



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION  
COMMITTEE

**Consideration of Additional Estimates**

MONDAY, 18 FEBRUARY 2002

CANBERRA

BY AUTHORITY OF THE SENATE



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**SENATE**  
**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**  
**Monday, 18 February 2002**

**Members:** Senators Cooney, Greig, Mason, McKiernan, Payne and Scullion

**Participating members:** Senators Bartlett and Harradine

**Senators in attendance:** Senators Allison, Bartlett, Carr, Collins, Cooney, Greig, Harradine, Ludwig, McKiernan, Payne and Scullion

**Committee met at 9.02 a.m.**

**ATTORNEY-GENERAL'S PORTFOLIO**

**In Attendance**

Senator Ellison, Minister for Justice and Customs

Attorney-General's Department

Mr Robert Cornall, Secretary

Dr James Popple, Executive Adviser

Mr Ian Govey, General Manager, Civil Justice and Legal Services

Office of the Director of Public Prosecutions

Mr Graeme Delaney, Principal Adviser, Commercial Prosecutions and Policy

Mr John Thornton, Deputy Director, Legal and Practice Management

Federal Magistrates Service

Mr Peter May, Chief Executive Officer

National Crime Authority

Mr Adrien Whiddett, General Manager, Operations

Mr Jon Hickman, National Director, Corporate Services

Australian Transaction Reports and Analysis Centre

Mr Neil Jensen, Acting Director

Ms Liz Atkins, Deputy Director, Money Laundering Deterrence

Mr Alf Mazzitelli, Senior Manager, Corporate Resources

Australian Law Reform Commission

Professor David Weisbrot, President

Ms Rosemary Adams, Executive Director

Federal Court of Australia

Mr Warwick Soden, Registrar

Mr Alan Dawson, Senior Deputy Registrar

Mr Gordon Foster, Executive Director, Corporate Services Branch

Mr Greg Brown, Chief Finance Officer

Family Court of Australia

Mr Richard Foster, Chief Executive Officer

Ms Jennifer Cooke, Manager, Client Services

Mr Andrew Phelan, General Manager, Corporate Services  
Ms Angela Filippello, Principal Registrar  
Human Rights and Equal Opportunity Commission  
Dr Sev Ozdowski, Human Rights Commissioner  
Mr Stephen Duffield, Director, Human Rights Unit  
Ms Rocky Clifford, Director, Complaint Handling  
Ms Susan Roberts, Director, Legal Services  
Ms Robyn Ephgrave, Manager, Finance and Services  
Office of the Privacy Commissioner  
Mr Malcolm Crompton, Federal Privacy Commissioner  
Mr Timothy Pilgrim, Deputy Federal Privacy Commissioner  
Ms Robyn Ephgrave, Manager, Finance and Services  
Susan Roberts, Director Legal Services  
Administrative Appeals Tribunal  
Ms Kay Ransome, Registrar  
Office of Film and Literature Classification  
Mr Des Clark, Director  
Mr Paul Hunt, Deputy Director  
Mr Paul Tenison, Business Manager  
Royal Commission into the Building and Construction Industry  
Mr Colin Thatcher, Secretary  
Royal Commission into the failure of HIH Insurance Group  
Mr Richard St John, Secretary  
High Court of Australia  
Ms Carolyn Rogers, Senior Registrar  
Mr Lex Howard, Marshal  
Insolvency and Trustee Service Australia  
Mr Terry Gallagher, Chief Executive  
Ms Kerry Hunting, Chief Finance Officer  
Office of Parliamentary Counsel  
Ms Hilary Penfold, First Parliamentary Counsel  
Ms Glenyce Collins, General Manager  
Mr Tony Perkins, Executive Officer  
Australian Government Solicitor  
Ms Rayne de Gruchy, Chief Executive Officer  
Mr David Riggs, Chief Finance Officer  
Australian Institute of Criminology  
Dr Adam Graycar, Director  
Criminology Research Council  
Dr Adam Graycar, Director  
Australian Security Intelligence Organisation  
Mr Dennis Richardson, Director-General  
Mr Jim Knockels, First Assistant Director-General  
Mr Mark Aspin, Coordinator Financial Strategies

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Australian Federal Police

Mr Mick Keelty, Commissioner  
Mr John Davies, Deputy Commissioner  
Mr Simon Overland, Chief Operating Officer

Australian Customs Service

Lionel Woodward, Chief Executive Officer  
John Drury, Deputy Chief Executive Officer, Border  
John Jeffery, Deputy Chief Executive Officer, Commercial  
Mark Bonser, Director-General, Coastwatch  
John Hawksworth, National Director, Border Division  
Phil Burns, National Director, Commercial Division  
Gail Batman, National Director, Passengers and Information Technology Division  
Alistair Cochrane, Chief Financial Officer  
Sue Pitman, National Manager, Trade Measures Branch  
Philomena Carnell, National Manager, Planning and International Branch  
Steve Holloway, National Manager, Cargo Management Re-engineering

Outcome 1: An equitable and accessible system of federal civil justice.

Output 1.1—Legal services and policy advice on courts and tribunals, alternative dispute resolution, administrative law, human rights, evidence and procedure.

Output 1.2—Support for the Attorney-General as First Law Officer, advice on constitutional policy, and promotion of Australian legal services internationally.

Output 1.3—Legal services and policy advice on family law and legal assistance and the administration of government programs providing legal assistance and family law related services.

Output 1.4—Legal services and policy advice on international law.

Output 1.5—Drafting of legislative and other instruments, publication of legislative materials and provision of related legal services.

Output 1.6—Legal services and policy advice on information law.

Output 1.7—Legal services and policy advice on native title.

Output 1.8—Machinery of Government obligations (previously Output 1.6. This output will lapse at the end of the current financial year)

Outcome 2: Coordinated federal criminal justice, security and emergency management activity.

Output 2.1—Policy advice on, and program administration and regulatory activities associated with, the Commonwealth's domestic and international responsibilities for criminal justice and crime prevention, and meeting Australia's obligations in relation to extradition and mutual assistance.

Output 2.2—Legal services and policy advice on security law.

Output 2.3—Development and coordination of and support for national emergency management arrangements, including coordination of assistance to countries in Australia's region of interest, and provision of advice on emergency management matters to Commonwealth agencies, States and Territories, industry and the international community.

- Output 2.4—Development and promotion of protective security policy, advice and common standards and practices, and the coordination of protective security services, including counter-terrorism and dignitary protection.
- Output 2.5—Management and coordination of the delivery of security and guarding services to meet diplomatic, consular and other Commonwealth responsibilities.
- Output 2.6—Provision of protective security services.
- Output 2.7—Facilitation of the delivery of high quality national policing information services.
- Mr Ian Carnell, General Manager, Criminal Justice and Security  
Mr Geoff Hine, General Manager, Corporate Services  
Mr Peter LeRoy, General Manager, Information and Knowledge Services  
Ms Kathy Leigh, First Assistant Secretary, Civil Justice Division  
Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division  
Mr Tony Ward, Acting First Assistant Secretary, Office of Legislative Drafting  
Ms Phillipa Horner, First Assistant Secretary, Native Title Division  
Ms Sue Pidgeon, Acting First Assistant Secretary, Family Law and Legal Assistance Division  
Mr Peter Ford, First Assistant Secretary, Information and Security Law Division  
Mr Bill Campbell, First Assistant Secretary, Office of International Law  
Mr Paul Griffiths, Acting Assistant Secretary, Office of Legal Services Coordination  
Mr Ed Tyrie, Director, Protective Security Coordination Centre  
Mr Martin Studdert, Director, Australian Protective Service  
Mr David Templeman, Director, Emergency Management Australia  
Mr Stewart Cross, Deputy CEO and Director Operations, CrimTrac  
Ms Fran Raymond, Chief Finance Officer, CrimTrac

**CHAIR**—Good morning, ladies and gentlemen. I declare open this meeting of the Senate Legal and Constitutional Legislation Committee. On 14 February 2002, the Senate referred to the committee the particulars of proposed additional expenditure for the year ending 30 June 2002 for the Attorney-General's and Immigration, Multicultural and Indigenous Affairs portfolios. The committee will consider the portfolios in the order in which they appear on the circulated agenda, beginning after any general questions with the interstate agencies. Today's hearing will be suspended for a lunchbreak for one hour from 12.30 p.m. and for a dinner break from 6 p.m. to 7 p.m. Brief morning and afternoon breaks will be from 10.30 to 10.45 and 3.30 to 3.45 and will be taken as close to the scheduled times as possible.

The committee has authorised the recording and rebroadcasting of its proceedings in accordance with the rules contained in the order of the Senate dated 31 August 1999. Keeping in mind the imminent budget estimates in May, the committee has agreed to the date of 2 April 2002 for the receipt of answers to questions taken on notice and any additional information. I remind everyone present that mobile phones should be turned off or at least silenced while in the main committee room for the hearing.

I welcome Senator the Hon. Chris Ellison, Minister for Justice and Customs and Minister representing the Attorney-General, and officers of the Attorney-General's Department and associated agencies. When officers are called upon to answer a question for the first time, please state your full name and the capacity in which you appear. Please also ensure that you speak clearly and directly into the microphone, which will assist enormously our Hansard reporters, who are recording the proceedings.

I also remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless the parliament has expressly provided otherwise. I draw to the attention of witnesses the resolutions agreed to by the Senate on 25 February 1988, *Procedures to be observed by Senate committees for the protection of witnesses*, and in particular to resolution 1(10), which states, in part:

Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken.

And resolution 1(16), which states:

An officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.

Witnesses are reminded that the evidence given to the committee is protected by parliamentary privilege. I also remind witnesses that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate.

I would like to take this opportunity to note that there is only one outstanding question on notice, which relates to an Australian Federal Police operational matter, from the May 2001 budget estimates. However, the committee does wish to express its gratitude to departmental officers and to the minister for providing the vast majority of responses to questions on notice in advance of or by the due date. The committee acknowledges and is grateful for the overall advance and improvement made by the department and by agencies in providing responses within those shorter timeframes. We are indeed very grateful. Minister, do you or Mr Cornall wish to make any opening statement?

**Senator Ellison**—Thank you. I have no opening statement but I believe Mr Cornall does.

**Mr Cornall**—Since we last met there have been a number of topical issues where the department has given the government legal advice. That advice has contributed to the formulation of government policy. Officers today will provide as much information to the committee as possible but cannot, as the committee is aware, disclose the substance of advice given to the government or give opinions on the policy adopted by the government on legal issues following the receipt of that advice.

**CHAIR**—We will now move to the commencement of estimates. I would particularly like to welcome my colleague, Senator Nigel Scullion, to his first meeting of an estimates committee as a member of the Legal and Constitutional Legislation Committee. I am sure it is an experience you will find very enjoyable, Senator Scullion. We begin with general questions directed to the departmental executives. Are there any questions in this area?

**Senator McKIERNAN**—I was going to hold my general questions until we actually came to the department itself, in an endeavour to deal with the agencies and allow them to get back to their places of work and the jobs they do on behalf of the people of Australia. When the department appears we could address general questions to the department. We are doing that because we are under some pressures: there are two days of hearings scheduled and there are a number of topical issues in front of the committee. Certainly from our point of view we will want to scrutinise things, so we will be endeavouring to move as fast through the process as possible. That is not to say that we want to limit any individual member of the committee or participating member from asking general questions at this juncture. It would, I think, aid the

whole process of the committee deliberations if we were able to move directly to the agencies at this point.

**CHAIR**—Do any other senators have questions in general?

**Senator COONEY**—If I make a general statement now it might expedite things later on. My focus is on the royal commission into the building industry, and I will be asking a series of questions of agencies as they appear before us. Mr Cornall and Minister, if at this stage I state what my problems are about it, it may make it easier and simpler for people to answer my questions.

Please bear with me while I will put this in context. There is a royal commission into the building industry, and members of the union are constituents of mine. In fact, one person approached me—or I approached him, perhaps—about the issue. Lots of money is being spent on this royal commission, and the big issue is whether or not that money is being spent wisely. There is a feeling—expressed by the constituent who approached me, in any event—that the commissioner could go about his task in a better fashion.

There is also apprehension that telephones are being tapped and other surveillance is being carried out. That is a matter of concern. I asked them whether they had any evidence of that, and they do not; but I can well imagine that there may be and I will be asking agencies about that, and that is why I am raising it now. The apprehension was so significant that Mr David Noonan, whom I was talking to and who is the vice-president of this organisation, felt that he could not tell me about things on the phone and had to come across town. Now if that is the sort of fear and apprehension that is being put into the community, that is not a good thing. A person should be able to talk to his member of parliament by phone without any apprehension that it is in any way being interfered with. So I will be asking questions along those lines.

I will also be asking questions about whether or not the commissioner himself has become so infected by an attitude towards the union that you must begin to wonder about the quality of whatever he gives across. May I say, in fairness to him, that he is somebody for whom I have high respect as a great man, and so I am not attacking the commissioner as a man; but people can go about a royal commission in a way that infects the quality of their decisions. So I will be asking questions of all organisations that go in for surveillance. When the person from the royal commission does appear before us, I will be asking questions in that context.

**CHAIR**—Thank you, Senator Cooney. Are there any general questions? If there are not, we will move directly to the Office of the Director of Public Prosecutions. Minister?

**Senator Ellison**—Yes. There is no problem with the suggestion by Senator McKiernan. While we are on an order of events, is it possible to get any idea of when you will be calling agencies? I realise that it happens at every estimates and it is always difficult, but is it possible to say to some witnesses that they will not be needed before a certain time so that they can go back to their offices? That is something that the committee might care to look at during the course of the morning: if it were possible at some stage to give a direction to say that officers further down the list—from the AFP, for instance—might not be needed before lunch or might not be needed before the morning break.

**CHAIR**—Minister, we will as usual endeavour to stick to the program as closely as possible, as you know. Before we have called our first agency, it is hard to determine how matters will progress. We might begin with the DPP and see where that takes us and, as soon as I can get an indication from my colleagues, I will do as you suggest. I will certainly ensure that officers have the opportunity to make the most of their working day.

**Senator Ellison**—Thank you.

**CHAIR**—We will begin by asking the officers of the Office of the Director of Public Prosecutions to come to the table, please.

**Mr Cornall**—Madam Chair, I am instructed that they are not here; they have been caught up in traffic. I am unable to advance the matter any further.

**CHAIR**—The best laid plans of mice and, in this case, ‘me’ go astray. I know that Mr May is here, so we will move on to the Federal Magistrates Service. Welcome, Mr May. We will begin with questions in this area of the Federal Magistrates Service from Senator McKiernan.

[9.14 a.m.]

### **Federal Magistrates Service**

**Senator McKIERNAN**—What is the current staffing profile of the Federal Magistrates Service?

**Mr May**—The current staffing of the Federal Magistrates Service is 19 federal magistrates, including the Chief Federal Magistrate, and approximately 60 staff to assist the administration of the court and the federal magistrates. The numbers are about 16 in the national office and the balance work directly with the federal magistrates.

**Senator McKIERNAN**—Where are the magistrates located? Can you give me a breakdown of their locations?

**Mr May**—There are currently two in central Sydney, two in Parramatta, two in Brisbane, one in Townsville, one in Darwin, one in Adelaide, one in Newcastle, one in Canberra, six in Melbourne and one in Launceston.

**Senator McKIERNAN**—Has there been any change to the arrangements between the Federal Magistrates Service and the Federal Court or the Family Court since we last met?

**Mr May**—There has been no change in the arrangements. Both memoranda of understanding are under consideration. We have recently commenced discussions with those courts about new arrangements to run from 1 July 2002, because the first set of arrangements was for that two-year period.

**Senator LUDWIG**—When you say the issues are currently being looked at, has a committee been formed? Is there a general aim about what you intend to achieve out of the review process?

**Mr May**—The discussions are at a very early stage and, at this stage, I am not envisaging any substantial shift that would change the way services are being delivered. What we are seeking to achieve in the discussions is a shift that was anticipated when the court was set up whereby the funding for the court would be put into our appropriation and we would purchase—if I can use that word—services rather than have them provided at no cost. But the nature of the services will basically remain the same.

**Senator LUDWIG**—Will that conclude by 1 July 2002?

**Mr May**—The current aim is to have the new arrangements in place for 1 July.

**Senator McKIERNAN**—Could you give the committee an update of the status of the magistrates services primary dispute resolution service?

**Mr May**—I take it, Senator, that you are referring to the mediation services that we provide through community agencies, that we were separately funded for?

**Senator McKIERNAN**—Yes.

**Mr May**—Perhaps if I could outline all of the services: we receive some services directly from the Family Court through its mediation service. In the past year, from 1 July, my understanding is that we received approximately 1,000 services from what I will describe as the court counsellors and there were 283 conciliation conferences. In addition, we put approximately 215 referrals out to community agencies.

You might recall from my evidence last time I was before the committee that there was a delay in getting those arrangements with the community agencies up and running. Those arrangements have now been concluded and they are operating quite effectively. The rate at which community agencies are being used is almost increasing exponentially. I am told that in February, to date, we have referred 44 matters to community agencies. That is about the rate of referral for each of the previous three months and the rate of referral was very much lower in the earlier months. So the rate of referral is now increasing and I think that is as the profession and the federal magistrates gain a greater level of confidence in shifting from quite an established and well-proven supplier of services to other suppliers of services.

**Senator McKIERNAN**—Are you evaluating effectiveness?

**Mr May**—We will be, Senator.

**Senator LUDWIG**—That was the direction I was going in. Is there an audit process in place to ensure that not only programs are evaluated but the outsourcing to the various committee organisations is effectively achieving the aim of the program, and have you done that to date?

**Mr May**—The arrangements with community agencies are contractual arrangements, and we will be monitoring the delivery of services under those contracts. Whether we do that as part of our internal audit program is yet to be determined, but we will certainly be monitoring those arrangements and changing them as necessary if there are problems in service delivery. There is a very consistent level of contact with the community agencies, especially as we try to improve some of the initial delivery issues.

**Senator LUDWIG**—What are they?

**Mr May**—There were issues about how agencies made contact with their clients. We have been bedding down a process whereby arrangements are made by our Melbourne office with the agency and the client for an appointment to be made. In some cases we have had feedback from the profession that the time taken to establish the conference and some of the procedures—because they were different from the procedures that were operating when we only obtained services from the Family Court—was causing some concern, especially to the legal profession. So we have looked to ensure that those arrangements are operating effectively and are not in fact creating a lesser level of service than we have contracted for.

**Senator LUDWIG**—Is there a template agreement in place?

**Mr May**—There was a template agreement.

**Senator LUDWIG**—Could you provide one of the templates that you used—perhaps you could take that on notice, unless you have the information there.

**Mr May**—I will take that on notice.

**Senator LUDWIG**—Could you also advise how many agreements are in place as at today's date—I think you said that there are 213 referrals; they must be to a certain number of agencies. In addition, is there a complaints mechanism in place so that the clients of the

various agencies you use are aware that the services are ultimately contracted by you and so that your auditing process might pick up whether there are delivery issues between you and the agency and also between the client and the agency?

**Mr May**—We certainly have a complaints mechanism, which we have recently published on our web site. My recollection is that one of the conditions of the tendering process, or one of the matters that was looked at in the tendering process, was how the complaint mechanism operated—how an organisation responded to client complaints. But perhaps I could take that question on notice.

**Senator LUDWIG**—Yes. Do you understand what I am looking at?

**Mr May**—Yes, I do.

**Senator COONEY**—Is the Federal Magistrates Service doing what would otherwise be done by the Federal Court, and how much is it doing what would otherwise be done by the Family Court? I do not want any precise numbers, but just a rough indication.

**Mr May**—In relation to work that would otherwise be done by the Federal Court, the vast majority of matters in the bankruptcy jurisdiction are now being done in the Federal Magistrates Service. That seems to be happening across the country, except in the Sydney CBD where, if my recollection is correct, approximately 20 per cent of the matters are still being issued in the Federal Court. Again, I could take that question on notice.

**Senator COONEY**—Bankruptcy used to be done by a judge who later became Chief Justice of the High Court of Australia.

**Mr May**—Indeed.

**Senator COONEY**—What about the Family Court?

**Mr May**—Just to continue, in the human rights jurisdiction, again most of those matters are now being either issued in or transferred to the Federal Magistrates Service. That is where the major impact is being felt in Federal Court work.

In the family law arena, approximately 23 or 24 per cent of the new filings for final orders are happening in the Federal Magistrates Service. That is work that otherwise would have been in the Family Court. Approximately 62 to 65 per cent of the divorce applications are now being filed in the Federal Magistrates Service, although one has to be careful looking at that figure because there is an arrangement in place which directs applications without fee into the Family Court in most cases. There is a different fee for a divorce in the Family Court and the Federal Magistrates Service, so there is obviously a reason why people file in the FMS there.

**Senator COONEY**—Why do we use the term ‘Federal Magistrates Service’?

**Mr May**—That is the term determined by the Attorney. We do not use that term when we are operating in court. The administration of the court is the Federal Magistrates Service; on the court documents it is referred to as the Federal Magistrate’s Court.

**Senator COONEY**—What strikes me is that the Federal Magistrate’s Court—I would call it that because that is what it seems to be—is doing some work that used to be done by a person who ultimately became Chief Justice of the High Court and doing very important work. I am a bit concerned that it should be called a service. The other thing is that it is a chapter 3 institution, isn’t it?

**Mr May**—Indeed.

**Senator COONEY**—Do they get a pension?

**Mr May**—They do not get a judges pension under the Judges Pension Act, if that is the question. They do receive an amount of 13.1 per cent of salary, which can be directed to a superannuation fund nominated by the federal magistrate or to a retirement savings account nominated by them.

**Senator COONEY**—This is directed not so much at you, Mr May, but at anybody at the table who wants to answer it. The two things that in the old days used to go to ensuring that you would have integrity in the court and that there would be no temptation on the people deciding the issues was, firstly, that you would have tenure, which this court has, I think—it certainly has tenure; it has to under chapter 3—and, secondly, that you would have a pension. I was wondering why no pension was paid to this court.

**Mr May**—I think we are into the realm of policy.

**Senator COONEY**—I am not asking you, Mr May.

**Mr Cornall**—Senator, it was a decision by the Attorney-General and the government that, at the level of a magistrates service, superannuation was an appropriate method of providing for their retirement but that a judicial pension was not.

**Senator COONEY**—You are putting forward the policy; I can understand that, but it seems a very bad piece of policy. I do not know whether the opposition supported it—I cannot remember—but it seems a very bad piece of policy that a chapter 3 court should have taken from it one of the two leagues that have been traditionally looked upon as preserving the integrity of a judicial office.

**Mr Cornall**—It is my understanding that magistrates in other jurisdictions in Australia do not receive judicial pensions, so I do not think there is any significant difference between federal magistrates and state magistrates or territory magistrates, in that regard.

**Senator COONEY**—In our state of Victoria I do not think they give pensions. It is just a bad policy, in my view.

**Mr Cornall**—I think the independence of the magistrates is guaranteed by their security of tenure.

**Senator COONEY**—Anyhow, it is a matter of policy.

**Senator McKIERNAN**—What circuits did the service undertake last year, and what is the schedule of circuits this year?

**Mr May**—There is a very large amount of information to be provided on that. Perhaps I could take that on notice and simply provide the schedule of circuits that have been undertaken and are currently programmed to be undertaken. I can refer the committee to the map on page 43 of the annual report of the service—and the same information is on our web site—where there is an indication of where the circuits are. Do you wish me to run—

**Senator McKIERNAN**—No, don't. If the information is there and it is not in front of me, that is my fault. What are the proposals for the current year and the coming year? Have you entered into discussions? I ask that from the point of view that one of the very strong points that was used in establishing the Federal Magistrates Service was that it would be able to take justice to the people and they would not necessarily have to come to it, that it was going to service outlying areas. We are aware of what is in last year's annual report. That is some time ago now. There might be some disappointments in some sectors as to which areas were

covered and which were not. What are the current things, in brief, and what are the plans for the future?

**Mr May**—There are ongoing discussions about circuits. We have recently published new circuit arrangements for South Australia and Queensland on our web site. Discussions are just beginning in relation to the next financial year for New South Wales, where we have some difficulty in establishing some of the circuit arrangements because of delays in getting the state court system timetables out. The availability of court space is sometimes dependent on when state courts are sitting in particular towns and what impact that has on the local profession and other arrangements. So we have to fit in in our pecking order, and those discussions are happening at the moment in relation to New South Wales. I cannot tell you what the current arrangement is in relation to Victoria.

**Senator McKIERNAN**—Can you take that on notice for the next round of estimates, which will be in June, and be in a position then to give an update on what is happening currently? I will not be here for the estimates after that, so I will ask for it for then. I have two final questions. There were changes to the legislation last year which extended the powers of the magistrates service to give the service power to adjudicate over some migration matters. What impact has that legislation had on the workload of the service?

**Mr May**—The workload of the service has not been greatly affected yet. There have been two matters heard in the service. I understand that there are approximately 13 matters that may be transferred to the service in one city, which will obviously increase our workload there. But most migration matters I understand are still being issued in the Federal Court. Of course, while the legislation changed to give us the jurisdiction, other legislation went through the parliament to change the powers of courts in relation to some migration matters and that has had its own impact on the potential workload of the Federal Magistrates Service.

**Senator McKIERNAN**—It is only potential. So there are two matters and then a further 13 matters potentially being transferred?

**Mr May**—Yes.

**Senator McKIERNAN**—So those 13 matters would be matters already filed in the Federal Court?

**Mr May**—The 13 matters have been filed in the Federal Court. I could not tell you whether the two matters that we have heard were originally filed in our court or transferred, but I have got a suspicion that they were actually filed in our court.

**Senator McKIERNAN**—Are you trying to tell me that no litigant or representative of a litigant has sought to file a new matter in the Federal Magistrates Service since the legislation passed last year?

**Mr May**—Two matters were filed and have been decided.

**Senator McKIERNAN**—In which jurisdiction were they?

**Mr May**—Both of them were in Sydney.

**Senator McKIERNAN**—Thank you very much, Mr May.

**Senator COONEY**—Do magistrates go on circuit?

**Mr May**—They do, yes.

**Senator COONEY**—And they are at it the whole time, working the whole time, from the description you have given—and you are working the whole time too, may I say.

**Mr May**—Yes.

**Senator COONEY**—We sound like a fairly mean Commonwealth, I think.

**CHAIR**—A mean?

**Senator COONEY**—Commonwealth. I am not going to go and get political at this stage, Madam Chair.

**CHAIR**—I am overwhelmed by your generosity, Senator Cooney. Senator, have you further questions?

**Senator COONEY**—No.

**CHAIR**—Senate Ludwig, have you concluded in this area or do you have further questions?

**Senator LUDWIG**—I have a couple of questions. I noticed in your annual report that you refer to the docket system. Have you moved towards a case management system or a system more in harmony with the Federal Court or the Family Court style of dealing with cases, or is it your intention to maintain the docket system?

**Mr May**—For the moment, the court has adopted and is continuing to work with the docket system. It is not quite the docket system that the Federal Court operates, and we have not shifted towards the sort of case management system that the Family Court operates. The court regards the docket system that it is operating as the most effective way to meet the expectation that lies on the court to deliver justice in a quick, simple and accessible manner.

**Senator LUDWIG**—You also mention on page 17 under the heading ‘The capacity of the court to do its work’—this might be a little out of date—that at present the court has 16 federal magistrates. The suggestion is that this will not be a sufficient number for the court to continue to do its work. Are you currently in negotiation for more federal magistrates to be appointed and, if so, how many and when?

**Mr May**—The appointment of federal magistrates is a matter for the government, so that would have to be referred to the department.

**Senator LUDWIG**—Have you made a request?

**Mr May**—At this stage, we are always keen to have some additional federal magistrates. We could use them in a number of places. It is clear from our current data that we could use additional appointments in probably four cities. But it is a matter for the government about where appointments are made.

**Senator LUDWIG**—I understand that. The question was: have you made the request? You put it in your annual report, but have you then made a request?

**Mr May**—We have been in discussion with the department and with government about where appointments might be made.

**Senator LUDWIG**—Page 20 refers to self-represented litigants. How far have you got in relation to that? The annual report states:

The court is aware of its responsibility to address the needs of unrepresented litigants.

Have you gone further than just simply raising the issue?

**Mr May**—Yes. I am pleased to be able to say, Senator, that on Thursday of last week we signed the employment contract for a research officer to work with us for the next 12 months on a self-represented litigants project. That person will take up her duties at the end of this

month and work through till 28 February 2003. The purpose of employing that person is to give some impetus to that very important project.

**Senator LUDWIG**—Thank you.

**CHAIR**—Any further questions in this area? As there are no further questions, Mr May, thank you very much for assisting the committee this morning.

[9.38 a.m.]

#### **Office of the Director of Public Prosecutions**

**CHAIR**—I invite Mr Delaney and Mr Thornton from the Office of the Director of Public Prosecutions to come to the table. Good morning.

**Mr Delaney**—Madam Chair, I apologise for not being in the room when we were called previously.

**CHAIR**—Thank you, Mr Delaney. We were just moving so quickly—at the speed of light! We are hoping to continue at the speed of light. Before we begin in the area of the DPP, in consultation with my colleagues—and to give you guidance as you sought, Minister—we would hope to be in the vicinity of examining matters to do with the High Court by about lunchtime. That can only be a guide, as you know, but we will aim to reach that point in proceedings.

**Senator Ellison**—Because Federal Police and Customs are large agencies, would it be safe—

**CHAIR**—Are they both here?

**Senator Ellison**—I think they might be around somewhere—if not in the room, outside.

**CHAIR**—Hiding themselves as well, as one would expect, Minister.

**Senator Ellison**—I just wondered if it would be safe to say ‘not before lunch’ for those two agencies.

**CHAIR**—Yes, I think you are quite safe in that regard.

**Senator Ellison**—Thank you. I am obliged to the committee.

**Senator McKIERNAN**—I want to start on a series of questions by firstly referring to a comment contained in Mr Bugg’s executive statement in the annual report. On page viii, he states:

One of the great successes of the DPP has been to maintain its status as an independent agency free from political influence and political pressure. I think it is important that the DPP continues to operate independently from the political process. However, that does not mean that the DPP cannot maintain good working relations with the Attorney-General and the Minister for Justice and Customs.

I think that is a particularly well-written comment, and I make that statement in the light of the last round of estimates questions when quite a large series of questions was directed to the investigation of certain affairs of a minister in the Commonwealth government. The DPP chose then, on the basis of I think lack of evidence, not to proceed with any prosecutions. I am referring, of course, to Mr Reith and what was colloquially known as the telecard affair. I am not making any incorrect statements in those observations, am I?

**Mr Delaney**—No. I think that is generally accurate.

**Senator McKIERNAN**—The DPP has made a number of investigations into allegations against a number of ministers of the Crown over a number of years. Has the DPP's office ever instituted any prosecutions against any of those ministers?

**Mr Delaney**—I am going from recollection here, but I do not think there has been a prosecution of a minister of the Crown.

**Senator McKIERNAN**—Neither do I. Thank you for that qualified confirmation. I understand your qualification in that as well. Since our last meeting there has been a further relatively high profile investigation of a minister. I am referring to Minister Tuckey. Again, no charges or prosecutions were lodged with regard to this matter?

**Mr Delaney**—That is so. There was a decision made not to prosecute. That decision was made prior to Mr Tuckey being sworn in as a minister.

**Senator McKIERNAN**—When was the Tuckey matter—if I can call it that without being disrespectful to the minister—referred to the DPP?

**Mr Delaney**—I think the first referral of some material was in October of last year; further material was provided in December and the director made his decision in about mid-January. I will get the precise date for you—16 January.

**Senator McKIERNAN**—Who made the referral to the DPP?

**Mr Delaney**—The Australian Federal Police.

**Senator McKIERNAN**—So one would assume from that that the Federal Police were investigating Mr Tuckey during the course of the federal election, which was conducted in early November.

**Mr Delaney**—That would have to be a question you would address to the Australian Federal Police. Certainly the investigation predated the federal election by a long period, because there was an investigation of two matters, Mr Crane and Mr Tuckey—although they are quite separate, as I understand it, in their factual basis—and those ran for 2½ or three years.

**Senator McKIERNAN**—Just a minor correction: it was Senator Crane, a colleague of mine and indeed of the minister's. I accept what you say. I should direct the earlier question to the Federal Police and I will be doing so at the appropriate time. It was public knowledge that Senator Crane was under investigation over some allegations that were made against him. To the best of my knowledge, it was not public knowledge that Minister Tuckey was under investigation by the Federal Police or that there was indeed a referral of Minister Tuckey to the DPP in October last year. Would I be correct in that? Or could you, from your office, point me to any media comment that would dispute the assertion I have just made?

**Mr Delaney**—I do not recall any personally, and that would not be unusual. Unless there is some correspondence with the media by some party privy to it, investigations would not normally be a matter that would be made public either by my office or, I would think, by the AFP.

**Senator McKIERNAN**—Minister, are you able to help me on this matter of whether or not there was any publicity about the investigation of Minister Tuckey prior to the public revelation, post-election? I think it was at the time of the appointment of the ministry that it first came to light. That is my recollection.

**Senator Ellison**—I would have to check on that, Madam Chair. Certainly the matter involving Senator Crane was public. I am not so sure about the matter concerning Mr Tuckey

but, as to whether there had been any mention of it at all in the press, I would have to check. I think the AFP are the people to put these questions to, as to when these matters were first looked into. As to the publicity, I would have to check on that. I tend to agree with Senator McKiernan, but I want to make absolutely sure there was not some mention in passing, because the matter involving Senator Crane attracted a lot of attention over a long period of time, and I just need to check whether Mr Tuckey was mentioned, albeit inadvertently, along the way.

**Senator McKIERNAN**—Thank you, Minister. Please take that on notice and come back to us. During the investigations prior to the decision not to proceed with the prosecution of Minister Tuckey in this instance, was there any communication between the DPP or the DPP's office and the Attorney-General and/or the office of the Minister for Justice and Customs or any persons in those offices? I am referring to the particular allegations against Minister Tuckey in the lead in to the decision not to prosecute.

**Mr Delaney**—Certainly I am not personally aware of any such contact. I would put that forward as the DPP's answer. If there should be any change to that—and I will make further inquiries—I will undertake to come back to you.

**Senator McKIERNAN**—Where is Mr Bugg today?

**Mr Delaney**—He is in Queensland today; he had an appointment that was made some time before the Senate additional estimates date was set and he thought it was one he could not break.

**Senator McKIERNAN**—Can you tell us the nature of that appointment?

**Mr Delaney**—We are opening a new office in Townsville, and he is presiding at that opening.

**Senator McKIERNAN**—So he has decided that the opening of an office in Townsville is more important than being accountable before the Senate estimates committees and the parliament of Australia.

**Mr Delaney**—No, I do not think he has decided that at all. In fact, he will make himself available at, for example, the spillover session on Friday if the committee so wishes.

**Senator McKIERNAN**—That is a very generous offer; thank you very much. We will consider on that and after some consultation we will make a decision and let you know. Thank you very much for the offer, though; I do appreciate it.

I want to move on to another issue—that is, the charges against an ABC journalist that were laid following some disturbances at Woomera, not that she was involved, and the decision to institute a prosecution, very quickly, very sharply, very speedily. I want to contrast the actions of the DPP's office in that instance to the matters that we have just been discussing—the many months of investigation of matters dealing with Commonwealth ministers. But before I move on to the journalist matter, I was going to leave it open to my colleagues if they wanted to develop other areas.

**Mr Delaney**—I will respond to that briefly. I think there are notable differences between the two matters. In the case of the journalist there was an arrest and following an arrest things do have to move quickly. In the other matter there was an investigation and a decision was made on the evidence that was collected.

**Senator McKIERNAN**—Because the journalist was arrested, do you have to move quickly?

**Mr Delaney**—Yes.

**Senator McKIERNAN**—These are very serious allegations of impropriety which can be investigated over a very lengthy period of time out of the public eye—if what we know is true—and then, at the end of that, there is an announcement there is no prosecution. Is there a different criterion being used in the DPP's office as to how different individuals will be treated—those that are under suspicion?

**Mr Delaney**—No, there is not, Senator. I think, as I referred to earlier, we only received final material in relation to Minister Tuckey late last year. Whilst the investigation took a period of time, one of the reasons—as I understand it—that there was some delay was that proceedings were taken in the Federal Court by Senator Crane and those proceedings, in effect, delayed the further investigation of both matters.

**Senator McKIERNAN**—Notwithstanding that, though, the Tuckey matter was referred to the DPP's office in October last year, during the federal election campaign—or was it before the campaign was formally announced?

**Mr Delaney**—To clarify this, I think there was contact with our office in October but the first letter, as I understand it, from the AFP was on 22 November 2001.

**Senator McKIERNAN**—So what is the standing of the contact that was made in October?

**Mr Delaney**—My understanding is that it was a phone call from the AFP.

**Senator McKIERNAN**—That phone call did not mean then that the DPP were inquiring into the allegations against Mr Tuckey?

**Mr Delaney**—No, I will qualify the term 'inquiring into' that you used. We respond to material that is forwarded to us in the nature of a brief of evidence in which it is asserted that there may have been offences committed. We assess that material and decisions are made on the basis of what is provided to the DPP.

**Senator McKIERNAN**—The other person that was under investigation by the AFP claimed parliamentary privilege on some documentation. Did Mr Tuckey claim any parliamentary privilege?

**Mr Delaney**—I am not aware that he did.

**Senator McKIERNAN**—Would that claim be made, again, to the DPP or would it have been an earlier claim to the AFP?

**Mr Delaney**—I think that is a matter you would have to address to the AFP.

**Senator McKIERNAN**—When was the Senator Crane matter referred to the DPP?

**Mr Delaney**—The initial allegations were referred in August 1998.

**Senator McKIERNAN**—I assume, because there has been no public announcement, that those inquiries are continuing.

**Mr Delaney**—That is my understanding.

**Senator McKIERNAN**—So no decision has been made.

**Mr Delaney**—Certainly not by the DPP.

**Senator McKIERNAN**—If that is an active matter I am going to leave it.

**Senator LUDWIG**—I am not going to take up where Senator McKiernan left off. The *Sydney Morning Herald* of Tuesday, 22 January 2002 states:

The DPP has advised the police not proceed further “because there is insufficient evidence to establish the commission of a criminal offence by any party”.

Is that the normal statement made by the DPP in relation to these matters? Was that the eventual finding issued by the DPP or was that a verbal—

**Mr Delaney**—I do not precisely know the answer to your question. I suspect it was a verbal response.

**Senator LUDWIG**—The newspaper report went on to say:

The DPP has also advised that any further investigation would not bear any further fruit, but it is believed—

and this is the nub of the question—

that the DPP did make the qualification that this advice was subject to any more information coming to light.

Is that an accurate statement of the DPP’s position in relation to the matter and, if it is, has any further information come to light since this was last before the DPP?

**Mr Delaney**—To my knowledge there has been no further information and, as with any case, if further information comes to light and it is referred to the DPP then it would be considered in the normal course of things.

**Senator COONEY**—Just to follow-on from the question that Senator McKiernan was asking you about the journalist, was that a summary offence?

**Mr Delaney**—I do not want to mislead you. It can certainly be dealt with summarily.

**Senator COONEY**—I do not want you to be particularly accurate.

**Mr Delaney**—I am just thinking about whether it is an ‘either way’ offence; I am just not sure of that.

**Senator COONEY**—All I was going to go on and ask you is whether the DPP prosecutes summary offences.

**Mr Delaney**—Yes, we do—in all jurisdictions.

**Senator COONEY**—I thought that had passed. I remember years ago that it used to prosecute parking offences at the airport, which I thought was very interesting in terms of the money involved. But it still does that, does it?

**Mr Delaney**—Perhaps I could qualify that in this way: we certainly prosecute the great majority of offences that are summary offences against Commonwealth law. There are some exceptions—the tax office, for example, does some more routine summary matters, as does the Australian Securities and Investment Commission, and there may be some other departments that do minor matters that cannot result in a term of imprisonment.

**Senator COONEY**—I was just looking at chapter 1 of the report. It talks about the primary role of the DPP but then states:

The DPP does not generally prosecute street crimes or crimes against the person.

I suppose that means those sorts of crimes do not arise at the Commonwealth level. Is that what is meant?

**Mr Delaney**—I think that is what is intended there. They are more the domain of state offences.

**Senator COONEY**—So there is no offence under Commonwealth provisions that is prosecuted by the Federal Police direct?

**Mr Delaney**—No.

**Senator COONEY**—On that matter, I want to ask you about the way things are expressed in the Attorney-General's portfolio as to the function of the DPP. The report talks about the role of the Office of the Director of Public Prosecutions as follows:

To contribute to the safety and wellbeing of the people of Australia and to help protect the resources of the Commonwealth through the maintenance of law and order and by combating crime ...

It just seems strange to me that the function of a DPP should be to maintain law and order. I would have thought that was more the function of the Federal Police and the National Crime Authority and so on. What concerns me here is the attitude that that manifests. The expression 'law and order' has become a buzz word, I think, for coming down on anything that is perceived to be wrong. To say that the function of any DPP—not only the Commonwealth DPP—is to, as it were, go out and suppress that is a very interesting concept.

**Mr Delaney**—We would hope that that is a result of what we do, that general and personal deterrence is given effect by effective and timely prosecution. It is more the result and the maintenance of that result.

**Senator COONEY**—I always thought—and I might well be wrong here—that the role of the DPP is to look at the evidence and to judge whether there is sufficient evidence to prosecute or not to prosecute.

**Mr Delaney**—That certainly is a function of the DPP.

**Senator COONEY**—Is it only one function or is it the function, I wonder.

**Mr Delaney**—I think there is an overlap with what is hoped to be achieved by effective prosecution, and that is the maintenance of law and order.

**Senator COONEY**—It is also, I would have thought, to be fair to everyone. That expression has me somewhat concerned, given the fact that we now are going to have confiscation of property on a civil standard.

**Mr Delaney**—Yes, I understand your views on that, Senator.

**Senator COONEY**—I suppose that is what they are. You were not here earlier—I know you got caught in traffic, so I am not making any criticism at all about your arriving late—but I made a little speech before you got here about one of the things I am going to pursue throughout the course of these proceedings: the way that the building royal commission is being conducted in Melbourne. I have discussed that with David Noonan, the vice-president of the construction division of the CFMEU. I will not go into a long speech again, but are there any proceedings that the DPP is contemplating against anybody in the building industry because of their connection with the building industry? I am not asking whether somebody who is a builder or is in the building industry is being prosecuted for some other offence, but are there any proceedings that the DPP is presently contemplating for an offence by any member of the union in the building industry because of conduct in the building industry?

**Mr Delaney**—Not to my knowledge. I might just ask Mr Thornton. No, not to our knowledge.

**Senator COONEY**—Thank you very much.

**Senator McKIERNAN**—Before I move back to the charges against journalist Natalie Larkins, I note an article in yesterday's *Sunday Telegraph*, dated 17 February, entitled 'MP's paper trail followed'. It concerns certain allegations made against a former Western Australian member of the federal parliament, Mr Richard Evans. Is that matter currently under consideration by the DPP?

**Mr Delaney**—I am not aware of that. I do not know. Neither of us are aware of that matter, but I can take that on notice.

**Senator McKIERNAN**—Thank you. I just want to move on to the matter of Natalie Larkins and to contrast answers on this matter with what we have heard in regard to inquiries by the DPP into allegations against a number of ministers—I am not just picking on Minister Tuckey—none of which have resulted in a prosecution. In asking this series of questions, I am aware of the prosecution policy of the Commonwealth—that is, the decision to prosecute. I do not have the reference number of that particular document, but I certainly have the document here with me. I understand the contents of that—that is, the decision making capacity within the DPP and the liberties that the DPP's office has to institute a prosecution or indeed not to institute a prosecution.

On the occasion of the arrest of Ms Natalie Larkins, an ABC journalist who was part of a media contingent outside the Woomera Detention Centre in January this year following disturbances at the detention centre, a media ban was instituted in the surrounding area of the detention centre and the Australian Protective Services personnel asked the media to move back some distance from the detention centre. As a result of that there was some altercation and Ms Larkins was subsequently arrested and then charged by the DPP's office. This incident occurred on 27 January and within a very short period of time the DPP's office had said that charges would be laid against Ms Larkins. Can you perhaps outline the scenario, the chronological stage of events, if what I have said is not factual?

**Mr Delaney**—I would add this: following arrest a court date is allocated to that matter and there is an expectation that on that court date a charge will either be preferred or not, and that is indeed what occurred. But I would not like to go into the detail of that matter: it is still before the court and it is pending. In answer to your question, there is a requirement to be at court and, even if the matter is being considered on an ongoing basis, things have to be done—and were done.

**Senator McKIERNAN**—Are you telling the committee that you do not have the ability, within the guidelines contained in the prosecution policy of the Commonwealth, not to proceed with charges against the journalist in this particular instance?

**Mr Delaney**—You do if you have all the information that you need to make that decision.

**Mr Thornton**—I have a comment on that, Senator. There are two different ways in which matters come to the DPP. One is that somebody might be arrested. For example, in a major drug operation or something like that, an arrest can be made in the course of the activity and charges will be laid by the arresting officials and then the matter is set down to come before the courts and certain timetables are set. On an occasion like that the DPP would not have a brief and would not have all the material. They may have some material and there may have been some prior consultation, but then that brief will be assessed once we get all the material in and decisions made about whether the matter should continue—or if there was insufficient evidence then the matter would be discontinued.

I would contrast that with a number of other ways in which some major matters come to the DPP. For example, an agency might put a brief together on, say, a fraud matter which occurred some time ago. There may be some issues about whether it is a particular offence or not, and they will refer a whole brief to the DPP. The DPP will then make the assessment and say, 'Yes, there is sufficient evidence to prosecute; provide the advice.' Then the investigating official will go and lay the charges. That is really the contrast between an arrest matter, if you like, and a summons matter.

**Senator McKIERNAN**—So Ms Larkins, in this instance, was arrested and as a result of the arrest was charged with an offence; is that right?

**Mr Thornton**—I can tell you about the way it would work in some jurisdictions that I have worked in. I am not totally familiar with the system in South Australia, but normally it would be the arresting official who would lay the charge initially, and then that would be before the court. I know that in South Australia there seems to be almost a hybrid system, where they have made an arrest on the basis of a particular charge and then the person has been bailed but then comes back before the court on a certain date, and charges are laid formally on that return date at the court. In a case like that we may not necessarily have all of the information. We may not necessarily have a complete brief. We would make an assessment, on the basis of the material we had, of whether the matter should continue at that stage. Then when the full brief came together we would reassess the matter.

**Senator LUDWIG**—To add clarity: the prosecution policy of the Commonwealth states at paragraph 2.10:

Factors which may arise for consideration in determining whether the public interest requires a prosecution include ...

And it lists from (a) all the way down to (t), by the look of it.

**Mr Thornton**—Yes.

**Senator LUDWIG**—Aren't those matters then taken into consideration by the DPP in relation to, say, the Ms Larkins matter, now that—as you have said—the arrest was made and charges were preferred?

**Mr Thornton**—They will be taken into account and, obviously if the DPP had more information or more material or if a full brief came together and we looked at it then, we might decide that we did not have enough information or that there was not sufficient evidence.

**Senator LUDWIG**—Paragraph 2.10 goes broader than that, as you would be aware. You probably know this far better than me. Subparagraph (a) talks about the seriousness or, conversely, the triviality of the alleged offence and other paragraphs talk about whether it is of a technical nature only, any mitigating or aggravating circumstances, the alleged offender's antecedents and backgrounds and the effect on public order and morale. So there is more than just simply evidence that has to be collected; there are also those considerations that have to be taken into account, as I understand it, by the DPP.

**Mr Thornton**—Yes, that is correct, Senator.

**Senator LUDWIG**—When do you do that? I am just trying to understand the order of these things.

**Mr Delaney**—You do that when you have all information that you feel is needed to make that decision.

**Senator LUDWIG**—When will that be done, or is that part of the operation?

**Mr Delaney**—There are still matters that are being looked at in relation to this particular matter and I would not like to go into it in any detail beyond saying that.

**Senator COONEY**—I have been listening to the questions on Natalie Larkins. Is the DPP considering her situation or are people in South Australia? I thought you were talking about South Australia there a while back.

**Mr Delaney**—It is our South Australian office that is seized with the matter at the moment.

**Senator COONEY**—What is the charge; do you know?

**Mr Delaney**—Yes, I can tell you what the charge is. It is under paragraph 12(2)(c) of the Public Order (Protection of Persons and Property) Act. It is the charge of failing to leave Commonwealth land when lawfully directed to do so.

**Senator COONEY**—So, in effect, ‘trespassing’ would be the common term you might use about the situation. In other words, she has been asked to leave and she hasn’t.

**Mr Delaney**—Well, yes, as a general description, I suppose.

**Senator COONEY**—It is a very general description. Was it a member of the Australian Federal Police who arrested her?

**Mr Delaney**—I think it was the Australian Protective Services.

**Senator COONEY**—Did he or she—whoever did the arresting—say, ‘I arrest you for—

**Mr Delaney**—I couldn’t give you that detail, nor do I think it would be appropriate, Senator, to go into the detail.

**Senator COONEY**—I am not too sure that it is not appropriate. What you have been asked is what your prosecutorial policy is. You are saying, ‘Well, look, we charged because we had to charge for a particular reason.’ Then in respect of other people you had to do a lot of investigations—all of which sounds sensible—but I would have thought it was very significant to know who did the actual charging at the time. I would have thought that if Natalie Larkins was arrested she would have to be arrested and given a reason. That is the normal way of doing things. I am trying to think of how people are arrested without being told why they are being arrested. So when you say you do not want to go into that that seems a very strange sort of answer.

**Mr Delaney**—It would just be speculation on my part. I haven’t seen the papers. We haven’t, as I understand it, a full brief yet.

**Senator COONEY**—I see. It is not that you don’t want to tell us; it is that you don’t know. It is quite interesting. This is speculation, and you can check on it, but I would have thought that the person would have asked her to leave—I don’t know whether he did or didn’t—and then when she didn’t there was an arrest made and then proceedings taken. I remember years and years ago, during the Vietnam war, there were people who went onto Commonwealth property—you wouldn’t remember it; it was probably before your time. That is what happened and then the case was dismissed later on. It would be interesting to know. Then, once charged they would be bailed. But then you would not rush the preparation of the evidence simply because a particular person had been arrested. You would still go about your proper research and your proper preparation, wouldn’t you? You are not saying, in other

words, that she has been charged and it has been proceeded with simply because she has made arrested? That would seem strange.

**Mr Delaney**—No, not at all, Senator.

**Senator LUDWIG**—Following up on the same point, I notice that under the guide that I referred to earlier about the decision to prosecute, it talks about consent to prosecute, and 2.25 states:

A number of Commonwealth Acts provide that a prosecution for an offence under the Act cannot be commenced or, if commenced, cannot proceed except with the consent of the responsible Minister ...

In what Senator Cooney has referred to as the trespass matter generally, does that require the minister to consent to that, or is it alternatively delegated to the DPP to decide?

**Mr Delaney**—My understanding is that it is delegated, Senator.

**Mr Thornton**—Yes, it has been delegated to the DPP.

**Senator COONEY**—The DPP has state offices in every state?

**Mr Delaney**—Yes, in every state.

**Senator COONEY**—Who decides on the prosecution: the person or the people in that particular office? Is that what happens?

**Mr Thornton**—That is what would normally happen.

**Senator COONEY**—And what does Mr Bugg decide about what to prosecute? Only what comes up in Canberra or Tasmania, I suppose. He goes back to Tasmania, a great state, on occasions—the whole time. What happens there? It interests me now. What is the relationship between the DPP and the state offices, in terms of whether a prosecution goes ahead or not?

**Mr Thornton**—It depends on the nature of the case. Looking at the normal sorts of cases that we do in the state, they would be determined at the state level. Some of the more high profile matters may be referred to the director. Also, once matters have gone on indictment to the superior courts—if, for example, there was an application by a defendant to discontinue the prosecution—then all of those matters go to the director, and so Mr Bugg would deal with all of those.

**Senator COONEY**—Say, for a drug case?

**Mr Thornton**—In a normal drug case, if there were an arrest made in one of the state offices, the brief would be assessed by our people in that state and the matter would just proceed on that basis.

**Senator COONEY**—So there would have to be something significant about it—either that it is a high profile case or there are new issues of law or something—to take it up to Mr Bugg: would that be the situation?

**Mr Thornton**—That is correct.

**Senator COONEY**—Mr Delaney, getting back to what you were saying: the Natalie Larkins matter would be dealt with in South Australia?

**Mr Delaney**—Well, no. It is a fairly high profile case and it may well come to the director, I would think.

**Senator COONEY**—But it has not come to him yet?

**Mr Delaney**—No.

**Senator COONEY**—Right. You would think that the evidence would be in fairly small compass, in the sense that there would be a series of warnings given—I suppose; I do not know—and then the issue would be whether or not she was on that land and whether she had any entitlement to be there.

**Mr Delaney**—I would not like to comment further.

**Senator COONEY**—Fair enough.

**Senator McKIERNAN**—As I understand what has been said, Mr Delaney and Mr Thornton, in regard to the charges against Ms Natalie Larkins from the events at Woomera on 27 December, the DPP has not as yet made a decision to proceed with charges against Ms Larkins.

**Mr Delaney**—There are charges pending, but a final decision as to whether those charges proceed or not—

**Mr Thornton**—Yes. The fact is that we do not have all of the material, Senator. We would expect that, once we get a full brief of evidence, we will review the case and that either the case will proceed or we will make the final decisions then.

**Senator McKIERNAN**—Why don't you have the full brief now, bearing in mind that these events occurred on 27 January and have received very interested media attention and that charges were laid? I think there has been an initial court appearance, so why haven't you got a brief at this time? Is it because they are not ministers of the Crown?

**Mr Delaney**—No. I do not think that is the reason at all, Senator. As to why the brief is not completed at this stage, I am not in a position to say. The APS are putting it together, in my understanding, and the AFP are assisting in that. When it is available, it will be provided to the DPP.

**Senator McKIERNAN**—Under paragraphs 2.8 and 2.9 of the prosecution policy, you are required to take a number of matters into consideration, including public interest requirements—and I will not waste the time of the committee by going through both of those matters. The incident that occurred was a matter of great public interest and has continued to be a matter of great public interest. Again, I repeat: why has some action not been taken on this matter at this particular time? On one particular day this person is standing in an area where it is quite lawful for the individual to be. An administrative decision is made by a minister or somebody else which makes it unlawful to be in that particular area, and the individual is arrested as a result of that. I seems to me that our laws are in question here and, from that, the actions of the DPP must be brought to bear.

**Mr Delaney**—I do not agree with that conclusion. I do not know that I can assist you any further than by what I have said before in relation to the process. That process will be followed and a decision will be made when all the information is available, and it will be made in accordance with the prosecution policy.

