and bemused by the variety of laws and systems that they are under. The Australian Law Reform Commission, in their conclusion at page 43 of the little book—and I quoted this to the previous witness—made the recommendation ‘for the council to take on a greater role in encouraging the development of uniform or complementary administrative law among the various levels of government’.

I read through your submissions last night. At pages 150-151—paragraph 235—you summarise changes to the council’s functions. Within that I could find no specific recommendation arising from your retreat or any subsequent thoughts which paralleled that of the Australian Law Reform Commission. The nearest I got to it was to promote knowledge about the Commonwealth administrative law system, which could be read in a motherhood way, but I sure it was not intended like that.

To my mind, I believe from the range of work I have had a look at that you have broken the back of the biggest task that faced you as an organisation when you were set up in 1976. It does not mean that you do not have a continuing role, but it is not quite as large a role as it was formerly.

People are fond of talking about a whole of government approach; I would rather hear something about a whole of Australia approach. To me, the most practical way in which you could assist a number of the states who have a far lower standard in this area is either where they request you to, so that there is a cooperative arrangement, or particularly where there is a drive in a particular field of reform for uniform or harmonious law where the Commonwealth and the states are actively seeking to make laws of a similar or uniform nature.

I would like you to address the following questions. To what extent do you interact with the states at present? To what extent do you participate in the harmonisation and uniformity of our laws at present? To what extent do you think it is practical for this to be enlarged in line with both my own views and those of the Australian Law Reform Commission to take on a larger role for yourselves?

**Prof. Neave**—As you will be aware from our submission, there are a number of situations in which our work has been used by state bodies. The Electoral and Administrative Review Commission is just one example.

**Senator MURRAY**—And the Commission on Government in Western Australia.

**Prof. Neave**—Yes, that is right. We were also approached by the Norfolk Island government for advice on one occasion. So there is some interaction. Probably our more important interaction is in the context of state tribunals. Members of state tribunals have in the past attended our tribunals conferences. Just as one example, I remember that somebody from the Queensland Buildings Tribunal, for instance, was at our last tribunals conference. In that area, in particular, there is likely to be more interaction as we try to do more education for tribunals. I think there are some state tribunals which are crying out for that sort of support and we are going to be involved in that process.

In terms of harmonisation of laws, I guess the problem for us is that states have not, historically, shown a great willingness to consult us, except perhaps informally and at officer level.

**Senator MURRAY**—Is that because you are not part of the process—in other words, you are not promoted by the Commonwealth as a body to which they should refer?

**Prof. Neave**—To some extent it may be due to that. It may also to some extent be due to the desire of some states to go it alone. Just as one example, the Victorian government issued a discussion paper in October 1996, talking about tribunals. The people who prepared that report did not refer to us, which I think was unfortunate.

**Senator MURRAY**—Would they have been aware of you?

**Prof. Neave**—Yes.

**Senator COONEY**—Your own home state would love you.

**Prof. Neave**—I think they are aware of us, but I do not think that they have called upon us very much in the past. Obviously, we could do more by way of promoting ourselves as a repository of advice and information than perhaps we have done in the past, but you can lead a horse to water but you cannot make it drink.

**Senator MURRAY**—One option of the Commonwealth is in legislation. Legislation could come through to amend your act to require the Commonwealth to put you into the process of consultation, when you are talking about harmonisation and uniformity—in other words, to make it obligatory for the Commonwealth to carry you forward, not obligatory for the states to use you. My instinct is that you just have not been included in the loop.

**Mr Skehill**—It is important to look at the areas of law that we are concerned with. There is quite a lot of harmonisation work going on but where the interests of the jurisdiction, and I think the national interest, lie is having harmonisation, not necessarily uniformity, where there are cross-boundary impacts. For example, the portability of a domestic violence order from one jurisdiction to another jurisdiction, the enforcement of judgments and the capability of a trustee to gain access to the assets of a deceased estate are areas that are identified in the Standing Committee of Attorneys-General by states, territories and the Commonwealth as priority areas for harmonisation and interconnectivity between the legal systems of our states.

