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# Official Committee Hansard

## SENATE

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COMMITTEE

**Estimates**

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BY AUTHORITY OF THE SENATE

when? Were there are other options considered in the terms of reference, including whether or not perhaps the matter should be considered by something similar to the Ruddock review instead of going to the Australian Law Reform Commission?

**Mr Newnham:** I will start and call on colleagues with a little bit more detail if that is available. I will return to the point that they were developed by the Attorney-General's office.

**Senator SCARR:** In the first instance?

**Mr Newnham:** Yes.

**Senator SCARR:** Was that before the department got involved?

**Mr Newnham:** That is my understanding and I'll make sure. I have nods from colleagues.

**Senator SCARR:** I just note that everyone nodding, so that is everyone's understanding.

**Mr Newnham:** I was going on to say that that was the process taken in consultation with stakeholders. It wasn't done in isolation. A series of religious bodies, education sector unions, legal experts and other civil society representatives were involved.

**Senator SCARR:** At what stage were they involved? Were they involved as part of the Attorney-General's ministerial office coming up with the terms of reference or were they involved after the department was brought into the loop? Do you see what I'm saying?

**Mr Newnham:** I think the safest bet would be to ask my colleague Ms Nawaz about this.

**Ms Nawaz:** I can confirm that the consultation that was undertaken by the Attorney-General's office occurred around the development of the terms of reference.

**Senator SCARR:** Was that before the Attorney-General's Department got involved?

**Ms Nawaz:** Yes. The Attorney-General's Department attended those consultations. There is a QoN that we put forward in response to Senator Rice's question at the last estimates that I can also draw to your attention about the department's involvement. But it was the Attorney-General's office that ran the consultation, and the purpose of those consultations was to consult on the terms of reference.

**Senator SCARR:** Do you know when the final decision was made around the terms of reference?

**Ms Nawaz:** The terms of reference were actually issued by the Attorney on 4 November.

**Senator SCARR:** So the final decision was made on 4 November. Is that how I interpret that?

**Ms Nawaz:** Yes, and that aligned with the announcement about the ALRC review when Justice Rothman was appointed as well.

**Senator SCARR:** Presumably there was consultation and that is good. Were changes made to the terms of reference through the period of consultation?

**Ms Nawaz:** I will have to take that on notice.

**Senator SCARR:** I am interested to know if the consultation was positive in the sense there were tweaks made to the terms of reference. Could you also take on notice whether or not the consultation included the way in which the inquiry would proceed in terms of whether or not it was appropriate for it to be led by a single commissioner under the Australian Law Reform Commission or whether or not any of the other stakeholders suggested another route such as, for example, the way the Ruddock review was conducted. Can you take that on notice?

**Ms Nawaz:** I will take that process on notice but my recollection is that the consultations related only to the terms of reference. I will double-check.

**Senator SCARR:** Mr Newnham, I am trying to dovetail that process with the appointment of Justice Rothman. Was he selected prior to that process of settling the terms of reference occurring?

**Mr Newnham:** What I can say is that we were advised on 27 October that Justice Rothman was the preferred candidate to head up the review. I know that is before 4 November, when the terms of reference were issued. I couldn't speak to the moment at which they were decided. I know there was a 27 October decision on the appointment and a 4 November release of the terms of reference.

**Senator SCARR:** If you could take on notice whether or not Justice Rothman himself was involved in settling the terms of reference or in the consultation on the terms of reference before a final decision was made. If you can answer that now, that's fine.

**Mr Newnham:** We are happy to take that on notice.

**Senator SCARR:** I now want to turn to the knowledge around the candidacy. In fact, we talked about the 1984 Wentworth by-election. Mr Rothman was also a candidate for preselection for the seat of Dobell in 2003 for the Labor Party. When you are aware of that, Mr Newnham?

**Mr Newnham:** I certainly wasn't, but we can do the same process again by checking with colleagues.

**Senator SCARR:** Yes, if you could, if your colleagues are listening.

**CHAIR:** In 1980—

**Senator SCARR:** No, we're at Dobell now, in 2003. I return to my initial comment around His Honour Justice Rothman and his right to run as a candidate, but I note that he was a candidate in an actual election in 1984 and then stood for preselection to be the Labor candidate in Dobell nearly 20 years later, which does indicate a long—

**Senator Chisholm:** It was still twenty years ago.

**Senator SCARR:** True, but it does indicate a long-term interest in politics. So the department had no knowledge with respect to the involvement?

**Mr Newnham:** After a straw poll of those of the table, I can confirm that no-one at the table was aware of that. But I would have to do the same thing we did a moment ago, which is check with colleagues. I think I know the answer, but I'd like to await confirmation from colleagues.

**Senator SCARR:** I'm happy for you to wait. That's absolutely appropriate. When you gave the three helpful clarifications, Mr Newnham, you talked the 'iterative process'.

**Mr Newnham:** Yes.

**Senator SCARR:** Can you drill down? What does that mean in practice? To give you a hand—and I'm not looking to put words in your mouth, but the question in my mind is: an iterative process could be the department comes up with a list of 10 potential appointees which goes up to the Attorney-General. The Attorney says: 'Gee, I'm not sure about one, two and three. I like four and five. Let's have a discussion about that.' Or it could involve the Attorney actually proposing some additional names to be considered. I'm interested to know whether or not the Attorney-General's Department proposed additional names and whether or not one of those was His Honour Justice Rothman.

