

The Parliamentary Joint Committee on Intelligence and Security

- 1.1 The Committee is established under the *Intelligence Services Act 2001*. The Act governs its size, structure, functions, procedures and powers. This report is made in compliance with section 31 of the Act which states that:

As soon as practicable after each year ending on 30 June, the Committee must give to Parliament a report on the activities of the Committee during the year.

- 1.2 In the last year, the functions of the Committee have not altered, the size, structure and membership of the Committee remained unchanged, and the work program continued to be quite heavy. The Committee conducted two major reviews of legislation as mandated in the Intelligence Services Act and the Criminal Code and it completed one review of administration and expenditure and largely completed a second. A large part of its work comprised reviews of the listing of organisations as terrorist organisations, a requirement under the *Criminal Code 1995*. Four reviews of the listing of organisations as terrorist organisations, covering 14 organisations, were completed in the year.
- 1.3 The functions, structure, size and powers of the Committee are outlined in detail in the last two Annual Reports of the Committee. These can be accessed at:
<http://www.aph.gov.au/house/committee/pjcis/reports.htm>

Reports and Activities 2006-2007

Reports

- 1.4 Since the last annual report on the Committee's activities, tabled in September 2006, the Committee has tabled 7 reports. In addition to the tabled reports, the Committee is currently conducting inquiries into the operations, effectiveness and implications of the terrorist organisation listing provisions of the Criminal Code and the fifth review of administration and expenditure.

Review of Administration and Expenditure No. 4: Recruitment and Training

- 1.5 Reviewing administration and expenditure on an annual basis was an initial function of the Committee under section 29 of the Intelligence Services Act. This particular review was the result of a recommendation in the third review. That report identified human resource management as an area for further, focussed inquiry, recommending that issues such as recruitment strategies and language skills in Australian intelligence agencies should be more fully examined. In selecting this area of review, the Committee was conscious of the strains that rapid expansion had placed, and was placing, on the agencies.
- 1.6 This was also the first review that scrutinised all six agencies. As with all such reviews by the Committee, it was conducted in private. All agencies supplied submissions to the inquiry¹ and all six, represented by their directors and other relevant staff, appeared at private hearings on Thursday, 26 March 2006, Friday, 24 March 2006 and Monday, 8 May 2006. In addition to the agency representatives, the Committee heard from the Mr Neil James, Australia Defence Association, and Mr Ian Dudgeon.
- 1.7 The Committee reported in two separate formats: a public report, which was tabled in Parliament in August 2006, and a classified report, which was delivered to relevant Ministers.
- 1.8 The Committee found that, in a competitive market place, increasing and retaining staff was very challenging and that timely security clearances remained an inhibition to recruitment. A particularly serious problem for the agencies was the recruitment of sufficient

1 In all 12 submissions were received.

numbers of people with necessary language skills. The Committee concluded that:

Language training remains one of the most difficult and expensive areas of training for AIC agencies and the agencies demonstrated that various initiatives are being devised to lessen and, it is hoped, eventually overcome these difficulties.²

- 1.9 Overall, the Committee was satisfied by the work of the agencies in managing their expansion. Recommendations were made regarding the need for separate financial statements from DSD, DIGO and the DIO, the need to address the backlog in security clearances and the suggestion that the agencies inquire into the feasibility of establishing a combined facility for basic training.
- 1.10 The Government has not responded formally to this report; however, the Committee is already into another round of administration and expenditure reviews. Recommendation 1 dealing with the separate financial statements from the defence agencies has been agreed in practice. The Committee appreciated the comprehensive and detailed submissions received in the current review. The Committee also notes that agencies have begun to conduct more combined training exercises, although not under the auspices of a single facility.³

Review of Security and Counter Terrorism Legislation

- 1.11 The other major inquiry of 2006 was the statutory review of the security and counterterrorism legislation. The package of legislation under review was passed by the Parliament in 2002 'in order to strengthen Australia's capacity to respond to the threat of international terrorism.'⁴ The Committee's review followed and took into account the report of the Security Legislation Review Committee

2 Parliamentary Joint Committee on Intelligence and Security, *Review of administration and expenditure: Australian Intelligence Organisations No 4 – Recruitment and Training*, Tabled August 2006, p. 35.

