



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

ESTIMATES

(Budget Estimates)

TUESDAY, 27 MAY 2008

CANBERRA

BY AUTHORITY OF THE SENATE

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**SENATE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

Tuesday, 27 May 2008

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Bartlett, Fisher, Hurley, Kirk, Marshall and Trood

Participating members: Senators Abetz, Adams, Allison, Bernardi, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, George Campbell, Chapman, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Heffernan, Hogg, Humphries, Hurley, Hutchins, Johnston, Joyce, Kemp, Lightfoot, Lundy, Ian Macdonald, Sandy Macdonald, McEwen, McGauran, Mason, Milne, Minchin, Moore, Murray, Nash, Nettle, O'Brien, Parry, Patterson, Payne, Polley, Ronaldson, Scullion, Siewert, Stephens, Sterle, Stott Despoja, Troeth, Watson, Webber and Wortley

Senators in attendance: Senators Abetz, Barnett, Brandis, Crossin, Ellison, Fifield, Fisher, Heffernan, Ian Macdonald, Kirk, Marshall, Mason, Nettle, Parry, Payne, Siewert and Trood

Committee met at 9 am

ATTORNEY-GENERAL'S PORTFOLIO

Consideration resumed from 26 May 2008

In Attendance

Senator Ludwig, Minister for Human Services

Attorney-General's Department

Management and Accountability

Mr Robert Cornall AO, Secretary

Mr Miles Jordana, Deputy Secretary, National Security and Criminal Justice

Mr Ian Govey, Deputy Secretary, Civil Justice and Legal Services Group

Ms Sue Chapman, General Manager, Corporate Services Group

Mr David Finlayson, Assistant Secretary, Public Affairs Branch, Corporate Services Group

Ms Jan Blomfield, Assistant Secretary, Human Resources, Corporate Services Group

Ms Sue-Ellen Bickford, General Manager, Financial Services Group

Outcome 1—An equitable and accessible system of federal civil justice

Output 1.1

Ms Kathy Leigh, First Assistant Secretary, Civil Justice Division

Ms Toni Pirani, Assistant Secretary, Family Pathways Branch

Mr Kym Duggan, Assistant Secretary, Family Law Branch

Ms Sandra Power, Assistant Secretary, Federal Courts Branch

Ms Alison Playford, Assistant Secretary, Administrative Law and Civil Procedure Branch

Ms Kathleen Falko, Acting Assistant Secretary, Intercountry Adoption Branch

Output 1.2

Dr James Popple, First Assistant Secretary, Legal Services and Personal Property Securities Division

Mr James Faulkner, Assistant Secretary, Constitutional Policy Unit

Ms Janette Davis, Assistant Secretary, Office of Legal Services Coordination

Ms Janet Power, Special Adviser, Office of Legal Services Coordination

Output 1.3

Ms Philippa Lynch, First Assistant Secretary, Classification, Human Rights and Copyright Division

Mr Matt Hall, Acting Assistant Secretary, Human Rights Branch

Ms Helen Daniels, Assistant Secretary, Copyright Law Branch

Ms Kelly Williams, Assistant Secretary, Classification Operations Branch

Ms Amanda Davies, Assistant Secretary, Classification Policy Branch

Output 1.4

Mr Bill Campbell QC, First Assistant Secretary, Office of International Law

Mr Greg Manning, Assistant Secretary, International Security and Human Rights Branch

Mr Stephen Bouwhuis, Assistant Secretary, International Law and Trade Branch

Output 1.5

Mr James Graham, First Assistant Secretary, Office of Legislative Drafting and Publishing

Output 1.6

Mr Iain Anderson, First Assistant Secretary, Territories and Native Title Division

Ms Kerri-Ann Smith, Acting Assistant Secretary, Future Acts and System Coordination Branch, Native Title Unit

Ms Tamsyn Harvey, Assistant Secretary, Claims and Legislation Branch, Native Title Unit

Output 1.7

Ms Katherine Jones, First Assistant Secretary, Indigenous Justice and Legal Assistance Division

Mr John Boersig, Assistant Secretary, Indigenous Law and Justice Branch

Dr Albin Smrdel, Assistant Secretary, Legal Assistance Branch

Output 1.8

Dr James Popple, First Assistant Secretary, Legal Services and Personal Property Securities Division

Outcome 2—Coordinated federal criminal justice, security and emergency management activity, for a safer Australia**Output 2.1**

Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division

Dr Dianne Heriot, Assistant Secretary, Strategic Policy Coordination Branch

Dr Karl Alderson, Assistant Secretary, Criminal Law Branch

Ms Sheridan Evans, Assistant Secretary, Identity Security Branch

Mr Craig Harris, Assistant Secretary, National Law Enforcement Policy Branch

Output 2.2

Ms Maggie Jackson, First Assistant Secretary, International Crime Cooperation Division

Ms Anna Harmer, Assistant Secretary, Mutual Assistance and Extradition Branch

Mr Nick Morgan, Acting Assistant Secretary, International Assistance and Treaties Branch

Output 2.3

Mr Geoff McDonald PSM, First Assistant Secretary, Security and Critical Infrastructure Division

Ms Catherine Smith, Assistant Secretary, Telecommunications and Surveillance Law Branch

Mr Mike Rothery, Assistant Secretary, Critical Infrastructure Protection Branch

Ms Belinda Moss, Assistant Secretary, National Security Policy Branch

Ms Annette Willing, Acting Assistant Secretary, Security Law Branch

Output 2.4

Mr Tony Pearce, Director General, Emergency Management Australia

Ms Diana Williams, Assistant Secretary, Emergency Management Policy and Liaison Branch

Mr Karl Kent, Assistant Secretary, Capability and Operational Coordination Branch

Mr Peter Channells, Assistant Secretary, Community and Sector Development Branch

Output 2.5

Mr Martin Studdert, Executive Director, Protective Security Coordination Centre

Mr Jim Dance, Acting Assistant Secretary, Information Coordination Branch

Ms Leonie Horrocks, Assistant Secretary, Policy and Services Branch

Mr Mike Norris, Assistant Secretary, Counter-Terrorism Branch

Mr Mark Brown, Acting Assistant Secretary, Security Coordination Branch

Output 2.6

Ms Elizabeth Kelly, Executive Director

Ms Annette Bouchier, Assistant Secretary, Operations

Ms Jamie Lowe, Assistant Secretary, Business Development and Governance

Outcome 3—Assisting regions to manage their own futures**Output 3.1**

Mr Iain Anderson, First Assistant Secretary, Territories and Native Title Division

Ms Karen Stewart, Acting Assistant Secretary, Territories East Branch

Mr Julian Yates, Assistant Secretary, Territories West Branch

Output 3.2

Mr Tony Pearce, Director General, Emergency Management Australia

Mr Peter Channells, Assistant Secretary, Community and Sector Development Branch

Aboriginal and Torres Strait Islander Social Justice Commissioner

Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and Commissioner Responsible for Race Discrimination

Administrative Appeals Tribunal

Mr Doug Humphreys, Registrar

Ms Megan Cassidy, Assistant Registrar

Mr Steve Wise, Chief Financial Officer

Australian Commission for Law Enforcement Integrity

Mr Philip Moss, Integrity Commissioner

Mr Peter Bache, Executive Director

Mr Nicholas Sellars, Manager Policy and Governance

Mr Brett Adam, Manager Corporate Services

Mr Gavin Larsen, Manager Operations

Australian Crime Commission

Mr Alastair Milroy, Chief Executive Officer

Ms Jane Bailey, Executive Director, Organisational Services

Mr Kevin Kitson, Executive Director, Strategic Outlook and Policy

Mr Michael Outram, Executive Director, Criminal Investigation and Intelligence Strategies

Mr Paul Southcott, Chief Financial Officer

Australian Customs Service

Mr Michael Carmody, Chief Executive Officer

Ms Marion Grant, Deputy Chief Executive Officer

Ms Linda Smith, Deputy Chief Executive Officer

Mr Neil Mann, Deputy Chief Executive Officer

Ms Sue Pitman, Acting Deputy Chief Executive Officer

Mr Chris Ramsden, Acting Chief Financial Officer

Mr Murray Harrison, Chief Information Officer

Ms Maree Bridger, National Director, People and Place

Ms Jaclyne Fisher, National Director, Cargo

Mr Peter White, National Director, Compliance

Ms Jan Dorrington, National Director, Passengers

Mr Geoffrey Johannes, Acting National Director, Trade

Rear Admiral Allan Du Toit, Commander, Border Protection Command

Ms Roxanne Kelley, National Director, Enforcement and Investigations

Mr Nigel Perry, Acting National Director, Maritime Operations Support

Mr Jeff Buckpitt, National Director, Intelligence and Targeting

Mr Demetrio Veteri, National Director, Law Enforcement Strategy

Mr Tom Marshall, Director General, Border Protection Operations

Ms Jo Corcoran, National Manager, Industry Engagement and User Services

Ms Teresa Conolan, National Manager, Planning

Ms Tonie Differding, National Manager, Research and Development

Australian Federal Police

Mr Mick Keelty APM, Commissioner

Mr John Lawler APM, Deputy Commissioner National Security

Mr Tony Negus APM, Deputy Commissioner Operations

Mr Andrew Wood, Chief Operating Officer

Australian Government Solicitor

Ms Rayne de Gruchy PSM, Chief Executive Officer

Mr David Riggs, Chief Financial Officer

Australian Security Intelligence Organisation

Mr Paul O'Sullivan, Director-General of Security

Australian Transaction Reports and Analysis Centre

Mr Thomas Story, Acting Chief Executive Officer

Ms Jane Elizabeth Atkins, Acting Executive General Manager

Mr Alf Mazzitelli, General Manager Corporate, Chief Financial Officer

Mr Darryl Roberts, General Manager Compliance

Mr Russell Wilson, General Counsel

Classification Board

Mr Donald McDonald, Director

Classification Review Board

Ms Maureen Shelley, Convenor

CrimTrac

Mr Ben McDevitt AM APM, Chief Executive Officer

Ms Nicole McLay, Chief Financial Officer

Family Court of Australia

Mr Richard Foster PSM, Chief Executive Officer

Mr Grahame Harriott, Executive Director Corporate Services

Ms Angela Filippello, Principal Registrar

Federal Court of Australia

Mr Warwick Soden, Registrar and Chief Executive

Mr Philip Kellow, Deputy Registrar

Mr Gordon Foster, Executive Director Corporate Services

Mr Peter Bowen, Chief Finance Officer

Federal Magistrates Court

Mr John Mathieson, Chief Executive Officer

Mr Glenn Smith, Deputy Chief Executive Officer

Ms Anne Hicking, Executive Director Corporate Services

High Court of Australia

Mr Andrew Phelan, Chief Executive and Principal Registrar

Ms Carolyn Rogers, Senior Registrar

Mr Jeff Smart, Manager Corporate Services

Human Rights and Equal Opportunity Commission

The Hon. John von Doussa QC, President

Mr Graeme Innes AM, Human Rights Commissioner and Commissioner Responsible for Disability Discrimination

Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner and Commissioner Responsible for Race Discrimination

Ms Elizabeth Broderick, Sex Discrimination Commissioner and Commission Responsible for Age Discrimination

Ms Susan Roberts, Executive Director

Ms Karen Toohey, Director, Complaint Handling

Insolvency and Trustee Service Australia

Mr Terry Gallagher, Chief Executive and Inspector-General in Bankruptcy

Mr Peter Lowe, Executive Director

Mr David Bergman, Adviser, Policy and Legislation

National Capital Authority

Ms Annabelle Pegrum AM, Chief Executive

Mr Phil Wales, Managing Director, Governance

Mr Todd Rohl, Managing Director, Planning and Urban Design

Mr Andrew Smith, Acting Managing Director, Projects

Mr Gary Rake, Managing Director, Finance and Estate
Ms Alison Walker-Kaye, Managing Director, International Relations and Leasing
Mr Peter Byron, Director, Exhibition and Outreach

National Native Title Tribunal

Mr Franklin Gaffney, Acting Registrar
Mr Hugh Chevis, Director Service Delivery
Mr Hardip Bhabra, Chief Financial Officer

Office of the Director of Public Prosecutions

Mr Christopher Craigie SC, Director of Public Prosecutions
Mr John Thornton, First Deputy Director
Ms Stela Walker, Deputy Director, Corporate Management

CHAIR (Senator Crossin)—I declare open this public meeting of the Senate Standing Committee on Legal and Constitutional Affairs. The Senate has referred to the committee the particulars of proposed expenditure for 2008-09 and related documents for the Attorney-General's portfolio. The committee may also examine the annual reports of the departments and agencies appearing before it. The committee is due to report to the Senate on 24 June 2008, and has fixed 10 July 2008 as the date for the return of answers to questions taken on notice.

Under standing order 26, the committee must take all evidence in public session. This includes answers to questions on notice. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and any such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The Senate, by resolution in 1999, endorsed the following test of relevance of questions at estimates hearings: any questions going to the operations or financial positions of the departments and agencies which are seeking funds in the estimates are relevant questions for the purpose of estimates hearings. I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has discretion to withhold details or explanations from the parliament or its committees unless the parliament has expressly provided otherwise.

The Senate has also resolved that an officer of a department of the Commonwealth or of a state may not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to either superior officers or to a minister. This resolution prohibits any questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. Any claim that it would be contrary to the public interest to answer a question must be made by the minister and should be accompanied by a statement setting out the basis for the claim.

I welcome again today the Senator the Hon. Joseph Ludwig, representing the Attorney-General and the Minister for Home Affairs, and Mr Robert Cornall, Secretary of the Attorney-

General's Department. Minister, do you have an opening statement you wish to make this morning?

Senator Ludwig—No, thank you.

[9.04 am]

National Native Title Tribunal

CHAIR—I now welcome officers from the National Native Title Tribunal. Mr Gaffney, do you wish to begin with an opening statement from the tribunal?

Mr Gaffney—No. I am happy to take any questions that the senators may have.

CHAIR—We will go to questions.

Senator BARNETT—Good morning, Mr Gaffney, and thank you for appearing. I have some questions about the Native Title Tribunal regarding the number of cases, the backload and the resources that you have to meet the demands of the tribunal. I wonder whether you could provide a status report of the number of live claims, when they were lodged and the current status of those claims.

Mr Gaffney—As of 31 March, we had 557 native title applications, including 513 claimant applications. Most of those applications are in the Northern Territory, which accounts for 34 per cent. Queensland has 29 per cent, Western Australia has 22 per cent and most of the nonclaimant applications are in New South Wales, which has 91 per cent of nonclaimant applications.

In terms of a progress report on those applications themselves, 135 were determined as of 31 March 2008. Sixty-two of those applications were by consent determinations, 49 were litigated determinations and 24 were unopposed determinations. There are currently 513 claimant applications in the system—119, or 23 per cent, were lodged in or since 2003; 282, or 55 per cent, were lodged between 1998 and 2002; and 112, or 22 per cent, were lodged earlier than that.

Senator BARNETT—Can you do a breakdown of the 112, please?

Mr Gaffney—In what respect?

Senator BARNETT—In terms of the timing—when were they lodged?

Mr Gaffney—They were lodged prior to 1998.

Senator BARNETT—So more than 10 years ago you had 112. What is the oldest application?

Mr Gaffney—The oldest application would be 14 years.

Senator BARNETT—Have you got a date for that?

Mr Gaffney—I do not have a date, but I can take that on notice.

Senator BARNETT—So, of the 112, one application was made at least 14 years ago?

Mr Gaffney—That is correct.

Senator BARNETT—Where is that one at?

Mr Gaffney—I could not give you an answer off the top of my head.

Senator BARNETT—What is the likely prognosis? Do you know if the claim has been heard? How far through the process are you?

Mr Gaffney—We would have to take that question on notice.

Senator BARNETT—If you could. In terms of the process, can you make a general observation of the 112? Most people would ask, ‘Why has it taken more than 10 years to assess the application?’

Mr Gaffney—From a summary point of view of why they take so long, there are a number of points to take account of. The first one is timetabling, management, preparation and assessment of connection material. The second one is the timetabling and working of tenure analysis. The third one is those with overlapping claims. The fourth one is the number of parties involved and assessing their interest in the application itself. They are the four main reasons why applications take so long to get through this system.

Senator BARNETT—Is it fair to say that, if the resources within your capability were increased, that timeliness would improve markedly? Is that one of the reasons?

Mr Gaffney—I would not use the word ‘remarkably’. The Native Title Tribunal works within the system and each of the parties within the system is dependent on the others. So, if you were suggesting—if I am hearing you correctly—that increasing resources in the tribunal alone would increase the rate of resolution, I do not necessarily think that that would be the case. You would have to look at the entire system because each of these areas, whether they are in terms of connection material, tenure, overlaps or reducing and clarifying the interests of the parties, are not just within the remit of the tribunal.

Senator BARNETT—You have 557 applications and 135 have been determined. But I think you said that 513 were current.

Mr Gaffney—Yes. There are 513 current claimant applications.

Senator BARNETT—What is the difference between the 513 and the 557?

Mr Gaffney—They would include claims relating to compensation and non-claimant applications.

Senator BARNETT—What is your prognosis with the 513 that are currently before you? What is your prognosis in terms of time to complete the application and make the claim?

Mr Gaffney—Based on analysis of the 135 applications that we have researched over the last year, we anticipate that it will take in the vicinity of around 30 years for those applications to be determined.

Senator BARNETT—So, it will take another 30 years from today, from 2008, approximately, to complete the tasks before you in terms of the 513 or the 557?

Mr Gaffney—The 513.

Senator BARNETT—Approximately 30 years?

Mr Gaffney—That is correct.

Senator BARNETT—And that is not taking into account other claims that may be made from here forward?

Mr Gaffney—It is. Using our projections and looking at analysis of how many claims have been lodged each year, and factoring that over the forthcoming years—because there would not be 513 claimant applications throughout the entire system; some will be determined and some new ones may come in—we anticipate it will be around 30 years.

Senator BARNETT—How many do you receive per year?

Mr Gaffney—It depends, but—

Mr Chevis—It would be between 20 and 40 a year.

Senator BARNETT—So you are receiving between 20 and 40 claims a year. Is that right?

Mr Chevis—Yes.

Senator BARNETT—Can you describe a standard or an average type of outcome for these claimants? What is the resolution that you provide the claimants?

Mr Gaffney—We mediate. The resolution is actually a matter for the Federal Court and whether it is a determination of native title. They are the ones that they do. We are part of the mediation process. A determination is a matter that goes before the Federal Court. As we said, there can be a consent determination, determination can be by litigation or it can be an unopposed determination. Maybe you could be a bit clearer.

Senator BARNETT—There has been some debate and discussion in the last weeks—and no doubt over a longer period—about improving the system. I am not an expert in the area. What needs to be done to improve the system? Have you made comments or representations to the government or in other places to ensure that we have a better process so that we do not have to wait another 30 years to clear the backlog?

Mr Gaffney—Sure. The president of the tribunal, Graeme Neate, has made a number of speeches throughout last year and this year, looking at alternative ways to speed up the resolution of native title issues in Australia. One of the areas that we have been looking at is the issue of alternative settlements—which are often referred to as comprehensive settlements—and what those settlements may entail. In order to look specifically at the issue of alternative settlements requires a number of things: agreement of the parties, parties acting in good faith and with good will and parties looking at the interests at the outset. There are a number of areas but primarily the tribunal takes the view that it is a matter for the parties to approach the agreement-making process in a non-adversarial way, to be able to establish their interests at the outset and to determine the issue of connection—one of the major issues that we do see in the tribunal—at the earliest possible opportunity rather than halfway through the process. That leads to issues such as consistency in connection guidelines and state government policies on how to deal with connection. There is a myriad of issues. We at the tribunal believe that alternative settlements could be a way forward in order to reduce, as we indicated, the 30-year time frame for actually seeing a resolution in native title issues.

Senator BARNETT—You believe the 30-year time frame is unsatisfactory?

Mr Gaffney—We would like to see the 30-year time frame reduced, yes.

Senator BARNETT—What benefits would the recommendation or proposal put by your president to use the alternative settlement process have—for example, in reducing the backlog and the time frame? Would there be other benefits?

Mr Gaffney—In terms of the time frame, if you look at determinations that have been litigated or determinations that have arisen as a result of negotiations, you see that there is a slight decrease in the amount of time that it takes for a negotiated termination rather than a litigation determination. But I think that, if alternative settlements were an option, you would probably see a greater benefit being derived by the claimants in the applications if a determination were successful in their case—that is, both economic and non-economic benefits deriving from the agreement that has been reached.

Senator Ludwig—Can I add something?

Senator BARNETT—Yes, Minister.

Senator Ludwig—On the 30 years that have been mentioned, it appears to me that this all grew up under the previous government's watch.

Senator BARNETT—Sorry?

Senator Ludwig—It seems to me that this projection of 30 years to determine cases grew up under the previous government's watch. The previous government, to its credit, did recognise it late, as I understand it. I recall, having dealt with it in the Senate, that the previous government did make some attempt to streamline the process by passing legislation, although I think it was—to put it mildly—controversial at the time as to whether it would make a significant impact or not. But we were prepared, from an opposition's perspective at that time, to attempt to do what we could to streamline the process to ensure that long-tail cases were resolved early. However, it seems to me that—

Senator BARNETT—You have already done that, have you?

Senator Ludwig—No, that was the previous government's attempt. We joined with them in any proposal that might streamline the process because, clearly, the delays that grew up in the last 11 years were significant. The Attorney-General, as I understand it, has now said that he is also keen to work with and streamline the system to improve it. Of course, the 30-year projection would be based on the current circumstances being projected forward—that is, the current situation that the previous government left us in being projected forward. What the Attorney-General is keen to do, as I understand it, is to actually work with the participants and look at alternatives to streamline the process and bring that number significantly downwards.

Senator BARNETT—Can you outline what those alternatives are?

Senator Ludwig—Not at this stage. The extent to which the Attorney-General is keen to look at this area and does recognise that the area requires attention. My understanding is that, in due course, he will make some announcements about it.

Senator BARNETT—So you cannot provide any specificity in terms of recommendations or proposals going forward?

Senator Ludwig—As I said, in due course the Attorney-General will make some announcements about this.

Senator BRANDIS—Perhaps I could pursue this matter a little further, Minister. Have you seen reports that were in the *Australian* newspaper last Thursday of Minister Macklin's third annual Eddie Mabo lecture, delivered in Townsville last Wednesday?

Senator Ludwig—I cannot say I have seen it in any great detail. I certainly have not had an opportunity to read the speech at this point in time, but I do recollect the article in some form. The other issue that I wanted to alert you to is that the Attorney-General has on his website a speech where he has outlined some views about this particular area. Likewise, I have not had the opportunity to read that either, but I would encourage you to go there if you were interested.

Senator BRANDIS—We do watch the Attorney-General's website with keen attention.

Senator Ludwig—I am sure you have already read it then.

Senator BRANDIS—Returning to Minister Macklin's speech in which she foreshadowed significant changes to the Native Title Act, it was reported:

Ms Macklin wants direct payments to individuals minimised in favour of payments that create benefits for the whole community—

and that she foreshadowed:

... the Rudd Government would work up a reform package over the next six months in tandem with ... its Indigenous Economic Development Strategy.

The report went on to say:

... she and Attorney-General Robert McClelland would convene a small informal group of key players involved in native title to work through these issues, including ... indigenous academic Marcia Langton and Ian Williams, a member of the Argyle Native Title Trust.

All I want to know, further to Senator Barnett's question—and this, I suspect, is a question for the department rather than for the officers of the tribunal, although it does seem convenient to ask it in this bracket—is where this process is at. Mr Cornall, perhaps you can help me.

Senator Ludwig—We do have someone who can provide some assistance.

Senator BRANDIS—Where is this process at? Has the membership of the working group—or the 'small informal group of key players', as it is described by the press report—been identified?

Mr Anderson—I might actually start with the question before that, about the Attorney's reforms. I just want to say that, in his speech, the Attorney talked about the need for the behaviour of parties to change rather than for systemic change itself to the framework of the native title system. He was encouraging parties to be more flexible and more creative in how they approached the opportunities for agreement making that native title presents. There is going to be a native title ministers meeting involving all the state and territory native title ministers in July, and that is where there is going to be some further discussion about how to try and take that new approach forward. In terms of Minister Macklin's speech, the consultative group has not yet been announced. I think an announcement is going to happen very soon, but I believe that those people are still being contacted.

Senator BRANDIS—So names of the members of the group have been identified?

Mr Anderson—I believe that Minister Macklin and the Attorney have had some discussions about the identities of the members of the group.

Senator BRANDIS—So they have been chosen; they just have not all been formally approached?

Mr Anderson—I believe that a process is underway of approaching the intended members.

Senator BRANDIS—How long are we expecting it to be before the announcement is made?

Mr Anderson—I cannot say for sure.

Senator BRANDIS—Is it a matter of weeks?

Mr Anderson—Ultimately it is a matter for the ministers as to when it is going to occur, but I believe that it is going to happen relatively soon.

Senator BRANDIS—Was the formation of this body a cabinet decision?

Mr Anderson—We would not actually comment on whether something had or had not been a cabinet decision.

Senator BRANDIS—Why not? I am not asking you what the substance of the decision was; I am simply asking whether a particular decision of government was made at a particular level. I can ask that. At what level of government was the decision to convene this group made?

Mr Anderson—As far as I am aware, it was a ministerial decision.

Senator BRANDIS—Thank you. Will the group have a brief or a remit to work from?

Mr Anderson—I understand that it is proposed that they will have terms of reference and that they will be focused on agreement making within native title.

Senator BRANDIS—Have those terms of reference been prepared or are they currently under preparation?

Mr Anderson—I believe that there is discussion occurring between the Attorney and Minister Macklin as to the precise terms.

Senator BRANDIS—Are they the two principal ministerial players in this process?

Mr Anderson—Yes, they are.

Senator BRANDIS—Will the terms of reference be published?

Mr Anderson—I cannot say. That will be a matter for the ministers.

Senator BRANDIS—Has a decision as to whether or not the terms of reference will be published yet been made?

Mr Anderson—I am not aware of a decision having been made.

Senator BRANDIS—Minister Ludwig, can you help me?

Senator Ludwig—I do not have any information on it either. What I can say is that the usual course of events is that these will be announced by the minister in due course. That is

not surprising; it is their decision as to how they progress these matters and when they progress them.

Senator BRANDIS—I can understand that; I am simply asking whether or not a decision has been made yet.

Senator Ludwig—And I think I answered that in the beginning of my answer when I said ‘not to my knowledge’.

Senator BRANDIS—Can you take that on notice, please, and find out whether the terms of reference will be published? Is it contemplated—and this seems to be the purport of the press report of the Mabo lecture—that this working group will be leading a comprehensive rewrite of the Native Title Act?

Mr Anderson—No, it is not.

Senator BRANDIS—What is it contemplated that the working group will do?

Mr Anderson—The working group is intended to look at the way in which agreement making works and how to make effective and enduring agreements that deliver sustained benefits for Indigenous communities involved in the agreement making.

Senator BRANDIS—So this is kind of a streamlining and enhancing the dispute resolution aspects of this process in effect?

Mr Anderson—I understand that it is particularly motivated by a concern that Indigenous groups entering into agreements might not be seeing the full benefits of those agreements over the life of the agreements.

Senator BRANDIS—So this is not intended to be the basis of a wholesale rewrite of the Native Title Act?

Mr Anderson—That is correct.

Senator BRANDIS—Is it expected that this group will be a bipartisan group?

Mr Anderson—I have indicated that the Attorney and Minister Macklin are still determining the identity of the participants in the group. I cannot say anything further than that.

Senator BRANDIS—I suppose we would be holding our breath to wait for Mr Mal Brough to be invited to be a member of this group, notwithstanding his peerless experience in the field.

Senator BARNETT—In terms of any Mabo speech by Minister Macklin, it was reported in the *Australian* on Thursday last week—and it has been referred to by Senator Brandis—that the minister indicated:

... that the native title legislation was too complex and had failed to deliver money to remote Aboriginal communities, despite lucrative agreements with mining companies.

In the opinion piece in the same newspaper, the minister is reported as having said:

This has led to the negotiation of many agreements across Australia for a range of purposes, including more than 300 registered Indigenous land-use agreements.

Can you, on notice, advise the committee of those agreements and perhaps provide a description or nature of those agreements?

Mr Gaffney—Will do.

Senator BARNETT—The article also reported the minister as having said:

... the changes to native title should be used “as part of our armoury to close the gap between Indigenous and non-Indigenous Australians”.

Some might say that that is slightly tangential to the objective of the Native Title Act. Can you describe for us the objective of the Native Title Act and whether it is consistent with the social objective of closing the gap between Indigenous and non-Indigenous Australians?

Mr Gaffney—The object of the Native Title Act as outlined, I believe, in section 3 of the act is the resolution of native title issues. The preamble of the act does recognise that, for many Indigenous people in Australia, due to where they currently live, native title is extinguished. So there are a couple of objectives in the act in terms of actually achieving social justice. One of the aspects of the Native Title Act looks at a social justice package. At the moment, from the Native Title Tribunal’s perspective, we are looking at the resolution of native title issues rather than the second aspect, the social justice aspect. I cannot speak for the minister. As far as bridging the gap, that is probably an area for her department to speak to. The tribunal itself is just looking at the issue of native title issues.

Senator BARNETT—Just to make it very clear, in terms of the tribunal’s role, you are not looking at the social justice issues; you are looking at the native title claims and assessing those claims accordingly, rather than the social justice claims or social justice issues. Is that correct?

Mr Gaffney—That is correct. From my point of view, I always see native title as part of the social justice issue—part of the entire package.

Senator BARNETT—If that is the case, and if the objective of closing the gap is the government’s objective, we would see very much a wholesale change to the native title assessment process. You do not even have to answer that. I can see the minister reaching. That is a policy.

Senator Ludwig—I think you are making a statement or a speech now.

Senator BARNETT—The minister, in her opinion piece, said that ‘the processes in place to resolve outstanding native title claims are overly complex and exceedingly slow’. Would you agree with that?

Mr Gaffney—I agree that they could be streamlined.

Senator BARNETT—Is that code for overly complex and extremely slow?

Senator Ludwig—Chair, it is still asking for an opinion as to how the legislation would work.

Senator BARNETT—I think the facts speak for themselves. I will not press you further on that—we have a 30-year backlog. The second point she makes is—

Senator Ludwig—That was built up over 11 years—and it is not a 30-year backlog. I think you need to correct the record to the extent that it is not a 30-year backlog.

Senator BARNETT—We are sitting here and now, and we are looking for solutions.

Senator Ludwig—Chair, I just wanted the record corrected: it is not a 30-year backlog. That was not the witness's evidence in this matter. There is a backlog, and I think the witness agreed to what that was.

Senator BARNETT—A backlog of up to 14 years with the prognosis for further years to complete—

CHAIR—Senator Barnett, I think we should give the minister the opportunity to respond.

Senator BARNETT—I note the minister's comment: the backlog is up to 14 years and the prognosis for clearing the backlog is some 30 years. If that is the point he wanted to make, I would agree with that.

Senator Ludwig—That is on the present projections.

Senator BARNETT—Correct. The second point that Minister Macklin makes is:

... those who framed the Native Title Act had not left the system with the best possible representation for native title claimants. There is an inadequate statutory framework for native title bodies, weak accountability arrangements and not enough funding to get the job done.

Mr Gaffney, do you want to respond to that?

Mr Gaffney—I cannot comment. That would be a matter for her department.

Senator BARNETT—The third point she makes is:

... there is uncertainty about how payments flowing to native title holders and claimants should be allocated and administered.

How do the financial benefits flow at the moment?

Mr Gaffney—I do not have in front of me the article or the opinion piece that you are referring to. If she was referring to Indigenous land use agreements that take place, there are a number of ways of actually looking at royalty payments or other forms of payments that flow from them. I am not currently in a position to give you any detailed information as to if there is any commonality in them. That is a matter for negotiation between the parties. So I cannot actually expand on what the minister has indicated there.

Mr Anderson—Could I add something?

Senator BARNETT—Yes.

Mr Anderson—You asked before about Minister Macklin's comments on closing the gap. The issue of payments demonstrates where that can be relevant, because native title of course is not just about the resolution of claims themselves; it is also about future acts—it is about negotiations as to whether certain acts can take place on land that is subject to native title. It is through the agreement making, and the economic benefits that can flow from that, that payments can actually be relevant to closing the gap on Indigenous disadvantage.

Senator BARNETT—I appreciate that. Mr Gaffney, thank you for your comments, your elucidation of the applications and the backlog, and your prognosis for the future. It is appreciated.

CHAIR—As there are no further questions, I thank the Native Title Tribunal for appearing.

[9.33 am]

Administrative Appeals Tribunal

CHAIR—We will now move to the Administrative Appeals Tribunal. Mr Humphries, do you want to begin with an opening statement?

Mr Humphries—No, thank you.

CHAIR—Senator Barnett will start questions.

Senator BARNETT—I will kick it off and Senator Trood may flow through from there. I want to ask about the budget implications and the efficiency dividend. Has the efficiency dividend affected the AAT?