**Senator McKIERNAN**—And the public interest will be taken into account?

**Mr Delaney**—Absolutely.

**Senator McKIERNAN**—Is it in the public interest? You have to determine what is in the public interest. Is it in the public interest for a legitimate—licensed, if you like—journalist in Australia to report matters of interest that are occurring at one of the Commonwealth detention centres?

**Mr Delaney**—With all these matters, there is a balance and all factors will be taken into account when all the material is available.

**Senator McKIERNAN**—I understand that there is a balance, and I think we have seen that there is a balance when we have been asking questions about allegations against ministers of the Crown. We know that no prosecutions have resulted from it. We know also that, in this instance, a journalist was doing what journalists are employed to do. On one day the action was legal; on the next day she is charged with undertaking an illegal act because of an administrative change. How will the DPP measure the public interest in that instance?

**Senator Ellison**—Madam Chair, Mr Delaney has taken it as far as he can. He has said that these matters will be considered when all the details are before the DPP. That stage has not yet been reached, and this is not the place to pre-empt what may or may not happen or what hypothetically may occur. There are proceedings on foot and, under the circumstances, having regard to the Senate's long observation of the sub judice rule, this line of questioning has really gone as far as it can go.

**Senator McKIERNAN**—I am appreciative of your comments, Minister. I am very aware of the sub judice rule and I have taken that into account, but I did start my theme of questioning with a quote from the DPP from his annual report, which states:

One of the great successes of the DPP has been to maintain its status as an independent agency free from political influence and political pressure. I think it is important that the DPP continues to operate independently from the political process.

That is the basis of my questioning. The DPP has a very important role to play in our law enforcement processes in this country, and there are reasons why these matters should be questioned in the public arena and why the actions of the DPP should be brought to public scrutiny. That is why I am proceeding with this line of questioning.

**Senator Ellison**—I understand that. The whole role of these estimates committees is for public scrutiny, but this is done within well-recognised conventions and there has not been any evidence today to indicate that the DPP has not been acting in accordance with its mission statement. But I understand the reasons for Senator McKiernan's questions. Nonetheless, this has now gone as far as it can go in view of the answers given by Mr Delaney and the convention that I have referred to.

**Senator McKIERNAN**—I think you are probably right in regard to this particular estimates committee, Minister, that there is probably not a great deal more we can pursue. But we will be watching in early March when the matter goes to court and we will be scrutinising how the DPP responds to the brief of evidence in this instance. I think that we, as well as members of the media, will be adjudicating on those actions and perhaps even comparing them to the earlier theme of questioning where we had followed through on matters from previous Senate estimates committees in regard to the telecard affair and the fact that no prosecutions followed from that. But at this time I am going to take the minister's advice and endeavour to move on, but I think my colleague Senator Ludwig has a further question.

**CHAIR**—I understand that Senator Ludwig does have another question in this area, and then we may perhaps have completed the DPP.

**Senator LUDWIG**—How many of those type of prosecutions—what Senator Cooney has referred to as trespass—has the DPP agreed to prosecute in the last five years? Perhaps you would like to take it on notice. I cannot recall any in the papers, but that would not necessarily mean there have not been any. I was curious whether it was a usual offence that was obviously dealt with regularly by the DPP or whether it was a oncer.

**Mr Delaney**—I would have to take that on notice.

**Senator LUDWIG**—You cannot recall any yourself?

**Mr Thornton**—I can recall other cases—

**CHAIR**—Mr Thornton, it is actually quite difficult to hear you. Could you speak into the microphone for me?

**Mr Thornton**—I can recall other cases. This is not the first of the type under those provisions. I could not give you a number, but we could certainly have a look at that and get back to you.

**CHAIR**—Thank you. If there are no further questions to the DPP then, Mr Delaney and Mr Thornton, thank you very much for your assistance this morning.

**Mr Cornall**—Just before we leave this issue, one comment made by Senator Cooney was about the role of the DPP and the wording used to express that role. On page 160 of the additional estimates statement, the DPP's output is said to be:

An independent service to prosecute alleged offences against the criminal law of the Commonwealth, in appropriate matters, in a manner which is fair and just ...

I think that addresses the question the senator asked.

**CHAIR**—The committee will resume consideration of the additional estimates in the order in which it is set out in the program. Having completed the DPP, we turn to the National Crime Authority.

[10.28 a.m.]

#### **National Crime Authority**

**CHAIR**—I welcome Mr Whiddett and Mr Hickman to the table. Senator McKiernan will begin the questioning.

**Senator McKIERNAN**—There is just one question from me and then I think that my colleagues will continue. Where is Mr Crooke this morning?

**Mr Whiddett**—Mr Crooke is in Brisbane.

**Senator McKIERNAN**—Why is Mr Crooke in Brisbane?

**Senator COONEY**—It is the state to be in!

**Mr Whiddett**—I have no particular understanding of that—that is where he is normally based.

**Senator McKIERNAN**—I think I should put a protest on the record: this is the second person out of three sets of witnesses where the CEO of the organisation is not present before the Senate estimates committees. I am going to be more forceful on this occasion because this is the second time it has happened, not because you are the NCA. I think there is an expectation from the parliament that agencies of the Commonwealth be accountable for the actions taken over a period of time. It is nearly nine months since Senate estimates committees met and there are questions that could be directed to CEOs of organisations, and there is an expectation that CEOs be present at this scrutiny process.

I might say that I personally am not happy—and I think it could be said of the opposition as a whole that we are not happy—that we are not getting CEOs here. That might be a warning shot over the bows for any other organisations or agencies that are appearing under

this portfolio. Perhaps at this point in time, if you are in possession of information that the CEO is not present today and has to be in Brisbane or in another part of Australia, you could let us know now and we could adjourn those proceedings until Friday. I think that we probably should continue with the scrutiny of the National Crime Authority at this juncture but, if we run into difficulties, we may have to bring you back on Friday. It is really not good enough that the CEO, the Chief Executive Officer, of an agency is not present to be accountable for the expenditures in their portfolio statements during the period.

**Mr Whiddett**—Point taken.

**Senator LUDWIG**—Minister Ellison, were you aware that the CEO was not going to be present in both this matter and the preceding matter that we dealt with? Were you advised that this was the case?

**Senator Ellison**—No, I do not recollect any advice on that but that is not unusual because estimates are a moving feast, so to speak. It is, of course, difficult for some of the CEOs because they have other commitments. What I have done and what the secretary of the department has done is initiated inquiries in relation to the other agencies to see if their CEOs will be present and we will endeavour for that to happen. We have, on past occasions, not had the CEO here and the committee has not taken issue with that, but I fully understand what Senator McKiernan is saying here and we will endeavour to have all the CEOs of the agencies here.

**Senator LUDWIG**—I do understand that on occasion a CEO might not be present but my recollection was that the committee was usually informed at the commencement of proceedings that that was the case. Be that as it may, we will move on.

**Senator Ellison**—That would not have been done through my office, more through the administration. Anyway, we will follow that up and will endeavour to have them all here.

**Senator LUDWIG**—Thank you.

**CHAIR**—Senator Ludwig, in the course of preparation for the committees, witness lists were made available to senators which did indicate where officers were or were not attending. I understand those to have been circulated.

**Senator LUDWIG**—I would like to see that.

**CHAIR**—Sure. Are you going to continue questioning in this area?

**Senator LUDWIG**—Yes. In relation to the National Crime Authority, the Prime Minister announced on 28 October last year that the National Crime Authority would be reviewed. To that end, on 21 December the Attorney-General released a media statement that I suspect you have also seen which announced that the former AFP Commissioner Mick Palmer and former A-G's departmental secretary Mr Tony Blunn would review the performance and cost effectiveness of the NCA. In respect of that, was the NCA contacted by anyone associated with the review announced by the Attorney-General on 21 December prior to or at that time?

**Mr Whiddett**—Yes, indeed, Senator. There was full consultation between members of the National Crime Authority and both Blunn and Palmer.

**Senator LUDWIG**—Is there a terms of reference or review document that has been issued or released?

**Mr Whiddett**—I am not sure what has been released, but I am certainly aware that it was about the efficiency and effectiveness of the organisation. That was the general thrust of the review.

**Senator LUDWIG**—If there is a terms of reference document, is it available to the committee?

**Mr Whiddett**—I do not think it is available at this point. It is still under the consideration of government.

**Senator LUDWIG**—Are you saying that it is cabinet-in-confidence?

**Senator Ellison**—Yes, but I will see what we can do in relation to the terms of reference. I know there was a press release but I am not sure if there was not some release in relation to the reference. I will take that on notice, Madam Chair, and get back to you with whatever we can. I do make the point at the outset that the matter is being considered by the government and it is a matter before cabinet.

**Senator LUDWIG**—As I understand it, it was obviously established in 1984 as a result of a certain number of events that occurred. The relevance of it then, I would imagine, would be a matter that you would want to include in the terms of reference if you are going to review the effectiveness and performance of the NCA—that is, what it was originally established for and whether it is meeting that requirement.

Has the NCA itself then provided any information into the review being undertaken by Mr Palmer and Mr Blunn at this point in time? Is there, effectively, a committee that has been formed? Are there minutes of that available? What is the process that is intended to be undertaken?

**Mr Whiddett**—There were several meetings with both Mr Blunn and Mr Palmer, and a submission was provided to them on some of the main points of their review. But there was close consultation in the course of that review, both orally and in writing.

**Senator LUDWIG**—Minister, will you examine what of that is available to the committee to have a look at?

**Senator Ellison**—Of the consultation?

**Senator LUDWIG**—Yes.

**Senator Ellison**—The report of course is a matter which cannot be disclosed because it is before government and is cabinet-in-confidence. I would think that any of those inquiries made by the committee members would also be in that category as well. I have undertaken to look at the terms of reference—and I will do that—but, as to the detail you are seeking, I believe that would be cabinet-in-confidence. But I will have a look at it and see what we can do.

**Senator LUDWIG**—As well, I was looking at whether or not there were any submissions made to the reviewers—whether they were made by the departmental officers, the NCA officers or other interested bodies. Obviously, it is a matter for concern if the *Australian* is correct in its report on 13 January. It states:

Many senior NCA officers are already convinced the agency will be abolished or have its mandate sharply reduced.

My view is that the public should have some knowledge of what is going on—or are you saying that that decision has not been made and that the *Australian* is running ahead of the pack?

**Senator Ellison**—There has been no decision yet made—I can tell you that much—about the future of the NCA. As I have said, this is a matter before the government and, in fact,

forms part of a wider consideration which the Prime Minister announced in the course of the election—that is, that there would be a summit on transnational crime and terrorism. This really fits part of that. There are other considerations as to what flow-on effects there could be on Commonwealth law enforcement—this is just part of it. It has been stated by the Prime Minister that this is something that would be looked at in particular and also in the wider context of reviewing state-Commonwealth relations in respect of terrorism and transnational crime. That has been a very public commitment.

**Senator LUDWIG**—Have the other states been asked to make submissions in relation to the effectiveness and efficiency of the NCA?

**Mr Whiddett**—Certainly, Palmer and Blunn did consult with the states. I am not sure at what level, but it would have almost certainly have been at commissioner level.

**Senator LUDWIG**—So you do not know whether it was any higher than just the commissioner?

**Mr Whiddett**—It may well have been; I am not aware.

**Senator Ellison**—The Attorney-General's press release of 21 December last year, which was released jointly with me, states:

The Prime Minister said then—

'then' referring back to the election—

that one of the matters which would be considered at the meeting between the Commonwealth and State and Territory leaders will be the reformation, abolition or replacement if necessary of the National Crime Authority.

So the Prime Minister had signalled during the election campaign that most definitely the question of the NCA would be a matter of discussion with the states and territories. That is a very public commitment in relation to that. I understand that officials have been talking on these and a variety of other matters in the lead-up to the summit.

**Senator LUDWIG**—I understand that. The press release of 21 December also states:

Mr Palmer and Mr Blunn will provide their opinion prior to the Commonwealth-State Summit on Transnational Crime and Terrorism in March ...

That is not that far away. I was curious as to what this committee could obtain about their opinion. It does not say whether they have written a report or a review. As you have said, it is a very important issue as to whether the NCA will continue or be abolished or changed—or, as some suggest, be amalgamated with the AFP. It is a matter that I think goes further than simply saying, 'It's a matter that we'll deal with as a government issue, and it's cabinet-in-confidence at the moment.' The public have a right to know. Be that as it may, in relation to that forthcoming summit on terrorism, has the NCA prepared any submissions or any other evidence for that summit?

**Mr Whiddett**—We have been involved in departmental consultations with Prime Minister and Cabinet and the Attorney-General's Department on aspects of transnational crime, and to a lesser extent terrorism, which is not really the major interest of the NCA.

**Senator LUDWIG**—In relation to smuggling claims—which I will return to later as it is more likely in the area of the AFP—I think the *Herald Sun* mentioned a Mr Enniss. Has that matter come across your table?

**Mr Whiddett**—What is that matter, Senator?

**Senator LUDWIG**—The matter with regard to Mr Enniss, the Australian citizen living in Indonesia.

**Mr Whiddett**—No, but I am aware of the case.

**Senator LUDWIG**—You conduct joint investigations with the AFP.

**Mr Whiddett**—We do.

**Senator LUDWIG**—You have not conducted any joint investigation with the AFP on that matter?

**Mr Whiddett**—Not in relation to that matter.

**Senator LUDWIG**—Have you been in discussions with the Australian Protective Service about any future amalgamation with the AFP?

**Mr Whiddett**—We have had no discussions whatsoever.

**Senator COONEY**—I understand that Mr Blunn and Mr Palmer, for both of whom I have the utmost respect, are looking only at the NCA. Is that right? They are not looking at the Australian Federal Police or ASIO or ASIS, as far as you know?

**Mr Whiddett**—As far as I am aware. I do not know what else they might be doing.

**Senator COONEY**—If we are talking about the cost-effectiveness of the security system throughout Australia, I wonder why the government is concentrating on only one body. Have you any idea why?

**Senator Ellison**—In the release on 21 December, it states:

Mr Palmer and Mr Blunn have been asked to explore options for achieving better and more cost effective outcomes in national crime law enforcement.

The press have largely driven the idea that it is an NCA focused matter. I stress again that the government is approaching this in an across-the-board effort to look at the relationship, as I said, between the Commonwealth, the states and the territories in relation to transnational crime and terrorism. Obviously, the NCA is a matter of interest to people, and that has been singled out. Last week, it was announced that the APS would be absorbed into the AFP. That was another aspect of this general review in relation to events which changed our thinking on September 11 last year. The government believes that it is timely for Australia to review the set-up in relation to transnational crime and terrorism. I think that was a point the opposition in the election campaign even referred to. If I recall correctly, there were various suggestions made in the opposition policy. I do not think anyone would say that it is not timely to have a look at this situation now.

**Senator COONEY**—I think it is timely. The fourth paragraph of the joint news release that you referred to states:

Mr Palmer and Mr Blunn have been asked to explore options for achieving better and more cost effective outcomes in national crime law enforcement.

I follow that. But then you say, ‘This is good. We will look at the state police in conjunction with the state authorities, of course, as well as the NCA, the AFP, ASIO, ASIS, DSD, et cetera.’ This will be a document of high vision on how we can stop international crime imposing itself upon us. Yet the whole inquiry is directed at only the NCA. It is not that it does mean that, but people could draw the conclusion that this matter is not so much about looking at how we can get forces in Australia to the point where they can stop international terrorism but more about getting rid of the NCA. It is a bit like an inquiry into Steve Waugh:

you just look at him and not the rest of the team as to what is happening. You just get the impression—it is a false impression, I am sure, but you might want to correct it—that this is an attempt to get at the NCA.

**Senator Ellison**—It is not an attempt to get at the NCA. People have to remember that the NCA is the major law enforcement body where the states, the territories and the Commonwealth meet and work together in a systemic and structured way. That is an obvious first port of call when you are reviewing law enforcement relationships between the states, the territories and the Commonwealth. This is the major body where those jurisdictions come together. There has been a lot of comment as to the systemic issues in relation to the NCA and how the states and territories work together. Even the chairman has said that jurisdictional problems had been encountered. That has been a longstanding issue. There is the question of warrants at state borders. All of those things have been the subject of concern for some time.

Last year across the board you had a heightening of concern because of September 11. But, in any event, there were people expressing concerns across the board again—opposition and government alike—that some issues had to be addressed in relation to cross-jurisdictional issues. There is a system in place whereby the NCA has to have a reference to it, and that has to be signed off by state, territory and Commonwealth ministers. I have been through that process. I have seen it in relation to the issue of bikie gangs. Even with the best will in the world, that took a degree of administrative effort, and I just wonder whether something like that does not need looking at, because you have to address something which is pressing and urgent and you have this reference system. That is just one aspect I personally have a view on, and I think it has been commented on before.

Can I say that this has not been just an NCA focused review by the government; it has been an across-the-board review, heightened by not only September 11 but a move towards transnational crime and terrorism operating more closely together. The CIA said before September 11 that transnational crime posed a threat to national security, that there was evidence before September 11 that terrorist groups were involving themselves with transnational crime syndicates. That was in place beforehand. September 11 merely compounded that and convinced everyone that this had to be brought to immediate focus and resolution.

The Hilton bombing caused a great deal of concern in Australia, and that is largely credited as the reason for forming the AFP as we know it. These sorts of events do cause us to address these sorts of issues. They were issues which people thought ought to have been addressed anyway; it was just that it gave us the impetus.

**Senator COONEY**—Can I adopt most of what you say but then go on to say that it seems to me that the problem is that if you want to have a well-motivated, confident, forward looking force there is a risk at least that you will not get that if you choose the NCA out of a whole series of bodies and say, ‘We’re going to look at you and at nobody else.’

**Senator Ellison**—But we have been looking at other bodies as well. We just saw that with the APS and the AFP. That was something which the Commonwealth could do because it was entirely within its own jurisdiction. The NCA is not. As we stated in our election platform, the present scope for AFP officers to investigate state offences is very limited, and the only way that the Commonwealth can intervene is through referral of investigations to the National Crime Authority. As I stressed, the NCA is the meeting place of law enforcement jurisdictions in Australia. For that very reason, it is centre stage in any review of this sort.

**Senator COONEY**—Have we—and when I say ‘we’, I refer to the Commonwealth—got onto the states and said, ‘Let’s have a combined investigation into how we can get our forces into such an order that we’re going to counter terrorism, whether at home or abroad’?

**Senator Ellison**—I think that is being done, as I mentioned, through the officials in the lead-up to the leaders summit and also, as Mr Whiddett mentioned, Messrs Blunn and Palmer consulted with the state and territory people—and that is my understanding as well. So you had a number of points of contact with the states. That is being progressed as we speak. Because the leaders summit now has been put off until April, as I understand, obviously we need to talk to the states and territories—and that is being done.

**Senator COONEY**—We could talk about this all the time, but it just seems to me that you have this material run by the *Australian* and there are rumours abroad that the NCA has to go through great modification, if not be absorbed. You have all of that rumour out there and, following on that rumour—whether correct or not I do not know, but the rumour is there; I know that—in that context, the government then says, ‘We have these two very, very senior people and we will have this body looked at, but no other body at this point in time.’ When you talk about the AFP and the APS, that is just restoring to one body what was separated into two I think in the 1970s. It just seems to me that, if I were in the NCA, I would not be feeling confident and getting the feeling that I was going to be asked to bat and to take an important part in the team. I would have thought that, if that were the situation, it should be corrected.

**Mr Whiddett**—I might like to say something on that, just on the basis that press speculation does not help the morale of the people inside the organisation, but we cannot stop the media from speculating. I think it is reasonable to say that after, 17 years of existence, there are some things that could be improved and, as the minister pointed out, certainly the reference system is cumbersome; it needs to be tightened up. Given the requirement to move quickly in some matters, the reference system can be a barrier at times. So it is timely, for whatever reason, that the origins of the organisation be reviewed and the future reassessed.

**Senator COONEY**—I would have thought that one way over that is to get people from outside, if you like—everybody seems to bring consultants in in these times—to get advice and to bring them in and talk about it together. But in any event, I do not think you can sort of make a comment that is anywhere near political.

**Senator LUDWIG**—Has the joint statutory committee that has been formed to oversee the NCA operations been involved in the deliberations of Mr Blunn and Mr Palmer in relation to the review of the NCA?

**Mr Whiddett**—Is this the intergovernmental committee?

**Senator LUDWIG**—No—well, I can ask on that one too. This is the joint statutory committee.

**Mr Whiddett**—I am not aware of that.

**Senator Ellison**—I do not know about that. I will have to take that on notice and see what I can advise you.

**Senator LUDWIG**—Minister Ellison, doesn’t it smack of a committee that has been formed to come to a predetermined outcome? We do not know what the full terms of reference are; we do not know who the committees talk to; we know that there is a cabinet-in-confidence document that currently has the outcomes on it, but no-one has had a look at them; we know that the NCA have been consulted, but we do not know how broadly or how widely; we do not know who has made submissions to the NCA or what opportunities people have

had to make submissions to the NCA about their current operational position; and we do not know and we have not been informed about whether or not they actually have been meeting their requirements.

**Senator Ellison**—I can tell you that both this government and the former government often had reports to the executive, and they are in a different situation to inquiries which come via parliamentary committees. The government is entitled to commission these reports and advise itself of matters of the day. In accordance with longstanding established practice, where these are to the cabinet it is cabinet-in-confidence. Cabinet has not yet considered this; it is under consideration. There has been no decision; I can tell you that. It would be inappropriate to start talking about what is being discussed at this time. Governments discuss a lot of things in cabinet, and they do not open the door to let in the outside world to join in their deliberations, and there is a very good reason for that—one which former governments and this government have adhered to. This is a normal process.

Two people of the calibre of Messrs Blunn and Palmer have been employed to carry out this review—they are both highly qualified. The government believes that this report was necessary. It follows from its very public commitment in the election. This was part of the government's election campaign. It stated in the document that I referred to earlier that the referral process, being a complex cooperative scheme, can be very time consuming. There is a need for law enforcement agencies across Australia to work together, and the fact is that the National Crime Authority was the place where state, territory and Commonwealth law enforcement met.

All this has been very public and very open in the election context. It ties in with the leaders summit that the Prime Minister mentioned. If anyone wants to speculate on what may or may not happen, that of course is open to them to do so. But it does not help those people in the NCA. As Mr Whiddett has mentioned, they are doing a very good job in law enforcement. Speculating as to what may or may not happen is not helpful to them. Can I stress that this is part of an overall review that the government is undertaking in relation to transnational crime and terrorism. It is thoroughly appropriate that it happened at this point in time. There are some weighty issues to be considered—for example, whether a police force have the powers of examination of the NCA, and those sorts of things. All this no doubt will be discussed at the leaders summit, and the Prime Minister has said that this will be discussed with the state and territory leaders. That is a transparent process.

**Senator COONEY**—I understand what you are saying, but there is a concern here. I do not know what Mr Blunn and Mr Palmer are being paid. I hope it is a proper amount, because they are both highly skilled people. Here you have the government committing public funds to this inquiry, and nobody is really sure of what is going on, other than that there is an inquiry into the NCA for some purpose. Anyhow, I suppose we could just keep talking. I had another question on a different matter.

**CHAIR**—Have we concluded in this area, Senator Ludwig?

**Senator LUDWIG**—Yes.

**Senator COONEY**—I do not know whether you were here when I made my little speech at the start about the royal commission into the building industry?

**Mr Whiddett**—Yes.

**Senator COONEY**—I was going to ask a series of questions. I wanted to ask—and I want you to stay within your charter; there are some things you cannot say, but I simply want to

ask—has anybody from the NCA been detailed to examine the building industry in terms of the industry itself? I do not want to ask about whether somebody who is a builder or somebody who is in the union is being investigated for something else, but whether they are being looked at because they are members of the building union.

**Mr Whiddett**—There was an investigation some time back into the conduct of one aspect of the building industry. It was separate from the matters now before the royal commission. Yes, the NCA has had involvement in that type of work.

**Senator COONEY**—Is it presently employed in that type of work?

**Mr Whiddett**—Not at the present stage.

**Senator COONEY**—One of the points we are going to raise is whether or not the sum of money—I think it is \$25 million, \$50 million over two years or thereabouts—includes all the sums of money that have been devoted to this, or whether there are other sums as well, for example money that would be paid to people from the AFP or the NCA or from anywhere else who were presently helping the commission in some way. Can you tell us that?

**Mr Whiddett**—I am unaware of that. There may well be former employees of organisations working for the commission.

**Senator COONEY**—But not the NCA as a body?

**Mr Whiddett**—No.

**CHAIR**—There are no further questions in this area. Mr Whiddett and Mr Hickman, thank you very much for your assistance with the committee this morning.

[11.01 a.m.]

#### **Australian Transaction Reports and Analysis Centre**

**Senator COONEY**—It is good to see you here, Ms Atkins and Mr Jensen. Are you still collecting information in the financial field? It is still the same thing, isn't it? Many years ago I went down there and had a look. It is where you have television sets—whatever you call them, with all sorts of lines coming here, there and everywhere?

**Mr Jensen**—We have software applications to look at our data and analyse it.

**Senator COONEY**—Your institution is intelligence gathering only, and you are not looking for powers to arrest, to break into houses, to get warrants or anything like that? You are just an institution that goes around doing a great job gathering intelligence?

**Mr Jensen**—That is correct. Thank you.

**Senator COONEY**—You are not looking to expand the power of the Australian Transaction Reports and Analysis Centre? I think—without going into details—you would have produced lots of vital information that has ultimately led to successful prosecutions. Is that so?

**Mr Jensen**—That is correct.

**Senator COONEY**—It is all done at a fairly reasonable price?

**Mr Jensen**—Yes. That is the case.

**Senator COONEY**—I would like to congratulate this body. I reckon it is a great body—Chair, are you listening to this? I am saying that AUSTRAC is a great body, and you are not even acknowledging this body!

**CHAIR**—I am paying attention to the secretariat staff, which as you can imagine is very important for the effective proceedings of estimates. It is about as important as your attention to AUSTRAC.

**Senator McKIERNAN**—You were tracking it as well, weren't you, Chair!

**CHAIR**—Yes. Thank you for the pun, Senator McKiernan. There are no further questions in this area to AUSTRAC. Thank you very much, Mr Jensen and Ms Atkins, for your appearance here this morning.

[11.04 a.m.]

#### **Australian Law Reform Commission**

**CHAIR**—Good morning, Professor Weisbrot and Ms Adams.

**Senator COONEY**—You have had some great conferences on law reform, et cetera—and I have spoken about this before. I just want to get your impression as to whether you should have more parliamentarians. I am not talking about ministers such as Senator Ellison, who is big and powerful and turns up and makes speeches, just parliamentarians. Do you ask them along? I think there is a contribution to be made by eminent people such as Senator Greig, et cetera. Have you ever thought of that when you are preparing the conference and speech lists?

**Prof. Weisbrot**—You took me to task last time I was here for not including sufficient sitting parliamentarians in the most recent conference we had on civil and administrative penalties. We have solved the dilemma this year by not having a conference at all.

**Senator COONEY**—Now I feel mean and miserable.

**CHAIR**—I hesitate to ask whether that says anything about those who appeared on the last occasion, Professor Weisbrot.

**Senator COONEY**—I suppose there is a changing system whereby law is subject to scrutiny. Is your body—which has been a very honourable body over the years, I think—absolutely essential to the way we have developed the law? There are the judges, et cetera, but there are also committees, like this, and people on these committees, and I am wondering whether, in the perception of things and the way people conceive of things and think of things, parliamentary bodies and groups are taken sufficiently into account. Over the years I think there has been an attempt from time to time to get the two tendencies together—if I can call it that—but not enough. I suppose we should be making the effort, too. Do you have any thoughts about all that?

**Prof. Weisbrot**—I think the interaction is a healthy one at the moment. I would not tip it one way or the other. We regularly appear before committees when asked to make a submission. We have done so on a number of occasions in recent times and we will continue to do so. We certainly also very actively monitor what the committees are doing so that we do not overlap with that process. Also, it has been the case a number of times recently that Senate committee reports have culminated in a recommendation that some matters should go to the Law Reform Commission for further research. We have a member of staff at the moment whose role is primarily to monitor what happens in parliament. That includes the implementation of our reports, which is why we can provide figures on that, as well as to look at the reports themselves and what is happening.

**Senator COONEY**—This is a difficult question to ask and you may not want to answer it: how are resources? That is the other thing you need to be able to do that sort of thing and to look across the legal system generally.

**Prof. Weisbrot**—They are adequate to the task. We also tailor our work program to resources. We are currently engaged in two major inquiries. Prior to that time we had three smaller ones. That is about the balance of what we could handle. We have not made any request for additional funding through additional estimates. I think we are okay. We are in that funny situation where, if we took on more staff, we would need to expand our premises. By adding a little we would have to make a request for a lot, so we have not done that.

**Senator COONEY**—What are the two major ones you are doing at the moment?

**Prof. Weisbrot**—Civil and administrative penalties in federal jurisdictions. We are looking at the whole range of noncriminal sanctions to enforce compliance, which goes across a very wide range of subject matters—from corporations, consumer, competition, environment, social security and the like. The other one is on the protection of human genetic information, which also is a very wide ranging reference.

**Senator COONEY**—The other issue I want to explore with you is whether the reports can better be made available to the public. They are clearly available to the public. That is what you want: that people get a report. Have you thought of any way in which your work on, for example, genetic material and what ought to be done about that can be put into a form which the public can read?

**Prof. Weisbrot**—I have the issues paper we produced. It was meant to be a brief outline of the issues but has turned out to be vast; so we were alive to that. I am pleased to say that we have got a lot of positive feedback from members of the public who said that they were very daunted by the size of it but that once they got into it they found it to be very readable. Because of the length of it, we also produced a summary. I should backtrack and say that everything we do now is produced on our web site so that anyone can access any issues paper, discussion paper or final report and download all or some of it. In the case of something this large, we also produced what is, in effect, an executive summary of about 12 pages which crystallises what it is about. In an even briefer form, we did a four-page brochure which outlined the very key points and then indicated where people could get more information and how they could participate.

With this reference as well, because it is one in which we do not want to hear merely from expert groups, we have been taking a show on the road in which we have been explaining what is happening in the new genetics and then talking particularly about the issues. This is a joint reference with the Australian Health Ethics Committee of the NHMRC. We will by the end of next month have visited every capital city plus quite a few regional ones—I think there are 17 or 18 meetings around Australia. So we are having those public meetings as well and are also using the media, to the extent we can, to talk about these issues. I have done probably 40 or 50 programs on talkback radio and so on, talking about the issues involved.

**Senator COONEY**—Do you put former reports on the web site?

**Prof. Weisbrot**—Yes. Of course the current ones are up, and we have a program in which we have been putting all the back issues up as well. Are they all there now?

**Ms Adams**—Yes. I believe all back issues are now on the web site in PDF format, and they are now also going up in ASCII format.

**Senator COONEY**—What about a thing like WS1 and evidence done by Tim Smithers? He has been a judge now for years, but would you put on that one on evidence? The reason I talk about that is that some might become dated, because their recommendations are taken up

and legislated. Do you pick and choose the ones you put on the web site? Or do you put them all on?

**Prof. Weisbrot**—They are all on the web now. Initially, just to get them up, we put them all up on PDF format, which is what most people want; but it is not as accessible for people who are visually impaired, and so we have now put up all of the reports in ASCII format, which works better with the reading programs that visually impaired people use.

**Senator COONEY**—That is interesting. So if I wanted any report from the Law Reform Commission going right back, I could tap it up, if I knew how to work the machine?

**Prof. Weisbrot**—Yes. Go to [www.alrc.gov.au/past-publications](http://www.alrc.gov.au/past-publications), and there is a list of all of them now.

**Senator COONEY**—Senator Ludwig says I need to do the course first.

**CHAIR**—I could show you here as we speak, Senator Cooney.

**Senator COONEY**—Can you do that?

**CHAIR**—I could.

**Senator COONEY**—That is good. Have you any idea of how actively that web site is gone to?

**Prof. Weisbrot**—Yes. I cannot recall the figures off the top of my head, but that is included in the annual report; and the extent of increase is quite dramatic. We monitor it monthly and when we have been in the news, if we have released a report or we have been in the media, then predictably the interest, the number of hits, increases pretty dramatically. We do monitor that.

**Senator COONEY**—There was some difficulty, I suppose—and Senator Ellison might want to answer this—at one stage about the relationship between parliamentary committees and the commission, and the Attorney and the commission, and what you should be able to say and what you should not be able to say, and what can be addressed. Has that been cleared up now? Do you remember that?

**Prof. Weisbrot**—I will be happy to answer that; that was prior to your time. As Senator McKiernan will remember as well, we produced a protocol at that time, which I assume is repeated in here, which talks about our policy on making submissions, which is that we will make submissions in areas that the commission are currently working on or have done—one which we have current expertise on is the best way to put it. There was an issue about privilege so that we do not run copy past the Attorney in a way that it could be implied that there was a comment on it or a suppression of it. The blow-up of that was prior to my time—

**Senator COONEY**—I should say that the difficulty certainly did not arise while you were there. What about the courts: do you know whether they use your materials at all?

**Prof. Weisbrot**—Do you mean to cite them or do you mean the *Managing justice* report?

**Senator COONEY**—Both, I suppose: to cite and to look at them, to get their concepts together. Do you have any evidence of that?

**Prof. Weisbrot**—The reports are regularly cited and of course now the Acts Interpretation Act says specifically that the courts can have recourse to Law Reform Commission reports where the commission had some role in the development of the policy or the legislation. We are also cited sometimes in overseas courts. Our marine insurance report was recently cited by

the English court of appeal, with some approval, about an emerging area of law, so that is the case.

In relation to *Managing justice*, of course, we made recommendations that went to court administration and so on and those things are matters that you can ask the courts about. We are following the implementation, and both the Family Court and the Federal Court have been active in giving us feedback on what they are doing in response to those recommendations.

**Senator COONEY**—The only other matter I wanted to talk was about your relationships with other law reform bodies, not only in Australia but generally throughout the world. Can you say a few things about that?

**Prof Weisbrot**—There is an association called ALRAC, which is the Australasian Law Reform Agencies Conference. It includes all of the law reform bodies in Australia—the state and federal ones—as well as New Zealand, Papua New Guinea, the Solomon Islands, and Fiji when those law reform commissions are operating. So we have a regional association. There is also a Commonwealth Law Reform Agencies Association that meets every two years in association with the Commonwealth law meeting. Of course, the most recent meeting was postponed because it was to be held in Harare, Zimbabwe. I believe the next meeting is in Melbourne, next year.

**Senator COONEY**—You will be able to go to Melbourne!

**Prof Weisbrot**—Yes, definitely; we will send a large delegation. Our biannual journal, *Reform*, includes at the back what is called ‘Reform round-up’ and we have a section from every commission that participates—that is all of the Australian ones plus a very large range of overseas agencies in England and Wales, Scotland, Ireland, Zimbabwe, Malawi, Zambia, Fiji, PNG and so on. They provide information about what they are doing and people do not have to reinvent the wheel—they can see that other agencies are working on it. Also, typically, when we receive a new reference we send out an email or a letter to our sister agencies around the world saying: ‘We are doing this; have you done anything that might be of interest to us?’

**Senator COONEY**—Thank you very much for that.

**CHAIR**—I see there are no further questions for the Australian Law Reform Commission. Professor Weisbrot and Ms Adams: thank for your time this morning.

[11.19 a.m.]

#### Federal Court of Australia

**CHAIR**—Welcome, Mr Soden, Mr Dawson and Mr Foster.

**Senator McKIERNAN**—Your annual report on page 11 goes into some detail of the impact of the Migration Act on the workload of the court, and you went to some statistics about the seemingly ever-increasing workload in the migration area. The parliament last year passed legislation which sought—in part—to address that problem as perceived by the government and probably by the courts. I am referring to the privative clause legislation—the judicial review legislation passed in September of last year. What has been the impact of the amendments to that legislation? Have they had any appreciable impact at this stage?

**Mr Soden**—I can give you some precise numbers but I think, in summary, it is fair to say that there has not been any significant change to the incoming migration workload in the Federal Court and, if anything, there has been an increase of workload in recent months compared to those amendments you mentioned.

**Senator McKIERNAN**—How can that be? If the intent of the legislation was to ‘restrict’—and that is my word rather than a direct quote from the bills that were before the parliament; the bills, incidentally, had been before a sister committee on two occasions—how could it be that the workload is increasing?

**Mr Soden**—Yes, I certainly understand the intent. I think it is also fair to say that the intent is not understood by applicants who continue to file, many without legal representation and many who appear before the court without legal representation. And as the legislation you mention has not been considered yet in the detail it could be considered by the court—because those applications have not gone through to enable the legislation to receive the consideration it probably will receive—it is still unclear as to what the likely long-term impact of the legislation will be.

**Senator McKIERNAN**—The long-term impact can be looked at by a future estimates committee—by certainly different personnel, in a couple of instances—but one would have expected that there would have been an immediate impact. My expectations were that there would be a decline in the numbers. Now you are giving me advice to the contrary. You mentioned in your response that it is the unrepresented litigants who do not know. I could accept that ignorance may be an excuse, but are their persons with legal representation who are still filing in the Federal Court on migration matters?

**Mr Soden**—Yes, Senator.

**Senator McKIERNAN**—That causes me further problems because we had an expectation that the legal profession would be aware of the changes in the legislation because it did receive some attention at the time.

**Mr Soden**—It certainly did, Senator. I cannot answer for the legal profession as to what view they might have in relation to the effect of the legislation and I cannot answer for them in relation to the reasons they may not be continuing to give advice to their clients in relation to lodging applications in the Federal Court. They are still coming in at a rate slightly more than prior to the amendments.

**Senator McKIERNAN**—From my point of view as a legislator, I had that expectation. Are you in a position to tell the committee what the court’s expectation was?

**Mr Soden**—I think it is fair to say that our initial reaction to the likely effect of the legislation was that it would produce a dramatic decline in the number of migration cases coming to the court. I think my answer as to why that hasn’t happened is that I believe that most of the applicants do not understand the intention of the legislation, and I think legal representatives are still unclear as to the likely effect once the legislation has been examined in relation to cases that have been commenced after the legislation commenced. In other words, there appears to be a degree of uncertainty in the legal profession about the real impact of the legislation.

**Senator McKIERNAN**—Do you have any explanation as to why that would be so?

**Mr Soden**—Again, I cannot answer for the legal profession. I can only presume that there is a view within the legal profession that the amendments that you mentioned may not have the complete effect that was intended.

**Senator McKIERNAN**—Minister, are you on top of the developments that are occurring in this regard? That question—if indeed you or the government are on top of this—is the lead-in to asking what, if the objectives of the bills that amended the migration legislation are not being met, is being done to address that state of affairs?

**Senator Ellison**—The Federal Court comes under the Attorney-General's jurisdiction. I can take your question on notice and undertake to get back to you with a full reply, because this is not something I have been dealing with myself. As to fulfilling the objects in relation to immigration, that is perhaps a slightly different question, and we can deal with that later on in these estimates when the department is before us. But insofar as your question relates to the Attorney-General, I will take that on notice.

**Senator McKIERNAN**—The thrust of my question concerned the report to the Federal Court and the difficulties being experienced in the court that are detailed on page 11 of the court's report on migration matters. We can canvas other matters when we turn to the immigration portfolio, but the privative clause and the judicial review bills were to address this problem in the courts rather than the general migration issues.

**Mr Soden**—One matter I can assist the committee with is that the court has initiated a system to attempt to accelerate what might be considered test cases in order to clarify the uncertainty that appears to continue to exist. We are yet to have identified test cases—it is a little too early, I think, to have those through the system yet—but the Chief Justice has set up a system where judges are asked to inform him of any test cases that they are aware of in order to see how they might be accelerated before a full court to clarify the law. That would certainly make a difference.

**Senator LUDWIG**—Mr Cornall, are you aware of the current position—that there has been the opposite effect of an increase rather than a decrease in matters currently before the Federal Court?

**Mr Cornall**—Probably to that extent, but not as to the reasons for it.

**Senator LUDWIG**—Is there a problem with communication? Have you not advised people that the opposite effect is actually occurring?

**Mr Soden**—No, we have advised people in the department about what is happening with migration work and, at an officer level, we have discussions with officers in the Department of Immigration and Multicultural and Indigenous Affairs about what is happening in our court—not on the precise detail of what is happening but certainly in relation to trends.

**Senator McKIERNAN**—Chair, could the matter of the amendments made to the Migration Act through the judicial review bills of last year be put back for a moment until I am able to refresh my mind on the matters that came before the Senate Legal and Constitutional Legislation Committee.

**CHAIR**—We can certainly come back to it.

**Senator COONEY**—Senator McKiernan referred to page 11 of the report. The last paragraph—and perhaps the minister might comment rather than you, Mr Soden—states:

Many applicants for review are in immigration detention, and are dependant on those maintaining the detention centre for the provision and transmission of forms to enable the applicant to seek review in the Court. There have been a number of instances during the reporting year where, through no fault of the detainee, the application for review was received by the Court outside the 28 day period. In these cases the Court was required to dismiss the application without regard to its merits: see, for example, *Kucuk v Minister for Immigration & Multicultural Affairs* (10 May 2001).

The inability of the Court to grant an extension of time in an appropriate case may result in significant injustice.

I wonder how it is, Minister, that the government, who is a litigant, so arranges things that the person who has a case against them is unable to exercise their right under the law.

**Senator Ellison**—The question you asked is more a question of administration in relation to the detention centre, as I read that report; it is not something which relates to the Federal Court.

**Senator COONEY**—That is right.

**Senator Ellison**—It is something which relates to the filing of an application out of time. Really, the question of why there was that late filing is something better addressed to the department for immigration when it appears before this committee. As for the question of whether the government has arranged this in this manner, let us hear what the department of immigration has to say before we go down the path of saying that the government has set this situation up deliberately to defeat claims. It may well be that there was inadvertence in other areas—we do not know.

The question to ask, Senator Cooney, is a reasonable one and one that could be put to the department of immigration, in relation to the detention centres and the filing of the applications. I do not know whether the officials from the Federal Court would really have any knowledge or whether this would in fact be within their responsibility. It certainly noted these late applications. There is an inference that there may be other factors which have caused the late lodgment. The reasons for that are best explored with the department of immigration.

**Senator COONEY**—I am not asking Mr Soden because certainly it has nothing to do with him, except for the fact that the person was prevented from giving a notice—that is not his issue. But it is an issue that their court is denied the jurisdiction it should have to decide upon a matter because of the action of government. There are three strands of government, as you know. Here is a case of the executive frustrating the judicial arm from doing its work. That must have something to do with the government as a whole, not just the immigration department.

**Senator Ellison**—There would have to be evidence to show that the executive had done something to impede the lodgment of the form of the applicant exercising his or her rights. As I say, that is not a matter which can be canvassed here, because these officials would not have that knowledge. But certainly the department of immigration could answer the questions as to how things are done through the detention centres.

**Senator COONEY**—I want to take issue with you on that in a big way. This is a report signed by Chief Justice Michael Black, who is—and I say this in all seriousness—one of the great jurists and a great judge. He has written a report to the minister, the Attorney—not to Mr Ruddock, but to the Attorney—where he says that there have been instances during the reporting year where, through no fault of the detainee—read, ‘the litigant’—the application for review received by the court has been out of time and there is nothing the court can do. You—and I am not criticising you personally—and the government are saying, ‘That’s a matter for the immigration department.’ The immigration department will come along and say, ‘That’s a matter for ACM.’ There is a refusal, may I suggest to you, Minister, to take responsibility for something which I know personally you would be outraged about. In other words, a person who has a right to appeal is denied that right because the doors of a prison are not open or, alternatively, a fax machine is not made available. We—if you like, I will make it is as broad as this—as a Commonwealth say, ‘Bad luck.’

**Senator Ellison**—There are two issues, and perhaps I understand Senator Cooney’s point a bit more clearly now. There is the question of how was it that these applications came to be late—

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**Senator COONEY**—And how it was that there is no right to give leave to appeal out of time.

**Senator Ellison**—To extend.

**Senator COONEY**—Yes.

**Senator Ellison**—That is a question which is relevant here. That is a question of policy, not one for the Federal Court.

**CHAIR**—I understand, Minister.

**Senator Ellison**—As to why there is no provision for an extension of time, I can take that on notice, refer it to the Attorney-General and get back to you, Senator Cooney.

**Senator COONEY**—If you follow what I am saying—and this is no criticism of the Federal Court—this is trying to get the Federal Court a hearing. That is the next point I want to make. The Federal Court, through its Chief Justice, writes a report to government, to the Attorney-General, raising what I would say on the face of is a gross—I use the word deliberately—example of injustice, and it just does not seem to get through. The Chief Justice does not seem to have got through on the point that he makes here.

**Senator Ellison**—This report was tabled in I think October last year. We have had an election since then, and this particular report has not been in the public record for that long, I would suggest, having regard to the fact that we have had an election and the Christmas break in between. I will take that matter up with the Attorney-General, as to the question of the extension of time and what is the government's attitude in that regard. I will take that on notice and get back to the committee.

**Senator COONEY**—I think this is outrageous. I think it so outrageous that I am going to get personal with you and say that this is something that personally you would be outraged about. I do not want you to comment, but people are denied their rights, particularly in this area—people locked up in detention centres. Because the prison officers in effect deny them facilities, their rights are denied. That is bad stuff. I do not want you to comment any further, but it is something that I think is pretty poor. I do not want to go on.

**CHAIR**—Mr Soden, do you wish to add anything?

**Mr Soden**—There is nothing I need to add.

**CHAIR**—Are there any further questions in relation to the Federal Court?

**Senator COONEY**—Yes.

**CHAIR**—In this area? I do not want to leave this area. Please continue, Senator Cooney.

**Senator COONEY**—I want to go onto other matters.

**CHAIR**—Senator McKiernan, do you have any questions in relation to the matter we were discussing earlier?

**Senator McKIERNAN**—Thank you, Chair, and thank you for giving me the ability to go back and get the Senate Legal and Constitutional Legislation Committee report of April 1999 and the [Migration Legislation Amendment \(Judicial Review\) Bill 2001](#), which we passed in September last year. I quote clause 474(1) of the amendment from this particular report, which states that it would insert a prohibitive clause, which would be:

- a). final and conclusive;

b). shall not be challenged, appealed against, reviewed, quashed or called into question in any court; and

c). is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

That was the understanding that was in the bill when the parliament passed the bill in September last year and when it was given royal assent. That is what should be happening within the court now: there should be no actions, no filing against migration matters in the courts.

**Mr Soden**—I understand what you are saying was the intent of the legislation, Senator. As I said earlier, that understanding is not shared by many applicants who are still coming to the court. Of course, at the counter of the registries or at the end of the fax machine receiving applications from detention centres, it is not appropriate for those people to make decisions in relation to that legislation, and the matters need to go before the court. The court has yet to make any decisions in relation to those provisions.

**Senator McKIERNAN**—I put it to you now that, following the passage of this amending legislation, the court's hands were tied in this area because the court has to abide by the laws of the land as well and implement the laws of the land—do they not?

**Mr Soden**—‘Justice according to law’ are words we use frequently in the court.

**Senator McKIERNAN**—So the amending legislation had an impact on the court. That being the case, why then does the court continue to accept applications from litigants on matters which the parliament has decided the court cannot adjudicate?

**Mr Soden**—As I said just a moment ago, there is a doubt as to the real impact of that legislation—it has yet to be completely tested—and counter clerks in the registry are not qualified nor is it appropriate that they make decisions as to whether or not to accept those applications. They must ultimately be accepted, processed and placed before the court for final decision.

**Senator McKIERNAN**—But the CEO could give instructions to those counter clerks not to accept those applications.

**Mr Soden**—That is a potentiality, but that would be something that I would not do because it would be denying potentially access to justice, and I would not do it without the agreement of the judges—and I very much doubt that I would be able to obtain that agreement.

**Senator McKIERNAN**—I am sorry, and I apologise to my colleagues if I am delaying proceedings here because of my understanding of the process. The court has to deliver justice according to law; the parliament has determined what the law is. The court is not allowed now to adjudicate on migration matters, except in exceptional circumstances. Why then is hope given to litigants, to applicants, that the court can adjudicate on this matter?

It is a serious question because many of the applicants—from the previous round of questions from Senator Cooney—are in detention. If their administrative applications have been completed and they are making applications to the courts, they remain in detention until the court's resolution of the problem. If the parliament has determined that the court cannot adjudicate on those matters, the court will not be able to adjudicate on those matters—but in the interim, until the court gives a decision, those persons continue to be held in detention. That is the background. If there is doubt about the legislation and the impact of the legislation, who will adjudicate on that doubt?

**Mr Soden**—It is the role of the court to make decisions in relation to whether the law that the parliament has passed is lawful—and clearly there is some doubt in some applicants' minds, or in the minds of the representatives of applicants, and that doubt has yet to be finally tested. As I mentioned a little earlier, we appreciate the intent of the parliament and we are attempting to identify a suitable case that would clarify the doubt, and then it would be much easier for the court to inform all prospective applicants of the futility of their application or otherwise.

**Senator COONEY**—You are saying it is not the parliament's duty to interpret the law.

**Mr Soden**—No, it is ultimately the responsibility of the court to interpret the law as passed by parliament. Of course, our court is subject to the High Court.

**Senator COONEY**—And not to parliament.

**Senator McKIERNAN**—Do you want to respond to that question from Senator Cooney, because I am interested in a response to it as well?

**Senator COONEY**—It is not parliament's duty to hear appeals from the Federal Court. You would be confident in saying 'yes' to that, I think.

**Mr Soden**—That is true. The court is accountable to the parliament, but when it comes to a consideration of the laws passed by parliament, I would suggest that the parliament might be subject to the determination of the court in relation to whether the parliament exercised its powers lawfully.

**Senator McKIERNAN**—The bill had been before the Senate Legal and Constitutional Legislation Committee on two occasions and, on the last occasion, Senator Cooney and I put in a minority report which indicated that we were not supporting the thrust of the bill. We thought that there were some merits in it and we were prepared to work with government to address the problems which brought the bill on. However, we had some concerns about the manner in which the legislation was being brought forward and, indeed, put in a paragraph which talked about 'respect among the arms of government', recognising that there are three arms of government that make the Australian Constitution work.

It seems to me that there is a breakdown in that respect, or indeed in the implementation of the laws that have been passed by the parliament at this point in time, that legislation has been passed with a particular intent and in fact it is having the reverse intent—that numbers are increasing—from what you have told us earlier. I am wondering why, if there was this doubt, it has not been resolved to date or at least why a decision has not been taken that a case can go forward as a test case as to the validity of the laws, bearing in mind the legislation was passed in September last year and a considerable period of time has passed since. There was an awareness in the community, among all the players, including the legal profession, about what the legislative amendments would do, and I really am surprised that no adjudication on the merits has occurred to date.

**Mr Soden**—As I said earlier, and as we indicated in our annual report, we have been concerned about the extent of the migration workload coming to the Federal Court, but importantly we do not control that workload in the sense of encouraging or discouraging it. All we do is deal with cases that come before us. In respect of cases arising after the amendments, we are anxious in order to make our view, or particularly the full court's view, of the law clearer to everyone out there who may be uncertain about what the law is, but to do that we cannot manufacture a case. We need to try to find a case that would put up the issues that seem to be unclear and that seem to be continuing to produce applications.

**Senator McKIERNAN**—Is there no obligation on the court itself to assist to manage these matters? I am thinking particularly in the area of an unrepresented litigant—a person who is ignorant of the judicial process, a person who is ignorant of Australia's laws, who gets advice from the bush lawyer to go off to the court after their application for refugee status for protection in Australia has failed and they make an application to the courts. That has the effect, if they are in the community, of allowing them to remain in the community and, if they have a visa to work, of allowing them to continue to work. More importantly, if the person is in detention in Australia, it causes that person's removal from Australia to be delayed until the court adjudicates. If somebody had put in an application in September last year, that is a further eight months that individual has been in detention. Whose responsibility is that? Does the court not have some responsibility, from an educative point of view, to point out to the individuals making applications that the court cannot, because of the laws that the parliament has made, adjudicate on their applications?

**Mr Soden**—I agree entirely with your point about the court having an educative role. Just prior to those last amendments we were about to issue a brochure that we had settled with the Department of Immigration and Multicultural and Indigenous Affairs and that they were willing to provide to all applicants in detention, which attempted to explain the limits on the court's jurisdiction. Clearly, that brochure now needs to be revised. We have not yet done that because, as I said earlier, there is uncertainty still within circles as to what the ultimate effect of the legislation is. It is also true that there have been some cases that have come in from unrepresented applicants that have gone before a court and the court has said there is no jurisdiction. But that again has not stopped similar applications coming in from the same place as the first application.

**Senator COONEY**—Can I just say something here in defence of the courts. It is a bit hard, when government lock people up, that they then criticise the court for keeping them there. I cannot remember the court actually locking up any of these people. When it is put to you that the court is keeping them there, I think that is a bit hard on the courts.

**Mr Soden**—For the same reasons we mentioned in our annual report, we are concerned about the extent of this workload—it is consuming a large amount of our resources. We are continually trying to find ways in which we can manage that or reduce it where appropriate. In relation to that education point that you mentioned, it is not easy for the court to communicate with applicants in remote locations. We have been attempting to work out the best way to do that. At the moment, it is thought to be inappropriate—as a result of that uncertainty about the legislation that I mentioned—to issue a brochure which says to applicants that the court has no jurisdiction, when it is suggested to the court in some applications yet to be finally dealt with by the court that there is some jurisdiction.

**Senator COONEY**—Do you think it would be fair in preparing that brochure to say that they might nevertheless be able to go to the High Court?

**Mr Soden**—I would need to check with the High Court about that, Senator. I am not sure what they would say to that.

**Senator COONEY**—This is the trouble with putting out brochures. You put out brochures saying, 'You cannot come to the Federal Court,' and their own representatives say, 'That's the end of it,' whereas they have a right to go to the High Court. There are real problems with putting out brochures.

**Mr Soden**—The other consequence that occurs in many circumstances, notwithstanding a single judge of the court finding that the court has no jurisdiction or that there is no basis to

the case, is that there seems to be an automatic appeal lodged. It goes before a full court of the Federal Court—three judges—some months later. Again, the full court confirms that there is either no jurisdiction or there is no merit in the case, and the case is dismissed. We have no control over stopping those appeals from being lodged.

**Senator McKIERNAN**—In regard to the comments from Senator Cooney, if I purported to give a view that I was saying the courts were putting people in detention or keeping them in detention, I apologise. It was not my intention to do that. What I am seeking to examine and what I am asking is this: if people are in detention and have a belief that the court can assist the processing of their case when the law says the court cannot, what steps is the court taking to change the views that may be in the minds of those individuals? I have heard what you are saying, Mr Soden: it does need a decision of the court to the rule on the legislation.