3 See recommendation 3. Review of Administration No 4.

4 *Security Legislation Amendment (Terrorism) Act 2002; Suppression of the Financing of Terrorism Act 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002; Border Security Legislation Amendment Act 2002; Telecommunications Interception Legislation Amendment Act 2002; Criminal Code Amendment (Terrorism) Act 2003*. See Parliamentary Joint Committee on Intelligence and Security, *Review of security and counter terrorism legislation*, tabled December 2006, p. 1.

(the Sheller Committee). It was stipulated as a function of the Committee under section 29 (1)(ba) of the *Intelligence Services Act 2001*.

- 1.12 This review was conducted in public. Twenty-five written submissions were received, one of them confidential. Thirteen witnesses were heard over one and a half days of hearings on 31 July and 1 August 2006.
- 1.13 The Committee endorsed the findings of the Sheller Committee. In his tabling statement the Chairman drew attention to important issues of principle and practice, which had been of concern to members during the review:
- Terrorism law is essentially a preventive model that allows police to intervene at an earlier stage to avoid potentially catastrophic events. It differs from the traditional criminal justice model in several important ways. For example, the definition of a terrorist act and terrorist organisation are pivotal to a Commonwealth offences and expanded intelligence and law enforcement powers. Terrorism law also extends the criminal law by including preparatory offences, capturing conduct before intent has crystallised or any attempt is committed, and some offences relate to a person's status rather than their actions.⁵
- 1.14 The Committee made 26 recommendations. Perhaps the most significant of these was recommendation 2 for the appointment of an Independent Reviewer. The Committee noted that the anti terrorism law 'differs in many respects from our earlier legal traditions'.⁶ There is such a large body of anti-terrorism legislation. Parliamentary review has been sporadic and fragmented, and the picture of how terrorism laws are actually working is incomplete. The Committee argued that it is vitally important to retain public confidence in the new laws and, therefore, there should be timely and well informed reporting and analysis.
- 1.15 The Committee believes it is time for an integrated approach to monitoring and review of terrorism laws and has recommended the appointment of an independent reviewer. Notably, the Committee recommended that:

5 Mr David Jull, MP, Tabling statement, Review of security and counter terrorism legislation, House of Representatives, 4 December 2006.

6 Parliamentary Joint Committee on Security and Intelligence, *Review of Security and Counter Terrorism Legislation*, December 2006, p. vii.

- the Government appoint an independent person of high standing as an Independent Reviewer of terrorism law in Australia;
 - the Independent Reviewer be free to set his or her own priorities and have access to all necessary information;
 - the Independent Reviewer should report annually to the Parliament;
 - the *Intelligence Services Act 2001* be amended to require the PJCIS to examine the reports of the Independent Reviewer tabled in the Parliament.
- 1.16 Concern about the impact of the counter terrorism legislation on the Muslim community was reiterated in this report as it had been in previous reports.
- 1.17 The Government has not yet responded to this report.

Criminal Code Act 1995 – The proscription of terrorist organisations

- 1.18 Four reports on the listing of organisations as terrorist organisations were tabled in the period under review. The four reports dealt with fourteen organisations, all re-listings.
- 1.19 Procedural issues relating to consultations with the States and Territories and the nature of the information provided to the Committee remain a concern in all these reviews. The Committee has recommended that information in the statement of reasons address ASIO's criteria and that, particularly for re-listings, it be current information dealing with the period since the last review.
- 1.20 This does not yet occur. There is no expectation of a response to recommendations relating to the disallowance of regulations as these are recommendations to the Parliament. However, the Government has not formally responded to any of the Committee's recommendations relating to procedural matters since these reviews began in 2004. This is disappointing.

Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah

- 1.21 Both of these organisations were originally listed in 2002 and re-listed in 2004. In August 2006 the Attorney-General advised that he intended to re-list them, and the regulations, made by the Governor General on 24 August 2006, were tabled in the House of Representatives on 4 September 2006. The Committee reported on 16 October 2006.
- 1.22 The Committee dealt with the review on the papers alone.