Mr Humphries—The two per cent efficiency dividend equates to approximately \$600,000. We have an approved operating loss this year of \$600,000. It is not anticipated that it will impact on the tribunal's operations in 2008-09.

Senator BARNETT—When you say you have a \$600,000 operating loss this year, do you mean in 2007-08?

Mr Humphries—No, in 2008-09. When I talk about 'this year' I mean 2008-09—I find it easier.

Senator BARNETT—What percentage is the efficiency dividend for you and the AAT?

Mr Humphreys—There is the ordinary efficiency dividend of 1.25 per cent and then there is the additional efficiency dividend of two per cent. It is a total of 3.25 per cent this year. As I said, the two per cent equates to \$600,000. We have approval for 2008-09 to operate at a loss of \$600,000, so there should be no impact on operations.

Senator BARNETT—Where will the impact be in terms of the \$600,000 operating loss?

Mr Humphreys—We will operate at a loss and use reserve funds.

Senator BARNETT—Have you ever done that before?

Mr Humphreys—In some years we have. I cannot tell you off the cuff. We have an accumulation of funds for depreciation and we have been making a surplus. It is anticipated we might make a slight surplus this year, so we are able to in effect take those funds forward and use them in the following year.

Senator BARNETT—What is in your reserves?

Mr Wise—I am not sure exactly. It is around \$7 million in the reserve.

Senator BARNETT—Have you applied to the government for an exemption in terms of budgeting for an operating loss?

Mr Humphreys—We have to have permission from the finance minister to operate at a loss. We made that application and the application was granted.

Senator BARNETT—Which minister?

Mr Humphreys—The Minister for Finance and Deregulation.

Senator BARNETT—Has your agency made any request for a regulation 10 authority from the finance minister in the last 10 months?

Mr Wise—No, we have not. In the previous year, we did apply for several.

Senator BARNETT—At 26 November 2007, what was the total number of permanent and part-time staff at the AAT?

Mr Humphreys—At 27 November? I would need to take that on notice because it goes up and down. We would need to go back. It is roughly what it is at the moment, and that is shown in the PBS. It might be one or two that have varied. What we have at the moment is 166, as shown on page 70 of the PBS. It would have gone up one or two as of that date, but I would need to take it on notice.

Senator BARNETT—So you have definitely increased staffing since that time?

Mr Humphreys—No, I did not say that. What I am saying is that it will be around the same and I would need to go back and get a precise figure for 27 November. It will be within one or two, either up or down depending on the status of our recruitment at that particular point of time, of the figure of 166 that I have given.

Senator BARNETT—Thank you. Could you take that on notice?

Mr Humphreys—Certainly.

Senator BARNETT—Do you undertake media monitoring?

Mr Humphreys—We have a service that on a daily basis provides us with clips where reference is made to the Administrative Appeals Tribunal. We then put those up on our intranet site. It is very low cost, actually.

Senator BARNETT—That is good news. What is the cost and which is the agency that provides the service?

Mr Humphreys—Can I take that on notice?

Senator BARNETT—Of course. When you and your officers undertake travel arrangements, what cost is incurred in that regard? Do they travel economy or business? What policy do you apply to AAT staff?

Mr Humphreys—I need to differentiate staff from members. Members are entitled to travel according to the arrangements that are set out by the Remuneration Tribunal. They are entitled to tier 1 travel.

Senator BARNETT—Which is?

Mr Humphreys—The highest level, which is business class within Australia. They receive a per diem rate for travel.

Senator BARNETT—Can you advise the daily rate?

Mr Humphreys—It varies from place to place.

Senator BARNETT—For travel allowance?

Mr Humphreys—Yes, for travel allowance. It varies from place to place according to the Remuneration Tribunal determination, in exactly the same way as it would for you, Senator.

With the exception of myself and the assistant registrar, who is an SES officer, all other staff generally travel economy class. Wherever we can, we will use discount fares by pre-booking. We will use discount airlines where it is available and suitable. When we are going to a conference or a function where there may be a number of people going, we try to book well in advance—and we receive some cooperation from members in this regard. If we have a conference, members agree to travel economy class to that conference, although they are entitled to travel business class. That is an accepted thing within the tribunal to try to minimise cost.

We have committee meetings on a six monthly basis and we make bookings for members and others who are attending so that they do not get to choose where they stay. We choose a hotel and they then do not receive the per diem rate. We also do other things. For example, we will get sandwiches for lunch, and that will then constitute lunch and then they do not receive a luncheon allowance either. We actually look at everything we can do to try and minimise the cost of travel—even to the extent of using discount fares on the way out but getting a flexible fare on the way back, because you generally tend to know when you are going but it is not as easy to know when you are coming back.

Senator BARNETT—Well done—congratulations. How many AAT members are there and what are they paid?

Mr Humphries—As at 30 June 2007 there were 18 presidential members, 18 full-time members and 56 part-time members—giving a total of 92 members. Of that, one deputy president was on extended leave during that period. Since 30 June there have been four retirements and there have been four new appointments.

Senator BARNETT—Since when?

Mr Humphries—Since 30 June last year.

Senator BARNETT—Can you identify them?

Mr Humphries—Yes. Deputy President Robert Nicholson, previously a presidential member of the tribunal, was appointed on 6 September 2007 for a period of three years—previously Justice Nicholson of the Federal Court. Deputy President Bruce McPherson was appointed in Queensland, from 6 September 2007 to 5 September 2012. He is a former Court of Appeal Judge from the Supreme Court of Queensland. Deputy President Graham McDonald was on leave—he was the principal member of the Superannuation Complaints Tribunal. He left that post and has resumed full-time work with the tribunal.

Senator BARNETT—When was he appointed, or reappointed?

Mr Humphries—He was not reappointed.

Senator BARNETT—Okay he has been there. No, that is fine. Go on please.

Mr Humphries—He has been there—he is in fact one of two members who has tenure and he has come back.

Senator BARNETT—Okay. Next one?

Mr Humphries—The last one was senior member Steven Karas, who was appointed as a senior member in Queensland from 26 September 2007 to 30 November 2012.

Senator BARNETT—So you have had no appointments since November last year?

Mr Humphries—That is right.

Senator BARNETT—Can you provide now, or take on notice, the remuneration for each of those?

Mr Humphries—The remuneration for each of them is set out in the Remuneration Tribunal website. There is a separate amount payable for full-time members and a separate amount payable for part-time members.

Senator BARNETT—If you could flick it back to us on notice that would be appreciated.

Mr Humphries—Certainly.

Senator BARNETT—On notice, can you advise the committee how much sick leave and other leave has been taken in the last 12 months?

Mr Humphreys—By members or staff?

Senator BARNETT—Staff.

Mr Humphreys—Certainly. When you say ‘other leave’, are you talking about annual leave, long service leave—

Senator BARNETT—Yes.

Mr Humphreys—All of it.

Senator BARNETT—Parental leave—whatever.

Mr Humphreys—Certainly. We can do that.

Senator BARNETT—Can you also advise the committee whether AAT members, be they full-time or part-time, have requested leave? Again, could you set that out in a matrix formula?

Mr Humphreys—I should indicate that leave for members, other than recreational leave and long service leave, is at the discretion of the president, under the AAT Act.

Senator BARNETT—But you would have records—

Mr Humphreys—We have figures.

Senator BARNETT—of the leave.

Mr Humphreys—Certainly.

Senator BARNETT—Could you provide that? Thank you.

Senator MARSHALL—How are the \$639 fee for a review of a decision and the \$64 fee determined?

Mr Humphreys—I cannot actually tell you how it was arrived at. What I can tell you is that every two years it is the subject of a CPI adjustment, and it is due for an increase in accordance with the CPI increase over the last two years on 1 July this year.

Senator MARSHALL—So you do not know whether it is based on average cost recovery per case?

Mr Humphreys—It is certainly not that. I would need to go right back to when it was set, but it is an application fee. It bears no relation to the average cost of matters.

Senator MARSHALL—Which then brings me back to the first question of how it was arrived at. Maybe you could take that on notice.

Mr Humphreys—I would have to take it on notice. But it would have been set a long time ago.

CHAIR—Mr Humphreys, thank you for your time today.

Mr Humphreys—Thank you.

[9.47 am]

Insolvency and Trustee Service of Australia

CHAIR—I now welcome officers from the Insolvency and Trustee Service of Australia. Mr Gallagher, do you wish to begin with an opening statement?

Mr Gallagher—No, thanks.

CHAIR—We will go to questions, then.

Senator BRANDIS—Who is the insolvency man?

Mr Gallagher—My name is Terry Gallagher. I am the chief executive.

Senator BRANDIS—Mr Gallagher, I am just looking at Budget Paper No. 4, the summary of the agency resourcing, and I see that the appropriation for the Insolvency and Trustee Service of Australia in this budget is \$56,817,000. That is all under Appropriation Bill No. 1, netting off receipts and special appropriations, but there are no equity interest injections that might complicate the matter between revenue and capital. By my calculations, that is a 1.4 per cent increase over the previous year in actual terms but, when you factor in the assumption made in Budget Paper No. 1 of an inflation figure over the coming year of 3.25 per cent, it is in fact a reduction in real terms of about 2¼ per cent. My question to you is: what cutbacks do you think that you are going to have to make in various areas of your agency as a result of the reduction in real terms of your funding?

Mr Gallagher—We, like all other agencies, have had to accept the two per cent additional efficiency dividend—and of course the ongoing efficiency dividend of 1.25 per cent is factored into our budget—so we will be required to make adjustments across our agency. We have been looking at that. We think that, overall—as I think is indicated in the budget papers—our staffing numbers will reduce from an average staffing level of 290 staff to an average staffing level of 280 staff.

Senator BRANDIS—Are you able to take me to the relevant page in the PBS that contains those data?

Mr Gallagher—They are on page 306, table 2.1. At the end of that table there is an estimate of average staffing numbers.

Senator BRANDIS—So you will have fewer staff. We know—because of the management of the economy already evident from Mr Swan—that the economy is going to be

deteriorating, so we assume there will be more insolvencies; but you will have fewer resources and fewer staff to deal with them. Is that the picture, Mr Gallagher?

Mr Gallagher—It is the case that insolvency numbers are increasing. In last year's budget there was an adjustment made to ITS's budget, which was agreed to be reviewed every two years. Last year there was a workload based adjustment to our budget of something in the order of \$3 million. That is to be reviewed in two years time. That workload budget, it is important to remember, is—

Senator BRANDIS—Sorry to interrupt—by workload budget, do you mean that aspect of your operating budget which is premised on forecasts as to the number of cases you have to handle?

Mr Gallagher—Essentially that is the case, although the Insolvency and Trustee Service has moved onto cost recovery arrangements, so there are fees for a large majority of our services. We recover approximately \$28 million in fees out of our \$36 million total budget. The government has agreed that there not be a fee for some of our services. As our volumes increase, by and large our revenue increases. The government has agreed that, as our revenue increases—which reflects our workload—our resources will be adjusted.

Senator BRANDIS—But that does not help the general creditors, does it, because you are a preferred creditor, aren't you? If you are charging fees, they are charged to the estates, aren't they?

Mr Gallagher—There is a variety of fees for our services.

Senator BRANDIS—But in an insolvency ultimately the fees are going to come from the estate of the insolvent individual or corporation. It gives me no comfort to hear you say, 'Our fees are going to increase,' because as a preferred creditor all that means is that the amount of money available for distribution of the general creditors is going to shrink. That is right, isn't it?

Mr Gallagher—If there are more bankrupt estates, yes. To the extent that there are more bankrupt estates and the fees are taken from those bankrupt estates, the money for our trustee work—which represents less than 50 per cent of our fee revenue—comes from creditors.

Senator BRANDIS—Pardon my ignorance of this, but are these fees set by regulation or are they charged according to the scale of the Insolvency Practitioners Association—or is there some other measure?

Mr Gallagher—The Insolvency and Trustee Service fees are set by a determination by the minister and they are set on the basis of cost recovery—they are set to recover the cost of our services.

Senator BRANDIS—But the economic value of most of your services is going to be the time spent by your officers, is it not?

Mr Gallagher—Yes, essentially our costs are calculated on the basis of the time staff spend.

Senator BRANDIS—So according to what scale is the time of your professional officers costed?**Mr Gallagher**—I do not have the details of our fees here but we have a range of fees

for our services. For example, people can apply to search the bankruptcy register. It is \$22 a search.

Senator BRANDIS—I am not concerned about that; I am concerned about professional time on a time-costing basis.

Mr Gallagher—In terms of professional time for administering bankrupt estates, the fee is based on a flag fall fee of \$3,000 plus 20 per cent of realisations.

Senator BRANDIS—I see, and that is set by the minister. So it is not time costed?

Mr Gallagher—It is not time costed in the sense that we do not charge per hour, but we are required, under the cost recovery regime, to ensure that that fee—that broad fee applying across the board—does recover the cost of our estate administration work.

Senator BRANDIS—I think I diverted you a little from the main point I was pursuing. I want to know where, in this era of economic deterioration and increasing insolvency, you are cutting back, since your budget has been cut in real terms. Where else are you cutting back?

Mr Gallagher—We are cutting back really broadly across our agency. We do not propose that there be any specific services that we will remove. We think that we have the capacity within the organisation to absorb the saving that is required. That response needs to be put in the context of last year—there was a \$3 million budget adjustment for us to reflect workload increase, and we are funded on the basis that that will be reviewed in a year's time. So we have the comfort, I suppose, that as our revenue increases, which reflects our additional workload, then our resources will increase. It is correct that this year an additional two per cent dividend was applied to us, but we think that 10 staff across the organisation is able to be absorbed—not with ease, but will be able to be absorbed without adversely affecting our services.

Senator BRANDIS—I know you are not an economist and these questions are usually more in the purview of economists, but I assume that you also make projections as to the expected movements in the rate of insolvencies. Do you have a projection for the coming year as to the percentage by which personal bankruptcies and corporate insolvencies will increase?

Mr Gallagher—Just to clarify, the Insolvency and Trustee Service is responsible for personal insolvency.

Senator BRANDIS—You do not have any corporate dimension at all?

Mr Gallagher—We do not have any corporate dimension at all; only personal insolvency.

Senator BRANDIS—Then dealing with personal bankruptcies, what are you expecting in the coming year? By what percentage do you expect personal bankruptcies to increase?

Mr Gallagher—The budget papers indicate that we are expecting 37,000 new insolvency proposals this year. That is not a projection. That is essentially the same figure as is the case now. We are not in the business of projecting what they will be.

Senator BRANDIS—No, I understand that. But your operating assumption when you prepare your budget is that there will be 37,000 extra personal bankruptcies in Australia in the coming year. Is that right?

Mr Gallagher—There will be 37,000 new insolvency proposals this year, which is in the vicinity of the current year. Current insolvency levels, year to date, are running at about 1.5 per cent above what they were last year. Trends over the years are for a gradual increase; there are fluctuations year by year.

Senator BRANDIS—Let us take the last year for which, I assume, you would have actual figures. I assume you would have actual figures for 2006-07?

Mr Gallagher—Indeed.

Senator BRANDIS—How many new insolvencies were there in 2006-07?

Mr Gallagher—Just a second—I have the figures here. There are three forms of insolvency: bankruptcy, debt agreements and personal insolvency agreements, or part Xs. In total last year, 2006-07, there were 31,964 new proposals.

Senator BRANDIS—So there were about 32,000 insolvencies across those three categories in the last year for which you have figures.

Mr Gallagher—Correct.

Senator BRANDIS—In the coming year, 2008-09, you are anticipating 37,000.

Mr Gallagher—I need to clarify that. There are proposals and there are administrations. So in the debt disagreement and the part X arena, for example, proposals are put to creditors but not all of them are approved. The 37,000 number is for the proposals that are put forward, and 32,000 are actual administrations commenced last year.

Senator BRANDIS—I do not particularly care to go into that level of detail. All I am concerned about is comparing like with like. What you have told me is that, for the past period for which you have actual figures the number of new proposals was a shade under 32,000.

Mr Gallagher—Correct.

Senator BRANDIS—For 2008-09 the projected figures are 37,000.

Mr Gallagher—No, that is not correct. The figure that I quoted of 37,000 was for proposals. The 32,000 figure that I quoted for this year was for new arrangements entered into. So the figures are not like with like.

Senator BRANDIS—What is the projected figure for 2008-09 that is the relative comparison with the 2006-07 figure you gave me?

Mr Gallagher—The comparison is much the same figure. So 37,000 proposals would, on the current proportions, produce about 32,000 agreements.

Senator BRANDIS—I see. Thank you.

Senator MARSHALL—You got a \$3 million increase in the 2006-07 budget, based on workload. In light of those comparisons that Senator Brandis was talking about, that was based on an obvious significant increase. It would probably be worth while for the committee if you could make those comparisons going back for the last five financial years so that we can see the increase, based on those different categories.

Mr Gallagher—Certainly that information is available. It is in our annual report. When I was before the committee last year, I was asked what that adjustment last year was based on. The answer was and is that we do not endeavour to adjust annually, because there are fluctuations. What the government agreed to was to adjust our budget because of our long-term trend increase. You can go back 10 or 15 years and, even though it fluctuates year on year, there is a progressive increase, a gradual increase, in insolvency numbers. So the adjustment that was made was based on that long-term trend. The way we endeavour to make a future adjustment is to average over a period, so you keep taking an average of years.

Senator MARSHALL—Thank you.

CHAIR—Thank you, Mr Gallagher. That is all we have for you today, it would seem.

[10.03 am]

Australian Government Solicitor

CHAIR—Ms de Gruchy and Mr Riggs, welcome. Do you want to begin with an opening statement?

Ms de Gruchy—No, thank you, Madam Chair.

CHAIR—We will go to questions, then.

Senator ABETZ—I understand that the Queensland bar have ceded to the Tasmanian bar for a few questions, and I thank them for it. I have a few brief questions in relation to some legal proceedings that have been undertaken by Senator Bob Brown. I understand that the costs of them, prior to the High Court challenge, have now come out at a figure in excess of \$800,000. I am wondering whether the Australian Government Solicitor has been or will be seeking costs in relation to those actions. I refer to the Wielangta court case in particular.

Ms de Gruchy—I have no personal knowledge of the issues relating to that matter. I would need to take your question on notice.

Senator ABETZ—Just last week, the High Court ruled 2-1 against Senator Brown's appeal in relation to Wielangta. It found its way through the full Federal Court as well, and the departments of environment and agriculture have just given me an indication that their costs to date—prior to the High Court appeal—exceeded \$800,000. I would assume, with the High Court appeal, we could well be looking at over \$1 million worth of costs occasioned to the Australian taxpayer. Was the Australian Government Solicitor instructed in this matter by the departments?

Ms de Gruchy—As I said, Senator, I have no personal knowledge of the matter.

Senator ABETZ—Does Mr Riggs? I understood that, because Mr Riggs nodded his head when I referred to the case, he understood the case I was referring to.

Mr Riggs—I understood your question, Senator. I do not have any personal knowledge of the matter either.

Senator ABETZ—It was a matter that I pursued last time. I am surprised, given the freshness of the case, that we know nothing about it. But that is fine. I invite you then to take on notice whether or not the Australian Government Solicitor has sought costs. This is a case that has attracted over a million dollars worth of support from the taxpayer, and the Australian

Government Solicitor seems to be oblivious to it—other than being aware that it might have occurred. I am astounded at that, I must say. Possibly you have got a stack of other cases involving members of parliament that incur greater expenses, but I would have thought this would be one that would attract your attention. That is a bit of self-indulgent editorial on my part. Allow me now to get to the questions. Can you indicate to the committee the total costs, including the High Court challenge, that the Australian Government Solicitor has charged other departments; whether or not it has sought costs; and, in the event that it did seek costs, the outcome of that? If it did not seek costs, why did it not seek costs? I think that might cover that particular issue.

In asking that, I would also inquire, in general terms, what the Australian Government Solicitor's attitude is in relation to cost recovery when it is successful in court actions. Usually costs follow the event, and I would have thought that when somebody goes on a frolic of their own and incurs over a million dollars worth of taxpayers' expenditure, it would be something that might be worthwhile being viewed. But I would be interested in the general approach by the Australian Government Solicitor on that.

Ms de Gruchy—Senator, could I please clarify one aspect of the questions taken on notice. That is, the Australian Government Solicitor acts in the capacity of legal adviser and of representing clients. The Australian Government Solicitor would not have a policy view in relation to the recovery of costs. That would be a matter for instruction from our clients. But I am happy to take your questions on notice.

Senator ABETZ—But correct me if I am wrong: you are not simply robots of the department; you are legal advisers. So in the event that the department were to ask you if cost recovery is possible, surely you must have a policy to advise as to how the Australian government should behave as a model litigant in relation to cost recovery. I would have thought that that would be the way that you would be advising departments and that departments would then be liable to follow your advice, given the government's commitment across all agencies—and quite correctly so—to be a model litigant in relation to matters that proceed to the courts.

Ms de Gruchy—Certainly, Senator, we would be in a position to provide legal advice to our clients as to their entitlements in relation to whether or not to recover costs, but it is under the legal services directions a matter for our clients to make decisions as to whether or not they take any particular action based on legal advice given.

Senator ABETZ—But the department is bound to follow the model litigant rules.

Ms de Gruchy—Departments do follow the model litigant principle set out in the legal services directions and are in fact required to comply with other Commonwealth policy in relation to the recovery of moneys, but that is a matter for the department or the agency who has carriage.

Senator ABETZ—They are required to follow the rules of being a model litigant. The department goes to you asking: what does being a model litigant require of us in these particular circumstances? The department would then be bound to follow your advice, would they not, because they would otherwise be in breach of the model litigant rules.

Ms de Gruchy—We certainly are in a position to ask, as requested by clients, as to the implications of the model litigant principle. It is then a matter for our clients to decide what the course of action is that will be taken—mindful of their obligations under the model litigant principle.

Senator ABETZ—Look, they have to follow the model litigant rules. We are agreed on that, aren't we?

Ms de Gruchy—Yes.

Senator ABETZ—Thank you. They go to you and say, 'What do the model litigant rules require of us?' You give advice on that. Is that correct?

Ms de Gruchy—If we are asked to give advice on that, we will certainly give advice on that.

Senator ABETZ—And if you were not asked to give advice would you consider it within your remit of being general legal advisers to advise the department of the model litigant rules? Surely you do not only answer the questions provided to you by the department but also are in the business of providing general legal advice and also advising clients of potential pitfalls, such as being mindful of the model litigant rules.

Ms de Gruchy—Yes, Senator, there are many occasions on which we will offer advice in relation to the model litigant and also when our clients ask us for advice in relation to the model litigant.

Senator ABETZ—That is right. So you offer advice even when you are not specifically asked about it.

Ms de Gruchy—Yes, Senator. If the circumstances are that there is an issue concerning the model litigant principle that we feel it is important for us to draw to the attention of our clients, we will certainly do that.

Senator ABETZ—Excellent. I think we have finally got to the position I was asserting at the beginning. Thank you for that. Could I ask whether legal advice was provided to the Minister for Home Affairs in relation to the whale watch debacle. I do not want to know what the legal advice was; all I want to know is whether legal advice was provided.

Ms de Gruchy—In relation to what matter?

Senator ABETZ—The whale watch debacle, where we spent—as I think we found yesterday—\$1.474 million on a wonderful expedition into the Southern Ocean. It was trumpeted by Mr Debus as being the evidence for a court case which I now understand is no longer going to be pursued. All I want to know is whether legal advice was provided by the AGS in relation to what our international legal options might be.

Ms de Gruchy—To disclose whether or not AGS has provided advice to government is part of the deliberative process of government. As a legal advisor to government I would feel constrained—

Senator ABETZ—Can I suggest Mr Cornall come in on this. I think he might be able to assist you.

Mr Cornall—Thank you Senator. Ms de Gruchy will probably not be aware of a direction that we have received from the Department of the Prime Minister and Cabinet on Friday evening in relation to the question of legal advice and questions of the nature that you are presently asking. The advice says in part:

The government will not generally disclose the content of legal advice.

Senator ABETZ—That is right.

Mr Cornall—It goes on:

However, it will generally be appropriate for an official to disclose whether legal advice has been sought and obtained on a particular issue—

Senator ABETZ—That is right. That has always been the case.

Mr Cornall—

and, if asked, who provided the advice, unless there are compelling reasons to keep such information confidential.

Senator ABETZ—Yes.

Senator BRANDIS—I cannot help thinking, Mr Cornall, that that is the position I put to you in the February estimates, and you and Ms de Gruchy controverted it—so I am delighted to see that the Department of the Prime Minister and Cabinet has made this ruling which is, of course, a proper ruling.

Senator ABETZ—We are back to the Howard era of revealing, which is great to see. Can you tell us please Ms de Gruchy—

Senator MARSHALL—Given those sorts of comments, you may want to recall some of the estimates you were on, Minister, when you never defended that principle.

Senator ABETZ—I did. I was always willing to say whether legal advice had been sought and/or obtained, but I did not disclose the legal advice was, which is quite proper. And that is why I prefaced my question by saying I do not want to know what the advice was. All I want to know is whether advice was sought and Mr Cornall has now indicated to you, Ms de Gruchy, that you are allowed to tell us whether that advice was sought.

Senator BRANDIS—Mr Cornall, would you be good enough to table that document from the Prime Minister's department?

Mr Cornall—Yes, I will.

Senator BRANDIS—Thank you. May I take it that that advice is advice that applies to all departments and officers in all estimates rounds?

Mr Cornall—I understand that is the case. The letter came late on Friday. I am aware that the secretary of the minister's department received a letter in the same terms so I am assuming that is the case.

Senator BRANDIS—I am a little surprised, I must say—and this is not a criticism of you—that this directive first comes to light during the course of the second morning of the estimates round. I would have thought it appropriate for officers in all departments, if that was the government's position, to have made it apparent at the beginning of the estimates, so that

senators could have asked their questions having regard to those guidelines. Nevertheless, it is on the table now, which is good.

Senator ABETZ—Ms de Gruchy, was legal advice sought in relation to the Australian government's opportunities to take international action, or any legal action, against the Japanese government on the issue of whaling?

Ms de Gruchy—Could I just raise for the consideration of the committee that while I understand that what has been put by Mr Cornall to the committee relates to officials disclosing whether or not legal advice was obtained, AGS as a legal services provider is in a slightly different position to an official of a department who may or may not have sought legal advice from an organisation like my own or, in fact, any private sector law firm.

Senator ABETZ—Fair enough, Ms de Gruchy. Minister, did the government seek legal advice from the Australian Government Solicitor in relation to the issue of taking Japan to some legal institution—chances are internationally—in relation to the issue of whaling?

Senator Ludwig—It is public knowledge that advice has been sought in this matter, and the advice will be taken into account by the government in deciding whether to commence a legal action against Japan.

Senator ABETZ—Can I ask how old that brief is? I thought the news now was that the government had been mugged by all the legal advice that the Howard government had received—that is, that taking legal action would be bound to fail—and therefore Mr Debus had agreed not to pursue it any further. I thought that was the latest state of play. Are you telling us that we are still deciding?

Senator Ludwig—The question you asked originally was in respect of whether legal advice had been sought by the government.

Senator ABETZ—That is right.

Senator Ludwig—The advice that I have provided is to the affirmative. The second part was part of the general description of that advice itself. If you ask the second question, I am not aware of the view of the Attorney-General or Minister Debus in respect of having received that advice. If you want, I can certainly inquire.

Senator ABETZ—Yes, I do. Can you please take on notice whether the government will be taking any legal action against Japan on the issue of whaling within the next six months or 12 months—or, indeed, whether any time line has been set in relation to the commencement of any proceedings? I might say it is passing strange that, before you even know whether you have a cause of action, you spend \$1.474 million in obtaining evidence for a matter which you may well not be able to prosecute in any event. Once again, it sounds as though it was—

Senator Ludwig—I take it that that is not legal advice you are providing; that it is a question you are asking.

Senator ABETZ—it was all about spin and nothing about substance.

Senator Ludwig—Is that part of the question as well?

Senator ABETZ—Minister, did the government seek any legal advice in relation to implications for Customs officers on the *Oceanic Viking* in having to provide potential evidence in matters relating to the *Sea Shepherd* activists in boarding Japanese vessels?

Senator Ludwig—I do not have any advice in respect of that particular matter.

Senator ABETZ—Can you take that on notice then, please?

Senator Ludwig—I certainly can.

Senator ABETZ—I wish to backtrack—for which I apologise. In relation to the legal matters with Senator Brown and the costs associated thereto, can I also ask whether any costs are being sought to be recovered in relation to the Port Phillip Bay dredging issue?

Senator Ludwig—I take it that that is directed at the AGS.

Senator ABETZ—Yes.

Senator Ludwig—Did we need to establish at first instance whether the AGS was the instructing solicitor in respect of that matter?

Senator ABETZ—If the AGS was not, undoubtedly you will be told that—or can you tell us now, Ms de Gruchy?

Ms de Gruchy—Are we talking about the dredging matter?

Senator ABETZ—Yes, at Port Phillip Bay, where I understand Mr Garrett has been taken to court by some activists.

Ms de Gruchy—The Australian Government Solicitor was instructing in that matter.

Senator ABETZ—Thank you. In that case, we now have that on notice. Chair, with your indulgence, can I be very cheeky and ask the minister a question—on notice, I would suspect, but it would saving me coming back under ‘general questions’?

Senator Ludwig—By all means.

Senator ABETZ—Thank you. I thought you would not want me to come back.

Senator Ludwig—I was merely saving you from the committee.

Senator ABETZ—I thought you were saving yourself from me, but it is very kind of you to say so, Minister. Last estimates I referred you to an article in the *Mercury* of Friday, 14 December in which there was a request by a group of activists saying that they had written to the Attorney-General asking him to ban lawsuits against environmental activists. They say the lawsuits were designed to stifle dissent, but of course those on the other side say that they had engaged in illegal activity et cetera—and I do not want to go there because that matter is still being litigated.

We were told that a spokesman for Attorney-General Robert McClelland said he would examine the proposal once he received the letter. I think last time I asked whether he had received the letter. I assume by now he has received the letter. Has the Attorney responded to that letter? If so, what was the response and will he make known the government’s attitude to this request? If you have an answer now that is great, but I assume you do not. If that is the case, I am happy for you to take it on notice.

Senator Ludwig—That is correct—we do not have a complete answer to all of the questions that you have put. In the interests of both time and accuracy, I will take it on notice to ensure that there is a complete response to all of the questions that you have asked.

Senator ABETZ—Thank you, Minister, and I thank the committee for that indulgence.

Senator BRANDIS—It might be necessary for the officers to take this question on notice. But I am sure it is a question that, if the relevant officer is not present, could be satisfied by a telephone inquiry, so I would like an answer before the end of the AGS's appearance here this morning, please. Did the Australian Government Solicitor provide advice to the government in relation to the amendments to the Reserve Bank Act which were introduced into the House of Representatives yesterday?

Ms de Gruchy—Again, for the reasons given before, whether or not AGS has provided advice is more appropriately a matter for the government.

Senator BRANDIS—No; that is absolutely unacceptable. You tried this at the last estimates. Plainly, as a direct result of the questions I directed to you at the last estimates, the Department of the Prime Minister and Cabinet have now given a direction to all agencies of government, including yours. Let me read you Mr Moran's letter:

... it will generally be appropriate for an official to disclose whether legal advice has been sought and obtained on a particular issue, and, if asked, who provided the advice ...

That is a direct quote from Mr Moran's letter. I am not asking you to breach any professional principle of client confidentiality. I am not asking the content of the advice. I want to know whether the Australian Government Solicitor provided advice to government in relation to the Reserve Bank amendment bill currently before the parliament. I insist on an answer.

Ms de Gruchy—As you indicated, I am not personally in a position to provide an answer.

Senator BRANDIS—I am not suggesting you are. But I, on behalf of the committee, take the most severe objection to the ground you advanced a moment ago, which is also the ground you advanced in the February estimates. The position you take is no longer even supported by the government itself. So can we find out who the officer was, if advice was given in relation to this matter? I am not going to ask you the content of the advice. Can we find out if advice was given to the government in relation to the current amendments to the Reserve Bank Act that are before the parliament?

Ms de Gruchy—You indicated before that you would like that advice before the Australian Government Solicitor finishes giving evidence today.

Senator BRANDIS—Yes.

Ms de Gruchy—As I say, I can only take the question on notice to refer that. I have no knowledge of whether we will be able to provide an answer within that period of time. I can endeavour to do so.

Senator BRANDIS—I am sure there are officers back at the AGS who are watching the broadcast of these estimates. This is currently a matter before the parliament and therefore is a time-sensitive matter. What I am asking you to do, Ms De Gruchy, in the morning tea adjournment, which is about to happen, is to make a telephone call, or have one of your staff

make a telephone call, so that an answer to my question can be provided by 11 o'clock. Thank you.

Proceedings suspended from 10.30 am to 10.50 am

CHAIR—We are now continuing our questions for the Australian Government Solicitor.

Senator BRANDIS—I do.