I am not going to labour the point further on the report of the Senate committee, but there was some merit for law making in this country in the content of the minority report on the legislation and the earlier report, which I do not have in front of me. I know I had, during the course of the debates on that package of bills which went through under a guillotine with the cooperation of the main opposition party in the Senate, concerns about that. I put on the record my concerns about the passage of legislation in such a quick manner. Part of the problem with the legislation is the urgent passage of the legislation. It did not receive the necessary scrutiny in the chamber to point out some of the difficulties that may have arisen. From my memory of the legislative package of some seven bills, we were able to ask some questions about the first and possibly the second of the bills, but we were not able to do any detailed scrutiny of the minister or the officials at the table during the passage of certainly the judicial review bill and some of the other bills that were part of the package.

So there is a problem, and I hope the problem can be addressed soon. If the court has any powers to address it through an educative process, I hope that it would use those powers as quickly as possible. The problem of course remains with the government. One of the reasons—and this is my assertion, nobody else's—we do have disturbances in detention centres around Australia is the long periods of detention, which in many cases are caused by people awaiting judicial determination of their applications to the courts. If the courts cannot rule on it, we really are keeping people in detention far too long. I do not want to canvas that at this point. We will likely be asking some questions in this direction when DIMIA appears before the committee later in the proceedings.

I cannot recall, Mr Soden, if you gave the committee the numbers of migration applications, particularly protection applications dealing with protection visas that are before the court at the moment. Are you able to break down those numbers you gave us at the opening of your contribution?

**Mr Soden**—No. I cannot break down the protection visas but, in relation to numbers and the projections that take us through to the end of this financial year, Mr Dawson might speak to the figures that he has put together on this issue.

**Mr Dawson**—If we look at the filings from 2 October 2001, which is when the privative clause came into force, to the date that I did an analysis, which was 7 February 2002, we will see that 425 matters had been filed. If you average that out, it is 106 per month and, if you multiply that by 12, although it is not a financial year, on a calendar year basis you would end up with something like 1,275 filings, if they continue at the same rate. That probably ends up being about 60 more than would have been filed before the privative clause came into effect. So there is no diminution of it.

If I could just add something else, in relation to officers of the court, they are not in a position to refuse an application filed in the court. If they make that value judgment, they are subject to section 39B of the Judiciary Act and a potential application under the ADJR Act.

**Mr Soden**—Which, I might indicate, has occurred. You might have an officer at the counter making an administrative decision, and that decision can be taken on review before a judge of the court. So even if, hypothetically, officers at the counter were saying, ‘This court has no jurisdiction,’ it is quite foreseeable that an application could be taken to the court to review that decision—which might potentially delay the decision in relation to the substantive matter in the first place. So it is quicker to put them straight before the court, in other words.

**Senator McKIERNAN**—Okay. Let me just use a hypothetical question to try to illustrate my difficulty. If my good friend Senator Cooney wanted to keep the dissolution of his marriage to Lillian secret from Lillian and he applied to the Federal Court for that dissolution rather than going to the Family Court—because Lillian might be examining the filing systems in the Family Court—would the court clerk at the desk in the Federal Court building have to accept that application?

**Mr Dawson**—I will tell you what I would do, Senator. I would turn around and say, ‘The Federal Court of Australia has no jurisdiction in this matter—

**Senator McKIERNAN**—Exactly. Thank you.

**Mr Dawson**—and it comes under the Family Court of Australia Act.’ If the person says, ‘I insist upon filing this documentation,’ I accept it and make a file note that I have indicated to the applicant that there is no jurisdiction within the Federal Court and that this is a matter for the Family Court of Australia but that, however, this person has insisted upon filing it. In that way, I get around the 39B and the ADJR Act application—which could be more time consuming than the original application.

**Senator McKIERNAN**—Good response. You take that on board, Senator Cooney!

**Mr Soden**—It may be a delaying tactic in some litigation.

**Senator COONEY**—I just have a little story about this. One of my constituents, one who comes up a fair bit—

**CHAIR**—Senator Cooney, I think our timeline is running against having a story, but please go ahead.

**Senator COONEY**—It is very interesting, just to illustrate the point. He keeps insisting on filing things. You might well know who it is, Mr Soden, when I tell the story. He has had to be thrown out of the court and charged with trespass and what have you but he just keeps coming back. He comes back to my office as well. But the court does give him a hearing, because that is what the court is supposed to be there for, just to see whether there is some element in what he says. He has gone on to tragedy almost, but that is it. Unless you are willing to do that, you are not really giving everybody a go.

**Mr Soden**—Officers of the court cannot exercise the judicial power of the Commonwealth in any matter other than those matters or issues referred to those officers by judges. Judges have never allowed officers of the court to make decisions about jurisdiction at the counter.

**Senator McKIERNAN**—It has got an impact on the court itself. In previous estimates committees we were told that many of these applicants in the migration area have their application fees waived.

**Mr Soden**—I would say almost all.

**Senator McKIERNAN**—That is obviously a cost to the court.

**Mr Dawson**—Not a cost to the court; a cost to consolidated revenue. The court collects fees on behalf of the government; it does not keep the fees itself.

**Senator McKIERNAN**—All right, it is a cost to the taxpayer. A small part of the reason for bringing in this amending legislation was that this was causing delays in the court processes and was also a cost to taxpayers. Would most of the represented cases apply to have their fees waived?

**Mr Soden**—I assume so, because the criteria would be in relation to the resources of the applicant, not whether or not they have got legal representation. Often legal representation can be at no cost to the applicant or on a pro bono basis.

**Senator McKIERNAN**—I am going to conclude questions in this area, but I ask you on notice to bring to the committee for our June hearings as much detail as you can get on the applications since the passage of the [Migration Legislation Amendment \(Judicial Review\) Bill 2001](#), which passed in September of last year.

**Mr Soden**—The effective date is 2 October.

**Senator McKIERNAN**—That was the date of royal assent. That was a Sunday, wasn't it?

**Mr Soden**—I think it was.

**Senator McKIERNAN**—So we have got the Governor-General working on a Sunday giving royal assent to bills. Interesting, but I will not say that here. My Catholic upbringing is coming to the fore here. Working on a Sunday was not a done thing—not that I follow that now. I want to move on now to some questions on unrepresented litigants.

**CHAIR**—Is there anything further in this area on the Federal Court? Senator McKiernan.

**Senator McKIERNAN**—Can you give the committee some information on the number of unrepresented litigants by type of case that you are experiencing now?

**Mr Soden**—We do not have those detailed statistics. I would have to take that question on notice and see what we can produce. It is of concern to the court that we do not have the details that we would like at the present moment in relation to the extent of unrepresented litigants by jurisdiction. We have got a good understanding but we do not have the definitive statistics.

**Senator McKIERNAN**—Are you able to break down the outcomes of cases which are brought by unrepresented litigants?

**Mr Soden**—Potentially, yes. I would need to have a look at what information we have to identify those cases to have a look at outcomes. It is a very complex area for this reason: often litigants in person can be unrepresented only in parts of proceedings or at the trial. So it is quite a difficult task to categorise them as being unrepresented if you look only at when the case is commenced or only at when the case is finished. We are looking at the moment at how we can set up a much more comprehensive data collection system.

What might occur, and occurs fairly regularly, is the litigant will be before the court unrepresented, a judge will indicate that that person needs some assistance in relation to some aspects of their case—it might be an advice on the merits or it might be an advice in relation to drafting a proper statement of claim, a proper pleading before the court—and that assistance will be organised either by a pro bono practitioner or through some other arrangement. We presently do not collect that information as well as we could. That would be

quite a cumbersome task. That, for example, might show that an unrepresented person who became represented got advice and withdrew their proceedings. That would be an important thing to find out. Unfortunately, we just do not have that information at the moment.

**Senator McKIERNAN**—I take it from what you have just said that you would not have, at this stage, information as to how long it takes for cases involving unrepresented litigants to be finalised compared with cases where the parties were represented.

**Mr Soden**—It is not readily available, Senator.

**Senator McKIERNAN**—Are you looking at building a database?

**Mr Soden**—Yes, we are. We have had a committee of the court looking at self-represented litigants for about the last six months. Only a couple of weeks ago we looked at the draft of the report of that committee. It does make recommendations in relation to the data that we ought to be collecting—it makes a whole lot of recommendations. That is an internal report. It is very, very comprehensive. It will be considered by all of the judges at their next meeting in March and I believe out of it will come a lot of significant initiatives in relation to better management of, dealings with and assistance of unrepresented litigants.

**Senator McKIERNAN**—You referred to order 80 of the Federal Court rules—that is, the pro bono legal assistance. Are you in a position to tell the committee how many such orders have been made in the past 12 months?

**Mr Soden**—I can give you the figures which, on this latest report, are from 1 January 2001 to 31 December 2001. There has been a total of 527 referrals, and I can break that down by state and by jurisdiction.

**Senator McKIERNAN**—Yes, if you would.

**Mr Soden**—There is a lot of detail here. There might be some jurisdictions you are more interested in than others and some places you are more interested in than others. It is a cross table, so there are a lot of columns and a lot of—

**Senator McKIERNAN**—Is it in a form that could be tabled to save the time of the committee?

**Mr Soden**—I think so. I am happy to table that, Senator.

**Senator McKIERNAN**—I would be prepared to take that.

**Mr Soden**—It is self explanatory, although it is not headed ‘Federal Court of Australia’—I will just do that to make sure it is clear.

**Senator McKIERNAN**—Does it break down into types of cases?

**Mr Soden**—It does, Senator.

**Senator McKIERNAN**—Does it break down into the outcomes?

**Mr Soden**—No, it does not.

**Senator McKIERNAN**—Does it break down into the time taken to finalise?

**Mr Soden**—No.

**Senator McKIERNAN**—If it is an unreasonable request from the committee I invite you come back to committee on it, but would it be possible to give the committee some indication of the time taken to finalise cases where order ratings have been in place?

**Mr Soden**—We could certainly do that. But in isolation of any comparative information it may not be all that meaningful. If you are looking for something along the lines of whether it is quicker or whether it is slower, that would be a very cumbersome and time consuming exercise because you would need to have a look at what jurisdiction, consider which state—there are a number of issues there.

**Senator McKIERNAN**—All right, I will not press with that question at the moment. I will study this and, if necessary, we can come back to it in June of next year.

I have a final question for the Federal Court. We talked earlier of the impact of the judicial review bills that were passed in September. Another bill that was passed at that time dealt with class actions. I do not actually have the name of the bill in my head but it was to do with the restriction of class actions in the Federal Court and the High Court.

**Mr Soden**—My recollection is that that was connected to the privative clause legislation in the migration jurisdiction, so I think it was intended to restrict class actions in migration cases.

**Senator McKIERNAN**—Are you aware of the amending legislation?

**Mr Soden**—I am aware of it but not of the details.

**Senator McKIERNAN**—I am not going into the details because I do not have the bits of paper here to inform me either. I am asking: do you know if any class action applications have been lodged in the Federal Court since the passage of that amending legislation in September of last year?

**Mr Soden**—I am not aware of any. It has not been mentioned to me. That leads me to believe that there has not been any, but I cannot say categorically that there has not. We would need to get back to you about that.

**Senator McKIERNAN**—Would you take that on notice, please? Thank you very much, Mr Soden.

**Senator COONEY**—This is in reference to the Federal Court and the questions that Senator McKiernan was asking about the migration applications. Does the government have any plan to accommodate applications that might be made to the High Court now that people cannot go to the Federal Court? It might not happen, but you could well imagine that a lot would and there ought to be a risk management provision, I would have thought, to accommodate the actions in the High Court.

**Senator Ellison**—I think, Senator Cooney, you are asking what we are doing in the High Court to accommodate that traffic which otherwise would have gone to the Federal Court.

**Senator COONEY**—Yes. Had the appeal processes been kept in place the appeals would have gone there, whereas now they will probably go by, I suppose, prerogative writs to the High Court. Senator McKiernan was worried about the delays for people in the camps. This will cause even greater delays.

**Senator Ellison**—The High Court is an area where that question should be asked. In the meantime, I will take it on notice.

**Senator COONEY**—Senator McKiernan was putting all this—

**Senator Ellison**—I understand what the query is.

**Senator COONEY**—Going through the report here, I see that one of the objectives of the court is to decide disputes according to law promptly and effectively—which many a tribunal

does—but also courteously. Not many tribunals within the federal jurisdiction have that as a criterion; that is a very nice little word to have in there. Could I ask you about the e-court strategy and pioneering any application of the technology to the delivery of justice? Was that put into play very recently in respect of a 25th anniversary? Would you like to tell us about that?

**Mr Soden**—Our e-court strategy was developed some time ago. It is an ongoing strategy to take up having regard to the needs of the litigants—the best possible advantage out of technology—and to make access easier and, hopefully, the cost of proceedings less expensive. The ceremony that you referred to was not connected closely to that e-court strategy.

**Senator COONEY**—Wasn't it? What was that?

**Mr Soden**—The technology used was our national video conferencing network. As you might be aware, that has been in place for some time. We use it almost daily. It was all done on that day by court officers, who frequently use it and know how to use it. But we did use that equipment in that way on that day with the hope that it might show some other courts which were represented what could actually be done with innovative technology.

**Senator COONEY**—I thought there was some suggestion, even in respect of that event, that it would not be able to work.

**Mr Soden**—There was some doubt as to whether it could all be connected and some doubt as to whether it could be produced in the way it was, with all of the sites linked up on a national basis to enable the court to sit as one in all of the capital cities.

**Senator COONEY**—The objective of the court is to be courteous. Perhaps I should be courteous and ask: how did the 25th celebration go? You were not there at the start of the court, were you? I would not have thought so.

**Mr Soden**—No, I haven't aged that well. It was an occasion for the court to acknowledge the assistance it had received over the years. I think we did that and it was something that we wanted to do. We were very pleased with the very favourable comment that we received from the participants who spoke in relation to the reputation of the court. It was a short one-hour event that was able to bring all of the states together. It enabled the court to make reference to what was termed the 'Australian judiciary'. There were judges from many state courts in many state locations. For the court to have judges from its own court and other courts sitting in Perth at 6.30 in the morning to participate in a national event was, I think, an indicator of the importance to them of the occasion.

**Senator COONEY**—I have a disappointment to pass on through you, Mr Soden, and that is that the Chief Justice wasn't in Victoria. I know Sydney is supposed to be the principal registry but I think most of the great advocates are in Melbourne.

**Mr Soden**—The reason that it was held in Sydney was that the first sitting was held in Sydney. You might have noticed that two former judges—two of the first judges, Justices Northrop and Keeley—were actually able to take the same places on the bench that they took 25 years ago, which was, we thought, an appropriate thing to do on the occasion.

**Senator COONEY**—I would like to go to page 62 of the report. You might be interested, Minister, that it says:

During the reporting year, the Court wrote to the Attorney-General seeking a number of amendments to the Federal Court of Australia Act. These included amendments to allow the Court to clearly identify those judgments that are interlocutory and which may therefore only be the subject of an appeal by

leave. Amendments were also sought to support the Court's eCourt initiatives such as electronic filing and the issuing of process electronically.

What has happened about that?

**Mr Soden**—I understand that those two initiatives are presently—

**Senator COONEY**—under discussion?

**Mr Soden**—in a bill that is shortly to go before parliament. From our perspective, we have received the assistance from the department. We have been liaising with them and those matters, we understand, are in hand.

**Senator COONEY**—Is that right? Is that in legislation? Does anybody know? Perhaps we could come to that when we are talking generally.

**Mr Cornall**—I am sorry, Senator. I don't have the detail of that matter at my fingertips.

**Senator COONEY**—Okay. The other matter which I wish to refer to is the amendments to the Federal Court of Australia regulations. The report says:

During the reporting year, the Registrar wrote to the Attorney-General seeking a number of amendments to the Federal Court of Australia Regulations. These included a proposal to rewrite the regulations using plain language and a simpler structure, as well as a number of amendments to address various administrative issues. Many of the suggested changes will support the Court's electronic filing facility.

What is happening there, do you know?

**Mr Soden**—We have had discussions following that request. We understand work is under way in the department following our request. I am just not sure of the status of that work at the moment.

**Mr Cornall**—Madam Chair, I wonder if we can supply the answers to those questions when we come to the department later today.

**CHAIR**—Yes, I am sure that would be acceptable to senators. Thank you, Mr Cornall.

**Senator COONEY**—Mr Cornall, is it going to be done in plain language? That plain language has been around since you are a lot younger, Mr Cornall.

**Mr Cornall**—I will take that on board too, Senator.

**Senator COONEY**—I notice the corporations jurisdiction has been restored. Is that back fully?

**Mr Soden**—It is coming back in different places at different rates, but the jurisdiction of course is back fully before the court.

**Senator COONEY**—The other thing I want to ask about on page 69 is the court's major community relations projects. How are they going? I think you have touched on them to some extent with Senator McKiernan. On page 69 it says:

The Art of Delivering Justice Project was managed by the Court's Director ...

How did that all go, do you know?

**Mr Soden**—Those initiatives, we believe, are very important and are going very well—the combination of the establishment of comprehensive user groups, a collection of publications that attempts to explain the court to those who may not understand it or who need to understand it. The Art of Delivering Justice is an initiative for the court to attempt to produce a greater understanding in all of the schools throughout Australia of the importance of courts

in a modern democracy. Working with the Curriculum Corporation of Australia, which develops curriculums for school, we thought the way this could best be done was to try to connect art to the role of courts and the role of justice in society and to promote an art competition which is presently under way. That has received a lot of support from schools and it is interesting how it has increased the number of visits to the court by schools so they can get a better understanding of the importance of courts to them. We did produce a small video which explains in relation to some important cases how important it is to people that the rule of law is applied for their benefit.

**Senator COONEY**—Another thing I wanted to ask about is your human rights jurisdiction. Are you putting most of that down to the Magistrate's Court—and when I say 'you' I mean the Federal Court—doing its fair share of human rights work, including disability, race and sex discrimination?

**Mr Soden**—You might have heard Mr May this morning mention the number of human rights cases that are transferred from the Federal Court. That is the bulk of human rights jurisdiction that we receive. It is going to the Federal Magistrate's Court.

**Senator COONEY**—Who is referring that? Is your court referring that?

**Mr Soden**—Individual judges make an analysis in respect of each case as to whether or not it ought to be transferred to the Federal Magistrate's Court. The judges look at them quite carefully as to whether they ought to stay with our court or be transferred to the Magistrate's Court. Often, accessibility to that court is a factor because some of the applications are coming in from places outside a capital city and it is much more convenient for the Federal Magistrate's Court to deal with those cases away from the capital cities.

**Senator COONEY**—I do not say this in any other spirit than just to establish it on the record—I am not suggesting this is the case—but I take it that those referrals do not indicate that the Federal Court is not as interested in human rights cases as in other cases such as corporations cases and things like that.

**Mr Soden**—No, Senator; we take that jurisdiction very seriously. You might recall when the jurisdiction came to the court we undertook public meetings to explain to the stakeholders and interest groups how we would approach the jurisdiction. I think it has been undertaken in accordance with those aims you mentioned earlier about being effective and courteous et cetera.

**CHAIR**—Senator Ludwig, you said you had a question in relation to the table as well.

**Senator LUDWIG**—Only in respect of the bracketed figures. What do they represent?

**Mr Soden**—I do not have a copy of those.

**Senator LUDWIG**—We have your copy.

**CHAIR**—The secretariat will hand it back to you, Mr Soden.

**Mr Soden**—I am not sure, Senator. I think it might be the migration figures.

**Senator McKIERNAN**—Or non-migration?

**Mr Soden**—I would have to check.

**Mr Dawson**—I have a further suggestion. It might indicate this financial year.

**Senator LUDWIG**—That is probably more likely.

**Mr Soden**—Yes, I think that is the case.

**CHAIR**—The financial year, Mr Soden?

**Mr Soden**—Yes.

**Senator McKIERNAN**—In regard to the matter that Senator Cooney raised earlier from the annual report about the applicant in migration detention whose application was filed out of time, I have had the ability to read the examiner's decision on the matter and know some of the facts as identified by the court in the background. The question does not relate to the facts of the case at all but to the timelines. The application was lodged in February and it was out of time, but it was not adjudicated on until May. Are there any processes operative within the court whereby similar situations might be brought to adjudication earlier? I ask that from the point of view that while the application was not ruled upon the applicant remained in detention, and it would seem to me to be in everybody's interest if applications such as that could be processed earlier and a decision given on the application within a matter of weeks rather than a matter of months, therefore giving the applicant the opportunity to move to the minister or to remove themselves from the country or to be removed.

**Mr Soden**—We try and process these applications as quickly as we can. I think it would be fair to say, on the face of it, that that application would have been out of time and therefore there may have been no jurisdiction, or the law says there is no jurisdiction. We ordinarily rely upon the respondent—that is, the department—to put together all the information that the court would need in order to make a proper and fully informed decision in respect of the matter, particularly if the applicant is not represented. Additionally, even if the applicant is represented, the department needs to supply all of the relevant documents to the court. That takes a little bit of time to put together. It is much quicker than it has been in the past, and we have set ourselves a time goal in relation to applicants in detention: three months is the time we set from application to disposition, to try and turn these matters over quickly. Three months might seem a long time from the time an application is received, but we need all the information from the department. All of the documentation needs to be served and so on before the court can actually hear the matter.

**Mr Dawson**—I can add to that. That is the date of the decision. There probably would have been directions hearings prior to that, then the decision may have been reserved. That would probably not have been the first time the matter was before the court.

**Senator McKIERNAN**—With regard to the 28-day period, which is very firm, I am aware that there was a storm in Sydney the other evening which knocked out the power, and I am aware that from time to time the lines to fax machines and electronic equipment get broken and destroyed and fax machines are not operating. If such an event did occur within the court and if an applicant making a last-minute application could not get it through because there was a problem with the lines of communication within the court, is there any ability within the court to take note of those circumstances when they are clearly outside the control of the applicant—or indeed of the court itself?

**Mr Soden**—I cannot answer that categorically, but I think that case held that if it is out of time it is out of time, no matter whether it is the applicant's fault or not. So, even if the lines were down in the court and it was received out of time, that decision says that the law says that if it is out of time there is no jurisdiction.

**Senator McKIERNAN**—Senator Ludwig points out that paragraph 17 in the judgment on this case repeats virtually word for word what you have just said, Mr Soden—and you did not have the benefit of the electronic equipment that we have. Well done.

**Mr Soden**—Thank you, Senator.

**Mr Dawson**—I might also indicate that some applications come in Farsi, Japanese or Uzbek, and quite often they have to be translated.

**Senator McKIERNAN**—Do you refer them automatically to Mr Soden!

**Senator LUDWIG**—On page 14 of your annual report you refer to the Community Relations Program. Is that under way at present, or perhaps you could give me a short update as to where the program is currently up to. Apparently you are running a contest and there is a Curriculum Corporation involved. It is a national civic education program, Discovering Democracy. Has that now been completed?

**Mr Soden**—The details of that initiative are on pages 68 and 69 under our Community Relations Program. The Art of Delivering Justice, together with the Curriculum Corporation materials, is not completed. There was a delay in getting some of the information out so we have extended the time frame for art work to be submitted.

**Senator LUDWIG**—When will it be finalised?

**Mr Soden**—From memory, I think it is going to be finalised in October this year. We needed to put it in sync with the Higher School Certificate system.

**Senator COONEY**—We ought to comment on page 71, after the part that Senator Ludwig has been talking about—the part about the judges. It ought to be noted that the court is very active in all sorts of roles outside this actual decision making.

**Mr Soden**—We wanted to emphasise that to overcome some suggestions that judges only judge and sit in court. Set out in there is a whole lot of information about the other important work that judges do in relation to the law and related activities, particularly reform activities.

**Senator COONEY**—They do not get paid for it.

**Mr Soden**—Often it is done in their own time.

**CHAIR**—Mr Soden, Mr Dawson and Mr Foster, may I thank you for assisting the committee with those extensive discussions this morning. It is appreciated.

**Proceedings suspended from 12.31 p.m. to 1.33 p.m.**

**CHAIR**—We will resume our consideration of the additional estimates. Before I turn to questions in relation to the Family Court of Australia and while I am making these remarks, I invite Mr Foster and his associates to come to the table, please. I need to place on the record that, following a part of this morning's hearings, we have been contacted by the National Crime Authority to indicate that unfortunately Mr Croke's absence was due to illness. Mr Whiddett that was not apprised of this and was not able therefore to advise the committee accordingly. I think it is important to note that for the record, given the discussion that ensued.

**Senator Ellison**—Mr Croke has said that, depending on his wellbeing, he can be available for Friday. He fully intends to be available should the committee require it.

**CHAIR**—Thank you for that information, Minister.

**Senator McKIERNAN**—I do not think that Mr Croke will need to come on Friday, but I will consult with colleagues and give an early indication if that were not the case. We are grateful for the explanation of his absence, and we wish him a very speedy recovery back to 100 per cent health.

[1.34 p.m.]

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**Family Court of Australia**

**CHAIR**—Senator Greig, I understand that you have some questions to the Family Court of Australia.

**Senator GREIG**—I have. Thank you. In the first instance I think I ought to direct my questions to Senator Ellison. Minister, I am interested in a particular case—that is, the government’s recent announcement that it would be appealing to the full bench of the Family Court its recent decision to recognise the marriage of a transgendered citizen. It is a case known in the media at least as the Kevin and Jennifer case. If I can give some brief information, Kevin was born as Kimberley—that is, as a female, as a person with a transgendered history. Kevin now identifies as a male and has lived in a long-term relationship with a female. Together the couple are raising a child. The Family Court recently determined that the marriage, conducted by a civil celebrant, would be appealed by the government—that is, the government wants to invalidate the recognition of their marriage by the Family Court. As I understand it, the Attorney to date has refused to say why. I am wondering if you can place on record specifically why the federal government wants to invalidate this marriage, on what grounds it is doing so, and for what purpose.

**Senator Ellison**—I understand that the matter concerns an application for a declaration as to the validity of the marriage. That was, I think, the first time that such a matter had been considered by the Family Court. It is the belief of the government that any change in this area is a matter for the parliament and not for the court. The advice I have is that the appeal is pending, that it is before the court, and that it would be therefore inappropriate for me to canvass the merits or otherwise of the case in this forum. As I understand it, the decision is based on the fact that this question is one which should be addressed by the parliament and not the Family Court.

**Senator GREIG**—Is it the government’s intention to pursue the definition of ‘gender in marriage’ with that regard?

**Senator Ellison**—I think that then goes to the question of the merits of the appeal, the grounds of the appeal, and I think it would be inappropriate of me to canvass the Commonwealth’s case, or anybody else’s case for that matter, as it is now pending before the Family Court.

**CHAIR**—Yes, Minister.

**Senator Ellison**—Certainly the Commonwealth’s case can be followed in the court, and the grounds will be argued there, but at this stage I do not think I am able to go into that detail.

**Senator GREIG**—Can I ask this then in general terms: is it a policy decision? Is it a government position that transgendered status is not a medical condition? I ask that in the context of overwhelming international evidence to show that a transgendered status is a medical condition. Therefore, I submit that discrimination against transgendered people, whether in marriage or on other grounds, is discrimination against people on the grounds of a medical condition. Does the government hold to the view that it is not a medical condition?

**Senator Ellison**—I think again that is getting into a difficult area. Can I take that question on notice? I am not being obstructive here. Senator Greig asks the question and Senator Greig is doing it with the best of intentions, but I cannot really canvass a case that is pending before the courts. I will take that question on notice and perhaps any others you have and see what I can get back to you with.

**Senator GREIG**—Perhaps I could just indicate one question that I am interested in pursuing on notice. I accept, as I am sure you would, that there are rights and responsibilities that are provided to people who are legally married or in a recognised de facto relationship, and those rights and responsibilities do not apply to single people in some cases when raising a child. In the event that this particular marriage recognition is invalidated, it would result in discrimination against this couple and their child. Does the government acknowledge that?

**Senator Ellison**—What the government is saying is that the declaration in this matter related to the validity of a marriage and the questions that were raised were more for the parliament than for the court. It is not a question of discriminating against any particular person but a question of what the law is and who should make that law. I suppose you have a question of judicial interpretation, perhaps. But I would certainly reject that there is any discrimination involved in this. It is a question of the law and how it is administered and who should make it.

**Senator GREIG**—I guess the discrimination would be in a government position which determines that someone of a particular gender is not of that gender. In that case, there would be a raft of taxation advantages, for example, that would not apply to this couple that would apply to a married couple, and that financial discrimination would carry through to the raising of a child.

**Senator Ellison**—One of your questions touched on this area before when you talked about a medical condition and the question of an operative procedure. There are questions of fact involved, as well as questions of law. I think it is not quite as simple as saying that people are discriminated against. The government does not believe that there is discrimination here, but questions of law then have to be dealt with. But I will see what I can provide you with—if there is anything further than the brief I have been given—and also see what can be provided in the context of these proceedings pending.

**Senator GREIG**—If the government's appeal to the full bench is not in its favour, is the government intending to pursue this to the High Court?

**Senator Ellison**—That is a decision the government will have to make if and when that decision arises. I cannot pre-empt what the government would do, and really that is a question for the government if and when that arises.

**Senator LUDWIG**—In relation to question No. 74, which was part of the examination of budget estimates in 2001-02, you advised that the Family Court's current case management system does not hold information which would allow accurate reporting on the time taken in cases to resolve through mediation and that a new case management system is under development. Where is the new case management system up to?

**Mr Phelan**—The Case Track system is being rolled out at this very moment. Over the next six to seven months, it will roll out in Newcastle. It is rolling out in Parramatta and Sydney in March. So over the next six to seven months, we will have completed the roll-out of Case Track. After that, as the information begins to be collected, we can better report on all of those things.

**Senator LUDWIG**—In relation to question No. 75, where you provided a table of the number of registrars, assistants and counsellors, could you update that table as at today's date or as at the date closest to your reporting date. I understand that it is full-time equivalents.

**Mr Phelan**—Certainly.

**Senator LUDWIG**—The same goes for attachments (a) and (b).

**Mr Foster**—As at today's date, there are 10 band 2 registrar positions in the court. We are expecting that position to be maintained until the end of this financial year, when it is intended to reduce that number from 10 to seven due to different funding arrangements. In terms of the counsellors, as at today's date—

**Senator LUDWIG**—I think the number of assistants are next—

**Mr Foster**—It is the same number—there is a direct correlation between the number of registrars and the number of assistants.

**Senator LUDWIG**—What are the new funding arrangements you mentioned?

**Mr Foster**—The transfer of money from the Family Court of Australia to the Federal Magistrates Service—it is part of those arrangements.

**Senator LUDWIG**—And counsellors?

**Mr Foster**—As at today's date, there are 82 FTE positions. Our target is 86, but for various reasons—backfilling vacancies et cetera—there are from time to time short-term vacancies. We are working towards filling that number of counsellors.

**Senator LUDWIG**—I am happy to take attachment (b) on notice, unless you have those figures available to be tabled. I do not think there is a need for you to go through them.

**Mr Foster**—We need to take that on notice to be able to go through all that material.

**Senator LUDWIG**—I do not need an update on (c) and (d), thank you.

**Senator COONEY**—I notice that page 55 of the report mentions the service charter and that the complaints have fallen considerably. I notice that, if you put the complaints against the initiating and supplementary applications, less than 0.5 per cent give rise to complaints. That is a very low figure. Oftentimes the perception is that there are a lot of complaints about the Family Court, but that is a very low percentage, I would suggest.

**Mr Phelan**—Yes, Senator.

**Senator COONEY**—Has that fact been published, do you know? Has the government done anything about that happy figure, Minister?

**Senator Ellison**—Again, the report was tabled in September. I am not aware of anything in relation to that. I will have to take that on notice.

**Senator COONEY**—Oftentimes the court gets criticised, and that looked pretty good to me. Page 26 refers to where the Family Court has presence. It has a very extensive presence throughout Australia, if you look at that map of locations of major services.

**Mr Foster**—Yes, it has.

**Senator COONEY**—Does that stretch your resources a bit?

**Mr Foster**—The court made a conscious decision that in its view it is important that the court continues to service rural and regional Australia. Most of our judicial resources are in the major centres, but we have managed to maintain our circuit commitments throughout the country.

**Senator COONEY**—Does that throw a strain on the staff? I was asking in the context of the fact that you have occupational health and safety considerations to take into account.

**Mr Foster**—It is a stressful environment in which to work, but I do not think the fact that we are maintaining circuits creates any more health issues for staff. I should add that we are

increasingly using our video links as well so that in some sense there might be an appearance of a judge or judicial officer but not necessarily always in person.

**Senator COONEY**—How is that working out?

**Mr Foster**—Pretty successfully. We now have—in fact, we completed it last calendar year—a complete network through all of our major registries, and we are continuing to identify more and more uses of our video network. Similar to the Federal Court, the staff internally have been trained in its use. Its reliability is good. I think it provides an extra service which is worthwhile.

**Senator COONEY**—On page 19 it mentions the judges and judicial registrars. You have told Senator Ludwig that the registrars are to be reduced by three.

**Mr Foster**—They are to be reduced by three, yes.

**Senator COONEY**—And that is because of the Magistrate's Court?

**Mr Foster**—That is because of the transfer of resources from one court to another.

**Senator COONEY**—Was that done simply because there was a Magistrate's Court set up, or was there any analysis done as to the need for registrars both at the Family Court level and at the Magistrate's Court level? What I am getting at is: has this just been the automatic transfer of three registrars to another court without really considering what demands there are from those courts?

**Mr Foster**—There was an assessment made of what the impact might be, as I understand it.

**Senator COONEY**—I wonder who made that assessment.

**Mr Foster**—I was not at the court at the time.

**Mr Phelan**—We were involved in assessing the unit cost, if I can put it that way, of a registrar and assistants and court officers that were to transfer across. My recollection is that the estimates of workload to move across were estimates and that there is a transitional arrangement in place to increase the funding over time as more and more magistrates come on line. But in terms of the actual workload to shift across, I cannot recall any analysis to that sort of level.

**Senator COONEY**—I wonder what sort of result that has on the Family Court, which, when you look at that map, you can see has got an extensive amount of work to do. I was just wondering whether there has been inadequate resources left to the court.

**Mr Foster**—It is very difficult to actually say, as the magistrates service has only been operating now for some 18 months. I guess in the first six months it was more of a transitional introduction, a number of magistrates were appointed over a period of time, and we have one calendar year's worth of data. It is probably a bit early to draw too many conclusions about where the workload shifts are going to be, but there are certainly now some indications and I think Mr May accurately reflected those in his statement this morning.

**Senator COONEY**—I want to ask you about page 19, 'Judges and judicial registrars'. Is it right that Sydney has not got a judge in the appeal division?

**Mr Phelan**—They do.

**Senator COONEY**—It just does not appear there. Where does it appear?

**Mr Phelan**—It appears on page 19.

**Senator COONEY**—In Parramatta?

**Mr Phelan**—No, ‘Senior Administrative Judge (Appeal Division)’. Justice Ellis is located in Sydney.

**Senator COONEY**—I cannot see that.

**Mr Foster**—Page 19.

**Senator COONEY**—All right, that is from Sydney. All of the others seem to have theirs listed as a judge of appeal. Have you got a full appeal division there?

**Mr Foster**—We have a vacancy in terms of the Deputy Chief Justice, and that person would normally be a member of the full court. In that sense, I guess there is a vacancy.

**Senator COONEY**—Do you always keep the administrative judges separate from the judges of appeal, or does the system do that?

**Mr Foster**—There is an administrative judge in charge of each major jurisdiction so, yes, they are separate from and not necessarily members of the full court.

**Senator COONEY**—That is what I was going to put to you. Can they be both?

**Mr Foster**—They need to be appointed to be both, so I guess—

**Senator COONEY**—I understand that, but is there anyone here that is both a judge and—

**Mr Foster**—Justice Ellis is a judge administrator and a member of the full court. He is the only one.

**Senator COONEY**—So ‘Senior Administrative Judge (Appeal Division)’ is meant to convey that he is both an administrative judge and an appeal judge. The Federal Court has got a pro bono scheme going. Has the Family Court thought of that?

**Mr Foster**—We set up a self-represented litigants project late in 2000 chaired by Justice Faulks. It is intended that this be a strategic approach to dealing with self-represented litigants. We, like the other courts, do not have necessary accurate data about the number of self-represented litigants, but the figure that we are using in the court is that between 30 and 40 per cent—based on a range of research which has been undertaken in recent years—of litigants are self-represented at various stages during the court process. So we are talking about a significant number of people who are not legally represented at every stage in the process. The project has a number of goals: to develop a consistent national approach to providing services to self-represented people, to improve court services, practices, procedures, protocols et cetera and to develop service deliveries that are clear, consistent and understandable to litigants of average ability.

That group of Justice Faulks has done quite a significant amount of work. It has held various public forums—one in Brisbane, one in Parramatta and soon to be one in Adelaide. We seek feedback on our web site and we receive, as I understand it, quite a lot of feedback on forms, processes et cetera through that. We also intend in April to have what the court calls a ‘visioning project’, which is a gathering of judges, academics and self-represented litigants to workshop what some of the possibilities are in terms of how the system might be improved to assist self-represented litigants. We do not believe we have all the answers; this project is not one of those things that will develop an eight-volume report. It is intended that, as good ideas come out of this project, they are assessed and implemented. As I said, it is a two-year project and we are well into it and I think seeing some of the benefits of it.

**Senator COONEY**—In the light of that—this whole issue of legal aid and who is representing who before the Family Court—it just strikes me that the Family Court is, in a certain sense, a most difficult court for judges and for people generally because the emotions are very high. It goes from the poorest and most vulnerable to the richest and most powerful, but all are affected, I would have thought, by and large, by great emotions. I suppose if you are the poor and the vulnerable you have the same sort of emotions but not the same ability to present your case because you cannot get representation—and there are all those arguments that you know better than I do about having people, in a most hostile attitude, cross-examining each other and so on. Is the Attorney-General's Department constantly thinking about these things and, if so, what is it doing?

**Mr Cornall**—The legal aid guidelines are regularly looked at in terms of their applicability and their currency. One of the significant issues in terms of legal aid is determining whether people meet the financial criteria for assistance. In my experience, a lot of litigants who are self-represented are either unable to qualify for assistance because they have some access to assets or, alternatively, they want to pursue a matter where it is assessed that the matter should not be pursued in terms of the merit of the application. Those are two difficult decisions that legal aid administrators have to make on a regular basis. The counterpoints to put are: should funds be spent on litigation where there is a question about the merit of the application and should people who are thought to be able to afford some form of representation themselves be assisted? I appreciate, as you say, probably more than a lot of people that the level at which the legal aid means test is set means that people would struggle to run a long and expensive case themselves, but I think that has always been a dilemma for legal aid administrators.

**Senator COONEY**—Obviously the court is doing what it can to get unrepresented litigants into some sort of situation where they can make some attempt at presenting their case, but the system—and, I suppose, the public purse—has to take a look at it as well and it has some responsibility.

**Mr Cornall**—I think that is the case, and it was just two years ago that I think a very substantial injection of legal aid funding was brought to the legal aid situation by the current government over a four-year period.

**Senator COONEY**—How is the program going in which you talk about unrepresented litigants? Where is that along the line? Is that having much success?

**Mr Foster**—I do not know that there is much more I can add to what I have already said. One of the outcomes of the project is a complete rules revision and we are looking at the whole of our rules in terms of this very large number of self-represented litigants. With any opportunity the court has to simplify the procedures it makes a real attempt to do so—on the basis of consulting with the legal profession, certainly, but also, importantly, self-represented litigants are getting the experience from people who have been through the system on their own and learning from that experience.

**Mr Phelan**—Some of the early wins, as it were, that you will see are the redesigns of our forms and our pamphlets—our information products. Very shortly we will be fundamentally redoing our web site to make it even easier to migrate around than it currently is and to provide more information services on the web site.

**Senator McKIERNAN**—Stay away from migration.

**Senator COONEY**—It is not only litigants. I do not know how a judge copes with it all. You have got very emotional litigants in front of you and you have got to try to produce a fair result and also a result that appears to have been got fairly. That is a bit hard—to be the judge,

as the perennial point, of course, and to be a helper. In any event, I suppose there is nothing to be done other than what is being done now.

**CHAIR**—If there are no further questions, then to Mr Foster, Mr Phelan and Ms Cooke, thank you very much for your attendance and your assistance to the committee today.

[2.02 p.m]

#### **Office of the Privacy Commissioner**

**CHAIR**—I ask Mr Crompton and Mr Pilgrim and other officers to come to the table, please.

**Senator Ellison**—There was no need for HREOC, is that right? On my list I had HREOC next.

**Senator McKIERNAN**—Another new policy direction.

**CHAIR**—We must have lists in different order, Minister. Mine says the Privacy Commissioner.

**Senator Ellison**—I think the secretary and I both have the same one.

**CHAIR**—There was a view, I think, that HREOC's appearance may be delayed in terms of travel and arrival. I am sorry, Minister. So we have, in the order in which I was intending to proceed, the Office of the Privacy Commissioner, the AAT, the OFLC, then the two royal commissions and then HREOC. Is that not in accord with the material you have got?

**Senator Ellison**—We have that now.

**CHAIR**—I welcome Mr Crompton and Mr Pilgrim, and Senator Ludwig will begin questions.

**Senator LUDWIG**—I generally refer back to question 45 during the last budget estimates process, where we looked at the issue of the consultative group that is meeting in respect of children's privacy, and then you provided attachment A, which was the first meeting of the consultative group on children's privacy. I notice that your annual report does not take us much further than that, other than to indicate that you are meeting. Could you provide an update of where you are in relation to that?

**Mr Crompton**—We are seeking to assist that inquiry as much as we can. The Attorney-General's Department is chairing the inquiry and has been consulting with us on the preparation of an issues paper—I think it is called—or a discussion paper. We held discussions on that inquiry as recently as late last week. I think I have some information on when they expect to issue that discussion paper, but the process is fundamentally being run by the Attorney-General's Department. At this stage the research work continues—I think that is the best way of describing it.

**Senator LUDWIG**—I will reserve my further questions for the Attorney-General's Department in relation to that. In relation to the Privacy Amendment Private Sector Act 2000, can you provide an update of where we are now at? In short, give us a view about the steps you have taken to implement that act since we last met.

**Mr Crompton**—By way of background, the act treats Australian organisations in three different sectors. For organisations with a turnover of more than \$3 million and private sector health service providers of any size, the act commenced on 21 December last year. For some small businesses, including businesses that basically trade in personal information or are contracted Commonwealth service providers, the act commences on 21 December this year.

Since we last met, we have undertaken a considerable process of finalising guidelines and issuing them, and we have undertaken both a speech campaign and a media campaign that I think have been fairly successful. I have a number of statistics that I can produce on that, if you are interested in them, including a couple of interesting newspaper articles remarking on the progress made. Now that the act has commenced, we have obviously seen an increase in the number of inquiries made of the office and of the complaints we are receiving, and we can proceed through some statistics there. In other words, there are three sets of data that I am happy to talk about. One of them is what we did in the lead-up to 21 December, a couple of assessments of the impact of that work and then what has happened since that date.

**Senator LUDWIG**—The committee would be pleased to receive those statistics when you have them available. You can take it on notice, if you prefer, rather than give the statistics orally. If they are in short form, then give them orally.

**Mr Crompton**—A couple of them are in short form, and it might just give us the lie of the land for the rest of the discussion, if you want to pursue it.

**Senator LUDWIG**—Thank you.

**Mr Crompton**—We finalised a number of documents and issued them on or before 21 December. The documents were about guidelines on privacy in the private health sector, guidelines for the national privacy principles, code development guidelines—a short pamphlet to be distributed—and a public interest determination to make sure that the taking of family medical histories continued properly under the act. We have revised our web site considerably. We have started a frequently asked questions page on the web site, and that has all led to considerable activity. For example, we had 80,000 downloads of the draft guidelines documents before they were superseded by the finalised documents and, by December, we had well over 100,000 downloads of the final guidelines. We had almost 150,000 downloads of the information sheets by December and 140,000 downloads of the Privacy Act over the whole of the year. Similar numbers through January show that the interest continues.

Our web site continues to score a remarkable number of hits for a small organisation. During January there were 375,000 page visits, which is a conservative measure. Most people do other extraordinary measures of their web sites that deliver big numbers that are mostly meaningless. These measurements are of actual visits by real people. We delivered—we think—speeches to roughly 10,000 people over the period leading up to the legislation, and we distributed about 9,000 kits to the people to whom we spoke. We have a list—I cannot remember how many pages it is; I think it is 13 pages—of people and organisations that we met with over that time, and I think it added up to about 350 meetings.

What is the effect of having done all of that work? I would be happy to table two newspaper articles which I think summarise that fairly well. One of them is an article that appeared in the *Financial Review* on 10 January called ‘Privacy changes given their due publicity’. One of the things that many Australians remark upon is the number of privacy statements that, one way or another, fell out of envelopes during January and February this year.

**Senator LUDWIG**—I was coming to that.

**Mr Crompton**—It is a good indication of what has ended up being quite a remarkably good additional education program for the general community. That article unpacks that observation in a couple more ways. But I thought it was quite useful to see that outsiders, unprompted, were reaching the conclusion that some good publicity was being given to the law at that point.

The other one is an article that is a little bit more controversial. It appeared in the *Australian* on 26 December and is entitled 'One-third of companies not ready for changes'. There are two pieces of data there that I find very interesting. The first is that, when we surveyed Australian business in about April 2001—essentially we had data that suggested about 20 per cent of Australian companies were beginning to get ready for the privacy legislation—about only one-third of the businesses were not ready for the new privacy legislation. So there had been considerable transition. The test area being ready for the privacy legislation is higher—about 60 to 70 per cent of Australian businesses claimed that they were ready. It is obviously not as good as 100 per cent, but there has been a huge move over the preceding months.

The second measure I think is even more impressive, because this is what we were really aiming at over that period. Only two per cent of the businesses surveyed, according to this article, were not aware that the legislation came into effect on 21 December. I think that shows the effect of the way we sought to engage with a number of professional organisations over time and the tremendously good work that some of those organisations have done. For example, the Australian Information Industry Association launched a tool kit, the Australian Retailers Association launched a privacy tool kit, the Medical Association launched a privacy tool kit, the Pharmacy Guild put out a very good CD-ROM to help its members to get up to speed, and the Real Estate Institute has put out its privacy guidelines to its members. All of that at least in sectors of the Australian economy has had a very good effect. I am willing to pause there if that is where you are like me to stop before I move on to what has happened since 21 December.

**Senator LUDWIG**—Only to the extent that you talked about those privacy letters that, I suspect, have been falling out of business. Do you provide advice to consumers about what they are supposed to do with those? Do they sign them and send them back? The banks, for argument's sake, hypothetically speaking, are sending all their customers letters with the words 'please sign and return'. Can they access your web site and find out what they should or should not do? Banks collectively have a view about what they require the owners of the accounts to do.

**Mr Crompton**—The vast proportion of those notices are in the end opt out notices. They are doing two things. They are telling people what information is being collected about them and what the organisation is doing with that information. The second thing they are doing is saying, 'Here is how to contact us if you want to opt out of receiving marketing material.' Probably a lot of people are not actually doing anything active about that, and so they are implicitly accepting the arrangement as set out in that document.

**Senator LUDWIG**—Do you agree with that process—that by omission you then end up in a marketing arrangement?

**Mr Crompton**—That is essentially what it has been before, but the difference is that people are now aware that that is what is happening and have more consciously been given an option to opt out. That is the way the law has been constructed. The two-year review, commencing 21 December 2003, will begin to put together evidence to find out whether or not that has been sufficient to meet the needs of the Australian people.

**Senator LUDWIG**—Can people access your web site for a view about that?

**Mr Crompton**—For a view about what?

**Senator LUDWIG**—To understand what the letter is. In this hypothetical case it is a letter from the bank. They are providing the options to the customer in this instance and so, if a person wanted a separate view about that, can they go to your web site and access a view about what they should or should not do, whether it is within their rights and whether the banks are right in what they say?

**Mr Crompton**—We have not been established to assess and comment on each of the individual privacy notices that would have been sent out, so we have not.

**Senator LUDWIG**—But you have seen them, I take it?

**Mr Crompton**—As a consumer mostly, yes. We have not yet received, as I recall, formal complaints that require us to do more investigation than that. I stand to be corrected on that by the deputy, who probably has a better recollection of the complaints that we have received.

**Senator LUDWIG**—You have second-guessed where I was going—by all means, Mr Pilgrim.

**Mr Pilgrim**—To build on what the commissioner has been saying, members of the community can access our web site. We have there, as the commissioner said, frequently asked questions, some of which deal with the issue you have raised. We propose some answers there to some of those questions. I would also add that we have some 14 particular, more detailed, information sheets available on the web site, dealing with some of the key issues that are coming up with the introduction of the new legislation. Furthermore, we have had a 50 per cent increase in our inquiries calls, and the majority of those now are, of course, coming from members of the community, and there we seek to answer questions with regard to what the individual member of the community has to do when they receive some of the sorts of information or privacy statements that they have been receiving from the banks, for example. Those are some of the other mechanisms with which we are trying to respond to some of those questions.

**Senator LUDWIG**—How are you coping with this increased activity, if there is a 50 per cent increase in telephone calls? I suspect that web contact is not costing you much, but are there follow-ups required? Do people email you, requesting advice and information?

**Mr Crompton**—Yes. It is very, very early days to try and spot trends yet, but one of the things that surprised us quite a lot was the extent to which inquiries came to us via emails. We have always had a stream of phone traffic coming through, and people writing to us with inquiries. Interestingly enough, a new stream opened that had not been happening very much before, in the way of email inquiries. The office took a new approach to handling those email inquiries. It seems to have already peaked so that January, at this stage, looks as though it was more active than February in this area. Basically, we took the emails and divided them up into groups of 10 and handed them around all over the office, to make sure that we did not get behind, and it appears to have worked very successfully in getting a response out to those people who have sent those email inquiries, as well as trying to handle people as they call us on the telephone, directly and on the spot.

**Senator LUDWIG**—Given the new work that you have got, have you been prioritising the work within your office, or are you adequately coping with the increased activity between 21 December and now?

**Mr Crompton**—We are seeking to monitor that very closely. At this stage, we are managing and, as I was saying, we reprioritise by, for example, passing around the emails. We are about to undertake some further activity, which we can describe in a moment if you like,

which I think will have another impact on the office in terms of the amount of phone call inquiries and email inquiries that it gets. Again, we will be reprioritising to handle that, too. At this stage, we are managing within the resources that we have been given. We obviously intend to keep the Attorney-General's Department and the Attorney himself well informed of the impact on the office of the increased activity. At this stage, we are managing. I think it is really just too early to say whether the trend will continue upwards or whether we have already reached a new plateau, but at this stage we have got it under control.

**Senator LUDWIG**—That was effectively my next question—whether you have made an assessment—but I suspect you have now answered that, in the sense that you are waiting to see whether it has peaked. The question was, of course, whether you had made an assessment as to whether you expect that you will require increased resources to meet your current customer requirements and whether you have passed that on to the Attorney-General. Your answer—if I can short-circuit the system—is that you are coping at the moment, and that you haven't; is that right?

**Mr Crompton**—Yes.

**Senator LUDWIG**—In relation to business, do you differentiate between small business and large business, in the type and level of service that you provide? I know that your act does.

**Mr Crompton**—‘Probably not very well’ is the answer to that. We are mostly helping people who come to us rather than saying, ‘Are you big? Therefore you get this much service,’ or ‘Are you small? Therefore you get that much service.’ We have to be very careful in the amount of service we give to any one organisation, because we are small and our main approach, as soon as detailed questioning comes along, is to say, ‘You will have to speak to your own advisers to take you any further down the track than that.’ And many of the advisers have done a very good job of helping organisations to get it right, but I am not sure that we have an active, conscious discrimination between big and small business in the sense that I can give you statistics on it. The deputy commissioner may have more to say on that, but I am not sure.

**Mr Pilgrim**—I would just like to add that the way we structured the guidelines and information sheets for organisations is that they are aimed generally at private sector organisations but, when you get into the body of the guidelines and the information sheets, they clearly stipulate issues, such as the delayed introduction of the law for small businesses, so that a small business will be able to look at either the information sheets or the guidelines to ascertain first off whether in fact it should be covered by the legislation at this stage or after 21 December 2002. There is information, again, on the web site and in the publications we have done to assist both sides of business, but it tends to be done in the one document rather than in specific documents aimed at a specific size of organisation.

**Senator LUDWIG**—So you have not found a need to differentiate the types of information or packages of information that you are providing, given the different requirements between small business and big business currently defined in your act.

**Mr Pilgrim**—Not at this stage. We have found that the nature of the questions we have had coming in on our inquiries line and again through our email contact have been of a generic nature which has required a response first off to say, ‘If you're an organisation of \$3 million or under then you will be exempt except for certain criteria,’ so we are able to answer questions with fairly generic responses.

**Senator LUDWIG**—In respect of the new provisions themselves, have you done an assessment as to whether or not you can form a view or opinion of whether business is coping—in other words, adequately dealing with the introduction of the new legislation?

**Mr Crompton**—In the sense that there have not been large problems, I get the sense that those who have felt that they have been touched by that privacy law have largely coped, so we have not got any privacy Chernobyls yet, melting things down, but that is a very different statement from saying that we are sure that all Australian businesses have got it right.

**Senator LUDWIG**—When will you be able to give that assurance?

**Mr Crompton**—That will gradually reveal itself and certainly the two-year review point is where we clearly want to stop and take stock.

**Senator LUDWIG**—I will leave you with the second two issues that you were going to cover. I know we jumped around.

**Mr Crompton**—I think we may have actually half-answered the question anyway. The first thing I wanted to do was to give you a feel for the level of activity before the commencement date and then to give you a brief assessment of the impact of that, which was those two newspaper articles. Then the third set of answers I wanted to give you will give you a feel for what has happened since the launch date. We have already half-answered those questions in terms of the roughly 50 per cent increase in the number of calls that we have taken. We have already begun to receive complaints from people who feel as though the national privacy principle had not been followed. We have about half a dozen privacy code applications in front of us. Something like 30 to 40 organisations have already opted to be covered by the act even though they did not have to be—almost all of them are credit unions—on the advice of their affiliating body.

As I said, we have issued a couple of public interest determinations to make sure that family and medical history taking can continue under the act. We have also had to address one particular problem relating to a public service payroll number that otherwise might not have been properly covered by the law. We have had to initiate four or five own motion investigations where evidence came to light that suggested the best thing that we could do was to initiate investigations. So the activity is beginning to move forward. It is very early days. At this stage I do not think we have a single resolved complaint or a completed own motion investigation—and, in a sense, nor should we. That would be jumping the gun too much.

**Senator COONEY**—Thank you very much for your evidence. In May, when you come back, I suppose you will be in a much better position to assess how things are going.

**Mr Crompton**—I am sure that we will. As I understand it, when the credit provisions came into effect in 1992, complaints then did not peak until about six months after the commencement of the legislation. You can tell in hindsight that that was the peak, but you cannot always tell at the time that that is the peak. We will have more data and we will probably still be circumspect in what it means, but we will certainly have many more months of data at that point and be willing to talk about it.