1.23 The Committee sought to understand the 'current nature and reach of Al-Qa'ida and Jemaah Islamiyah' and to try to 'establish as accurate a picture as possible of the nature, size, reach and effectiveness of the organisations.'

1.24 The Committee concluded that both organisations have been central in the current wave of terrorism; however, it noted that, while there had been considerable diminution in the structure and loss of leaders through war, capture and assassination, the strength of the organisations lay in their capacity to inspire.

... [T]he capturing or killing of some two thirds of Al-Qa'ida's leadership ... has undoubtedly diminished its organisational capacity , [but] it hasn't done anything to diminish its global following.⁷

If its role is largely one of propaganda, it would seem to the Committee that to ascribe more success to it than it warrants would be dangerous and self-defeating.

The fight against Al-Qa'ida and associated groups poses several challenges. Governments and the media have personalised Al-Qa'ida through a constant evocation of bin Laden and a public narrative that defines the group in organisational and even bureaucratic terms. This 'parable' has little operational utility in countering Islamic jihadist groups. Instead it might actually support their aims by attributing operational reach and power to Al-Qa'ida it does not possess, allowing the group to morph from a material organisation centred on Afghanistan into a virtual and global model to be emulated, evoked or feared.⁸

1.25 While much of this analysis did not detract from the argument that both Al-Qa'ida and Jemaah Islamiyah met the definition of a terrorist organisation for the purposes of the proscription power, the Committee believed that the phenomena was worthy of analysis when considering the success of the 'war on terrorism'.

1.26 The Committee did not recommend disallowance.

7 Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiya*, p. 16.

8 Jane's Terrorism and Insurgency Centre, *Al-Qaeda*, 22 August 2006, p. 14. <http://jtic.janes.com>, quoted from Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiya*, p. 17.

Review of the re-listing of Abu Sayyaf (ASG), Jamiat ul-Ansar (JuA), Armed Islamic Group (GIA), Salafist Group for Call and Combat (GSPC)

1.27 The Attorney-General notified the Chairman of his intention to re-list these four groups on 16 October 2006. The Governor General made the regulations on 1 November 2006 and they were tabled in the House on 7 November and in the Senate on 27 November 2006. The Committee tabled its report on 26 February 2007. As with Al-Qa'ida and Jemaah Islamiyah, these organisations were first listed in 2002 and re-listed in 2004.

1.28 Of these four groups, the Committee found that JuA and the GIA were much diminished as organisations since the last review in 2004, although 'members' trained in previous times continued to represent a threat. The Committee concluded:

[T]hat the JuA continues to exist, albeit in a diminished capacity from its capability of the late 1990s, and that it has the capacity to act as a terrorist group.⁹

And

[The Committee] notes that the GIA has been a deadly organisation and, although it appears that its numbers and support have been drastically reduced, the Committee accepts that the group may still be capable of terrorist activity.¹⁰

1.29 The ASG and the GSPC were considered to be more active. The ASG has links to Jemaah Islamiyah (JI), a group of significance to Australia. The GSPC has been the recipient of disaffected members of the disintegrating GIA. However with the exception of the ASG, with tenuous links to Australia, none of the others had demonstrated links to Australia. With this in mind, the Committee stated a caveat to its conclusions:

... that it is important to include, in any decision about listing an organisation, its links to Australia and Australians, because, despite the lack of a legislative requirement for this, the listing will have little practical effect without it. Application of the powers of the Criminal Code under the geographical extraterritoriality provisions appears to be an

9 Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of ASG, JuA, GIA and GSPC*, February 2007, p. 15.

10 Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of ASG, JuA, GIA and GSPC*, February 2007, p. 16.

unlikely prospect. Prosecution of Australians, or foreigners acting in Australia, has a greater prospect of success. Therefore, listing only terrorist organisations which Australians support through financial contributions or by providing personnel makes sense in the fight against international terrorism. As well, listing those organisations that have a presence and operatives in Australia, where there is an immediacy of threat to the Australian community, also makes sense. All else is symbolism that is costly in time and effort and possibly distracting for Australia's anti-terrorism efforts.¹¹

- 1.30 Nevertheless, the Committee was aware that the organisations met the test of the definition of a terrorist organisation in the Criminal Code. The larger discussion about the operations of the proscription power, inherent in the caveat outlined above, are the subject of a broader review currently being conducted by the Committee.
- 1.31 Therefore, the Committee recommended that none of the regulations be disallowed.