Senator Ludwig—Whilst Senator Brandis is preparing his questions, regarding the issue of seeking legal advice, we had an opportunity during the break to find out from PM and C as to the position of AGS in respect of that. The general view, I am informed, is that it is correct that that information will be provided by the relevant government department. In other words, if you are seeking legal advice, the general answer is no; if you are seeking the subsidiary questions that I think you have asked in the past and have asked today, then the most appropriate place to direct that is to the relevant department at the relevant committee. The reason is that, if there are questions about whether or not the information may itself disclose information that may not have been anticipated, then it would be the relevant department that would be in a position to claim the matter is outside of what they could reasonably provide to a committee. They may also raise the issue that it is a matter that might, for argument's sake, go to national security or some other case.

In respect of AGS, it is, as you can appreciate, a client of the department. It is placed in two issues. One, it provides a competitive market in legal services to the government. Two, it provides confidential advice to government departments where legal privilege would be attracted. Therefore, there are two ways we can proceed. We can ask AGS whether they can obtain, in respect of the information that you seek, clearance from the relevant department—I think that is a difficult direction to proceed—or you can direct the question to the relevant department to provide that advice that you seek in respect of whether legal advice was sought, the date and the usual matters that you have raised before.

In the intervening time, as I understand it, the AGS has been able to contact Treasury. I am not sure of the response to date, and we can find that out.

Senator BRANDIS—Who told you that?

Senator Ludwig—I was informed by Mr Cornall during the break. That is why I wanted to—

Senator BRANDIS—So you are passing on something Mr Cornall knows about. Mr Cornall, who told you that?

Mr Cornall—Mr Govey made inquiries over the break. I am looking again at the letter that you have in front of you—

Senator BRANDIS—Before you go on, let me ask a couple other little questions. Mr Govey, who told you that?

Mr Govey—I had discussions with both the Prime Minister's office and the Attorney-General's office during the break.

Senator BRANDIS—The people to whom you spoke in the Attorney-General's office and the Prime Minister's office were not officers of either department; they were ministerial staff? Am I correct?

Mr Govey—That is correct. I was also informed, second-hand, during the break that there had been discussions with the relevant person in the Department of the Prime Minister and Cabinet, but I did not speak to that person myself.

Senator BRANDIS—Who is the relevant person?

Mr Govey—Mr Alex Anderson, who is an assistant secretary in the Department of the Prime Minister and Cabinet.

Senator BRANDIS—Mr Cornall and Mr Govey, none of these people, whether they be ministerial staff—and let us not put too fine a point upon it, who are political operatives in ministerial offices or are an assistant secretary in the Department of the Prime Minister and Cabinet—sit above Mr Terry Moran, the head of PM&C in the hierarchy. To the extent that there is an inconsistency between this direction given by Mr Moran, in his capacity as the senior public servant of the nation, and political operatives in the Prime Minister's office, then I think we should consider ourselves, should we not, bound by or at least primarily guided by what Mr Moran has had to say?

Mr Cornall—I agree with that, and I would like to take you to Mr Moran's letter. The letter itself, at this stage, is only directed to departments, the names of which we also ascertained over the break, and it says:

... it will generally be appropriate for an official to disclose whether legal advice has been sought and obtained on a particular issue, and, if asked, who provided the advice, unless there are compelling reasons to keep such information confidential.

That clearly indicates to me that the intention of this letter is that the department which asked for the advice and received the advice should disclose who it sought the advice from. If, for example, we sought advice from the AGS, we would advise you that we sought advice from the AGS. I do not think you can read into this paragraph a requirement that the AGS should respond that the department sought advice from it. 'It' is the service provider and this letter is directed to government departments to disclose to you on request from whom they sought advice.

Senator BRANDIS—I am not so sure I agree with you. I appreciate the difficulty here that the AGS, in effect, has a double capacity. It is an agency of government and it is also, as Ms de Gruchy has pointed out more than once, a competitor with private legal practitioners for the supply of professional services to government. And, in the latter capacity, its officers are of course subject to the professional ethical obligations and obligations of confidentiality that attach to any solicitor giving advice to any client. The difficulty I have with what Ms de Gruchy has said to us is that she is privileging the latter capacity over the former capacity. Can I suggest to you, Mr Cornall, that it is not tenable to pretend that the former capacity—that is, an agency of government, answerable to the parliament, through the estimates process—does not exist. Therefore, I respectfully suggest to you and to Ms de Gruchy that, in trying to reconcile a potential inconsistency between the obligations that attach to each of those capacities—that is, the obligation as an agency to parliament and the obligation as a

professional services provider to the client—one has to adhere strictly, as Mr Moran does in his letter, to the principle that the content would never be disclosed and ought not to be sought by a senator, but that merely essentially administrative questions or causal questions which do not reveal the content of the advice should be responded to.

Senator Ludwig—In those instances—

Senator BRANDIS—Minister, I am asking Mr Cornall.

Mr Cornall—If you simply apply the request or the direction from the Department of the Prime Minister and Cabinet to Ms de Gruchy then the answer will be that she has not sought advice on an issue and she has not been provided with advice on an issue.

Senator BRANDIS—I am asking her on behalf of the agency, obviously.

Mr Cornall—I am saying that the AGS has not sought advice on an issue; nor has it been provided with advice on an issue. This instruction simply does not apply to someone in the unique situation that the AGS is in. I agree with you that it is in a unique situation and I agree with you that it has a dual capacity. But I think, given the importance to the AGS of getting this question right, we should be allowed time between now and the next estimates to clarify its position with the government so that it is then very clear about what it should and should not do in this situation.

Senator BRANDIS—I do not think this is time-wasting; I think this is an extremely important principle, Mr Cornall. I think it is a useful use of at least a few minutes to debate it with you, since you have been good enough to indicate that the appropriate people will consider the matter carefully and formulate a further response. I think we are debating a very important constitutional principle. The observation you just made to me is premised on the assumption that Mr Moran's letter is to be read from the point of view of the recipient of the legal advice only. Can you point me to the sentence or phrase in Mr Moran's letter which is the strongest for your argument that it is to be looked at from the recipient's point of view only?

Mr Cornall—The second sentence in the third paragraph.

Senator BRANDIS—The sentence beginning with the word 'however'?

Mr Cornall—Yes.

Senator BRANDIS—It says:

However, it will generally be appropriate for an official to disclose whether legal advice has been sought and obtained on a particular issue, and, if asked, who provided the advice, unless there are compelling reasons to keep such information confidential.

Pausing there, is there any other sentence or phrase in the letter to which you would point to support your argument that this letter is to be read from the point of view of the recipient of the legal advice only?

Senator MARSHALL—That might well depend on who it is addressed to.

Senator BRANDIS—Thank you for that very astute observation, Senator Marshall.

Mr Cornall—Yes, that point about to whom the letter is addressed is relevant. At this stage it has only been addressed to departments on the basis of our inquiry.

Senator BRANDIS—I was going to ask you about that. Has a copy of this letter gone out to the secretary of each department or just to you?

Mr Cornall—We did answer this before, and I said I believe that it has been sent to all departments.

Senator BRANDIS—I am sorry; I must have missed that.

Mr Cornall—It certainly was sent to the secretary of the minister's department. I assume it has gone to others. We think that is the case.

Senator Ludwig—And it is also worth drawing attention to the penultimate paragraph on the first page, which says:

In deciding whether it is appropriate to release the content of legal advice, a minister will balance the public interest in disclosure with the protection of the Government's legal interests.

This brings about a position whereby someone who has sought the legal advice can decide on that balance, rather than, in this instance, the Attorney-General, over the AGS as an agency.

Senator BRANDIS—I understand your point, Minister. This is obviously an issue that could only ever arise in this estimates committee, because this is the only estimates committee to which the AGS is directly answerable.

Mr Cornall—The other point is that a lot of the advice received by government would not be given by the AGS because of the panel and other arrangements.

Senator BRANDIS—Quite.

Mr Cornall—So when you read this, to think that it applies to the providers of legal advice does not make logical sense, because a great number of them will not be subject to this sort of direction.

Senator BRANDIS—I do not think it is illogical. All you are identifying is a lacuna in the coverage of the letter. That is not an illogical error.

Mr Cornall—That is why I am suggesting that we ought to resolve this matter, because it is important and we might as well get it right for the future between now and the next estimates.

Senator BRANDIS—All right. I must confess that, although I see your point, Mr Cornall and Senator Ludwig, I do not necessarily think that the reading you prefer of the sentences you have identified is the only reading of the letter. Nor does the fact that the addressees of the letter are the departmental secretaries seem to me to be a conclusive consideration, having regard to the fact that the AGS is an agency within the Attorney-General's portfolio and therefore, as the secretary of the department, you have some overall responsibility and the Attorney-General has overall responsibility for the AGS as an agency. Your observation would only apply, logically, if the purport of the letter were limited to departments, not agencies.

Mr Cornall—No, I do not think that is right. I think the purport of the letter is that it is directed to the recipients of the advice to decide whether they wish to disclose that advice. It is not directed to the provider of the advice.

Senator BRANDIS—I accept that that is an available reading of the letter. I do not regard it as the only reading of the letter. At best, I think the point is ambiguous, having regard to the fact that the sentence that you have identified is the sentence which most strongly bears out your point. And, having regard to that fact, if there is an area of uncertainty as to whether or not this direction applies only to the recipient and not to the provider of legal advice, might I refer you to Senator Faulkner's speech on 19 April 2008 on the issue of the accountability of government, in which he commits the Rudd government to resolve any areas of ambiguity with a bias in favour of disclosure rather than a bias against disclosure.

Mr Cornall—I did not get a chance to mention this before but I think the last sentence also supports the view that the decision to release advice and so on should be made by the recipient of the advice or the minister responsible, not by the provider of the advice because—

Senator BRANDIS—I am not asking for the release of advice, I am asking for information concerning the circumstances in which advice may or may not have been provided.

Mr Cornall—Yes, but I am just adding this observation, that the sort of decisions that are being contemplated there are not appropriate decisions for the provider of the advice to make their decisions for the recipient of the advice to make.

Senator BRANDIS—I think you have a fair argument, Mr Cornall, but I do not think it is a conclusive one. In view of the fact that there is ambiguity about this matter, in my opinion, and given the government's declared intention to resolve ambiguous cases in favour of disclosure, I am going to persist. So let me put my question. I can probably anticipate what the answer is, but let me put the same question to you, Ms de Gruchy. Did the Australian Government Solicitor provide advice to government in relation to the amendments currently before parliament to the Reserve Bank Act?

Ms de Gruchy—During the break I was able to ensure contact was made with the Treasury. The Treasury is the department responsible for the administration of the Reserve Bank Act, and Treasury advises that it is in a position to confirm that it sought advice from the Australian Government Solicitor in relation to the amendment legislation.

Senator BRANDIS—Well, that is a neat way around this Gordian knot, Ms de Gruchy—congratulations! Did Treasury receive advice from the Australian Government Solicitor?

Ms de Gruchy—I think a corollary of that is that the Australian Government Solicitor is advising the Treasury on the matter. I am not in a position and could take on notice whether that advice is concluded or not concluded.

Senator BRANDIS—What I would like to ask you then, whether it is concluded or not concluded, is: if advice has been provided in writing, what was the date or the dates—if there was more than one piece of advice—on which the written advice was provided? Further, if counsel were briefed, can you give me the name of the counsel, the date the instructions were given to counsel and the date on which counsel's advice was received? Can you take those questions on notice, please?

Ms de Gruchy—I will take them on notice, Senator.

Senator BRANDIS—I anticipate a further elaboration and refinement of Mr Moran's letter at the next estimates round, Mr Cornall. I am very pleased in view of this list that I asked

those questions at the last estimates round, or we might not have even got this far. Is this department or the Attorney General's department the appropriate place for me to ask questions about legal purchasing?

Mr Cornall—During this department's outcome 1, Senator.

Senator BRANDIS—I thought that might be the case. Can I ask you some questions, please, about the briefing practices of the Australian Government Solicitor? Is there a document, Ms de Gruchy—and, if so, could it be produced, please—which sets out the current briefing rules for the briefing of private counsel by the Australian Government Solicitor?

Ms de Gruchy—There are two relevant documents. There is the Attorney-General's Legal Services Directions, which includes the direction as to the briefing of counsel—the counsel engagement direction. In addition to that we have an internal professional standard that relates to the briefing of counsel, which supports the Legal Services Directions. That document is an internal document of the Australian Government Solicitor and, for confidentiality and competitive reasons, we do not provide any of those documents in a public sense.

Senator BRANDIS—So neither of the two documents are public documents?

Ms de Gruchy—The Legal Services Directions document is a public document.

Senator BRANDIS—What is the title of the professional standards document—the second of the documents that you referred to?

Ms de Gruchy—I am not quite sure of the exact wording but it would be something like 'National professional standard 2', which relates to the briefing of counsel.

Senator BRANDIS—What was the first document that you referred to?

Ms de Gruchy—The council engagement direction—a legal service direction on the engagement of counsel.

Senator BRANDIS—Is that a public document?

Ms de Gruchy—Yes.

Senator BRANDIS—Has that been amended since the election?

Ms de Gruchy—I am not aware of an amendment to that document. That would be a matter for the department.

Senator BRANDIS—Can you check that for me, please? Can you help me, Mr Cornall or Mr Govey?

Mr Govey—I do not think it has, but we can check on that and let you know.

Senator BRANDIS—That is fine. Thank you. None of this is terribly urgent, so you can take that on notice. When was the confidential document first issued within the AGS?

Ms de Gruchy—It would have been closer to 1999. When the Legal Services Directions first came out in 1999 we ensured that, from an internal perspective, we were mirroring the requirements of the direction.

Senator BRANDIS—When was the internal document last amended?

Ms de Gruchy—We may have had some minor amendments to the document over the years. We are currently contemplating some changes. I have not yet signed off those changes. Some changes simply relate to some of our internal procedures in relation to the processing of counsel invoices but there is nothing substantive.

Senator BRANDIS—So there have been no substantive amendments to the internal document since the election?

Ms de Gruchy—That is correct.

Senator BRANDIS—And there are no substantive changes to the document in contemplation? Leave aside processing counsel invoices. I do not regard that as a substantive matter, though of course barristers would. So, other than that, there are no substantive changes to that document in contemplation?

Ms de Gruchy—It is interesting that at present the Office of Legal Services Coordination within the Attorney-General's Department is doing some consultation in relation to some broad aspects of legal services procurement and provision in the Commonwealth. One of those areas for discussion has been in relation to the briefing of counsel. Should that emerge in any change to the Legal Services Directions in relation to the engagement of counsel and that meant that we should change our internal procedures, then we would. So, in terms of whether it is in contemplation, it is possible that, within the shorter term rather than the longer term, there may be a change.

Senator BRANDIS—All right. So what you are telling me, if I may put it in my own words and correct me if I am misapprehending you, is: you are aware that there is another office, the Office of Legal Services Coordination, which does have changes in contemplation. If the Office of Legal Services Coordination does change the principles, that will bear upon you and, in that event, you would expect to make complementary changes. But it is only in that derivative sense that you have any changes in contemplation. Is that right?

Ms de Gruchy—That is correct, and I am not aware if there are changes in contemplation. All I am saying is that it is an area for current discussion and, if it were to emerge, then yes, in that derivative sense we would consider changing our internal policy.

Senator BRANDIS—Were you consulted by the Office of Legal Services Coordination for the purposes of their current consideration of these matters?

Ms de Gruchy—The Office of Legal Services Coordination are engaging in a broad consultation which includes AGS as a significant provider of legal services in the market—

Senator BRANDIS—So the answer to my question is yes.

Ms de Gruchy—Yes, and we would expect to continue to consult.

Senator BRANDIS—Okay, the answer is yes. Did you make a written submission to the Office of Legal Services Coordination for the purposes of this exercise?

Ms de Gruchy—We have not to date, although we understand that the Office of Legal Services Coordination would be quite open to AGS providing a submission.

Senator BRANDIS—Is it AGS's intention to provide a written submission?

Ms de Gruchy—We are contemplating that at the moment.

Senator BRANDIS—When will you make a decision?

Ms de Gruchy—It is very topical. The Office of Legal Services Coordination has asked for any comments that legal services providers might wish to make by, I understand, 3 June.

Senator BRANDIS—All right. The date for questions taken on notice is 11 July, so would you please, in the event that you do make a submission to the Office of Legal Services Coordination, provide to the committee—in camera, if necessary—a copy of that submission, please.

Senator Ludwig—I do not think it can be made to the estimates committee in camera. These are public hearings and any document tendered would be a public document, as I understand.

Senator BRANDIS—But as you know, Minister, there is a practice in estimates committees to provide documents on a confidential basis.

Senator Ludwig—Not for estimates committees, no; that is not my understanding but I would defer to the chair. In a standard committee that would apply but in estimates committees these are public hearings and there is no basis for providing confidential material.

CHAIR—That is correct. My opening statement will attribute to that.

Senator BRANDIS—Then can I ask you to provide a copy of the document to the committee, Ms de Gruchy, in the event that a decision is made to make a written submission.

Ms de Gruchy—Senator, at the moment we are contemplating in what manner we might provide a submission. I understand that the Office of Legal Services Coordination has sought submissions that could be confidential or open. So in that situation we have not yet addressed the detail of whether some of the things that we might wish to put in a submission might be more appropriate to be confidential because of perhaps the competitive position that we are in, or whether in fact it will be open.

Senator BRANDIS—All right. In the event that you make a decision to make a submission, in the event that it is in documentary form, and in the event you can mask confidential parts of the document and you are able to provide it to the committee, can that be done please?

Ms de Gruchy—Yes, Senator.

Senator BRANDIS—Have there been meetings between the AGS and the Office of Legal Services Coordination in relation to this matter?

Ms de Gruchy—Yes, there have.

Senator BRANDIS—Were those meetings minuted or was there some record made of the proceedings and substance of the meetings?

Ms de Gruchy—We have had meetings with the Office of Legal Services Coordination over a very long period of time. If you are referring to the specific areas under consideration at the present—

Senator BRANDIS—I am.

Ms de Gruchy—there have been meetings. In some cases it would be a discussion not minuted. In other cases there may have been preparatory notes prepared. I am not aware of any particular minuted conversations from our perspective other than perhaps file notes of some parts of the conversation that would be an aide memoire in relation to considering issues.

Senator BRANDIS—I understand that there are different gradations of formality from formal interagency meetings down to what was once famously called in another context ‘tearoom gossip’. What I am interested in knowing is whether there have been any meetings at which the position of the AGS in relation to the OLSC’s review has been conveyed in circumstances of such formality that a record was made. Could you please look at that for me?

Ms de Gruchy—I am personally aware of the fact that I have been involved in a meeting with the OLSC where I would have a record of some aspects of that conversation—so, yes, there have been.

Senator BRANDIS—Could copies of the relevant records please be produced to the committee.

Ms de Gruchy—Those are confidential internal documents.

Senator BRANDIS—Hang on a second—are they only confidential because they are internal documents? That is not a ground for declining to produce them. There has to be a further ground for confidentiality beyond saying, ‘This is a document created inside the public service or inside a public agency.’

Ms de Gruchy—They are discussions that relate to our views in relation to various aspects of legal services in the Commonwealth. At the time that meetings are held, it is generally understood that these are part of the deliberative process of government.

Senator BRANDIS—I have asked you to produce them. If you object to producing them, no doubt in your answer to my question on notice you will state that objection. But let’s cut to the chase here—what are your views? What are the views the Australian Government Solicitor has expressed to the Office of Legal Services Coordination in relation to its current review of briefing practices and other related matters that have been the subject of these paintings?

Ms de Gruchy—I am not aware of us expressing any particular views in relation to briefing practices of the Commonwealth.

Senator BRANDIS—What have you been talking about with them?

Ms de Gruchy—There would be perhaps seven or eight topics on which the OLSC has sought information and suggestions from a broad range of agencies and legal services providers. Could I clarify an earlier answer to a question?

Senator BRANDIS—Sure.

Ms de Gruchy—When you asked me, ‘Have notes been kept of meetings between AGS and OLSC?’, I should have answered that, in relation to one aspect of those consultations,

AGS has been advising the department in relation to the standardisation of tendering processes.

Senator BRANDIS—I am not interested in that—do not worry about that. I am interested in what the OLSC is up to—it has attracted my interest. Of these seven or eight matters for which the OLSC is seeking the views of different agencies and relevant entities within the government, has the AGS been consulted in relation to all of them?

Ms de Gruchy—In the same manner as other agencies and legal services providers, yes.

Senator BRANDIS—What are the seven or eight topics?

Ms de Gruchy—Mr Govey might wish to answer that question.

Mr Govey—Senator, I can help you with those. The first one on my list is whether or not to establish a whole-of-government legal services panel or an optional legal services panel for smaller agencies that cannot otherwise access a panel. The second one is whether there should be—

Senator BRANDIS—Can you go a bit slower? I am taking notes.

Mr Govey—Did you want me to repeat the first one?

Senator BRANDIS—No—next one please.

Mr Govey—The second one is whether there should be more direct briefing of barristers in relation to advice work. The third one concerns the issue of increased responsibilities for OLSC such as monitoring of procurement arrangements, providing information about best practice and developing a standardised tendering package including a common-form contract. The next one is whether there should be an increase in legal services expenditure reporting requirements—that is, enhanced reporting requirements for legal services expenditure.

The next one is to give effect to a stronger emphasis on alternative dispute resolution in relation to government legal disputes. Next is the use of local law firms in regional areas. Next is equal opportunity for women in Commonwealth legal services procurement. Finally, whether steps can be taken to encourage legal service providers to the Commonwealth to undertake pro bono work.

Senator BRANDIS—All right, Mr Govey. I will stay with you on this, since you seem to have it all at your fingertips. Where is this process? How far advanced is this process?

Mr Govey—I think it is at the stage of discussions taking place and views being expressed so that recommendations can be made to the Attorney-General for changes to Legal Services Directions and to other procurement practices. I am aware that, so far, there have been meetings convened—and indeed I chaired one of the meetings in Canberra—where AGS, private law firms and government agencies were invited to come along and talk about these issues.

Senator BRANDIS—In what capacity did you chair the meeting?

Mr Govey—I chaired the meeting as an officer of the Attorney-General's Department.

Senator BRANDIS—Is the Attorney-General's Department the lead agency here?

Mr Govey—Yes, the Office of Legal Services Coordination is effectively a branch within the department which reports to me.

Senator BRANDIS—When did this process begin?

Mr Govey—I am not sure what date the letter that kicked this process off was sent out, but the Attorney-General has also made public comments about it. We are at the stage of having meetings—

Senator BRANDIS—I have seen some of the Attorney-General's public comments in relation to a range of these matters.

Mr Govey—It was in the last few weeks.

Mr BRADBURY—Within the last few weeks?

Mr Govey—The meetings that I am aware of have taken place in the last two weeks. In addition to the meeting that I referred to a moment ago, there have been meetings held with lawyers and agencies in Sydney and in Melbourne. That is part of the process.

Senator BRANDIS—Is this a project of the Office of Legal Services Coordination itself or is it a project of the Attorney-General's Department, in which the Office of Legal Services Coordination is a key stakeholder?

Mr Govey—I would not draw a distinction of that sort because the office is titled as an office but it is, in the ordinary way, a branch of the Attorney-General's Department. There is no distinction between them.

Senator BRANDIS—It is running this.

Mr Govey—It is running it in the same way as any other public servant in the Attorney-General's Department would run a project on behalf of the Attorney-General.

Senator BRANDIS—Can you tell me who your interlocutors are, who the recipients of this letter were and who has been invited to the meetings?

Mr Govey—I can in general terms but if a more specific response is required we would be wise to wait until Dr Popple and others arrive for the discussion proper of output 1.

Senator BRANDIS—On reflection, it might be a more efficient use of the time to wait for that. Back to you, Ms de Gruchy. taking each of these eight issues in sequence, what is the Australian government's view on the first issue—that is, whether to establish a whole of government legal services panel? Before you answer Ms de Gruchy, I will just mention to you, Mr Govey, that I am going by my notes of what you said so, if I have made a mistake here or I am expressing the categories that you adumbrated to briefly, please feel free to jump in to correct me. The first issue, Ms de Gruchy, what is the Australian Government Solicitor's view on that?

Ms de Gruchy—We probably would not have a position on a whole-of-government panel. That is a matter for the government to decide as to how it wishes to procure legal services. It is not a matter that we would comment on.

Senator BRANDIS—That is fine. The second issue is whether there should be more direct briefing of counsel on advice matters. Does the AGS have a view about that?

Ms de Gruchy—Again, it would be a matter for Commonwealth policy. Our role, in a sense, in relation to that—if we make a comment—would be in relation to what perhaps might be some of the issues around direct briefing of counsel that the department might wish to consider if it were mindful to issue guidance in relation to direct briefing of counsel.

Senator BRANDIS—I do not understand anything you said. I am just asking you whether the Australian Government Solicitor has an opinion about the second of the eight topics—that is, whether there should be more direct briefing of counsel on advice matters. Does the Australian Government Solicitor have a view about that? You have been consulted about it. You told us that you have been to the meetings. If you do have a view about it, what is it? Do you favour it or do you oppose it; what is your view?

Ms de Gruchy—We do not have a particular position for or against the direct briefing of counsel. That is not our position—

Senator BRANDIS—On advice matters.

Ms de Gruchy—On advice matters. It is not our position to have a position. That is a matter for government. We are however—

Senator BRANDIS—I think you are at grave risk of having some of this transcript republished in the tabloid newspapers, Ms de Gruchy, if I may say so with respect.

Ms de Gruchy—Senator, I can only answer the question that you are putting to me as well as I am able to.

Senator BRANDIS—So you do not have a view on No. 1 and your position is that you do not have a position on No. 2.

Ms de Gruchy—No, I said in relation to No. 2 that we would be in a position to make suggestions to the department around certain things that might be important for consideration in deciding the extent to which there is direct briefing of counsel.

Senator BRANDIS—You could not make suggestions unless you had an opinion about it, so what is your opinion about it?

Ms de Gruchy—Our opinion is that there are certain things around the direct briefing of counsel that should be looked at. For example—

Senator BRANDIS—Just tell me what they are.

Ms de Gruchy—For example, the information that is provided to counsel on direct briefing to ensure that counsel are aware of the difference, perhaps, in advising the Commonwealth given various aspects of Commonwealth policy, be it the legal services directions or be it the Financial Management Accountability Act.

Senator BRANDIS—These are kinds of functional questions, but on the broad issue as stated by Mr Govey here, you do not have a view, but you are offering helpful suggestions as to the ways in which this ought to be implemented, were the Office of Legal Services Coordination to adopt a conclusion on this matter. Is that the effect of what you are saying?

Ms de Gruchy—Yes. Given that how broad there is direct briefing could have implications for the Commonwealth in terms of how it procures legal services.

Senator BRANDIS—Mr Govey's third category was 'increased responsibilities for the Office of Legal Services Coordination in relation to standardised tendering, best practice'—and what was the third one you mentioned, Mr Govey?

Mr Govey—Monitoring of procurement arrangements.

Senator BRANDIS—Procurement arrangements. Does the Australian Government Solicitor have a view about those matters?

Ms de Gruchy—We are aware that the Office of Legal Services Coordination is a small part and has a large role to play. It is not for AGS to comment on the level of resourcing of the office.

Senator BRANDIS—That seems fair enough. Mr Govey's fourth issue was, 'issues of legal service expenditure reporting requirements'. Do the reporting requirements apply to you or do you already satisfy those requirements through your annual report?

Ms de Gruchy—I believe that the area that the department is looking at here is in relation to what is reported from agencies to the Office of Legal Services Coordination in relation to their purchase of legal services and in relation to their own internal service provision. It follows, in a sense, from the ANAO report of a few years ago which recommended more consistent financial reporting of legal services expenditure by departments and agencies that could then be centrally coordinated. So AGS, in a sense, are not directly providing information that meets that particular requirement. But we certainly help our clients whenever we can with financial information that will assist them in providing reports that they are required to give to the Office of Legal Services Coordination.

Senator BRANDIS—The fifth of the topics mentioned by Mr Govey was 'stronger emphasis on ADR in disputes involving the government'. Does the Australian Government Solicitor favour stronger reliance on ADR?

Ms de Gruchy—The use of ADR mechanisms has always been encouraged by the legal services directions. AGS has always, as a legal services provider, endeavoured to advise its clients on the appropriate course to take in the management of any dispute. That will cover a full range of aspects of dispute management, which would include many aspects of the adoption of ADR techniques. So, yes, AGS is in favour, where it is appropriate in any particular claim or dispute, of finding the best course in order to achieve the outcome sought. As you would be aware, Senator, ADR is not for all. It is a matter of being appropriate to the circumstances. We certainly follow the policy direction that has been set by the government in the legal services directions.

Senator BRANDIS—So the answer to my question is yes?

Ms de Gruchy—Yes.

Senator BRANDIS—The sixth topic Mr Govey mentioned as being under consideration is 'the greater use of local law firms in regional areas'. Is that right, Mr Govey? Mr Govey, does 'regional' mean non-Canberra or non-capital city?

Mr Govey—Non-capital city, I think, and, yes, it is a question of whether or not there should be greater use of regional firms.

Senator BRANDIS—Thank you for clarifying that. Ms de Gruchy, what is the Australian Government Solicitor's opinion on that? Should there be greater use of regional law firms?

Ms de Gruchy—Again, it is not our position to comment on the policy aspects of that, but we would be in a position to suggest that if that policy proceeds there are certain things that might be looked at in relation to ensuring that any smaller law firms who do not have a substantial practice in Commonwealth law do have an understanding of some of the principles that apply to practising law on behalf of the Commonwealth.

Senator BRANDIS—The seventh subject was 'equal opportunities for women in Commonwealth legal services procurement'. This would involve the issue that has been mentioned a little in the press lately—that is, affirmative action for briefing female counsel. What is the Australian Government Solicitor's position on that?

Ms de Gruchy—The Australian Government Solicitor have always briefed widely, which is the requirement of the legal services direction on the engagement of counsel. We have an excellent record in relation to the briefing of women at the bar. We have always sought appropriate counsel for matters on behalf of clients. That has included briefing a broad range of women across all bars.

Senator BRANDIS—Do we really need to have such a policy any longer? I must say, my experience as a legal practitioner was that many of the best barristers were women. That is hardly a surprise. Have we reached the stage at which having affirmative action, in effect, for women was yesterday's argument which has now been resolved?

Ms de Gruchy—It is a while now since I was actively involved in the engagement of counsel, but certainly as recently as the consultations to which Mr Govey refers, for example, I understand that a representative of the bar in Victoria made some comments in relation to the briefing of women. From an anecdotal perspective, what comes to me is that there are many junior women at the bar who would be keen to have opportunities to do Commonwealth work and thereby to build their experience.

Senator PAYNE—I think it would be fair to say that in an ideal world Senator Brandis's perception may apply, but unfortunately we do not live in an ideal world.

Senator BRANDIS—Senator Ludwig and I, who are both members of the Queensland bar, might think that, in Brisbane and at the Queensland bar, those hurdles and glass ceilings no longer exist.

Senator PAYNE—I am sure any world that you and Senator Ludwig cohabit, Senator Brandis, is an ideal world.

Senator BRANDIS—Indeed. I have one last question. Ms de Gruchy, the last item is the provision of pro bono. I will pursue this with the OLSC. Do I understand that there is going to be some preference given in the procurement of legal services from private law firms and private counsel to those who meet some quota of pro bono work in their practices? Is that the point?

Mr Govey—I could perhaps elaborate on that. There are two elements to this issue. One is the one that you mentioned. We are looking at the Victorian scheme, which does give some kind of preferential treatment to firms which have a good pro bono scheme. That is one

element of it. A subelement of that is whether or not the requirements should be mandatory or just one factor to be taken into account. The second element that we are looking at are changes to the Legal Services Directions to ensure that lawyers who provide legal services to the Commonwealth are not prejudiced because they have performed pro bono legal work against the Commonwealth.

Senator BRANDIS—I am a little surprised at the second, Mr Govey. Is there some suggestion that that could be the case?

Mr Govey—We did have feedback—but it was reasonably informal feedback—going back a few years either that it was happening or at least that there was a perception that that was an issue.

Senator BRANDIS—Really? I understand the second. If there were grounds to be concerned about that, that would be an alarming matter. In relation to the first, beyond just saying that there is a choice between mandatory or not mandatory and beyond the question of whether there should be some preference or not, has there been any more shape given to this proposal?

Mr Govey—We are looking very closely at the Victorian scheme, and I think we have a fair idea of the way in which it operates and the choices it would provide—for example, to be eligible to tender it could be a requirement that a law firm has to satisfy a certain threshold level of pro bono work or it could simply be a matter that is taken into account as one of the factors when tendering bids are considered.

Senator BRANDIS—Has the consideration of this matter reached the stage of being a preliminary view?

Mr Govey—No, I would not take it that far. We are still waiting for comments to come in, as Ms de Gruchy indicated previously.

Senator BRANDIS—Are there models other than the Victorian model before you under discussion?

Mr Govey—There is the model which is not used by Victoria. The Victorian model is reasonably mandatory in form. There is the model that is not so mandatory.

Senator BRANDIS—I understand.

Mr Govey—In broad terms, those are the two issues that we are considering, but there might be some further refinements to them.