**CHAIR**—Thank you very much, Mr Crompton and Mr Pilgrim. I think that has assisted the committee in our examination of this area. We appreciate your time.

[2.25 p.m.]

### **Administrative Appeals Tribunal**

**CHAIR**—We will begin with questions in this area from Senator McKiernan.

**Senator McKIERNAN**—I will start with a comment on the great action shot on page 9 of the annual report. It is excellent. Incidentally, for those who do not have a copy of the annual report, it is an action shot of Ms Ransome and the Assistant Registrar, Janet Cooper. Ms Ransome, could you provide the committee with a staffing profile showing the staff currently employed by the AAT from the President down, compared with the staff employed over the previous three years?

**Ms Ransome**—I have some of that information. There may be aspects of it that you might wish me to take on notice. I think I provided the committee on a former occasion with some information going back to 1999, at which time the total number of members of the tribunal was 97. That was at 1 January 1999. As at 1 January 2000, that figure was 87. As at 1 January 2001, it was 88. The current figure is 78. It may be better if I take it on notice to break it down by category of member, because there has been some change over that time. The current staffing level in terms of staff employed under the Public Service Act is about 134 or 135.

**Senator McKIERNAN**—Thanks very much. I will accept your offer to take it on notice. It may be something we will address in further detail when we return in June. In relation to the most recent appointments to the AAT made after the defeat of the ART legislation last year, can you provide us with details of the lengths of appointment of the new personnel? What periods of time are they appointed for?

**Ms Ransome**—The average appointment is three years up to 30 June 2004, but there were some appointments for one year and there were some appointments for two-year periods as well.

**Senator McKIERNAN**—On notice, rather than doing it now, can you give us a breakdown of those appointments and the period for which the individuals have been appointed? Was any explanation given at the time of appointment as to why the differences in appointment periods?

**Ms Ransome**—Not that I can recall. That may be something that the department has some information about. There may well have been issues to do with the age of the appointee. Other than that I am not aware of any particular issues—other than also to give turnover amongst the membership so that there is not a period when all appointments expire, which makes it a very difficult logistical exercise.

**Senator McKIERNAN**—I appreciate that. Is there anything forthcoming from a volunteer from the department?

**Ms Lee**—In relation to the question about the different durations of terms of appointment for the AAT members, one of the objectives of that selection process was to ensure that the needs of each registry were met in terms of numbers of members and levels of members and the type of expertise that was required, so some of the appointments were made for periods of less than three years to allow for the workload requirements to be assessed and to consider whether we had the right mix of those needs.

**Senator McKIERNAN**—Thank you. When you do that breakdown, Ms Ransome, can you make sure it is broken up in terms of the registries and the skills? That is, can you break it down into social security compensation and other taxation, as Ms Lee was referring to, to make sure that everything was covered? Can you break it down in those areas as well?

**Ms Ransome**—Certainly, Senator, particularly in relation to part-time members, the majority of whom, as you know, are appointed because of the particular expertise they possess. We can easily do that.

**Senator McKIERNAN**—Thank you very much. Has the passage of the migration legislation last year—and I am talking, in particular, about the privative clause of the judicial review legislation—had any impact on the workload of the AAT?

**Ms Ransome**—Not that I am aware of, Senator. There was no effect on matters which could come before the tribunal itself. The effect is on those matters being appealed to the Federal Court from the tribunal.

**Senator McKIERNAN**—In regard to the proposed Administrative Review Tribunal, the legislation for establishment of which was defeated in the parliament last year, have any calculations been done on the amount of resources and dollars spent within the AAT leading to its establishment?

**Ms Ransome**—No, that has not been done, Senator.

**Senator McKIERNAN**—Would it be possible to do that?

**Ms Ransome**—It would be very difficult to do. It would have cost time more than anything else—probably, the time spent by me and other senior officers in attending meetings or providing information to the working party that was established in relation to the ART. I can endeavour to do it but I do not undertake to give you an answer that is 100 per cent correct.

**Senator McKIERNAN**—I do not seek to put an additional workload on the tribunal. I am of the view that the tribunal is there to administer administrative justice and not to spend all its resources in answering questions from parliamentary committees. But I am concerned that a lot of effort was made to establish the ART. I think that onlookers might have predicted early in the piece that the legislation was not going to pass the parliament and therefore the ART was not going to be established, yet the resources continued to be poured into the establishment of the ART. I am aware—and I know this for a fact because of my involvement on a parliamentary committee looking at the bills establishing the ART—that a lot of resources were not put to effective use. I will not say that they were wasted, because they never are wasted, but they were not put to the most optimum effective use. I actually see in a variety of reports—and I will address it later—that there is still planning going on towards the establishment of the ART, despite the will of the parliament.

**Ms Ransome**—I am not able to comment on that aspect of it. The AAT, all the way along, provided information to the department and to the working party that was formed to establish the ART. I was a member of that working party. Apart from the time and effort involved in that, there were no other resources put to that project by the AAT itself.

**Senator McKIERNAN**—Currently it is still the stated aim of the government to establish an ART. Are there any resources being directly put in from the AAT to establish the ART, currently?

**Ms Ransome**—Not at the moment—not unless the working party is reconvened in the future, in which case it would be me attending a working party meeting. But there have not been any of those meetings for quite some time.

**Senator McKIERNAN**—Other than those meetings, there is no activity going into the tribunal?

**Ms Ransome**—Not within the AAT.

**Senator McKIERNAN**—Thank you very much. That is about it from me for the AAT. Thank you, Ms Ransome.

**Senator BARTLETT**—I would like to follow up on that line from Senator McKiernan about the potential future reintroduction of moves to go to an ART. It may be something that the minister is more able to answer. I note that it is in the program of foreshadowed legislation. Is there any time frame for when that may come forward? Is it basically going to be a re-run of the previous one or are there likely to be to be significant alterations?

**Senator Ellison**—I cannot answer that at this point. The government is considering its position. A number of options are being considered and there has been consultation with bodies such as ACOSS and other people. So that is really where the government is at—considering some options. I cannot say one way or another what will be adopted. Suffice it to say that the ART is still there as an issue. It is still a live option.

**Senator McKIERNAN**—You said discussions with ACOSS and somebody else. What was the other group?

**Senator Ellison**—The others included the Law Council and the Welfare Rights Network.

**Senator BARTLETT**—Is the time frame as included in the list of legislation sent around as proposed for introduction in this session—is that still the plan at this stage in terms of when legislation may come forward?

**Senator Ellison**—That is correct. It is listed, but it is dependent on the options. I think it was a legislative bid, as is normally done at the beginning of the year, as to what the department or the Attorney-General would see as desirable, but the progress of it is dependent on other factors.

**Senator BARTLETT**—Senator McKiernan touched on what the possible costs may have been in dollars and the like committed. Obviously something has been hanging over the authority's head—I do not say that in a negative way necessarily—by way of a significant change in the near future, theoretically, for quite a period of time, and it is still there with a possible major change to things. Surely that must be causing some disruption in staff members' future options and general long-term planning for the authority?

**Ms Ransome**—I think it would be fair to say that there certainly has been some effect on long-term planning within the tribunal, simply because we have had a series of dates by which the organisation was to have been amalgamated with other tribunals and those dates have not eventuated. There has been an effect from time to time on morale within the organisation, although I would have to say that, surprisingly, the organisation has relatively high morale. It continues to deal with its workload. There have been changes in personnel, some of which may have been due to the fact that those people went on to better opportunities rather than stay in an organisation that had an uncertain future. But overall the AAT has continued to deal remarkably well with its current workload in an environment of what has been uncertainty for quite a number of years.

**Senator COONEY**—How long have you been registrar now?

**Ms Ransome**—Coming up to five years.

**Senator COONEY**—While you have been there, the AAT has been run in excellent fashion?

**Ms Ransome**—Of course it has—without a doubt.

**Senator COONEY**—And you would certainly have no problems with the way the AAT is working?

**Ms Ransome**—There are always ways in which an organisation can be improved.

**Senator COONEY**—Tell me why, now that you have raised that issue. Let me see if I can help you here. There would be nothing of a major nature that would be of concern to us at the AAT?

**Ms Ransome**—People have different views on that.

**Senator COONEY**—I am asking your view.

**Ms Ransome**—From my own perspective as registrar of the organisation there are things that I would like to see improved in terms of timeliness et cetera but, within the legislative framework in which the AAT currently works, I believe it works very well.

**Senator COONEY**—Sorry, but I am not going to let you get away with that. Is there anything other than timeliness that has you concerned?

**Ms Ransome**—There are a number of issues, and some of those were raised by the Australian Law Reform Commission in its *Managing justice* report. They could be addressed.

**Senator COONEY**—I am asking you though. You are the person who is closest to the running of the organisation; you are the registrar. I understand that you are in difficulty here, but I am going to press it just the same, if you do not mind. As has been pointed out, the ART is still being put forward as a possibility. I think what has got you concerned is that you do not want to say to me that the AAT is perfect because that would not be a good thing for the ART. But I wanted you to say that the AAT is perfect so that there should not be an ART. You are the registrar, so I am going to press you to give an answer. Then I am going to press Ms Leigh, so you are not going to be on your own.

**CHAIR**—I think that is regarded as due warning, Ms Leigh.

**Ms Ransome**—I reiterate: there are some things that could be improved about the AAT. One of those issues is timeliness. There are issues to do with the way that the AAT Act itself is structured, too. For example, if a member of the tribunal at the member level—as opposed to deputy president or senior member level—is to preside at a hearing, they must sit alone. They cannot sit with other members of the tribunal unless one of those members is a senior member or deputy president. That, I think, is a flaw in the legislation. It would lead to a better service to clients if an ordinary member of the tribunal could sit with a doctor expert, for example, on a compensation case.

**Senator COONEY**—If that was fixed, would you then say that things were very good? You will not lose your job, I am sure.

**Ms Ransome**—No. As I said, there are always things that can be improved—that is just one example. There are other examples in the way that the tribunal deals with summonses. There is no one thing that I think will make the AAT the perfect organisation.

**Senator COONEY**—You are never going to get a perfect organisation, are you? If you went to a system such as the ART, there would be problems as well. I am not asking you as a matter of policy, but it is a matter of reality.

**Ms Ransome**—As a matter of reality, there are always ways in which organisations can be improved and in which legislation can be improved.

**Senator COONEY**—But as far as you can see fair results are being returned by the AAT?

**Ms Ransome**—Yes.

**Senator COONEY**—As a matter of interest, how many appeals go to the Federal Court from the AAT?

**Ms Ransome**—It is very low. I have not got the current figures—figures that were in last year's annual report. I do not know that they give you an actual percentage, but I will come back to you on that. It is only about one or two per cent.

**Senator COONEY**—Yes, but the thing is that very few litigants want to appeal a decision of the AAT to the Federal Court.

**Ms Ransome**—That is right.

**Senator COONEY**—Of those that do go to the Federal Court, how many times does the Federal Court say you are wrong? Not very many?

**Ms Ransome**—I do not have that information. I can take it on notice.

**Senator COONEY**—Ms Leigh, what do you say to the same questions?

**Ms Leigh**—The government's position is that the ART proposal would be a significant improvement on the current review tribunal.

**Senator COONEY**—This is in your area. Ms Ransome had to go through this. I am not asking you for any policy decisions, and I am not asking you what the government position is. All I am asking you is: have you got a thought in your mind, a judgment to make, about the efficiency of the court? That is the sort of thing that you would expect from a fearless public servant who wants to help the system along.

**Mr Cornall**—Perhaps I could assist you in this way: the AAT can work effectively as an organisation in its present structure, but the government's proposal is to amalgamate a series of tribunals. While they might independently be operating satisfactorily, by giving it a greater size and scope they get a more efficient combined tribunal. One of the illustrations of that process working satisfactorily is in Victoria, where the Victorian Civil and Administrative Tribunal has established itself as a combined tribunal and is generally recognised as being an efficient administrative review organisation.

**Senator COONEY**—VCAT is an independent institution in the sense that it was set up by government to hear planning, civil and human rights issues and so on. It is not an institution where particular departments contribute; it is all done through the Attorney's, as I understand it. So it is really not a fair comparison to look at the ART and look at VCAT and say they are the same.

**Mr Cornall**—In terms of users of the tribunal, the way in which it is administered within government would not be particularly apparent. From the users' point of view, the larger tribunal would just seem to be a large administrative tribunal with operating divisions, and the manner in which members are appointed to those divisions or the manner in which the tribunal is funded between departments would not be apparent.

**Senator COONEY**—I will not press Ms Leigh, but you have got to be a courageous, fearless public servant every now and then, Ms Leigh. All I was doing was asking you about matters of fact, not of policy.

**Senator McKIERNAN**—Regarding the matters contained in figure 2.1 on page 18 of the annual report—the comments at 3.2.1 on page 21 are an elaboration of what that means—the

table on page 18 shows a dramatic increase in the number of taxation matters going to the tribunal. Part of the explanation contained at 3.2.1, Taxation Applications, states in part:

The tribunal is liaising closely with the Court—

that is the Federal Court—

in relation to these matters.

As I had earlier explained, the tribunal holds applications pending the outcome of test cases before the Federal Court. What about cases where the applicant does not agree to withhold their case from tribunal review? Does the tribunal then proceed to adjudicate on the matter before the tribunal?

**Ms Ransome**—The tribunal has made a number of directions in those matters where the applicant has not consented to the course that the tribunal proposed to take. Those directions are that the matters will await the outcome of the matters in the Federal Court. What happens now with those tax scheme matters I am not particularly sure of as at today. You may know that the commissioner made an announcement last Thursday about the settlement in those matters. The Acting President of the tribunal, Justice Drummond, and I are meeting with the tax office this Wednesday to discuss the implications of the settlement offer for those matters which are before the tribunal. As I understand it at this stage, the offer is not made in relation to all scheme matters that are currently before the tribunal but only in relation to those which can be termed ‘mass marketed’ schemes. We will be discussing with the tax office which particular schemes may be caught up and how the tax office intends to proceed with that settlement offer.

**Senator McKIERNAN**—Thank you very much for that. I expect that that matter will still be of note in June when we next meet. I put you on notice to provide further and more up-to-date information at that time. In saying more up-to-date information I am not critical of the tribunal or of your response now; I understand that these matters are on foot as a result of the commissioner’s announcement last week. A final matter with regard to the establishment of the proposed Administrative Review Tribunal: I take note of the president’s overview where the president of the AAT states that she has regular meetings with the MRT, the RRT, the SSAT and the VRB. The VRB was not included in the bill to establish the ART. Is it proposed, Minister, that the Veterans’ Review Board would be included in the new legislation?

**Senator Ellison**—No consideration has been given to that, so I suppose the answer is that it is not to be included, as I understand from that. Although I said earlier that options were being considered, that one is not.

**Senator McKIERNAN**—It is still off the agenda?

**Senator Ellison**—Yes.

**Senator McKIERNAN**—I suppose that those earlier discussions that you spoke about would have included groups such as the Returned Services League?

**Senator Ellison**—The group I mentioned I think might have been representative. As to any other groups being included, I will make inquiries and find out what the situation was or is.

**Senator McKIERNAN**—Senator Bartlett had alerted me to the fact that the bill is not on the *Notice Paper* as such, but it is foreshadowed to be introduced. Does that foreshadowing include a consequential bill?

**Ms Leigh**—I think the answer is necessarily it does. If that bill were to be reintroduced it could only operate together with a consequential bill.

**Senator McKIERNAN**—I would have thought that the department and those involved would have learned from the experience of not having the consequential bill early in the process. I hope that somebody has learned from that experience.

**Mr Cornall**—Yes, I think we have. What Ms Leigh is really foreshadowing is that at this stage we are dependent on government making decisions and we will then endeavour to implement those government decisions, taking account of the issue you have just raised.

**Senator McKIERNAN**—But a number of decisions have already been made.

**Mr Cornall**—No. When the Attorney addressed the staff of the department a few days ago, in referring to this issue he simply said to us that the ART issue has to be resolved. That is as far as we are able to take it at this stage.

**Senator McKIERNAN**—I cannot pick that point up earlier, but I certainly remember reading it and through it to be stronger than that: ‘to resolve the future of the Administrative Review Tribunal’. I thought from reading the Migration Review Tribunal’s annual report that things were perhaps a little bit more definitive and more definite, but we can address those matters when those tribunals appear before the committee tomorrow.

**CHAIR**—Senator McKiernan will pursue that area tomorrow. There being no further questions, Ms Ransome, thank you very much for assisting the committee.

[2.52 p.m.]

#### **Office of Film and Literature Classification**

**CHAIR**—I welcome Mr Clark, Mr Hunt and Mr Tenison to the table.

**Senator LUDWIG**—I have only got a couple of short questions in relation to your annual report. I note that on page 4 you refer to the guidelines review, which commenced, I understand, on 16 November 2000. Whereabouts is that currently up to? I understand that a position paper has been circulated. Is that correct?

**Mr Clark**—There was a discussion paper circulated publicly following a procedure agreed to by the Attorney and ministers. That public consultation is now completed. An independent consultant has been appointed to assess the public submissions to the guidelines review. He is preparing a paper which will go to ministers in March, and from then on we will just see what decisions ministers make in relation to further progressing the guidelines review.

**Senator LUDWIG**—Who is the independent consultant?

**Mr Clark**—The independent consultant is Professor Jeff Brand from Bond University.

**Senator LUDWIG**—In respect of the other reviews, on page 5 it states that progress was also made on the review of advertising provisions in classification legislation. Perhaps you could tell us where that is up to?

**Mr Clark**—There is a paper going to ministers on 8 March in relation to the advertising review. We are making recommendations in relation to that and there may be further work coming from that review.

**Senator LUDWIG**—Is that available to the committee?

**Mr Clark**—After the ministers consider it in March.

**Senator LUDWIG**—The censorship ministers also decided in March 2001 to review the Australian Record Industry Association code of practice. Whereabouts is that currently?

**Mr Clark**—Yes, that also is the subject of a paper going to ministers in March and that is hopefully being brought to a conclusion.

**Senator LUDWIG**—So those two papers—the last two—might be available to the committee after they have gone to the—

**Mr Clark**—It depends on the decision of the ministers, but yes.

**Senator LUDWIG**—Should they be available and if we have not finished this round of questions from additional estimates, perhaps you could make them available?

**Mr Clark**—Certainly.

**Senator LUDWIG**—If not, could you let us know that they are still in the pipeline, so to speak? If you recall the *Grand theft auto 3*, my recollection is that it hit the shelves before it was subject to an order. I was wondering how that occurs in the sense that the decision that it was going to be banned, as I understand it, was made after it got to the shelves and then it had to be recalled. Is that how it operates generally?

**Mr Clark**—No, it is not how it should operate, but from time to time there are breaches of legislation. You are not permitted to advertise or sell a computer game until that game has been classified. It was brought to our attention that the game had not been classified and in fact was on sale. The game, at that time, had been submitted for classification. A classification decision was taken, which was to refuse classification to the game. The distributor appealed that to the Classification Review Board, and the review board upheld that decision. In the meantime, the games had been taken off the market and since then the distributor has submitted another version of the game for classification, which has gone MA 15+.

**Senator LUDWIG**—Do you talk to the distributors about the process that they should adopt?

**Mr Clark**—We do and we also speak to retailers in relation to the sale of games on the shelves, and we are being strategic about that in trying to get the big retailers to ensure that they check the classification of a game before they start selling it.

**Senator LUDWIG**—Have you sent out a letter or adopted a methodology in talking to the big retailers?

**Mr Clark**—We have the community liaison officers who deal with both individuals and larger retail groups. We seek to meet with them at the buyer point, if you like, to ensure that that advice goes through. We are getting better, I hope, at doing that, but it is certainly something we have been working at very hard in the last few months.

**Senator GREIG**—I think, unless I am mistaken, I asked you similar questions on this at roughly this time last year, and I would like to pursue those. They were on the question of the liaison the OFLC does with the general community in terms of classifications, in things like G, PG and so on. If I remember rightly, you acknowledged that there was no community liaison in terms of classifications relating to R and X. Is my understanding correct?

**Mr Clark**—When you say community liaison, do you mean with industry or do you mean with the broad community?

**Senator GREIG**—I am looking at the broad community.

**Mr Clark**—I think there is a need for greater communication to the community about the meaning of all of the classification ratings, including R. X is very specific to the adult industry and very specific to retail and distribution within the territories. It is problematic when material is being sold in other states. We deal with that at community liaison officer level, once again talking with retailers where there are found to be breaches. We do what we can in relation to X, but it is a more complex one to manage in terms of public education. But we are looking longer term to broader public education campaigns in relation to all of the determined markings.

**Senator GREIG**—My question, though, was not so much about how and why you should educate the community on the decisions taken or the guidelines that you adhere to, but in the framing of those guidelines. I understood from your answers last time—and correct me if I misunderstood you—that the OFLC does engage in some discussion, debate and dialogue with the general community in helping to frame those guidelines, but not in relation to R and X.

**Mr Clark**—I am sorry; you were referring to the community assessment panels.

**Senator GREIG**—Yes.

**Mr Clark**—The current process in relation to the guidelines review is wide open to all classification categories.

**Senator GREIG**—Including R and X?

**Mr Clark**—Including R and X.

**Senator GREIG**—Is this the first occasion on which the OFLC has done that?

**Mr Clark**—It would be in relation to prior reviews of the classification guidelines. There have been quite a number of submissions to the OFLC in relation to the X guidelines. The R tends to fit into the spectrum of the other grouping, but certainly we have had submissions on X guidelines. As you have indicated, they have not been reporting in the annual report. Looking at the X, that is certainly happening at the moment.

**Senator GREIG**—Do you solicit advice from the general community and from industry in terms of working with that?

**Mr Clark**—The guidelines review has been widely advertised and there have been responses from industry and the general community. Some of those have been in the form of pro forma letters—in relation to the X classification in particular.

**Senator HARRADINE**—First of all I go back to the question asked of you by Senator Ludwig. Why is the paper that is being prepared by the OFLC re advertising and ARIA not able to be given to the committee?

**Mr Clark**—The guidelines are determined by the state, territory and Commonwealth ministers in relation to their content, as is the advertising review and the ARIA review, which is the ARIA annual report. It is reported there so, as it is a cooperative scheme of the Commonwealth, states and territories, that is where that information goes in the first instance.

**Senator HARRADINE**—But this is a paper prepared by the board. It would have been handy previously if we had known that the board was attempting to impose an NVE classification—rather than going through all of the problems that we had as a result of that.

**Mr Clark**—The discussion paper in relation to the current review has been very widely circulated. I would be surprised if you had not—

**Senator HARRADINE**—I understand that. Surely you know that I am not talking about that. I am talking about the documents that you are preparing as a result of that and, initially, the question that was asked by Senator Ludwig about the ARIA matter and also about the advertising.

**Mr Clark**—The papers go to the state, territory and Commonwealth ministers in the first instance. What they decide to do with them is really a decision for the ministers. Regarding the advertising provisions, if there were a need for legislation, naturally that would come back to the parliament.

**Senator HARRADINE**—Of course. But the point that I am getting at is: wouldn't it be better to be quite open about this and to have information that is supplied by the board to the ministers? It is a Commonwealth-state cooperative scheme. One of the problems is that under those schemes you do not know who is taking responsibility for what: what the Commonwealth minister does and what any of the state ministers do.

**Mr Clark**—As I understand it, the way that it works is that it is a cooperative scheme and broad agreement is reached between all participants in that cooperative scheme. We follow the protocols that were adopted for the operation of those.

**Senator HARRADINE**—Regarding the ARIA matter: are you taking into account the complaints that are being received about lyrics?

**Mr Clark**—That is very much the reason we are looking very carefully at the ARIA scheme and why there has been a review of it: to ensure that it operates effectively to inform people of potentially offensive lyrics and what markings should be on those—both OFLC and ARIA markings.

**Senator HARRADINE**—It is a paper tiger, though, isn't it? ARIA is a voluntary scheme.

**Mr Clark**—It is a voluntary scheme, apart from those CDs which have enhanced images on them, which are classified as film.

**Senator HARRADINE**—Yes, of course. I think I saw amongst some of your papers there an indication that concern has been expressed about the level of violence in the community.

**Mr Clark**—In lyrics?

**Senator HARRADINE**—Yes, in lyrics and in other media types, generally speaking.

**Mr Clark**—A concern in relation to violence in entertainment media has been expressed in submissions to the guidelines review. It is something that was expressed in the community assessment panel research conducted by OFLC. So, yes, there is a concern about representations of violence in entertainment media.

**Senator HARRADINE**—Under those circumstances, why is it being proposed by the board—in the board's review paper, at least—to introduce an R category for computer games?

**Mr Clark**—It is a discussion paper prepared by the OFLC. It is not the board's proposition. At this stage the board is having input into the guidelines review.

**Senator HARRADINE**—I am sorry, I must be looking at the wrong documents because I am looking at 'proposed film and computer game guidelines: an R category proposal'.

**Mr Clark**—It is not a proposal at this stage for an R category for computer games; it is something which is part of the discussion paper. There is a body of opinion in the community that there should be an R rating for computer games because the majority of players are aged between something like 22 and 35. The paper raises the matter because, as with many other

issues included in the discussion paper, it should be discussed and so it is there as a proposition for input from the community.

**Senator HARRADINE**—But it says ‘proposed guidelines for classification of films, videotapes and computer games’. Isn’t the board proposing to have a common system for all of those areas—films, videotapes and computer games?

**Mr Clark**—Senator, I think you are reading from a comparative table which has been prepared and which takes the essence of the existing guidelines and proposed guidelines. The actual discussion paper says, ‘this should be talked about’ but it is not recommending. We have not recommended; it is there for discussion.

**Senator HARRADINE**—It says ‘proposed’ here. I know what you are talking about—I have got the review document here. But it says ‘proposed film and computer games’. Is that desired by any of the state attorneys or SCAG members? They specifically rejected an R classification for computer games previously.

**Mr Clark**—That is correct, Senator.

**Senator HARRADINE**—If this proposal were adopted, how many of those computer games that have been refused classification would become legal?

**Mr Clark**—Senator, I could not give you an answer to that question. For instance, if I refer to the GTA3 game, because there is not an R guideline we would not know whether that would achieve R or still remain RC. If there were such a classification, we would apply it, but we cannot hypothetically do it at this stage.

**Senator HARRADINE**—You were saying that the reason that you are having this proposal is that there had been a community request. How many requests did you actually have to introduce an R classification for computer games which will be very violent interactive games?

**Mr Clark**—In the guidelines review consultation process there were quite a large number of pro forma—as with the X guidelines—submissions to the guidelines review which requested consideration of an R classification for games. With the refusal to classify the GTA3 game there were, similarly, a large number of letters of complaint in relation to the lack of an R classification and the need for it.

**Senator HARRADINE**—Were they form letters?

**Mr Clark**—Not all; there was a petition in relation to the guidelines review which was largely electronic and there were individual submissions. The GTA3 response was all individual responses.

**Senator HARRADINE**—Yes, but the previous one was generated by the industry.

**Mr Clark**—A larger number of them, yes, were pro format.

**Senator HARRADINE**—So in those proposed film and computer games guidelines you can have strong depictions of realistic violence, and that would be interactive. What effect will that have on young people? It is not available now.

**Mr Clark**—I think that the draft guidelines for the R classification reflect largely what would be applied to film. You will find that interactive segments have qualifiers which say that there should not be rewards for violence in interactive segments which would be very highly offensive. I cannot find the detail now, but certainly it is there in the document. There are qualifiers in relation to rewards and particularly in relation to sexual violence.

**Senator HARRADINE**—Could you show me that?

**Mr Clark**—On the bottom of page 15, the proposal reads:

[Aggressive content in interactive segments should not involve detailed violence between realistic human characters that has a high impact. It may involve competitive intensity and authenticity so long as this does not increase the impact.

In non-interactive sequences, the level of detail, authenticity and realism may increase so long as the impact is not high.]

**Senator HARRADINE**—But what about the reward? It does say there, ‘It may involve competitive intensity and authenticity’.

**Mr Clark**—That comes in the lower classification.

**Senator HARRADINE**—Yes, that is right.

**Mr Clark**—As I say, the R classification as it is proposed at this stage largely refers to film and certainly needs refining in relation to games.

**Senator HARRADINE**—So it is proposing far more violent material for interactive games. I ask again: what is that going to do to the young people of Australia?

**Mr Clark**—The R classification is restricted to persons over the age of 18. It is legally restricted and should not be available to young people.

**Senator HARRADINE**—Oh, yeah? How are you monitoring that?

**Mr Clark**—I think the issue is the point of sale in relation to games and also in relation to how families monitor what their children in fact have access to.

**Senator HARRADINE**—Exactly. There is example after example where young people have this material. It is one of the reasons that there was not an R classification in the computer games originally. Not one of the ministers, federal or state, wanted an R classification in computer games. Have they changed their minds?

**Mr Clark**—The matter has not gone to ministers as yet. It is a discussion paper and is purely serving that purpose. That discussion paper is being evaluated and then will go to ministers for a response.

**Senator HARRADINE**—On page 16, on the essential matters in interactive material—that is, with computer games—it can be interactive sexual manipulation by the player of the R-rated computer game, except that it should not be aggressive. Is that right? You still have manipulation?

**Mr Clark**—Yes.

**Senator HARRADINE**—And that will be a game.

**Mr Clark**—It will essentially be in an aggressive context.

**Senator HARRADINE**—I understand that.

**Mr Clark**—Which is the reason why GTA3 was refused.

**Senator HARRADINE**—Sure, but sexual activity will be able to be manipulated by the player of the video game.

**Mr Clark**—I would not want to speculate on how the board might interpret the guideline.

**Senator HARRADINE**—Well, it says it here. By the way, on top of page 16, where it says ‘sexually explicit’, what does the word ‘explicit’ mean there?

**Mr Clark**—I will check our definition, Senator, and be precise. I am sorry, but I thought that ‘explicit’ was in our definitions within the guidelines, Senator. ‘Explicit’ will mean that the depictions permitted would be probably of full sexual activity as opposed to obscured sexual activity.

**Senator HARRADINE**—So on these computer games you are going to have that?

**Mr Clark**—As I say, Senator, I am not proposing that we have that; but what we have is a set of draft guidelines and a discussion paper for response from the community and for ministers to consider. So I am not at this stage proposing anything in relation to games.

**Senator HARRADINE**—Do you see our difficulty when you say something like that, when I have the document here which says, ‘Proposed film and computer games guidelines’? Have you considered the implications of DVD?

**Mr Clark**—Yes, we have. One of the reasons for the review is not only games but DVDs and the convergence of all entertainment media into single forms. So what we are seeking to do is to certainly bring the guidelines together—regardless of whether there is an R classification for games—so that we can better deal with converged media, whether they are DVDs which have games on them, or games which have films on them, which is part of the reality that we now face.

**Senator HARRADINE**—I now come to the question of the film *Intimacy* and its ramifications to the classification system, and the current guidelines for film and video. But before I get on to that, with computer games and the question of coarse language, are there virtually no restrictions on coarse language?

**Mr Clark**—Senator, that is the current guideline for R-rated movies.

**Senator HARRADINE**—Yes, so that would exist.

**Mr Clark**—That would flow through, if that were adopted.

**Senator HARRADINE**—That would flow through. On the current R classification, it says:

Sexual activity may be realistically simulated; the general rule is “simulation, yes—the real thing, no.” In this film, there is some simulation but there is also ‘the real thing’, real sexual activity. What is the basis for that?

**Mr Clark**—Well, the board applied the guideline, which says:

Sexual activity may be realistically simulated; the general rule—  
and the words ‘general rule’ are important words—  
is “simulation, yes—the real thing, no.”

The board was mindful of the decision taken over two years ago, in relation to a movie called *Romance*, by the Classification Review Board, in which they applied the rule in that manner. The brief incidence of actual sexual activity in this film, they felt, could be accommodated within the R guideline as currently before you.

**Senator HARRADINE**—Why?

**Mr Clark**—Because it says the ‘general rule’, as opposed to ‘the rule’.

**Senator HARRADINE**—Sure, but why was that general rule considered not to be applicable in this case.

**Mr Clark**—The board was of the view that the film had merit in terms of its narrative and was not such that it should not be made available to the Australian public.

**Senator HARRADINE**—You say in your decision that the high-level sex scenes are contextually justified. What does that mean?

**Mr Clark**—It means that they are very much a part of the narrative of the movie.

**Senator HARRADINE**—So a clever film producer could cook up a narrative, and, under the precedent that you will establish here, seek an R classification.

**Mr Clark**—The decision on any of these films will be a decision that the board will have to consider. The board considered this one very carefully, and I do not believe this is the precedent, as other decisions have been made. Certainly the board was mindful that, in this narrative of contemporary life in Britain, it was appropriate in that context.

**Senator HARRADINE**—A contemporary life in Britain?

**Mr Clark**—Yes.

**Senator HARRADINE**—Are you suggesting that this type of activity, which involves almost soulless sex every Wednesday between two partners, both of whom have a marriage partner, is what occurs in life in Britain?

**Mr Clark**—I am not suggesting that in the slightest. What I am saying is that the film is a fictional narrative about contemporary life in Britain. The board, in viewing the movie, was content that it fitted within the guidelines. It was fitted within section 11 of the act, which looks at the standards of morality and decency. Section 11(d) says:

the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

So the board, in looking at section 11 of the act, believes that as a movie it was appropriately located at R.

**Senator HARRADINE**—I have read a large number of reviews of the film. It is interesting to note that an overwhelming majority of the female reviewers were opposed to it; they bagged it mercilessly. I think most of the males supported it. I refer to a review by Charlotte Raven in the *Guardian* entitled ‘Why intimacy is undercover porn’. This reviewer made a case that in fact it is pornographic.

**Mr Clark**—The board, in making decisions, must apply the classification guidelines and look at the code and the act. The task of film reviewers is to make qualitative comments about the nature of film and the art, if you like, contained or not contained with any entertainment media product. The board is really, as part of its functionality, applying the tools and using the tools that it must use in making a classification decision. So, yes, there has been a large amount of speculation in relation to the film as a piece of entertainment media, but it is not for the board to consider those matters.

**Senator HARRADINE**—But you said that the board felt that it should be a film that should be seen by Australians.

**Mr Clark**—Yes.

**Senator HARRADINE**—On what grounds?

**Mr Clark**—On the grounds that are in the report which I think you have in front of you. The board report refers to:

The recent debates established that the community is prepared to be tolerant of strong classifiable elements insofar as the film can establish its artistic values with regard to integrity and substance.

So it goes on. It refers to the writer of the stories on which the film is based as a writer of some standing.

**Senator HARRADINE**—You say ‘recent debates established that the community is prepared’. What recent debates? Does the board go on debates?

**Mr Clark**—Certainly not, Senator, but the board takes note of debates both in the media and in other places. I think there is probably a reference there to the debate about the film *Romance*.

**Senator HARRADINE**—You point out some of the principles that guide the board, one of which is:

(a) adults should be able to read, hear and see what they want.

**Mr Clark**—That is correct, Senator.

**Senator HARRADINE**—But they cannot, can they?

**Mr Clark**—That is true.

**Senator HARRADINE**—Child pornography, bestiality—you name it—and sexually violent films are supposed to be knocked on the head by your board. They cannot see that. What about this? Isn't that right dependent upon the claimed right of the porn merchant or producer to freedom of expression? I would like your answer to that. Maybe I am wrong, but I would have thought that the principle that adults should be able to read, hear and see what they want is very much dependent on whether it is published and whether the film-maker uses his claimed right of freedom of expression.

**Mr Clark**—That is a very significant debate in the community. I think the board members are appointed to broadly reflect the Australian community and the attitudes and values within the Australian community, so therefore they take the act, the code and the guidelines and apply those and, yes, we recognise that the guidelines are very explicit on those things which will not be made available to the public. If one applies the points within section 11 of the act, yes, the first statement reads:

(a) adults should be able to read, hear and see what they want

But as the board is appointed to reflect the community, they will make some decisions which do not make material available.

**Senator HARRADINE**—On the grounds that the claimed right of the film-makers to an absolute freedom of expression should be balanced against the common good; is that right?

**Mr Clark**—That is correct.

**Senator HARRADINE**—But what about the suggestion that these particular segments are just porn? I give you the definition of pornography, which was adopted unanimously by the joint select committee on video materials:

Pornography refers to the nature of the materials themselves, their content and apparent or purported intent to arouse sexual desires of its target audience.

Under that definition, would you regard those segments as being pornography?

**Mr Clark**—In coming to its decision, the board was of the view that that was not the case. The material of that nature would usually fit within the X classification as opposed to a

narrative film of some length which has some very brief segments which are sexually explicit and other sex scenes which are simulated that do go on for some time. In the overall context of the film, the board was of the view that, no, this was not pornography and was justified within the context of a narrative.

**Senator HARRADINE**—If it were, it would go into X.

**Mr Clark**—If it were a film which dealt exclusively with sex, it would go into the X classification.

**Senator HARRADINE**—What about the R classification now? It has got pornography in it, has it not? How can you say, on the one hand, that if it is porn then it goes into X but, on the other hand, put this into R as though there is not porn in R? What about those R equivalents of the X category that are precisely the same in content, intent and theme as the X classification, save that they are taken from another angle by a camera? They are in R. Why don't you get rid of them if they are totally to do with sex and pornography? Why aren't they in the X category?

**Mr Clark**—Once again, it comes back to the application of the guidelines by the board, and the R classification says that simulated is possible. The board take their decision making in relation to the classifications extremely seriously, and these are matters they consider a lot. But if simulation is permitted within the R classification, that is in fact what it is.

**Senator HARRADINE**—Irrespective of its theme, intent and content? How do you know that it is simulated? I have seen these things—you would not know whether or not it was simulated.

**Mr Clark**—That is correct.

**Senator HARRADINE**—But you have still got them in R. Why aren't they in X?

**Mr Clark**—Because they fit within the R classification.

**Senator HARRADINE**—Because they are simulated?

**Mr Clark**—The X guidelines state:

This classification is a special and legally restricted category which contains only sexually explicit material.

**Senator HARRADINE**—What do you mean by 'explicit'?

**Mr Clark**—It is specifically identifiable sexual activity as opposed to obscured activity where it is difficult to tell. The guidelines go on to say:

That is material which contains real depictions of actual sexual intercourse and other sexual activity between consenting adults.

**Senator HARRADINE**—What about the films that have the R equivalent and it is just that shots are taken from a different direction by a different camera?

**Mr Clark**—The difference is that they are obscured and they are not explicit in the context of the definition within the X guidelines.

**Senator HARRADINE**—They are pornography.

**Mr Clark**—They may well be pornography—they are certainly sexually suggestive—but they are not explicit in the context of actual sexual activity.

**Senator HARRADINE**—These are niceties—it is exactly the same action. You have got them in the R category.

**Mr Clark**—Correct, because they fit within the R guidelines as interpreted by the board and certainly as supported by other decisions that have been made in relation to other films such as *Romance*.

**Senator HARRADINE**—That is not the point in this respect. In respect of the X and R equivalents, you have got the same film, the same action, the same intent, the same theme and the same content but you put one in the X category and one in the R category. The basis on which you do that is that one is labelled ‘explicit’—whatever that means.

**Mr Clark**—‘Explicit’ in the context here ‘is material which contains real depictions of actual sexual intercourse and other sexual activity between consenting adults’. That is the X guideline; the R guidelines permit simulated sexual activity.

**Senator HARRADINE**—You have just told the committee, in relation to film *Intimacy*, that the reason that you are able to have that is that it is contextually justified and that it is not pornography, so you put it into R. Under those circumstances, what is to stop a film-maker thinking up a narrative which, on the basis of contextual justification, he can submit that it should be given an R classification. Isn’t it very important that they do have the R category? Doesn’t it mean more money for the producers?

**Mr Clark**—Senator, the number of R-rated movies has decreased significantly over the years. In terms of public exhibition, the number of R-rated movies is quite small. In terms of videos for sale or hire, once again the numbers have declined over time. The issue of contextual justification is something that the board would need to consider in looking at any product that was presented for classification, but the guidelines are, in fact, silent on the word ‘pornography’. The guidelines are silent on that, so therefore within the restricted categories X or R is what we are applying. In the guidelines we are not discussing pornography as a definition.

**Senator HARRADINE**—Why not?

**Mr Clark**—Because it is not within the guidelines.

**Senator HARRADINE**—Why isn’t it?

**Mr Clark**—That decision in relation to the development of the guidelines is a matter for ministers to consider in developing and reviewing guidelines.

**Senator HARRADINE**—Can’t you accept that it is ludicrous to have the two films with the same content, the same intent and the same theme but one is in the X classification and one is in the R classification simply because one is taken by one camera and the other is taken by another?

**Mr Clark**—I can accept your point that it is very difficult to split the difference between them but that is the guidelines and that is the way they operate and the way the board is obliged to apply them.

**Senator HARRADINE**—I looked in vain to see whether that was considered in these proposals, and it is not. It might perhaps be taken on board to think about that. Finally, I go to the question of the review board on the question of your review. Shouldn’t the public hear about it? You have advertised the review and you have had the paper out since—I can’t remember—the middle of last year, was it?

**Mr Clark**—It was 24 August last year.

**Senator HARRADINE**—What about public hearings? Why don't you have some public hearings? The ABA does. Why doesn't the OFLC have public hearings?

**Mr Clark**—Senator, we are following a procedure that was adopted by the Attorney-General and by ministers in relation to the conduct of classification reviews. So that process was predetermined and we are following that process. It had not been planned as part of the review in this instance. The call for public hearings was an issue that was raised by a couple of organisations, virtually at the end of the public submission phase. We will take that on board but I think that, given the progress of the review so far and the likely impact of that in terms of cost to the budget of the office, it is not something that we were envisaging would be a part of this review. Certainly, we do not want to extend it unreasonably into the future.

**Senator HARRADINE**—Going back to the violent computer games and so on, how much do you pay the Durkin group for its consultation paper?

**Mr Clark**—That is now some three years ago. I would have to do some research to establish what the cost of that document was. I can certainly take that on notice and get back to you.

**Senator HARRADINE**—Did any of these proposals emerge from the paper that resulted from the Durkin inquiry?

**Mr Clark**—None of the proposals came about as a consequence of that paper. The only really new proposal is the discussion around the R rating for computer games, but it did not come from that paper; it came as a result of other submissions to the office. We may be considering some further research after Dr Brand has reported on the submissions. But at this stage we are not making any decisions about further research.

**Senator HARRADINE**—What is the status of Dr Brand's report? Will we get a copy?

**Mr Clark**—It is going through censorship ministers in March, and we expect them to make decisions about future directions with that document.

**Senator HARRADINE**—Can't the members of parliament on this committee get a copy of Dr Brand's report?

**Mr Clark**—As it is a document that is prepared for ministers as part of the national cooperative scheme, it must go to them and a decision will be made there as to how the document is utilised into the future.

**Senator HARRADINE**—Wouldn't it be better if all this was transparent and we did not have to argue all the time about the matter?

**Mr Clark**—Certainly I am very much in favour of a great deal of transparency. We shall present your concerns to ministers at that time and see what decision is made.

**Senator HARRADINE**—On the question of *Intimacy*, there is a restricted area of standing when it comes to an appeal against the board's decision. In other words, a member of the public cannot appeal your decision; only the producer of the film or somebody with standing like that—or, indeed, the Attorney-General or a minister—can do that. What can the ordinary public who are concerned about this matter do?

**Mr Clark**—I suppose that under the current legislation the ordinary member of the public can make representations to their Attorney-General in the states and territories in relation to the matter. There are amendments to the legislation which change the status of the standing a person must have to appeal. Once again, it has to be somebody with a demonstrated interest in

the particular product that is the subject of an application. Then it is up to the review board to make a decision about that standing.

**Senator Ellison**—I can help Senator Harradine in relation to the policy of the coalition government. It was stated during the campaign last year:

The Coalition will continue to review the operation of the Office of Film and Literature Classification to ensure it operates effectively.

The Coalition will continue our program of ongoing review of classification schemes including film, video, computer games, digital video discs, and publications, to ensure that our classification system appropriately reflects community attitudes.

That was in the coalition government's platform, so certainly it was an election commitment to keep a review of this ongoing. That is a mechanism for there to be some input, as you suggest. Senator Harradine has a longstanding interest in this area and that may well be a process which you could employ.

**CHAIR**—As there are no further questions for the Office of Film and Literature Classification, Mr Clark, Mr Hunt and Mr Tenison, thank you very much for your assistance.

[3.45 p.m.]

#### **Royal Commission into the Building and Construction Industry**

#### **Royal Commission into the Failure of the HIH Insurance Group**

**CHAIR**—I invite both officers to come to the table at this stage. I understand from senators that there are questions which pertain to both royal commissions, and there are questions to be addressed to each individual commission. So we will begin the proceedings and see how we go. I welcome Mr St John, secretary of the Royal Commission into the Failure of HIH Insurance Group, and Mr Thatcher, secretary of the Royal Commission into the Building and Construction Industry. I invite Senator McKiernan to begin with questions, and I understand that colleagues have further questions after that.

**Senator McKIERNAN**—I have a couple of common questions to both tribunals which I might start with and, in turn, you can respond before we get in and examine appropriations for the individual commissions. The sum of \$10.869 million has been appropriated in the year 2001-02 for financial assistance to witnesses who are appearing before the two commissions. No amount has been appropriated for the out years—namely, 2002-03. I take it from that that there will be no witnesses before either commission after July of this year.

**Mr Hine**—No decision has been taken on the level of funding in next year's budget. Those funds have been provided purely for this financial year, and those funds have been appropriated to the Attorney-General's Department, not to the two royal commissions.

**Senator McKIERNAN**—So if the commission is going to continue taking evidence and providing funding for witnesses, this matter will be addressed in the May budget, will it?

**Mr Hine**—Yes.

**Senator McKIERNAN**—That puts a different light on my questions to the two commissions appearing jointly.

**CHAIR**—Are there any questions from senators which need to be addressed to both commissions?

**Senator CARR**—I was just wondering if the officers could help me with a little problem I have. I read through the tables here on page 28 of the PBS, and I noticed that the royal

commission into the building industry has been allocated \$28 million this year, and the royal commission into HIH has been allocated \$21 million. In the out years, \$25 million has been allocated to the royal commission into the building industry and just under \$1 million has been allocated to the HIH royal commission. Could someone please explain to me how it is that you have reached those costs and the comparisons that one might draw as to the relative appropriations that have been made to each of the commissions?

**Mr Hine**—Sorry, Senator, we cannot assist with that. The transfer of the administration of the royal commissions occurred as the result of the administrative arrangements order on 26 November. As you will see from the notes on that page, \$28.068 million will be appropriated to this department, with \$6.9 million for the building and construction industry royal commission being appropriated to the Department of Finance and Administration. I am sorry, Senator, we would have to take that on notice and take the matter up with our colleagues at the Department of Finance and Administration in respect of assumptions they may have used in deriving the level of funding that has been provided.

**Senator CARR**—If I look at the notes on page 27 of the PBS, I see that the total funding is \$60 million for the building royal commission, but \$30 million for HIH, and you have no explanation for the discrepancy in the allocations.

**Mr Govey**—Senator, I might be able to help you with some points there. The first comment to make is that, obviously, a costing was made—primarily by the Department of Finance and Administration—about the needs of each royal commission. While the secretaries might be able to elaborate on this, effectively, a process of looking at the budget that they might need was gone through. But the other factor that is, of course, very important in terms of the allocation for next financial year is the expected conclusion of the royal commissions. In the case of the HIH royal commission, they are due to report at the end of this current financial year; whereas, in the case of the building and construction royal commission, the date for the conclusion of the report is December.

**Senator COONEY**—I get from what you are saying there that if either royal commission feels that they need to investigate further the likelihood is that there will be funds available for that.

**Mr Govey**—I think that would be a matter for discussion between the commissions, the commissioner and the government.

**Senator COONEY**—What you are saying is that, even though the commissions might want more money, the question is left open as to whether or not the government would give either or both commissions more money.

**Mr Govey**—That is right. My understanding of the figures here is that they are prepared on the basis of a conclusion on the due dates.

**Senator COONEY**—To make this clear, the proposition is that we have two royal commissions going and their future is a matter for government. That is the logical thing, by the way. But that is the position, and it is because of that that you cannot talk about what finances will be available for next year.

**Mr Govey**—Beyond the due dates.

**Senator COONEY**—That is indicative, of course, of the function of a royal commission, which is to help the executive go about its business. If the executive thinks that either of those royal commissions has gone about the government's business to the extent that the

government finds satisfactory, the government can then just terminate them. That is right, isn't it?

**Mr Govey**—I think that is right.

**Senator CARR**—So is it fair to conclude that if you are allocating \$60 million for one and \$30 million for the other that, in the opinion of the government, one is twice as important as the other?

**Senator Ellison**—I do not think that is a matter that Mr Govey can answer; that is a matter for the government.

**Senator CARR**—Perhaps you could indicate to me.

**Senator Ellison**—They are both very important matters. Obviously, when you say there is a discrepancy I do not agree with you in relation to that, Senator Carr, because they are two different royal commissions with two different requirements. You cannot just say that all royal commissions will require the same resources or the same funds. One can be quite narrow in its reference and one much broader. I think that to say that money signifies an importance that is attached to these matters is wrong.

**Senator CARR**—Yes. It is just that one is a royal commission into the country's biggest ever corporate collapse. One would have thought there would be some importance attached to that.

**Senator Ellison**—There is.

**Senator CARR**—Another is into the building industry. Sixty million dollars is allocated to the building industry but only \$30 million is allocated to the royal commission into the largest corporate collapse in this country's history. Would it not be fair to suggest that there is a view about priorities there being expressed by government?

**Senator Ellison**—They are two entirely different matters. The collapse of HIH was extremely important; it affected the lives of a lot of Australians. But as to the reason for it and the surrounding circumstances—they could well be much narrower than looking into the whole of an industry which is across the country and involves everything from small contractors to large companies and trade unions in all the different states and nationally. That is a very different scenario to looking at the collapse of HIH in relation to the landscape that is involved. They are both very, very important.

**Senator CARR**—Going back to the comments of Mr Hine, were you suggesting that there has been an appropriation transferred from DOFA?

**Mr Hine**—Yes. It was originally intended that these royal commissions would be administered by the Department of Finance and Administration. As a result of administrative arrangements orders on 26 November, the administration of those royal commissions was transferred to the Attorney-General's portfolio.

**Senator CARR**—Is it your understanding that all functions, all expenditures, have been transferred from DOFA to this department?

**Mr Hine**—No. The expenditure that the royal commissions incurred from their establishment until 26 November will be shown in the Department of Finance and Administration's financial statements and the balance will be shown in our financial statements. But this is the additional estimates process, and therefore the whole \$60 million has been appropriated for the first time now through the bills.

**Senator CARR**—So are you saying that the total cost for the building industry royal commission is \$60 million?

**Mr Hine**—Correct.

**Senator CARR**—And the total cost—across both departments—for the HIH royal commission is \$30 million. Have I understood that correctly?

**Mr Hine**—That is correct.

**Senator CARR**—Do those figures of \$60 million and \$30 million include all cost to government or are there other costs once you start examining within that?

**Mr Hine**—There are other costs. The figure that was mentioned earlier—the \$10.6 million figure—has been appropriated to the Attorney-General's Department to assist persons appearing before both royal commissions.

**Senator CARR**—Are there any other costs to government?

**Mr Hine**—In terms of direct costs, no, not that I am aware of.

**Senator COONEY**—With great respect, that is just how you should describe it, because there is some suggestion—I do not know whether this is correct and you would not know either—that there are investigations going on into this industry by other agencies, which would be a cost, but since it is suggested that these are carried out in secret you would not know about it. Would that be a fair comment for me to make?

**Mr Cornall**—They would not be a part of the royal commission hearings.

**Senator COONEY**—That is right, but it is a cost, isn't it?

**Mr Cornall**—It is not a cost to the royal commission.

**Senator COONEY**—Not to the royal commission, that is right. But what is being asked is in relation to the cost to government, not to the royal commission. What Senator Carr is doing is examining what cost there is to the public purse. I do not think that we can legitimately say, 'We are only going to look at the cost to the royal commission.' If there were investigations going on about which you do not know and I do not know, but which may well be going on if you look at what has happened in the past, they would be costs about which we would not know. I gather Mr Thatcher would know. So we are in a position where we are unable to say with any certainty what the impost is on the public purse.

**Senator CARR**—For instance, is the Federal Police expenditure included in that \$60 million?

**Mr Hine**—I am not sure. I will defer to Mr Thatcher on that question.

**Mr Thatcher**—In respect of the Australian Federal Police, there is an MOU between the royal commission and the AFP. For example, it might be in respect of the secondment of staff to the royal commission to work full time on royal commission business, subject to royal commission directions. In that case, we are reimbursing for those staff. We will reimburse the AFP on a full cost recovery basis.

**Senator CARR**—In the case that you have mentioned, how many Federal Police personnel have been seconded to the royal commission?

**Mr Thatcher**—We have a total of 16 investigators, of which I think about seven are from the Australian Federal Police.

**Senator CARR**—So seven have gone to the building industry royal commission?

**Mr Thatcher**—I will just confirm that figure. I should say that we have eight persons seconded from the AFP as either investigators or analysts.

**Senator CARR**—What is the cost of those?

**Mr Thatcher**—I can get the figure for you of the full cost recovery basis, but it is basically the rates which are paid under the AFP certified agreement, and those conditions are extended.

**Senator CARR**—Have Federal Police personnel been seconded to the HIH royal commission?

**Mr St John**—No, we have not made an arrangement of that kind with the AFP.

**Senator CARR**—So do we have a difference in the investigating methods here?

**Mr St John**—I can only speak for our royal commission. We have engaged a number of lawyers, a legal team, and forensic accountants. The thrust of our work is in those areas of commercial transactions and corporate activity.

**Senator CARR**—Is one because you are looking at criminal actions and the other because you are looking at civil actions? Is that the distinction here?

**Mr St John**—I am not sure of the distinction, but our range of activity is, as I say, across corporate activity. It could involve potentially criminal conduct, but it is basically corporate financial activity.

**Senator McKIERNAN**—Doesn't corporate fraud come into that? Have there not been public accusations of some corporate fraud in the HIH collapse?

**Mr St John**—There have been a lot of questions raised at this stage.

**Senator McKIERNAN**—Accusations, I put to you.

**Mr St John**—In terms of the possible range, it could include—

**Senator McKIERNAN**—No. I know what it could include and I know what it could not include. I am putting to you that as a matter of fact there have been allegations of corporate fraud leading to the collapse of HIH.

**Mr St John**—I do not think before the commission there have been allegations quite in those terms. There have been serious questions raised about conduct. But the hearings are ongoing, and—

**Senator McKIERNAN**—I do not think it is the role of a committee such as this to second-guess what is happening within the commission, but I am asking you about public accusations of corporate fraud then leading to the question of why the commission has not engaged investigators from the AFP and other bodies, like the royal commission into the building industry has done. Why has that not happened? Is the commission not about getting the truth?