Review of the re-listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network)

- 1.32 This organisation was first listed in 2005. On 2 February 2007, the Attorney-General wrote to the Committee advising that he intended to re-list the organisation. The Governor-General made the regulation on 15 February 2007 and it was tabled in the House of Representatives and the Senate on 26 February 2007. The Committee reported on 9 May in the Senate and on 21 May in the House of Representatives.
- 1.33 In its report, the Committee discussed some of the uncertainties connected with the information put forward about this group. Given that it operates within a particularly dangerous war zone, the fluctuations in leadership, the ambiguity about number of supporters and difficulties in attributing responsibility for activities are understandable.
- 1.34 Nevertheless, the organisation itself lays claim to violent attacks on military and civilian targets in Iraq in pursuit of its political goals. To that extent, it meets the definition of a terrorist organisation in the Criminal Code.

11 Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of ASG, JuA, GIA and GSPC*, February 2007, p. 18.

- 1.35 The Committee did not recommend the disallowance of the regulation.

Review of the re-listing of Ansar al-Sunna, Lashkar-e-Jhangvi, Egyptian Islamic Jihad, Islamic Army of Aden, Asbat al Ansar, Islamic Movement of Uzbekistan

- 1.36 These seven organisations were first listed in 2002 and were re-listed in 2005. The Attorney-General advised the Committee of the proposed re-listings by letters dated 2 March, 15 March and 22 March 2007. The regulation regarding Ansar al Sunna was tabled on 26 March and the others were tabled on 8 May 2007. The Committee resolved to deal with all regulations together and on the basis of the papers only. The Committee reported on 12 June.
- 1.37 No information was provided in respect of any of these organisations about links to Australia. The seven organisations within this group are based or originated in places as diverse as Pakistan, Iraq, Egypt, Lebanon, Yemen and Uzbekistan. All began as part of localised political disputes but now have connections with al-Qa'ida. In its conclusion, the Committee noted:

all of these organisations have been localised groups growing out of specific grievances or particular conflicts. For most, it has been the advent of the war on terrorism that has extended their reach and their objectives – to the establishment of a regional caliphate, to providing fighters into other fields of battle, to cross funding through the al-Qa'ida network. Individual conflicts are now seen as part of a larger conflict and they appear to feed on and re-enforce each other, bringing experience and skill learned in one place to other disputes. And, with wars in Iraq and Afghanistan, the focus has broadened from opposition to local 'apostate' governments to a larger enemy in the West.

Nevertheless, the circumstances in which many of these groups operate are often complex and decisions to proscribe an organisation should not be made in an historical vacuum or without a rigorous testing of the evidence. It seems to the Committee that the solutions to some issues still lie, not so much in the outlawing of particular groups, but in undermining support for violence by addressing local problems at the political or economic level or dealing with disputes as part of peace processes, especially settling longstanding disputes in places like Kashmir, Chechnya, and

Palestine and negotiating solutions in Iraq and Afghanistan.

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- 1.38 These views, as with discussion noted in other reviews are the subject of the broader review of the proscription power as a whole. For the purpose of the Act as it stands, all met the definition of a terrorist organisation in the Criminal Code. The Committee did not recommend the disallowance of the regulations proscribing any of them.

Current reviews

- 1.39 Two reviews were in the final stages of drafting at the end of the current reporting period. They are: the fifth review of administration and expenditure and the review of the proscription power.

The International Intelligence Review Agencies Conference 2006

- 1.40 Since 2002, the Committee has sent representatives to the biennial conference of oversight agencies. In 2002 the conference was held in London and, in 2004, in Washington. In 2006, the conference was hosted by the intelligence agencies of South Africa in Cape Town between Sunday, 1 October 2006 and Wednesday, 4 October 2006.
- 1.41 Since its inception in Australia in 1997 the conference has become larger and more elaborate. In 2006, the following countries sent delegates:
- **Australia:**
 - ⇒ Parliamentary Committee on Intelligence & Security;
 - ⇒ Inspector General of Intelligence and Security.
 - **Belgium:**
 - ⇒ Permanent Oversight Committee on Intelligence Services.
 - **Canada:**
 - ⇒ Security Review Committee;
 - ⇒ Office of the Communications Security Establishment Commissioner;
 - ⇒ Office of the Inspector General of the Canadian Security Intelligence Service.