Senator BRANDIS—Ms de Gruchy, does the Australian Government Solicitor have a view about whether there should be some element of mandating of the procurement of legal services from firms that provide pro bono work, or is that nothing to do with the AGS?

Ms de Gruchy—We are very much in favour of pro bono activity and we do engage in pro bono activity. As to the level of that, we will await the outcome of the department's deliberations. If a requirement is imposed on all legal services providers, we would expect to comply with it.

Senator BRANDIS—What pro bono work does the AGS do?

Ms de Gruchy—We have a number of projects.

Senator BRANDIS—Give me an example.

Ms de Gruchy—We provide a lawyer who works for a number of hours a week at a local law society's clearing house to process requests for assistance.

Senator BRANDIS—Mr Govey, I know this is a hypothetical but, were the conclusion to be that there should be some element of mandating pro bono work, I would expect that that would apply uniformly to the private sector and to the Australian Government Solicitor on the principle of contestability.

Mr Govey—I think that would be my expectation. Whether the requirement was a mandatory one or simply a factor to be taken into account, I would expect that the same rules would apply.

CHAIR—Thank you very much for appearing before the committee today.

[11.49 am]

Federal Court of Australia

CHAIR—I welcome officers from the Federal Court of Australia. Do you wish to begin with an opening statement?

Mr Soden—No.

CHAIR—In that case we will go straight to questions.

Senator BARNETT—Good morning and thank you for being here. I want to ask you or perhaps the minister about the appointment process for Federal Court judges, and I understand from recent reports that the government has decided on a different approach. Would you like to outline the approach for the appointment of Federal Court judges, or would the minister like to do that?

Mr Kellow—I think that is a matter for the minister or the department.

Senator Ludwig—I think Mr Govey can provide a response to that.

Mr Govey—As the article in the *Australian* reported, I think last week, the Attorney-General, in relation to the Federal Court, has established a panel with the people referred to in that report—

Senator BARNETT—Can you identify the members of the panel?

Mr Govey—Sir Gerard Brennan; Acting New South Wales Supreme Court Justice, Jane Mathews; the Chief Justice of the Federal Court, Michael Black—or, when he is not available, a senior nominee from the court—and either the secretary or me from the department.

Senator BARNETT—When were they appointed?

Mr Govey—I would need to check on the precise date but it was in the last month or so.

Senator BARNETT—What are the terms of the appointment?

Mr Govey—The terms are that it is a standing panel and that when required the panel will make recommendations to the Attorney-General.

Senator BARNETT—What are the terms of reference and what are the criteria for the appointment? Was there a letter of appointment and can you table that letter for us?

Mr Govey—There was a letter confirming the appointment. I think we would need to check with the Attorney-General whether he would be comfortable with that letter being tabled.

Senator BARNETT—Can you outline to the committee the criteria that apply to the appointment of Federal Court judges?

Mr Govey—Around the time that the panel was put in place, there was a public notice in some of the newspapers to indicate the Attorney's intention to make appointments to the Federal Court in the Sydney registry.

Senator BARNETT—Have you got a copy of that advertisement? Can you table that for the committee?

Mr Govey—Ms Leigh has a copy. The public notice was reasonably short but it referred to the Attorney-General's Department's website, where there were more details provided about the proposed appointments and in particular, I think I am right in saying, the criteria that were to be applied.

Senator BARNETT—Can you tell us what are the criteria and provide the advertisement?

Mr Govey—We can certainly provide the advertisement and indeed we could provide a copy of the criteria.

Senator BARNETT—Can we pass that to the secretary, please?

Mr Govey—Ms Leigh is just looking for those documents, Senator.

Senator BARNETT—While Ms Leigh is passing that through and we are getting copies of the advertisement and the criteria that apply, there have been references to that advertisement so we will come back to that in a minute. When do they anticipate having their first meeting and how often are they expected to meet? What are the other terms of the appointment?

Mr Govey—I do not think there are any other relevant terms of the appointment other than that the Attorney will from time to time ask for advice as to—

Senator BARNETT—So they will meet only at the request of the Attorney, or do they meet of their own volition?

Mr Govey—The panel will meet when there is an appointment that the Attorney wishes to put forward to the Federal Court.

Senator BARNETT—Is there one at the moment?

Mr Govey—The Attorney has indicated that there are two appointments at least that he would want to make in Sydney in view of the recent and prospective retirements from the bench there. To answer your previous question, the panel has discussed the results of the nomination and the expression of interest process that was put in train through the public notice and it has provided a report to the Attorney-General.

Senator BARNETT—How many applications did you receive to that advertisement?

Mr Govey—If you take into account both the expressions of interest and the nominations by third parties—either individuals or organisations—from memory there were over 90.

Senator BARNETT—And from which states did they apply? I presume you are not able to identify the applicants, That would not be appropriate—

Mr Govey—That is correct.

Senator BARNETT—but can you advise from whence they applied? You said the advertisements were in Sydney.

Mr Govey—That is correct.

Senator BARNETT—I am a Tasmanian Senator. I am interested in parts of Australia other than Sydney.

Mr Govey—The vast majority of expressions of interest were made by people who lived in Sydney. From memory, there were some applications or some expressions of interest from people outside of Sydney. The organisations that provided nominations, provided nominations of people who resided in Sydney but also of a number who were from outside Sydney.

Senator BARNETT—Does the criteria, with respect to the appointment of Federal Court judges, refer to geography?

Mr Govey—No. It would be a matter for the individual who was proposed for appointment to confirm that they were prepared to work out of the Sydney registry.

Senator BARNETT—So these two positions, the ones that are currently vacant, are based in Sydney. We are talking about Federal Court judges. Can we expand that a little to the Federal Magistrates Court?

Mr Govey—Ms Leigh has been primarily involved with that process, so it would be appropriate for her to deal with that.

Senator BARNETT—Is it a similar process, and can you explain the process for the Federal Magistrates Court and any other court appointments?

Ms Leigh—Starting with the Federal Magistrates Court, there were advertisements of positions in five locations for the Federal Magistrates Court. Those advertisements were in the *Financial Review* and in the *Australian*, and I can provide copies of those if you would like.

Senator BARNETT—And can you advise the date when they were advertised.

Ms Leigh—Yes. That was 1 February and 2 and 9 February. Supporting material referred to in those advertisements was placed on the department's website. In addition, the Attorney wrote to a number of people seeking nominations for those positions. The Attorney wrote to the heads of the Law Council of Australia and the Australian Bar Association, the heads of all the state and territories bar associations and law societies, the deans of law schools, the head of Australian Women Lawyers, the head of the National Association of Community Legal Centres and the head of National Legal Aid inviting nominations for those positions.

Senator BARNETT—Did the minister also write with respect to the Federal Court vacancies?

Ms Leigh—Yes, he did.

Senator BARNETT—To those same entities?

Ms Leigh—That is correct.

Senator BARNETT—When was that letter sent?

Ms Leigh—In relation to the Federal Court, it was sent on 17 April, and in relation to the Federal Magistrates Court, it was sent on 7 February.

Senator BARNETT—How many applications did you receive for the Federal Magistrates Court.

Ms Leigh—We received over 460 expressions of interest and nominations of over 100 people—some people nominated the same person. So the number of people nominated was over 100. There were more nominations than that.

Senator BARNETT—This was not to make an application; this was to nominate someone else.

Ms Leigh—That is correct.

Senator BARNETT—And how many of those did you receive?

Ms Leigh—Over 100 names were nominated. Some of those people were nominated by more than one person, so there were about 130 nominations received but, because some of those nominations were for the same person, in terms of actual individuals nominated there were over 100.

Senator BARNETT—Do you have an exact figure on the nominees?

Ms Leigh—The exact number of individuals, if I do not do any double counting, was 109.

Senator BARNETT—All right. So you had 109 nominees. That process was not followed with the Federal Court.

Ms Leigh—Yes, it was.

Senator BARNETT—Sorry; Mr Govey advised me that you had received 90 applications.

Mr Govey—No. I think what I said was that there were over 90 expressions of interest and nominations.

Senator BARNETT—Let us break it down.

Mr Govey—I do not have the breakdown.

Ms Leigh—I could provide a breakdown of those.

Senator BARNETT—Can you provide that, Ms Leigh?

Ms Leigh—In both cases there are overlaps, because some people who were nominated also put in an expression of interest.

Senator BARNETT—That is fine.

Ms Leigh—I would need to give it to you in round figures: the total number of nominations for the Federal Court was over 30 and the total number of expressions of interest received was over 70. As you can see—given that Mr Govey said there were over 90 people considered—there was an overlap.

Senator BARNETT—So that is now well under way. What has happened since that occurred?

Ms Leigh—Could I address the Federal Magistrates Court?

Senator BARNETT—Yes.

Ms Leigh—In relation to the Federal Magistrates Court, the panel was formed and there was analysis of all of those applications and expressions of interest.

Senator BARNETT—Who is on the panel?

Ms Leigh—The panel for the Federal Magistrates Court: Federal Magistrate Baumann was nominated by Chief Federal Magistrate Pascoe to be on the panel in his place, retired Judge of the Family Court the Hon. Susan Morgan is the second member of the panel and I have been the third member of the panel.

Senator BARNETT—So only a three-member panel, as opposed to a five-member panel for the Federal Court—is that right?

Ms Leigh—I think it has a four-member panel.

Senator BARNETT—Where you appointed by the minister?

Ms Leigh—The Attorney decided who should be on that panel. As I said, Federal Magistrate Baumann was nominated by Chief Federal Magistrate Pascoe.

Senator BARNETT—That is fine. Have you received a letter of appointment from the minister?

Ms Leigh—No. I act in accordance with the instructions of the minister.

Senator BARNETT—Would the other members of the panel have received a letter of appointment from the minister?

Ms Leigh—I would like to check that, if I may.

Senator BARNETT—Do you want to take that on notice?

Ms Leigh—Yes, thank you.

Senator BARNETT—Could you provide a copy of the letter, on notice?

Ms Leigh—I will take that on notice.

Senator BARNETT—You are a panel member—what criteria do you use for the appointment of federal magistrates?

Ms Leigh—The criteria were published on the website, and I can hand those out. They are consistent with the criteria for the Federal Court but of course reflect that it is a lower level court.

Senator BARNETT—Have you got the criteria with you?

Ms Leigh—Yes I have.

Senator BARNETT—Could you table those?

Ms Leigh—I will hand them up.

Senator BARNETT—How many vacancies are there?

Ms Leigh—The advertisements were for five locations.

Senator BARNETT—So we are looking for five people?

Ms Leigh—As I said, there are five locations. I do not think the Attorney has specifically said whether he will only appoint one person in each location. I am mindful there may be opportunities to appoint more in some locations. Certainly we have been asked to put forward names for each of five locations.

Senator BARNETT—What are the locations?

Ms Leigh—Adelaide, Melbourne, Hobart, Sydney and Brisbane.

Senator BARNETT—How is it not known how many are likely to be appointed? Normally if you do an advertisement for a position you know how many you wish to appoint. Why wouldn't you know?

Ms Leigh—I am not quite sure I would agree with that comment. The advertisements were for locations, so it was not necessary to say—and of course retirements happen all the time. I am simply commenting that it would be open to the Attorney to appoint more than one per location. Certainly he intends to appoint at least one per location.

Senator BARNETT—How many vacancies are there on the Federal Magistrates Court?

Ms Leigh—In relation to the five locations, there were two federal magistrates who vacated their positions—one who passed away and one who retired. There was some additional funding provided for a federal magistrate in relation to child support work. There was a judicial registrar of the Family Court who retired and, as has been the case with all the retirements of judicial registrars, the decision was taken that a magistrate would replace that judicial registrar. In relation to the fifth position, there are a number of options as to how it would be funded. There was money allocated for de facto jurisdiction for the Family Court and the Federal Magistrates Court based on the passage of that legislation, which has not yet passed. So there are a number of possibilities as to how that fifth position would be funded, and it has not been necessary to make a decision as to which source of funding would apply to that fifth position.

Senator BARNETT—Have any interviews occurred as yet?

Ms Leigh—Yes, they have. Interviews have been held in Adelaide, Melbourne, Hobart and Sydney. Interviews are yet to be held in Brisbane.

Senator BARNETT—How many have you interviewed and how many do you expect to interview?

Ms Leigh—I would have to take that on notice.

Senator BARNETT—But obviously you have interviewed, in those locations you have advised the committee of, at least one person in each location?

Ms Leigh—No. When I say we have interviewed in those locations, it does not mean that the people we have interviewed in each location are to be considered for that location and only for that location. Some people are interested in being considered for more than one location. Some people were not available on the day the committee was in the location where they reside, so the committee gave them the opportunity to be interviewed elsewhere. So we need to look at the number of people interviewed as a group.

Senator BARNETT—When will you conclude the interviews?

Ms Leigh—We will conclude the interviews next week.

Senator BARNETT—When do you expect to make a recommendation to the minister? Is that the process?

Ms Leigh—That is correct. We will be providing the Attorney-General with a group of names for each location.

Senator BARNETT—How many names will you provide for each location?

Ms Leigh—The Attorney-General has asked the panel to provide up to five names for each location.

Senator BARNETT—Do you expect to make that recommendation next week? If not, when would you expect to make that recommendation?

Ms Leigh—Because we have not conducted the interviews, it is impossible to be certain. We are well advanced. We have already been speaking to referees as we have been going along, but we will obviously need to speak to referees after we conduct those interviews and, as I said—

Senator BARNETT—You have not spoken to any referees as yet?

Ms Leigh—No, I said we have been speaking to referees as we have been going along, but we will need to do further follow-up after those interviews. That will depend upon availability of referees and the outcome of those interviews.

Senator BARNETT—Does each applicant require at least two referees? What types of referees?

Ms Leigh—We have asked people to provide at least two referees and it has been left to them who they nominate.

Senator BARNETT—Whether they are professional or personal referees is up to them?

Ms Leigh—Yes, but by and large what we are looking for are professional referees.

Senator BARNETT—Do you have an understanding of when, once you have put forward your recommendation, the minister expects to make a decision?

Ms Leigh—That would be a matter for the minister.

Senator BARNETT—How will he make that decision?

Ms Leigh—As is always the case with judicial appointments, the minister will take names to Cabinet. It will be a government decision.

Senator BARNETT—I am not sure that, in this case, it is ‘always the case’. This seems to be a major shift in the process for the appointment of judges in this country.

Ms Leigh—I would not disagree with you on that, Senator. I am simply commenting on the appointment process once it reaches the point of government decision. Cabinet makes that decision and then, of course, the Governor-General makes the appointment. That has not changed.

Senator BARNETT—You have isolated the *Australian Financial Review* and the *Australian*?

Ms Leigh—That is correct.

Senator BARNETT—So none of the country newspapers, apart from the national newspapers—the *Australian Financial Review* and the *Australian*?

Ms Leigh—National newspapers, yes.

Senator BARNETT—I presume it is on the website, as well.

Ms Leigh—And referring then to the website, exactly.

Senator BARNETT—How many letters were sent out by the minister?

Ms Leigh—I listed who they were sent to. I would need to get somebody to give me the exact numbers, for example, of deans of law schools to be able to give you a total number of letters.

Senator BARNETT—Can you estimate? Was it dozens or hundreds?

Ms Leigh—Mr Govey informs me there are 28 deans. The heads of the Law Council of Australia and the Australian Bar Association, two; the heads of each state and territory bar association, 16; deans of law schools, 28; the head of Australian Women Lawyers, one; the head of the National Association of Community Legal Centres, one; and the head of National Legal Aid, one.

Senator BARNETT—I appreciate the outline of that process. That covers the Federal Court and the Magistrates' Court. I realise Mr Soden is here from the Federal Court. What about the Family Court and the High Court? I understand the High Court is being quarantined from this process.

Ms Leigh—The Attorney also covered appointments to the High Court in the speech he gave in February this year in relation to judicial appointments and the new approach that would be taken to judicial appointments. The Attorney has written to a group of people—and I will give you that list—inviting the names of people they would consider suitable for appointment to the High Court. He has written to the state and territory attorneys-general, as he is required to do by section 6 of the High Court Act. He has also written to each of the High Court justices, to the chiefs of each of the three federal courts, to the chiefs of each of the state and territory supreme courts, to the heads of the Law Council of Australia and the Australian Bar Association, to the heads of each of the state and territory bar associations and law societies, to the deans of law schools, to the head of the Australian Women Lawyers, to the head of the National Association of Community Legal Centres and to the head of National Legal Aid.

Senator BARNETT—So that is a similar list or—

Ms Leigh—That is the same list, except of course the High Court justices.

Senator BRANDIS—Can I ask why some of these categories have been chosen—for example, the head of National Legal Aid? Why would you ask the head of National Legal Aid for their opinion about who would be a suitable High Court judge?

Ms Leigh—I believe that the Attorney was keen to consult as widely as possible.

Senator BRANDIS—Well, he did not consult me, and I am not saying he should have done. You can say ‘consult widely’, and that sounds very nice, but, if you then put down a list of the people who will be consulted, each of those nominated persons or entities has to justify the fact that they have been privileged above other potential influences in holding their place on the list. Why would you consult the head of National Legal Aid?

Mr Cornall—That was a decision that the Attorney took and the department implemented it, and I do not know that we can take it any further than Ms Leigh has already stated.

Senator BRANDIS—Are you on the list, Mr Cornall?

Mr Cornall—No, Senator.

Senator BRANDIS—We know from historical knowledge and memoirs that the head of the Commonwealth Attorney-General’s Department is probably second only to the Attorney-General and perhaps the Prime Minister as the most important person when it comes to the selection of the senior levels of the federal judiciary and, in my humble opinion, should be on the list—yet you are not on the list. I just think there is something a little deceptive—almost like a public relations exercise—about a list which lists almost every worthy community group associated with the legal profession but omits the people who in fact are the key influences on these decisions, and they are entitled to be by virtue of their office.

Senator Ludwig—You could also take all other sorts of soundings as well. I am not sure it is closed to that list that the Attorney-General has invited suggestions from. So I do not think it is a list which is closed.

Senator BRANDIS—I understand that.

Senator Ludwig—He may very well consult with you, Senator Brandis, but he does consult with the Bar Association and others, which might also represent you—and, for that matter, me in that respect.

CHAIR—You might need to turn your mobile phone on, Senator Brandis, in case he is watching and has a change of heart.

Senator BRANDIS—I understand that observation, Minister, but my point is a different one. Let us take for example the selection of a High Court judge—one of the most important decisions a government can make. There are certain people who are of course consulted and whose views ought to be paid regard to, including the Prime Minister and the head of the Commonwealth Attorney-General’s Department. Those two people will have an enormous influence on any selection—and they should. Yet they do not appear on the list; whereas, towards the bottom of the list, a number of worthy legal professional organisations or public sector legal organisations—like the head of National Legal Aid—are put on the list. I do not know who the head of National Legal Aid is at the moment but I am sure that person is a very worthy person. But the suggestion that that person should appear on a list and the head of the Commonwealth Attorney-General’s Department should not when it comes to the selection of a High Court judge is, frankly, ridiculous. What it demonstrates is that this list is somewhat deceptive.

Senator Ludwig—I think there is an alternative view that can be put, and that is that the Attorney-General has also invited suggestions. As to the exhaustiveness or otherwise of the list, I think you are putting too much stock in the list itself. Like past attorneys-general, the Attorney-General has advised that he has consulted widely. So to say that the list is exhaustive or that because someone is not on the list they are not included or otherwise are not going to be consulted—I do not think you made that point—or that they are valued either less or more because they do not appear on the list is I think, mildly put, to have the wrong impression.

Senator BRANDIS—My point is that the list, or a least some aspects of it, is essentially a box-ticking exercise that enables a politician of whichever political party may be in government at a given time to claim to have consulted widely, when you and I both know that certain people, many of whom are not on the list, are the real players in these decisions. Another name I notice is not on the list, unless I misheard you, is the Commonwealth Solicitor-General. Unless the Commonwealth Solicitor-General were himself a candidate for appointment, I can think of nobody better placed to give wise advice to the government of the day as to where the best quality was from whom one might look for a High Court judge—yet that officer is not on the list.

Senator Ludwig—I think that opens up the point that the list is designed for those in addition to whom the Attorney-General might wish to consult for a range and variety of reasons. The list is not exhaustive. The list is designed to ensure that the Attorney-General does undertake his duties purposefully and with deliberate decisions to consult widely. One of the difficulties is that we do not know in past instances whom the Attorney-General of the day did or did not consult with or whom he may have decided to consult with and no more. The list is designed to give transparency and openness to a process—

Senator BRANDIS—With respect, no it is not—and that is my criticism. It is designed to give the appearance of transparency to a process but not in fact to give transparency to a process.

Senator Ludwig—We can differ on that point. This does provide the opportunity for those people to be consulted about the appointment in addition to others with whom the Attorney-General may decide to consult.

Mr Cornall—I would like to add that I have discussed this issue of judicial appointments with the Attorney-General on a number of occasions in the course of our normal meetings.

CHAIR—Thank you.

Senator BARNETT—Can I go back to this advertisement for the federal magistrates. You very clearly advised the committee that one of these advertisements was put in the *Australian* and one was put in the *Financial Review*, yet there are five locations, including Adelaide, Hobart, Sydney, Brisbane and Melbourne, and there were no advertisements in, for example, the Tasmanian newspapers for a position in Hobart. Why would you want to exclude advising the people of Tasmania that there is a Federal Magistrates Court position available in that state? The point that Senator Brandis has made is that the minister has written to a certain number of key people and perhaps not so key people and entities. Why would you want to exclude an advertisement and quarantine a place like Tasmania when there are potentially eminent people in Tasmania to apply or express an interest in the positions?

Ms Leigh—Senator, firstly, there were two advertisements placed in the *Australian* on the second and the ninth. I think you mentioned one. They were placed in national newspapers, so they were available to people all around Australia, and the advertisements clearly stated at the top the locations where the positions would be appointed. We received applications from around Australia for all locations, and there is no indication at all that the people of Hobart did not see and respond to that advertisement.

Senator BARNETT—That is your view. We do not know that, because you did not advertise there. I will take that as read. I think that is a bit of a discourtesy to the rural and regional parts of Australia, not just to Tasmania, which have missed out. You have got Brisbane and Adelaide as well.

Senator BRANDIS—We in Brisbane do not regard ourselves as part of the ‘rural and regional’ part of Australia, Senator Barnett.

Senator Ludwig—We do read the national paper.

Senator BARNETT—You do. I want to go to the members of the panel. You have appointed four for the Federal Court and three for the Federal Magistrates Court. Can you advise the term of their appointment.

Ms Leigh—There was no term specified for the panel members’ appointments. The panel members were asked to conduct the selection process for the five locations currently advertised.

Senator BARNETT—And that was it?

Ms Leigh—That is correct, Senator.

Senator BARNETT—And once that is concluded the panel will disband. Is that the assumption? Or is there an assumption that the panel will continue?

Ms Leigh—I do not think there is an assumption either way.

Senator BARNETT—I can assure you the appointment of this panel is extremely important. We are talking about appointing our judges. Do you have a biography for each member of the three-member panel? You have indicated their names.

Ms Leigh—I could provide those to you, Senator.

Senator BARNETT—Could you take that on notice and could you provide the biography of each member of the Federal Court appointment panel?

Ms Leigh—Certainly, Senator. In the speech he made in February announcing the process for the selection of judges, the Attorney-General said that the selection panels would be made up of a head or an experienced member of the court, a retired judicial officer and a senior official from my department. Those are the categories that those people fall under.

Senator BARNETT—I appreciate you advising us of that. What remuneration is paid to the panel members? What travel and accommodation costs are paid?

Ms Leigh—The Federal Magistrates Court member is covered by his normal remuneration, and the court covers his costs. I am covered by my normal remuneration, and the department covers my costs. Former Justice Sue Morgan is being paid a sitting fee in

relation to the days that the panel convenes, and her costs are being covered by the department.

Senator BARNETT—What is the sitting fee?

Ms Leigh—The sitting fee that she is being paid is the Remuneration Tribunal amount that is determined for advisory bodies. It is the same fee that members of the Family Law Council are paid for their meetings.

Senator BARNETT—Do you know what that fee is?

Ms Leigh—Yes, Senator.

Senator BARNETT—I want to ask the same questions for the panel for the Federal Magistrates Court.

Ms Leigh—The fee is \$696 per day, I think by way of a recognition of the time commitment for being involved in the selection processes over five locations, which is quite a considerable commitment.

Senator BARNETT—So on top of the \$696 per day they get their travel and accommodation.

Ms Leigh—That is correct.

Senator BARNETT—Is there a per diem rate?

Ms Leigh—Yes, that is correct.

Senator BARNETT—In addition to the \$696?

Ms Leigh—It is \$696 plus flights, accommodation, meals and incidentals. That is only in relation to Susan Morgan.

Senator BARNETT—I am with you. What is it for the panel for the Federal Court?

Mr Govey—The Federal Court's representative and the department's representative of course already receive a payment. Neither Sir Gerard Brennan nor Acting Justice Mathews sought any payment.

Senator BARNETT—What has been offered?

Mr Govey—Neither has sought any payment. At this stage they are doing it pro bono.

Senator BARNETT—What about their travel and accommodation?

Mr Govey—That has not been discussed with them, but obviously any out-of-pocket expenses would be met either on a reimbursement basis or on the same basis of a lump sum per diem.

Senator BARNETT—Okay. I will go back to the Federal Court. When are those interviews likely to be held? Have they been held? When are the appointments likely to be made?

Mr Govey—A report has already been made to the Attorney-General. No interviews were considered to be necessary, and the timing for the process from here is a matter for the Attorney-General.

Senator BARNETT—How many people have been put forward as a recommendation to the Attorney-General?

Mr Govey—I think from memory there were 10 people on the list, but I will double check that.

Senator BARNETT—So you are advising the committee that no interviews occurred, but the panel members simply recommended 10 people to put forward to the Attorney.

Mr Govey—That is correct, subject to the qualification of the figure.

Senator BARNETT—Why would they not have had interviews?

Mr Govey—Having regard to the considerations that were before the panel in terms of the people and the further inquiries that were made, no interviews were considered to be necessary.

Senator BARNETT—Did the Attorney ask for 10 or for five? Why did the panel put forward 10 rather than five?

Mr Govey—The expectation was that there were at least two vacancies, and it follows from that that 10 was about right.

Senator BARNETT—When did that recommendation go to the Attorney?

Mr Govey—It was about a week ago.

Senator BARNETT—Do you have an idea as to when the appointment will be made?

Mr Govey—That is a matter for the Attorney?

Senator BARNETT—Let us focus now on the Family Court and the High Court. What is the position with regard to the appointment of Family Court judges, and, moving to the High Court, why have they been quarantined from this process?

Mr Govey—There is no current process in place for the Family Court. I think that takes care of that one.

Senator BARNETT—So, when you say that there is no current process, the former process is continuing. Is that correct?

Mr Govey—No. The Attorney-General has not sort recommendations for appointment right now to the Family Court but our expectation is that, having regard to the Attorney's speech, that same process would be employed?

Senator BARNETT—Are there any vacancies on the Family Court?

Mr Govey—I do not think it is appropriate to talk about vacancies as such because, at any time when somebody retires from the court, decisions are made about whether or not a new appointment will be made. But right now, no decision has been made to appoint a new person to the Family Court?

Senator BARNETT—But it is your indication, based on your understanding of his speech in February, that there would be a similar process where a panel would be appointed and they would make recommendations and so on, as we have outlined today.

Mr Govey—That is our understanding.

Senator BARNETT—Can you advise the committee why the High Court has been quarantined from the appointment of a panel process?

Ms Leigh—Yes. The Attorney, in his speech in February, identified that the High Court might require a different approach. He said that he was firmly committed to undertaking extensive consultation on High Court appointments, and he referred to the provision in the High Court Act that required consultation with the state attorneys-general. He said that it was unquestionably possible to have a much broader consultation process than that mandated by the act, to ensure that the best possible candidate was identified. He said, however, that there was room for argument about the appropriateness and applicability of other aspects of that process and that he had previously made clear his view that face-to-face meetings with candidates are inappropriate for appointments to the High Court. He referred to a comment that Chief Justice Gleason had made and said that as the Chief Justice had observed, most of the candidates for High Court appointments were likely to be serving judges; they were already well known to the government, the judiciary, the legal profession and often the general public.

Senator BARNETT—Thank you, Ms Leigh; I can have a look at that speech. When did the letters go out from the minister to the state attorneys et cetera?

Ms Leigh—On 17 April.

Senator BARNETT—Do you know how many applications or how many nominations have been made?

Ms Leigh—Most of the people written to have responded, although some of the replies are outstanding.

Senator BARNETT—Do you know how many nominations have been made.

Ms Leigh—No, I have not counted them up.

Senator BARNETT—Can you estimate?

Ms Leigh—I would rather take that on notice. Some letters mentioned one; some many.

Senator BARNETT—Could you take that on notice?

Ms Leigh—Yes.

CHAIR—It is 12.30 pm, so we will break for lunch till 1.30 pm. We are going to do outcome 2 straight after lunch. That will provide those officers with the opportunity to leave if they need to.

Senator Ludwig—We still have the Federal Court with us at the moment. Does that mean that they are now excused and they will not be required?

Senator BRANDIS—I have brief questions for the Federal Court which I could dispose of within five minutes.

Senator Ludwig—Or you can put them on notice.

Senator BRANDIS—No.

CHAIR—You do not have any more questions, Senator Barnett?

Senator BARNETT—No.

CHAIR—We could go for another five minutes.

Senator Ludwig—I am happy to go for another five minutes.

CHAIR—That will enable us to finish with the Federal Court. My anticipation is we will do outcome 2 after lunch and then go to the Magistrates Court and the Family Court after outcome 2.

Senator BRANDIS—After when?

CHAIR—After outcome 2. I am trying to provide officers in outcome 2 with enough opportunity to leave if they need to.

Senator Ludwig—What time will HREOC be at?

CHAIR—HREOC will now be later this afternoon. We had anticipated that they would be at 3.30 pm, but it now might be just a little later. We will finish with the Federal Court before we break for lunch.

Senator BRANDIS—I just want to know one thing, as a matter of fact: what has the Federal Court's position been in relation to the Semple review? Does the Federal Court have a position as to what the outcome of that review ought to be so far as it concerns itself?

Mr Soden—Mr Semple has spoken to our chief justice on a number of occasions. Our chief justice has expressed a view to Mr Semple in relation to the questions he has asked. I was not at that meeting, so I cannot—

Senator BRANDIS—This is the chief justice, not the acting chief justice?

Mr Soden—This is the chief justice, yes. As you know, the chief justice is on leave at the moment. I cannot tell you what was said by the chief justice to Mr Semple; I was not at those meetings.

Senator BRANDIS—To cut to the chase—because we are against the time—would I be right in understanding, though, that the Federal Court's position in relation to the Semple review is that it basically just wants to be left alone?

Mr Soden—I would describe that as getting on with our business. It is a review focusing on the family law services.

Senator BRANDIS—But you are aware, of course, that one of the models being propounded by some is that the Federal Court and the Family Court should be consolidated into a superior court of Australia or a court with some name like that and then divisionalised so that the family jurisdiction is one division and then there is a commercial division, an administrative division, a tax division and so on. I take it the Federal Court has no interest in that proposal whatsoever?

Mr Soden—I have heard that that proposal has been suggested. I do not think we have been asked formally for our view on that. I would be surprised if we supported that proposal.

Senator BRANDIS—Thank you.

CHAIR—Is that all, Senator Brandis?

Senator BRANDIS—That is all.

Mr Govey—Madam Chair, I can clarify two matters that were raised before. I can confirm that there were 10 names on the Federal Court short list and the date that the letter went forward from the panel to the Attorney with those short-listed names was 14 May.

CHAIR—Thank you very much.

Proceedings suspended from 12.34 pm to 1.37 pm

ACTING CHAIR (Senator Barnett)—The committee will resume with outcome 2, Coordinated federal criminal justice, security and emergency management activity, for a safer Australia. I call Senator Brandis.

Senator BRANDIS—You will have to help me again, Mr Cornall—is outcome 2 where I can ask questions of the Office of Legal Services Coordination?

Mr Cornall—No, that is outcome 1, which will be later today.

Senator BRANDIS—I have some questions in relation to the National Community Crime Prevention Program. How did the National Community Crime Prevention Program fare in the budget?

Dr Heriot—The National Community Crime Prevention Program will terminate on 30 June this year.

Senator BRANDIS—That is what I thought. When was that decision made?

Dr Heriot—It would have been made in the budget context.

Senator BRANDIS—Producing a saving of how much for the government?

Ms Blackburn—The program, when it was initially established, was established as a four-year program which was due to terminate on 30 June this year.

Senator BRANDIS—However, am I right in thinking that those responsible for the operation of the program sought to have the program continue?

Ms Blackburn—The decisions made in relation to the replacement of the program is a decision for government.

Senator BRANDIS—I know that; I am not asking you that. I am asking: what was the position of those responsible for the National Community Crime Prevention Program?