**Mr St John**—The commissioner is very closely involved in the investigation.

**Senator McKIERNAN**—How?

**Mr St John**—We have quite a strong team that is accessing, analysing—

**Senator McKIERNAN**—How?

**Mr St John**—and investigating the information we gather under the powers of the commission. We have powers to by summons obtain information—we obtained an immense amount of documentation—and powers to summons people to give evidence. It is also a fact

on the record that other agencies—in particular, the Australian Securities and Investments Commission—have been carrying out investigations in the general area into some aspects. So they are working in the field too. There is a degree of communication and cooperation with ASIC under a protocol that we published some time back.

**Senator CARR**—The point I was trying to get to was that there was an assumption built into the cost that Federal Police would be required for the building industry royal commission but not for the HIH royal commission. Is that the assumption made?

**Senator McKIERNAN**—Have you made that decision?

**Mr St John**—Again, I cannot speak for the other royal commission—

**Senator McKIERNAN**—I know you cannot. Has your commission made that decision? It is a straight question.

**Mr St John**—Yes, in that we have not seen the need at this point to engage police investigators. If we saw a need to engage other kinds of investigators, we would take that action. But at the moment we are progressing according to our plan.

**Senator McKIERNAN**—Would the commission have the power to bring down a negative finding against the security body—I think it is the ASIC—that you are using as an investigative tool, which probably was blindfolded in the lead-in to the collapse of HIH.

**Mr St John**—I did not make myself clear. We are not using the other body as an investigative tool; they have their own role and responsibilities and we have our own role and responsibilities. There is certainly some potential overlap and likely overlap. That was recognised in our terms of reference, which required our commissioner to take all practical steps to avoid unnecessary duplication and to avoid adverse impact on any proceedings the other body had under way. That has led us to work out a memorandum of understanding, or a protocol, to bring about proper communication, having regard to our separate but sometimes overlapping roles and also to the fact that we are both using public resources in an area where there is some overlap.

**Senator McKIERNAN**—Who is beholden to whom in this?

**Mr St John**—I am not sure I have understood the question, but I do not see that—

**Senator McKIERNAN**—The question is a quite simple one, as most of my questions have been—and I cannot say the same thing about your answers. It seems to me that we have a royal commission of inquiry into the largest financial collapse this country has ever seen. There are a number of government organisations that should have been watching all of this. It would seem to me that one of the functions of the royal commission is to get to the bottom not only of what happened but also of why it was allowed to happen. You would also need some investigating body in order to do that. You have chosen not to use professional investigators, but you are cooperating with the ASIC. You have a memorandum of understanding going with them. How then could the commission have a negative finding against the ASIC if, indeed, you are working hand in glove with them and you could be subservient to them?

**Mr St John**—We have necessarily first to find what happened with the company; to look into the conduct of the company that led to the collapse. We also, as you have pointed out, have to look at the conduct of the regulators and others who may have had responsibilities with regard to the system under which the company was working—there is no question about that. At this stage I was talking about the investigation and the finding of facts about the collapse of the company. We are also, of course, addressing and obtaining information about the role of the regulators. I have not suggested—or have not meant to suggest—that we do not

have investigators. We have our team of forensic financial analysts and our team of lawyers who have been chosen not only for their commercial but also for their forensic skills, and they are working on a fully committed basis on investigation and analysis. That is what they are doing, and some of them are also presenting evidence in the hearings.

**Senator McKIERNAN**—Are lawyers necessarily investigators? Would you not be better following a lead like that of the other royal commission, of having professional investigators brought in, particularly where allegations and assertions of fraud have occurred?

**Mr St John**—There are no closed minds on this. As I say, we are progressing in a way that we see as effective. If at any point we see a need for different skills, we do not hesitate to find them. We have done that already in terms of bringing new people into the team. Our aim and purpose is to effectively find out, address the serious questions that have been raised, throw light on them and provide explanations as well as point to any further follow-up action that the commission believes should be taken.

**Senator McKIERNAN**—Without second-guessing the commission then, you have already started to investigate the role of the regulators leading into the collapse of the company, have you?

**Mr St John**—It is part of our general inquiry at this stage, but the focus in the initial stages—as was apparent in the hearings—is in the conduct of the corporate group itself. That then will lead, as one works through that, into questions about where regulators and others stood in relation to the corporate events that unfolded. It will be something of a sequence, I suppose.

**Senator McKIERNAN**—Who, then, is investigating the role of the regulators?

**Mr St John**—At this stage, it is the team I outlined. It is the team we have engaged which is primarily built around legal and forensic financial people.

**Senator McKIERNAN**—Are they working with ASIC in that investigation?

**Mr St John**—At some level, in a formal and controlled way, there are communications on some matters on which we regard it as appropriate and proper, having regard to our terms of reference, to communicate with a body which, at the same time as us, is pursuing inquiries in the same area. Those communications go through particular people who meet as required.

**Senator McKIERNAN**—Could you not save the commission some money by having ASIC investigate its own role?

**Mr St John**—We will investigate those matters, including the role of gatekeepers and so on, as we have been asked to.

**Senator McKIERNAN**—What is the end objective of the royal commission?

**Mr St John**—The product of a royal commission is a report. The commissioner is asked to inquire and report, with recommendations, to the Governor-General. In the case of our commission, given the context, I would see it as, firstly, calling for a report on what caused the collapse of the corporate group; secondly, an explanation as to how it happened and who was accountable; thirdly, looking at, as you have mentioned, the role of regulators or others who might have been seen as having some responsibilities in the general area; and, fourthly, offering recommendations for the future as to what steps, whether regulatory or otherwise in better governance, should be taken.

**Senator Ellison**—Madam Chair, I have a copy of the terms of reference for the royal commission. It might be of assistance to the committee if I hand it up. It does cover those points of criminal liability which Senator McKiernan touched on, the question of regulators and the role of ASIC, which is mentioned there, and the letters patent—

**CHAIR**—I will ask the secretariat to distribute that to members.

**Senator Ellison**—There was a change on 6 February to clarify two points, but I think we can take care of that as well.

**Senator COONEY**—Mr Thatcher, you told us that there are eight members of the Federal Police who are assisting the commission. Are you in a position to tell me whether the investigations they carry out include telephone tapping? If you are in that position, are you willing to tell me whether telephone tapping is going on?

**Mr Thatcher**—There is no authority for the royal commission to engage in telephone interceptions.

**Senator COONEY**—I will ask that question again: do you know whether telephone tapping is going on? What you have said is that there is no authority for that, but do you know whether there is telephone tapping? I will tell you the context in which I am asking. I was talking yesterday to the vice-president of the construction division of the CFMEU, Mr David Noonan, and he felt obliged to come over to my house rather than talk by telephone. To be fair, he said that he had no evidence of telephone tapping but he had the apprehension that there was. There would be a couple of problems if there were telephone tapping of communications between a constituent and his member of parliament. But what concerns me, from the point of view of the civic life we lead, is that law abiding people should be apprehensive that they cannot use the phone, which is a normal community facility. It is in that context that I ask you whether any telephone tapping, legally or otherwise, is going on that you know about.

**Mr Thatcher**—I feel very confident to say that there would be no illegality being undertaken by our investigators. Our investigators—and it is a limited number, as I have indicated; 16 in all—operate under counsel assisting. In each case we have four teams led by senior counsel. There are processes in place so that investigators do not just go off working for themselves; everything is within the team.

**Senator COONEY**—I think there has been some damage—or could be—to public confidence, with the asylum seekers. Can you understand that there is a climate abroad that says, ‘How can we check on government activity?’ I wonder how we can. It sounds like a lot of people—

**Mr Thatcher**—Sixteen in total.

**Senator COONEY**—Sixteen, but eight Australian Federal Police. You would have thought they would be tempted to use telephone tapping. The government comes to us all the time saying, ‘Please extend the telephone tapping legislation.’ Can you understand that there is a climate which would point to the fact that this commission has taken actions, by way of listening devices, against members of the union?

**Mr Thatcher**—I certainly understand your point that the public must have confidence in a royal commission. The statements of the commissioner—and he has made them on a couple of occasions now—have emphasised the independence and high standard in which this royal commission will be undertaken.

**Senator COONEY**—He is engaged in a political function, isn’t he?

**Mr Thatcher**—Quite the contrary. The commissioner has made statements on a couple of occasions—the last being 10 December—emphasising the fact that he is totally independent of politics.

**Senator COONEY**—You say that he is totally independent and it is not a political exercise. You would know the Irvine letter, wouldn't you? Do you know about the Irvine letter of 1923? Mr Cornall would.

**Mr Thatcher**—Sorry, it is before my time.

**Senator COONEY**—This is your first job as a secretary with a royal commission, is it?

**Mr Thatcher**—There have not been that many royal commissions at the federal level, but this is my first.

**Senator COONEY**—You do not know of the—it is very much a Victorian thing—judges down there not taking on royal commissions, or taking them on very reluctantly because of the political element in them? I do not think that has been much denied over the years. Do you know about that?

**Mr Thatcher**—I have no knowledge.

**Senator COONEY**—As a matter of fact, I have an interesting little book here—and your secretary would know about this. It is *Sir Charles Lowe: a biographical memoir* by Newman Rosenthal. Chapter 4 sums up this issue very well. I would be willing to give it to you and Mr Cornall to look through if you would be willing to accept it.

**Mr Thatcher**—I am aware of a number of books in recent times which refer to the functions of royal commissions.

**Senator COONEY**—Justice Lowe did conduct some royal commissions, including an interesting one into the Communist Party in Victoria. Were you around in the late 1940s?

**Mr Thatcher**—I was very young.

**Senator COONEY**—Well, he conducted that and he was seen as being very fair, so much so that Mr Ted Hill—a very eminent lawyer; Mr Cornall would know about him—who appeared for the Communist Party in that, later complimented Justice Lowe for the way he conducted it. But there is no doubt—and this is the point that I want to make, Mr Thatcher—that a political element goes through all these commissions. I would have thought that that was well known. But you have not heard of that proposition being put?

**Mr Thatcher**—It is certainly not my view.

**Senator COONEY**—If it that is your view, it is a view that differs from that of a lot of eminent judges in the past. In any event, can you see that it is very important that the commission be seen as a commission of integrity? Would you agree that that is what ought to happen?

**Mr Thatcher**—Senator, can I just assist by—

**Senator COONEY**—Mr Thatcher, are you going to answer the question? If you do not want to, do not bother, but I would like you to answer if you could.

**Mr Thatcher**—I think that I said it was an opinion which I do not share. I was referring to the commissioner's statements as recently as 6 February, when he said:

I made clear that the Commission is entirely independent. I stated—  
on 10 October—

that “this Commission will, at all times, maintain its independence from the Government of the day, from those who are authorised to appear before it, and from parties with whom it will consult.”

2. I consider it appropriate that I restate and reinforce the independence of the Commission today. The Commission will consider submissions placed before it. The Commission will not be influenced by the statements or writings of political parties or politicians of any persuasion, by employers or employer organizations, by unions or union officials or by the media.

3. The Commission will investigate such matters which fall within its terms of reference in a completely independent manner. Any perception that the Commission will be influenced in the performance of its work is entirely without foundation.

**Senator COONEY**—Mr Thatcher, have you heard the statement, ‘That is what he would say’? What do you expect? Do you think I would ever say that I was not absolutely fair? Do you think you would ever say about yourself that you were not going to be absolutely fair?

**Senator Ellison**—That is an unfair question to ask Mr Thatcher about the royal commission. He said that that is the statement made. As to the question, ‘Well, he would say that, wouldn’t he?’, which Christine Keeler said of Mandy Rice-Davies, that is something you cannot ask an official. The question was asked and Mr Thatcher has given his answer. As for the reasons why the commissioner said that, that is a question best put to the commissioner.

**Senator COONEY**—That is not quite how it was put, Minister, as you know. I simply asked a question, which Mr Thatcher sought to answer by reading out a statement by somebody who is not here. What do you want me to do—just accept that statement without challenging it in any way? If that is your position, I can understand it, but I do not think it is a fair position.

**Senator Ellison**—The statement can be challenged but not by having the official draw an inference from or pass comment on the statement made.

**Senator COONEY**—That is fair enough. That is reasonable. Mr Thatcher, do you know that there are allegations or complaints coming from the union and from the union’s legal advisers that they are not allowed to cross-examine as they ought be allowed? I am not asking you to agree one way or the other; I am asking you whether you are aware of those allegations being made.

**Mr Thatcher**—I am aware of an action which was taken in the Federal Court to challenge some of the terms of practice note of the royal commissioner, but I am also aware that the Federal Court has given a decision in that respect, upholding that practice note.

**Senator COONEY**—I take it from that that you are not aware then that there are allegations about cross-examinations. Is that what you are telling us—that you are not aware of such allegations—because you chose not to answer my question?

**Mr Thatcher**—I thought that was what you were referring to.

**Senator COONEY**—No, I am asking you whether you are aware of allegations by counsel for the union and by the union that they are not allowed to cross-examine in the way that they would. Are you aware of those allegations?

**Mr Thatcher**—I am not aware of the—

**Senator COONEY**—So you are not aware of them?

**Mr Thatcher**—allegations to which you are referring, no.

**Senator COONEY**—Are you aware of allegations from the union that the commissioner is not giving them as fair a hearing as he might? You are not aware of those allegations either?

**Mr Thatcher**—I am only aware of what has been said in the hearing room as contained in the transcript of proceedings.

**Senator COONEY**—Just let me get this clear: you are telling me that you are not aware that there have been allegations by the unions and by their counsel that this commissioner is not giving them as fair a go as they feel they deserve; you do not know that there are such allegations abroad?

**Mr Thatcher**—I have referred to the concern which I understood certain persons expressed in respect of one of the practice notes, but I have also responded from what I understand is the decision on that matter.

**Senator COONEY**—So the only allegation that you know about is in reference to the practice notes and not outside that.

**Mr Thatcher**—It is that practice note which refers to the cross-examination to which I think you are referring, but I do not know what you are in fact specifically referring to.

**Senator COONEY**—But that is your position, or what?

**Senator McKIERNAN**—Following up on an element of Senator Cooney's question before—it is only one question, Kim—what were the circumstances that led the commissioner to make the statement asserting his independence?

**Mr Thatcher**—I am not aware of particular circumstances.

**Senator McKIERNAN**—So he just did it out of the blue?

**Mr Thatcher**—You would have to ask the commissioner about that.

**Senator McKIERNAN**—Regrettably, we cannot do that, but you are here responding to questions on appropriations, the expenditure of taxpayers' money: some \$60 million to a commission which is going to impart justice. In the impartation of that justice, the commissioner had to make a statement asserting the commissioner's independence and you, the secretary of the commission, do not know the circumstances behind that? I did not come down in the last shower. With all due respect, I think you, as the secretary of the commission, must have some understanding of what led the commissioner of a royal commission to make a public statement—quite a lengthy public statement—asserting that commissioner's independence from political and other influence.

**Mr Thatcher**—I do not speak for the commissioner, but he made that statement on 10 December, which was the start of his opening statement and he then reiterated it in February when he came back to Victoria. He made the statement initially in Victoria and this was the commencement of the proceedings again.

**Senator McKIERNAN**—The statement you read to this committee a short while ago—

**Mr Thatcher**—That was 6 February.

**Senator McKIERNAN**—That was the 6 February statement.

**Mr Thatcher**—He reiterated what he had said on 10 December. The statement referred back to that earlier statement.

**Senator McKIERNAN**—Can you provide the committee with copies of both statements?

**Mr Thatcher**—Certainly.

**Senator CARR**—Mr Thatcher, you referred to four teams each led by a senior counsel—four teams of investigators; a total of 16 personnel. Have I understood you correctly?

**Mr Thatcher**—Of the investigators? That is correct.

**Senator CARR**—What work do they actually do? What is the nature of their investigations?

**Mr Thatcher**—Referring back to the terms of reference, you can see that they relate to an inquiry which refers to inappropriate and unlawful practices or conduct in relation to workplace relations, industrial relations and so forth. The terms of reference defined law, including the law of the Commonwealth or a state or territory. Of course, you would be aware that the industrial relations system in Australia is a federal one, and therefore we are looking at a federal industrial relations system and five state systems to investigate.

**Senator CARR**—I understand the point you are making. You are saying that the investigations go to the issues mentioned in the terms of reference. That is the thrust of what you have put to me. What I am concerned about is the accountability of these investigators. If people are concerned about the accountability—that is, they believe, for instance, that investigators are making inquiries which are not consistent with the terms of reference—what redress do citizens have?

**Mr Thatcher**—I guess a citizen can always lodge a complaint with the commission, but I am not aware of any complaint that has ever been lodged. The investigators, as I have indicated, are very experienced investigators coming from a wide variety of areas. They operate within a team which is oversighted by a Queen's Counsel. There are also a number of solicitors, so you find a situation where a complaint could be made or lodged, the investigator would go out and interview the person, possibly take a statement and then that would be reported back to the solicitor who would see whether or not it was a matter which would be referred on to the commissioner.

**Senator CARR**—You say these investigators are drawn from a broad range of areas. Can you indicate to us the nature of the areas they are drawn from? You are saying there are eight federal policemen there. What are the other categories of persons that are called upon to make these teams?

**Mr Thatcher**—We have advertised in the press and we drew upon responses to that. We have eight from the Australian Federal Police, several from state police—

**Senator CARR**—How many from state police?

**Mr Thatcher**—I can tell you: one from the Western Australian police, one from the Victorian police, a couple of people from the National Crime Authority, and other people with a variety of investigator backgrounds, such as from the Australian Taxation Office.

**Senator COONEY**—Did you say there were some people from the National Crime Authority?

**Mr Thatcher**—We have had people from the National Crime Authority who have been seconded.

**Senator COONEY**—I asked that very question of the National Crime Authority this morning and they said no. Can you just check that. Subject to correction, that is a direct contradiction by you of the National Crime Authority.

**Mr Thatcher**—I might clarify that. I was talking about where these people have come from. Those two persons have been employed within the royal commission.

**Senator COONEY**—But you said they came from the National Crime Authority.

**Senator CARR**—Didn't you say seconded?

**Mr Thatcher**—I apologise. I withdraw that remark.

**Senator COONEY**—What is the position? Can you get that clarified for me?

**Mr Thatcher**—Sure.

**Senator CARR**—Are you able to clarify whether or not the personnel that you referred to as being seconded from the National Crime Authority are former employees of the National Crime Authority or current employees of the National Crime Authority?

**Mr Thatcher**—If I can have a moment, I will just take some advice. I am sorry for the confusion. The two people who have come from the National Crime Authority are seconded from the National Crime Authority to the royal commission. As I said earlier, they are working under the direction of the royal commission.

**Senator CARR**—I appreciate that. I heard Senator Cooney ask a question before of the National Crime Authority and he was advised that there were no personnel seconded and you are saying that there are two. Therefore I will have to ask you a few more questions. What was the date of their secondment?

**Mr Thatcher**—I will have to take that on notice.

**Senator CARR**—What is the period of their secondment? Can you indicate to us the period of their secondment?

**Mr Thatcher**—I will take that on notice too.

**Senator CARR**—Thank you. Are you able to indicate their level of seniority?

**Mr Thatcher**—I do not have the details of the two. I have the names of the people but I do not have their positions in front of me. I am sorry, I will have to take that on notice as well.

**Senator CARR**—I have some further questions about other agencies that have seconded personnel. Can you indicate to us whether there are any other Commonwealth agencies that have personnel seconded to the royal commission?

**Mr Thatcher**—That is correct; there are no others, as investigators.

**Senator CARR**—I will just go through that. We have a Victorian policeman, a Western Australian policeman, two NCA, and eight AFP. Is that right?

**Mr Thatcher**—That is correct.

**Senator CARR**—No-one from New South Wales? No New South Wales policemen?

**Mr Thatcher**—That is correct.

**Senator CARR**—None at all?

**Mr Thatcher**—That is correct.

**Senator CARR**—Are there any other agencies that have seconded personnel to the royal commission?

**Mr Thatcher**—Not that I can think of.

**Senator CARR**—So there are no other Commonwealth agencies there. If I can just get that straight—

**Mr Hine**—Excuse me. I would like to correct that from a technical point of view. There are officers who were originally officers of the Department of Finance and Administration

who are working on both royal commissions. Those officers are now officers of the department but their costs are being fully met by the royal commission. So they were part of the teams that established them. They are administrative staff.

**Senator CARR**—What are the details of the officers that you say are DOFA secondees?

**Mr Hine**—As part of the administrative order arrangement changes they were transferred.

**Senator CARR**—So they are now A-G's personnel.

**Mr Hine**—That is correct, Senator.

**Senator CARR**—Could I get a breakdown of all Commonwealth officers being seconded to the royal commission, their level of seniority and their home department or home agency? Is it possible to provide that?

**Mr Hine**—I will defer to Mr Thatcher and Mr St. John, but I think so, Senator.

**Mr St John**—In the case of the HIH royal commission, Senator, two members of the secretariat, administrative staff, were seconded from Finance initially and are now, I believe, on Attorney-General's books. Other staff, I believe, have all been engaged direct. A number of the administrative staff have been put on non-ongoing Public Service Act contracts; others are contractors.

**Senator CARR**—Are there any NCA staff seconded to your royal commission, Mr St John?

**Mr St John**—No.

**Senator CARR**—There are no other Commonwealth agencies with staff seconded to your royal commission?

**Mr St John**—No, I do not believe there are. I am sorry, Mr Miller reminds me that our legal team—our solicitors team—is a joint team constituted of officers from the Australian Government Solicitor and an Adelaide law firm, Fisher Jeffries. It is a composite team that we have engaged.

**Senator CARR**—I understand, Mr Thatcher, you have taken on notice that previous question I asked about Commonwealth officers.

**Mr Thatcher**—Yes, Senator.

**Senator CARR**—We therefore have 12 personnel of the 16 identified. We have one Western Australian and one Victorian police, two NCA and eight AFP. Where do the rest come from?

**Mr Thatcher**—A variety of backgrounds. They could be the Australian Stock Exchange, the Australian Taxation Office, BHP, Australia Post and so forth.

**Senator CARR**—Sorry, BHP, Australia Post—

**Mr Thatcher**—I did not bring their CVs with me. We are talking about the investigators.

**Senator CARR**—Could I please have a list of the backgrounds of each of the personnel of the 16 you have named and if they are on secondment from another agency or company—

**Mr Thatcher**—No, sorry; these other people that we were talking about are people who have applied for positions and been appointed.

**Senator CARR**—So they are currently employed by the commission and they are former employees of these other organisations. Is that what you are saying?

**Mr Thatcher**—Just a technical point: they are employed within the commission but they are technically employees of the Attorney-General's Department.

**Senator CARR**—Of the Commonwealth?

**Mr Thatcher**—Yes.

**Senator CARR**—So they are currently Commonwealth employees. They are not on secondment from another organisation, on loan or any other legal description. Is that the case?

**Mr Thatcher**—That is correct.

**Senator CARR**—If it is possible to get a background on the additional investigators that you have referred to, I would appreciate that very much.

**Senator COONEY**—Mr Thatcher, when you say those four come from the Commonwealth, do you mean from the Attorney-General's Department or do you mean from the Australian Government Solicitor?

**Mr Thatcher**—I think the four that I was referring to a moment ago were from the Attorney-General's Department.

**Senator COONEY**—What part of it; do you know?

**Mr Thatcher**—Which four?

**Senator COONEY**—I will just go through with you what you are saying. You are saying that there are 16 people; this is what Senator Carr has got from you. You have one Victorian policeman, one Western Australian policeman, two NCA officers and eight AFP officers. That is 12. You said there were 16. If you take 12 from 16 you get four. When you were asked about it you said that those four were employees of the Attorney-General's Department, as I understand it. Do you know from what section of the Attorney-General's Department they come? Do they come from the civil division or from the criminal division? What do they do?

**Mr Thatcher**—I am sorry, Senator; I am not following. There is nobody from the Attorney-General's Department.

**Senator COONEY**—Don't worry about it. If you can't follow it, just don't worry about it.

**Senator CARR**—I will turn to some of the other comparisons on the question of costs. Are you able to advise me, on both royal commissions, what the commissioners are being paid?

**Mr St John**—My understanding, from the HIH royal commission, is that the Commonwealth made an arrangement to reimburse, in effect, the Western Australian government for the services of Justice Owen while he is carrying out the commission.

**Senator CARR**—I am sorry, I am not familiar with the wages judges are paid. What is it? Can you tell me the figure?

**Mr St John**—I do not have the figure precisely in mind.

**Senator CARR**—Perhaps you could give a bit of a punt at it now and take it on notice so that I can get it accurately.

**Senator Ellison**—We will take it on notice. It would be the salary applicable to a Supreme Court judge in Western Australia.

**Senator CARR**—Mr Thatcher, can you indicate to me what the salary is for the royal commissioner—is it Mr Cole?

**Mr Thatcher**—The remuneration to Justice Cole was negotiated by the Department of Finance and Administration, and I do not feel that I could produce that figure at the moment. I would like to take that on notice.

**Senator CARR**—It is Mr Justice Cole. My apologies: I called him Mr Cole.

**Senator COONEY**—It is not Mr Justice Cole, as I understand it. He is not a serving judge—I hope—is he?

**Mr Cornall**—No, he is a retired judge.

**Senator CARR**—What is his title?

**Mr Cornall**—He is Commissioner Cole.

**Senator COONEY**—Mr Thatcher, did you think that you were going to be asked questions about the cost of this commission when you came here today?

**Mr Thatcher**—Yes, I did.

**Senator COONEY**—Did you think it might be useful to have on board what the commissioner was actually being paid? You do not know, do you? You have got to go away and find that out.

**Mr Thatcher**—I have certain information which is bulk type information rather than payments to individuals.

**Senator CARR**—Thank you. You have very extensive briefing materials there. All the Commonwealth officers that I have ever seen before estimates go to considerable lengths to prepare for a Senate estimates committee. I would be very surprised if that practice has changed. When you say you have ‘a considerable bulk’, does that mean that you have a figure there, or do you just want to extract it from other figures?

**Mr Thatcher**—No. I am saying that, as I understand it, for example, the rates that are paid to barristers are not generally discussed in committees of this nature because of the public interest. Therefore I have been looking at, say, the rates paid and the total cost of all the barristers.

**Senator COONEY**—Hold on. I will just stop you there. Are you saying, Mr Thatcher, that you came along presuming that we would not ask questions about the amount of public funds being devoted to barristers and to commissioners, and other things in this commission? Did you come along with that belief?

**Mr Thatcher**—I am sorry. I was trying to say something to the contrary. I thought that I would be asked, but I thought the questions would be more of a global nature rather than about individual persons.

**Senator CARR**—You have taken on notice that you will be able to provide us with the salary for the royal commissioner. I would appreciate that. I take it that that is the case. Are the other Commonwealth officers here able to advise me on the figure?

**Mr Cornall**—I am sorry, Senator. I do not have that information.

**Senator CARR**—You do not have it? Thank you.

**CHAIR**—It has been taken on notice, Senator Carr, I believe.

**Senator COONEY**—This commission has got a political overtone to it, like most commissions have. Didn't you think you would be asked questions like the questions you are being asked now? Didn't you realise that this was going to be a commission with a heavy

political overlay and that it would evoke from this sort of committee the sorts of questions we are asking—and you do not bother bringing the figures along? I just wonder about all this You come along, right; you know it is a very controversial commission, particularly the building one. When we try to get some reasonable information, you say, ‘We don’t know,’ ‘We will take it on notice’ or ‘We will check on this.’ What sort of effect does that have on a committee trying to pursue a line of questioning? The effect it has is to stop all that, so we are frustrated by a group of Commonwealth officers.

**Senator CARR**—Mr Thatcher, is it possible—

**Senator Ellison**—Madam Chair, can I just say that I will take on notice the matters that Senator Cooney and Senator Carr raised. I do not think Mr Thatcher has been a previous attendee—if I can put it that way—at Senate estimates.

**Senator CARR**—Is this your first appearance?

**Senator Ellison**—Others of us have. But I can remember vividly sitting over there and questioning the former government in relation to barristers’ fees and being told that was commercial-in-confidence.

**Senator CARR**—That is true—

**Senator COONEY**—That is fair enough.

**Senator CARR**—but you will have a higher standard, won’t you?

**Senator Ellison**—I think it was Mr Skehill when he was secretary; I remember that very clearly. Senator Vanstone and I were on that one. But certainly we have got another couple of days here and we will see what we can get for Senator Carr and Senator Cooney.

**Senator CARR**—Can you get it by Friday?

**CHAIR**—Thank you for reminding us, Minister.

**Senator McKIERNAN**—I wonder if we cannot put that statement to good use. It seems to me that it is somewhat unfair for the secretaries of the two commissions to come here first off and not be in possession of quite a deal of information. I wonder if it would not be fairer all round for us to end proceedings here and invite the gentlemen to reappear on Friday

**Senator Ellison**—You could give us some questions on notice so that we can prepare the information.

**Senator CARR**—No, no—

**CHAIR**—I ask the committee to come to order. We do not necessarily need to have public negotiations between members of the opposition about how they would like the representatives of the royal commissions to appear. Senator McKiernan was putting forward a proposition, Senator Carr. I understand that you disagree with that.

**Senator CARR**—This is news to me. I have a series of questions which I would like to pursue today. There may well be matters that the officers wish to take on notice, and I would like the opportunity to take a look at those answers on notice and then come back and talk to the officers about those answers. There is a series of matters that I would like answers to today if it is possible. I trust that that is not too inconvenient for the officers.

**CHAIR**—It is not a question of inconvenience at all. The officers are here to assist the estimates committee in our deliberations—

**Senator CARR**—I appreciate that, and that is what I am looking for.

**CHAIR**—and I am trying to ensure that we use the time available to the committee as effectively as possible in every instance. It has been suggested by Senator McKiernan that perhaps we should conclude this area now and have the officers return. You have indicated that you wish to ask specific questions on the public record now. I understand that to be the case and I am sure that Senator Cooney may be similarly engaged, so, with the concurrence of the committee, we will continue at this point. Officers have already taken questions on notice. They have undertaken to provide responses on those questions and we will go from there.

**Senator Ellison**—Can I clarify that we will continue now, as was planned on the agenda. If there are questions which need to be taken on notice, they will be taken on notice, and we will endeavour to get those answers back to the committee before the committee concludes this set of estimates this week. Are we happy with that?

**Senator CARR**—That is much appreciated, Minister. Can I ask if it is possible for you to provide me with advice, Mr Thatcher, as to the amounts paid to the counsel assisting. What is the salary for the counsel assisting the commission?

**Mr Thatcher**—I am advised that it is not the practice to refer to the rates paid to individual barristers, because that would affect their value in the marketplace.

**Senator CARR**—I see. Who advised you of that?

**Mr Thatcher**—I understood that that is the practice when I inquired of the Attorney-General's Department.

**Senator CARR**—Is that the advice you have tendered?

**Mr Govey**—Certainly I can confirm that what has happened with the counsel for both royal commissions is that they have been engaged in accordance with the usual policies of the Commonwealth in relation to the engagement of counsel. That involves amounts being approved either by the department or the Attorney-General and, as was referred to earlier, it has been the longstanding practice of the Commonwealth not to reveal those amounts because they are regarded as commercial-in-confidence. I understand the basis of the policy to be that the Commonwealth financial position could be prejudiced if particular rates for particular counsel were disclosed.

**Senator COONEY**—So you are saying, Mr Govey, that when we ask a question about a royal commission which has a political overtone—I am not saying it is all with a political overtone—where people's and unions reputations are at stake and where we are trying to find out about that sort of thing, you think it is proper and right to rely on the old, hackneyed phrase 'commercial-in-confidence'. In other words, you are saying that it is more important to protect the financial status and the financial earnings of barristers than it is for us, as a committee, to protect the good name of people who are in unions and the good name of the unions themselves. That is the result of what you are putting, isn't it?

**Mr Govey**—Obviously I would not agree with that characterisation.

**Senator COONEY**—How else can you put it? Tell me how else you would put it.

**Senator Ellison**—The rate of pay for barristers per hour is something quite different from the points that Senator Cooney raises. It is a valid point that you do have people who could have adverse inferences drawn against them, but I fail to see how the rate of pay for a barrister impacts on that. Perhaps Senator Cooney can assist us further.

**Senator COONEY**—I will tell you how it impacts. I might be wrong about this, but I take it that the barristers are being paid on a daily rate, and the longer this commission goes the

more money they make and, depending upon the rate at which they are paid, they might want to go off to other work or they might want to stop with this. We really need to know what the financial benefits are to people who are pursuing a union and members of a union in the way that this royal commission is. But Mr Govey says that right and honour are not to be given a great deal of weight in this contest between commercial-in-confidence and the reputation of people.

**CHAIR**—To be fair, I am not sure that is what Mr Govey said.

**Senator Ellison**—No.

**Senator COONEY**—That is the consequence of what he is saying.

**Senator Ellison**—No, it is not. That quantum leap involves the inference that the professional counsel involved might want to unduly prolong matters for a financial benefit. If that is what is being said, then it is a serious matter because it is saying that these people could be acting unprofessionally, because it would be unprofessional to unduly prolong matters in order to earn a greater fee. Of course, this has been the subject of comment by courts and law societies. I think really that is something that Mr Govey cannot possibly comment on and certainly it was not a point he was making.

Senator Cooney is entitled to his opinion, but I must say that I do not accept that quantum leap from the non-disclosure of the rate to the fact that it could prolong the royal commission. We mentioned earlier where funds had been allocated for the royal commission and were asked in the earlier questioning whether it was going to be extended, and the answer quite clearly was that that is what has been allocated and that is what the government is budgeting for, which would suggest there is a finite aspect to the cost of these commissions.

**Senator COONEY**—If you have taken me that way, then you have misunderstood me, although not greatly. What I am saying is this: whenever we come along here and ask for these matters to be raised, the commercial-in-confidence plea, defence, excuse or whatever is used. You then ask, ‘Oh well, in any event, what relevance would that have?’ We then put forward a point that could have relevance if people took the view that these barristers may or may not be prolonging it. I do not say that they were prolonging it; I am saying that it is open for somebody to do so. What I am complaining about is that we cannot even test that.

I know the odd-barrister who is briefed by the government and they would not transgress in that way, but I am pointing out that this commercial-in-confidence plea is denying this parliamentary committee—a committee of the only body that is selected by all Australia—by using what I call fairly specious arguments. If somebody then asks you what you want to test and you suggest what you want to test, they say that you are casting aspersions on barristers. It does not matter how many aspersions are cast on the unionist or the union—that is irrelevant! They then get very pure and say, ‘Look at these aspersions cast on the counsel.’ I was not casting aspersions on the counsel, and I do not; but if we knew the fee, we would at least know better what the cost of this exercise is and where the money is going.

**Senator Ellison**—We will have a look at it and we will give what figures we can.

**Senator CARR**—Thank you very much, Minister. Obviously, the question has already been taken on notice. I am seeking the counsel assisting costs—for both the commissions if possible—the rates that are applied for QCs and barristers assisting in the commission. I will need to know the total quantum that has been allocated in those budgets for various legal advice to the commissions through the counsel assisting or other means. Is it possible for that

to be provided for both commissions? How much money have you allocated to pay the lawyers assisting these commissions?

**Senator Ellison**—I think that is something that can be done, and that will be taken on notice.

**Senator CARR**—Thank you. I ask, then, about the question of financial assistance. The PBS refers to a figure of \$10 million for financial assistance. That is a fund that, I understand, is administered by the department. How much of that \$10 million, nearly \$11 million, is being allocated to each of the commissions?

**Mr Govey**—As you have indicated, these are matters for the Attorney-General's Department. My colleague Ms Pidgeon, who heads up the division, will be coming along later.

**Senator CARR**—That is for later on, is it?

**Mr Govey**—If we could.

**Senator CARR**—I had better come back to that.

**CHAIR**—Do you want to put that on notice then?

**Senator CARR**—If I could. I would like information on the applications that have been made for financial assistance to date, the applications that have been granted financial assistance to date and the moneys allocated for each of those applicants for each of the commissions. I would like those in separate categories so I can get a comparison.

**Senator McKIERNAN**—And the numbers that were unsuccessful.

**Senator CARR**—Yes. I would like a separate table, if you would not mind, that details those that have applied but failed to have their applications granted, if it is possible to have that provided. I want to come back to something, though, Mr Thatcher, that we started on.

**Senator McKIERNAN**—Just on the same issue, how many of the unsuccessful applications, again to both commissions, were from employees or union officials and how many applications were from company representatives? Could you take that on notice. What was the average amount of each grant? That information would be appreciated as well.

**Senator CARR**—I have some other questions on this issue of the legal costs, but before I ask them I want to talk about an issue I raised before about citizens of this country who might have a complaint about the behaviour of these investigating teams. Mr Thatcher, I asked you a question about what action could be taken by persons who had complained and you said that basically their complaint goes to the commissioner. As I understand the procedures at the moment, if a citizen is unhappy about these investigations he goes to the people investigating the citizen and makes a complaint about their activities. Is that the case?

**Mr Thatcher**—I think that I said 'the commission'. I did not mean necessarily personally to the commissioner. I imagine that a person could, but I am saying that I am sure—because I have checked—that there have been no such complaints made. They could address the complaint to me and I would refer it to—

**Senator CARR**—Given the questions that Senator Cooney asked before about the perceptions of partiality by the commission and the commissioner, would it be reasonable for people to say that they would not get a fair go if they were to make complaints about the commissioner's investigators?

**Senator Ellison**—Madam Chair, that is a question which is really unfair, and Mr Thatcher really is in no position to answer that. To say what other people might think or what they might feel really is not within his knowledge. It also asks him to pass judgment indirectly on the commissioner. To say ‘in view of the perception of partiality wouldn’t it be fair to assume that people might not want to complain’ is asking him to read the minds of others, and you cannot answer that sort of question.

**Senator McKIERNAN**—You can always ask.

**Senator Ellison**—You are all experienced hands at estimates, and this is really pushing it.

**Senator CARR**—I will follow the question through, though. If there are specific concerns that people have, is it an opinion of the government that citizens should have confidence to be able to present their case?

**Senator Ellison**—That is a better question; ask me that.

**CHAIR**—I think that was directed to you, Minister.

**Senator Ellison**—Yes, I know, and I will miss seeing Senator Carr at the education estimates this year for the first time in a very long time!

**Senator CARR**—You will miss a great performance!

**Senator Ellison**—Of course the government believes that the community should have every confidence in any royal commission and that there should be confidence that they can feel free to complain if they have a grievance. If there is a complaint in relation to that—for instance, something that Senator Carr can put to this committee by way of someone feeling that they have made a complaint and it has not been addressed or that there is a systemic flaw in the complaint process—then put that. I think that should be put.

**Senator CARR**—I will; you are about to hear it. Thank you for the invitation, Minister. It has been put to me by senior officials of the CFMEU that officers of the commission have been approaching the officials’ neighbours—this is around their residences—and seeking information on their private, domestic affairs, namely the relationship between an officer of the union and their wife in one particular case. Mr Thatcher, what term of reference would such investigations fall under? What actions could an officer of the union that felt so aggrieved take to prevent that sort of behaviour continuing?

**Mr Thatcher**—I can only assist by saying that investigators of the commission act within the terms of reference of the royal commission, a copy of which has been handed up. It must relate to unlawful or otherwise inappropriate industrial workplace practice or conduct, and the document goes on to mention a few others. Therefore, I would have to hear a more specific complaint than that. I say in a general way, because I do not want to sound uncooperative or unhelpful, that as the commission goes about its business it is our normal policy not to comment publicly on operational matters. We do not deny or confirm, because obviously it would not be in the public interest if the royal commission started talking publicly about or foreshadowing the nature of its strategies, tactics or timetables. I say this by way of background. In finishing, I could not imagine how the example you have given would refer to the Letters Patent.

**Senator CARR**—That is right. It would not fit within the terms of reference in any possible description. If officers of the union feel that their personal, domestic circumstances are the subject of inquiry by this commission or by its officers, presumably you would be able to advise me that such activity would not be authorised.

**Mr Thatcher**—Speaking in the hypothetical, I have said that I could be very confident about the inspectors of the commission. I am not sure where these allegations are coming from—I do not know whether or not they are actually people connected with the commission or who these people supposedly are—but I can only repeat what I have said earlier.

**Senator CARR**—So you are not monitoring the personal movements of members of the CFMEU?

**Mr Thatcher**—You were talking about a marital situation and so forth—

**Senator CARR**—Yes, we are, and I want to know whether it is the case that this commission has members of the union under surveillance.

**Mr Thatcher**—I am not in a position to comment on operational matters, as I have indicated. All inquiries would be relating to the terms of reference of the Letters Patent.

**Senator CARR**—Can you just explain to me how it would be an operational matter to have the domestic circumstances of union officials as the subject of investigations by investigators of this royal commission.

**Senator Ellison**—Madam Chair, there are two things here. One is that you have had Senator Carr ask a hypothetical question which Mr Thatcher, as he rightly pointed out, could not really answer, because he was asked whether if something were to happen it would be outside the terms of reference. Senator Carr has put forward an assertion and Mr Thatcher has answered—as I understand it; correct me if I am wrong—that, if that has taken place, it would be hard to see how it would fit within the terms of reference. Without any further detail, I do not think Mr Thatcher can really take this matter any further. Whether or not someone is under surveillance is an operational matter, and that is quite separate and apart from the issues that Senator Carr raised. Senator Carr raised the issue of whether someone was under surveillance and whether there are investigations being made about their marital relationship. In these sorts of situations, you really do need something more specific to be put to Mr Thatcher, and then that can be investigated and followed up.

**Senator COONEY**—When you say ‘an operational matter’, who actually engages the 16 people you have told us about?

**Mr Thatcher**—The royal commission is not the employing authority. We arrange for them to be employed through the department which is responsible for our administration, which was originally DOFA and now is the Attorney-General’s Department.

**Senator COONEY**—So the Attorney-General employs those 16 people.

**Mr Thatcher**—The Attorney-General’s Department.

**Senator COONEY**—That is right. So they are not answerable to the Australian Federal Police?

**Mr Thatcher**—No. They are directly responsible within the commission to the—

**Senator COONEY**—Or the National Crime Authority, or the Victorian police or the Western Australian police. Is that right?

**Mr Thatcher**—If you are talking about the seconded people—

**Senator COONEY**—Yes.

**Mr Thatcher**—Whilst they are working for the royal commission, they are accountable to the royal commission and to nobody else.

**Senator COONEY**—So, when you are talking about operational matters, they are carrying out those operations for the royal commission. Is that right?

**Mr Thatcher**—That is correct.

**Senator COONEY**—So when we say to you, ‘Did the particular body go to investigate a unionist or a building worker about a matter,’ and you say, ‘I can’t tell you because that’s an operational matter,’ it is operational in the sense of an operation being conducted by the royal commission. Is that right?

**Mr Thatcher**—That is correct.

**Senator COONEY**—So we have a body, from what you tell me, that is going to make a report based upon evidence which this royal commission seeks and directs people to investigate. So not only do we have to rely on a decision of a person about whom there is some perception, rightly or wrongly, of some bias but we have to rely on the decision of the person who is controlling the investigation. And when we ask about those investigations, we are met with the plea that it is operational. When you say that you want something more specific than what Senator Carr is putting to you, where are we going to get that from?

**Mr Thatcher**—What you have said is not completely accurate.

**Senator COONEY**—What is inaccurate about it?

**Mr Thatcher**—The commission teams, each under the oversight of a senior counsel assisting, investigate numerous allegations or other concerns which have been made to them. Ultimately that finds its way into the hearing process and statements are made and sworn and evidence is admitted, and that is on the public record. There are due opportunities for people who might be adversely affected to be notified in advance and to make application to be represented and so forth. So there are protections along the line. Nobody is going to be suddenly just investigated with the results of that somehow finding their way into the commission’s report without going through due process.

**Senator COONEY**—So you are telling me that there are four senior barristers who are conducting these investigations?

**Mr Thatcher**—No, there are four teams that senior counsel are leading. Each of those teams is made up of barristers, solicitors, investigators—

**Senator COONEY**—There must be somebody—

**Mr Thatcher**—and it is senior counsel who ultimately admit the evidence into the hearing process.

**Senator COONEY**—But when you talk about operational matters, the operation is being conducted at the top—there has got to be somebody at the top. What you tell me is that there are these four barristers who are at the top of these investigation teams who are conducting the operations.

**Mr Thatcher**—Each team has a senior counsel leading, assisted by barristers, solicitors, investigators and analysts. What I am saying is that we are focusing on investigators who might be out at the coalface—

**Senator COONEY**—Just take it very slowly, Mr Thatcher, just concentrate. If you can’t quite understand I will try to reframe the question. What I am putting to you is that you talked about operational matters. You said to Senator Carr, ‘I can’t tell you about that because they are operational matters.’ Somebody must be in command of the operation—or perhaps

nobody is in command of the operation. Perhaps these people just go around and conduct the operations as they will, but I have grown up with the idea that if you are going to have operational matters there is going to be somebody who conducts them. Am I wrong in conceiving that there should be somebody conducting these investigations that these four teams are carrying out? Is there nobody in charge of that?

**Mr Thatcher**—I have tried to explain, Senator.

**Senator COONEY**—Who is in charge?

**Mr Thatcher**—There are four senior counsel who are each in charge of and responsible for a team consisting of barristers, solicitors, investigators and analysts. It is those senior counsel who, as counsel assisting the commission, oversee the work, the quality and the overall effectiveness of the persons within their team.

**Senator COONEY**—Do they report to the commissioner?

**Mr Thatcher**—They are counsel assisting. They have a separate role under the act.

**Senator COONEY**—Do they report to the commissioner, or what do they do? What do the four counsel do? Don't you know? If you don't know, take it on notice. When the four counsel get the information—people go out into the building sites and investigate the sort of situation, they go down the street and do it—

**Senator CARR**—Or in the private homes of citizens.

**Senator COONEY**—and they take notes. Can you follow that? They might not take notes, but they copy all this down, I presume, and they get information. They go back somewhere. Do they just keep the information to themselves or do they tell somebody about what information they have got?

**Mr Thatcher**—As I was explaining earlier, they would make that information available to solicitors within their team.

**Senator COONEY**—What do the solicitors do with that?

**Mr Thatcher**—The solicitors will discuss that with the barristers within the team and then a decision will be made on what to do with that evidence. Obviously, we, as a royal commission, are not following up every possible thing. Some things come to a dead end and so forth.

**Senator COONEY**—Does the commissioner have anything to do with this or does he just sit in his room and come out every now and then?

**Mr Thatcher**—It is the role of the senior counsel assisting to present evidence before the commissioner.

**Senator COONEY**—So when you are talking about operational proceedings that is what you are talking about—you cannot talk about the proceedings which are being conducted by the senior barristers and, ultimately, by the person assisting?

**Mr Thatcher**—Yes, that is what I was referring to.

**Senator COONEY**—What I then want to ask you is this. We have had some very eminent people in here from the Federal Police over the years who have been highly skilled and highly trained. What is the training that these barristers have in policing matters? Have they had experience in conducting operations where you go and investigate citizens? Have they had experience in taking down notes about citizens in private and in making accusations about

citizens that are accurate or otherwise? What experience have these people got in conducting such operations?

**Mr Thatcher**—I was trying to convey the information that the work of investigators is subject to the oversight of the team leader, who is a senior counsel, and so forth. If we are talking about the day-to-day oversight of inspectors, we have within our establishment a director of investigations, who is an Australian Federal Police person, Commander Donaldson. He was director of operations in New South Wales and director of operations in Victoria. He oversees what we would call 'the practical nature—

**Senator COONEY**—Is he the man who is carrying out the investigations, rather than the four barristers, or however many barristers there are, who head up these teams?

**Mr Thatcher**—The investigations are being undertaken by the teams. I am sorry; I seem to be repeating myself. That is the way it is operating.

**Senator COONEY**—Somebody has to make a decision on matters such as: is this information reliable, where does this information come from, how does this information fit into the whole scheme of things, is it likely that there might be some criminal conduct to investigate here, is this just a matter of how the union runs, is this a matter of what happens on building sites? Who makes decisions about the weight to be given to those various pieces of evidence?

**Mr Thatcher**—Ultimately, within the team it is the senior counsel assisting who is making the decision.

**Senator COONEY**—What does Mr Donaldson do?

**Mr Thatcher**—Mr Donaldson is the director of investigations. A fair amount of his time until now has been looking at the recruitment of the investigators and the analysts for the commission. He is also providing us with consultancy advice. When an investigator would have a concern about a particular issue on investigation matters, rather than the day-to-day practice of investigations, he might offer some assistance. He would be consulted possibly by the senior counsel, as the team leader, when required on a needs basis.

**Senator COONEY**—I have the impression that you have some investigators who go out to building sites—or to homes, if you accept what Senator Carr said—and they are like vacuum cleaners: they just draw everything in. Then they take their bag full of information back to Mr Donaldson, and he goes through it and works out the quality of the information and then sends it up to the barrister or the team leader. Where is it evaluated?

**Mr Thatcher**—That is incorrect. The information would go back and a report would be made. It would go to the solicitors in the first instance. If the investigator had some concern about the nature or process of the investigation or how it should be undertaken, they might seek the advice of Commander Donaldson. Essentially, the information just goes within the team and is ultimately within the oversight of the team leader.

**Senator COONEY**—You get this information and you call the person in. Do you bring them in by a subpoena? Do you give people subpoenas?

**Mr Thatcher**—That is possible. A number of subpoenas have been issued.

**Senator COONEY**—Has the commission subpoenaed anybody to this inquiry?

**Mr Thatcher**—A number of subpoenas have been issued by the commission.

**Senator COONEY**—And then you put the person in the box and say, ‘This is the information that we got from the vacuum cleaner. It has been evaluated.’ Is that how you put it? Is that what happens?

**Mr Thatcher**—I would not put it in those terms.

**Senator COONEY**—How would you put it?

**Mr Thatcher**—Usually a person would be interviewed. A decision would be made during the piece as to whether or not that information is relevant to the inquiries, and on a needs basis a witness statement would be prepared and the person would be called to give evidence in the appropriate setting.

**Senator COONEY**—Would that person be given a copy of that evidence before he gets there so that he could prepare his answers?

**Mr Thatcher**—In most cases. In some cases persons have volunteered to prepare statements assisted by their own legal representatives. There was a recent example where the person came along on the morning of the hearing, which was not very helpful. We try to get the statements onto court book a couple of days in advance so that the persons appearing before the commission can see the information in advance.

**Senator COONEY**—If you found out something about Senator Carr on these building sites—which well you might—could Senator Carr get a statement before he came to the commission, a week before or a day before? How long would it be before he would get a statement?

**Mr Thatcher**—We are a little flexible in this process, but we try to get it as early as possible, as I said, to get it onto court book, which allows the persons who are authorised to appear before the commission—

**Senator COONEY**—You would not try to entrap him? You would not call him cold and say, ‘This is what we are going to put to you.’ The commission would give him plenty of warning as to what he is going to be asked about?

**Mr Thatcher**—I can only repeat what I said.

**Senator COONEY**—I take it from what you said that he does get plenty of warning.

**Senator CARR**—Mr Thatcher, what is the budget for informants?

**Mr Thatcher**—We have spent no funds on informants at this stage.

**Senator CARR**—Do you have a budget for informants?

**Mr Thatcher**—We do not have a particular amount of money for informants, no.

**Senator CARR**—So you do not have a budget line for informants?

**Mr Thatcher**—We are managing a global budget on an ongoing basis, as our expenses come along.

**Senator CARR**—But you do not have a specific allocation to pay people to provide you with information.

**Mr Thatcher**—No.

**Senator CARR**—Would you be prepared to pay for information?

**Mr Thatcher**—The question has never been raised with me.

**Senator CARR**—I will ask the question: is the commission prepared to pay informants for information?

**Mr Thatcher**—I do not think so.

**Senator CARR**—Can you take that on notice? I think we ought to have a very specific response to that question, given your somewhat equivocal response.

**Mr Thatcher**—I did not mean to imply an equivocal response.

**Senator CARR**—You said that you did not think so.

**Mr Thatcher**—I am the secretary. I was giving an answer in my position as the secretary responsible for administrative matters.

**Senator CARR**—Can you advise me as to whether or not the commission has authorised the payments of moneys to persons providing information to the commission?

**Mr Thatcher**—I envisage that there may be a position—and I am not sure whether it has happened yet—whereby persons who are assisting the commission require some refund of out-of-pocket expenses. In that case, we would entertain that proposal.

**Senator CARR**—So out-of-pocket expenses they get payments for. What about information in itself? Would you pay people for information?

**Mr Thatcher**—I can only repeat what I said earlier: I do not think so. I am saying that as secretary, and I would like to—

**Senator CARR**—Mr Thatcher, I ask you to take this on notice: are investigators authorised to make payments to persons providing information to the commission?

**Mr Thatcher**—I can answer that equivocally: no.

**Senator CARR**—That is no authorisation at this point. Is it possible that the royal commission is able to make that authorisation?

**Mr Thatcher**—You are talking about specific payments and not about the refund of out-of-pocket expenses?

**Senator CARR**—You have already told me that you are able to refund out-of-pocket expenses. We are not talking about persons coming to you saying, ‘I’ve got an out-of-pocket expense. I am prepared to provide you with information. I want you to pay my airfares and other matters.’

**Mr Thatcher**—I can say that no officer of the commission is authorised to make such payments. You were asking some hypothetical question about whether, down the track, it would be possible. I said, ‘To the best of my knowledge, no.’ But I am speaking as secretary.

**Senator CARR**—Would you take that on notice to establish whether or not the commission has the capacity to authorise payments to informants? The second question is: what is the nature of out-of-pocket expenses? What is the definition of out-of-pocket expenses? Is it loss of salaries, for instance?

**Mr Thatcher**—It could be. It could be travelling allowance— it could be someone who has to travel from, say, a regional area or someone who has to stay overnight to be interviewed by royal commission officials.

**Senator CARR**—So it is a travel allowance?

**Mr Thatcher**—It could be a payment in response to those expenses, not an allowance. It would be a refunded payment.

**Senator CARR**—So it is on the basis of receipts, is it?

**Mr Thatcher**—I do not think we have had such a situation at this stage, but that is what I envisaged when preparing the budget.

**Senator CARR**—Let me turn to the question of moneys paid to Dunhill Madden and Butler. How much has been paid to Dunhill Madden and Butler?

**Mr Thatcher**—I am sorry, I am not aware. Could you elaborate?

**Senator CARR**—What is their function at the commission?

**Mr Thatcher**—I am not aware of Dunhill Madden and Butler at this stage.

**Senator CARR**—Are you saying they have no function?

**Mr Thatcher**—No, I said I was not aware at this stage.

**Senator CARR**—I am led to believe that they are employed by the government to assist the commission. Have I been misinformed?