When you come to administrative law, the basic thrust is the relationship between the citizen and the state. There is not a cross-border element. It all takes place within the state. We may have a federal system, of which I think we are justifiably proud, and we might want to say to the states and territories, 'Here's a great system that you might like to emulate', but there is not really much of a harmonisation gain in duplicating that system within individual jurisdictions because there is not the cross-border element.

**Senator MURRAY**—Let me propose to you a somewhat radical view. You are familiar with Amnesty International. Amnesty International takes a checklist of the 162 countries, or whatever the number is, worldwide and ranks them one to 162 in terms of human rights abuses. Is it not possible for your body, as an independent, objective and extremely high status body, to rank the states in terms of their administrative review procedures and capabilities with the view of trying to encourage them to lift their game? There are a number of states whose game badly needs lifting in this area.

I, both as a state representative and as a federal parliamentarian, do not accept saying, 'Hands off; that is a different citizen out there.' These are Australian citizens we are talking about who are subjected to different laws and different procedures because there is a hands-off approach. That is an activist speaking. I would like to know how you view that.

**Prof. Neave**—I certainly think that an appropriate role for the council is to act as an advocate for the values that are reflected in the Commonwealth administrative law system. That is something that we have consistently done. It tends to be done in a more informal way. I and other members of council speak at administrative law conferences and so on. So, in that sense, we do have an advocacy role.

What we are discussing is not so much the desirability of us having an advocacy role, because we would agree with that, but what is the best way of achieving that. I am not sure that ranking the states—a fairly provocative thing to do—would necessarily result in the states immediately wishing to follow the Commonwealth model.

That said, there are lots of discussions which occur at informal level. As you would know, there are developments going on in various states in terms of their

administrative law systems. It certainly would be useful for them to call upon us for advice as to which things work and which things do not. We do have an advocacy role. I accept that. I hope it is something that we fulfil satisfactorily. The next step—how you achieve that—is a more difficult question.

**Senator MURRAY**—I was interested in the chairman's remarks and your own. You adopt much of modern management appraisal. You talked about quality assurance and cost benefit analysis, and I think you mentioned continuous improvement. One of the most fundamental methods of managerial, corporate and organisational improvement is benchmarking. If you want to see this Australian government hop up and down, just let them be benchmarked on health, education or economic measures versus other countries in the world. Instantly there is political activity.

Quite frankly, if you want to advance the standards of administrative law reform—which is your purpose, and you seem to have achieved it exceptionally well over a 20-year span—my thesis is that it is a Commonwealth responsibility to assist government to raise its standards. I am suggesting that it is appropriate for your organisation to look at the alternative means and to not automatically walk away and say, 'Wow! Benchmarking or ranking would create some irritation.' It surely would not from the ones at the top of your table—it might from the ones at the bottom.

**Mr Skehill**—If the council were to do that in any active way under the current law, it would be acting *ultra vires*—beyond power. The law could be amended to give it that role. It would be a fairly provocative proposition. The council should look to state operations to see whether there is anything in them that can be adapted, by way of benchmarking or best practice, and built into its recommendations for the Commonwealth. But to go the other way at the moment would be beyond power for the council. Whether the government would be prepared to give the council that wider ambit is another issue.

**Mr Robertson**—Certainly, it seems to me that it would be quite simple to amend section 51 to say that one of the functions of the council would be that, when requested by a state, we could permit the Administrative Review Council to give the advice. That would be a low level amendment. It would deal with the problem—which Mr Skehill identified, and which I agree with—where, at the moment, if the states wrote to us and asked, 'Could you do a major project involving expenditure of \$10,000 to help us fix a non-existent AAT act?' we would probably have to say no because, as section 51 now stands, we could not spend the Commonwealth's money on that.

I add one other thing to that. It is all very well for the ARC to lend its expertise in what I call technical matters. Say the states said, 'We are inclined to introduce a general requirement for statements of reasons of certain classes of decisions. Can you tell us what the Commonwealth's experience has been in that? Do you have any ideas about what pitfalls to avoid?' That is quite easy. But to the extent that, as is often the case, our recommendations involve a detailed knowledge of the Commonwealth bureaucracy—how

it works, what its aims are and the aims of government and so on—we would not, as we sit there, necessarily have that expertise in relation to state bureaucracies in respect of how they work and what their governments have in mind for them.