Ms Blackburn—Senator, I do not believe it is appropriate for me to put forward to you any position taken by the department in relation to that. It was a budget process and a decision of government.

Senator BRANDIS—This was, in 2007-08, a \$22 million program, correct?

Dr Heriot—Yes.

Senator BRANDIS—Because this program is going to terminate on 30 June there is no entry for it in the PBS is there?

Dr Heriot—It is on page 25.

Senator BRANDIS—I see, it is in the budget measures summary.

Dr Heriot—Yes.

Senator BRANDIS—Can you tell us what are the specific projects or programs which the National Community Crime Prevention Program is undertaking at the moment?

Dr Heriot—If I could just clarify—while there would be no additional moneys appropriated in forward years for the program, funding for the existing grants will be carried forward.

Senator BRANDIS—But administered by another?

Dr Heriot—No, administered by the department. The last round of grants, for example, was approved in September 2007 and some of them will run through to 2010-11, and that forward funding is in the budget as it was rephased.

Senator BRANDIS—I am sure that this is the pea and thimble trick. Whenever a program, or for that matter an office or an agency is terminated, somebody comes along and says, 'We are still doing the same thing. It is just being done under a different guise.' But the fact is there was, established by the Howard government, a program called the National Community Crime Prevention Program that the new government has decided to terminate. What were the projects which the National Community Crime Prevention Program was undertaking?

Ms Blackburn—The projects, which have been funded under the National Community Crime Prevention Program, are all listed on the National Community Crime Prevention Program website. There are significant—

Senator BRANDIS—No, I am asking you. Here we are at estimates and I am asking you. Please do not refer me to a website. I am asking you.

Dr Heriot—Senator, we have 417 small grants and they were awarded in September. Over the life of the program we have had 311 large grants awarded. I do not have with me a full listing of all 311 large grants but we can certainly procure those for you this afternoon.

Senator BRANDIS—That would be very helpful.

Dr Heriot—A number of those, I should note, are concluded.

CHAIR—He could print them off the website, Dr Heriot, like everyone could do.

Senator BRANDIS—Mind your tone, Madam Chairman. You are being disrespectful to the committee. The committee is here to ask questions of officers about government expenditure.

CHAIR—Senator Brandis, get on with your questioning please. If you have questions we would appreciate you asking them.

Senator BRANDIS—I am absolutely within my rights to ask a question of a witness about a program that has been terminated.

Ms Blackburn—Senator Brandis, we can certainly provide you with a list—

CHAIR—Excuse me, the committee will adjourn for a short private meeting.

Proceedings suspended from 1.44 pm to 2.02 pm

Mr Cornall—Before we start, I would like to make a couple of comments about Senator Brandis's questions—it just might help.

Senator BRANDIS—Could I indicate too, before you start, Mr Cornall, that I am still going to proceed with the National Community Crime Prevention Program.

Mr Cornall—Yes, that is what I am going to talk about.

Senator BRANDIS—Thank you, Mr Cornall.

Mr Cornall—The National Community Crime Prevention Program was a lapsing program, and all lapsing programs were considered by the Expenditure Review Committee and the government in the course of the budget process. Decisions were then made and are reflected in the budget. The second point is that the grants that have already been made have been made, in some cases, over a period of years, and the grants will be paid out as certain milestones are achieved as they are outlined in the grants. In some of them, even though the grants have already been made out of the current funding to 30 June, that will not actually be paid out to the recipient for some time to come, which is why the program is continuing in that sense, to run off existing grants. The third thing is that we are obtaining the printout of the list on the website for you now and we should have it soon.

Senator BRANDIS—That is very kind of you, Mr Cornall. In fact, during the interruption to the meeting, I arranged to have my own copy brought up. I have got enough particularity to go on, but I appreciate your cooperativeness. Am I right in understanding that round 5 is the final round under this program?

Dr Heriot—Yes.

Senator BRANDIS—How many large grants did you say there were under round five?

Dr Heriot—Under round 5 there were 70.

Senator BRANDIS—Just looking at the list randomly—because I am not going to take you through the list exhaustively, obviously—it included programs such as a program to provide \$150,000 to Alice Springs Youth Accommodation and Support Services to reduce antisocial behaviour, criminal behaviour and substance abuse; a program to fund the Brisbane Indigenous Media Association to the tune of \$141,950, to involve young people in detention and those at risk in rehabilitative activities, through the production of music and online material; and a program in New South Wales through the Community Business Development and IT Services to reduce crime and the likelihood of petty offenders committing more serious criminal offences. I could go on. These programs are targeted in most cases at young offenders, and in all cases their objectives are preventative or rehabilitative—is that right?

Dr Heriot—Yes, the grants that you have read out are targeted to that area. The program funded a wide variety of programs but certainly the ones that you read out are in that category.

Senator BRANDIS—The only reason I read them out was so that the record can show the flavour of the kinds of programs that were funded under this measure. You said that this was 'chopped' if I can use the vernacular as a result of a decision by the ERC—is that right?

Ms Blackburn—What has been explained is that it was a lapsing program, and the program will lapse on 30 June.

Senator BRANDIS—I understand that and I can understand why you do not feel able to respond affirmatively to this question, but there would have been an expectation—would there not—that the program would have been continued? It was a four-year pilot program, but we all know that these pilot programs, when they prove successful, are continued, unless they are chopped by the government.

Ms Blackburn—I would not describe the four-year National Community Crime Prevention Program as a pilot program. There was in fact a program which came before that one. It operated for a number of years and had slightly different parameters, both in terms of the grants that it funded and the purpose for which the funding was provided. The current program, which lapses on 30 June, was established as a four-year grant funding program.

Senator Ludwig—I might have some information that might assist the committee. The government correctly states that it has not ceased funding crime prevention related grants in the 2007-08 additional estimates funding of \$15 million over two years, now reprofiled over three years following a movement of funds at the request of the Attorney-General. This was provided for a range of targeted community crime prevention projects as part of the Safer Suburbs program, which aims to reduce crime, antisocial behaviour and gang activity through mechanisms such as the installation of closed circuit television cameras and street lighting in lanes. The 2008-09 budget also contains other measures which are aimed at materially improving the safety and security of the Australian community, including \$25 million over five years, to improve the security of schools deemed to be at risk through school security programs. It has been correctly identified that the National Community Crime Prevention program was a four-year program. Before that there were other iterations of it and I think it stretches back some years. This government has made a decision, which I have just advised the estimates committee of.

Senator BRANDIS—Thank you, Minister. When I said that the program was a pilot program, you rightly corrected me by saying that in substance it was not a pilot program but a continuation of earlier iterations of similar programs under different names. I see Mr Cornall nodding there. That is right—isn't it Mr Cornall?

Mr Cornall—Yes.

Senator BRANDIS—But now—whether it is called by its existing name, the National Community Crime Prevention Program, or by the names of the earlier iterations of substantially the same thing—it has been abolished. Although the grants that are being paid under round 5 will continue to be paid, presumably, a kindred program with a like purpose will no longer exist.

Senator Ludwig—There are the grants announced for Safer Suburbs, as the Minister for Home Affairs correctly outlined in his press release on 26 May 2008. Perhaps a flavour of those grants might also assist the estimates committee. In that press release the minister said:

“Five grants have been approved as part of the Government’s \$15 million election commitment to fund locally developed crime prevention measures.”

The grants provide:

- \$300,000 for Alice Springs Council to monitor CCTV in Todd Mall
- \$680,000 for up to 27 CCTV cameras to be installed around—

locations including Woy Woy beaches. Among other grants, there is also:

- \$1.4 million for Belmont in Western Australia to provide low cost alarm systems for 400 businesses and residents in the area and CCTV installation ...

I did not want to let the estimates committee come away with thinking that there was no replacement or no consideration for a type of granting system—I think Safer Suburbs falls neatly into that area.

Senator BRANDIS—I understand completely, and I do not assert that all of the sorts of beneficial programs that had been funded under the National Community Crime Prevention Program will no longer be funded under some other program—and the Safer Suburbs program of which you give an example will no doubt take over that function in part. But it will not take it over completely, will it? For a start—if I may infer from its name—the Safer Suburbs program is a program directed specifically at suburban centres. Yet many of the projects under the National Community Crime Prevention Program are in regional and remote areas of the country. You are not able to assure us, are you, that all of the kinds of programs which had been funded under the National Community Crime Prevention Program will be able to be funded under different programs with different names in the future?

Senator Ludwig—In my earlier remarks I mentioned two matters, and there are a range of others. The first matter I mentioned was, of course, the one that you identified—the Safer Suburbs program—which aims to reduce crime, antisocial behaviour and gang activity. The second matter was the \$25 million over five years to improve the security of schools deemed to be at risk through the School Security Program. In his press release Minister Debus also said:

“Organisations will assess their effectiveness to help with the development of future crime prevention planning.

“I look forward to new proposals being received to continue the rollout of our Safer Suburbs Plan.”

So it is a different emphasis. As to the extent of that, I can say that the emphasis does seem to be in the area that the minister has mentioned, but I think there are also other programs, such as the School Security Program, that address other parts of the issues. In addition, of course, there is the \$191.9 million over five years to deliver an additional 500 sworn Australian Federal Police officers to increase investigative coverage of high impact matters, including the broader area of organised criminal activity.

Senator BRANDIS—So I take it the answer to my question is, no, you cannot give me an assurance that there will be projects that would have been funded under the lapsing program that will be funded under new programs? That is what it amounts to—the fact that you cannot give me that assurance.

Senator Ludwig—By definition I could not give you that assurance. There is a different emphasis—that is clear.

Senator BRANDIS—That is fine, thank you.

Senator BARNETT—Can you identify the projects that were to proceed in Tasmania under that program?

Ms Blackburn—We can provide you with a list of all of the organisations which have been funded under the National Community Crime Prevention Program.

Senator BARNETT—I have the list here that has been tabled under round 5. Is my understanding correct that that funding concludes on 30 June?

Dr Heriot—No, Senator. To add to that, I am now in a position to table the grants awarded under rounds 1 and 4, and the small grants stream of round 5. We are still seeking rounds 2 and 3 and I apologise for that. Those projects which were awarded grants in round 5 will receive the full award of grant over the life of the project.

Senator BARNETT—Can you advise what is the life of the project? How long? Is it different for each project?

Dr Heriot—It is different for each project. Some run for a number of weeks or a number of months, and some run for up to three years. Each project has a specific funding agreement with milestones that set out the deliverables and funding arrangements. They are all different.

Senator BARNETT—And they will be funded, unlike the Regional Partnerships projects, which you do not have to comment upon?

Dr Heriot—I would simply say that no funding has been taken away from those that were awarded in the last round.

Senator BARNETT—But what I am interested in are the ones that have been awarded but have subsequently been scrapped or concluded and will not now proceed. Can you advise and identify those projects, specifically the ones in Tasmania?

Dr Heriot—We have had a number of projects cease over the life of the program but that is for reasons of implementation failure or the organisation ceasing. There have been no funds withdrawn otherwise.

Senator Ludwig—Perhaps you could rephrase the question. The government has not terminated any of the grants that have been awarded, as I understand it.

Senator BARNETT—Together with my Liberal Senate colleagues, we were organised by Senator David Bushby in the Franklin electorate and I think we visited Rosny Neighbourhood House some weeks ago, and they advised us of their concerns. Does that ring a bell to you? My understanding of the background was that the former minister Johnson had, on behalf of the government, committed the funding for that particular project.

Ms Blackburn—I am sorry, could you please restate the name of the particular project that you are concerned with?

Senator BARNETT—I thought it was Rosny Neighbourhood House.

Senator Ludwig—Do you know whether that had gone through a grants process and whether an application been made, or whether it was simply the minister wandering around an electorate?

Senator BARNETT—I am sure it would not have just been the minister wandering around because he is very particular in these sorts of matters. It may have been in and around election time, but I thought it was before then and I thought it was a commitment provided—that is why I am asking the question.

Dr Heriot—Senator, I am not aware of a commitment around Rosny Neighbourhood House but I am happy to take that on notice.

Senator BARNETT—Are you aware of any commitments in the southern part of Tasmania that are now not proceeding?

Senator Ludwig—That question might be a bit broad. Can we confine it to at least this program that is currently before us? In fairness to the witnesses I think we can—

Senator BARNETT—In fairness I have indicated a neighbourhood house that you are saying you cannot recall.

Senator Ludwig—What we have said is that we will take it on notice to examine the issue. I did try to clarify with you whether or not a grant had been made under this heading, or under another one or whether it was simply a separate election commitment made by the minister at the time.

Senator BARNETT—I am happy for you to take it on notice. Could you please advise the committee of any other projects in Tasmania which were committed to and are now not proceeding?

Senator Ludwig—That is under the crime prevention program?

Senator BARNETT—Under either of the programs—Community Crime Prevention or Safer Suburbs.

Dr Heriot—Certainly.

Senator BARNETT—At the last estimates in February you provided a response that you were preparing guidelines for schools that could apply for funding under the schools safety program. You had to liaise with both ASIO and the Australian Federal Police. The answer you gave at the time was that you were preparing guidelines and that criteria was being prepared so that the relevant schools, whether they have a Jewish background, Islamic background or whatever religious background, could then apply for that funding. Can you now advise the committee of further and better particulars?

Mr Cornall—My current brief says that the Minister for Home Affairs wrote to the Attorney-General in each jurisdiction on 11 March this year, seeking advice on schools which may be eligible for funding under the program. The minister also wrote to the state ministers for education and for police as well as to non-government school bodies. All identified schools will be invited to apply. Applications will then be assessed by an advisory group, which will make recommendations to the Minister for Home Affairs.

Senator BARNETT—What response has the minister or the department received since that letter went out on 11 March?

Dr Heriot—We received responses from three jurisdictions, and I understand that responses from other jurisdictions are coming in the next week or so.

Senator BARNETT—Which jurisdictions have you received responses from?

Dr Heriot—As of last week, which is the last time I checked, it was the Northern Territory, WA and the ACT—in terms of formal responses.

Senator BARNETT—I am interested in formal and informal responses.

Dr Heriot—We have had informal responses from other jurisdictions indicating that responses were en route.

Senator BARNETT—Can you advise the committee which jurisdictions?

Dr Heriot—I will have to take that on notice.

Senator BARNETT—What have these three jurisdictions said—how many schools have they nominated in each case?

Dr Heriot—I will have to take that on notice.

Senator BARNETT—What criteria have to be met by the relevant schools?

Dr Heriot—Mr Rudd made clear in announcing the election commitment that the funding was not to deal with student bullying or harassment or opportunistic acts of vandalism or property damage but to help schools that are assessed as being especially at risk for particular security reasons. That was the information that was provided to the jurisdictions and they were asked to identify schools that might fall into that category.

Senator BARNETT—That was before the election. It is now some six months or so later. Surely you have developed the criteria. I asked these questions in February and the criteria were not available. You said they were being prepared and that the guidelines were being prepared. We are now at the end of May and you are advising the committee that you still do not have any criteria.

Senator Ludwig—What I can say is that the Minister for Home Affairs wrote to the Attorney-General in each jurisdiction—as we have heard—on 11 March, seeking their advice on schools which may be eligible for funding under this program. The minister also wrote to the state ministers for education and police as well as non-government school bodies. All identified schools will be invited to apply. As to the particulars, that specific question you have asked will have to be taken on notice.

Senator BARNETT—I appreciate your response. It is exactly word for word what Ms Blackburn said in answer to my first question, which was the same question. So we have had it twice. I appreciate your willingness to assist, but you must understand that six months have gone by and we do not have the criteria. We do not have the guidelines. We have been advised that the minister has written to various state jurisdictions. The schools have an interest. Some schools have a special interest and they like to know what is going on and what criteria will apply. Do you have anything further to add at this stage—or do you want to take it on notice?

Senator Ludwig—As I have indicated, I think it is best in this instance to take it on notice. The minister obviously may want to make decisions about timing and the announcement. All of those matters are really for the minister to decide, but I will see if I can find out any additional information for you.

Senator BARNETT—Thank you.

CHAIR—Senator Barnett, can you give us an idea of how much longer you might want under outcome 2?

Senator BARNETT—On emergency management, 15 to 20 minutes. I have questions for Emergency Management Australia officers on the involvement of volunteers and volunteer programs.

Senator BRANDIS—Minister, could I foreshadow, for the assistance of the officers, what I want to ask questions about after Senator Barnett's questions. I have got some questions about the national handgun buyback, anti-money-laundering, counterterrorism financing and general questions about terrorism legislation. Senator Barnett is going to handle emergency management. I also have questions about the National Counterterrorism Committee and the Haneef inquiry.

CHAIR—We will take Senator Barnett's questions now then.

Senator BARNETT—Regarding volunteers, Emergency Management Australia and the State Emergency Service, could we go to the big picture first. How many volunteers do we have in Australia today?

Mr Pearce—My understanding is we have in the vicinity of 500,000, or thereabouts, across the country.

Senator BARNETT—Are you talking about emergency service volunteers or all volunteers?

Mr Pearce—No, I believe they are emergency service volunteers.

Senator BARNETT—Five hundred thousand?

Mr Pearce—Approximately.

Senator BARNETT—And how many per state and territory?

Mr Pearce—I would have to take that on notice. I could not give you a breakdown at the moment but we can get that for you. It may be approximate; I am not sure it would be accurate.

Senator BARNETT—Just for your reference, my understanding is that, in terms of total volunteers, there are in the vicinity of 6.2 million.

Mr Pearce—That is across the whole volunteering sector, not just in emergency service.

Senator BARNETT—So you are focusing on emergency management?

Mr Pearce—That is right.

Senator BARNETT—Fine. So you can take on notice the state and territory breakdown. Can you also break it down into the types of emergency service volunteers or can you advise me now as to whether it is fire, ambulance or other?

Mr Pearce—No, we would have to take that on notice as well, but we can break it down into those streams for you.

Senator BARNETT—Thank you. Are there any others in terms of fire, ambulance—what other?

Mr Pearce—As far as the uniformed agencies go, there is the State Emergency Service, as you know. The ambulance service has some around the country. There is the fire service

predominantly, but there are also other organisations that are non-government organisations that have recognised emergency service volunteers.

Senator BARNETT—Could we just focus on fire and then we will go to ambulance. Do you know the proportion of volunteers and employed emergency service personnel?

Mr Pearce—No, I do not. Again, we can find that out through the relevant authorities for you.

Senator BARNETT—Could you take that on notice and do a state by state and territory by territory breakdown?

Mr Pearce—We can.

Senator BARNETT—Likewise with ambulance, the State Emergency Service and any other. I know that in Tasmania, for example, we have approximately 5,000 fire service personnel and 4½ thousand of those are volunteers, so about 500, roughly, are employed. That highlights, I think, the importance of the role of volunteers and volunteerism across the country.

Mr Pearce—Certainly.

Senator BARNETT—What role do you have in terms of training volunteers and emergency service personnel?

Mr Pearce—The role that we have is through our Mount Macedon Institute. The programs that are provided there for all emergency service agencies from the states and territories include access for volunteers from all of their agencies as well. All of the programs that we conduct at the institute are accessible by volunteers from emergency service organisations as well. We have a number of those passing through each year.

Senator BARNETT—Do you have figures on the training offered by state emergency service operations?

Mr Pearce—No, we do not. Again, it is something we could find out through our colleagues.

Senator BARNETT—Could you get a status report for us on that in terms of the training that is provided? I am particularly interested to know the policies that apply to the reimbursement of costs incurred by volunteers—for example, travel: whether the cost of getting to the training and the cost of getting to the fire or emergency management incident is reimbursed or not.

Mr Pearce—Yes, Senator.

Senator BARNETT—So you do not have an understanding as to policies that apply?

Mr Pearce—No. The policies would be different in each of the jurisdictions and finding that information out for you—which we can do through the jurisdictions—I would suggest, whilst we can get it for you, will take some time because it is a big question and they are all different policies.

Senator BARNETT—Sure. You have national meetings and conferences from time to time, don't you, with your state and territory counterparts?

Mr Pearce—We do.

Senator BARNETT—How often?

Mr Pearce—The Australian Emergency Management Committee meets every year on at least one occasion and usually twice. We also have a number of other forums where our state and territory colleagues meet with us on a range of issues. That is on an ongoing basis.

Senator BARNETT—What do you discuss? What are the things that are priorities for you? What are your discussion points at those meetings—at your annual meeting, to start with?

Mr Pearce—It depends on what the major policy issues are that the jurisdictions and the Commonwealth have agreed they want to address at that time. A lot of what the major priorities are is very dependent upon the world environment at the time and also the situation in Australia.

Senator BARNETT—All right. So it really depends on the situation at the time.

Mr Pearce—It does.

Senator BARNETT—How many other meetings are there? You said you just meet from time to time with the various other state jurisdictions. Is that right?

Mr Pearce—There are a number of forums that we either coordinate as Emergency Management Australia or are a party to that are coordinated by others—there are numerous ones. As I said, we would be meeting with our state and territory colleagues on a weekly basis, in effect, on an issue that is relevant to the country.

Senator BARNETT—How many staff do you have?

Mr Pearce—At this stage, 122, I think.

Senator BARNETT—Is that number going up or down?

Mr Pearce—It has just increased with the machinery of government, with picking up the former DOTARS natural disaster relief staff.

Senator BARNETT—I have not looked at the budget papers. Have you had a cut?

Mr Pearce—Only the standard efficiency dividend that has been applied to the department.

Senator BARNETT—What did that mean for your organisation?

Mr Cornall—The extra efficiency dividend of two per cent, plus the increase in the standard efficiency dividend of 0.25 per cent in our budget meant a reduction of \$4.765 million.

Senator BARNETT—Can you give me the total figures—what it was last year and what it is this year?

Mr Cornall—Yes. Our budget by 2007-08 was \$217.950 million.

Senator BARNETT—Do you have a page number that you could give me?

Mr Cornall—If you go to page 20 of Budget Paper No. 4 and look in the left-hand column you will see that this year's budget is \$230.136 million and the figure for last year, underneath that, is \$217.950 million.

Senator BARNETT—But that is not a \$4.765 million difference.

Mr Cornall—No, because there are a number of variations in our budget. I can take you through those of you would like me to. Do you want me to do that?

Senator BARNETT—If you could.

Mr Cornall—There were reductions in funding due to measures ceasing or a reduction in their funding. That was a reduction of \$11.468 million. There were increases in funding due to changes in the funding for existing measures—that was \$15.726 million. There were increases due to new measures in the budget of \$4.37 million. There was a savings measure, which was an EMA measure, to establish a deployable mortuary facility that it was decided not to go ahead with. That was a reduction of \$800,000.

Senator PAYNE—Did you say a deployable watering facility?

Mr Cornall—No, a deployable mortuary facility.

Senator PAYNE—Oh, worse than I expected! Thank you.

Mr Cornall—Under the machinery of government changes that took place earlier this year, some of our staff went to PM&C in relation to privacy and freedom of information, and some staff from the former department of transport came to us in relation to the territories function. We gained more staff than we lost, and the net increase in our funding was \$3.892 million. Under the normal increase in budgets, we received \$5.231 million. We then reduced that by the efficiency dividend increases, which was the \$4.765 million that I have already mentioned to you. When you add and subtract all those figures, starting at \$217.95 million, you get to \$230.136 million.

Senator BARNETT—Thanks for that. Can we focus on the Labor budget allocation of \$5 million over three years to help volunteers with fuel costs? I want to focus on that now. It is a particular budget allocation.

Senator Ludwig—I think you will find that is in a different portfolio.

Mr Cornall—That is nothing to do with us.

Senator Ludwig—My understanding is that Families, Housing, Community Services and Indigenous Affairs would be the appropriate place to ask that question.

Senator BARNETT—Are you familiar with it, Mr Pearce?

Mr Pearce—No, I am not.

Senator BARNETT—When it was announced, it was designed to help volunteers with fuel costs—a fuel voucher.

Mr Pearce—I would say, by the sound of it, that would be across the full volunteer spectrum rather than just emergency services. But I have not personally heard of it.

Senator BARNETT—Those sorts of figures, if you spread them across the 6.2 million volunteers, are not a lot of money for volunteers for their fuel costs, particularly in light of the cost of fuel going up at the moment.

Senator Ludwig—The questions should be, as I have indicated, directed at Families, Housing, Community Services and Indigenous Affairs for that policy.

Senator BARNETT—Is Mr Pearce aware of the Volunteer Management Program and Labor's support for that of \$69 million over three years, or is that in a different portfolio also?

Senator Ludwig—It is not in the Attorney-General's portfolio. My understanding is that the questions should be directed to the other committee as I indicated before.

Senator BARNETT—Finally, Mr Pearce, can you outline the various incidents over the last 12 months in terms of emergency management. Do you do a summary or a review of the incidents, whether it be fire or other safety incidents that have occurred?

Mr Pearce—We certainly conduct reviews of the ones that we are involved in. We also monitor those that we are not involved in—just so that we are across what is going on with them. But the reviews and the analysis of events that we do are generally across the events that we are actually actively involved with.

Senator BARNETT—Do you put that into an annual report? Where can we assess your review of the emergency incident in each case?

Mr Pearce—We do not put it into an annual report as such. We review those, effectively, as an operational review for our own purposes, and they are done within Emergency Management Australia.

Senator BARNETT—What would the last three reviews you have undertaken be? Can you name them?

Mr Pearce—The last three would be the re-entry of the US satellite approximately a month and a half ago and, prior to that, both the northern New South Wales and the Far North Queensland and southern Queensland floods at the start of this year. They would be the three most recent ones.

Senator BARNETT—How long is your review of each of those?

Mr Pearce—It is purely dependent upon whether or not issues arise. As a result of that, we also review the plans that are utilised to respond to those as well.

Senator BARNETT—In light of the fact that it is not in an annual report and we cannot see it in any other way, can you take those last three that you have referred to on notice and provide a copy to this committee?

Mr Pearce—Yes, we can do that.

Senator PAYNE—Mr Pearce, earlier this month there was a report released by the Australian Strategic Policy Institute called 'Taking a punch: building a more resilient Australia' which got a little bit of publicity at the time. It raised some interesting questions about Australia's broad preparedness in relation to natural disasters in particular, but also natural disasters when combined with other events. Is EMA planning to make any public, comprehensive response to that report?

Mr Pearce—We have reviewed it internally. We have reviewed the ASPI report and had a look at the recommendations and suggestions that were made in there, quite a number of which were either already being addressed or well in train. There were a number of others which were new or somewhat new suggestions that, in the process of looking at the national situation, we would consider. We are doing that with the jurisdictions, as I said, as part of normal business because they have been identified as potential areas that, in looking at them, might benefit the country. But there is no public statement EMA is making in relation to those.

Senator PAYNE—There are a range of, as you say, observations and recommendations which have excited a degree of interest in the community. For example, the statements:

... that physical assets in Australasian public hospitals do not meet US hospital preparedness benchmarks for mass casualty incidents.

and:

In fact, we don't have minimum disaster preparedness standards for our health system.

Those sorts of observations—observations about the impact of tree change in relation to bushfire emergency and sea change in relation to storm and climate change issues—seem to me to be about issues that greatly concern the public to greater and lesser degrees. It may perhaps be useful for Emergency Management Australia to be able to provide some assurance to the community in relation to those issues.

Mr Pearce—The first ones that you mentioned are obviously Department of Health and Ageing areas of interest, and they were a party to the outcomes of the report and have also done their own analysis of the detail that is in there. I cannot tell you what the outcome of that analysis is.

Senator PAYNE—Do you know if it has been made public?

Mr Pearce—Not that I am aware of, no. But I know the Department of Health and Ageing has taken the same approach that we have in looking at which issues are applicable to their area and looking then at how they can improve, if they can at all, the situation that they currently have. I am not aware of a public statement, though.

Senator PAYNE—Is there a role for your organisation? I take your point that this is a broad-ranging report and raises issues across a range of portfolio areas. But is there a role for your organisation, in your view, to publicly address some of the concerns which have been raised—notwithstanding the work that is being done by COAG and the work that is being done in other subterranean environments?

Mr Pearce—I think the organisation's role, if it is to do with emergency management, is to liaise and work with the other areas that are responsible for those particular issues and see if we can assist in any of the work that they are doing. It is not necessarily for us to make a public statement on them. A number of the issues that were raised in the ASPI report have been previously addressed in communication with the Ministerial Council for Police and Emergency Management—for example, community warnings and those sorts of things. So statements do get made over a period of time but not directly in relation to every issue in the report.

Senator PAYNE—That is true, but not all Australians have the rare privilege of being privy to the inner workings of the Police Ministers Council and the emergency services ministerial councils.

Mr Pearce—No, but they are released through communiques and through media releases that accompany them.

Senator PAYNE—One hopes.

Mr Pearce—They were.

Senator PAYNE—In terms of the suggestions—for example, about EMA and the state emergency management services working better with business and about establishment of business liaison units which can form good relationships with emergency crisis centres in the context of such an event—has EMA formed a view on those that you can share with the committee?

Mr Pearce—Only in that, in the relationship between the emergency management agencies and business, there has been an ongoing awareness that where there are opportunities to improve that relationship they should be undertaken. We are having discussions with the jurisdictions in relation to that, recognising that the emergency management responsibility does actually rest within the states and territories. Our role there really would be that, where there is a national outcome that can be achieved through working with them, we would contribute to that.

Senator PAYNE—What about the suggestion that EMA could take a lead in the coordination of employers of volunteers and assist in that area?

Mr Pearce—Again, that is something that, at least in my mind at the moment, would not be a practical solution, again because it relates to employees within a state employed system and therefore it is not one that I could see that we would have a role in.

Senator PAYNE—The Defence Reserves manages it though, from a Commonwealth level. They take a lead in talking with employers and employers of reservists across three services.

Mr Cornall—I just wonder if I could add here that the role of Emergency Management is actively being considered by Rick Smith in his homeland security and border security review.

Senator PAYNE—How prescient, Mr Cornall; I was coming to that.

Mr Cornall—I think that this ASPI paper is very timely and, as I understand it, EMA had a considerable input into it. On top of that, as you would well know, David Templeman, the co-author of the paper, was the former Director General of EMA, who preceded Mr Pearce.

Senator PAYNE—Yes.

Mr Cornall—The issue that the Commonwealth is grappling with, and that I think Mr Smith is grappling with, is that the Commonwealth has no constitutional or other authority in relation to emergency management. It has no emergency management resources other than the 120-odd staff at EMA and it has no authority to direct or otherwise arrange the way services are provided in the states. This is an issue that Mr Smith is giving considerable consideration to. I agree it is a very significant issue for Australia, particularly as we seem to be suffering more significant adverse weather incidents and there is every expectation that that will

continue. To do the things that are recommended in the ASPI paper would be a very major undertaking and would require a significant undertaking by all governments—significant resourcing and a commitment to achieve those outcomes. So, while I thought the paper was a very thorough, interesting and comprehensive paper, it also had a touch of idealism about it, that to achieve it would require a very significant commitment by all governments to get there.

Senator PAYNE—Mr Cornall, to take the item I raised before, for example, about an effort to coordinate the employers of volunteers, are you saying that you perceive, or the department perceives, or the government perceives that there is a constitutional barrier to EMA playing that role?

Mr Cornall—No, I have not said that. I am saying that, in terms of all of the things that might be contemplated in that paper, for a national authority in relation to emergency management, the Commonwealth does not have that authority. I think that the whole area of emergency management will come very much under scrutiny in the Smith review, and this paper will contribute very constructively to a consideration by the Emergency Management Ministerial Council and also by the government generally of where we need to take emergency management in the near future.

Senator PAYNE—Is the Smith review coordinated out of PM&C?

Mr Cornall—It is.

Senator PAYNE—What is its reporting date?

Mr Cornall—30 June.

Senator PAYNE—In terms of some of the more specific issues which are raised in relation to EMA in the report, if I wished to pursue those in further detail, are you advising me, Mr Pearce, that they are matters which are being considered internally to EMA and not matters which will be made public?

Mr Pearce—We are still reviewing the ASPI report to identify which of the suggestions or recommendations in there have been addressed; for those that have not, we are looking at those to see whether or not there are some strategies that are appropriate that we might look at applying and recommending.

Senator PAYNE—I do appreciate that the report has only been tabled in the last couple of weeks, so I am not suggesting you should have done it the day before yesterday or anything like that. But I am suggesting and I am in fact seeking, for the benefit of the committee, the provision of information on notice to the committee in response to some of the specific issues, or the specific issues, raised for EMA in the ASPI report and any response you can provide the committee to those.

Mr Pearce—We will take that on notice.

Senator PAYNE—Thank you.

CHAIR—Do you have any further questions?

Senator PAYNE—Not on that matter, no.

[2.49 pm]

CHAIR—We are dealing with output 2.1, Criminal justice division. Senator Brandis, do you have questions?

Senator BRANDIS—Yes. Regarding the forward estimates, I see the outlay on the national gun buyback scheme for 2008-09 is down to \$2½ million, down from \$6½ million in 2007-08. The note to the account says that that is due to the winding up of the scheme. Is it expected that 2008-09 will be the final year of operation of the scheme?