**Mr Clarke:** I think it's a bit of column A and a bit of column B in this circumstance. It was an exchange, and some names came from the Attorney-General's office and some names came from the department, is my understanding. There was a request for information and advice about candidates and their experience and background, and I highlighted before their experience in relation to human rights or anti-discrimination law. I wasn't personally involved, so I'm going to be a bit cautious about what I say. I can take the details of the notice, if that's alright.

**Senator SCARR:** Yes. The general question is whether or not it was a situation where the department provided names and the Attorney-General's office provided additional names for consideration. The more particular question is whether Justice Stephen Rothman's name originally initiated from the Attorney-General's office or from his advisors or whether it initiated from within the department itself without any communication between the Attorney or his office and the department. Do you understand?

**Mr Clarke:** I understand the question. It's a very clear and direct question, and I'd want to take it on notice to make sure I'm right.

**Senator SCARR:** And you're absolutely entitled to. I'll just ask a few quick additional questions to flesh it out. Was the role publicly advertised? As part of the Attorney-General's Department process did you actually publicly advertise the role or not?

**Mr Clarke:** No, it wasn't advertised.

**Senator SCARR:** What were the selection criteria? Did you have an actual list of selection criteria you were working to?

**Mr Clarke:** Perhaps I can step back with why I prefaced my answer previously to emphasise the point about a part-time commissioner and for a limited inquiry. I wanted to distinguish that from a permanent appointment from an office in the Australian Law Reform Commission. The requirements for that appointment are set out in subsection 7(2) of the Australian Law Reform Commission Act, and those requirements were addressed.

**Senator SCARR:** If I can just hold you there, what's the difference in terms of the process between the appointment of a part-time commissioner as opposed to a full-time commissioner? Presumably it's a less rigorous process because it's a part-time position—is that correct? Can you highlight the difference in process, if you could?

**Mr Clarke:** I'm conscious of getting outside my lane but let me say this: in relation to part-time commissioners and time limited inquiries, there is a past practice. In that circumstance, we consulted the APSC Merit and Transparency guidelines, where there are relevant exemptions for the requirement to run a full selection process where there is an urgent requirement to fill a position, as well as the availability of an eminent person. They were the kinds of considerations I had in mind when answering your question.

**Senator SCARR:** Could you take that on notice, as well as whether there were any other decisions. Is there a difference between the appointment itself in terms of the formal instrument and who does that?

**Mr Clarke:** That's the bit that's outside my lane. I will take that on notice.

**Senator SCARR:** In the process of you compiling your list, did you approach candidates directly? How do you compile this? Presumably, you've got to talk to people before you put them on the list or soon thereafter. When do you actually talk to candidates?

**Mr Clarke:** My understanding is that, in this process, it wasn't the department that was doing that direct engagement with candidates. As I mentioned earlier, the availability of Justice Rothman to do it was communicated to us by the Attorney-General's office. Our role was to consider potential candidates as a department. For example, I understand my team reached out to other areas of the department that might be involved in similar appointments. You'll appreciate that one of the categories of potential appointees is a serving judge, as I understand it. So we would have done that kind of consultation internally. But, to my knowledge, it wasn't the department's role, and we weren't requested to do that direct engagement with potential candidates.

**Senator SCARR:** How many candidates did you consider as a department?

**Mr Clarke:** I'd have to take that on notice.

**Senator SCARR:** Was there a final submission that went up to the attorney for sign-off with the recommendation? How did the end process occur?

**Mr Clarke:** That's outside my knowledge. I'll just pause and see if Ms Nawaz has any information about that.

**Senator SCARR:** You can take that on notice if you want.

**Mr Clarke:** We'll take it on notice.

**Senator SCARR:** A chronology stepping us through that would be good, as well as whether or not, as part of that, there was any requirement for any of the candidates to provide a list of potential conflicts as part of the process.

**Mr Clarke:** We can take that on notice.

**Senator SCARR:** What's the salary for a part-time commissioner? You can take that on notice too if you need to.

**Mr Clarke:** Yes.

**Senator SCARR:** I'm interested in the engagement between the department and the attorney's office throughout the process. If you could detail that, that would be excellent. As well as her honour Chief Justice Susan Kiefel being an outstanding Queensland legal mind, there's also Justice Sarah Derrington, who is also an outstanding member of the legal fraternity from Queensland. When did her appointment as President of the Australian Law Reform Commission end?

**Ms Jones:** We're getting that date. I am chairing a panel to progress the appointment of a new president of the ALRC.

**Senator SCARR:** Is her honour Justice Derrington no longer the president—her term has ceased?

**Ms Jones:** She's concluded her term.

**CHAIR:** Senator Scarr, you're at the end of a time allocation very shortly. I don't know if you can or might be able to find some questions to put a notice. Senator Shoebridge has a few more questions in this outcome, and then we were hoping to—

**Senator SCARR:** I've got about five minutes.

**CHAIR:** We'll have to come back to you.

**Senator SCARR:** I'm happy for you to come back to me. It won't take me long to close it out.

**CHAIR:** Senator Shoebridge.

**Senator SHOEBRIDGE:** I might go back to one point that Senator Scarr was addressing. Your colleague was asking questions about the critique to the Australian Law Reform Commission's discussion paper, the critique that