I can well see our role in what I call the technical expertise, for example, ‘This is something that Victoria’—or Tasmania—‘wants to do; can you tell us what your problems have been and what you think we should avoid?’ That is relatively straightforward. But, for example, to do something as we have just done with the Commonwealth in terms of contracting out would be really beyond our experience as our membership is.

**Prof. Neave**—I would add that we have said, however, in the context of our discussion paper, that some of our recommendations may be useful for the states. I think we have had quite an interesting response from a number of state agencies which have asked for copies of the paper. Those things are happening at an informal level. But I agree with Alan’s other comments.

**Senator MURRAY**—I think that is as far as I can go in provoking you.

**CHAIR**—In our terms of reference, we also refer to tertiary institutions. As Professor Jack Goldring has made comments about the possibility for collaborative research, can you indicate to us the ARC’s current relationship with universities? I suppose having a professor as head of the ARC assists somewhat, but further than that, does any collaborative research take place? Is there any objection to it in principle? Are there any practical difficulties that might be encountered if that were to be pursued?

**Prof. Neave**—I think Professor Goldring was talking about collaborative research in a formal sense, and I will make a comment about that. But certainly on an informal level, yes, it happens a great deal.

We have used academics to write things for us on particular issues. We have a pretty close relationship, as our submission and a number of other submissions make clear. Our work is quite heavily relied upon by law schools and law students, so we have that sort of relationship. But we have used in the past people to do consultancy work for us on either a voluntary or a paid basis. I have held a chair in three Australian universities, so I tend to know the people around the place a bit. I think we will be doing probably more of that.

Jack Goldring’s comment, I think, related to a discussion I had with him about applying for a collaborative grant from the Australian Research Council. It is possible to apply for a grant with an industry partner and, for those purposes, a government department or an agency counts as an industry partner, but that agency has got to devote some of its resources to the collaborative exercise.

What I said to Jack at that time was that, just at the moment, our priorities would

not fit in with what he wanted to do. But certainly, in principle, we are interested and there are a number of areas I have thought of where some collaborative research could actually be very helpful to us.

**Senator COONEY**—I have a couple of questions on the composition of the council. There is no requirement for the council to have on it any member of the AAT or any other body that looks at administrative decisions? Is that right?

**Prof. Neave**—No, except that the President of the AAT is an ex officio member of council.

**Senator COONEY**—I am looking at an old act, am I? I thought it said that the Governor-General shall appoint one of its members to be president of the council.

**Prof. Neave**—No, if you read that with the definition section, it is the President of the AAT. In our submission we actually suggest that it might be helpful to amend the act to make that clear, because a number of people in their submissions have read it that way. They thought it was talking about the President of the council, not the President of the AAT.

**Senator COONEY**—It just seems to me that, since you have to make recommendations about the adequacy of the procedures in the tribunal, perhaps you ought to have a couple of people from there. But you have one, have you?

**Prof. Neave**—We have one. We often have people—and Alan is an example—who have an extensive practice in that area, or experience with user groups and so on. But we do have a fairly close liaison with the tribunals. We consult with them frequently and have these heads of tribunal meetings and so on.

**Senator COONEY**—What about somebody from the courts? I was just looking at function (c) in section 51.

**Prof. Neave**—We have had judges who have been members.

**Senator COONEY**—But it is not required?

**Prof. Neave**—No, it is not required.

**Mr Skehill**—Although the President of the AAT at present is a judge and therefore brings that second hat.

**Prof. Neave**—And she is required to be a judge at the moment.

**Senator COONEY**—Why do we look at the law and practice of the courts and

only the procedures of the tribunals? Is there any subtlety in that?

**Prof. Neave**—I do not think so, no. But we usually have at least one member of council who is very familiar—

**Senator COONEY**—No, I was looking at function (c). Function (c) is to look at the law and practice of the courts and function (d) is to look at the procedures of the tribunals. What is that all about? Why do we make that distinction? Do you know?