12 Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU*, pp. 28-29.

- **The Netherlands:**
 - ⇒ Review Committee of the Intelligence and Security Services.
- **New Zealand:**
 - ⇒ Inspector General of Intelligence and Security.
- **Norway:**
 - ⇒ Parliamentary Intelligence Oversight Committee.
- **Poland:**
 - ⇒ National Assembly.
- **South Africa:**
 - ⇒ Joint Standing Committee on Intelligence;
 - ⇒ Office of the Inspector General of Intelligence.
- **United Kingdom:**
 - ⇒ Intelligence and Security Committee;
 - ⇒ Office of the Interception of Communications Commissioner.
- **United States of America:**
 - ⇒ Office of the Inspector General, Defense Intelligence Agency;
 - ⇒ Office of Assistant to the Secretary of Defense for Intelligence Oversight;
 - ⇒ Office of Inspector General, National Geospatial Intelligence Agency;
 - ⇒ Office of Inspector General, CIA;
 - ⇒ Office of Inspector General, Department of Defense;
 - ⇒ Office of Inspector General , National Security Agency/Central Security Service;
 - ⇒ Office of Inspector General, Department of State.

1.42 Observers attended from Ghana, Namibia and Tanzania.

1.43 The theme of the conference was 'Balancing National Security and Constitutional Principles within a Democracy.' This theme reflected, in particular, South Africa's historical experience. There was a strong emphasis on protecting rights and civil society and to see threats to security as related to development issues as much as to terrorism. This theme was consolidated during the conference by visits to Robben Island, the opening film depicting the birth of the new, post

apartheid South Africa and the address by Hon Albie Sachs and the Chairperson of the Human Rights Commission, Mr Kollapen.

1.44 The program was as follows:

Monday 2 October 2006

9.45am – 10.30am Opening and Keynote address: National Security in a Global World: Challenges for Intelligence Oversight, Minister for Intelligence Services, South Africa, Hon R Kasrils.

11.00am – 5.00pm

Plenary session: Country Experiences: Oversight Mechanisms – Challenges and Opportunities.

Speakers from South Africa, Canada, the United States and Australia outlined their country mechanisms prior to general discussion.

Tuesday 3 October 2006

8.30am – 12.00noon

Panel discussions:

Topic 1: Establishing an intelligence oversight system: principles to consider. Speakers from South Africa, Canada and USA lead the discussion.

Topic 2: Proactive rather than reactive oversight initiatives. Speakers from the United Kingdom, Australia, and the Netherlands lead the discussion.

Topic 3: National security, human rights and the effectiveness of intelligence oversight. Speakers from South Africa, the United Kingdom and Norway lead the discussion.

1.00pm- 4.00pm

Plenary session: reports and discussion from panels.

7.00pm – 10.00pm

Formal Dinner: Speaker: Hon Justice Albie Sachs, Judge of the Constitutional Court of South Africa. Justice Sachs spoke on the importance of intelligence oversight, accountability and human rights.

Wednesday 4 October

8.30am-9.45am

Plenary session:

Topic: Balancing secrecy and accountability. Speakers from South Africa – Professor N Levy, University of Western Cape; Hon Justice William Seriti, Judge of the High Court of South Africa, Mr S Fakie, Auditor General of South Africa.

10.15am-10.45.

Plenary session:

Topic: Civil society perspective on intelligence – reflections on intelligence and human rights and the role of a citizen. Speakers from South Africa – Mr Narandran Kollapen, Chair, South African Human Rights Commission; Mr Mathatha Tsedu, Editor City Press; Major General Lekoa S Mollo, South African National Defence Force.

11.15- 12.15

Summary discussions.

1.15pm – 2.30pm

Discussions continued.