Ms Blackburn—These figures, as I understand, relate to the handgun buyback scheme, which was instituted in 2003. That scheme had specific dates put on by which handguns had to be surrendered in order to be eligible for compensation. The scheme, in fact, only continues at the moment because there are some compensation payments which have not yet been finalised by the states and reimbursed from the Commonwealth.

Senator BRANDIS—So all the surrenders of weapons have happened?

Ms Blackburn—Yes, all of the surrenders happened in 2003, from memory, so we are simply tidying up the payments for those items which had already been surrendered.

Senator BRANDIS—Going to the annual report, you will see there that there are six reviews or evaluations described at pages 162 and 163. We have already dealt with one, the National Community Crime Prevention Program, so we will not revisit that. Regarding the other reviews, could you bring me up to date on where we stand, particularly with the three statutory reviews: the Mutual Assistance in Criminal Matters Act, part 1D of the Crimes Act and the Proceeds of Crime Act?

Ms Blackburn—The review of the Mutual Assistance in Criminal Matters Act is a matter to be handled under program 2.2.

Senator BRANDIS—It is in output 2.1 of the report. That is why I am asking.

Ms Blackburn—Yes, my apologies. On the part 1D review, as we noted in the report, it was required to be conducted within a certain time frame prescribed in the Crimes Act. The difficulty, as you may recall, was that the database did not in fact start to operate until very late last year.

Senator BRANDIS—So this was, in effect, suspended?

Ms Blackburn—Essentially, yes. The government made a decision last year to defer the review until 2009 because there was simply nothing to review.

Senator BRANDIS—That is the old government?

Ms Blackburn—Yes.

Senator BRANDIS—Has the new government made a decision to resume the review or has that matter not yet been addressed, Minister?

Dr Alderson—The new government has made a decision equivalent to the previous one's, that the most appropriate time for the review would be in 2009. There has not to date been any public announcement of that. The reasoning behind that is that, with matching having got underway during last year, that would then allow a year for some matters to have been

investigated and brought to trial, and then you could see how the database arrangements were working.

Senator BRANDIS—That is fine; that is uncontroversial.

Ms Blackburn—On the Proceeds of Crime Act review, as the report notes that report was completed. The report was tabled in parliament. So the review is complete.

Senator BRANDIS—What I am getting at is what is the new government going to do about it?

Ms Blackburn—The report was tabled in October 2006. There has been continuing consideration since that time of the recommendations which were made in that report and a number of other aspects of the Proceeds of Crime Act which are currently under review as well. There is an expectation that we would seek to have government make decisions on what changes might be put forward to improve the operation of the Proceeds of Crime Act later this year.

Senator BRANDIS—When you say ‘later this year’ can you be a little bit more specific?

Ms Blackburn—The criminal justice division is presently working on it. We have been working on the recommendations which came from the Sherman review plus a range of other matters. There are a number of agencies which have significant interest in the effective operation of proceeds of crime legislation. There are a range of issues which have been put forward by agencies for consideration to take forward. We are presently working on a proposal to put to government for decision.

Senator BRANDIS—We should therefore, Minister, expect some amending legislation in the second half of the year?

Senator Ludwig—That will be a decision for the minister of the day once the matters are finalised. There is the extent that some of those have been around for some time under the previous government and we did not see any legislation. But, as I think you have heard, the department is working on them. Announcements will be made in due course by the minister concerned.

Senator BRANDIS—So the minister will decide whether or not to take a submission to cabinet in the latter part of the year embodying recommendations arising from the review?

Senator Ludwig—They are all matters for government.

Senator BRANDIS—What about the Mutual Assistance in Criminal Matters Act 1987?

Ms Jackson—The department has been reviewing the Extradition Act and the Mutual Assistance in Criminal Matters Act and is holding consultations with stakeholders with a view to having proposals put to government that are directed at reducing the delays and enhancing our ability to cooperate with our international counterparts. We are hoping to have the review considered by government in the next few months and it is likely that there will be an exposure draft of the amendments that are agreed to before legislation is introduced.

Senator BRANDIS—When are you planning for the exposure draft to be exposed?

Ms Jackson—In the second half of the year.

Senator BRANDIS—Before the end of the year?

Ms Jackson—Yes.

Senator BRANDIS—By the way, Ms Jackson—since you are at the table—you had some success following the last estimates round with Dr Patel, I note. Can you bring us up to date with where that is—apart from what we read in the media? I assume your role in this matter is now largely acquitted, unlike Dr Patel?

Ms Jackson—There is ongoing litigation concerning Dr Patel in America and that is being handled by the prosecutors in Oregon on our behalf. I do not actually have the next court date in front of me, but—

Senator BRANDIS—Somebody has just come forward to assist you.

Ms Jackson—26 June is the next court date for Dr Patel.

Senator BRANDIS—I appreciate that you need to be circumspect here but, realistically, given the issues that are being litigated by Dr Patel, do you have a view—and I appreciate it can only be a rough idea—as to the time by which we will have a final determination of the issue of whether Dr Patel will be extradited?

Ms Jackson—That is something that I could not hazard a guess at. That is a matter for the US legal system, and I could not give you even a guess at when that might be concluded.

Senator BRANDIS—Could you perhaps, for the benefit of the committee, express in a couple of sentences what is the current issue before the Oregon courts.

Ms Jackson—Sorry?

Senator BRANDIS—What is the issue before the Oregon courts? What is the point that Dr Patel is taking to try and bring this process to an end?

Ms Jackson—The essence of the issue is really whether double criminality—

Senator BRANDIS—It is still a double criminality issue, is it?

Ms Jackson—Yes.

Senator BRANDIS—I see. Are there any technical issues as well?

Ms Jackson—Double criminality in the context of the circumstances of the Patel extradition, where you are dealing with medical procedures, is highly technical and complex.

Senator BRANDIS—I suppose by ‘technical’ I did not mean complex; I meant ‘technical’ as in the sense of process related issues. I take the double criminality issue to be the substantive legal issue, and that has always been the case. As well as that, are there issues of a procedural character or what might loosely be called a more minor technical nature that are being agitated also?

Ms Jackson—There has been a discovery order which has been dealt with as a preliminary matter to the hearing in June.

Senator BRANDIS—Are you now getting a satisfactory level of cooperation from the Queensland Director of Public Prosecutions?

Ms Jackson—We have always been working cooperatively with our Queensland counterparts.

Senator BRANDIS—I am sure you have. Can you tell me, please, how much the Patel extradition proceedings have thus far cost the Commonwealth.

Ms Jackson—The proceedings themselves are being conducted in the US and the US bears the cost of those proceedings.

Senator BRANDIS—But there must be some cost to the Commonwealth in providing the legal support and other routine administrative services associated with these proceedings.

Ms Jackson—Those are normal departmental costs for the Extradition Unit. The staff there provide that support.

Senator BRANDIS—Has any attempt been made to disaggregate or isolate those costs?

Ms Jackson—No.

Senator BRANDIS—Would you be able to do that?

Ms Jackson—Not really. We do not keep a record of how much time people spend on individual extradition cases. We currently have 100 extradition cases on hand. It would be very difficult to keep track of how much time is devoted to an individual matter.

Senator BRANDIS—I must confess I cannot immediately see why it should be so hard. Let me approach it this way: how many officers are engaged presently full time on the Patel matter?

Ms Jackson—There are no officers of this department engaged full time on the Patel matter.

Senator BRANDIS—Have there been, at an earlier time in its history, any officers engaged full time on the matter?

Ms Jackson—There would have been days on which officers were engaged full time, but not over an extended period.

Senator BRANDIS—What I would like you to do—and you will obviously need to take this on notice, Ms Jackson—is to give me an indication of the number of person hours within the department which have been devoted to the Patel extradition since you first received the letter of request from the Queensland authorities a couple of years ago. If it can only be an approximation or an estimate—if that is the best you can do—that is fine. Would you be able to do that for me?

Ms Jackson—Certainly.

Senator BRANDIS—Thank you.

Mr Cornall—Senator, given the absence of any time-recording system, any figure of that nature would almost be speculative. We can endeavour to do it but, if it is then going to become a public figure and it is very misleading, I do not think it is going to help the committee or the department.

Senator BRANDIS—Mr Cornall, I have a very high level of confidence in your capacity—in written form and, as you have been doing throughout these hearings, in verbal form—to put appropriate qualifications and caveats on any information you provide to us.

Mr Cornall—Very well.

CHAIR—Does that complete output 2.1?

Senator BRANDIS—Not quite, though almost—from my point of view, at least. I was just going to ask whether there are any other major statutory or institutional reviews underway at the moment under output 2.1.

Senator Ludwig—Just to qualify that, is that in addition to those that have been commenced prior to this government, are ongoing and are still due to report?

Senator BRANDIS—Thank you, Minister; that will shorten things. I am actually interested in those that have been commenced by the new government in addition to those referred to in the 2006-07 annual report.

Senator Ludwig—Are they separated out between those which are required by statute and those required by a review, either internal or external?

Senator BRANDIS—They can be if you like. You, perhaps, can speak to this—

Senator Ludwig—It just helps to provide a full context.

Senator BRANDIS—Of course. You can speak to this, Mr Cornall, but no doubt you will want to take it on notice for the sake of completeness. I am interested in significant statutory and institutional reviews, instituted since the new government came into office, in relation to acts administered under, or institutions within, output 2.1.

Ms Blackburn—I can answer that. There are no reviews in addition to those which are listed in the annual report. We have not commenced any new reviews since this report was completed. As we have noted in this report, some of these are, indeed, continuing.

Senator BRANDIS—Sure. Are there any in contemplation?

Ms Blackburn—None that I am aware of.

Senator BRANDIS—All right. That is interesting.

Senator NETTLE—Yesterday, Mr Cornall, you suggested that I ask some questions about the Balibo Five case. Is that in this section?

Mr Cornall—Dr Alderson can answer those questions.

Senator NETTLE—Thank you. Some of it was just about me understanding the process by which it occurs. I will have a go at what I think is the process, and you can tell me if it is wrong or right.

Dr Alderson—Certainly.

Senator NETTLE—After the New South Wales coroner made their finding, does it then go to the Attorney-General's Department for them to ask the Australian Federal Police to do a brief which comes back to Attorney-General's and then goes to the DPP?

Dr Alderson—The process in this particular case—concerning the coroner’s report on the deaths of the five journalists—was a quite unusual one, so I might contrast what happened in that particular case with the usual process. Normally our department would have no role in any domestic investigatory process. In this case the deputy coroner announced their findings and that she was referring this to the Attorney-General. There were two reasons why our department has come to play a role. Firstly, because the referral was to the Attorney-General rather than directly to the AFP, we thought it was important that there not be any confusion about the status of that. We thought that, by the department becoming involved, we could ensure that the matters ended up formally with AFP. That was the first consideration.

The second reason was that the deputy coroner’s decision was made during the caretaker period and so there was an additional consideration for the department to become involved. This is a very rare case where we have become a step in the process: we liaised with the New South Wales Coroner’s Office to ensure that all of the relevant documents ended up in the hands of the Australian Federal Police. That is a step that is now completed. The second step then is that the Australian Federal Police determine whether they have a basis to pursue investigation and whether they are in a position to work up a brief for prosecution that would be put to the DPP. In the course of doing that the AFP has certain enquiries they undertake, certain tests they apply, and that is the process we are in at present. Now that that is kind of down the chute, there is no need for that matter to come back to our department. That process can continue without any necessary step of it coming to us.

Senator NETTLE—So it would go straight from the AFP to the DPP if the AFP found—

Dr Alderson—Yes, if the assessment of the AFP was ultimately that there was a sufficient case there to prosecute, it would go to the DPP. Under the legislation that the deputy coroner identified—the Geneva Conventions Act—many of these war crime matters require the consent of the Attorney-General. They can be investigated, but to prosecute they require consent of the Attorney General. The particular act that the deputy coroner has pointed to in this case does not require the consent of the Attorney-General.

Senator NETTLE—At what point did you go from the Attorney-General’s Department liaising with the AFP to make sure they had all the documents and with the coroner to now where the AFP have all the documents and they are working out whether there is a brief for the DPP or not?

Dr Alderson—That process occurred during November, December and January. The deputy coroner first released their findings on 16 November 2007. The process of ensuring all of the documents and information were in the hands of the AFP and that the matter had formally been referred to the AFP was completed in the third week of January.

Senator NETTLE—I just ask you—maybe you cannot answer the question—about why in this case the deputy coroner referred the matter to the Attorney-General’s rather than to the AFP?

Dr Alderson—I do not know for sure but it may be that the deputy coroner just was not entirely aware of the process for Commonwealth criminal offences.

Senator NETTLE—When do you expect the AFP to make a decision about whether to send something to the DPP or not?

Dr Alderson—I could not comment on that.

Senator NETTLE—Thank you.

CHAIR—Senator Barnett, you had something you wanted to clarify.

Senator BARNETT—Ms Blackburn and Mr Cornall, I just wanted to follow up a question on notice you are taking about the secure schools grants. I draw your attention to the answer to my question to you in February where you said that ‘the department is finalising guidelines for the program and no decision on timing of applications has been made.’ Then the second part of the answer was that ‘the AFP and ASIO will be consulted in the assessment process to determine schools eligible for the program.’ My request for a copy of the guidelines today has not been successful, so I am drawing that answer to your notice and expressing strong disappointment that it has been many months—it is now late May—and still no guidelines. So I know you have taken that on notice.

Senator Ludwig—I think I did, Senator Barnett.

[3.14 pm]

CHAIR—We will move to output 2.2.

Senator BRANDIS—What is happening about the antiterrorism legislation? Is this the right output to ask about reviews of the antiterrorism legislation?

Mr Cornall—That is in 2.4, but Mr McDonald is here if you want to do it now.

Senator BRANDIS—I want to do all the terrorism stuff together and I thought that would be a convenient place to start. Mr McDonald, I did not see your photograph in the annual report. Did I miss it?

Senator PAYNE—I think Mr McDonald is lost for words! I have not seen that happen before.

Mr McDonald—I am not into advertising, as I am in the security area.

Senator BRANDIS—Very sound.

Mr G. McDonald—You wanted to know about the terrorism legislation.

Senator BRANDIS—I am using that as an omnibus expression. You and I have discussed these matters, along with Senator Payne here, for many years. There have been some reports, as you know, about a comprehensive review. Where is that at, please?

Mr G. McDonald—There has been no decision to have any comprehensive review. There are some reviews from previous periods and some recommendations have been made in relation to those. There is of course a major review scheduled for 2010, which will be a COAG review.

Senator BRANDIS—The Georgiou review, we might call it.

Mr G. McDonald—Yes. So they are the actual reviews.

Senator BRANDIS—I want to track down whether I am chasing a red herring here. There has been a suggestion of a comprehensive review. Is that in contemplation or under discussion? When you say no decision has been made, that always makes me a little

suspicious. Is a major review or the possibility of a major review under discussion or in consideration?

Mr G. McDonald—I am not aware of any discussions about a major review.

Senator BRANDIS—All right. That will do me on that topic. In output 2.2, on page 39 of the PPS, I am looking at the line item ‘anti-money-laundering and counterterrorism financing—information and public awareness campaign’. I see that the resources for that have been halved, from \$8.3 million to \$4.2 million. Note 6 to that entry in the account does not illuminate me very much. Can somebody tell me why we are halving our expenditure on the public awareness campaign on money laundering and counterterrorism financing?

Dr Heriot—Research was undertaken last year to underpin a low-level public awareness campaign. That did not proceed, due to the election.

Senator BRANDIS—Can I ask you to pause there? Just to clarify: when we talk about a public awareness campaign, in this context are we talking about an awareness campaign for the general public along the lines of ‘be alert but not alarmed’ campaign of a couple of years ago or are we talking about an awareness campaign for specific, identified stakeholder groups particularly targeted by the department?

Dr Heriot—No, we are talking about a general awareness campaign on a small scale. It was to provide information on those who might have a transaction that might require a change of process due to the anti-money-laundering legislation. The stakeholder awareness work has been done by AUSTRAC through outreach to the relevant sectors. It is for the public but not like the larger campaign.

Senator BRANDIS—It is not a major government advertising program?

Dr Heriot—No. During the caretaker period, a low-key set of information resources, including a customer information brochure, was developed and disseminated, and a customer information line was set up with AUSTRAC to field inquiries. There has been quite a low level of demand, and the unspent money for that financial year is being returned to budget.

Senator BRANDIS—That dimension of it is a demand driven program in any event?

Dr Heriot—Yes.

Senator BRANDIS—All right. That is helpful. When you say the money is being returned to budget, does that mean that the \$4.2 million reflects no significant reduction from the previous year because of the underspend in the previous year?

Dr Heriot—The program moneys were always appropriated with more money this year because this was the year that the anti-money-laundering act took effect and it was thought that this would be the peak interest, with a lesser amount in the next financial year. This year’s amount has not been expended and next financial year’s amount will be appropriated as originally planned.

Senator BRANDIS—I understand. I also want to ask questions about statutory reviews, which appear between pages 180 and 182 of the annual report. Mr McDonald, you have told us the main thing I wanted to know: the fact that there is not going to be a review of the terrorism laws. Going through the sequence in the annual report, what has happened with the

review of the E-Security National Agenda, which occurred between March and October 2006?

Mr G. McDonald—My colleague, Mr Rothery, will be able to give you a comprehensive answer on that.

Mr Rothery—The E-Security National Agenda review was the subject of a number of announcements as part of the federal budget last year. The 2007-08 budget announced programs across a number of different agencies, with the Attorney-General's Department having the lead coordination role.

Senator BRANDIS—Are there any outstanding issues arising from it?

Mr Rothery—As you would realise, we are just coming to the end of the first year of the four years of that program and, roughly speaking, that program is on track.

Senator BRANDIS—So everything that was required to be done arising from the 2006 review has been carried into effect?

Mr Rothery—There are minor variations in the delivery dates of particular elements, but there is no significant variation against the implementation plan for all of those measures.

Senator BRANDIS—What mechanisms exist for the monitoring of the efficacy of the implementation plan, by the way?

Mr Rothery—There is a standing interdepartmental committee—chaired by my colleague Mr McDonald—which meets monthly, and agencies are required to report any exceptions to their implementation obligations. There is also a quarterly reporting process through to the Cabinet Implementation Unit in the Department of the Prime Minister and Cabinet.

Senator BRANDIS—Has that process disclosed any significant problems with the operation of the scheme?

Mr Rothery—Both of those mechanisms occasionally identify variances in the delivery dates of particular measures by agencies, and then we work with those agencies to evaluate that discrepancy to see whether it is putting the overall objectives of the program at risk. Our view at this point is that none of those variations are putting the outcomes of the program at risk.

Senator BRANDIS—They would have to be pretty severe, wouldn't they, to put the program at risk? We are talking in generalities, I know, but would you say that those deficiencies have been of a marginal or slight character?

Mr Rothery—I would characterise them as being of a slight character.

Senator BRANDIS—That is very helpful. What about the results of the review of the regulation impact statement for COAG by the Critical Infrastructure Protection Branch which was presented to COAG on 13 April 2007? What has happened about that?

Mr Rothery—COAG considered the proposal. Unfortunately, COAG was not able to achieve a decision at that meeting.

Senator BRANDIS—By the way, when you say COAG, was this SCAG under the auspices of COAG or COAG at the prime ministerial and ministerial level?

Mr Rothery—The work that has been undertaken for reforms to state regulation of the private security guarding industry was initiated by the Australian Police Ministers Council.

Senator BRANDIS—I see.

Mr Rothery—However, the Police Ministers Council does not represent all of the ministers across the states and territories with responsibilities for regulation of the private security guarding industry. There was therefore a working group established under the Police Ministers Council that included those other portfolios in the states and territories, and the work was prepared at that level and brought forward to COAG.

Senator BRANDIS—And it lies there at the moment without any further action. Is that right?

Mr Rothery—We have maintained a conversation with the state and territory regulators to assess their interest in the item being brought before COAG at a future date, and we anticipate that there will be an opportunity sometime in the near future for COAG to revisit that item.

Senator BRANDIS—Mr McDonald, on the remaining three items—the security legislation review, the committee review of counterterrorism laws and the Parliamentary Joint Committee on Intelligence and Security’s inquiry into the terrorist organisation listing provisions of the Criminal Code—did you mean, when you answered me before, to say that there is no significant change to the current suite of terrorism laws to comprehend the outcomes of those three reviews?

Mr G. McDonald—Those reviews are matters that we, of course, have been conferring about with the Attorney-General, but at this stage there have not been any specific decisions about exactly what the response will be.

Senator BRANDIS—Let us get this straight. There is no overall review of terrorism laws in contemplation, but there have been three reviews that I have mentioned, each of which made recommendations, and in each case those recommendations are before government at the moment? Is that right?

Mr G. McDonald—That is exactly right.

Senator BRANDIS—And no decision has been made in relation to any of them?

Mr G. McDonald—Not yet.

Senator BRANDIS—I understand you may not be able to answer this question—

Senator Ludwig—I can probably cut to the chase on this, Senator Brandis.

Senator BRANDIS—Yes, Minister, as you always do.

Senator Ludwig—I do not have any further particulars than that. The information I have only goes to the extent that the Attorney-General is considering the recommendations made by the recent reviews which you articulated, including the Parliamentary Joint Committee on Intelligence and Security and the Australian Law Reform Commission. It would be inappropriate to pre-empt the outcome of the consideration of the Attorney-General’s view on those.

Senator BRANDIS—Are you able to help me on the question of when, roughly, we expect the government to indicate its decision?

Senator Ludwig—I cannot help you with that, either.

Senator BRANDIS—All right.

CHAIR—We will now break for afternoon tea.

Proceedings suspended from 3.31 pm to 3.50 pm

CHAIR—We will resume our questioning of officers. We are up to output 2.2, International Criminal Justice and Cooperation.

Senator BRANDIS—I note that we have already lost 25 minutes from this afternoon's time in part because of delays in resumption from the scheduled time of resumption. Can I ask about the budget measure in budget paper No. 2 of the PBS for legal aid funding for national security trials. This is a new funding measure, is it not?

Mr Cornall—Yes.

Senator BRANDIS—I have read the note to the item, but can you explain please more fully what the need for this additional appropriation is.

Mr Cornall—Several years ago the Commonwealth established what is called the Expensive Commonwealth Criminal Cases Fund because a number of very large drug trials were beyond the capacity of legal aid commissions to pay out of their normal routine Commonwealth funding because they were exceptional cases and attracted exceptional expense. Now that we have got two major terrorism criminal prosecutions on foot arising out of the Pendennis investigations, one in Sydney and one in Melbourne, they are producing very, very significant legal costs for the two legal aid commissions, and the Expensive Criminal Cases Fund, which was maintained for some years at a level of about \$5 million, does not have the resources to pay for those criminal trials. This funding is to accommodate those costs.

Senator BRANDIS—Is that because of an escalation of legal costs, of the rate at which legal costs are billed or is it because there are simply more of these expensive Commonwealth criminal trials these days?

Mr Cornall—Together I think there are 21 defendants in these two trials, and they are separately represented and so forth, and the trials are projected to go for a considerable period of time. When you multiply all that out they come to very significant amounts of cost for the legal aid commissions.

Senator BRANDIS—This expensive Commonwealth Criminal Cases Fund, is that a new fund or a continuation of the pre-existing fund?

Mr Cornall—It is a fund that has existed for several years since the 1990s.

Senator BRANDIS—How much money was in the fund before this appropriation?

Mr Cornall—I would have to check.

Senator BRANDIS—Can you take that on notice?

Mr Cornall—Yes.

Senator BRANDIS—Thank you. I assume this is an output 2 matter—though, which particular outlook output group I am not sure. But staying with the budget paper measures, budget paper No. 2, the appropriation for the inquiry into the case of Dr Haneef—you were here yesterday, Mr Cornall, when Commissioner Keelty gave some evidence about Dr Haneef—

Mr Cornall—Yes.

Senator BRANDIS—and you heard my questions to him in relation to in particular the terms of reference. First of all, let me ask you about the appropriation. How was the \$2.2 million figure arrived at and what will it represent?

Mr Cornall—The cost of the inquiry was estimated by us to be \$4.2 million. We had funds appropriated previously for the equine influenza inquiry which it appears we are not going to use, and we were able to utilise those funds for part of the cost. There is also a new appropriation for either \$2 million or \$2.2 million, which is the balance of the \$4.2 million.

Senator BRANDIS—Was that \$2.2 million? So we have this money from the equine influenza inquiry left over because the Hon. Mr Callinan was so efficient and wrapped up the inquiry sooner than expected. Is that correct? I see you smiling, Mr McDonald.

Mr Cornall—Senator, obviously predicting the costs of a royal commission is a difficult exercise and obviously utilising any funds which were not expended in a sensible fashion like this would make a lot of sense.

Senator BRANDIS—That is very sensible indeed, very commendable. Is this money just for the operation and conduct of the Haneef inquiry itself or is it also for the representation of the Commonwealth and Commonwealth agencies at the inquiry?

Mr Cornall—It includes all of the costs of the inquiry. Agencies such as the AFP and the Department of Immigration and Citizenship have undertaken to bear their own costs in relation to the inquiry. It also includes an allowance for legal assistance for Dr Haneef and possibly for others involved in the inquiry.

Senator BRANDIS—Does the allowance for Dr Haneef come out of this appropriation?

Mr Cornall—It all comes out of the \$4.2 million.

Senator BRANDIS—So the costs of other departments or agencies represented by counsel before the inquiry come out of their budgets?

Mr Cornall—Yes, that is my understanding, Senator.

Senator BRANDIS—The cost of running the inquiry comes out of this appropriation?

Mr Cornall—That is correct.

Senator BRANDIS—The cost of legal aid to Dr Haneef comes out of this appropriation?

Mr Cornall—That is correct.

Senator BRANDIS—Why does Dr Haneef need legal aid, by the way. Presumably he is a reasonably well-to-do professional man—he is a doctor.

Mr Cornall—I think the answer to that—and I stand corrected if I am wrong—is that given that he is a person principally involved in this matter legal assistance was thought to be appropriate.

Senator BRANDIS—Is that a routine approach?

Mr Cornall—It is with royal commissions, Senator.

Mr Faulkner—The scheme which provides assistance to people, who in turn assist inquiries, is administered by this department and that is the standard arrangement for a serious inquiry of this sort.

Senator BRANDIS—Okay.

Mr Faulkner—To add a gloss to what the secretary was saying, provision is made for assistance to people who may be required to assist the inquiry, and Dr Haneef might well be in that class.

Senator BRANDIS—Who else is in that class?

Mr Faulkner—I am not in a position to say.

Senator BRANDIS—Why? Because you do not know or because you wish not to disclose?

Mr Faulkner—I do not know and I would suggest that inquiries about just how that scheme operates would be best addressed to the legal assistance branch which will be here in due course.

Senator BRANDIS—I am not so concerned about the way the scheme operates, frankly, as the way this particular appropriation is going to be spent. I assume there is a budget for the expenditure of the appropriation. How much has been allocated to the professional costs for Mr Clarke QC?

Mr Cornall—The payment to Mr Clarke is calculated at \$3,000 a day excluding GST and I am assuming we have made an allowance in respect of how many days we expect he will be working on the inquiry?

Senator BRANDIS—How many days have you made provision for?

Mr Faulkner—The budget was framed against that rate, as it were.

Mr Cornall—I know, but the answer to the question is how many days we allowed for.

Senator BRANDIS—So \$3,300 a day for Mr Clarke QC. Will he have an associate or a person who will, in effect, be his executive assistant?

Mr Cornall—Yes, there is a secretariat office and there is also counsel assisting.

Senator BRANDIS—Now let us go through that. How many members of the secretariat?

Mr Faulkner—I am not in a position to say quite what form the whole secretariat is at the moment. It has been—

Senator BRANDIS—Let us just start with how many staff there are, please.

Mr Faulkner—There is a secretary to Mr Clarke, there is a counsel assisting—

Senator BRANDIS—No, I will deal with counsel assisting separately. Let us just deal with administrative support, please. Mr Clarke has a secretary that is fair enough.

Mr Faulkner—That is right. There was an executive assistant position.

Senator BRANDIS—When you say there was, is there still?

Mr Faulkner—I am just informed it is an executive director.

Senator BRANDIS—Executive director, okay.

Mr Faulkner—An executive assistant.

Mr Cornall—A personal assistant.

Mr Faulkner—And a business manager.

Senator BRANDIS—Goodness me, and did you say a personal assistant?

Mr Faulkner—Yes.

Senator BRANDIS—Is that in addition to the person you said was the secretary?

Mr Faulkner—The reason I am hesitating slightly is because the team as such, which is not a very large team, has been put together very recently—really just finalised—so it has been a rather moveable feast for some time.

Senator BRANDIS—The Federal Court and the Supreme Court judges of equivalent experience in these matters to Mr Clarke, who himself is a retired Supreme Court judge, run long and complex litigation, sometimes lasting for years and commonly lasting for many, many months on the strength of one associate and a secretary. We have Mr Clarke, who is being paid a professionally appropriate fee and he has five staff: a secretary, a personal assistant, an executive director, an executive assistant and a business manager. Why, Mr Cornall?

Mr Cornall—They are providing a lot of the services that would be provided by a registry in a court situation. They are also responsible for all of the administration of the office—the information technology and the recording of depositions or statements—so they are providing all of the services that a registry in a court would provide. So they are not just assisting Mr Clarke in that sense.

Senator BRANDIS—All right, it makes sense. It seems a bit steep to me, I must say. There are those five staff to Mr Clarke, then there are counsel assisting—how many counsel assisting?

Mr Faulkner—One.

Senator BRANDIS—Who is that?

Mr Faulkner—Chris Horan from the Melbourne Bar.

Senator BRANDIS—Is he senior counsel?

Mr Faulkner—No.

Senator BRANDIS—What is his fee?

Mr Faulkner—It has not been the practice to disclose fees paid to lawyers for the Commonwealth in any context.

Senator BRANDIS—Yes, it has.

Mr Cornall—We have disclosed total fees paid in the past but not daily fees.

Senator BRANDIS—In years gone by—I do not know if it is currently the practice—there was an annual list published of fees paid to private counsel. I know, my name used to be on it.

Mr Cornall—Total fees, Senator.

Senator BRANDIS—Yes, aggregate fees per individual.

Mr Faulkner—Yes.

Mr Cornall—Not daily fees.

Senator BRANDIS—Per individual in a given year.

Mr Cornall—Yes, that is true.

Senator BRANDIS—It is the same principle. What is Mr Horan being paid?

Mr Faulkner—I am sorry, I thought you were asking what is his daily rate?

Senator BRANDIS—Is he being paid per day or is he being paid some sort of all-up retainer?

Senator IAN MACDONALD—How many days is he working?

Mr Cornall—The point that Mr Faulkner is making is that in the past with this committee we have with the agreement of the committee provided total fees paid to barristers inquiries but not their daily rate.

Senator BRANDIS—Is there a reason? I am not quibbling that that may have been the practice in the past, but nothing remains the same forever. It is a proper question you will acknowledge, and in deference to you, Mr Cornall, because I am sure you would not say what you just said lightly, I will not press the question.

Mr Cornall—Thank you.

Senator BRANDIS—I wonder if you would take it on notice and give me a considered written response if on reflection you decide to persist with the reluctance to disclose the daily fee.

Mr Cornall—I could say now that one of the reasons is that the Commonwealth does pay I think quite moderate fees.

Senator BRANDIS—Yes it does.

Mr Cornall—Compares to the commercial fees that barristers might otherwise be paid. There is some sensitivity about that information being public. It is also true that we are not publishing daily fees paid to particular barristers because we do not then have the situation where barrister A is insisting on being paid a higher fee because that is the fee paid to barrister B. We thought it was in the Commonwealth—

Senator BRANDIS—Mr Samuel and anybody else from the Competition and Consumer Commission would tell us that transparency of pricing is a sign of a healthy free market—in this case a healthy free market in legal services. I am rather inclined to agree with that proposition. I note that you are of the old school, Mr Cornall.

Mr Cornall—The Attorney has been of the view that this was to the Commonwealth's advantage. So that the committee has visibility of the totality of fees paid, we have disclosed in relation to royal commissions and so on in the past the total fees paid to individuals, and we will continue to do so.

Senator BRANDIS—All right. Is Mr Horan being instructed by the AGS?

Mr Faulkner—No.

Senator BRANDIS—What is the arrangement?

Mr Faulkner—There are two solicitors also assisting the inquiry, both of whom are from Spark Helmore.

Senator BRANDIS—Was that retainer to Spark Helmore tendered for?

Mr Faulkner—Not as such.

Senator BRANDIS—What does that mean?

Mr Faulkner—In the time available there were a number of firms consulted and Spark Helmore were the firm chosen.

Senator BRANDIS—Aha! Which firms were consulted?

Mr Faulkner—I do not have that information with me but I would be happy to take it on notice.

Senator BRANDIS—Could you perhaps try and find that information out within the next hour or so? I am sure you have staff here who could make a telephone call. While your staff are helpfully assisting with that, to use your carefully chosen word 'consulted', roughly how many other firms were consulted?

Mr Faulkner—I am afraid I cannot say, but there were a number. That is all I can say.