**Prof. Neave**—I am sorry, I do not know the historical reason. Function (c) is concerned with courts, (d) is concerned with tribunals. We have concerned ourselves with procedural issues. We have written a number of reports about the sorts of procedures that should be adopted. In fact our *Better decisions* report deals at length with various procedural issues. But the way we have got that expertise in the past is, firstly, through having the President of the AAT as an ex officio member, secondly, through having a number of people with practical experience in appearing before tribunals or, thirdly, through having people who are familiar with the needs of users of tribunals. So I do not think we have been historically thin in those areas.

**Senator COONEY**—I understand that, but the act itself does not require it to be heavily laden with those sorts of people.

**Prof. Neave**—One of the requirements in section 50 is that the person has knowledge of administrative law, which I think would include procedural issues as well as substantive issues or public administration.

**Senator COONEY**—What about function (a)? Who carries out function (a)? Do you have somebody who just goes through every bit of legislation that comes out and makes a decision about it?

**Prof. Neave**—We frequently deal with those issues. We usually deal with them in council meetings.

**Senator COONEY**—But somebody must go through the decisions which are not subject to review. Who does that?

**Mr Skehill**—It is more usually done where there is a proposal for an amendment to an act or the introduction of a new scheme that requires legislation. So there is a cabinet submission and there is consultation with the council in that context, and a view is put forward as to whether proposed new categories of decisions should be appealable.

**Senator COONEY**—But it does not seem to talk about bills. It just talks about classes of administrative decisions.

**Mr Skehill**—They are bills that are going to introduce a class of administrative decision. There is also the historical stocktake. A large amount of that has been done over time, but then you get, for example, particular reports—such as the report on grants that was made a while ago—where there are questions about whether they should be brought within the regime or individual reports that look at older schemes.

There is some ongoing process, but a deal of that was originally the early day stocktake and the accretion of jurisdiction in the AAT. You will recall that, when the AAT started, it was originally proposed that it be created without any specific jurisdiction and that would be added over time. It was in fact created with a formative jurisdiction and then that has been added, and it is now very extensive.

**Prof. Neave**—The other way that these matters come to us is through parliamentary scrutiny committees. So we get matters sometimes if they have slipped through without our noticing them, which has happened on occasion. They tend to come back to us in that context.

**Senator COONEY**—Do you have any sorts of structures to address specific duties that are imposed upon the council under section 51?

**Mr Skehill**—In that particular area, there is a set of guidelines that the council has developed for testing whether a particular category of decisions should be appealable and, if so, how. That is a sort of standing council view and, as a category arises, the staff test the category against the guidelines and then there is usually consultation with the members to affirm the view.

**Prof. Neave**—We have a number of other guidelines that we use to test things against, which are also revised from time to time.

**Senator COONEY**—Could we get copies of those guidelines?

**Prof. Neave**—Yes.

**Senator COONEY**—What about function (g)? Can we do much with that?

**Prof. Neave**—That is the head of functions that we are currently relying on to justify the work that we are doing on internal review so that we do look at the way internal decisions are made, how administrative discretions are exercised, and, from time to time, provide advice either in the form of letters of advice, cabinet coordination comments or often in the context of our major reports. Appendix 7 of our submission contains the guidelines for determining whether the exercise of decision making powers is appropriate for external review. We have recently revisited those in the context of a particular project.

**Senator COONEY**—‘Appropriate to external review’, that is not (g), and that is not (a).

**Prof. Neave**—Sorry, that was what you were asking about. That is function (a).

**Senator COONEY**—Function (a) says:

to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court . . .

**Prof. Neave**—I guess we have guidelines which say the ones that are and the ones that are not.

**Senator COONEY**—You would not need guidelines. They either are or are not, are they not?

**Mr Skehill**—It is (a) and (b) together—look at what is not subject to review and then query whether they should be. Those guidelines are relevant to both those limbs.

**Senator COONEY**—So we ought to have a list of every class of administrative decision and whether or not they are subject to review and whether they should be?

**Mr Skehill**—Ideally, yes.

**Prof. Neave**—Our guidelines do say, ‘These are the sorts of things that are not suitable for external review. These are the sorts of things that are.’ When a new issue arises, when new legislation is going through, we apply it against that as a sort of template, and sometimes that reveals that we need to refine our guidelines a bit more.

**Senator COONEY**—If you did not have the Administrative Review Council—and I am not saying that we ought not, by any means—if it disappeared, do you think that another body would naturally grow up to do the sort of work it is doing?