- 1.45 The next conference is to be held in 2008 and will be hosted by New Zealand.

Issues arising during the year

- 1.46 The Committee was sufficiently resourced in both financial and personnel terms to conduct its work. The scrutiny of the additional three agencies was managed smoothly. There have now been two reviews of administration and expenditure affecting all six agencies.
- 1.47 Some aspects of the operations of the Intelligence Services Act as it affects the Committee may be matters for review in a new Parliament.

Restrictions on reporting to Parliament

- 1.48 For example, the Committee remains of the view that the restrictions on reporting to Parliament under section 7 (1) (c)(i) which includes a

capacity for agencies to request deletions on the basis that the 'information might prejudice the conduct of Australia's foreign relations' is unnecessarily restrictive. Such a restriction does not apply to the Foreign Affairs Committees of the Parliament. The Committee has expressed the view in a previous report that it would like to see those words deleted from the Act and their view remains unchanged.

- 1.49 Restrictions on the operations of the Committee also arise because the work of the Committee has broadened from the original intentions of the Act when it was drafted in 2001. At the outset, the function of the Committee was to conduct annual reviews on the administration and expenditure of the agencies. This work necessarily involves discussions which touch on the capabilities of the agencies. There was, therefore, good reason to include in the legislation restrictions which required the Committee to hold hearings in public only with the permission of the Minister and to table reports only with a clearance by the relevant Minister.
- 1.50 However, the work of the Committee has come to include numerous reviews of legislation. These are comparable to normal parliamentary inquiries and it is the view of the Committee that some distinction might be made between the reviews of administration and expenditure and these legislative reviews. These inquiries seek to take evidence in public from members of the public who have made submissions. Yet it still appears, under schedule 1 Part 3 section 20 (2) that the Committee requires the approval of the responsible minister before public hearings can be held. Seeking clearance, which is a time consuming process for both agencies and the Committee, would appear to be unnecessary where only public evidence or public source material has been taken. The current wording of the act does not encompass this possibility.

Private briefings: ONA

- 1.51 Mr Varghese, Director-General of ONA, declined a request from the Committee to give a private, background briefing to the Committee in the context of a terrorist listing review. Mr Varghese argued that section 29 (3) (h) prevented him from doing so. This section states:

The functions of the Committee do not include:

(h) reviewing the content of , or the conclusions reached in assessments or reports made by DIO or ONA, or reviewing

sources of information on which such assessments or reports are based.

- 1.52 The Committee is disappointed with his interpretation of the Act in relation to this matter. The Committee does not equate a request for background analysis as being the same as a review by the Committee of ONA assessments. Other agencies have been generous in briefing the Committee on background and operational information. The Committee has always been rigorous in the protection of such information. Most agencies recognise an obligation to the Parliament in the broadest sense and they have therefore sought to enable the Committee to understand their operations in order to make sense of their administration and their expenditure. The Committee has respected their trust and appreciated their generosity.
- 1.53 The Committee would also note that section 29 (3)(h), included in the Act as an amendment in 2005, would preclude the type of inquiry the Committee conducted in 2003 into the intelligence on Iraq's weapons of mass destruction.
- 1.54 In this respect, the Committee is mindful of the role of the IGIS in reviewing annually the independence of ONA's assessments. However, the Committee believes that, in the normal course of events, the Committee should be able to be privately briefed by the Director ONA and so have the benefit of the expertise of that office. Therefore the Committee will consider whether it may be necessary for the Parliament to revisit this section of the Act so that this might happen in the future and, where extraordinary circumstances arise, the Parliament has still a capacity to review the work of ONA.

Support for the Committee

- 1.55 To fulfil its statutory and other obligations the Committee is reliant on secretariat staff. In the reporting period, the Committee was supported by four full time parliamentary officers, a secretary, two inquiry secretaries/research staff and an administrative officer. All staff are, as required under the *Intelligence Services Act 2001* (Schedule 1 Part 3 section 21) cleared to the 'level of staff members of ASIS'. There was no change in these staff during the period and the continuity lent valuable experience to the support for the Committee. The staffing levels have been sufficient for the work of the Committee.

THE HON DAVID JULL MP

Chairman

14 June 2007