**Mr Govey**—I am not aware of Dunhill's having any role in relation to the commission. The only possibility—

**Senator CARR**—Take it on notice, if you would. Has Dunhill Madden and Butler been retained by the Commonwealth in any capacity with regard to this commission? If so, what payments have been made? Obviously there are matters that we will be pursuing. I trust, Mr Thatcher, that when we come back in the next round of estimates, you will be more familiar with the sorts of issues that concern the committee. There may well be further proceedings later on this week, given that we appear to have a conflict between what you have told us and what the NCA have told us. We may need to clarify that. Mr Thatcher, are you aware of a letter dated 24 December, sent by Mr Tony Abbott, concerning Multiplex Constructions, which stated:

For the record, let me state that the royal commission is not inquiring into any particular company but into coercive and collusive conduct in the building and construction industry generally. The key focus of the royal commission is the closed shop which generally operates in the industry and rorts, rackets and rip-offs arising from breaches of freedom of association principles. It is not a fraud commission, although it is certainly interested in any culture of illegality present in the industry.

That is a letter of comfort to Multiplex, which was used in England, regarding Multiplex's concerns about the Wembley rebuilding program—a program, if I recall, that involved some \$2 billion worth of construction. Are you familiar with that letter?

**Mr Thatcher**—I am familiar with media reports.

**Senator CARR**—You are not familiar with the letter itself?

**Mr Thatcher**—I have never seen the letter, but I have seen the media reports of the letter.

**Senator CARR**—Has the commission not made it its business to secure a copy of the letter?

**Mr Thatcher**—The letter has never been raised directly with the commission.

**Senator CARR**—I see. These are letters that, as I understand it, have actually appeared on Multiplex's web site. Are you still not familiar with them?

**Mr Thatcher**—I said I am familiar with media reports of the letter, but the commissioners had no involvement in the preparation of the letter.

**Senator CARR**—Given that the media reports have been quite extensive—I refer, for instance, to the *Financial Review* of 9 February—hasn't the commission made it its business to establish whether or not these statements in these letters are true?

**Mr Thatcher**—Minister Abbott's letter has not been raised with the commission or referred to the commission by any party.

**Senator CARR**—You have 16 investigators; surely you can read the paper! Is that not something the investigators would look at? It appears to me, on the evidence given to me, that they have time to go around knocking on the doors of the neighbours of various officials of the CFMEU and asking whether or not they are having trouble with their wives, but you do not have time to read the paper.

**Mr Thatcher**—The media reports are not the subject of the proceedings before the commission.

**Senator CARR**—Given your statement about the independence of the commission, wouldn't the commission be concerned about the statements of the cabinet minister, outlining what this commission will and will not do?

**Mr Thatcher**—The commission acts independently of government and has made statements as recently as 6 February reaffirming that position.

**Senator CARR**—But clearly Mr Abbott does not appear to agree with that. He has a firm view of what the commission will and will not do.

**Mr Thatcher**—I cannot speak for the minister.

**Senator CARR**—Have any proceedings for contempt been proposed against Mr Abbot for these letters?

**Mr Thatcher**—Not that I am aware of.

**Senator CARR**—Can you take that on notice? Presumably you would have to talk to the commissioner about such a matter.

**Mr Thatcher**—I can say that the matter has never been raised or been the subject of complaint to the commission.

**Senator CARR**—Not the subject of complaint?

**Mr Thatcher**—It has not been raised in the hearing room. I follow the evidence.

**Senator CARR**—I see. What is required, then, is for someone to actually go to the commissioner and make a complaint. Is that what you are putting to this committee?

**Mr Thatcher**—I am sorry; I keep trying to get to the question. The answer I was trying to give was that the commissioners had no involvement in that letter. The commission made its two statements in a matter of a few months about its independence. The letter that you are referring to, which I am familiar with in the media, is not the subject of the commission's inquiries.

**Senator CARR**—I ask the officers of the department: what advice was tendered to Minister Abbott before this letter was dispatched?

**Mr Govey**—As far as I am aware, the Attorney-General's Department was not involved in consideration of that letter. That would have been a matter for Mr Abbott's department, if in fact advice was obtained from the Public Service.

**Senator CARR**—So you sent no advice prior to the letter being sent—

**Mr Govey**—From the Attorney-General's Department?

**Senator CARR**—Yes, from the Attorney-General's Department. Was there any other advice that you were aware of that was sent to Mr Abbott about this particular letter?

**Mr Govey**—No.

**Senator CARR**—Was any subsequent advice tendered to the department of industrial relations about the propriety or otherwise of this letter being sent?

**Mr Govey**—Not as far as I am aware—and I would have expected to have been made aware of it.

**Senator CARR**—Has the department taken any action since the publication of these letters?

**Mr Govey**—It would not be a matter for us; that would be a matter for Mr Abbott and his department.

**Senator CARR**—The question of the independence of the commission is not a matter for your department?

**Mr Govey**—I do not think that in this context it raises any matters for us.

**Senator CARR**—As far as you are concerned, there are no further issues for your officers to be concerned about?

**Mr Govey**—The conduct of the commission is a matter for the commission, obviously. It is, as Mr Thatcher has explained, independent of the executive, and we have not had any involvement in that issue.

**Senator COONEY**—It is an extension of executive power.

**Mr Govey**—Certainly, but I was referring to the legislative framework in the Royal Commissions Act, which gives it that independence.

**Senator COONEY**—The government sets them up; it is not like the courts. They are dealing with a whole range of things. A court deals with a specific instance and is independent, but you could hardly say that a royal commission is independent in the way courts are. You might have a person of independent mind on the commission, but you can hardly say that the executive can wash its hands of the body it sets up to further its own purpose. That is what this is about. And I am not saying that it is a bad purpose; it could be a good purpose. It oftentimes is a good purpose. But just to say, 'We've got a royal commission extension of the executive,' and 'Yes, but it's nothing to do with the executive,' is just not consistent with the history of royal commissions over the years.

**Mr Govey**—The key point that I was wanting to make was that, once a royal commission is set up with Letters Patent issued by the Governor-General, the way in which it conducts its operations is entirely a matter for the royal commission—that is, if you like, the purpose of setting up a royal commission so that the investigation and the report that is made is, and is seen to be, separate from the government of the day.

**Senator COONEY**—Have you read this book? I will give you this book.

**Mr Govey**—I would be very interested in seeing it.

**Senator CARR**—I need to be clear about this. The Attorney-General's Department does not see it as its role to advise on the appropriateness or otherwise of letters of comfort to a company such as Multiplex by a cabinet minister.

**Mr Govey**—All I can say in response to that is that the Attorney-General's Department, as far as I am aware, was not so involved.

**Senator Ellison**—In fairness to the officers, they were not aware of the letter.

**Senator CARR**—Are you now aware of the letter?

**Mr Govey**—Only from the media.

**Senator CARR**—You have not chosen to actually secure a copy of it from the web site?

**Mr Govey**—No, Senator.

**Senator Ellison**—The Attorney-General's advice is given when it is sought, and if there is no knowledge of something and advice is not sought, that is not a matter of blame for the Attorney-General's Department. They are just not aware of it. Madam Chair, if Senator Carr is indicating that the Attorney-General's Department was deficient in not providing this advice, I think that is a bit unfair because they were not aware of this. Can I also say that royal commissions are supposed to be independent of the government and, if the government was in any way involved in trying to influence the royal commission, the opposition would be the first to complain about that. Once set up, they have a life of their own, and that is why the old adage says that you must be very careful when you call a royal commission because you never know where they end up.

**Senator COONEY**—Can I ask a question about that, though, Minister? This is a royal commission into the building industry, and subparagraph (a)(i) of the terms of reference states:

(i) any practice or conduct relating to the *Workplace Relations Act 1996*, occupational health and safety laws, or other laws relating to workplace relations ...

I was wondering what experience this person has in the area of industrial relations. Is he a barrister who has practised in this field, or did his work as a judge take him into this field, or what?

**Senator Ellison**—Are you talking about the royal commissioner?

**Senator COONEY**—Yes, the Hon. Terence Cole.

**Senator Ellison**—I do not have his CV, but perhaps Mr Thatcher does.

**Mr Thatcher**—The CV is on our web site. He was formerly a judge of the New South Wales Supreme Court and also the Court of Appeal and so forth. He is a retired judge and has a very distinguished record.

**Senator COONEY**—Do you know whether he worked in the field of industrial relations at all? I ask that because I would have thought that somebody going into this area would need some idea of how the industrial relations system works.

**Mr Thatcher**—I cannot say specifically what his previous experience was, but I do know that in discussions with him he has a very clear understanding of the industrial relations system.

**Senator CARR**—Mr Thatcher, do you have a particular public relations budget?

**Mr Thatcher**—We have a media relations area.

**Senator CARR**—How much is that?

**Mr Thatcher**—We have estimated that during the period of the royal commission it will be in the vicinity of \$700,000, which includes media adviser, media coordinator, media relations—

**Senator CARR**—Can I have a breakdown of that \$700,000, please? I was wondering, Mr St John, whether you have a media budget.

**Mr St John**—We have a communications, or media, adviser and our budget is in the order of \$140,000.

**Senator CARR**—Mr St John's is \$140,000; Mr Thatcher's is \$700,000. Do I understand that correctly? Mr Thatcher's is obviously a very public inquiry, and Mr St John's is an extremely private one. Would that be a fair description? You get half the money that Mr Thatcher's inquiry gets. It seems to me that there is a bit of a difference in the approach that has been taken here.

**Mr St John**—I have not looked at the difference. We have engaged someone to meet our needs as we see them.

**Senator CARR**—Yes. Mr St John's employs Federal Police; Mr Thatcher's does not. There seems to me to be quite an extraordinary difference in the approach being taken by the two royal commissions. It leads me to the view that perhaps there is a political issue here that needs to be explored further. Can I just ask one final question. Mr Thatcher, what function does Mr Gillespie perform?

**Mr Thatcher**—He is an officer formerly with the Department of Employment and Workplace Relations who is currently with Attorney-General's. He was with the Department of Finance and Administration and has come over. He is assisting with the administration area. He reports directly to me. He performs a number of liaison functions within the commission.

**Senator CARR**—Who does he liaise with?

**Mr Thatcher**—For example, at the moment he has been spending a lot of time liaising with other federal agencies in respect of arranging the interstate hearings. He is involved with matters of administration.

**Senator CARR**—Does he liaise with the government?

**Mr Thatcher**—Only in respect of matters of administration, such as he would have had discussions with the Administrative Appeals Tribunal, for example, in respect of arranging hearings or the use of their facilities. So there would be both federal and state agencies in that respect.

**Senator CARR**—Does he liaise with the media officers?

**Mr Thatcher**—No, not with external media officers. He has no role in that respect.

**Senator CARR**—How long has he been with A-G's?

**Mr Hine**—He came across as part of the administrative order arrangements. At the end of the royal commission he will return to the Department of Employment and Workplace Relations, as officers who have come across from the Department of Finance and Administration will return to their department as well.

**Senator CARR**—I am sorry. Perhaps you can correct me, but I thought I asked you a question about other Commonwealth officers, and I only heard about DOFA officers.

**Mr Hine**—And then we agreed to undertake to provide a list of all officers, as part of that—

**Senator CARR**—Thank you. That has clarified that. Mr Gillespie is formerly from the workplace relations department. Was he not a member of the Workplace Reform Unit?

**Mr Hine**—I cannot comment on his—

**Senator CARR**—Is this the same Mr Gillespie who actually played an integral role in the Patrick's dispute? Is that the same Mr Gillespie? Have I got the same person who was part of that performance during Mr Reith's time?

**Mr Thatcher**—Senator, I am aware that there was an article in the *Sydney Morning Herald* of 15 October.

**Senator CARR**—I am glad to see you do read the papers.

**Mr Thatcher**—It is headed, 'Unions oppose bureaucrat's posting', which referred to Mr Gillespie. That was the subject of comment by the royal commissioner in those subsequent hearings. I can only quote from the commissioner, who said:

I have read in the *Age* newspaper this morning—it was also reported in the *Age* this morning—that now an attack is being made on the integrity and independence of the commission by reference to the appointment of Mr Derren Gillespie. It is said he is a "bureaucrat accused of pursuing an anti-union agenda during the waterfront dispute". Mr Gillespie is appointed to this commission in an administrative capacity.

He went on to say:

He will play no role in my deliberations leading to my report.

Mr Gillespie reports directly to me, is engaged on administrative matters, and is playing no role in leading to the report.

**Senator CARR**—He is just a clerk. Is that the point you are making?

**Mr Thatcher**—I am saying that he performs administrative functions. I do not think it is fair to say that people who perform administrative functions are just a clerk.

**Senator CARR**—No, no. I just wanted to know. If you are saying that he does liaison with various Commonwealth agencies—

**Mr Thatcher**—That is right—administrative work.

**Senator CARR**—What is his level, his salary range?

**Mr Thatcher**—SES level 1. He has come across at his existing remuneration level.

**Senator CARR**—So he is a very senior public servant, is he not?

**Mr Thatcher**—He is an SES level 1.

**Senator CARR**—Maybe my description of him as 'just a clerk' might be a bit unfair, if he is a very senior public servant doing a bit of liaison work with Commonwealth agencies. Equally, it may not be fair to present him as 'just doing a bit of administrative work'. Is it normal for an SES1 officer just to do a bit of administrative work?

**Mr Thatcher**—Senator, could I say that the administrative work includes matters of security. He oversees the whole area, and that includes not just physical security or security

of documents but also the whole framework of the commission relating to security, which is an extremely important function; and I think that he is doing an admirable job in that regard.

**Senator CARR**—It is just that recently there was a report in the Melbourne press concerning a person who approached Mr Martin Kingham about the internal documents from the commission and, in return for the provision of some money, a source was prepared to provide internal documents of the commission to Mr Martin Kingham. This matter went to the Victorian police, as I understand it. Now you are saying that this man is in charge of security. I am just wondering if there has been any review of his function, given that there would appear to be such a poor record of performance?

**Senator COONEY**—I wonder if Mr Thatcher agrees that there were some documents taken.

**Senator CARR**—Was it the case?

**Mr Thatcher**—No, I would not agree. I am aware of the allegation, and that has been placed in the hands of the Australian Federal Police for investigation. It is under investigation and I prefer not to comment on the allegation.

**Senator CARR**—But you cannot confirm for us that documents were in fact leaked, or that an attempt was made to leak documents?

**Mr Thatcher**—I have seen no evidence which has led me to believe that there was an attempt made to leak documents from within the commission.

**Senator COONEY**—Well, in that case, why are the Federal Police investigating it? Did you tell them that? Did you say, 'Look, this is a pointless investigation. There is no evidence of documents being leaked'? Did you tell the police that?

**Mr Thatcher**—No—

**Senator COONEY**—If you did, are they still persisting with an investigation?

**Mr Thatcher**—Senator, a serious allegation was made by a union official, the matter was referred to the Australian Federal Police and they are investigating the matter.

**Senator Ellison**—I think, Madam Chair, that is as far as we can take this. We do have the Australian Federal Police coming in and they can be asked, but no doubt they will say that it is an operational matter.

**Senator COONEY**—I understand that—

**Senator Ellison**—There was a serious allegation made and, as you know, the fact that they are investigating any allegation does not mean to say that the allegation is made out.

**Senator COONEY**—Exactly.

**Senator Ellison**—When an allegation is made like that, they investigate it.

**Senator COONEY**—But here we have the secretary of this royal commission saying, 'Look, there is no basis for this.' That is what he said. I would have thought that, given a man of his standing and position, it was a very—

**Senator Ellison**—He did not quite say that, Madam Chair. With due respect to Mr Thatcher's evidence, I understood him to mean that he was not aware of any documents or tender documents being leaked, not that this investigation was baseless. That is a judgment, and he made that.

**Senator COONEY**—I understand that, but if he is not aware then the issue becomes one of competence. The person who is supposed to be in charge of the documents, the secretary, does not even know or is not aware of documents being missing. How long has this been around for?

**Senator CARR**—Two weeks?

**Mr Thatcher**—Senator, I chose my words very carefully. I said that I had absolutely no evidence to lead me to believe that there is a leak within the commission. You were talking about leaks, and that is what I have responded to.

**Senator CARR**—How would you describe the circumstances of a person approaching Mr Kingham claiming to have private and confidential documents in return for money and being prepared to provide further documents? How would you describe that?

**CHAIR**—Senator Carr, I do not want to curtail questioning in this area, but I did note the minister's statements in relation to this being an operational investigation currently under way by the Australian Federal Police. It is, as we indicated earlier, Mr Thatcher's first appearance before the estimates committee, and I am cognisant of the need to be very careful about discussion of operational matters in public hearings.

**Senator CARR**—I obviously misframed my question. Mr Thatcher seems to be suggesting that he is responding to my misuse of the term 'leak'. I am asking him how he would describe these events.

**Senator Ellison**—That again invites comment on a pending investigation and the subject matter of it. He has gone as far as he can go. He has been quite reasonable in answering the questions and has said what his position is. I think, Madam Chair, he can really go no further than that, because there is an investigation pending. You can ask the Australian Federal Police—they are really the appropriate people to ask in this case, because they are the people seized of the investigation, not Mr Thatcher. It is not Mr Thatcher's investigation now; it is in the hands of the Australian Federal Police.

**Senator COONEY**—I just raise one issue: that we asked him questions, and I apologise if I went down the wrong path. I know this is Mr Thatcher's first time before the committee, but if we are going to have people coming along and choosing their words carefully so that they can avoid a question then that is disappointing, if I can put it that way. We would hope that witnesses before this committee would be frank in their answers and not choose words so as to get round an issue.

**Senator Ellison**—I think it was more in the interests of not prejudicing an investigation which is on foot, and that is quite a legitimate concern. That is why comments are not made in relation to pending investigations—because you not want to prejudice the integrity of that investigation.

**Senator CARR**—If it can be demonstrated that these events occurred—

**Senator Ellison**—That is a hypothetical.

**Senator CARR**—I am asking the question in relation to Mr Gillespie, the head of security, and whether that raised any questions with you, Mr Thatcher, about the capacity to have confidence in this commission if documents are not being held securely.

**Senator Ellison**—That is a hypothetical question, Madam Chair—

**Senator CARR**—It is a serious allegation before the Federal Police.

**Senator Ellison**—No, you are saying, ‘If it can be demonstrated, what would you say?’ That is hypothetical.

**Senator CARR**—I take your point, Minister, on advice from my colleagues here. Mr Thatcher, do you feel that the allegation is sufficiently serious for you or the commission to take these matters seriously?

**Senator Ellison**—Madam Chair, that is another one. The matter is now in the hands of the Australian Federal Police. Really, I do not think Mr Thatcher can comment any further. He has given you his statement as to what he thinks. I do not think he can say anything further than that. A lot of other people would have refused to answer that. I think Mr Thatcher has been very frank with this committee and very cooperative. I think that we all know that, when there is a pending investigation by the Australian Federal Police, there is no comment made on that investigation. That has been the way ever since I have been on these committees.

**CHAIR**—That is the point I made earlier, Senator Ellison.

**Senator CARR**—It is just that I understand that these documents were actually delivered to Mr Kingham’s home. Given the amount of interest that investigators are spending on offices and the union’s private residences, presumably they would have seen someone deliver these materials.

**CHAIR**—Senator Carr, the committee is, I think, endeavouring to treat what is a serious matter and the subject of an investigation by the Australian Federal Police very seriously. The minister has sought your cooperation in that regard and I would hope that you are willing to assist us.

**Senator CARR**—I will return to the question, Mr Thatcher, on the advice of the chair.

**Senator McKIERNAN**—Can I get assurance on that latter point, that the persons conducting these investigations are not those AFP officers that have been seconded to the commission?

**Mr Thatcher**—You can certainly have my assurance on that.

**Senator McKIERNAN**—I want to ask a question about the transcripts of proceedings of the commissions. What is the cost per day of the provision of the transcript?

**Mr St John**—In our case, the corrected transcript goes up on our web page every night. It is freely available to anyone who is interested and the parties get the benefit of a real-time transcript during the proceedings. The press also can see that in the hearing room and that is provided at no extra cost to the users.

**Senator McKIERNAN**—Thank you.

**CHAIR**—Mr Thatcher, do you have anything to say in relation to transcripts?

**Mr Thatcher**—I do not have the information in front of me. I have a recollection, but I am not confident of what that amount is. It is more a nominal amount and I would not want to have a guess at it at the moment.

**Senator CARR**—Why isn’t it placed on the web site like the HIH commission is?

**Senator LUDWIG**—They’ve got a budget of \$700,000.

**Mr Thatcher**—That is a matter for the commissioner to decide. The information is available to the parties who appear before the commission.

**Senator McKIERNAN**—My understanding is that it is more than a nominal amount—that it is in the region of \$100 per day. That is my information. That would not come within my terms of what a nominal amount is.

**Mr Thatcher**—I do not want to get into a discussion on what a nominal amount is, but I am not confident to be able to say what the amount is. Just at the moment I do not have it in front of me, I am sorry.

**Senator McKIERNAN**—But you prepared copious amounts of information to come to these proceedings here today to justify the expenditure of some \$60 million of taxpayers' money.

**Mr Thatcher**—I am sorry, Senator. Could I please take the question on notice?

**Senator McKIERNAN**—Okay.

**Senator CARR**—Is there an explanation for why these transcripts are not placed on the web site, as is the case with the HIH commission?

**Mr Thatcher**—I am not in a position to answer the question. It is a matter for the commissioner.

**Senator CARR**—Ask him. We request an answer.

**CHAIR**—You can take that question on notice, Mr Thatcher.

**Mr Thatcher**—I will put the question to the commissioner.

**Senator McKIERNAN**—Has the commissioner made transcripts available to anyone free of charge?

**Mr Thatcher**—I am not aware of that. I will have to take that issue on notice, I am sorry. Is this in respect of the provision of the daily transcript?

**Senator McKIERNAN**—Yes. You indicated in response to my first question about the cost of the transcripts that the parties receive a transcript. Did I hear you correctly in saying that?

**Mr Thatcher**—That is correct.

**Senator McKIERNAN**—Did you say that the parties appearing on that particular day or part of a day receive a transcript of their evidence?

**Mr Thatcher**—That is right. We have a real-time transcript in the proceedings and through the IT arrangements such that the transcript comes up before the parties as it is being spoken and it remains on our court book, which is then available to the parties.

**Senator McKIERNAN**—Who are deemed to be the parties on the day?

**Mr Thatcher**—Persons who have been authorised to appear before the commissioner.

**Senator McKIERNAN**—If witnesses are called are they deemed to be a party?

**Mr Thatcher**—If they are legally represented—if their representatives are persons who are authorised.

**Senator McKIERNAN**—Have some rules been established by the commission about the recording, delivery and transcription of evidence and its sale—for want of a better word; it is probably not the right word—that is, the cost of delivering the transcript?

**Mr Thatcher**—Certainly rules have been set out in the commissioner's practice note No. 2.

**Senator McKIERNAN**—Can you, on notice—if you are not able to respond immediately—tell us on how many occasions the Department of Employment and Workplace Relations have received copies of the transcript even when they were not in the witness box or before the commission as parties to the commission?

**Mr Thatcher**—Senator, the Commonwealth is authorised to appear before the commission and it is on our web site as one of the parties who has been authorised to appear.

**Senator McKIERNAN**—Is that one of Mr Gillespie's roles—to liaise with regard to the transcripts with government departments and government bodies?

**Mr Thatcher**—No, it is not.

**Senator McKIERNAN**—Does any other department—for example, the Department of Employment and Workplace Relations or the Attorney-General's Department, as party to the proceedings—get copies of the transcript free of charge?

**Mr Thatcher**—Not that I am aware.

**Senator McKIERNAN**—Would you take it on notice, check and come back to the committee on that?

**Mr Govey**—I might be wrong on this, but I had understood that we received a transcript for the purposes of determining requests for legal assistance.

**Mr Thatcher**—I think that is correct. Thank you.

**Senator McKIERNAN**—Thank you, Mr Govey. I appreciate that information; it helps. I expected better preparation for the appearance here this afternoon. There was \$60 million of taxpayers' money at stake. I know that the commission does not have to raise that money, but it is still very important money. Under what circumstances would the commission consider providing, or provide, a transcript free of charge to persons on request? How many requests have been made, by individuals or other parties, for copies of transcript at no cost to the parties?

**Mr Thatcher**—I am not aware—

**Senator McKIERNAN**—I am asking you to take that on notice. From your earlier responses I took it that you were not going to be able to immediately respond. I am asking those latter two questions for you to take on notice. Thank you, Mr Thatcher.

**CHAIR**—Are there any further questions in relation to the royal commissions?

**Senator COONEY**—I would like to ask Mr St John the odd question. But before I do, Senator Ludwig brought my mind to this: there seems to be a contradiction on the record between what Mr Thatcher said and what Mr Whiddett said. Certainly Mr Thatcher has done his very best here this afternoon—I would like to say that. Mr Whiddett is somebody in whose integrity I have nothing but the highest reliance. If there has been a misunderstanding there I would like Mr Whiddett to have the chance to correct that as soon as possible.

**Senator Ellison**—A member of staff from my office is looking into this and I hope to have some answer to you this evening.

**CHAIR**—Thank you, Minister. That would be very helpful to the committee.

**Senator COONEY**—Just put it on record here. I am absolutely certain that it is just a matter of talking past one another and that there is nothing more than that in it but it might be appropriate to have it on the record.

**CHAIR**—In fact, Mr Thatcher is seeking clarification from the National Crime Authority, not from the royal commission.

**Senator COONEY**—Well, perhaps they both should correct it. I wonder if that could be reconciled.

**CHAIR**—Well, Mr Thatcher is not privy to the transcript, Senator Cooney.

**Senator COONEY**—All right. All I want is for nobody to be left on the record as having put a position that is not correct. I want that position to be corrected as soon as possible. If people do not want to correct it, that is a matter for them.

**CHAIR**—I am sure there will be no concern about capacity to correct the record. We have a difference between the National Crime Authority's evidence this morning and that provided this afternoon and, as the minister has already indicated, we will seek clarification on those points.

**Senator COONEY**—Mr St John, where do you intend to take your inquiry? Would you go to the United States? I think HIH was there. Is that an area where you would go? Would you go wherever else HIH dealt? I have the impression that you were taken to task about not having the Federal Police onto this. I can understand why you might not but I am just trying to gather what are the sorts of inquiries you would make. HIH went in for professional indemnity; it went in for all sorts of indemnities and all sorts of insurance, as far as I can see—and it went outside Australia. That would seem to be a mighty task to investigate. I just do not have any idea of how you would go about it. I have to make the obvious comment that that will fall flat, but you are not going to have Arthur Anderson investigating for you or something like that, are you? Who will you have?

**Mr St John**—I would not be too sure. The thrust of the terms of reference are to inquire into the reasons for, and the circumstances surrounding, the collapse of the HIH group. That group, based in Australia, had operations, as you have indicated, in the United States, Europe and Asia. The inquiry at this stage is broad but with a view to being targeted where it matters. In terms of one soon, it is a realisation of the need to focus on matters that are material to the collapse, and so we are proceeding broadly. We are inquiring into matters across the group, including outside Australia. But, as we go on, issues get refined in terms of their materiality. In the end there is this particular issue or matter in the scheme of things, and that is a judgment—and, ultimately, that is a judgment for the commissioner. But the inquiry team is seeking to focus all the time on the issues that matter and it is trying to resist the temptation to pursue the others.

**Senator COONEY**—I presume that you would have to have actuaries on board. Do you have actuaries on board?

**Mr St John**—We have engaged actuarial assistance; we have had advice.

**Senator COONEY**—Who have you engaged on the Corporations Law? Who is doing that for you?

**Mr St John**—Included in the legal team, we have some very experienced commercial lawyers, insolvency lawyers, among others, as well as our forensic accountants. I have talked about our team. I have described it as a legal team, but it is really the inquiry team. We believe we have assembled an able team, but we keep that under review. From time to time as we have gone on, we have engaged additional expertise. When you open up and start an inquiry, you have an idea of where it is going. As you go along, you get a much clearer idea.

**Senator COONEY**—I am just trying to get a purchase on how you are going about it. You would be looking at the minutes of the board, I suppose, and the investment portfolios and things like that, or what?

**Mr St John**—First, I imagine we have a subpoena power, a summons power, to require the production of information. But, in the case of HIH, there were already in the field provisional liquidators who had taken control of the documents of the company, and there are also regulators—I mentioned ASIC before, and APRA—who were exercising powers, as is on the record. So there was information, documentation, that will already be collected by others, to which we in turn could get access. But the commission has been pursuing directly any gaps where it sees them. That information assembly is really the first thrust, and then increasingly there is the identification of people who may be able to assist and having discussions with them, with a view to getting assistance or, in the end, requiring them to appear, where that is felt necessary.

**Senator COONEY**—Is there any evaluation of the weight to be given to particular investigations? Were there nonexecutive directors and so forth? If so, will you interview them, or will you just look at the executive side of things? Do you have a plan? Is there a plan that I could look at and say, ‘Yes, look, they are going to look at the board, they are going to look at the CEO, they are going to look at the senior officers,’ and ‘This is what they did in America and these are the investments they made here, and this was obviously a very negligent investment,’ or ‘There was more in this than negligence.’ I just do not get a picture. Will you have a meeting every now and then and say, ‘Look, we ought to give priority to this line of investigations’?

**Mr St John**—Yes. On the last point, we do that on a continuing basis, in terms of the inquiry team and under the strategic direction of the commissioner, in terms of the plan of approach. That plan is reassessed and refined as we go on. We have already indicated—and to some extent it will appear on our webpage—the order of witnesses, at least in broad chunks. The commission began by taking evidence from at least two other parties who had already, at the beginning or before the commission, come in and had a look at the circumstances of HIH. One of those had been an inspector appointed by APRA and another was a firm of accountants who had been engaged in the last month. So we started off with getting, and putting on the record, the perspective of people who had come in with access to information. The commission has now moved the inquiry into some issues relating to reinsurance contracts that were seen to be significant. The commission has indicated that it will move from there to hear from executives, people in the management of the company; it will then move on to directors and auditors, and then to regulators. So that is the broad order. But, in the particular, that is reviewed on a continuing basis.

**Senator COONEY**—For example, did HIH hold reinsurance policies, did it reinsure itself, or was it a bit of both?

**Mr St John**—It reinsured with external parties. It also to some extent reinsured the risk of others.

**Senator COONEY**—I find it very difficult to get a perception of just what exercise you are going through. Clearly there is a loss—we all know that—quite a catastrophic loss. But I do not quite gather whether you are investigating why the loss occurred, or whether you are looking more at how this company was administered or what policy it pursued or what.

**Mr St John**—The first thing is: how did the collapse happen, the reasons for it and the accountabilities or responsibilities of who was involved. Then the terms of reference call for

an indication of whether there should be any further actions taken, and then any recommendations, any learnings, any lessons for the future. But perhaps I could mention again that on the webpage there is some material that may be of assistance to members of the committee. There is a series of background papers to try to assist people coming to grips with a fairly complex state of affairs.

**Senator COONEY**—This goes into *Hansard* and supposedly we are doing this on behalf of the people of Australia. I do not think we, as a responsible committee, can say, ‘Go and look at the webpage of the inquiry.’ I think we need to have a bit more on the record.

**Mr St John**—I understand that but say that, among that, we try to telegraph the direction of the subject matter of the hearings, to put on notice people who are following it more closely.

**Senator COONEY**—Say we come back in May. I would keep going now, but my fellow senators want to go and have a meal; they are looking angry at me.

**CHAIR**—No. Our priority, Senator, is the effective implementation of the estimates process.

**Senator COONEY**—So you would not mind if I went on for another hour?

**CHAIR**—I would, because my priority is the effective implementation of the estimates process.

**Senator COONEY**—All right.

**CHAIR**—You are not sure how to take that, are you, Senator Cooney?

**Senator COONEY**—I always take it as coming kindly from you.

**CHAIR**—Indeed, and you should.

**Senator COONEY**—You just get the feeling with the inquiry that it is going to look as well as it can at what went on, but you do not get the feeling that there is a segmentation of inquiries—say as to who wrote the policies, who was in charge of that and whether they were responsible; and whether the actuarial work that was done was responsible in the sense of working out what the risk was and what a fair premium was. You just get the feeling that there was a helter-skelter pell-mell to ensure whatever they wanted to ensure irrespective of whether that was a responsible approach?

Do you know how often the board met and whether they knew what was going on or whether they ought to have known what was going on, and whether your prudential regulator really cared about it? That is another matter that arises here; you just get the feeling that the prudential regulator was more interested in smaller organisations than this. I do not have a concept of whether you have a strategy for tackling all these issues or whether people just turn up to work in the morning and say, ‘Look, this is another thing we have found when we were looking at this HIH collapse and we will spend the next hour responsibly doing this.’ Is there a plan or a strategy to look at all this?

**Mr St John**—Senator, we do in fact have a plan, a strategy, and we are working to that. I believe the results will become clear as the inquiry proceeds. It is not happening in just any old way; the inquiry is being pursued in a very considered way, which we hope and believe will be very effective.

**Senator COONEY**—Could we get your strategic plan or is that ‘commercial-in-confidence’ or ‘operational matters’ or something like that? If you do not want to give it to us, that is all right. We are used to not being given things.

**Mr St John**—We really regard the plan and its detail as internal but, as I say, in terms of the order in which the issues will roll out publicly—

**Senator COONEY**—You do not want to give me the strategic plan; now you have to work out why you do not want to give it to me. Senator Ellison will give you an excuse. What are you going to call it this time—‘commercial-in-confidence’ or ‘operational proceedings’? What excuse will you give this one?

**Senator Ellison**—I think, Senator Cooney, that it does go to the operation of the royal commission. I think the very word ‘strategic’ signals the futility of the request, because it is something which is no doubt of direct relevance to how the matters will be investigated, and you do not want to prejudice those investigations.

**Senator COONEY**—I can follow that, but you should remember—although you might not remember when you were on this side of the table—

**Senator Ellison**—I do!

**Senator COONEY**—You have been a minister for so long now—

**Senator Ellison**—I have been working hard not to go back there.

**Senator COONEY**—Mind you, I reckon that, of those who have gone from here to where you are, you are amongst those who have been the most understanding of committees like this. But can you see the problem, Mr St John? We are supposed to look at how all this is being handled, and there seems to be a lack of strategy. There is not a lack of strategy, because you have told me and I accept what you say. But you then say, ‘We can’t really tell you the strategy because, if we told you the strategy, the strategy wouldn’t work.’

**Mr St John**—The inquiry is being conducted in a very open way. One of the objectives is to be as transparent as possible and in doing that the information that is being made public is being shared with parties and with the public. The order of events—the order in which we will be dealing with people, which in good part indicates the order in which issues will be addressed—I think shows the direction in which the commission is going. How effective that will be will turn out but, in the meantime, we would be very happy if any members of the committee could take the opportunity to attend the hearing and get some sense of not just the way in which a hearing is conducted but of the kind of information that is open, and we are, I believe, indicating the direction in which we are going.

**Senator COONEY**—The big thing is to get it on the record. We will come back in May and have a talk about it then.

**Mr St John**—Yes. Thank you, Senator.

**Senator McKIERNAN**—In regard to what Mr St John said about the commission and the webpage, there is no link from the Attorney-General’s Department and I thought that there would be, but I can understand that because they change. The administrative decisions are to be made in November and possibly that will be corrected. Would it be possible, because of the fact that you put the evidence earlier, to give the link orally to the committee and, if the building industry royal commission has got a webpage as well, could you give that address too? Do you have it? Are you able to do it now?

**CHAIR**—Do either of the secretaries have the URLs?

**Mr St John**—Yes. It is [www.hihroyalcom.gov.au](http://www.hihroyalcom.gov.au).

**CHAIR**—Mr Thatcher, do you have the URL?

**Mr Thatcher**—Yes. It is [www.royalcombc.gov.au](http://www.royalcombc.gov.au).

**CHAIR**—Thank you, Mr St John and Mr Fletcher, for assisting the committee over that extended period in relation to those issues. The committee had considered beginning with the Human Rights and Equal Opportunity Commission before the dinner break but, now that it is close to 20 past six we will adjourn the committee for dinner and reconvene at 7.20 p.m.

**Proceedings suspended from 6.17 p.m. to 7.24 p.m.**

### **Human Rights and Equal Opportunity Commission**

**CHAIR**—We will reconvene the consideration of additional estimates if everybody is ready to begin. As I indicated before the dinner break, we will move to the Human Rights and Equal Opportunity Commission. I welcome the Human Rights Commissioner, Dr Sev Ozdowski, and the officers. Thank you very much for attending this evening.

**Senator Ellison**—Mr Whiddett has been on a plane flying, I think, to Sydney and we have left a message for him to contact my office. We will obtain from him clarification in relation to his evidence and relay it to the committee. I just let you know that we are pursuing that, but the reason we could not get it earlier was that he was on a plane.

**CHAIR**—I understand completely, Minister. Thank you for the clarification.

**Mr Cornall**—There is one more matter, Madam Chair, that we could clarify from the questions just before the dinner break.

**CHAIR**—Yes, Mr Cornall. Mr Govey.

**Mr Govey**—We were asked about whether or not the Commonwealth or the royal commission had used Dunhill Madden Butler in relation to the building construction royal commission.

**CHAIR**—Yes.

**Mr Govey**—Obviously I cannot speak for the royal commission but we had inquiries made of the Department of Employment and Workplace Relations. They have advised that Dunhill have not been used in relation to any matter to do with the commission.

**CHAIR**—Thank you very much, Mr Govey.

**Senator McKIERNAN**—Dr Ozdowski, I want to start with some questions from the annual report, a very comprehensive document as usual. I note on tables 2 and 3 a number of complaints—written, telephonic and so on—that go on to tables 5, 6 and so forth. I wonder if the commission has ever constructed a pie chart and broken it down in the areas where complaints come in, and then done a pie chart on the areas of activity to which the commission devoted its resources.

**Dr Ozdowski**—Could I ask Ms Clifford to respond to that question. She is in charge of that.

**Ms Clifford**—Senator, we have not done anything like that in the past but certainly we would see a rise in complaints depending on various activities that the commissioners are undertaking in terms of some of the broader policy work. For example, when the former Sex Discrimination Commissioner, Susan Halliday, did her inquiry into pregnancy discrimination,

quite often there would be a flow of calls and complaints following some sort of public exposure by the commissioner on that topic. That is anecdotal; we have not charted it in any formal way.

**Senator McKIERNAN**—I wonder if it would be worthwhile doing in the future. I know you are able to do pie charts, because there are some here in the body of the report. I have a series of questions later on the inquiry into detention centres and children in detention centres. I noted that of the telephone inquiries received by issue there was a total of 9,580, yet only 32 related to detention centres. One goes on then to written inquiries received by issue. Detention centres rated three out of 751. It is not exactly a case of the squeaky wheel getting the oil; it seems to me the oil is going to not quite so squeaky a wheel. Would that be a fair comment?

**Ms Clifford**—Senator, in terms of the telephone inquiries, in some ways a reflection of the way matters might come in is that we receive quite a number of complaints, not necessarily through telephone inquiries but complaints that come to us via facsimile, which is the standard mode for detainees to contact the commission. They do that more regularly than using the telephone inquiry service.

**Senator McKIERNAN**—Where do you delineate them in the report?

**Ms Clifford**—Under the human rights complaints you would find—

**Senator McKIERNAN**—Can you point me to that table?

**Ms Clifford**—Table 10 is complaints received under the Human Rights and Equal Opportunity Commission Act. That is on page 67 of the annual report.

**Senator McKIERNAN**—That is where I am looking now. There were 214 complaints received.

**Ms Clifford**—There were 214 complaints received under the Human Rights and Equal Opportunity Commission Act. They will not all be related to matters of detention. If you go a little further along to tables 31 and 32, particularly table 32, you will find 'Acts and practices of the Commonwealth'. Almost all of those matters will relate to matters of detention centres.

**Dr Ozdowski**—Also could I refer you to table 33. Under 'Immigration' you will have a total of 61 complaints, which constitutes 34 per cent of complaints received under the Human Rights and Equal Opportunity Commission Act.

**Senator McKIERNAN**—With due respect, that is on immigration generally and not necessarily on detention only. I make the point that on detention, as I perceive things, there is a major inquiry going on into detention centres.

**Dr Ozdowski**—Yes.

**Senator McKIERNAN**—It would not appear from the statistics contained in last year's report that the issue of detention centres was the focus of the majority, or even near majority, of complaints that were received by the commission. Yet a considerable amount of the commission's resources, in the human rights section of it, is going to be devoted to this particular issue. Obviously, if that is the case and my submission is correct, other areas that have been complained about, where large numbers of complaints have been received, are not going to receive the same degree of attention.

**Dr Ozdowski**—Senator, perhaps I can explain. During the year, before I called for the inquiry, I visited most of the detention centres. The last two centres I visited early in the year. Going through the centres, I was interviewing a whole range of people. I formed an opinion that the issue of children is the one which requires further inquiry. There were a number of

reasons why I decided so. First was the number of complaints I was receiving about schooling, the health of children and medical attention available for them. The second reason was that children usually do not lodge complaints; they do not write. Looking at the Convention on the Rights of the Child, it is very specific when one looks at the International Covenant on Civil and Political Rights. There are some articles which do apply to detention, and inquiry was made by the previous commissioner, focusing on that particular instrument. When I looked at the children, I formed a judgment that it is an area which requires a more systematic examination.

**Senator McKIERNAN**—The inquiry did not come about because of—

**Dr Ozdowski**—Not because of the complaints but because of my visit to detention centres.

**Senator McKIERNAN**—Thank you. I will return to the inquiry at a later time. It might be useful for you to consider constructing pie charts of the nature I described in my first questions. It is something the commission can take on board.

**Ms Clifford**—We can certainly have a look at that, Senator.

**Senator McKIERNAN**—You will see to it, even though I may not be here to question you on it. I want to go to some of the determinations of the commission detailed in the report. On page 84 there is Mingli Wanjurri, Ben Taylor, Robert Bropho, Edna Bropho and Clarrie Isaacs v Southern Cross Broadcasting Ltd and Howard Sattler. The result of that inquiry was—and I do not want to go into the detail of it—that Commissioner Innes declared that the respondents should pay each of the complainants \$10,000 for the injury done to them. I must say I only read part of it, but the commissioner found that the actions offended the Nyungah people, their religion and culture. Yet the award was only to certain individuals. Why was that so? Why wasn't it made to the people if it offended the people?

**Ms Clifford**—Senator, if someone makes a complaint under the act, they need to be an aggrieved person. That person then is the one who seeks any remedy in relation to the alleged discrimination. That decision of Commissioner Innes is part of our old public hearing regimes as well. This was prior to the Human Rights Legislation Amendment Bill in April 2000, so this is our old hearing function, but certainly, as with the court, the aggrieved person or the person who brings the complaint will be the one who will be remedied.

**Senator McKIERNAN**—Even though the findings are against the Nyungah nation or the Nyungah people? The finding was not against the individuals who made the complaint. The report I have states:

Commissioner Innes found that the discussion degenerated into a denigration of the Nyungah people, their religion and culture.

**Ms Roberts**—Senator, the complaint was not a representative complaint though. Commissioner Innes may have made that finding, but in fact there were specific complainants who brought the complaint, and under the powers of the legislation only they could be the subject of awards.

**Senator McKIERNAN**—I will not develop it any further. Have the moneys been paid?

**Ms Roberts**—I am not aware of that, Senator.

**Senator McKIERNAN**—You did not have follow-up powers?

**Ms Roberts**—No, and that is not just specific to this case. We were often unaware as to whether determinations were actually complied with or not.

**Senator McKIERNAN**—The same question relates to HRC report 12. It is delineated on page 89 and 90, where the president recommended at No. 4 that the sum of \$20,000 and the sum of \$15,000 be paid by way of compensation and damages to each of the individuals that took the action. Were those moneys ever paid?

**Dr Ozdowski**—My understanding is that the department of immigration did not accept the findings and no money was paid.

**Senator McKIERNAN**—That was my understanding as well, and I think the motivation for putting a mark against this question was the issue of why the commission has not put a line on this report to give the full information if the individual department has not accepted those findings. It would help the uninformed reader who is examining reports such as this if complete information was provided. Why was that not done?

**Dr Ozdowski**—I think that is a good suggestion, and we will do it in the future.

**Senator McKIERNAN**—The second good suggestion of the night for your report. Thank you. I will leave a mark before I leave, Madam Chair. In HSC report 13 the president recommended that the complainants be released from detention pending deportation. The note on the bottom of this states: 'On 15 June 2001 the MOU was signed with Vietnam.' It does not say it was the individual's release in accordance with the recommendation of the president. Again, is this an instance where the department did not accept the recommendation?

**Ms Roberts**—That is correct, Senator.

**Senator McKIERNAN**—I would suggest that you consider including information like that in the report as well, just for the completeness of proceedings. I note you do that on the Ming Dong Liu decision on page 95. That is the extent of my questions regarding the annual report. As I indicated earlier, I have some questions now relating to the inquiry into children in detention.

**CHAIR**—I will just clarify whether there are any further questions on the HREOC annual report from senators.

**Senator BARTLETT**—Just in terms of all the inquiries you have conducted that are covered by your report, are they always submitted to the government by way of information or are they only submitted to the government where the government activities are relevant to the nature of the inquiry, like government-run institutions such as detentions centres and the like?

**Dr Ozdowski**—The inquiries I conduct under the Human Rights Commission Act usually result in a report to parliament.

**Senator BARTLETT**—And do they all require a response from government?

**Dr Ozdowski**—It is up to government what actions the government takes on our recommendations.

**Senator BARTLETT**—Are there any reports you have provided over the course of the last year that have not produced any response from government in relation to recommendations you have made?

**Ms Roberts**—Senator, as part of the process of producing the report, before the report is finalised, a notice containing the findings under the act has to be provided to the respondent for their comments as to the action that they are going to take in relation to the findings. That is a practice that we are required to take, and therefore, before the report is actually tabled, the

commission is aware of the respondent's reaction to the report, and that is in fact included in the actual report that is tabled.

**Senator BARTLETT**—Was that the case in relation to the recent one on children in detention centres?

**Ms Clifford**—Senator, maybe I can clarify it. I am a little unsure of which matters you are talking about. Under the Human Rights and Equal Opportunity Commission Act, the commission may inquire into complaints that we receive, but the Human Rights Commissioner of course can inquire in a broader manner. I am not sure which ones you are referring to at the moment.

**Senator BARTLETT**—I am talking about ones where in the past the Human Rights Commission has done reports into detention centres of those who come across the seas or whatever. That is some time back. The reports had a range of recommendations or findings that, at least as I read it, suggested it would be helpful to get responses from government on, and I think they were provided at some stage. I guess it is reports like those that would be enhanced by getting a response back from government. Are there any others which are outstanding where there has been no feedback from government?

**Ms Clifford**—At the moment, the Human Rights Commissioner's inquiry is in progress. That is the only one at the moment. The others have all been finalised.

**Dr Ozdowski**—Yes. Since I have taken the job, this is the first major inquiry I have conducted. There was no earlier report under my name that went to the parliament.

**Senator BARTLETT**—Thank you. That would be a good lead-in to the children in detention report.

**CHAIR**—Thank you, Senator Bartlett. Are there any further questions in the general area? Yes, Senator Cooney?

**Senator COONEY**—Thank you. I notice here on page 15 it says that it is properly and widely recognised that the ultimate test of our worth as a democratic nation is to be found in how we treat the most vulnerable and disadvantaged members of our society. That, I take it, is the sort of driving force of the Human Rights and Equal Opportunity Commission?

**Dr Ozdowski**—Very much so. It is our role.

**Senator COONEY**—Then on page 25 it says that the Attorney-General is the minister responsible in parliament for the commission and that he has a number of powers under the Human Rights and Equal Opportunity Commission. It says that one of the most significant is to declare, after consultation with the states, an international instrument relating to human rights and freedom for the purposes of the act. Who does that consultation with the states, Minister?

**Senator Ellison**—I am advised that the Attorney-General is the one who does that.

**Senator COONEY**—All right. I want to comment on something at page 30, where it refers to 2,000 human rights medals and awards. Is the granting of those awards done by the commission?

**Ms Clifford**—The commission runs the awards, Senator, but the judges who make the decisions on who should win the awards are people that we have sought expressions of interest from to be part of a judging panel. They remain as a judging body independent from the commission.

**Senator COONEY**—I want to come back to that. I notice that the Rt Hon. Malcolm Fraser and the Rt Hon. Gough Whitlam received medals in the 2000 award ceremony. What I want to talk about, if I may, Madam Chair, is the judging panel. This has a serious purpose. I want to be very definite about this. There is a series of people on the judging panel, but I would like to identify and note in this context Peter Nugent. I think everybody would agree he is an outstanding fighter and an outstanding beacon, if you like, for civil rights in this parliament and in the community generally. I think you would endorse that, Senator.

**Senator Ellison**—I would agree with that, certainly.

**Senator COONEY**—And Madam Chair?

**CHAIR**—Of course, Senator Cooney.

**Senator COONEY**—Anything more than just ‘of course’?

**CHAIR**—Everything Senator Cooney has said is very much the case in regard to Mr Nugent. As you know, that is my view.

**Senator COONEY**—All right. I also notice that the Refugee Council of Australia received a highly commended award. Another matter that interests me very much is on page 62. It is the telephone inquiries received by issue, and I notice there is an issue of age—of people being too old. Do you look after those inquiries?

**Dr Ozdowski**—Yes. Under the Human Rights Commission Act we have got the ILO 111 document, which allows us to look at age discrimination.

**Senator COONEY**—Do you look at it carefully and closely on every occasion?

**Dr Ozdowski**—We look at it very carefully. I personally am of the view that what we have is not sufficient and, therefore, I was quite heavily lobbying the federal government to get age discrimination legislation which would be much stronger.

**Senator COONEY**—It is a very important section of the community—those who are getting a bit older. You would agree with that.

**Dr Ozdowski**—I fully agree with that, and I publish opinion pieces on it. I welcome the Commonwealth government initiative now to put this legislation in place.

**Senator COONEY**—The other page I want to look at is 154, where it says that the commission sought and was granted leave to intervene on 15 February 2001. This was in the ACTU test case, parental leave to long-term casuals. Do you know what has happened to that? What was the result of that application?

**Ms Roberts**—Senator, the result of it is, I think, at the end of page 154. The AIRC decided to grant parental leave entitlements to casual employees in its decision on 31 May 2001.

**Senator COONEY**—Did you feel a justifiable pride when that came down?

**Ms Roberts**—In relation to all of the commission’s interventions, Senator, we hope that we provide useful assistance to the court or the commission hearing the matter.

**Senator COONEY**—If there was an application made to look after the aged, would you support that?

**Dr Ozdowski**—We are working now with the federal government. I have been invited to be a part of the consultative group on age discrimination, and also the commission is being consulted on the contents of it. So we hope that this legislation will come soon into being.

**Senator COONEY**—Thanks very much.

**CHAIR**—If that is all on the annual report, I understand that Senator McKiernan has some questions in relation to the commission's current inquiry—

**Senator McKIERNAN**—Into children in detention.

**CHAIR**—So why don't we start with those? Senator McKiernan.

**Senator McKIERNAN**—Thank you, Chair. Who from the commission visited the Woomera Immigration Detention Centre?

**Dr Ozdowski**—I visited Woomera Immigration Detention Centre, I think in March last year. Two other officers visited more recently. I could not do it because I was visiting Christmas Island Detention Centre and, because of the situation which developed in Woomera, I asked two of my officers to go there. One was from the human rights unit and the other one was from the legal area. They were both experienced investigators.

**Senator McKIERNAN**—Was that particularly in regard to the disturbances that were occurring at Woomera, or was it in regard to the inquiry into children in detention?

**Dr Ozdowski**—It was part of the inquiry into children in detention. We intend to visit all detention centres. However, considering that situation was very difficult and we were reading quite a number of press reports about it, I thought it was important to capture that particular moment in time and go and see what was really happening—the impact it was having at the detention centre on children, and especially in the context of violence over there.

**Senator McKIERNAN**—How long did the commission representatives spend there?

**Dr Ozdowski**—They spent five days.

**Senator McKIERNAN**—To whom did the commission representatives speak during the course of their visit?

**Dr Ozdowski**—They spoke to a whole range of people. They spoke to the ACM manager and ACM staff. They spoke to the DIMIA manager; they spoke to local psychologists and they spoke to medical staff. They interviewed also parents and children. They also interviewed some other personnel. They had very comprehensive access to a whole range of people in the detention centre.

**Senator McKIERNAN**—They had free movement and free access to all of the detainees?

**Dr Ozdowski**—Yes, the department of immigration is always providing us with free access and free movement.

**Senator McKIERNAN**—I am pleased to hear that. Did you bring your own interpreters, or were there interpreters provided to you at the centre?

**Dr Ozdowski**—I need to check that detail, but the usual practice is to use TIS. I assume that on this particular occasion also TIS was used, because I saw some bills come in to us to pay for it.

**Senator McKIERNAN**—But the interpreters were provided on site.

**Dr Ozdowski**—Yes, they were outside, yes. We were using a telephone with a loudspeaker and we were using people outside the centre.

**Senator McKIERNAN**—How many children were at the centre during the visit?

**Dr Ozdowski**—Allow me to go to my statistics. There were 236 children, just under a third of all detainees there.

**Senator McKIERNAN**—How many of them were unaccompanied by parents?

**Dr Ozdowski**—Twenty-three.

**Senator McKIERNAN**—Twenty-three unaccompanied. What was the age range of the children? Do you have a breakdown?

**Dr Ozdowski**—Yes, I understood the question. I possibly do not have that particular information with me. However, I possibly could provide you with the ages of children involved in some activities there.

**Senator McKIERNAN**—That is only useful if I have the overall picture, and that is why I am asking.

**Dr Ozdowski**—I do not have that number with me. I possibly could ask the department of immigration to provide it to you, or maybe my officers have it.

**Senator McKIERNAN**—Of the 23 accompanied minors, do you know the age range of those persons?

**Dr Ozdowski**—The age of them?

**Senator McKIERNAN**—Yes.

**Dr Ozdowski**—No, I do not have that data here. I can take it on notice and provide you with that information.

**Senator McKIERNAN**—If you would.

**Dr Ozdowski**—Yes.

**Senator McKIERNAN**—You then come to some conclusions regarding children in detention centres, but from your conclusions I am not able to do a comparison against the overall population. I am disappointed we do not have that full comprehensive information available.

**Dr Ozdowski**—What do you mean by overall population? Do you mean only Woomera, or are you thinking about—

**Senator McKIERNAN**—No, it is Woomera we are talking about; only Woomera at this stage.

**Dr Ozdowski**—Yes. The overall number of people was 794.

**Senator McKIERNAN**—Sorry, I am just with the children at the moment.

**Dr Ozdowski**—Yes, okay.

**Senator McKIERNAN**—I am making the comment that I am disappointed that you do not have that age breakdown which would enable me then to do a comparative analysis between your findings - which you have released and the overall population of the centre per age group, and particularly where it is dealing with unaccompanied minors.