Senator BRANDIS—All right, but that information will be obtained for me within the next hour? You said that there was no tender process as such but that a number of firms were consulted. What was the process of consultation and by what criteria were the firms who were consulted put on the list of firms to be consulted? More particularly, why was it that these particular firms got an opportunity to bid for this lucrative work and others who were not consulted were excluded. It sounds terribly much like something was done on the 'old boy' network or it may be—and I am sure you would not be responsible for this—on the 'old Labor mates' network.

Mr Faulkner—Would it be possible to take those matters on notice? I would be happy to look into that and provide you with answers.

Senator BRANDIS—I would like you to do your best to provide me with the answer before the end of estimates today, please.

Mr Faulkner—It may be difficult to provide that.

Senator BRANDIS—I am sure it will be the easiest thing in the world for somebody who knows the information, on the other end of a telephone call, to say ‘These were the firms consulted.’ I acknowledge that you may have to think more carefully about the answer to the second question, and that is: the process by which the firms consulted were chosen and according to what criteria they were chosen. You can take that on notice if you are unable to provide that answer, but I want to know the names of the firms, please.

Mr Faulkner—Of course.

Senator BRANDIS—I would like to know by, let us say, 5 pm.

Mr Faulkner—Of course.

Senator BRANDIS—What is Spark Helmore? It is a small national firm, is it not, with offices in Sydney and Melbourne?

Mr Faulkner—To my knowledge in Sydney and Canberra.

Senator BRANDIS—Sydney and Canberra. Which office of Spark Helmore? Will it be Canberra or Sydney?

Mr Faulkner—Both offices were involved.

Senator BRANDIS—Both. Where are the solicitors physically present—in Canberra?

Mr Faulkner—That is right.

Senator BRANDIS—What are their names, please.

Mr Faulkner—Rohan White.

Senator BRANDIS—Is he a partner?

Mr Faulkner—Yes, he is.

Senator BRANDIS—Is he a litigation partner?

Mr Faulkner—I am not sure of his designation, but he certainly knows his way around litigation, and Kylie Neville is the other.

Senator BRANDIS—Kylie Neville?

Mr Faulkner—That is right.

Senator BRANDIS—Who else is on the budget? We have got Mr Clarke. We have got five staff. We have got a junior counsel but not a senior counsel. We have got two solicitors. Who else?

Mr Faulkner—That is it.

Senator BRANDIS—Could I inquire, given the importance and sensitivity of this matter, why senior counsel was not engaged?

Mr Cornall—Mr Clarke is not intending to conduct a royal commission.

Senator BRANDIS—We know that.

Mr Cornall—It is not going to be conducted in the format of a royal commission, so counsel assisting is truly an assistant to Mr Clarke in conducting a hearing which will involve interviews, perusing material obtained during the course of the inquiry, perusing submissions

and forming views on them, so it is, I think, appropriate to the role that is envisaged. It is not the role of a counsel assisting in a royal commission.

Senator BRANDIS—So although it is styled as counsel assisting, what Mr Hannon is doing in effect is acting as Mr Clarke's junior.

Mr Cornall—Mr Horan.

Senator BRANDIS—Mr Horan is acting as Mr Clarke's junior?

Mr Cornall—I suppose that is one way to put it, yes.

Senator BRANDIS—Who chose Mr Hannon—Mr Clarke?

Mr Faulkner—Yes, it was a decision made by Mr Clarke ultimately.

Senator BRANDIS—Did any other counsel get a look in, or did Mr Clarke have the only say in who the counsel assisting was?

Mr Faulkner—Other counsel were consulted.

Senator BRANDIS—Who were they, please.

Mr Faulkner—I would have to once again obtain their names.

Senator BRANDIS—Could you do that, please.

Mr Faulkner—I would be happy to. There is a question in mind whether there is any issue in disclosing the names of counsel to a consultant, but I cannot see a problem myself as to that.

Senator BRANDIS—I cannot see a problem. If you can disclose the names of the solicitors' firms who were consulted, I am sure you can disclose the names of the counsel who were consulted. And you might by parity of reasoning take this on notice as well, Mr Cornall: I would like to know what the fee agreement was with Spark Helmore, please.

Mr Faulkner—Can I just say on that front that the arrangements ultimately concluded with the solicitors would be a matter for the secretary of the inquiry, who essentially runs it very much at arms length from the department. The department with this inquiry, as with others, provided a great deal of assistance to begin with in terms of checking availability of counsel—whether they were interested in assisting—but once the thing is going, essentially it is a matter for the secretary to actually engage anyone.

Senator BRANDIS—I understand that, but the inquiry is not answerable to an estimates committee.

Mr Faulkner—No, quite so.

Senator BRANDIS—Because its conduct involves the expenditure of public moneys, the appropriate Commonwealth entity is answerable to this estimates committee, and that is the Attorney-General's Department. It is an Attorney-General's Department appropriation.

Mr Faulkner—Of course. I meant simply that I would need to get that information from the secretary.

Senator BRANDIS—Sure, I understand that.

Senator IAN MACDONALD—It is available, you are saying. Surely the solicitors would have wanted to know what they were going to be paid before they agreed to take the job?

Mr Faulkner—Certainly.

Senator BRANDIS—What arrangements will be made for there to be security clearances for each of these people? Will they all need security clearances or just the professional personnel?

Mr Faulkner—I think the general answer is that the conduct of the inquiry is really a matter for Mr Clarke and clearly the management and handling of secure or confidential information is an important consideration. The inquiry is ensuring that the people who need to consider relevant documents have the appropriate clearance, and they have been consulting the department to ensure that the right clearances are obtained.

Senator BRANDIS—Subject to the advice of the department, the appropriate levels of security clearance will be obtained?

Mr Faulkner—That is correct.

Senator BRANDIS—That is fair enough. In budgeting for the expenditure of the \$4.2 million, we have the commissioner's fee, the secretariat's salaries, the barristers' and the solicitors' fees, the cost of providing legal aid to Dr Haneef and other persons who meet the appropriate standard or criterion against which legal aid is furnished to people in these circumstances. Presumably there are logistical costs, for example, the lease of premises, transport and so on associated with the inquiry?

Mr Cornall—Yes, that is right—premises.

Senator BRANDIS—Are there any categories of costs?

Mr Cornall—IT costs, travel costs.

Senator BRANDIS—I think I said travel costs—so IT costs also?

Mr Cornall—Recording costs, transcription costs.

Senator BRANDIS—Will the transcription be subcontracted out to one of these private transcription providers?

Mr Cornall—I am not sure how they are proposing to do it, Senator, but they are the sorts of costs, I imagine, that will need to be met.

Senator BRANDIS—For how many days will the inquiry run in terms of hearing days? How has it been budgeted? By hearing days I included camera hearings as well. Also, for how many days between the reservation of Mr Clarke's decision and the publication of his findings?

Mr Cornall—Senator, we will need to take on notice the detailed calculations of the budget but I think what we did was to calculate in reference to the period to 30 September when Mr Clarke is due to report and we made an allowance for his time on a daily basis from when he is anticipated to be fully engaged in the inquiry from mid-June.

Senator BRANDIS—Does this \$4.2 million allow for any requests by Mr Clarke for an extension of the reporting date?

Mr Cornall—No, it does not. It also may not be fully expended either as we have not fully expended the other.

Senator BRANDIS—As the equine one was not?

Mr Cornall—Yes.

Senator BRANDIS—That is fair enough. Can you take those matters on notice?

Mr Cornall—Yes.

Senator BRANDIS—May I take it that the \$4.2 million is basically a multiple of the number of days from the commencement of the inquiry up to 30 September with adjustments for the different rate at which costs are incurred?

Mr Cornall—In respect of Mr Clarke's time, in respect of the solicitors' time, they would be doing work before Mr Clarke returned from overseas and of course the rental and other costs will be incurred for the duration of the period from when the premises are set up.

Senator BRANDIS—Is it planned to bring Dr Haneef from India? I have followed the debate on this in the press. Is it currently planned to bring Dr Haneef from India or for the inquiry to visit Dr Haneef in India?

Mr Cornall—Mr Clarke indicated he was flexible on how we dealt with that and he was prepared to travel to India to interview and meet Dr Haneef there. I do not know if any further decision has been taken on which the most appropriate course of action is.

Senator BRANDIS—Senator Ludwig, do you know if any decision has been made by government as to its attitude to granting Dr Haneef the appropriate form of visa were the inquiry to be of the view that it would be better to examine him in Australia?

Senator Ludwig—I think it is a matter for Mr Clarke to make a decision first.

Senator BRANDIS—The government does not have a preliminary view?

Senator Ludwig—It is a matter for Mr Clarke in that sense.

Senator BRANDIS—I accept that. I am asking if the government has a preliminary view.

Senator Ludwig—I am not aware of anything.

Senator BRANDIS—Thank you. Why was this not set up as a royal commission?

Mr Cornall—This inquiry was thought to be an appropriate level of inquiry to get to the bottom of the issues involved. An investigation by a person of the standing of Mr Clarke, with the full cooperation of the agencies involved, would be able to provide an answer to the questions that the government wanted answered.

Senator BRANDIS—I am not quibbling with Mr Clarke as an appropriate person and I do not doubt that subject to the limitations inherent in its terms of reference and any procedural and forensic limitations that might have been imposed upon it by the manner in which it has been set up, this inquiry will go about its business in an appropriate professional manner. That really does not answer my question. Mr Clarke could have been established as a royal commissioner, if he is an appropriate person. Being called a royal commissioner will neither elevate nor diminish his authority or the authority of the proceedings. However, as we both know, what it will do is invoke certain privileges and immunities under the Royal

Commissions Act. It seems to me—and correct me if I am wrong—the decision not to constitute this as a royal commission is necessarily a decision to deny to the inquiry the privileges and immunities that will ordinarily attach to a royal commission; that is the only practical consequence of this decision.

Mr Cornall—No, I do not think that is right. The form of the inquiry was discussed with Mr Clarke at length before the government made its decision how to proceed. He agreed that he felt that he could achieve the government's objectives with this form of inquiry, and the reservation that the government has placed on it is that if Mr Clarke finds that that is not the case he will be liberty to come back to the government and make that point to the government at that time and the government would consider whether it needed to construct the inquiry in a different way.

Senator Brandis—With respect, Mr Cornall, you are confusing the jurisdictional issue with the powers of immunities issue.

Mr Cornall—No, I do not think I am, because the powers of immunities issue was well considered and assurances were received from the key agencies involved that they would give complete cooperation to Mr Clarke and, on the lines of those assurances, the matter is thought to be able to be handled in this way. Once you call something a royal commission you are setting in train a whole process of cost and formality that is more than I think this issue necessarily needs to get to the bottom of it. You can have royal commissions, for example, of the sort that were in Queensland many years ago to get a very broad range of issues. You can have broad-ranging issues into royal commissions or a whole range of commissions that involve many departments and many individuals. This is basically an inquiry into one matter with a limited period of time, and the view is that this inquiry will be sufficient to achieve the government's objectives.

Senator BRANDIS—You have said that already, Mr Cornall, but with respect, just because it is constituted as a royal commission it does not either expand or narrow the focus of what it has to inquire into—that is a function of the terms of reference. You could have this inquiry constituted as a royal commission with precisely the same terms of reference—precisely the same jurisdictional limitations—and it would not take any longer just because it is called a royal commission. All it would mean is that the witnesses to the inquiry in particular would have protection that in the absence of it being constituted as a royal commission they will not have. This argument is a furphy, that because you establish it under the Royal Commissions Act it is necessarily going to take longer or be more expensive. It will take longer or be more expensive depending on how extensive its jurisdiction is derived from its terms of reference.

Mr Cornall—Senator, all I can say is that those are the considerations I understand they took into account in coming to a decision.

Senator BRANDIS—I am very mindful of Mr Moran's helpful letter that you produced this morning, Mr Cornall. Did the government take legal advice in relation to the appropriate manner of constituting this inquiry?

Mr Cornall—The department itself had a very large number of discussions with the Attorney-General about the way in which the inquiry could be established. The Attorney also

met with Mr Clarke and discussed with him how the inquiry could be established. So the answer is, yes, the government took a lot of advice about legal advice.

Senator BRANDIS—No, I am talking about legal *stricto sensu*.

Senator Ludwig—You might want to be a bit more specific in terms of the inquiry.

Senator BRANDIS—Was external legal advice taken either from the Australian Government Solicitor or from a private firm of solicitors?

Mr Cornall—No.

Senator BRANDIS—Or from counsel in relation to the constitution of the inquiry?

Mr Cornall—No.

Senator BRANDIS—Has legal advice been obtained from any of those three categories of sources in relation to the question of the rights and, more particularly, the immunities of witnesses in consequence of the fact that this inquiry has not been established as a royal commission?

Mr Cornall—No, we were well aware of those rights and immunities that attach to royal commissions and do not attach to this inquiry.

Senator BRANDIS—Has legal advice been taken from any of those three categories of sources in relation to any aspect of the constitutional conduct of this inquiry and, if so, what?

Mr Cornall—Mr Faulkner suggests to me that we may have discussed the question of the possibility of defamation actions arising from the effect of evidence given with the Australian Government Solicitor?

Senator BRANDIS—Do you know, Mr Faulkner?

Mr Faulkner—I hesitate only because I am not quite sure. I believe some advice was obtained which may have touched on the question of defamation; I am simply not in a position to answer. I am conscious also that I would hesitate to stray into the area of the substance of advice; I am not sure that would be appropriate.

Senator BRANDIS—You can be completely confident, Mr Faulkner, that I will not ask you about the content of the advice.

Mr Faulkner—I am just concerned that we may already be getting into that area, if you take my point.

Senator BRANDIS—All I want to know is whether advice on the topic that you, not me, have defined has been taken, and you think it has been but you are not sure.

Mr Faulkner—That is right.

Senator BRANDIS—Could you find out, please? What I would like to know is the date on which the advice was obtained and from whom it was obtained.

Mr Faulkner—Yes, of course.

Senator BRANDIS—There is one other aspect of the Haneef inquiry I wondered about. As I read the Attorney-General's statement at his press conference announcing the inquiry whenever it was back in March, he specifically said that the inquiry would not be looking at

foreign intelligence sources. We explored this a little, I think, at the last estimates committee, but can I ask again why that limitation was placed on the terms of reference?

Senator Ludwig—I think my recollection in answer to that question last time, although you have the liberty to correct me, was that the Attorney-General's response to that was in the speech, which he then directed you back to. That may not be sufficient for you, but that was the response that the Attorney-General had provided to the committee last time.

Senator BRANDIS—That is not sufficient, Senator Ludwig. I have seen the speech, but I just wonder if you would be good enough to answer why the initial decision was made that the inquiry would not look at foreign intelligence—

Senator Ludwig—I cannot answer why on behalf of the Attorney-General, but I can seek to ask again.

Senator BRANDIS—Thank you. I am sure you will have to take this question on notice, or perhaps on reflection you will not. Mr Cornall, did you accompany the Attorney-General on his visit to London several weeks ago?

Mr Cornall—Yes, I did.

Senator BRANDIS—Then you will not have to take this on notice. During the course of that visit, did the Attorney-General have meetings with British intelligence sources which, among other things, related to the Haneef matter?

Mr Cornall—No, Senator.

Senator BRANDIS—Did he have meetings with any British authorities which related to the Clarke inquiry?

Mr Cornall—Senator, we met with a number of people who have interests in prosecution of terrorism cases, including Susan Hemming from the Crown Prosecution Service. Their interest in these issues arose from being certain that nothing we were going to do in what was basically a public inquiry in Australia was going to intrude into matters that are being investigated and prosecuted in England. The Attorney assured them that we were not going to get into the areas that were of concern to them.

Senator BRANDIS—Let me just understand what you are telling me, Mr Cornall. Are you saying that the Attorney-General, in his meetings with the English prosecutorial authorities, including Ms Hemming, indicated to those authorities what the Clarke inquiry would do in advance of the Clarke inquiry being convened? How could he bind the inquiry like that?

Mr Cornall—Senator, I think Commissioner Keelty has pointed out to this committee before that there are ongoing inquiries in relation to what might generally be called the Haneef matter but with particular reference to—

Senator BRANDIS—He has said something more specific than that Mr Cornall, as you know.

Mr Cornall—the English inquiry. He has made the point that a lot of the work done in Australia was in support of the English authorities and their inquiry into the events that took place in London and Glasgow. The British authorities were concerned that none of the

information that they had given to Australia would be involved, or that we would have regard to the sensitivity of that information in relation to the Clarke inquiry.

Senator BRANDIS—What were you going to go on to say before you just corrected yourself, Mr Cornall? ‘That none of the information that they had give to Australia would be ...’—and then you corrected yourself. What were you about to say?

Mr Cornall—I was just trying to think of the correct way to put it, Senator.

Senator BRANDIS—It sounds to me, Mr Cornall, as if what you are telling us, albeit with proper circumspection, is that the Attorney-General gave assurances to the British authorities that the Clarke inquiry would not go into certain matters which, were it to do so, would be of concern to them. Is that what it amounts to?

Mr Cornall—No, it was to assure them that the focus of the inquiry in Australia was in relation to the treatment of Dr Haneef and it was not more broadly in relation to other matters which are of relevance to the British authorities—both prosecution and intelligence authorities—and were not directly related to Dr Haneef.

Senator BRANDIS—This really has to be to the minister: surely you are in a position to assure the parliament and the public, Minister, that the Haneef Inquiry will have regard to all matters relevant to its terms of reference and that no limitation upon the capacity of the inquiry to get to the bottom of the issues covered by its terms of reference will be imposed by any private assurances given by the Attorney-General to the British authorities.

Senator Ludwig—I think the terms of reference are quite clear and I would expect, as you have correctly said, that there is no limitation on the terms of reference.

Senator BRANDIS—I think Mr Cornall let the cat out of the bag a bit, if I may say so, Minister, when he said that the Attorney-General had given this indication to the British authorities. It sounds very much to me, having studied these terms of reference, that if the Attorney-General is giving an informal assurance to the British authorities that the Clarke inquiry will not touch certain matters which may be relevant to its terms of reference, then I do not know how we can construe that other than an informal limitation at the political level on the Clarke inquiry.

Senator Ludwig—That is not the evidence that has been given to this committee.

Senator BRANDIS—I think that is a fair interpretation of what Mr Cornall said.

Senator Ludwig—I think it is your wrong view, quite frankly—

CHAIR—Minister, I am sure you will be glad to complete your explanation.

Senator BRANDIS—Madam Chair, please do not interfere with the questioning unless you are going to rule my question out of order.

Senator IAN MACDONALD—Why don’t you let the witness answer the question? You interrupted the answer.

Senator Ludwig—As I said, the terms of reference are quite clear—

CHAIR—Order, Senator Ludwig, for a moment: as chair, I am requesting that people such as you be given an opportunity to complete your statements before being further interrupted. So please continue, Minister Ludwig.

Senator Ludwig—Thank you, I was just finalising that I do not agree with Senator Brandis's formulation of what the evidence before the committee was. I can add that the Attorney-General has stated, and Mr Clarke has stated publicly, that he is confident that the inquiry can be effectively conducted in its present form. I think the evidence also in the committee today, as the Attorney-General has made clear himself, is that if Mr Clarke indicates a lack of cooperation from any person that would affect the inquiry in the terms as promulgated, the government will consider any recommendation he has for giving the inquiry additional powers. The terms of reference are there. Mr Clarke is independent of government. I think that is clear.

Senator BRANDIS—I accept that Mr Clarke is independent of government and I am familiar with the terms of reference. Mr Cornall, what did the Attorney-General say to the British authorities in the conversation you adverted to a few answers ago concerning the Clarke inquiry?

Mr Cornall—I think what I said, and what I repeat, is that the Attorney indicated that the Haneef inquiry conducted by Mr Clarke would be focused on the events in Australia involving Dr Haneef and that due regard would be paid to the sensitivity of English intelligence and policing information which were not directly related to Dr Haneef but related to the bigger issues that are being addressed by the British authorities in Britain.

Senator BRANDIS—‘Due regard would be paid to the sensitivity of English policing information.’ Mr Cornall, we know that the inquiry has powers to take evidence in camera, and it has been indicated by Mr Clarke that he proposes to make extensive use of those powers. The opposition have no criticism of that. In fact, that is what he ought to do. We know what the terms of reference are. We know, as you told us a little while ago, that all of the relevant professional and administrative staff of the inquiry will be given the appropriate security clearance and we can be perfectly confident of that process as well, I am sure. In those circumstances, how can it be that a political officer, the Attorney-General, can give a promise to an authority of a foreign government that due regard will be paid to the sensitivities of English policing information by an independent commissioner if it occurs that exploration of that very information is necessary for Mr Clarke to address all of the issues in a thorough manner in his terms of reference? How can a political officer give that assurance on behalf of an independent inquiry?

Mr Cornall—One of the bases of the assurance was that this would be not a royal commission but an inquiry conducted in a more discreet fashion and, secondly, that Mr Clarke would be entitled to treat security information in a confidential manner or in closed session.

Senator BRANDIS—Well, a royal commission can do that. Nothing turns for the purposes of that issue on whether or not it is a royal commission. A royal commission can do that too. How can a political officer make a promise to a foreign government limiting the capacity of an independent inquiry to examine the issues thrown up by its terms of reference because the foreign government might regard those areas as issues of sensitivity?

Mr Cornall—The Attorney's assurance was that the inquiry was seeking to be focused on the matter of Dr Haneef in Australia and was not seeking to intrude into broader issues arising out of the British inquiry into the Glasgow and the London potential terrorist attacks.

Senator BRANDIS—But the test of relevance for Mr Clarke's inquiry is a test which he, and he alone, can apply. And as we all know, what is relevant to an issue is defined by the application to the terms of reference of the evidence that is adduced before the fact-finding body or the inquiry. How can it be said in advance that a particular issue may not become relevant?

Mr Cornall—Senator, I do not think I can take it any further than to say that the Attorney's view was that the terms of reference were focused on the events involving Dr Haneef in Australia, and that is what he was saying to our British counterparts.

Senator BRANDIS—Well, you have adopted my word freely that Mr McClelland gave an assurance to the British authorities to this effect and you have been perfectly forthright in stating what that assurance was. I say to you, Mr Cornall, as the senior legal officer of the Australian Public Service that this is a very improper thing for the Attorney-General to have done, to have given an assurance to a foreign government which potentially seeks to limit the scope of inquiry of an independent inquiry.

Mr Cornall—No, I do not think it is. The assurance was that it was the intention of the government to have an inquiry that was focused on the events involving Dr Haneef in Australia. I think that is something he is perfectly at liberty to advise our British counterparts.

Senator BRANDIS—You have said this conversation was with Ms Hemming from the British prosecution authorities. Was the assurance given to any other British authority or significant British actor?

Mr Cornall—Yes, there were concerns expressed by the Director of Public Prosecutions in England, and those concerns were expressed in a similar fashion.

Senator BRANDIS—By the Director of Public Prosecutions himself?

Mr Cornall—Yes.

Senator BRANDIS—What is his name?

Mr Cornall—His surname is Macdonald and I am just trying to remember his Christian name. It is Sir—

Senator BRANDIS—I am sure he would be Sir somebody Macdonald. So this promise was given to the Director of Public Prosecutions?

Mr Cornall—The explanation of the inquiry and how the inquiry would work was given to Susan Hemming.

Senator BRANDIS—It was given to Susan Hemming. Who else was it given to?

Mr Cornall—And I had correspondence with Sir Kenneth Macdonald, I think it is, in the same vein.

Senator BRANDIS—Anyone else?

Mr Cornall—I would have to reflect. We had a lot of discussions with a lot of people over a very short period of time.

Senator BRANDIS—Would you take that on notice please, Mr Cornall. Can I ask you as well: I assume the conversations were minuted and I would like the minutes or whatever record was made of that aspect of the conversations—that is the only aspect I am interested in—to be produced please. Just remind me what Ms Hemming's position is?

Mr Cornall—She is with the office of public prosecutions but she is responsible for the overview of all terrorist prosecutions.

Senator BRANDIS—Were these assurances given to anyone other than Sir Kenneth Macdonald or Ms Hemming?

Mr Cornall—That is what I will have to check because, as I just said, we had a lot of meetings with a lot of people in a very short time.

Senator BRANDIS—Indeed, I understand that. But you also have procedures whereby the transactions of these meetings can be recorded because they are important meetings on sensitive issues. Thank you.

Mr Faulkner—Excuse me, chair, I wonder if I might just make a further observation before the senator leaves the room.

CHAIR—Sure.

Mr Faulkner—I think it is relevant to what has just gone. It is worth while drawing to the committee's attention that Mr Clarke himself in his opening statement touched on the question of dealing with sensitive. I would like to read a couple of sentences from that statement because I think they are germane. Mr Clarke said:

My intention is that the proceedings of the Inquiry should as far as possible be made public. However, given the subject matter of the terms of reference, the Inquiry must observe restrictions on the disclosure and publication of certain material which raises issues concerning national security, or which may place at risk ongoing investigations or pending trials, both in Australia and overseas. These considerations will not confine the scope of the investigations carried out by the Inquiry. However, they may affect the extent to which some of the material examined and considered by the Inquiry may be made public.

I think it is worth putting that on the record.

Senator BRANDIS—I am glad you told us that, Mr Faulkner. But may I say that I would expect nothing less. The opposition is perfectly satisfied that Mr Clarke has so directed himself. But it makes even more powerfully the point I am making. If we can be certain of the discretion of Mr Clarke, which I am sure we can be, and if we can be certain that sensitive and secure information will be protected by Mr Clarke's inquiry, which I am sure we can be, then the assurances given to Sir Kenneth Macdonald and Ms Hemming by the Attorney-General were entirely unnecessary as well as improper.

CHAIR—Is there a question there, Senator Brandis? Senator Macdonald, I think we will go to you.

Senator IAN MACDONALD—I wanted to make some inquiries about how pardons are progressed or initiated.

Senator Ludwig—I think I have asked that question before, if I recall.

Senator IAN MACDONALD—All right.

Dr Alderson—You would like me to talk through the process for determination of a pardon in a federal case?

Senator IAN MACDONALD—Yes.

Dr Alderson—Certainly. The starting point is that pardons are an exercise of executive power, so the formal decision is made by the Governor-General. In practice that is done on the advice of the relevant minister who under the current arrangements is the Minister for Home Affairs. In turn, to allow the minister to make that decision, normally what would happen would be the department would provide a brief to the minister that would set out the background to the particular matter: what was the offence, what was the conviction, what are the arguments that have been put for a pardon, what are the pros and cons of the arguments for and against, and some material on historically what have been the criteria applied to determining a pardon in a particular case. The other thing to add is that it is a matter in each case—there is no legislative restriction around when a pardon can be granted, but historically they are only granted in very rare cases based on the principle that it is fundamentally important that normally determination of guilt and innocence is a matter for the courts and there should only in rare circumstances be a departure from that principle.

Senator IAN MACDONALD—Can you recall how many federal pardons, if I might call them that, have been granted in the last 50 years?

Dr Alderson—I will have to take on notice providing a specific figure. It would be extremely rare. The number would be between zero and two, I would think.

Senator IAN MACDONALD—And you are the relevant officer in that area?

Dr Alderson—I am, yes.

Senator IAN MACDONALD—I am not asking you for details or names, but are you currently working on any pardon briefs?

Dr Alderson—I could not reveal any names. It is appropriate to say there are some matters on hand where that issue is being looked at, yes.

Senator IAN MACDONALD—That is plural ‘matters’?

Dr Alderson—Yes.

Senator IAN MACDONALD—I could guess as to what they might be in a wider sense.

Senator Ludwig—We all can, I suspect.

Senator IAN MACDONALD—I could guess as to what they might be but in a wider sense, but I am particularly interested in a government promise before the election to provide pardons to fishermen who were convicted under the previous government’s green zones legislation in the Barrier Reef on the basis that these people who were convicted were, if we can use the term, very ordinary Australians who now have criminal records for fishing in an area on the ocean that did not fit within a defined zone. How you would find the defined zone all that certain, but one of them took the matter on appeal and succeeded on the basis of GPS

readings. The other 300 or 400 who were convicted were not in a position, financial or otherwise I suspect, to also take appeals, and so the proposal by the former government was to arrange for pardons. That commitment was also mirrored by the then opposition spokesmen in that area. Is it giving away secrets to ask in the broad—I do not want to impinge on anyone's privacy, but in this instance with such a mass of people I am sure those people would not mind even if they were named individually—if they are the people that you are looking at pardons for?

Dr Alderson—There are a few different facts I can give you in response to your question. The first is that my understanding is no undertaking was made to give pardons in those cases. There may have been an indication that the possibility of pardons would be considered on a case by case basis, but my recollection of the decisions and statements that were made during last year was that there was not an undertaking to grant pardons.

Senator IAN MACDONALD—I do not want you to get into that. If there is to be an argument on that, that should be with Senator Ludwig, not with you.

Dr Alderson—That is the first thing. The second thing, without identifying the particular case or individual, is that there has been one case, within the category that you mention of those Great Barrier Reef cases, where an application for pardon has been considered and a decision has been made not to grant a pardon. That is the only matter that has been determined. In fact, that is the only case in which a formal application in a particular case has come through to the department for consideration and advice.

Senator IAN MACDONALD—Was that publicised, or could you give us details about it?

Dr Alderson—It wasn't. I cannot give any details of the particular case.

Senator IAN MACDONALD—On what basis?

Dr Alderson—The details I can give you are that the matter was decided in 200. But to reveal anything about the identity of the individual or the particular case would give rise to privacy issues.

Senator IAN MACDONALD—I understand that. When in 2007?

Dr Alderson—It was in August 2007.

Senator IAN MACDONALD—Was there any sort of public announcement on that?

Dr Alderson—There wasn't.

Senator IAN MACDONALD—Are you saying that only one of those convicted in those green zones cases actually applied for a pardon?

Dr Alderson—Correct.

Senator IAN MACDONALD—And that was rejected?

Dr Alderson—Yes.

Senator IAN MACDONALD—Your knowledge of the issue is good. Am I correct in saying that one was taken on appeal and was successful because of the uncertainty of the GPS readings?

Dr Alderson—I think that is my understanding. In fact, just going back to my notes of this, I think the finding was not on appeal; it was actually at first instance where there was a finding of not guilty in a particular instance. Again, if anything I say turns out to be not quite—

Senator IAN MACDONALD—You might be right. My factual knowledge of each of the individual cases may not be right, but it would have been a decision taken to a hearing; whereas the other great number—I am using 300 again, but I think the figure was more than 300—the other 300 or so, would have simply pleaded guilty on the basis that, as we all know, for ordinary Australians to contest a prosecution like that is simply beyond the financial means of most people. So it was on that basis that one had gone to court and had failed that the others should have had their convictions reviewed and discharged, because they now do all have a quasi criminal conviction against their names. For the case of the others of that group to be considered for a pardon, then each one of them individually would have to make their own application to the Minister for Home Affairs for a pardon?

Dr Alderson—That has historically been the process based on the premise that the stringent criteria that are traditionally applied depend on making out the case in the individual circumstance. In theory, if you had a large group of people affected by the same considerations, there are different ways that could be presented, but the starting point is that each individual who would seek a pardon would have to make application for that.

Senator IAN MACDONALD—I was going to ask how big your department is. Perhaps you should be putting in a bid for additional assistance—if you suddenly get 300 applications, I mean.

Dr Alderson—I will note that.

Senator IAN MACDONALD—I do not want to particularly argue with you, but I will wait for the minister to return.

Senator Ludwig—I was listening and am interested in that. I am always open for an argument.

Senator IAN MACDONALD—I am sure. Senator, you were making asides earlier that you knew where I was going. Did you correctly anticipate where I was going or did you have some other case in mind?

Senator Ludwig—I did and am familiar with it. I assumed you were talking about the fishing matter, if I can broadly describe it that way. I have some recollection of it. I think Senator Boswell had an interest in it and had spoken in the Senate about it. Correct me if I am wrong. I do not have any further details about that; I thought that was a matter that was clearly outside of my own portfolio. It is a matter that rests with the Attorney-General's portfolio. I can undertake to put any further inquiries about particular matters to the Attorney-General, and that is the extent to which I can assist.

Senator IAN MACDONALD—Contrary to Dr Alderson's recollection, Senator O'Brien, one of your Senate colleagues, then the spokesman on these issues, indicated in Townsville that there would be a bipartisan approach on this issue. He made that comment following the previous government's commitment in the election to overturn either by legislation or by

pardon the convictions of those who had been convicted. As I say, I do not want to argue with a public servant about the interpretation of Senator O'Brien's commitment; I can argue—

Senator Ludwig—If you make available any of the details you have to the committee, I could pass it to the Attorney-General so that he can be aware what transpired prior to the last election in respect of this matter.

Senator IAN MACDONALD—Thank you very much. I assume you mean to the Minister for Homeland Security.

Senator Ludwig—Yes, sorry. I referred to the Attorney-General, but it is clearly Minister Debus.

Dr Alderson—If I could just offer one quick clarification. When I talked about whether commitments had or had not been made, I was thinking in terms of the minister then responsible for pardons at each point in time. As to other statements that have been made, we will have a look at that material and provide an answer through the minister.