**Mr Skehill**—I think that is what I was suggesting. If the council was abolished and the function given to the department, I would be wanting to create a body that would give me access to this same sort of expertise.

**Senator COONEY**—I am glad you said that because I tossed that Dorothy Dix question up to the previous two witnesses, neither of whom took the opportunity. So I am very pleased you did, Mr Skehill.

**Mr Skehill**—I am glad I have pleased you, Senator.

**Senator COONEY**—Just one other matter: to be fair to Mr Morris, I think he

considers not only that the Administrative Review Council should go but also that the system generally should be much reduced. So I do not think he is particularly choosing you out as the one that ought to get the chop. On page 12 of his submission, he says that the way to deal with this is to get rid of the ARC and then:

. . . the relevant "interest group" would make appropriate submissions to the Attorney-General, who would then be in a position to consult both senior officers and the Department concerned . . .

That might be a better way of doing things: go straight to the Attorney-General. Do you think that the Attorney-General and perhaps you, Mr Skehill, as the secretary to the department, would be able to listen to the various problems we all have? You could perhaps sit under the palm tree and we could come and consult you.

**Mr Skehill**—It sounds good. As I say, I tend to think that, if we try to do it that way, we would in not too long a time find that there were recurring issues on which we felt the need to get access to some fairly consistent categories of expertise and we would be reinventing the council, effectively, albeit as consultants to the department or as a standing advisory group or something. I tend to think it would recreate itself.

I think, though, that, as I said, Mr Morris's submission is very helpful. One of the thrusts that comes through in it and which I support is that we need to be careful that we do not have an administrative review structure that is better than it should be and that we have a focus that is firmly directed to getting the right decision first time round. The aim of tribunals and the aim of the council should be to do themselves out of a job. The aim should be to work back into administration through improving the quality of primary decision making in such a way that citizens less and less have need to have recourse to an external review arrangement.

If there is a criticism of the council, it lies in that area—that perhaps it has not in the past given enough focus to that—but in the more recent times it has certainly seen that focus and set about working on it. It did, for example, do a project on authorised review officers in the Social Security internal review process, but some years ago. As a result of our retreat last year, we have recognised that internal review is an area to which we ought be paying a lot more attention and we should be training decision makers at the primary level so we do not just focus on the superstructure but go right to the elements of primary decision making.

**Senator COONEY**—Professor Neave took that point up before when she was talking about function (g) in section 51, did she not?

**Prof. Neave**—Yes, I did.

**Mr Skehill**—While we can probably continue to do that without amendment of the act, and I do not think there is a problem there, I think it would be appropriate to amend

the act to highlight that the focus ought to be on the right decision first time round and that the council ought to see itself, and the tribunals ought to see themselves, as working in aid of the primary decision maker so the lessons are learnt from review and fed back into the system.

**Senator MURRAY**—If I may say so, Senator Cooney, that is the fundamental problem at the states level. It is at the internal review end.

**Senator COONEY**—Following on from what Senator Murray was talking about before, do you think there is any gain to be had at the Council of Australian Governments or SCAG to sort of get some high class of uniformity across the systems?

**Mr Skehill**—Again, for the reasons I was discussing with Senator Murray, I think that states and territories would probably be fairly resistant to the Commonwealth's seeking to tell them what to do in this area, particularly as it tends to focus on citizen-state. Certainly, we stand ready to provide advice and assistance in an incidental way to our state colleagues.

**Senator COONEY**—I was not thinking in terms of the Commonwealth dominating. I think that some of the states, in spite of what is said, have very good institutions. There are good tribunals in Victoria, for example. I just thought about an exchange across the states.

**Mr Skehill**—There is a bit of discussion that does take place on these matters, and certainly there are regular meetings of the heads of Justice and Attorney-General's departments, and it is an item that is quite frequently on our agenda. I think it has been on the SCAG agenda on occasions, but the SCAG agenda does tend to focus on harmonisation across boundaries.

**CHAIR**—Professor Neave, Mr Robertson and Mr Skehill, thank you very much for your contribution—the very detailed written submission, the detailed introductory comment and your answers. Thank you very much.

**Committee adjourned at 12.48 p.m.**