**Dr Ozdowski**—Yes, I have taken that on notice and will provide you with the numbers.

**Senator McKIERNAN**—Just as a matter of clarification at this early point, your inquiry is dealing with children in detention; you are taking any person who is under the age of 18—

**Dr Ozdowski**—Under 18.

**Senator McKIERNAN**—as a child.

**Dr Ozdowski**—That is correct.

**Senator McKIERNAN**—In terms of some of the unaccompanied minors that you met, some of them would have world experience, to put it broadly. Have they had to look after themselves for a long period of time in very difficult circumstances?

**Dr Ozdowski**—That is not my experience. My experience was that, at least on the basis of children I spoke with, usually the family sent them here in order to help them escape persecution. They simply make an investment. For example, the story I was given by one child was that the father was killed about a year ago, then the Taliban came and took the older brother, so the mother arranged money from family and friends for the 15-year-old boy. It bought him a ticket to Australia, as he called it.

**Senator McKIERNAN**—That is one of the 23. What about the other 22?

**Dr Ozdowski**—I cannot give you their stories.

**Senator McKIERNAN**—That does not help me make an objective conclusion, if I am only given the information in regard to one person, as opposed to the information on the majority, or even all 23.

**Dr Ozdowski**—Senator, I was not there; two of my officers were and I am relying on the report. I am confident they have the information you are asking for; I am taking it on notice and we will provide you with it.

**Senator McKIERNAN**—Probably an appropriate question to ask at this time then is why the commission went to the lengths of issuing a press statement or a media statement following the visit.

**Dr Ozdowski**—When the officers came back we had a full commission meeting where the evidence was represented, including photographs taken over there. The full commission was of the view that the issue was of such importance that it needed to be brought to attention before the inquiry was finalised. We wrote to the minister for immigration on 1 February advising him about it. Then, on 6 February, we issued a press release.

**Senator McKIERNAN**—I will come back to that in a moment. I will let my other colleagues have the opportunity of asking some questions. Did you experience any difficulties in conducting the inquiry at Woomera Detention Centre?

**Dr Ozdowski**—No difficulties in terms of getting access to children. However, the report which you see is only part of the report does not have all the details. The report I read clearly indicated that the officers had difficulties talking with children. The children were under substantial emotional stress and sometimes it was difficult to get full information from them, even if they were accompanied by parents.

**Senator McKIERNAN**—Right. What were the commission's observations regarding self-harming behaviour among children detained at Woomera?

**Dr Ozdowski**—That was recorded in the press statement. In terms of lip sewing, we saw five children, and one of them, a 14-year-old, sewed his lips twice. Then there were three children who slashed themselves. There was a question of drinking shampoo, and there were two children; there was one attempted hanging and there were threats of self-hurt in terms of 13 children. They are the statistics which were provided to us by ACM. It happened over a time of two weeks.

**Senator McKIERNAN**—I do not want to play with words but my question was this: what were the commission's observations? You have come back and given me the ACM's observations and the official statistics.

**Dr Ozdowski**—Yes. What I read to you were official statistics of what happened during this time. But my officers interviewed quite a number of these people asking for reasons and so on. We have direct contact with the people who committed self-harm.

**Senator McKIERNAN**—Did your officers reach conclusions which were different from those official statistics that were given to you?

**Dr Ozdowski**—My officers, in addition, reached a conclusion that these children were under enormous stress and that basically the whole situation was making it very difficult for children to be in that environment.

**Senator McKIERNAN**—I repeat the question. Did your officers reach conclusions which were different from the official statistics that were given to the commissioners by ACM?

**Dr Ozdowski**—No.

**Senator McKIERNAN**—Are they able to confirm or refute those statistics?

**Dr Ozdowski**—They are able to confirm them.

**Senator McKIERNAN**—The matter of parents engaging in a practice of lip sewing was, I believe, an issue around about that time. Did your officers investigate those allegations?

**Dr Ozdowski**—They interviewed all people involved on the issue. That means medical personnel, ACM officers, DIMIA officers. They also asked parents and they asked children about it.

**Senator McKIERNAN**—And what was the conclusion?

**Dr Ozdowski**—The conclusion was that there was no evidence found that any parent or other adult person sewed a child's lips or that they forced children into doing it.

**Senator McKIERNAN**—That conclusion was not contained in the media statement. Was it included in any attachments to the media statement after the commission?

**Dr Ozdowski**—This was included in a media statement. Do you have a media statement in front of you?

**Senator McKIERNAN**—I believe I have. Can you point out where it is?

**Dr Ozdowski**—It is the front page. 'Summary of Officers' Observations' is the title, and then you go to the second paragraph, the last sentence.

**Senator McKIERNAN**—The last sentence actually says, and it is the reason for my question:

HREOC officers in discussion with the ACM found no evidence of parents encouraging children to engage in acts of self-harm.

That was not the question I asked. I asked what your officers found, not what your officers were told by ACM about DIMIA or anybody else—what your officers found.

**Dr Ozdowski**—My officers found what I reported a moment ago, and they found it on the basis of talking to children, parents, ACM officers, DIMIA officers, medical personnel and psychologists.

**Senator McKIERNAN**—With due respect, that is not what you put in the report.

**Dr Ozdowski**—The press release is a very abbreviated form of the full documents, which will go later to parliament.

**Senator McKIERNAN**—As a politician I am used to press releases, though I do not do so many as I used to do, and I understand why we do it. I am just wondering why the commission does it.

**Dr Ozdowski**—Why we do press releases?

**Senator McKIERNAN**—No, why you did that press release in that form.

**Dr Ozdowski**—We thought it was an important issue to bring it to public attention.

**Senator LUDWIG**—Just in respect of that, then, have you received a response from Minister Ruddock?

**Dr Ozdowski**—Not till now.

**Senator LUDWIG**—Either formal or informal?

**Dr Ozdowski**—No, I have not received it.

**Senator LUDWIG**—As I understand what you have said, and correct me if I am wrong, is that the reason you went to the media statement—that you wrote first and received no reply, and then you went to the media statement.

**Dr Ozdowski**—No, it is not correct. I draw the time sequence, and what you usually do, and what is a standard procedure of the commission. We are trying not to correspond with governments by way of press releases, so if we are very concerned we usually bring a matter to the attention of the government, allowing the government to address the issue, and then sometime later we issue a press release. A similar thing happened when the investigation was conducted on Christmas Island into the detainees kept in the sports hall.

**Senator LUDWIG**—Are you saying this is a different circumstance?

**Dr Ozdowski**—No, it is exactly the same circumstances. We also wrote on that occasion to the Prime Minister, and a few days later we issued a press release about it.

**Senator LUDWIG**—And is the letter you have written to Minister Ruddock available to the committee?

**Dr Ozdowski**—It was a letter from us to him. I will need to ask him whether he is willing to release that correspondence. From the point of view of the commission, I do not see a problem with it. It is not much different from what you know.

**Senator LUDWIG**—And that was written on 1 February, was it?

**Dr Ozdowski**—Yes, it was written and delivered to him on 1 February.

**Senator LUDWIG**—And the minister has not responded to you by today, as far as you are aware?

**Dr Ozdowski**—As far as I am aware, no response was received.

**Senator LUDWIG**—Do you have any confidence in whether you will get a response to the request to release the letter? Did you ask for a time in the first letter?

**Dr Ozdowski**—No.

**Senator McKIERNAN**—In regard to the people that you or your officers met with at Woomera, did they meet with any of the lawyers who were representing the detainees at Woomera?

**Dr Ozdowski**—I do not think so, although I need to check that fact, because they were most of the time in the detention centre so they were meeting people within the detention

centre. They met a very limited number of outsiders. They met a Catholic sister who was providing services, but I do not remember them meeting lawyers.

**Senator McKIERNAN**—To your knowledge, did they meet with officers of the South Australian Department, FAYS, I think it is called?

**Dr Ozdowski**—Yes, Family and Youth Services.

**Senator McKIERNAN**—Family and Youth Services, yes.

**Dr Ozdowski**—No, but I met with them some time earlier, and we followed up the issue and we checked about what they knew about the lip sewing incident. They were confirming with us that there is no evidence, or that no evidence was found, that children were held by parents or forced by parents to do so.

**Senator McKIERNAN**—You personally met with FAYS representatives?

**Dr Ozdowski**—No. We knew about the inquiry, so after my officers returned from Woomera they rang the Department of Family and Youth Services in South Australia to consult on the issue of lip sewing, and the department officials told them that they have no evidence after they conducted some inquiry about the lip sewing.

**Senator McKIERNAN**—Did your officers confine their inquiries to lip sewing incidents only or did they deal with some of the other matters that were reported to them from ACM?

**Dr Ozdowski**—They dealt with all issues there.

**Senator McKIERNAN**—All issues? The attempted hanging, the threats of self-harm?

**Dr Ozdowski**—Yes.

**Senator McKIERNAN**—Did your officers meet with any Commonwealth government departmental agencies? Health and Community Services, I believe, are involved at Woomera as well.

**Dr Ozdowski**—That I do not know. We conducted an independent inquiry, and all interviews which were conducted were done by us.

**Senator McKIERNAN**—No, but I understand there are representatives of, I think, health and community services, the Commonwealth department, who also have an involvement at the Woomera detention facility because of the disturbances over a period of time. You do not know if your officers met with those individuals if they were at Woomera at that time?

**Dr Ozdowski**—No, I do not know that one.

**Senator McKIERNAN**—Whilst you were at Woomera, did any of your officers meet with the women and children who are on the trial release basis at Woomera town site?

**Dr Ozdowski**—Yes, they went there and they spoke also to women and children over there, and I was told that this pilot is working very successfully.

**Senator McKIERNAN**—The matter of schooling received some attention in the media release. They observed, and I quote from the press release:

HREOC officers also observed that despite ACM's effort to provide schooling opportunities for children, this is confined to those aged 12 and under and is not comparable in any way to the education received by Australian 12-year-olds. There are a number of children over 12 years who virtually receive no schooling at all. All children are taught in one classroom. Education is provided for a total of only two hours per day, four days a week.

And then you go on to make your findings. That is a critical comment.

**Dr Ozdowski**—Senator McKiernan, that is correct.

**Senator McKIERNAN**—What nationality were the children in question?

**Dr Ozdowski**—There are four major nationalities. The largest group of people are Iraqis—they are almost half of all—and then Afghans, Iranians and a range of smaller nationalities, like Egyptians, Moroccans, Palestinians.

**Senator McKIERNAN**—How many of them are able to not only speak English but read English?

**Dr Ozdowski**—It would possibly be unfair to offer you any statistics on it. I do not know whether they exist.

**Senator McKIERNAN**—Your problem is that you have offered me statistics and you have offered the Australian public statistics.

**Dr Ozdowski**—No, you are asking about English language ability in children. I did not offer you that one because I am highly doubtful whether such a statistic exists. I can provide you possibly with my observation from different centres. The response would be that the knowledge of English is quite mixed. There are some young people who speak quite good and fluent English; there are some who do not speak even a word in English. With small children you can see how they are picking up the language, especially if they are in detention for a longer time. The schools which are there do clearly contribute also to the learning of English, because it is the main focus of schooling in the detention centre.

**Senator McKIERNAN**—I hear what you are saying, but in the media release that is not what you are saying. I am aware of that because, as you may or may not know, I try and keep in regular contact with developments in detention centres, particularly within my own constituency, which is in Western Australia. I am aware of efforts to get people into schooling, and it would be quite unfair, in some circumstances, to force a 12-year-old child who does not speak English, or even read English, into a class of other 12-year-old children. It seems to me that that is what you are measuring the educational system at Woomera against.

**Dr Ozdowski**—Senator, can I clarify my comments? I was commenting on the basis of my experience of visiting all detention centres. Coming to that part of your last statement, it deals only with Woomera. Basically, the standard we are using as a comparison is what kind of level of education that child would have if it was in the community abroad. We see children under 12 having two hours per day over there and it is certainly less than a child would have if that child was in the community at large.

**Senator McKIERNAN**—I was asking my questions on the basis that this comment on schooling related to Woomera. That was my understanding, reading this prior to today's hearing and preparing for today's hearing—not overall children in detention across Australia.

**Dr Ozdowski**—My apologies; I went broader in my oral statement, but the written statement relates to Woomera only.

**Senator McKIERNAN**—That is what I thought.

**CHAIR**—Commissioner, can you clarify for me whether you were able to ascertain what level of literacy the children we are talking about have in their own language, let alone English?

**Dr Ozdowski**—No.

**CHAIR**—To take up the point that Senator McKiernan made, inserting them into the education system when we are not sure of even those levels of literacy is questionable.

**Dr Ozdowski**—It really goes to what you are comparing with. If a child came to Australia as a migrant, under normal circumstances the language level of the child would be assessed in a professional way and the child would be put into a normal school or maybe a special school very strong on English language tuition, and then slowly integrated into the schooling. But the child would be getting much more education than two hours per day, which is given at the moment in detention centres.

**Senator McKIERNAN**—I reckon you can benefit from my experience in this: my office does assist individuals coming into Australia under the refugee program and they do bring children with them. I am acutely aware that sometimes we get 14 and 15-year-olds who are not able to go to the same class level as Australian 14 and 15-year-olds, simply because of this knowledge of the English language. It poses a difficulty and a problem for the schools they go to, when we have these big strapping young men and young women who go off to school with 10-year-olds. It is from that experience that I am questioning and analysing the conclusions the commission has reached in their visit, over five days, to Woomera. You have reached pretty critical conclusions, but I am not so sure what you are using those conclusions as a comparison of—just the straight Australian schooling system or whether you take into account refugee migrants who come to this country and settle.

**Senator COONEY**—What has been put to you, I think, is that it is probably better to give them no education at all, rather than two hours a week. You might disagree with that.

**Senator McKIERNAN**—I cannot accept that, with all due respect.

**Senator COONEY**—Well, what are you putting?

**Senator McKIERNAN**—A comment has been made on the record that is implying a motive to my serious questions. I think I put on the record my reasoning for questioning what you are doing, and that reasoning was my experience and my electorate office's experience with the settlement of children who come to Australia under the refugee and humanitarian programs, who do not have a full knowledge of the English language. I did not imply, or did not assert at any point in time, that no education—

**Senator COONEY**—That is the impression I got.

**Senator McKIERNAN**—Senator Cooney, you can make your conclusions for yourself, but do not impute or imply motives to my conclusions.

**Senator COONEY**—You are giving the evidence.

**Senator McKIERNAN**—I am actually questioning a set of witnesses, and you are the one that is implying.

**Senator COONEY**—That is right, because that is the implication you tend to make.

**Dr Ozdowski**—Senator, the full report of my visits to the centres will be reaching you soon, and it will flesh out the issue in much fuller detail. You will understand our reasoning better.

**CHAIR**—When is 'soon', Commissioner?

**Dr Ozdowski**—I hope to have it sometime in March. Basically, it will be a short report describing my visits, including Woomera—the last visit by my officers to detention centres. It is a progress report.

**Senator McKIERNAN**—The submissions to your inquiry close in March, so we are still at the very early stages of the inquiry.

**Dr Ozdowski**—Yes, that is correct, but that report, which I will be putting to parliament, is based on my visits to detention centres. It is not part of that inquiry. Looking at the inquiry, we first ask for public submissions, then we will be releasing an issues paper which will summarise the key issues which arise in the submissions. Then we will have public hearings and then we will be requesting documents from the department of immigration, to cross-check the information which we have, whether it is in written form or in oral form. Then we will write our report. So it is a very extensive process, but a process which is aiming to establish the facts.

**Senator McKIERNAN**—Thanks.

**Senator LUDWIG**—Could you give us some time lines on that?

**Dr Ozdowski**—We hope the report will be available by the end of the year.

**Senator LUDWIG**—The time line I was looking for is of the stages that you go through. For argument's sake, how many submissions have you received to date? You might want to take that on notice. Then when do you intend to have the public hearings and what places do you intend to go to? Have you fleshed out a program about how you are going to progress this right up to the end of the year?

**Dr Ozdowski**—Yes. We received quite a number of submissions. I cannot give you an exact number—we would need to find it—because it is changing every day.

**Senator LUDWIG**—When do the submissions—I am trying not to interrupt you but I want to come back to the dates.

**Dr Ozdowski**—We extended it last week until 1 May. Then from mid-June there will be public hearings. I already have a schedule of when they will be held, and they will be held in all capital cities. Then we will be having officers going through the departmental files. We will decide which cases we would like to have a look at in detail. We will have a special officer going through the files, checking the data and facts, then we will provide a report by the end of the year.

**Senator LUDWIG**—And this information you will put on your website so that people will be able to understand what the process is and what are dates are—the cut-off dates for submissions and when there are likely to be public hearings and in which capital city. I take it that is in train as we speak.

**Dr Ozdowski**—Yes, and not only that. What we did was to develop a number of papers, which either just went on the web or will be going on the web this week, which deal with different aspects of the inquiry and human rights—so basically assistance to people who will be lodging submissions to us.

**Senator LUDWIG**—Could you just give us a short form of what those discussion papers are, if they are already on the web, basically by topic only?

**Dr Ozdowski**—The discussion paper deals with different issues, like health and education; it says what the Convention on the Rights of the Child is saying in this area, what is the Australian obligation, and then it is seeking responses to a number of questions.

**CHAIR**—In relation to the Convention on the Rights of the Child, Commissioner, where you said in your press release that you felt the conditions at Woomera were in breach of

CROC and provided, I would say, a modicum of evidence on that, given it was a press release, will your report on visits have more information in that?

**Dr Ozdowski**—Very much so.

**CHAIR**—Then that will build to the final report at the end of the process?

**Dr Ozdowski**—Yes.

**CHAIR**—I am not sure, in all of the media surrounding this, Commissioner, whether in your letter to the minister you made recommendations about steps that should be taken to address some of the issues that concerned you and your officers.

**Dr Ozdowski**—We addressed the area where we believed the breaches are happening and we are willing to collaborate with the department on finding solutions.

**CHAIR**—You did make recommendations?

**Dr Ozdowski**—No. We just set the areas where breaches are taking place. The report was specifically relating to Woomera only because it is where it was happening at a particular moment in time, and the minister was asked to look at the ways of improving the situation.

**CHAIR**—Do you intend to make recommendations down the track?

**Dr Ozdowski**—Yes. As a part of the report, when the full report is provided, there will be recommendations made.

**CHAIR**—In relation to the comments you made in response to a question from Senator McKiernan on the trial at Woomera to remove women and their families who were interested in participating, did you interview those people?

**Dr Ozdowski**—Yes, my officers interviewed the people over there and they formed a view that it is quite a successful project, although relatively narrow at that stage, so let us wait for the ministerial report, which I hope will be coming soon, about what is happening over there.

**CHAIR**—Can you tell us what proportion of the people participating in the trial you interviewed. This is an area in which I have a significant interest. What number of people participating in the trial did you interview? The majority of people participating in the trial? A small number?

**Dr Ozdowski**—I would need to go to my papers. Allow me a moment and I will check it. No, I do not have that detail here but I can provide it to you.

**CHAIR**—Thank you, Commissioner.

**Dr Ozdowski**—I will check that one, but it was a substantial number of people—possibly all people participating in the trial.

**CHAIR**—Thank you. That would be very helpful. In terms of your officers who were interviewing both within Woomera IRPC and those participating in the trial, as officers of HREOC they are qualified investigators. When they are dealing with children, do they have particular skills in that regard? Are they, for example, counsellors or psychologists as well?

**Dr Ozdowski**—They are not professional counsellors but they certainly have the skills. I saw the amount of preparation which went into ensuring that the atmosphere would be non-threatening and that children would be able to relax and talk freely, so I have full confidence that they followed appropriate procedures.

**CHAIR**—Does that mean that the children are interviewed away from other detainees? I ask, having been in similar centres myself.

**Dr Ozdowski**—Yes, we always do it in separation. We always have separate rooms where we conduct interviews.

**Senator COONEY**—Why do you interview the children separately from the parents?

**Dr Ozdowski**—No, I did not say separately from the parents. For example, unaccompanied children obviously will have to be interviewed separately. In terms of children, they were interviewed with parents as well.

**Senator COONEY**—When you are interviewing them, they have no person there to help them?

**Dr Ozdowski**—No, the interviews involve children with parents, and in some circumstances they involve individual children. Especially when you deal with unaccompanied children, you do not have adult people there, so then they are interviewed separately.

**Senator COONEY**—When you are interviewing them separately, how close are the ACM people?

**Dr Ozdowski**—They are not present. They are outside.

**Senator COONEY**—How far outside?

**Dr Ozdowski**—Twenty metres. They certainly cannot hear the conversations. We are very strict on that.

**Senator COONEY**—I am not so worried about them hearing the conversations. I am worried about their presence. What do the ACM people wear? Do they wear uniforms?

**Dr Ozdowski**—They wear uniforms.

**Senator COONEY**—Blue uniforms? I have not been to Woomera, so you will have to give me a description.

**Dr Ozdowski**—No, it is a khaki colour, if I remember correctly.

**Senator COONEY**—Like a military-style uniform?

**Dr Ozdowski**—Yes, they are uniforms.

**Senator COONEY**—Do they have leather belts?

**Dr Ozdowski**—Yes. They wear normal Aussie hats—Akubras, not military-type hats.

**Senator COONEY**—Made of rabbit skin! Do they wear boots?

**Dr Ozdowski**—Not boots.

**Senator COONEY**—Shoes?

**Dr Ozdowski**—Yes, shoes, I would say.

**Senator COONEY**—Do they march around or do they walk around?

**Dr Ozdowski**—No. I must say that, especially during my visits to detention centres, there were very few complaints expressed about ACM officers.

**Senator COONEY**—I am not talking about complaints. I am asking what they wear.

**Dr Ozdowski**—Yes. I am trying to describe it to the best of my ability. Yes, they are uniforms but they are not overburdening uniforms.

**Senator COONEY**—They are not what?

**Dr Ozdowski**—Overburdening. They are very relaxed uniforms.

**Senator COONEY**—How can uniforms be relaxed?

**Dr Ozdowski**—A bit like security staff.

**Senator COONEY**—Around here? The security staff around here are supposed to scare people. That is why they are dressed up in that uniform!

**Dr Ozdowski**—I would say here it is a bit more formal. Considering the weather over there, it is not that bad.

**Senator COONEY**—Do you see these people dressed up in these uniforms talking to children?

**Dr Ozdowski**—Yes. They talk not only to children; they are trying to keep reasonably personal contacts with detainees. They will ask them, I quite often saw, how they feel and so on.

**Senator COONEY**—I wonder why they are asking how they feel. Why would they be asking them that, I wonder? You would not know. You would have to ask them, wouldn't you? Did you ask them why they go around to people, saying, 'How are you?' and 'How do you feel?'

**Dr Ozdowski**—I saw a reasonable relationship between ACM officers and detainees.

**Senator COONEY**—In this reasonable relationship, did you see this little 12-year-old child running up and hugging the guards at all?

**Dr Ozdowski**—I did not see hugging but I certainly saw them talking to each other.

**Senator COONEY**—They had no problem with English then?

**Dr Ozdowski**—Quite often broken English, but I saw normal interaction, if that is what you are looking for.

**Senator COONEY**—What do you mean by normal interaction? May I help you here: the same sort of relationship as between a father and a son?

**Dr Ozdowski**—No.

**Senator COONEY**—Uncle and nephew?

**Dr Ozdowski**—It will be more formal because they still have a position of authority there.

**Senator COONEY**—I think you said there are 794 people. What is Woomera like? Is it wooded? Is there a river that runs through the woods?

**Dr Ozdowski**—No. Woomera is, in a way, possibly the most difficult place to be when you are some length of time over there. The difficulty is the harshness of the environment. You do not have trees there. You do not have greenery. Wherever you go—to different detention centres—it looks better. When you go to Wodonga, which provides accommodation usually for six to eight people, it is not that bad. The problem is when you come out of it.

**Senator COONEY**—In this harsh environment that you are telling me about, people dressed up in uniforms chatting merrily to the children who cannot quite speak English as well as they might—

**Dr Ozdowski**—I did not say merrily.

**Senator COONEY**—and everything is happy. Do the birds chirp in the trees, or are there any trees there to chirp in?

**Dr Ozdowski**—That is not what I am saying.

**Senator COONEY**—What are you saying, doctor?

**Dr Ozdowski**—What I am saying is that the relationships between detainees and ACM—the conditions are not the key problem which is faced by people who are there. The key problem—

**Senator COONEY**—Can you just stop there. I just want to know about the relationships before we go on. Do you know the impression you are giving me? You are saying to me—and this is how it is coming over to me and I think this is what you are saying if you look at your words—that these people in uniform and these people—somebody told me there was razor wire there around it, and I do not know whether that is right or wrong—are not in the most intimate of relationships, but are in a very happy relationship. That is what you are describing.

**Dr Ozdowski**—It is not what I am saying. Allow me to finish. What I am saying is that the key element which creates all this atmosphere of despair, especially in Woomera but also in other centres, is not so much the relationship between the guards and the detainees or the conditions; it is much more the length of detention. Having gone to all different detention centres, the length of detention, in my opinion, is the key factor which creates the feeling that people are so badly off there.

**Senator COONEY**—Let us get this straight. Are you saying that the only element that you would give any reasonable weight to—I am not saying the only weight—is the length of detention—that all other matters are fairly peripheral and of not much weight?

**Dr Ozdowski**—It is not what I am saying. I am saying that the length—

**Senator COONEY**—I am not sure what you are saying. Would you like to take that on notice and just tell me to what you give weight?

**Dr Ozdowski**—The length—

**Senator COONEY**—Because the impression you are giving me, doctor, is that if the time lines were fairly short you would be reasonably happy. As the executive officer of the human rights commission you would be reasonably happy.

**Dr Ozdowski**—Senator, I am taking it on notice.

**Senator COONEY**—Did I get that right? You are the chief executive officer of the human rights commission?

**Dr Ozdowski**—No, I am a Human Rights Commissioner.

**Senator COONEY**—You are the Human Rights Commissioner. You are saying to me that if you take away the length of the detention, the other stuff is not good but not terribly significant. That is what you are saying.

**Dr Ozdowski**—It is what I am saying, but I will take it on notice and I will provide you with more information.

**Senator COONEY**—The fact is that there is a fence around this place.

**Dr Ozdowski**—Yes, there are a number of fences. Not only one fence, but a number of fences. There is razor wire. It is bad.

**Senator COONEY**—But you say that has not got any great significance.

**Dr Ozdowski**—You see, when—

**Senator COONEY**—Is that right? Is that what you are saying?

**Dr Ozdowski**—When somebody is—

**Senator COONEY**—Is that what you are saying?

**Dr Ozdowski**—I am trying to provide—

**Senator COONEY**—No, you are not. You are prevaricating. What do you say?

**Dr Ozdowski**—I say, as I said before, that the strongest factor which impacts on wellbeing of people in detention is the length of detention. The other factors are important, but the factor in my mind which is the most difficult is the length.

**Senator COONEY**—Are you saying that if the length of time was removed then there would be no real problems?

**Dr Ozdowski**—I did not say that.

**Senator COONEY**—Why do you keep edging away from that other issue—there is more than one issue? Why do you keep edging away from issues other than length of time? That is what I am trying to get from you.

**Dr Ozdowski**—Because there are a number of factors which do impact on people. I saw people handling the other factors better. What people cannot handle is the lack of certainty of what is happening to them, and it goes together with the time of length of detention.

**Senator COONEY**—So what you are putting is that, if I am a person who is confined in Woomera against my will and I would prefer to be elsewhere, out of what you tell me is a place with razor wire and what have you, that should not worry me as long as I am going to get out in six or seven months. Is that what you are saying?

**Dr Ozdowski**—I am saying that I would prefer not to have people detained there. I would prefer not to have razor wire and so on. However, what I am saying is that when people arrive there is a limited period of time they can take it for, especially when there is hope. After that time they are breaking down.

**Senator COONEY**—Of course, you know that what you are really saying, I think, is this: if we can cut out appeals so that these matters are turned over very quickly without there being judicial review, you would be quite happy to have these people in these camps. I think that is what you are putting.

**CHAIR**—Senator Cooney, I am obviously more than happy for your exchange with Dr Ozdowski to go on, but as I understand it he has endeavoured to answer your questions to the best of his ability. He has indicated he will take some of those questions on notice, but I am not sure that—

**Senator COONEY**—All right, that is fair enough. I will stop.

**CHAIR**—Are there any further questions in this area to HREOC?

**Senator McKIERNAN**—None in regard to the inquiry into children in detention but—

**CHAIR**—More generally then, Senator McKiernan?

**Senator McKIERNAN**—More generally or more specifically on the—

**CHAIR**—I'm sorry, more specifically.

**Senator McKIERNAN**—On the religious discrimination guidelines. It was before your time as commissioner, Dr Ozdowski. The previous commissioner, Dr Sidoti, issued some guidelines on religious discrimination and how they were applied to the Job Network area of

organisation. They were issued in August 2000 and dealt with draft guidelines on religious criteria in employment for church-based organisations that provided community services on behalf of the Commonwealth. The guidelines were imposed especially by the then minister for employment services. Professor Tay was forced to defend the process, and did so by media comment on 14 September 2000. In early 2000 the commission reported in the media as having withdrawn the guidelines and Professor Tay was quoted in the *Australian* as saying ‘Churches are allowed to discriminate,’ and went on to say:

I have written to the people who have made submissions and told them their further submissions would be welcome. The first thing we want to do is clarify the guidelines. There has been a certain amount of misunderstanding.

The matter was developed further in the 2000-01 annual report, which said that, on the balance of freedom of religion and freedom from religious discrimination, during the year the commission had given extensive national consultation on employers’ responsibilities to avoid discrimination on the ground of religion in relation to employment and the rights of religious institutions to select certain staff on the basis of their religious affiliation, at least in part. It refers to an information paper entitled ‘Human Rights and Equal Opportunity Act 1996 Commonwealth, its application to a religious freedom and the right to nondiscrimination in employment’ and it gives the reference of the web page. What has been happening in this area?

**Dr Ozdowski**—I will ask Rocky to answer that question, but before she answers, may I say that new guidelines have been published some time ago, and they are on the web.

**Ms Clifford**—Senator, as you stated, the previous Human Rights Commissioner, Commissioner Sidoti, commenced this inquiry essentially because the commission received a number of telephone inquiries and a number of complaints relating to the advertising of positions through the Job Network providers. As you have pointed out, the commission undertook quite a number of consultations with the major employer groups. We have settled guidelines that are in the annual report on our website. Since that time, I cannot recall that we have received any further complaints about this matter. We did receive a number of complaints at the time, and the respondents to the complaints settled most of those matters with the people who made the complaints after some discussions about the way they may advertise, the types of issues and really the issues that go to these guidelines in terms of the balancing of inherent requirements of the jobs, or particular exemptions that religious organisations may have. Since that time I cannot recall that we have had any complaint that related to that area.

**Senator McKIERNAN**—So I have been misinformed. My information was that the guidelines were withdrawn by Professor Tay and, to the best of my knowledge, they have not been re-adopted. Am I incorrect in—

**Ms Clifford**—No, what the commission did to start off with, Senator, was put some draft guidelines up. Then there were some further discussions and consultations, and the guidelines were essentially settled and those ones on the website now are the commission’s finalised guidelines.

**Senator McKIERNAN**—Thank you very much for that. I will further inform myself on it. My difficulty with this technology is that I am not really able to use it. I am probably a danger to those all around me. There is just a final question from me to HREOC for tonight. It is from page 100 of the report. It deals with the other work I have been engaged in with regard to a different committee of the parliament. It is about mandatory sentencing, an issue which

was of grave concern to a number of constituents of mine, certainly, in the state of Western Australia, but also to constituents in the Northern Territory more particularly and, more widely, to those who have a concern on human rights issues right across Australia and indeed internationally.

The committee, from a decision of the Senate, embarked on an inquiry. The social justice commissioner, Dr Jonas, appeared before the committee in Sydney in August of last year. Regrettably, Dr Jonas was not able to assist us a tremendous amount and referred us to his social justice report for 2001. He took some matters on notice. The annual report of the commission for 2000 and 2001 gives scant information on this particular issue, which was of great concern, and I dare say it was the subject of a number of expressions of complaint and concern to the commission. The commission is in the position of developing a report which will be presented to the parliament next month. It will be, from my point of view as chair, not quite an adequate report, because we have not got the benefit of all of the assistance that we might have expected from the Social Justice Commission and from the Human Rights and Equal Opportunity Commission, but I guess that is par for the course. It has been asserted in submissions that mandatory sentencing is aimed at Aboriginal people. Regrettably, it is not quite such an issue as some of the other matters that are of concern to the commission. That is a thing I regret, certainly.

**Ms Clifford**—Senator, the Human Rights and Equal Opportunity Commission's annual report has a summarised version of the social justice commissioner's own report, which he has transmitted to the Attorney-General and it will be due for tabling within the next 15 sitting days. The commission has also developed best practice principles for diversion and has distributed those nationally. They are also available on the commission's website. So I think you will find more detail in relation to the diversionary programs from the social justice commissioner in his report, soon to be tabled.

**Senator McKIERNAN**—Which will not be available. The letter from Dr Jonas to the committee stated that his report is protected by privilege for now. It will not be available until something like 15 March or a date around then. I contrast what Dr Jonas has told us with the inquiry that Dr Ozdowski is conducting on children in detention—an inquiry which has just been announced, in which submissions have not yet closed and already we are getting conclusions. But in a matter that was actually the subject of a Senate motion to the social justice commission, the commissioner was not able to assist a parliamentary committee in its deliberations because of parliamentary privilege.

I contrast one with the other and say that the inquiry—and it is only a personal view, not the view of the committee—is lacking because the social justice commission was not able to assist the committee in probably the same way and with the same vigour that the human rights commission is pursuing the other inquiry, which is a no motion inquiry. Probably that makes the difference. It is regrettable, all over.

**Ms Clifford**—We have noted your concerns, Senator.

**Senator McKIERNAN**—Thank you.

**CHAIR**—Are there further questions of the Human Rights and Equal Opportunity Commission?

**Dr Ozdowski**—Yes. I would like to correct the impression relating to the letter to Minister Ruddock. In fact, in the letter we offered to discuss with him and DIMIA some possible improvements to the system, including extension of the trial, but the list was only preliminary and will be dealt with when the meeting takes place.

**CHAIR**—And you are going to determine whether that letter can be released?

**Dr Ozdowski**—Yes.

**CHAIR**—Thank you. There are no further questions. Commissioner and officers, thank you very much for appearing before us this evening, and also for your patience in waiting for that to occur. Yes, Minister Ellison.

**Senator Ellison**—Madam Chair, on that NCA matter before, I will table a note from Ann Carson, Director of Strategic Policy and Communications, National Crime Authority, of today's date, which details the two people assisting the building industry royal commission. One person is from the NCA and is taking voluntary redundancy on about 6 March this year, and the other is a financial investigator who has taken up the offer of a temporary secondment. Dr Whiddett advised my office that he was somewhat confused when the questions were put to him. He was really answering the question 'Are there any NCA people involved in the phone tapping or activity of that sort?' He was really saying, 'No, there are no NCA people involved in that.' That is really where the confusion occurred.

**Senator COONEY**—I accept that.

**Senator Ellison**—The NCA has a note here which is not at odds with the situation. That clarifies the situation where Dr Whiddett says he was somewhat confused. There were a few questions running at one time.

**Senator COONEY**—I agree.

**CHAIR**—Thank you.

**Senator COONEY**—I am glad of that because I think Dr Whiddett has proved over the years he is a man of honesty and integrity, and faces up and helps the committee.

**Senator Ellison**—Thank you, Senator Cooney.

**CHAIR**—Indeed that is the case, Senator Cooney. Minister, I appreciate the efforts of you and your office in clarifying that during the course of the proceedings. Now shall we move to the High Court of Australia.

[8.49 p.m.]

#### **High Court of Australia**

**CHAIR**—Ms Rogers, Mr Howard, welcome to the table. Thank you for your patience. Questions in relation to the High Court, Senator Ludwig?

**Senator LUDWIG**—Thank you. Could you provide to the committee figures on the number of immigration matters heard by the High Court in respect of both the original jurisdiction of the High Court filed over the last three years and perhaps on appeal, just to separate them out.

**Ms Rogers**—Yes, I can give you those, Senator.

**CHAIR**—Ms Rogers, it is quite hard to hear you. Would you mind speaking directly into the microphone.

**Ms Rogers**—I should also say that the chief executive and the principal registrar sent a letter through to the secretary.

**CHAIR**—We do have a letter of apology. Thank you very much for drawing it to our attention.

**Ms Rogers**—He apologises, but circumstances are such that he is not able to attend.

**CHAIR**—Indeed.

**Senator LUDWIG**—We thank you for your notification.

**Ms Rogers**—Migration matters filed in the original and appellate jurisdictions over the last three years are as follows. In 1998-99 there were 89 matters filed out of a total of 615 matters filed in the court. In 1999-2000 there were 102 matters out of a total of 754. In the year 2000-01 there were 105 matters filed out of 688, and in the financial year to date—that is, to the end of January 2002—the figure is 95 out of 422 matters filed so far.

**Senator LUDWIG**—I am sure clearly last year legislative measures were passed which were designed to put in place a privative clause in the Migration Act, if I recall, but I am happy to be corrected, which would have the effect of, as I understood it, narrowing the range of decisions made under the Migration Act which were capable of being reviewed by the High Court. Just to bring that into perspective, what date was that legislation to take effect?

**Ms Rogers**—There were various pieces of legislation, Senator, but the bulk of them were to take effect at the beginning of October 2001. Some other parts of the legislation had a retrospective effect, taking it back, I think, particularly in relation to class actions that may already have been commenced, but the bulk of the amendments took effect from the beginning of October.

**Senator LUDWIG**—Given the time, I was looking to see whether or not there has been a change in the nature or volume of matters which have come before the High Court in relation to both its appellate and original jurisdiction which that legislation may have direct effect on. Are you able to say with any degree of confidence whether or not there has been a diminution in the numbers of matters in the original jurisdiction or appellate matters as a consequence of that legislation?

**Ms Rogers**—It is a little bit early to tell, possibly, Senator, but I can give you some figures on the last few months. I am not sure what can be drawn from them but I am happy to provide those. If I take the current financial year, the figures from 1 July to the end of September 2001, there were a total of 53 migration matters filed. That was in the first three months of the financial year. And from the beginning of October 2001 to the end of January 2002, that figure was 42, and that is of course over a four-month period.

**Senator LUDWIG**—How does that compare with, say, the comparable period last year?

**Ms Rogers**—The July to September 2000 figure was 30 matters, and the October 2000 to January 2001 figure was 20 matters.

**Senator LUDWIG**—Does that mean there has been an increase?

**Ms Rogers**—Yes, over that period.

**Senator LUDWIG**—Does that accord with your commonsense understanding of the privative provisions having a positive effect?

**Ms Rogers**—It is a bit hard to tell what these matters are. For instance, the appellate matters may be decisions that were made in a period well before the amendments took effect.

**Senator LUDWIG**—So there might be a tail involved?

**Ms Rogers**—Yes. As I say, it is a bit hard to know.

**Senator LUDWIG**—And you cannot break those figures down into the original jurisdiction only?

**Ms Rogers**—I do have those figures.

**Senator LUDWIG**—Would they be more indicative of whether or not there has been an increase or decrease as a consequence of the legislation?

**Ms Rogers**—The figures certainly reflect an increase in the same periods similar to the total number.

**Senator LUDWIG**—That would not accord with your commonsense understanding of what the privative or the legislative provisions were supposed to do, would it? In fact the reverse should occur, as I understand it. Would you agree with that?

**Ms Rogers**—That is right, Senator, but I have not taken the time to examine each one of the cases to see exactly what they are.

**Senator LUDWIG**—Perhaps if you wanted to you could take it on notice.

**Ms Rogers**—Yes.

**Senator LUDWIG**—What you are now telling me, as I understand it, is that there has been an increase in the number.

**Ms Rogers**—Yes.

**Senator LUDWIG**—You are unsure of whether or not they are directly related to just the natural flow of the High Court and the trend of the increasing workload that the High Court may experience, and you are unable to tell me about the legislation that was passed in relation to what I will generally call the privative matters and the class action matters. The legislation was designed, as I understand it, and you can challenge me on this, to have a negative effect on the numbers, so that they should have decreased, but the—

**Ms Rogers**—To the extent that it is possible, Senator, yes, we will certainly go through each of these files and give you the breakdown.

**Senator LUDWIG**—Has any challenge been made to the validity of those Migration Act amendments that you are aware of in the High Court?

**Ms Rogers**—Not that I am aware, Senator.

**Senator LUDWIG**—Would you mind having a look to see whether or not there have been any matters that have been challenged or appealed?

**Ms Rogers**—I should say that it is not always clear when matters are filed whether they will ultimately end up in the particular challenge to legislation. It may be that there are some cases out there which will ultimately gather momentum, I suppose.

**Senator LUDWIG**—Yes. As far as you are able. I understand that they may in their pleadings disclose that there is a challenge, but then again they may not.

**Ms Rogers**—That is right.

**Senator LUDWIG**—Do you track the time lines? We talked earlier about the carryover or tail of some High Court decisions between the commencement and their final conclusion or their final judgment. Is there a usual length of time to determine a refugee status, from say claim or original lodgment to finality? Is there a process where you track them? Do you case manage those original jurisdiction claims?

**Ms Rogers**—I can give you a figure for matters that have gone to the Full Court. The average time from the date of filing to the date of determination, for instance, in 2000-01 was 11 months.

**Senator LUDWIG**—This could be someone sitting in a detention centre waiting for a judgment?

**Ms Rogers**—That is right, yes, Senator.

**Senator LUDWIG**—And is that the longest period or is that just one of the periods?

**Ms Rogers**—That was the average time.

**Senator LUDWIG**—So what could possibly be the longest period? Do you have a statistical breakdown of that? I am happy for you to take it on notice.

**Ms Rogers**—I do not have that with me. Yes.

**Senator LUDWIG**—And then if you could perhaps add the overlay as to the percentage of those, as far as you are able. If 11 months is the average, percentage-wise how quickly are they resolved within the first three months and 11 months, and then what percentage might fall into a longer period?

**Ms Rogers**—Yes, Senator.

**Senator BARTLETT**—I think Senator Ludwig was asking about the privative clause legislation predominantly, and the impact on the workload of the High Court. I did not hear your first question or two but I understand that was the case. Unless it was folded into his questions, I want to ask about the other legislation that went through in relation to prohibiting class actions in relation to migration and refugee related matters. Have you seen any flow-on consequences from that as yet? Obviously it did not relate to class actions that were already under way, but is it possible for you to be able to tell whether you would be starting to get numbers of applications to the High Court as individuals that might otherwise previously have been in court as a class action? Is that something you would be able to test or detect?

**Ms Rogers**—It is a bit hard to know, Senator, because if they come in as individual applications we would not know whether they might otherwise have joined in some sort of class action.

**Senator BARTLETT**—It is probably not really necessarily your job, or at least your priority, given all the other things you have to deal with, but, given that we pass legislation here on the understanding that certain things are going to happen in relation to decreasing workload on the courts, I guess it is incumbent on us to try and ascertain whether or not that has happened in practice. It is probably also too early in any case, but maybe I can even just flag for the future—we would be wanting to look at it again down the track—whether there is some way of trying to ascertain that. A theory was put forward previously, for example, that one or two key migration firms were engendering these class actions. Do you assess where cases come from—what number are coming from particular firms, or that sort of thing?

**Ms Rogers**—In my experience in the High Court, we have had three particular cases involving a large number of plaintiffs in those particular actions. Other than those, we tend to get applications that involve family members—the spouse and the dependent children—and they are exempt from the prohibition against class actions anyway. So they will still continue to come through in that form.

**Senator BARTLETT**—Do you see it as feasible down the track to be able to assess in any accurate way the impact of that change?

**Ms Rogers**—It might be something that we can try and analyse by looking at the parties and the nature of the cases that they are all bringing, and perhaps those that might be filed

around the same time and that sort of thing—that might otherwise have come in as a class action.

**Senator BARTLETT**—Thank you.

**CHAIR**—Senator McKiernan?

**Senator McKIERNAN**—Thank you, Chair. I notice on page 28 of the annual report, ‘Public information services’, that the number of visitors to the building during the year totalled 95,642. It decreased 16.8 per cent over the previous year, which was also, as I recall, a decrease from the previous year. The High Court was arguing for a number of years for funding to employ a public relations person and also for funding to enable this national institution to be open at weekends for visitors to Australia’s national capital and as one of the significant buildings in the capital. I cannot in this annual report find any reference to that request for the resource. Has the court now given up on that? Maybe I have overlooked it. I would be pleased if you could point it out, Mr Howard.

**Mr Howard**—Senator, there is a mention of it, and it is in part III of the report, in ‘The year in review’. We have a few lines there. It is on page 7. Certainly the desire of the court to eventually appoint a public information officer is undiminished.

**Senator McKIERNAN**—Considering the information we found out today about the government’s generosity of \$700,000 to the HIH royal commission, the government might be more amenable to a request from the court. It seems to me that the court might have a springboard to offer. It might be that, while the government is being generous on the application of funding for these things, it might be more amenable in relation to this national institution of ours. On a serious note, it is one of our national buildings and it is regrettable that there has been a reduction of 16 per cent in the visitors to the building. I must say I was not one of the visitors during the course of last year, although I have been in previous years, and I wish you well if you continue to press that request.

**Mr Howard**—Thank you, Senator.

**Senator LUDWIG**—How long have you been pursuing that request?

**Mr Howard**—I imagine about three years, Senator.

**Senator LUDWIG**—I thought it had been that long.

**Senator McKIERNAN**—Wasn’t there a time in post 1996 when there was a reduction in funding and the court had to reallocate resources? From that, a decision was taken to save money by closing the building on the weekend.

**Mr Howard**—That is correct.

**Senator McKIERNAN**—That would be more than three years then.

**Mr Howard**—Yes, that is true. The building was closed on weekends and public holidays, with effect from 1 July 1997.

**Senator McKIERNAN**—My memory is not bad for an old fellow, is it?

**Mr Howard**—No, it is pretty good. The issue of a public information officer did not arise until somewhat later than that, I think.

**Senator McKIERNAN**—Thanks very much, Mr Howard.

**CHAIR**—Any further questions to the High Court? As there are no further questions to the High Court, Ms Rogers and Mr Howard, thank you very much for your assistance. I now ask officers from the Insolvency and Trustee Service Australia to come to the table, please.

[9.07 p.m.]

### **Insolvency and Trustee Service Australia**

**CHAIR**—I welcome officers from ITSA, and we begin with questions in this area from Senator Ludwig.

**Senator LUDWIG**—Thank you. Good evening. The Bankruptcy Legislation Amendment Bill 2001, as I understand it, has been relisted for introduction. It obviously proposes a number of changes to the bankruptcy laws, including the abolition of provisions relating to low-income bankruptcy. Can you describe very briefly the operation of the current provisions relating to low-income bankrupts?

**Mr Gallagher**—You are asking me to describe the current provisions in relation to low-income bankrupts?

**Senator LUDWIG**—Yes. What happens currently?

**Mr Gallagher**—The Bankruptcy Act has provisions dealing with bankruptcy generally. There are no specific provisions directed to low-income bankrupts, although the early discharge provisions—those that enable a bankrupt to apply for early discharge after six months—do have income cut-off points which are, in that sense, directed at low-income debtors.

**Senator LUDWIG**—That is the point I am getting to. Could you perhaps describe the changes that are intended to act upon that area, as you understand them.

**Mr Gallagher**—The early discharge provisions enable debtors who meet certain criteria to apply for discharge from bankruptcy after six months from the commencement of their bankruptcy. The provisions, in summary, are that the person's income in the year prior to bankruptcy was below a certain threshold level, which is indexed—it is currently in the vicinity of \$35,000 after tax—that their liabilities were not more than 150 per cent of their income; and that their assets were no more than double that income limit, which is currently in the order of \$58,000. Those figures are not the exact figures, Senator. If you want the exact figures, I will have to get them for you.

**Senator LUDWIG**—Yes.

**Mr Gallagher**—That is the broad range. The other criterion is that the person has not been a bankrupt or party to another arrangement under the Bankruptcy Act in the previous 10 years.

**Senator LUDWIG**—In relation to those figures—and perhaps you could take it on notice—I was particularly hoping for the number of people who qualify for relief under the low-income provision, and particularly if you have a break-up in percentage terms against those in the table.

**Mr Gallagher**—I do have those figures, Senator.

**Senator LUDWIG**—That would be helpful.

**Mr Gallagher**—In the 2000-01 year, there were 5,922 persons granted early discharge from bankruptcy. That is compared to new bankruptcies that year in the vicinity of 24,000. Bear in mind that those figures are not directly comparable because, in the case of a person

applying for early discharge in that year, their bankruptcy may have occurred in the previous year. But it is a reasonably close comparative number.

**Senator LUDWIG**—Has that figure, to your knowledge, been increasing as a proportion of the total over the last couple of years, or has it been staying static, or decreasing?

**Mr Gallagher**—The last year actually was a fall from the previous year. I have that number as well, Senator.

**Senator LUDWIG**—Is that in absolute terms or in total?

**Mr Gallagher**—In absolute terms. The figure for the previous year is in our annual report. Granted were 7,555. I think an added point is that these are people who applied for early discharge and were granted early discharge. Our own research—we have done a profile of debtors although it is a little dated now—suggested something like 60 per cent of debtors are eligible for early discharge based on the information in their statement of affairs when they file for bankruptcy. Of course, a closer investigation is done when they apply, but that is the indicative number which is apparent from our profiling of debtors.

**Senator LUDWIG**—So there are about 60 per cent who could apply.

**Mr Gallagher**—Yes, correct.

**Senator LUDWIG**—What proportion of applicants are successful out of that?

**Mr Gallagher**—Of those that applied last year, we received—I am talking here about the year to June 2001.

**Senator LUDWIG**—Yes.

**Mr Gallagher**—Some 6,715 applied, of which 5,922 were granted, 761 were rejected and 39 withdrew.

**Senator LUDWIG**—Is it done on the papers, or is there a hearing?

**Mr Gallagher**—It is not a hearing. The trustee of the bankruptcy has the authority to grant or reject an application for early discharge. The decision of the trustee is reviewable, initially by the inspector-general, and the inspector-general's decision can be appealed to the AAT or the Federal Court.

**Senator LUDWIG**—That begs the next question: how many are reviewed to the second stage? First of all to the first stage, and then to the second stage, if you have got those figures available—that is, to the inspectorate and then to the next level of appeal?

**Mr Gallagher**—I have the figures readily available on review—inspector-general reviews. I do not know that I can give you the figures right now on those that are subjected to subsequent appeal, although I know it is very small. The early discharges—in that year I am speaking about—were 39 requests, of which four were granted and 35 were refused. They are appeals of the trustee's decisions.

**Senator LUDWIG**—And the income threshold—is that in the regulations and is it indexed? How do you arrive at that figure?

**Mr Gallagher**—Yes, the income is set in the regulations and is adjusted for price movements.

**Senator LUDWIG**—What is the current level?

**Mr Gallagher**—I do not have the exact figure, Senator. It is in the vicinity of 35,000 to 40,000 after tax.

**Senator LUDWIG**—When that occurs—for argument’s sake, once it is granted—what basically is the effect upon the applicant or the application itself? Say you decide to grant the early discharge, what does that mean to the applicant effectively? You have got a lot applying, so it seems to be well sought after.

**Mr Gallagher**—The person’s bankruptcy status, if you like, is altered to the extent that they are discharged, but the fact of their bankruptcy remains on record. It remains on the public record permanently. The National Personal Insolvency Index, which is the register of all bankrupts maintained by ITSA, remains a record. Any creditor inquiring as to the status of that particular person would be able to ascertain that they were bankrupt. The credit reference body—I think their current name is Credit Advantage—keep that record for seven years. In that sense their status has not changed, but, as I said, they are discharged from bankruptcy, so some of the constraints on a debtor that are imposed by the Bankruptcy Act are removed, or they are relieved of them.

**Senator LUDWIG**—All of them, or not all of them.

**Mr Gallagher**—They are discharged. As I say, other than the—

**Senator LUDWIG**—Other than the two.

**Mr Gallagher**—Other than their credit.

**Senator LUDWIG**—And the fact that they remain on the national database, they are discharged.

**Mr Gallagher**—Yes, correct.

**Senator LUDWIG**—And there is no other ongoing oversight by either ITSA or those administering the bankruptcy legislation. Is that right?

**Mr Gallagher**—I should clarify that, Senator. The Bankruptcy Act enables a trustee to recover, for the benefit of the estate, assets that are vested in the trustee at the date of bankruptcy. That right of the trustee extends beyond the discharge period. In other words, an asset that was not disclosed by the debtor, or subsequently comes to light, which existed at the time of bankruptcy, can be recovered by the trustee.

**Senator LUDWIG**—Yes.

**Mr Gallagher**—That is another aspect of it that is not altered by discharge.

**Senator LUDWIG**—In relation to the new bankruptcy legislation which will shortly be reintroduced, as I understand it—if it has not already been—has your agency been consulted about its effect and whether or not it will lower your overall costs or provide additional benefits to low-income bankrupt provisions, or relieve your budget of certain oversight provisions?

**Mr Gallagher**—Yes, Senator, we have consulted widely with stakeholders in the industry on these reforms. Yes. Was there a specific question beyond the consultation?

**Senator LUDWIG**—Have you estimated the cost? Is it going to provide not only in the instance of abolishing the early discharge, but also in the sense of there being a cost benefit to the department or the section from not having to administer it? You have 5,000-odd applications, so if you are relieved of those there are no early discharge provisions. If it is abolished, then you no longer have to do that; you then obviously would not have appeals, either of the first order or then the second order. Have you estimated the likely savings that might eventuate from that?

**Mr Gallagher**—We have not made an accurate estimate of that. We have, though, made the judgment that the savings that arise from not having to process an application for early discharge—if it were abolished—are probably offset by the costs that are associated with administering the bankruptcy for three years, that would otherwise not be administered for three years. There is a cost associated with a person remaining, if you are just talking about the administrative trustee costs associated with the estate.

**Senator LUDWIG**—Yes.

**Mr Gallagher**—There are some costs associated with the estate not closing, if you like, in those terms, after six months. As a broad generalisation, we believe that those costs will be offset by the saving that is derived from not having to process an application for early discharge.

**Senator LUDWIG**—So effectively what you are saying—

**Mr Gallagher**—It was motivated by saving, that is correct.

**Senator LUDWIG**—No, I was not trying to impute that. I was trying to establish whether there were any costs and whether the costs have been negated or whether there were any savings and whether the change would be cost plus, cost minus or neutral. You, as I understand it, are indicating that they would be cost neutral in the longer term.

**Mr Gallagher**—Correct, in the broad term.

**Senator LUDWIG**—But in the short term—

**Mr Gallagher**—The motivation was that the policy intent at the time that early discharge was introduced appeared not to be being satisfied by the application of the criteria that are applied, so 60 per cent of debtors are eligible for early discharge. There is really no evidence, as far as we are aware, to suggest that the 40 per cent who are disqualified by the criteria are any less deserving of early discharge than the 60 per cent.

**Senator LUDWIG**—Has there been an examination of what the motives are, if people are not motivated by seeking an early discharge for any tangible benefit?

**Mr Gallagher**—It was that the purposes of introducing early discharge were not, in the government's view, being achieved.

**Senator LUDWIG**—How do you say that? Was there a report? Was there a finding that you based that assessment on?

**Mr Gallagher**—I do not have the words in front of me, but at the time early discharge was introduced it was intended to be directed at low-income debtors whose bankruptcy was due to no fault of their own—was due to misfortune rather than misdeed and was not the result of commercially reprehensible behaviour. These were the policy objectives of early discharge. It is clear from the application of the criteria that are set for qualification for early discharge that those people who become disqualified by the application of those criteria are no less deserving against those criteria than those that do qualify. I will give you an example of a person who, under the act, is liable for an income contribution, which is the scheme under which, if you earn a certain amount above that threshold amount, you need to pay 50c of every dollar towards your estate. So a person who is bankrupt and is earning an income is disqualified from early discharge. If you relate that back to the purpose of the scheme, those persons are not intrinsically less deserving than a person who has not got an income. Similarly, with assets, if there are assets in the bankruptcy that are available for distribution to creditors, that disqualifies the debtor. Again, the fact that a person owns an asset that is

available for creditors is not something that is a qualifying criterion against those policy objectives of being misdeed and commercially reprehensible behaviour. It is concerns about those objectives of the scheme being not affected by the application of the early discharge scheme that has led to the view that it was not working as proposed.

**Senator LUDWIG**—Were there other options canvassed?

**Mr Gallagher**—The option to retain an administrative early discharge scheme would be to refine the objectives, perhaps to pick up some of those debtors whose bankruptcy may not be due to misdeed but who perhaps, for example, earned an income. But as soon as you adjust those criteria to pick those up, you introduce new anomalies. We found, on our examination and on talking with stakeholders, that was always the case. If you accept that a person has gone back out and got a job, and under the current scheme is disqualified because of that, and therefore perhaps you do not have an income threshold, then you would discharge that person from bankruptcy after six months, which would deny the estate—perhaps for a very high-income earner—the money that comes from the income contribution scheme.

We did look at adjusting the criteria to try and cater for those policy considerations. On each turn we found that you just introduce a new anomaly. The government felt that the problem was the administrative application of criteria and that perhaps the real consideration should be the standard period of bankruptcy.

**Senator LUDWIG**—Have you looked at any measures to address the actual policy initiative—for instance, to assist low income earners, other than early discharge?

**Mr Gallagher**—I think there is a misnomer in this sense about the concern for low income earners, in that what those people are seeking is relief from their debts. The time of the discharge does not affect that; the person is relieved from their debts when they go bankrupt. It is bankruptcy, not discharge from bankruptcy, that relieves a person from debt.

**Senator COONEY**—Then you might as well remain bankrupt forever.

**Mr Gallagher**—Yes.

**Senator COONEY**—We all might as well go bankrupt. It does not make any difference.

**Senator McKIERNAN**—Or you lose your job.

**Mr Gallagher**—As I say, discharge does relieve a person from, for example, the constraints and having to go through more. The question was whether those constraints apply for the benefit of low income earners or others. If we go back to the policy intents, they discriminate against people who are probably just as deserving of discharge. As I say, the relief that is given from bankruptcy is available on bankruptcy, not on discharge.

**Senator COONEY**—As I see it, and probably I am not seeing it correctly, what seems to be being said is this: that there may be a hardship which formerly, or up till even now, was relieved by an early discharge, but that since these anomalies we might as well hang everyone. That is a fair thing, because everybody is hung.

**Mr Gallagher**—If being an undischarged bankrupt is compared to hanging, and the concern is that there is automatically discharge from bankruptcy, and the debate about relief from debt is not resolved by that, perhaps the policy debate should be ‘What should be the standard period of bankruptcy for everybody?’ If three years is not appropriate, should it be more or should it be less? That is a legitimate policy consideration.

**Senator COONEY**—I think what is being said is that if you are going to treat everybody as a job lot and say, ‘Look, there’s no real difference to be drawn between individuals,’ then

you categorise people, you label people, you put them all in a group and say, 'That's all that matters. If you're a member of that group you've got no individuality in that group. You're all gone or you're all saved.' It is a very interesting way of looking at life.

**Mr Gallagher**—It was a balanced set of measures, and an offsetting accompanying the abolition of early discharge was a regime to strengthen the objections to discharge, which have the effect of extending a bankruptcy by two or five years, depending on the nature of the factor causing the objection. The amendments did propose to strengthen the objections to discharge provisions which are directed at behaviour by bankrupts to not cooperate with their trustees.

**Senator COONEY**—But as a result of this change, if it goes through, people who I am told by community legal centres and others will be badly disadvantaged are going to be disadvantaged. What the system is in effect saying is, 'Well, bad luck to you. Because there's some people who can't get that benefit, you don't get it either. So ta-ta.' Isn't that the position?

**Mr Gallagher**—Yes, I think that is correct, but I think the counter-argument is what I said: there are people who are missing out now; if you apply the criteria, they are not really in that category. They are not people whose actions are necessarily commercially reprehensible or misdeeds. It is just as much misfortune.

**Senator COONEY**—So everybody misses out.

**Senator LUDWIG**—I want to say something in relation to what is commonly referred to as the task force which the Attorney-General and, as I understand it, the Assistant Treasurer, established some time ago, and which was referred to by the Attorney-General in a speech on 18 September wherein he stated more broadly:

In March this year the Assistant Treasurer and I established a task force to report to ministers on whether any changes are needed to the bankruptcy and taxation laws to ensure that bankruptcy law cannot be used to avoid tax obligations.

I understand that ITSA was represented on that task force. Has that task force been ongoing since that time? Have you been a participant on that? Can we start at that and we will keep going from there.

**Mr Gallagher**—You are correct that ITSA was on the task force. The task force was in fact chaired by the department.

**Senator LUDWIG**—Were you the representative on the task force?

**Mr Gallagher**—No.

**Senator LUDWIG**—Who was the representative from your organisation on the task force?

**Mr Gallagher**—Our policy and legislation adviser, Don Costello.

**Senator LUDWIG**—Were you given briefs of where the task force was up to—how many times it met, if there were any minutes of the meetings?

**Mr Gallagher**—I was certainly briefed on when meetings were held and was aware of the position that was being put in relation to those aspects of the deliberations dealing with bankruptcy.

**Senator LUDWIG**—Are there any recommendations that have been passed to you from the task force that go to resolution of the matter?

**Mr Gallagher**—I do not know whether the department wants to answer that.

**Senator LUDWIG**—I am asking you.

**Mr Gallagher**—I know that the task force has prepared a report and it has been submitted to the government.

**Senator LUDWIG**—Were you given a copy of the report?

**Mr Gallagher**—Yes, I have been given a copy of the report.

**Senator LUDWIG**—Is that available to the committee? I am asking you. It looks as if I am now asking Mr Griffiths.

**Mr Griffiths**—I may be able to assist. The committee reported to the Attorney and the Assistant Treasurer in the first half of January. The committee proposed to the two ministers that the report not be made public in the short term, whilst acknowledging that that is a matter, of course, for the two ministers. There were a number of reasons for the task force recommending in that fashion. The primary reason was that the report does canvass some of the techniques that were used to facilitate tax evasion, and the committee did not want those techniques to be broadcast any more widely than was prudent until some measures were advanced to address some deficiencies in the law—in the tax act, the Bankruptcy Act and the Family Law Act, and a couple of other pieces of legislation that needed consideration as well. That is the reason that the report has not as yet been made public.

**Senator LUDWIG**—Is it intended to be made public?

**Mr Griffiths**—That, I think, is a matter for both of the ministers. Our advice was that it would not be made public in the short term.

**Senator LUDWIG**—What do you call the short term?

**Mr Griffiths**—I think until some measures in response to some of the recommendations are advanced, in terms of the policy approvals for amendment and things of that nature.

**Senator LUDWIG**—How long is that likely to take? You understand that this has been going on for quite some time, and it was, at least from the Attorney-General's position, as I understand it, a matter of some urgency a long time ago now. He referred to a committee that began in March and he reported in September that it was not far away. September is a long time ago now, and then we hear, I think from the new Assistant Treasurer, in January. That is no reflection upon her. As I understand it, she only would have taken over from the previous Assistant Treasurer. But we now are towards the latter part of February and we still have no response. Have you had an appraisal as to whether or not there are a number of people still using this as an excuse and avoiding the law, and how many have done so since March last year that you are aware of?

**Mr Griffiths**—Certainly there has been some fairly significant action taken by, for example, the Bar Association in New South Wales. I do not think anybody could confidently say that the practices have ceased to exist altogether, but I think the action that has been taken in New South Wales has been quite unprecedented in terms of its scale. I am talking about the proceedings—

**Senator LUDWIG**—Yes, I understand what has happened in New South Wales, but I am more concerned with what is happening nationally and what the response from the federal government is in relation to it. Or are you content to rely on each individual state, through their bar association, in an ad hoc way to deal with the matter? Is that what you are telling me: that you would prefer that to a legislative response?

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**Mr Griffiths**—No. As I mentioned earlier, the reason that we advised that the report not be made public was largely because of the lead time that is required to get a response to some of the deficiencies in the legislation that were identified by the task force, and work on that—certainly in Attorney-General's Department. Some of the legislation is not administered in the Attorney-General's Department, but the work on the legislation that is the responsibility of this department is progressing. Legislation bids have been made, advice has been provided to the Attorney, and things of that nature. But if we were asked for our advice on whether the report could be made public at this moment without any downside to that, then I think we would advise that it would not be wise to do so.

**Senator LUDWIG**—I suppose we get into the problem where, once you have progressed towards legislation, then it will go cabinet-in-confidence and will not be available anyway.

**Mr Griffiths**—That is a possibility. The report was drafted with a view to it becoming public if the ministers felt able to do so. It does not mention, for example, names or anything of that kind. The major consideration is really putting in place measures in response to some of the techniques that are discussed in the report and not giving those techniques any wider currency than they need to have.

**Senator LUDWIG**—You do not know whether legislation will in fact be drawn at all, do you?

**Mr Griffiths**—I think that is a decision for the government.

**Senator LUDWIG**—You do not know, but you have a report from a task force, with recommendations, and you do not know when that will be made public, if at all. But you do know—we both know—that it is likely that there is a continuing threat, if not an actual threat, of people still undertaking the task of putting themselves into bankruptcy when a normal assessment would be that they would not have to, they would have other income. That is where we are at, aren't we, and that has been going on since March last year and you have known about it since March last year?

**Mr Griffiths**—The revelations were in March of last year.

**Senator LUDWIG**—It may have gone on for quite some time before then.

**Mr Griffiths**—The report was only presented to ministers in January.

**Senator LUDWIG**—I do not have any further questions.

**CHAIR**—If there is nothing further in relation to ITSA, Mr Gallagher, Ms Hunting and Mr Griffiths, thank you very much for your time. It is 9.40; with the best will in the world, we have not made quite the progress I had envisaged today, and I do not think we will make it this evening either. I seek advice and guidance from my colleagues.

**Senator Ellison**—We have seven more groups of witnesses before we get to the department.

**CHAIR**—We do.

**Senator Ellison**—It is 9.40. I was wondering if we could excuse some or all of the officers from A-G's, from the department, rather than have them hanging around here until 11 o'clock and not being called. Is the committee able to assist us?

**Senator McKIERNAN**—I wonder if we might just go for a short adjournment, because we have made arrangements for tomorrow morning which we probably should discuss as well. Let us not do that in open forum but just adjourn for a few minutes.

**Senator Ellison**—Yes, because we have to work out where we go tomorrow as well.

**CHAIR**—Yes, we do.

**Senator COONEY**—Can we take the Office of Parliamentary Counsel first, because we cannot have senior counsel waiting around here.

**CHAIR**—I am aware that senior counsel have been waiting a long time, Senator Cooney—hopefully not charging out at commercial rates.

[9.39 p.m.]

#### **Office of Parliamentary Counsel**

**CHAIR**—Ms Penfold, thank you for coming to the table. We will deal with OPC and then the committee will take a short adjournment for a private meeting to discuss those matters. Then we will be able to better advise you, Minister, and, Mr Cornall, your officers.

**Senator COONEY**—This particular agency is always a most delightful agency to have along.

**CHAIR**—It is indeed, Senator Cooney, and we are always pleased to welcome Ms Penfold. Do you have any questions, Senator Cooney?

**Senator COONEY**—I do. It says here that the Federal Court wants some amendments to the Federal Court Act, which you do not deal with. I understand all that, but then they say about the regulations, ‘These include a proposal to rewrite the regulations using plain language.’ Do you do the rules, or do they do them themselves?

**Ms Penfold**—No, Senator Cooney, we do not draft regulations.

**Senator COONEY**—I thought you did. No, you do not. You have told me that before. Who does that, I wonder, if they want their plain language regulations?

**Ms Penfold**—That would be the Office of Legislative Drafting in the department.

**Senator COONEY**—Right. What have you drafted? What have you got drafting now? I am just wondering what impositions there are upon your agency at the moment in terms of demand.

**Ms Penfold**—Right at the moment everyone is very busy. We have, I guess, some obvious things like a lot of the counter-terrorism legislation. We still have large volumes of tax reform work that does not ever seem to dry up. In fact, a lot of what we are doing at the moment is tidying up things that were left over from the last parliament. I am just running through it in my mind, but those are probably the main substantial jobs that are—

**Senator COONEY**—Is counter-terrorism legislation almost finished or about to be finished?

**Ms Penfold**—I think most of it is expected for introduction this week.

**Senator COONEY**—Who does the explanatory memorandum? You do not do that, do you?

**Ms Penfold**—No, that is done by the department.

**Senator COONEY**—So you just draft it.

**Ms Penfold**—By the department’s policy officers.

**Senator COONEY**—I have often wondered about that. Have you noticed that the explanatory memorandum is never up to the legislation?

**Senator LUDWIG**—When I get around to reading it in full, yes.

**Senator COONEY**—Yes. Thanks. How many people are working in your department, in your office?

**Ms Penfold**—We have around 27 or 28 lawyers and another 18 or 20 support staff.

**Senator COONEY**—Thanks, Madam Chair.

**CHAIR**—That is good, Senator Cooney. I know we have a question in this area from Senator McKiernan.

**Senator COONEY**—If Senator McKiernan is not here I do not see why the witness should be made to wait.

**CHAIR**—Senator McKiernan will be here momentarily, Senator Cooney. He has a pressing question in relation to matters for the OPC.

**Senator LUDWIG**—I have one.

**CHAIR**—Senator Ludwig.

**Senator LUDWIG**—You indicated that you do the explanatory memorandum to the bill.

**Ms Penfold**—No, we do not draft that.

**Senator LUDWIG**—You do not?

**Ms Penfold**—Sorry.

**Senator LUDWIG**—I must have confused that from your other statement.

**Senator COONEY**—No, that is what I was saying. The memorandum is always a bit inferior.

**Senator LUDWIG**—They are dealt with by the department and your input is to the bill itself.

**Ms Penfold**—That is right.

**Senator LUDWIG**—That explains your quip, yes, thank you.

**Senator McKIERNAN**—Sorry if I delayed proceedings. Just one question: did the Office of Parliamentary Counsel have any involvement—and if you did have involvement, to what extent was it—in the development of the first border protection bill? That is the one that was introduced in the House of Representatives in August following closely on the arrival of the *Tampa*, not the second one, which was a more detailed and elaborate bill.

**Ms Penfold**—Yes, Senator, we did.

**Senator McKIERNAN**—You did. Can I make a comment and ask you to either support or refute it? I think that is the best way of asking the question. That was not a bill that would cast the Office of Parliamentary Counsel in a shining light, was it? It was criticised in a number of areas for its inadequacies and its broad sweeping powers, and there were also some questions asked about its constitutional validity.

**Ms Penfold**—Senator, I know the bill has been criticised for all sorts of reasons. I am not convinced that I have heard any criticism that actually stands up as far as the drafting is concerned.

**Senator McKIERNAN**—It was 10 or 11 clauses long.

**Ms Penfold**—About that.

**Senator McKIERNAN**—The next bill was more comprehensive, as is my recall of it.

**Ms Penfold**—Considerably more so, but it was doing a lot more.

**Senator McKIERNAN**—Your office had an involvement in the second border protection bill?

**Ms Penfold**—Yes.

**Senator McKIERNAN**—If you were wanting to put something on your CV which would be to impress a future employer or a client, which bill would you choose to put forward, if you had the choice of just one?

**Ms Penfold**—A good question. I do not know, Senator McKiernan. I am not sure. It might depend what I was trying to impress a client with.

**Senator McKIERNAN**—Serious?

**Ms Penfold**—Indeed. There are rapid response capabilities and there are more considered response capabilities, shall we say.

**Senator McKIERNAN**—Did you have any concerns about the constitutional validity of the bill? This is the first bill, not the second one. Of course, the second one has actually passed into law.

**Ms Penfold**—It is true that there were elements in the first bill whose operation would have been limited by parts of the constitution, but I do not regard that as making the bill unconstitutional. It is just a fact of life that everything we draft is subject to the Constitution.

**Senator McKIERNAN**—Yes, indeed.

**Ms Penfold**—And we do not, in every bill, start off by saying, ‘This bill is subject to the Constitution’; that is understood.

**Senator McKIERNAN**—You were following drafting instructions on the bill, were you?

**Ms Penfold**—We were.

**Senator McKIERNAN**—Yes, indeed. I am not going to ask for a copy, because you would probably take it on notice and I probably would not get it at the end of the day in any case.

**Ms Penfold**—Not all our drafting instructions are written.

**Senator McKIERNAN**—Were these drafting instructions written?

**Ms Penfold**—No.

**Senator McKIERNAN**—They were not?

**Ms Penfold**—No.

**Senator McKIERNAN**—How quickly was the bill developed?

**Ms Penfold**—Quite quickly.

**Senator McKIERNAN**—In a matter of hours, or was it days?

**Ms Penfold**—I think hours is closer to the truth.

**Senator McKIERNAN**—Is that a usual demand on the Office of Parliamentary Counsel—that you are required to draft legislation in a very short period of time from an oral instruction as opposed to a written instruction?

**Ms Penfold**—It is not unknown. I suppose a matter of hours is uncommon, but a matter of, say, 24 hours is not unknown. Routinely, the more urgent things are the less likely we are to get written instructions. That part of it is not particularly unusual these days.

**Senator McKIERNAN**—An onerous responsibility, and I am not going to develop it here any further tonight because of the pressures of other business upon us. Thank you, Ms Penfold.

**Ms Penfold**—Thank you.

**CHAIR**—Any further questions through the Office of Parliamentary Counsel? Ms Penfold, thank you very much and thank you for your patience this afternoon and this evening. We will adjourn very briefly for a private meeting to determine further business. We will make that as short as we possibly can.

**Proceedings suspended from 9.49 p.m. to 9.55 p.m.**

**CHAIR**—I call the committee to order and thank the minister and the officers present for their indulgence when we had that brief private meeting. I will indicate what the committee has resolved. The committee is of the view that we can conclude this evening with the end of the Australian Federal Police but that it is unlikely that we will get to Customs. If there are officers of the ACS here, as I am sure there are, then it will not be necessary for them to stay till the end of the evening. What we will do is begin tomorrow morning with Customs and the Attorney-General's Department, and conclude all of those estimates as expeditiously as possible tomorrow morning.

**Senator Ellison**—Start at 9 am?

**CHAIR**—Yes, Minister. The committee will then move to consideration of the tribunals in the refugee and migration area, as we normally would, and then go into general matters in that area and proceed through those estimates in the normal manner, working towards the indigenous component of the portfolio. At this stage, of course, the committee is not able to estimate when we see those matters concluding.

**Senator Ellison**—We do have a spill over for Friday.

**CHAIR**—Yes, we do, Minister.

**Senator Ellison**—So I think we can take it that we will be sitting on Friday.

**CHAIR**—Yes, Minister.

**Senator Ellison**—No problem with that, of course. Later on we will assess how we are going to go on Friday.

**CHAIR**—Indeed, yes.

**Senator Ellison**—On that basis, then, Customs and the officers from the department can retire?

**CHAIR**—Yes, Minister.

**Senator Ellison**—Thank you very much.

**CHAIR**—And I would like to thank those officers for being here during the duration of today's proceedings. I understand that that is an onerous way occasionally to spend that time, but we are very grateful for their assistance throughout the day.

[9.56 p.m.]

**Australian Government Solicitor**

**CHAIR**—We will deal with the area of the Australian Government Solicitor. Any questions from committee members?

**Senator COONEY**—I asked this before. Do you have a trust account or do you not have a trust account?

**Ms de Gruchy**—We do, Senator. We handle quite a large amount of clients' funds and therefore we operate trust accounts.

**Senator COONEY**—The clients are all government clients. What happens to that? Would they not keep it in their own coffers, if I can use that word, or how do you come to hold it?

**Ms de Gruchy**—There are many occasions where we need to pay out the funds on behalf of our clients, whether that be in settlement of litigation or in relation to property transactions, for example.

**Senator COONEY**—Without going too deeply into your business, because I would have thought commercial-in-confidence is one area where it has some legitimacy, what are the major fields that you operate in and that would involve a trust account? Would that be damages claims or what? I am just trying to get a picture of how the business operates.

**Ms de Gruchy**—Probably two major areas would be property transactions and any litigation settlements.

**Senator COONEY**—And that is right across the board, I suppose—commercial and compensatory litigation, if I can use that expression to cover both the common law and Comcare stuff. Do you do Comcare stuff? You do, don't you?

**Ms de Gruchy**—We do, Senator.

**Senator COONEY**—And would that be the sort of area that you would be dealing in?

**Ms de Gruchy**—Yes. It could be in relation to any type of litigation where there is a settlement of the matter. There are many occasions on which the dispensing of the funds will be channelled through our trust account.

**Senator COONEY**—Are you doing any work for the either of the royal commissions?

**Ms de Gruchy**—Yes, we are, Senator. We are providing solicitors assisting both royal commissions.

**Senator COONEY**—Are preparing briefs or gathering evidence, or a bit of both?

**Ms de Gruchy**—Senator, the role that our people play is directed by the commissions themselves. The commissions of course are clients; in that situation, it would be more appropriate for a description of the work that they do to come from those who are responsible for the management of the royal commission.

**Senator COONEY**—So, in effect, both royal commissions have seconded solicitors from your office?

**Ms de Gruchy**—No, that is not correct, Senator. We are in contractual relationships with the department on behalf of the Commonwealth.

**Senator COONEY**—I see what you mean.

**Ms de Gruchy**—And so we provide services pursuant to those contractual arrangements.

**Senator COONEY**—But what you are claiming is privilege—properly so, I think—as to your instructions to them and their advice to you.

**Ms de Gruchy**—That is correct, Senator.

**Senator COONEY**—Yes, I can follow that and I accept that. Can you go so far as to say in what areas—advice as to the powers of royal commissions, advice as to whether offences have been or may have been committed, or advice as to whether or not there has been a breach of the industrial law of Australia? Would you be able to go so far as to tell us what sort of area you are giving advice in, without giving evidence of what that advice is, or would you prefer not to talk about that?

**Ms de Gruchy**—Senator, I am probably not in a position to describe particular areas, other than to say that as a legal services provider to the commissions we are available to those commissions to provide the advice that they request us to provide in our capacity as solicitors assisting.

**Senator COONEY**—So I take it from that that what you are providing them with is advice, but is it in any particular area?

**Ms de Gruchy**—Again it would be really not a question that I should address.

**Senator COONEY**—All right. Can you go this far, then: are they consistently approaching you for advice or approaching you for advice on occasions? In other words, are you constantly engaged in some way with both commissions, or with one or other of them, or in respect of one or other of them, or both, for that matter, do you just give the occasional advice?

**Ms de Gruchy**—I think it would be on the public record that we provide solicitors to both royal commissions, so in effect we have a team with each royal commission, and of course they are called upon by the commission to carry out the work requested of them to further the aims of each commission.

**Senator COONEY**—Who is actually employing them at the moment? That is why I used the word ‘secondment’ before. They are still paid by you?

**Ms de Gruchy**—That is correct.

**Senator COONEY**—And you gather fees from the commission?

**Ms de Gruchy**—From the department.

**Senator COONEY**—From the department, yes. They are located at the commission during the duration of the commission?

**Ms de Gruchy**—Yes.

**Senator COONEY**—Or both commissions, for that matter?

**Ms de Gruchy**—Yes, they are, Senator.

**Senator COONEY**—And who do they get their instructions from: from the commission or from you?

**Ms de Gruchy**—From the commission. Well, in terms of the services they provide, they respond to their instructions. In terms of their employment relationship, that remains with AGS.

**Senator COONEY**—What areas do those solicitors that are there specialise in? Can you tell me that, because then I was going to ask what sort of advice is the commission getting

from you. Is it advice in the area of industrial law, commercial law or what? Can you go that far?

**Ms de Gruchy**—Senator, I am a bit constrained from doing that. I can say that the commissions sought from us the provision of solicitors with appropriate experience that would assist the commissions in carrying out their role.

**Senator COONEY**—How many of them are up there?

**Ms de Gruchy**—Again, I think that would be a question that would be more appropriately directed to the commissions or the department.

**Senator COONEY**—I do not know about that. Can the department tell us how many—

**Ms de Gruchy**—Fortunately, Mr Govey is here, Senator Cooney, so he can assist us.

**Senator COONEY**—That is all right.

**Mr Govey**—We do not have any problem saying that we could take that on notice and ask the two royal commissions to provide that information. I was going to make one other comment just by way of clarification, and that is just to make clear that the payments for the solicitors might be processed by the department, and perhaps that is what Ms de Gruchy meant, but the actual money of course is coming out of the money that is being appropriated for the royal commissions.

**Senator COONEY**—Are you prepared to say what areas the solicitors are giving advice in? All I want to know is what sort of advice the commissions are getting.

**Mr Govey**—Again I think that would be more a matter for the royal commissions, but, just following up again on what Ms de Gruchy said, can I just say that, when expressions of interest were sought for the positions of solicitors, areas like industrial for the building and construction royal commission and commercial law for the HIH commission were specified. So certainly, looking forward from that point, there was a clear expectation that those would be the sorts of areas in which advice would be sought.

**Senator COONEY**—Thank you very much. Are there any other solicitors providing advice, do you know?

**Mr Govey**—Yes, the firm of Fisher Jeffries is providing some assistance to the HIH royal commission.

**Senator COONEY**—But all the solicitors engaged in the building one come from the government solicitor.

**Mr Govey**—As far as I am aware, yes.

**Senator COONEY**—Thank you.

**CHAIR**—I know Senator Allison has some questions in this area, and I just have a couple of questions, Ms de Gruchy, in relation to aspects of the model litigant policy, if I can. Can you clarify for me whether all departments and agencies are automatically expected to follow the model litigant principles?

**Ms de Gruchy**—Senator, it would be appropriate, I think, if I requested my colleague Mr Govey to explain that operation of the model litigant policy.

**CHAIR**—I have a couple of questions.

**Senator COONEY**—How can he be your colleague if he is in a different area?

**CHAIR**—I think Ms de Gruchy was just being courteous, Senator Cooney. Mr Govey. We do exercise all the courtesies here, Senator Cooney, as you know.

**Mr Govey**—I am sorry, Madam Chair. Was the question whether the model litigant policy applies to all Commonwealth agencies?

**CHAIR**—Whether departments and agencies are automatically expected to follow the policy, yes.

**Mr Govey**—That is right. The policy has, I suppose, two sources for its authority. The first is that over the years various courts have expressed the view that the Commonwealth and its emanations are bound by what they have termed the model litigant policies. Of course, that would apply to state governments and other instrumentalities that they create, but at the Commonwealth level there is a second source for the obligations, and that is the legal service directions issued by the Attorney-General. Those directions are issued under the Judiciary Act, and they set out as general principles, but in some greater particularity than probably the courts have, the content of the model litigant obligation as far as the executive is concerned.

**CHAIR**—So the AGS itself, in everything it does, follows the principles?

**Mr Govey**—That is a somewhat complicated question, I suppose, as a matter of law, because as a GBE I think it is true to say that in terms of the legal service directions they do not apply to the AGS as an authority, but as the solicitor for Commonwealth agencies it is expected that the AGS will assist its clients to comply with the obligations.

**CHAIR**—That is an interesting construct.

**Mr Govey**—And I suspect it does not make any difference in practice, because I am sure that, in the unlikely event that the AGS were a party to litigation itself, it would be very clearly wishing to comply with the model litigant principles.

**CHAIR**—Is there a proactive process of advising departments or agencies of the principles and what the principles might oblige them to do?

**Mr Govey**—I think AGS certainly does some things in that regard, and so does the department, through the Office of Legal Services Coordination.

**Ms de Gruchy**—If I might just add something, from our own internal perspective, we see it as extremely important that we continue to train all of our lawyers in their obligations to assist clients to comply with the legal services directions, so I would have to say that a considerable effort every year goes into ensuring that our lawyers do understand what all of the legal services directions mean and how to go about assisting clients.

**CHAIR**—In a situation where an agency instructed an AGS solicitor or a barrister acting on its behalf in whatever context it was to perhaps act in a manner contrary to the principles, does the AGS automatically follow those instructions or does it revert to the model litigant principles, or does it depend on each individual case?

**Ms de Gruchy**—Certainly there are aspects of each individual case that would mean that the situation would be handled in a slightly different way, and also it depends on whether there is a potential breach or there has been an actual breach, because in the situation of the former there is the opportunity to ensure that the breach does not occur through action. In the latter, it could be that the breach has occurred, and the response is what is important. So, in relation to how we might approach what we might suspect would be a concern under the model litigant principle, we have a sort of advice to our people that they need to continue to talk through the issue with our client until it is addressed at an appropriately senior level. If

the matter can be resolved at a lawyer to instructing client level, then that is what happens. If we still feel that the situation is not resolved, then of course it will just continue to escalate until such time as it has been addressed.

**CHAIR**—So that would be what you would expect a solicitor or a barrister to do if they were acting for an agency or a department that gave such instructions? You would expect them to take it up as an issue in the way you have described?

**Ms de Gruchy**—Yes. In terms of assisting our clients to comply, it may be that our client at that point did not have an appreciation of the concern that we had, and simply advising the client that there may be a potential breach of the model litigant principle would be sufficient to enable the client to understand that we needed to take a different course.

**CHAIR**—Thank you for clarifying that for me. I know that Senator Allison has some questions here, and I might come back with a couple more.

**Senator ALLISON**—My questions are about the compensation claims made by veterans at Maralinga and whether the AGS has provided legal services to the Department of Defence in regard to those compensation claims. I am not sure who could answer those questions.

**Ms de Gruchy**—Senator, again, I do not have the information to hand but it would be an area where potentially I may be subject to client confidentiality. Perhaps I could take your question on notice and perhaps through the department assist you in a response to that question.

**Senator ALLISON**—Yes. Can you perhaps indicate whether the AGS has acted on behalf of the Commonwealth in all four of the cases which have come to the Federal Court, and what, if any, arrangements are in place for the Department of Defence or Veterans' Affairs to transfer payments to the AGS. I am not sure whether this is a regular arrangement that the AGS has with departments. Perhaps you could indicate whether procedurally that is common practice or not. Is that something you can answer now?

**Ms de Gruchy**—Senator, I cannot. I do not have enough information to address any of the questions that you have asked but I will ensure that, either directly or through the department, we address the questions.

**Senator ALLISON**—If you can then, take on notice the remainder of the 79 cases that have been initiated by veterans and whether the AGS has had an involvement in those in any way. They have not come to the courts. They have been withdrawn for one reason or another, but I wonder if there have been any legal services provided to the department for other than those that have come to the courts, and I would be interested in some further details about the cost transfer, if there was some, and what the costs of defending those compensation claims has been to the department or to the AGS.

**Ms de Gruchy**—Senator, the information that relates to the costs of defending actions would, of course, have to come from the department that was instructing in that. As I say, I do not have any information as to whether we have acted on those instructions. Again, for reasons of client confidentiality, I would need to refer the matter to the department concerned.

**Senator ALLISON**—I understand. There are no circumstances in which the AGS would itself bear the cost of that action? Is that a fair assumption?

**Ms de Gruchy**—Yes. AGS would only act on the instructions of a client.

**Senator ALLISON**—Yes, I understand. Thank you.

**CHAIR**—Further questions? Yes, Senator Cooney?

**Senator COONEY**—I would like to say, Madam Chairman, I am very impressed with the way all the witnesses have stuck by client confidentiality. I think it is a great doctrine and I congratulate them on it. I cannot help saying that I am going to quote them when we come to consider the proceeds of crime legislation.

**Senator ALLISON**—Sorry, Chair. I have another part to my question, if I could add to it?

**CHAIR**—Yes, Senator Allison. Thank you, Senator Cooney.

**Senator ALLISON**—I am not certain whether the AGS has also assisted in the Comcare Safety, Rehabilitation and Compensation Act cases, of which there have been 342, I believe. You mentioned earlier that the AGS did Comcare work and the question relates to those cases as well.

**Ms de Gruchy**—Senator, AGS is a legal services provider to Comcare, as are others. Therefore, in relation to that kind of question, it would perhaps be more appropriate if the department assisted in referring the matter to Comcare. It would not necessarily be within our ability to answer the question, in any event.

**Senator ALLISON**—I am sorry—to ask what question?

**Ms de Gruchy**—Your question related to cases where Comcare is involved.

**Senator ALLISON**—No. My question concerned whether the AGS has acted for the Commonwealth in any of those 342 claims made under Comcare under that act? I am not asking for individual details of cases but, rather, whether and how many.

**Ms de Gruchy**—The issue for us is that indicating whether or not we act on behalf of a particular client in a particular case can itself be an issue under client confidentiality, which is my concern in relation to your question, Senator. On previous occasions the department has assisted in referring the questions through to the agency concerned as to whether or not that particular agency has instructed any particular lawyer.

**Senator ALLISON**—Thank you.

**CHAIR**—Any further questions? As there are no further questions, Ms de Gruchy and Mr Riggs, thank you very much.

[10.19 p.m.]

**Australian Institute of Criminology  
Criminology Research Council**

**CHAIR**—I welcome Dr Graycar to the table in relation to both the Australian Institute of Criminology and the Criminology Research Council. Dr Graycar, thank you for your patience today.

**Dr Graycar**—Thank you.

**CHAIR**—I understand Senator Cooney has some questions for you.

**Senator COONEY**—Yes. Thank you for coming along, Dr Graycar. I think both of your agencies—the Australian Institute of Criminology and the Criminology Research Council—ought to be recognised by parliament and also publicly. What work are you doing at the moment? What areas are you working in?

**Dr Graycar**—Thank you. The Australian Institute of Criminology has five research groups that are loaded down with a large number of projects. We have a group looking at crime and justice monitoring and evaluation. I do not know whether you want me to go through all of

the bits and pieces or just give you the general bits, because we have about 47 projects on at the moment. You do not want me to list them, I am sure.

**Senator COONEY**—No.

**Dr Graycar**—We have a crime and justice monitoring and evaluation group, a sophisticated crime and regulation group, a communities and crime analysis group, a public policy and drugs group, and a research dissemination group. I can talk about projects within any of them, but there is a long list. We are doing evaluation on drugs, on sophisticated crime.

**Senator COONEY**—To whom do you provide services? I take it you give lectures to the Australian Federal Police?

**Dr Graycar**—We have a very large number of stakeholders. Our main stakeholder is the minister and the portfolio. Agencies within the portfolio deal with us on specific projects, and of course we provide material to all members of parliament; we provide material, as required in our act, to the states and to the community in general. We have a very vigorous publications program. Our basic publication is a document called *Trends and issues in crime and justice*. We put about 50 of these out each year, and about a dozen monographs. They have very different audiences and cover the full range of the programs that I have just outlined.

**Senator COONEY**—Have any of the research papers or material that you put out resulted in legislation—not necessarily on their own, but have they been an important factor in getting legislation through?

**Dr Graycar**—It is always very hard to point to a particular piece of research and think that that in itself becomes a piece of legislation. We believe that much of the data contained in our reports is picked up within the department, and blended into policy analysis that subsequently finds its way into legislation, so really, in a sense, providing the data and the framework rather than a particular piece of work that will then form legislation.

**Senator COONEY**—Thank you very much. Both the agencies are very important and ought to be given profile, in my view.

**Dr Graycar**—Thanks very much.

**CHAIR**—Any further questions? Dr Graycar, as ever, thank you very much for your assistance to the committee.

**Dr Graycar**—Thank you.

[10.23 p.m.]

#### **Australian Security Intelligence Organisation**

**CHAIR**—I invite officers from ASIO to the table. Mr Richardson, thank you very much for attending this evening.

**Senator McKIERNAN**—I have a whole series of questions for Mr Richardson, but they are all secret.

**CHAIR**—I am sure you have never heard that joke before, Mr Richardson. Senator Cooney has some which are public.

**Senator COONEY**—Mr Richardson, I will start off this gentle examination that we are going to go through by assuring you that I have nothing but absolute trust in your integrity. I have known you over the years. That is what I say. I do not know whether you have been here during the day and heard my little speech this morning about the royal commission into the building industry. I had a phone conversation—I think I initiated it—with David Noonan, who

is the vice-president of the construction division of the CFMEU, and he is apprehensive that his phone might be tapped. He felt it necessary to come down to see me at my place, rather than talking about matters over the phone, because he was talking about procedures and what have you. That was quite worrying, I thought—first of all, that a person did not feel confident talking to a politician or parliamentarian, and, secondly, that he was apprehensive about matters because of the telephone tapping, or, indeed, any investigation. I have been asking various bodies, as they have come before us, whether they have telephone tapped in any way, and they have said they have not. I suppose the problem with you is that you cannot either admit or deny, so the possibility that your organisation is causing this difficulty remains. The Commonwealth has powers under the Constitution to look at this. I was just thinking that conciliation and arbitration powers would probably support your organisation doing this. I do not think you can comment but do you want to make any comments?

**Mr Richardson**—I could make some general comments, Senator. The starting point to that is that ASIO can only exercise any of its special powers articulated in legislation if it is consistent with the functions of ASIO and if it meets the definition of security in the ASIO Act. ‘Security’ in the ASIO Act is defined in terms of politically motivated violence, promotion of communal violence, foreign interference and three or four other headings. Unless an individual was involved in matters relating to security as defined in the ASIO Act, we would not have the legal authority to take forward a request for such a warrant; if we did, it would not get to the Attorney, and if it did I think we would be in serious trouble.

**Senator COONEY**—Can I just follow this through, because I have constituents who are concerned. First of all, the communal violence covers a wide range. I notice in the outcomes that an ASIO outcome is ‘A secure Australia for people and property, for government business and national infrastructure,’ so there is no doubt there is an ability for you to cover this area. You have to get permission. Again, the Attorney is somebody I have a deal of respect for, but this is a royal commission into a building industry which involves a union—or involves more than one union—which a government might well expect are doing things that are not right. Therefore you might more readily get from the Attorney a tick off on the warrant—from this Attorney, because of his political position—than you would with others. I think there is a problem which remains here.

**Mr Richardson**—Senator, I think I can say quite categorically that nothing that I am aware of which is before the royal commission you are talking about comes within a bull’s roar of security as defined in the ASIO Act.

**Senator COONEY**—Yes. All right. If it comes within the act, you have got now power to obtain warrants and to break into premises or enter into premises and do all these sorts of things.

**Mr Richardson**—Again, you can only exercise that power in the context of security as defined in the ASIO Act. We cannot enter anyone’s premises simply because we think it would be a good idea or whatever. We would have to establish a case under the law, and it would have to be consistent with the requirements of the act. I do not know the details of what is before this royal commission, but I have read about it in the press simply in terms of being someone interested in current affairs and the like. I follow a whole range of things that are in the public domain, but I have no interest in that royal commission professionally and it has never even been mentioned. I have not been engaged in any discussion with any person at any time, informally or formally, directly or indirectly, in government or outside of government, in respect of any matter that is before this royal commission.

**Senator COONEY**—Thanks very much for that, Mr Richardson.

**Mr Richardson**—I might just add—and I think it may even be in our annual report; I am not quite sure—in relation to the establishment of the HIH royal commission, that I think we were involved in providing some protective security advice for the office establishment of that royal commission, but that is very different.

**Senator COONEY**—Yes. That is very reasonable, I would have thought.

**Mr Richardson**—Yes.

**Senator COONEY**—Another matter, I suppose, is the issue of the asylum seekers, but other people might want to ask about that.

**CHAIR**—Senator Cooney, I believe the floor is yours.

**Senator COONEY**—Is it? I suppose the other area—and I think you might find it more difficult to speak about—is whether or not you have taken any action in respect of unauthorised boat arrivals or people coming unauthorised into Australian waters.

**Mr Richardson**—Our only involvement in the issue of unauthorised arrivals is in the provision of security assessments.

**Senator COONEY**—Right.

**Mr Richardson**—Which is done in respect of some asylum seekers in the context of the process of decision making as to whether they are granted entry into the country or not. When I say ‘entry’ I mean that in legal terms.

**Senator COONEY**—Put it this way: any involvement you did have would not be comparable to the involvement the Navy has had, for example.

**Mr Richardson**—No.

**Senator COONEY**—Or the Army. I do not know whether the Army had any involvement but you know what I mean.

**Mr Richardson**—Yes.

**Senator COONEY**—All right. Thanks, I accept all that. I notice you are going to get—depending on what happens—powers of arrest. I am just thinking of what my good friend—I have not seen her for a while—Joan Coxsedge is going to say about that. Do you remember Joan?

**Mr Richardson**—Yes.

**Senator COONEY**—The spirit is still there, may I say, Mr Richardson.

**Mr Richardson**—I know that a bill will be introduced into the parliament and there will no doubt be discussions, with maybe questioning tomorrow re the A-G’s Department, but that bill will obviously come before some parliamentary committee.

**Senator COONEY**—Yes.

**Mr Richardson**—But I simply flag, Senator, that it is not proposed that ASIO have powers of arrest. It is proposed that ASIO can, through a process, seek a warrant from a prescribed authority for the detention of an individual. If it was thought necessary to seek a warrant which would lead to the arrest of someone to be brought in for questioning, then the arrest would be carried out by the AFP or the relevant police authority.

**Senator COONEY**—Can I perhaps explain to you what my attitude will be, just for the future, because I do have high respect for you, which has been achieved over the years, not only when you were in ASIO but when you were elsewhere. I always think there is a real problem in mixing intelligence gathering powers, which is really what ASIO is all about, and enforcement powers, or perhaps investigative powers for that matter. Just putting those two together is a bit of a problem in terms of our civil life, if you like. It is just an experience I have had, with a person I have high respect for ringing me up and then sort of feeling he cannot talk by phone about matters of tactics, and that brought home to me that there are two sides to this sort of stuff.

**Mr Richardson**—I can only repeat again, in respect of the person you refer to—re the royal commission—that no issue that is before that royal commission would come within cooe of security as defined in the ASIO Act, so ASIO certainly does not have an interest in that area.

**Senator COONEY**—Thanks very much for that.

**CHAIR**—There being no further questions in relation to ASIO, thank you very much, Mr Richardson, for assisting the committee.

[10.38 p.m.]

#### **Australian Federal Police**

**CHAIR**—I welcome officers of the Australian Federal Police to the hearing. I understand that you have been waiting for some time and I am very grateful for your assistance in that regard. On behalf of the committee, may I welcome the new Deputy Commissioner of the Australian Federal Police to estimates. Members of the legislation committee have met previously with the deputy commissioner in a legislation hearing but I am sure you will find the estimates process a fascinating experience, Mr Davies. I understand Senator Cooney has the first question.

**Senator COONEY**—I have been on this theme, as you probably heard earlier, about a person I know in the construction division of the CFMEU. He is the assistant president, David Noonan, and he rings me up and talks about the royal commission. Some of the questions I have been asking today came out of that. He felt he had to come and see me down in Elsternwick rather than tell me by phone because there was somebody tapping the phone. I said, 'Have you got any evidence?' and he said, 'No, but nevertheless there is that possibility.' Everybody says, 'No, no, he could have safely spoken to you'; the secretary of the royal commission said that. Are you able to help me, Mr Overland? Whatever you say I accept, I can tell you that. If you cannot say, do not say it.

**Mr Overland**—That question is probably better directed to the commissioner or the deputy commissioner, Senator.

**Senator COONEY**—They said no. All I am asking is: is there any independent legitimate action, as it would have to be—and as it would be, knowing you and Mr Keelty? You have not, as a force, taken any telephone taps? I do not know whether you are able to tell me; you might not be able to tell me.

**CHAIR**—Any questions should go to the commissioner.

**Senator COONEY**—All right. I am sorry, I thought you were saying to go back to the commission.

**CHAIR**—There are far too many commissions for our own good.

**Senator COONEY**—Sorry, Mr Keelty, I did not mean to leave you aside.

**Mr Keelty**—That is all right, Senator. As I understand it, the royal commission has no power to put a telephone intercept on in its own right. That is my understanding.

**Senator COONEY**—That is right; that is what the secretary told me.

**Mr Keelty**—That means that the commission would have to come to us to put a telephone intercept on. That has not happened.

**Senator COONEY**—Thanks very much. One of the things that seems to be said in this royal commission is that they are going to look at the unlawfulness in the industry. I asked the DPP whether there was anybody presently being charged because of the part they took within the industry. You might be charged and you happen to be a builder, but what I was asking was whether any proceedings had been brought against anybody because of their activity in the industry. The DPP was not here but the people who were here said no. Is there any serious investigation going on at the moment into the industry on that basis? You might not be able to answer but, if you can, it would be good.

**Mr Keelty**—From my recollection, having looked at this at the time that the commission approached us for assistance last year, there were four investigations into the industry in the last decade. I think one got some publicity; it was in relation to the building of the Olympic stadium. Another one was in relation to taxation matters. The other two I cannot recall, but they are dated.

**Senator COONEY**—Is there any current investigation going on, or would you prefer not to answer that?

**Mr Keelty**—No, I can answer that, I think, in the absence of any prompting from my deputy. We have one investigation that is associated with the royal commission and that is an investigation into an alleged leak of documents from the royal commission.

**Senator COONEY**—Yes, I have heard that.

**Mr Keelty**—My recall is that we were approached by one of the unions involved in the building industry last year about some internal union matters to do with voting. The approach did not materialise as a proper investigation after early discussions with the union or with lawyers representing the union.

I also have just had passed to me that in early April 2001 the Australian industry registry received correspondence from the Construction, Forestry, Mining and Energy Union. The correspondence included a statutory declaration alleging that a document purporting to be a certified agreement made under section 170LK of the Workplace Relations Act 1996 had been presented to an official of the CFMEU by a representative of a construction company. The CFMEU claimed that the document was false. That is one investigation and that is not yet complete. The second document relates to the same matter.

**Senator COONEY**—There was another matter raised this morning about documents being left on the doorstep of Martin Kingham, the secretary of the Victorian section of the union. Does that ring a bell?

**Mr Keelty**—Yes, it does. That investigation was referred to the AFP and I will give you some details on that. The royal commission referred the matter to us on 17 January 2002. Mr Kingham, the state secretary of the Construction, Forestry, Mining and Energy Union, construction and general division, Victoria, has alleged that on 13 January 2002 an eight-page document in an Australia Post envelope was placed under the front door of his home. The

document contained information pertaining to the royal commission into the building and construction industry. After seeking legal advice Mr Kingham advised the royal commission of the incident on 15 January. On 17 January the matter was referred to the AFP and we have had that matter under investigation since that time.

**Senator COONEY**—So that is still ongoing. Thanks very much for that.

**Senator McKIERNAN**—In an endeavour to speed the process I have some questions about the review of the NCA, which are not quite mirroring earlier questions to the NCA, which I would like to put on notice for the Australian Federal Police. In a similar vein, I have some questions—again, that have probably been asked—that I would like to put on notice regarding the building royal commission and the involvement of AFP personnel in that royal commission.

I will start with additional estimates funding, and then I have some questions about the annual report. The portfolio overview for additional estimates states that the ESP will receive an additional \$9.271 million in 2001 and 2002 for the enhancement of protective security and counterterrorism crime capacity. Can you break that figure down for the committee without divulging matters which should not go on the public record?

**Mr Keelty**—Senator, I understand you are referring to the \$7.4 million for the new initiatives?

**Senator McKIERNAN**—The figure I have here is \$9.271 million.

**Senator Ellison**—What page is that?

**Senator McKIERNAN**—There is no reference to a page number in the PAES.

**Mr Keelty**—In the interests of expediting proceedings, I think Mr Overland has the page in front of him.

**Mr Overland**—I think what you are referring to, Senator, relates to \$6 million which is for a protective security and counterterrorism initiative, and that relates to increasing staffing numbers to deal with the increased workload in that area. There is an additional \$3.2 million which relates to capital, and that is to purchase equipment and vehicles and other such things required to go with the people to service the additional requirements.

**CHAIR**—Which page are you referring to, Mr Overland, in the portfolio additional estimates statements?

**Mr Overland**—You would have to get that from a couple of different points, Senator.

**CHAIR**—I appreciate that you have consolidated that for us.

**Mr Overland**—I have that information in front of me.

**Senator Ellison**—I think it is on pages 12 and 81 of the portfolio additional estimates statements 2001-02.

**Senator McKIERNAN**—Yes, you are right, Minister; it is in the first dot point.

**CHAIR**—Mr Overland, in relation to the increased funding for staffing, broadly speaking, can you give the committee an indication of what part of that, if any, enhances the AFP's international presence in liaison posts and suchlike?

**Mr Overland**—No part of that money relates to international presence.

**CHAIR**—So our status in, for example, Pakistan and similar countries stays the same as you reported to the last committee inquiry in this area?

**Mr Overland**—Out of this initiative, yes.

**CHAIR**—So if not out of this initiative, Mr Overland, are there any changes out of any other initiative?

**Mr Overland**—There is nothing in additional estimates that relates to additional posts overseas, but of course we are in the process of preparing budgets for next year.

**Mr Keelty**—Just a correction on that: there is the Melanesia proposal for increased presence throughout Melanesia.

**CHAIR**—That is part of these additional estimates, is it not?

**Mr Keelty**—Yes, that forms part of additional estimates, that is correct. But your specific question in relation to Islamabad and other countries from a security intelligence perspective, if you like, for want of a better word, is not covered by these estimates.

**CHAIR**—Thank you.

**Senator McKIERNAN**—I have a further question from the additional estimates statements. On page 89, halfway down the major paragraph on that page it states:

These redirected existing resources comprise a one-off National Illicit Drug Strategy (NIDS) saving of \$1.9m in 2001-02 and \$2.250m savings over three years ... as a result of the AFP's business decision to move to six monthly deployments of peace operations personnel to East Timor.

I do not get the connection between NIDS and East Timor.

**Mr Overland**—There is no connection, Senator. There are offset savings that we have identified from two separate funding sources. One is from the National Illicit Drug Strategy; that is one source of offsets that we have identified. The second source is from the peacekeeping funding, and that primarily relates to our activities in East Timor. So we are saying that we have not needed to ask for that additional money from government because we have been able to find it from within those programs.

**Senator McKIERNAN**—The additional estimates statements say it was a 'business decision to move to six monthly deployments of peace operations personnel to East Timor'. Was it previously a shorter period than that?

**Mr Overland**—Initially it was, yes. Initially it was three months, as I understand it.

**Senator McKIERNAN**—I have a number of questions that relate to the annual report. On pages 31 and 32 of the 2000-01 annual report is the subject of sensitive matters under investigation by the AFP. Many of those referrals were related to the unlawful disclosure of information. It is the previous annual report I am referring to, not the current one.

**Senator LUDWIG**—In relation to page 31 of the 2000-01 annual report of the AFP, how many of those referrals—that is, the special references—relate to the unlawful disclosure of information? Do you have that information to hand or perhaps a breakdown of what those 23 referrals were? Sixteen of them were obviously continued from the previous financial year. On page 32 it includes 'unlawful disclosure of information' as a description of one or more of the special references.

**Mr Keelty**—I may be able to answer the question in a roundabout way, and I hope at this late hour that this is of assistance. In the current financial year, five matters have been referred for investigation, and five other matters were carried over from the previous financial year as leak investigations. Two of those matters have been finalised. Of the two, one is before the court. The others are active.

**Senator LUDWIG**—Are you able to say what the last of those referrals relates to? In other words, for the breakdown you have just given us in relation to leaked information, can you say which departments they come from? I assume you do not want to tell me who it is, because there might be an operational requirement not to tell me that. Can you tell me the department, perhaps, without disclosing the identity of the person?

**Mr Keelty**—There is one referral from the Civil Aviation Safety Authority that has been carried forward from 2000-01. That is an active investigation. There is one from the Department of Employment, Workplace Relations and Small Business which was received in the 2001-02 financial year. That is a current investigation. There was one received from the Department of Foreign Affairs and Trade that has been carried forward as an active investigation, and there is one with the Department of Foreign Affairs and Trade that is a finalised investigation. There is one from the Department of Immigration and Multicultural and Indigenous Affairs, and that is an active investigation.

There is one from the Department of Communications, Information Technology and the Arts, and that is an active investigation. There is one from the Department of Defence, which is the one I mentioned that is before the courts. There is one from the Department of Transport and Regional Services, which is an active investigation. There are two from the Department of the Prime Minister and Cabinet; one of those has been finalised and one is an active investigation.

**Senator LUDWIG**—What can you tell me about those? Is that the extent of the information that you can give the committee on the last three or four?

**Mr Keelty**—I can tell you that, out of the last three or four, the Department of Defence matter—the matter that is before the court—is an espionage matter. I will get some advice on the matter from the Department of Transport and Regional Services, whilst I am going to the next two. Of the two from the Department of the Prime Minister and Cabinet, one of those is an alleged leak of information from the Secretaries Committee on National Security relating to Australia's involvement in East Timor, and the other one, which is the active investigation, I do not have any advice on at the moment, I am sorry. I might have it shortly.

**Senator LUDWIG**—Whilst you are obtaining that, do you have an ability to compare those numbers with earlier reporting periods to determine or to form a view on whether the number of investigations that you have conducted in that area has increased or decreased?

**Mr Keelty**—We can, Senator, for a period of time since we have had the police reporting online management information system. Prior to that we had another information system. I might be able to, if I can consult with a colleague, give you an indication of whether I can give you that answer tonight or in the morning.

**Senator LUDWIG**—Thank you.

**Mr Keelty**—Senator, we might be able to give you a trend figure from 1 July 1997 tomorrow morning.

**Senator LUDWIG**—All right, that will be fine.

**CHAIR**—The committee will conclude its deliberations for this evening. We do appreciate your assistance, Commissioner, for the latter part of the evening. At least we have dealt with some of the matters concerning the Australian Federal Police.

**Committee adjourned at 11.02 p.m.**