Senator IAN MACDONALD—Thanks for that. I am mildly encouraged by the response I have got today. What I will do is send to the minister the material I have and perhaps urge those who have been convicted to make application for a review of their cases. Because there are a number of them, Senator Ludwig may prefer the issue to be dealt with as a block issue—because it was a block type of situation.

Senator Ludwig—It is a matter for the home affairs minister. What I wanted to do was make sure that he had a clear idea of what had transpired and, if there were particular conversations that were on the record, what they were so that he can make a decision with all the facts before him.

Senator IAN MACDONALD—That is about as far as I can take it. Dr Alderson, you are in the area of pardons: would that also be your area if there were perhaps legislation to be drafted? This is a bit hypothetical, but I am just trying to say: is that in your area?

Dr Alderson—I would answer: possibly but probably not—the reason being that the Environment portfolio and the environment minister have a big stake here because tied in with this whole issue are a range of questions about the legislative regime that was in place then and is in place now. So it is probably more likely that any question about the legislation would be one for the environment minister.

Senator IAN MACDONALD—Apart from that issue—and again no names and no identifiers at all—are you doing work on other sought after pardons?

Dr Alderson—Yes, there are current matters concerning requests for pardons that are being looked at beyond this category.

Senator IAN MACDONALD—They, of course, will be closely scrutinised by the public if it is the area that I think it perhaps might be, but I will not go any further.

Dr Alderson—Sorry, I would not want my comments to have too much read into them. Although pardons are very rarely granted, it is not uncommon for prisoners to seek pardons and so it is not uncommon to have a much larger number of applications under consideration than are granted.

Mr Cornall—Madam Chair, could I just make one point following our discussion about the Dr Haneef inquiry. I think one thing that did not come out that is relevant to the discussion that we had is that the Clarke inquiry was announced by the Attorney-General on 13 March this year. The Attorney and my visit to London was in the first week of April, and my correspondence with Sir Kenneth Macdonald was at about the same time. So all of the discussions and so on which took place in England were by way of explaining terms of reference that had already been established and made public in Australia.

CHAIR—I thank the officers. I invite officers from the Human Rights and Equal Opportunity Commission to the table.

[5.05 pm]

Human Rights and Equal Opportunity Commission

CHAIR—Welcome, Mr von Doussa. Do either you or any of the commissioners have any opening statements they wish to make this afternoon?

Mr von Doussa—We do not wish to make an opening statement.

CHAIR—We will go to questions. Senator Barnett.

Senator BARNETT—I just want to go back to the last time we were here when we were talking about your report and the recommendation for 58 laws to be amended on same-sex entitlements. It was 58 wasn't it?

Mr von Doussa—That is correct, yes. Commissioner Innes can answer these questions.

Senator BARNETT—I understand the government has found that some 100-odd amendments and laws need to be amended. Is that your understanding?

Mr Innes—That is my understanding.

Senator BARNETT—You found 58 and the government has found 100. Do you want to respond as to how that might be possible?

Mr Innes—It is my understanding that the government has, if you like, done a wider search of legislation than that undertaken by the commission. The commission undertook to look at laws which related to financial and work related discrimination against same-sex couples and we found 58 laws. I have not seen the list of laws which the government intends to amend, but it is my understanding that the extra 40-odd laws, which the Attorney has indicated, relate to other legislative areas which cause discrimination against same-sex couples.

Senator BARNETT—Have you identified which specific areas? Have you liaised with the government and identified which specific areas, in addition to the 58 amendments?

Mr Innes—I have not seen a list of the other laws which the government intends to amend.

Senator BARNETT—Have you had any liaison with the government with respect to your report or their plans to make further amendments?

Mr Innes—I have had discussions with government, but I have not seen—and my staff have not seen—copies of any draft legislation. Even if I had, I probably would not be in a

position to comment on it because it has not yet been tabled. I do not have to make that decision, because I have not seen it.

Senator BARNETT—In terms of the discussions that you have had with the government, what has been the nature of those discussions and when did they occur?

Mr Innes—I would have to take the question of their occurrence on notice. The dates would be in my diary, but I cannot tell you now in any detail without going back through my diary. I would be happy to take that on notice. The nature of the discussions has involved the commission and me on behalf of the commission, if you like, reinforcing the recommendations which were made in our report and discussing with government the way in which those recommendations could be implemented and being advised by government of matters which are on the public record—that is, that the government intends to amend over 100 laws and it will do so in two tranches of legislation. The first tranche is likely to be tabled in the near future, and I understand from a media release I saw earlier today that in fact that bill passed through caucus this morning. So I assume that it is likely to be tabled quite soon. As I understand it, that bill relates to superannuation issues, but I have not seen a copy of that bill.

Senator BARNETT—But you have seen the media release?

Mr Innes—I have seen the media releases, yes.

Senator BARNETT—And in whose name was that?

Mr Innes—The media releases—

Senator BARNETT—Perhaps the minister might alert us?

Senator Ludwig—Unfortunately, I was here instead of at caucus this morning and still being here I have not actually seen the press release that the commissioner has had the advantage of getting before me. During the 6.30 pm break I can find it for the committee and provide it to you.

Senator BARNETT—Thank you, Minister. In terms of the removal of the differential treatment of same-sex couples and their children in the law reform set out in the budget papers, have you seen any modelling of the costs that would be incurred or the savings made as a result of the proposed changes?

Mr Innes—I have only seen what is in the budget papers.

Senator BARNETT—And, based on your understanding of the budget papers, you have a view as to their veracity and their accuracy?

Mr Innes—I have no reason to doubt the figures put forward by Treasury and compiled by other departments. My understanding is that there is a saving, over the years of the budget cycle—I do not have those papers in front of me, so I cannot recall whether it is three or four years—of some \$66 million. But my recollection is that there are some one-off implementation costs of around \$37 million.

Senator Ludwig—Senator Barnett, I have some information for the committee. The Rudd government of course is delivering on its election commitment to introduce legislation to prospectively remove discrimination against same-sex couples and their children from—as

you have heard—from a wide variety of Commonwealth laws. It is directed at making a practical difference to the everyday lives of Australians who are in same-sex relationships. It will also bring Commonwealth legislation in line with state and territories which have previously moved to remove this form of sexual discrimination from their laws.

The legislative changes—I think I have been informed—have gone through caucus today and will provide for equality of treatment in a wide range of areas including government superannuation, taxation, veterans affairs, social security, workers compensation, Medicare and pharmaceutical benefits. This reform is estimated to result in net savings over four years of approximately \$74.8 million. The majority of net savings relate to personal benefit payments to same-sex couples who were previously identified as two individuals. They will now be recognised as a couple and paid benefits at the rate applying to couples.

It is anticipated that all of the changes will be implemented by mid-2009. Of course, that is all subject to parliament, as you can appreciate. The government's policy, of course, was enunciated prior to the election and I said we were delivering on that commitment. On behalf of the Attorney-General, I thank HREOC for their excellent report in this area, which did provide significant information and practical ways of how we can address this issue. They found 58 particular laws which related to financial and work related benefits which provided positive assistance to both the Labor government, when it was in opposition and now in government, and the Attorney-General has identified a range of other laws which can also be practically changed.

Senator BARNETT—Perhaps either the minister or the department may be able to answer my earlier question then: on what basis were the costings made and what modelling was used to prepare the budget papers to come up with the figure of a \$74.8 million saving over the four years.

Ms Lynch—Senator, perhaps I can help you there. The costings were done by each of the relevant agencies which had matters coming to them in the budget. This department was responsible for costings in relation to judges' pensions but, I think, overall the costings were based on figures derived from the 2006 ABS census of the number of same-sex couples, which I think the Attorney has previously indicated was about 25,000.

Senator BARNETT—So we cannot get an actual breakdown here and now, although this is the agency relevant to HREOC, for the different departments and how the savings are made in terms of people. We have about a dozen departments there. We have Education, Families and Community Services, Veterans' Affairs, Defence, and Immigration. Are you able to give us a breakdown of how the savings have been calculated?

Ms Lynch—I am not sure I am in a position to give you a detailed breakdown portfolio by portfolio, except that I understand the bulk of the savings are brought about by the fact that people will now be means-tested as a couple where previously they would have been assessed as two individuals. I understand the bulk of the savings fall in the areas of social security and family assistance.

Senator BARNETT—Could you outline to the committee what the upfront costs to implement the measure are and for what purpose they are derived?

Ms Lynch—There are certainly some upfront costs in relation to Centrelink and changes to their systems to accommodate the changes. There are ongoing expenses in superannuation. But, if you are talking about upfront capital costs, I understand the bulk of those are in relation to Centrelink and the setting up of systems to accommodate the changes.

Senator BARNETT—So they are more technological and infrastructure and the like?

Ms Lynch—That is my understanding, but we can take that on notice and get back to you.

Senator BARNETT—If you could take it on notice.

Ms Lynch—As I said, they are FaCSIA's costings rather than ours.

Senator BARNETT—If you can take that on notice and assist in any way you can. Let us focus on the Attorney-General's Department. I notice in the budget papers you have \$100,000 per year for four years. What is that for?

Ms Lynch—Judges pensions.

Senator BARNETT—Tell us how many judges there are, what the pensions are and so on?

Mr Govey—We do not have that information right now. We will check and see whether we have it or whether we need to take that on notice. But it is an estimate for a very small sum of money.

Senator BARNETT—It is \$100,000 a year. That is an expense not a saving.

Mr Govey—That is correct.

Senator BARNETT—We only have 500 in total across the country. We are talking about the federal judges as in Federal Court, High Court, Federal Magistrates Court and Family Court, are we?

Mr Govey—That is correct—and possibly the Industrial Relations Court.

Senator BARNETT—How long is it going to take? This is a budget estimates hearing and I am looking at a budget paper and it is \$100,000 per year. There must be somebody here who can assist with the calculations as to how that \$100,000 is derived. I am happy to go on to other questions and come back to that shortly, if you want me to do that.

Ms Lynch—Can we perhaps move on and come back to that in a minute?

Senator BARNETT—No problem. I am wondering whether there were any financial models for how these budget papers were derived. Are you aware of any particular modelling approach that has been used to determine that?

Ms Lynch—Again, the costings were done by relevant agencies. As I said, assistance was provided by the Government Actuary plus the use of ABS data, but the particular modellings used by agencies for their particular programs would be a matter for them. I am not aware of a single model that was used across the board other than the fact that we were basing it on 25,000 same-sex couples.

Senator BARNETT—Let us move on. In terms of those estimates, they are said to relate to the removal of 'differential treatment of same-sex couples and their children from

Commonwealth laws, except where they rely on the Family Law Act 1975 definitions and presumptions'. What is the rationale behind that exception?

Ms Lynch—I might get Mr Duggan to assist me with that answer.

Mr Duggan—In relation to the question of section 60H and the reason why the government at this time is not proceeding with amendments in that regard, it has to do with a whole range of issues concerning the complexity of the provisions themselves and the fact that states in relation to reproductive technology techniques do not have consistent legislation. There is also a Standing Committee of Attorneys-General process which was initiated under the previous Attorney looking at harmonising issues relating to surrogacy. For a whole range of reasons, the government is still considering whether it will move in relation to section 60H. No final decision has been made in that regard.

Senator BARNETT—Do the department have further instructions, or have they prepared a model or a budget with respect to section 60H?

Mr Duggan—The short answer to the question is no. We have certainly advised the government about the complexities involved, and the minister has communicated to us that he would like us to give further consideration to this matter.

Senator BARNETT—Have you given further consideration to it?

Mr Duggan—We have not formally briefed him since that time.

Senator BARNETT—I am not worried about whether it is formal or informal. Have you been given instructions to consider further budgetary impact of section 60H not being exempted?

Mr Duggan—Before the government would take a decision that there would be amendment to section 60H, briefing would be provided in relation to any costs that may be incurred by government in going to that stage. We have not got to that stage as yet.

Senator BARNETT—Have you prepared any preliminary costings on the basis that the exemption does not apply?

Mr Duggan—No, we have not.

Senator BARNETT—Have you prepared any papers or discussion papers or undertaken any analysis or had any meetings with respect to whether that exemption would not apply?

Mr Duggan—Do you mean in relation to costs or more generally?

Senator BARNETT—Both.

Mr Duggan—Clearly, the department have provided the Attorney with advice in relation to this issue, as I have outlined previously. We are also involved in processes concerning surrogacy and the Standing Committee of Attorneys-General process that I indicated to you previously. Other than that, the answer is no.

Senator BARNETT—What advice have you provided on the matter of surrogacy?

Mr Duggan—In relation to the issue of surrogacy, there is a process which the Standing Committee of Attorneys-General is currently undertaking. That has not yet reached any finality. There are about to be consultations with interested stakeholders in relation to where a

national approach might go in relation to surrogacy. Both the previous Attorney and the current Attorney are keen, as you are probably aware, for a harmonised approach in this regard. It is very different between states as to how this is approached at the moment.

Senator BARNETT—What advice have you provided? I am not after a policy position, but what have the department done on that to date? What have they undertaken?

Mr Duggan—What we have basically done is to be active participants in the Standing Committee of Attorneys-General process, providing briefing to the Attorney in that regard and having input into relevant papers that have been prepared.

Senator BARNETT—Have you prepared any models for common legislation or common regulations relevant to surrogacy?

Mr Duggan—No, we have not. The Attorney regards the primary responsibility for this matter as still being with the states, as they are the regulatory agencies for this area. We have not done at this stage any particular modelling in relation to what legislation might look like while we await the outcome of the states' consideration of this matter.

Senator Ludwig—I should add, just to make it absolutely plain, that the government has not made any decision regarding the status of same-sex couples in relation to adoption, IVF or surrogacy laws as these areas are primarily a matter for the states and territories. They are complex issues and will require extensive consultation. I think it is helpful for the estimates committee to be aware of the Attorney-General's view in that regard.

Senator BARNETT—That is useful, Minister.

Senator BRANDIS—Could I just ask a question arising from that observation by the minister? Is the reason that the government has taken this position in relation to marriage, adoption, IVF and surrogacy because they are matters for the states and territories or are there other reasons why the government has taken that view?

Senator Ludwig—I did not mention marriage; I mentioned adoption, IVF or surrogacy laws.

Senator BRANDIS—Okay, but you said that these were matters for the states and territories—

Senator Ludwig—And they are complex issues.

Senator BRANDIS—I think that is a little different from what the Attorney and the Prime Minister might have said on that matter.

Senator Ludwig—They are all part of the same; they are primarily a matter for the states and territories. I then went on to say that they are complex issues and will require extensive consultation.

Senator BARNETT—Perhaps the minister might wish to answer this. Will the government ensure that couples in a non-sexual interdependent relationship are not discriminated against by extending the benefit of the changes to them as well.

Senator Ludwig—The legislative changes will provide for equality of treatment in a wide range of areas, including government superannuation and tax, as I mentioned before. It is directed at those practical differences to the everyday life of Australians who are in a same-

sex relationship. The legislation of course will inform you further in respect of that latter matter.

Senator BRANDIS—What does that mean, Minister—that last observation? I am not trying to be contrary about this, but are you deliberating leaving open the possibility that the government would consider extending the reach of the legislation along the lines suggested by Senator Barnett?

Senator Ludwig—I am not the Attorney-General. I can certainly ask him whether he intends to do that. I personally do not have any knowledge of whether that is the case or not. I do have some understanding of what the intention is and that is to implement the current legislation. That is for the Attorney-General to announce and to provide and bring to parliament, so I did not want to go into detail of that.

Senator BRANDIS—By the way, just on this: Mr Cornall, when are we going to see a bill? We have been told that there are two tranches. My office has been asking the Attorney-General's office on an almost daily basis for a copy of the draft of the first tranche, which deals with superannuation. As of today we were still being told that it was not available yet, but we understand that it is imminent. When are we going to see a bill?

Ms Lynch—Very shortly I understand. The final decision of introduction is one for the Attorney. I understand that the Attorney's office is proposing to provide briefing to parties once it is introduced, but I cannot give you the date of the introduction.

Senator BRANDIS—No, no. My office has been assured by the Attorney-General's office that we would be provided with an advance copy of the bill, not provided with a copy when it is introduced, like everyone else.

Senator Ludwig—Can I take that on notice. I mean, if that assurance has been given, I should follow up on that.

Senator BRANDIS—If you would not mind, Senator Ludwig. I would greatly appreciate it. I do not want to be controversial about this.

Senator Ludwig—No, you are not. In opposition the then government would in some instances provide consultations. It may not have extended to a draft; it may have extended to a detailed briefing. In some instances it might have even extended to others as well, but I will find out what is the status.

Senator BRANDIS—Could you perhaps take it up informally and get back to me informally.

Senator Ludwig—I do intend to do that, Senator Brandis.

CHAIR—Do you have any more questions Senator Barnett?

Senator BARNETT—Yes, I do. Could the department advise whether, with respect to non-sexual interdependent relationships, you have done any research or modelling or had any discussions on amending the law accordingly so that they are not discriminated against in the same way that, purportedly, those in a same-sex relationship are discriminated against?

Ms Lynch—I think I might need to take that one on notice.

Senator BARNETT—You are the relevant officer. You must be aware whether there have been any discussions or any modelling prepared or if you have had any instructions to advise the government as to whether the law can be broadened to include not just those in a sexual relationship but those in a non-sexual interdependent relationship.

Ms Lynch—Senator, I think there may have been discussions about the issue of interdependency and the difference between interdependency and same-sex couples but in terms of doing modelling for this government or for any tasking, I am not aware of that but I would just need to check.

Senator BARNETT—Can you advise the committee of the nature of those discussions you have had to date with respect to that matter.

Ms Lynch—Senator, they were not with me personally, so I would need to again take that on notice.

Senator BARNETT—Can you take on notice whether any of your officers in the department have had those discussions and the nature of those discussions and when those were held.

Ms Lynch—Yes, Senator.

Senator BARNETT—Can we go back to HREOC if possible Mr Innes? What is the view of HREOC on this issue of couples in a non-sexual interdependent relationship?

Mr Innes—The view of the Human Rights Commission was to not continue down the road of the recognition of interdependent relationships in this circumstance for two reasons. Firstly, because it, if you like, diminished same-sex relationships in the way they were regarded in comparison to opposite-sex relationships and, secondly, because there are policy difficulties in defining interdependent relationships and it opens up a much broader category of people. For those reasons our report supported alteration of the definition of de facto to include same-sex couples and a recommendation to not continue with the introduction of benefits for interdependent relationships which occurred in the area of superannuation under the previous government.

Senator BARNETT—Did you do that based on any research or advice or any papers or is it just based on discussion amongst yourselves?

Mr Innes—It was based on the consultations we conducted with the community before we prepared our report and it was based on the community held view, in our estimations, with respect to same-sex relationships.

Senator BARNETT—I have some questions for HREOC, whoever would like to answer them. Does HREOC support gay marriage?

Mr Innes—The report which we conducted was into the financial and work related benefits for same-sex couples. The commission at this point has not looked at the broader area of gay marriage, so I am not in a position to answer that question. There were certainly views expressed to us both ways as part of the consultations which we conducted but the commission's reference related to financial and work related benefits for same-sex couples and of course those benefits are available to de facto opposite-sex couples so we were looking at that issue rather than the issue of marriage for same-sex couples.

Senator BARNETT—What about the question of gay adoption and IVF for gay couples, single women and lesbians? Do you have a view on that?

Mr Innes—The Commission, based on its interpretation of the Convention on the Rights of the Child and looking at the best interests of children, certainly argued in its report that children of same-sex families should be viewed in the same way as children of opposite-sex families. It is my expectation that, in the context of availability of benefits, that is the view that the government is likely to take. Our report did go more broadly into areas of adoption, and generally supported similar principles.

Senator BARNETT—Sorry, I just missed that last bit. Your report did cover gay adoption and supported gay adoption?

Mr Innes—Well, it supported similar principles. In other words, looking at both the principle of nondiscrimination and the principle of the best interests of the child, it supported the treatment of same-sex families in the same way as opposite-sex families.

Senator BARNETT—We are not trying to have word games here. In terms of principles or whatever, most people have a view as to whether they support it or do not, and I am just wondering what HREOC's view is—whether it is supported or not. The principles, I think, are pretty clear in terms of same-sex couples adopting kids.

Mr Innes—As I said, in line with both the principle of nondiscrimination in the Covenant on Civil and Political Rights and the principle of the best interests of the child in the Convention on the Rights of the Child, the commission—in the report which we prepared—supported the equal treatment of same-sex families and opposite-sex families.

Senator BARNETT—Does the commission have a position on access to IVF services, as in single women, lesbians or people in a lesbian relationship having access to IVF services?

Mr Innes—I am trying to recall whether that is a matter that the report canvassed. I do not think the report canvassed that issue.

Senator BARNETT—All right. I am not asking whether the report canvassed it or not; I am asking for the views of HREOC.

CHAIR—I am not entirely sure that that is appropriate, Senator Barnett.

Mr Innes—The commission has not formed a view.

Senator BARNETT—That is fine. That is a very good answer. I appreciate the fact that you can provide that answer. Thank you. Finally, I want to ask Mr von Doussa about his views generally about Australia's human rights record. How would you rate Australia?

Mr von Doussa—I think Australia has done reasonably well. We have ratified six out of the seven human rights conventions—but we have not implemented the covenant on Economic, Cultural and Social Rights yet. But I think one has to recognise that many of the human rights recognised in that covenant are already covered by other pieces of legislation in this country. We have very effective antidiscrimination legislation. We are engaging in the international community with the Human Rights Council. I think we are offering, with government support, capacity building on human rights issues with our neighbours.

Senator BARNETT—How would you rate us in the league of nations across the globe?

Mr von Doussa—Very close to the top, I would have thought.

Senator BARNETT—I read a reference—it is reported in the *Weekend Australian* of 3-4 May; you may be aware of it, I am sure—to an article from Andrew Bolt. He wrote:

OUR top human rights body is so savage on Australia that it claims we're guilty of "genocide".

But when it comes to China, the Human Rights and Equal Opportunity Commission can't grovel enough.

I was just wondering if you want to try and correct the record or respond to those comments, because they are pretty strong.

Senator Ludwig—The only concern I have—I am sure HREOC can answer questions—is that it may be straying into areas where HREOC is being asked to express an opinion on material or about, for argument's sake, our human rights record and how good it is. We can all have an opinion on that. I am not sure that estimates is the appropriate place to ask for an opinion from HREOC. You can certainly ask for an opinion from me, and I will provide it. But factual information, I am sure—matters that go to the budget and other related factual matters that people ask at estimates—is generally all right.

Senator BARNETT—Minister, I think that Mr von Doussa was about to respond. It is a question that goes to HREOC's view of Australia's position and China's position, and where we rate against each other, and the view—

Senator Ludwig—Well, that is an opinion.

Senator BARNETT—I am asking for a response to quotes that were in the newspaper just a few weeks ago. If Mr von Doussa does not wish to respond, I would be surprised, because I am just allowing him the opportunity to either clarify or correct the record, what was put down in that paper.

Senator Ludwig—If you are going to raise matters that appear in newspapers—I am sure they are accurate, but it is one of those situations where I think you should provide a copy of the item to the witness so that the witness can examine it and look at it for themselves and decide *prima facie* whether they would be expressing an opinion or whether they can provide a factual response to the issue raised in the paper. I think that is fair to the witness, rather than—

Senator BARNETT—I am more than happy to provide a copy if Mr von Doussa would like a copy.

CHAIR—Could you perhaps indicate for Mr von Doussa the newspaper or the date or the article?

Senator BARNETT—Yes, I have. I have said it twice actually.

Mr von Doussa—What was the paper?

Senator BARNETT—It was the *Weekend Australian*, 3-4 May, and it quotes you as saying:

... we're guilty of "genocide".

It quotes you as saying:

China ... actually “contributed” to human rights and should not be so criticised.

But I am happy to—

CHAIR—Who wrote the article, Senator Barnett?

Senator BARNETT—Andrew Bolt. He is quoting you.

Mr von Doussa—Senator, I have never discussed the question of genocide. If that comment has been made, I think it goes back to an era long before I was involved with the human rights commission. It is not an expression I have ever used. What was the next part of it?

Senator BARNETT—He quotes you as saying on Chinese state television last week—

Senator Ludwig—Chair, I just think, in fairness—

CHAIR—Senator Barnett, it may well be useful if we—

Senator BARNETT—You can have a copy.

CHAIR—It may well be useful if we take a copy of this first.

Senator Ludwig—We have got people that can provide a copy—out of fairness to the witness.

Senator BARNETT—Just while the copy is coming through, where do you rate Australia and China in terms of human rights?

Mr von Doussa—It is not really HREOC’s function to engage in the research that would be necessary to do that. You asked me for my personal assessment of where Australia stood in the international scene and I think HREOC and its officers would have a view, and would have the material to have a view, about that. In terms of rating the rest of the world, I think you are asking us to pass an opinion on something that we are not really qualified to do. If you just want me to put Australia ahead of China or vice versa, I personally have no difficulty in putting Australia well ahead of China.

Senator BARNETT—Good. I think that really clarifies things for the record. I think that is very useful.

CHAIR—Senator Barnett, have you finished, then?

Senator BARNETT—Yes.

CHAIR—I understand, Ms Broderick, you have some time constraints this evening—you need to get away. So, with the indulgence of the committee, I am just going to ask people, if there are any specific questions for Ms Broderick, that you could ask them now, which might ensure that we could let her go before dinner time. Senator Kirk.

Senator KIRK—Ms Broderick, thank you very much for being here today. I have a few questions for you in relation to your listening tour. I understand that it is nearing its end, if it has not already been completed, and I wondered if you could update the committee on the locations that you have been to and, generally, the outcomes of the tour.

Ms Broderick—Thank you, Senator. We have travelled quite extensively—to all capital cities and to a number of regional and remote locations throughout Australia. We have facilitated around 100 events during the listening tour and we have met, physically, in excess

of 1,000 people. But through the website we have had 66,826 hits, so our listening tour has been virtual as well as physical. And we did finish the tour, the week before last, in Queensland.

Senator KIRK—Okay. How were the people determined—in other words, who were the invitees to your listening tour? Was there something distributed to community groups? How did you do it?

Ms Broderick—We tried to be as diverse as possible. We visited workplaces, from abattoir workers to Chinese factory workers, and blue collar and white collar workplaces. We met with Indigenous women in Indigenous communities, community workers and academics. We facilitated business roundtables and met with government ministers, bureaucrats, African-Australian women and, of course, many NGOs. It was quite extensive listening.

Senator KIRK—What is the intended outcome of this tour? Are you going to prepare a report? How does it work?

Ms Broderick—We will be preparing a community guide and we will report back, quite extensively, to the community on what we heard. The objectives behind the listening tour were: firstly, to help us set the work plan for the next five years; secondly, to connect widely and build the relationships that were necessary to inform us over the next five years in order to build a profile about the work that we were doing; and, thirdly, and importantly, to set the stories for the speeches and media that I was giving—that is, putting a human face to the data that was coming across my desk. They were the key objectives.

Senator KIRK—What issues emerged from your tour? Did you attempt to gain information from the community in relation to certain topics, or was it just open slather and people could say whatever they felt was an issue?

Ms Broderick—We went with a framework which focused on three themes. The first theme was building economic independence. The second theme was around balancing work and family over the life cycle—to pick up the ageing of the population as well. The third theme was around living a life free from discrimination, harassment and violence. Looking at the first theme of economic independence for women, we heard a lot about the disparity between the women's and men's retirement savings and some of the issues around that—in particular, the issue of pay equity. Looking at the second theme of balancing work and family, there was strong support for a national paid maternity leave scheme, and the issue around flexible work and child care. Those issues came up. Looking at the third theme, depending on who we spoke to, sexual harassment emerged as a large issue in workplaces. In Indigenous communities and other communities, a big issue was the ability to live a life free from domestic violence.

Senator KIRK—In relation to paid maternity leave, I understand that you recently made a submission to the Productivity Commission. Did your listening tour inform your submission to the Productivity Commission?

Ms Broderick—That is right; it did. One of the changes we heard on the listening tour was about the desire of men or supporting partners to also be involved in the very early days of a child's life, so that helped inform our proposal that we put to the Productivity Commission.

Senator KIRK—With respect to the proposal to the Productivity Commission, did you make your written submission before you were asked to give oral evidence? Is that the way it worked?

Ms Broderick—Actually, it was the other way around. We gave our oral evidence. We are not due to put in our written submission until 2 June. We will be doing that shortly.

Senator KIRK—Does the Productivity Commission submission that you made broadly reflect the report *It's about time*? Is it the same model that is contained therein?

Ms Broderick—It is a slightly different model. In fact, when I looked back at that, I noticed that we had a model in 2002 from the sex discrimination commissioner. We had another model in 2005 and then in 2007. They all started with around 14 weeks paid maternity leave, and we have also recommended around two weeks paid paternity leave on federal minimum wage.

Senator KIRK—I believe that just recently you produced another sexual harassment brochure, and that is on your website.

Ms Broderick—That is right. A strong theme that came through was the issues around sexual harassment, particularly for young women. We have reproduced the brochure but, more importantly, we firstly want to look at understanding the prevalence, because no benchmarking has been done since 2003. So we need to understand the prevalence of sexual harassment and where the priority areas are, and then design an education strategy, which will also involve the internet, because that is where young men and women congregate.

Senator KIRK—What is the idea with this? Is it going to be distributed to employers across the board? How are you going to distribute this material?

Ms Broderick—We have not finalised our strategy around sexual harassment as yet. We will be announcing what we will be doing, probably, over the next month. It will have a combination of the benchmarking, the analysis around the priority areas, the education strategy and the dissemination of educative information around sexual harassment—what it is and what we need to do about it.

Senator KIRK—Are there any other inquiries being developed at present, or are you going to try to reflect upon your listening tour first?

Ms Broderick—We will be putting out our report from the listening tour, the community guide and a more detailed report, and we will be announcing a more detailed agenda in the next month.

Senator KIRK—Thank you.

CHAIR—I think you might have met your commitments, Ms Broderick, but I am afraid your colleagues will have to stay, because we have further questions.

Ms Broderick—Thank you.

Senator SIEWERT—I have a number of questions for the social justice commissioner and Mr Innes on some budget issues. I will start with some of the budget issues that relate to where funding may have been cut. As I understand it, HREOC received extra funding in the

2006-07 and 2007-08 budgets to meet the anticipated increased workloads to deal with Work Choices. Do I have a correct understanding of that?

Mr von Doussa—Yes, that is correct.

Senator SIEWERT—Did you expect that that funding would continue into the future? Was there additional funding in the forward estimates?

Mr von Doussa—In the 2007-08 budget we were informed that there would be an ongoing contribution towards the Work Choices workload for us of \$1.8 million per year continuing.

Senator SIEWERT—Was one of the reasons for that contribution an expected increase in complaints due to the removal of unfair dismissal protection for most workers under Work Choices? Is that why you were given that money?

Mr von Doussa—It was anticipated that, with the removal of the unfair dismissal jurisdiction for employers with fewer than 100 employees, many of those employees would bring their grievances to HREOC as discrimination complaints of one sort or another. Indeed, once the Work Choices legislation came into force, there was a marked increase both in our complaints and in our inquiries. The figure that we have given previously, based on the figures up to 30 June 2007, is that we experienced a 50 per cent increase both in complaints and in inquiries. In fact, that rate has gone up slightly in the nine months since then.

Senator SIEWERT—You are anticipating my next question: has it gone beyond 50 per cent?

Mr von Doussa—We started off with a base of approximately 1,200 complaints per annum, which went up to about 1,800 complaints—which is the 50 per cent increase. In the last nine months, the rates suggest that for the current year to 30 June it will exceed 19,000.

Senator SIEWERT—Does the additional funding that you receive—

Mr von Doussa—Sorry—1,900. I beg your pardon.

Senator SIEWERT—I took it to mean that, hence my non-alarm at the 19,000!

Senator Ludwig—I got alarmed!

Senator SIEWERT—Has the additional funding been adequate to deal with that level of increase in complaints?

Mr von Doussa—Yes. We would have been able to cut our cloth to deal efficiently with the number of complaints—at least to the 1,800-1,900 level—with that additional funding.

Senator SIEWERT—As I understand it, that is not in the forward estimates—you are not getting any further increase to deal with those issues. Is that correct?

Mr von Doussa—That is not quite the position. At the additional estimates in February, the budget allocation to us in relation to the Work Choices load was removed on the basis that the winding back of Work Choices would mean that in due course unfair dismissal jurisdiction or something similar would be returned. Assuming the correctness of that logic, the difficulty from our point of view is that we understand that the change in legislation will not occur until 2010 and we have the ongoing run of complaints. But the effect of removing that component of our budget was that we lost \$519,000 from the 2007-08 budget. Going forward, we have

now lost a further \$1.431 million. Allowing for the efficiency dividend et cetera, we have effectively lost \$1.95 million from our appropriation.

Senator SIEWERT—My understanding is that, unless we are going to be surprised when the legislation is tabled in the near future, the government's legislative changes do not come into effect until 2010.

Mr von Doussa—That is our understanding.

Senator SIEWERT—Do you expect that you will still have to deal with a number of unfair dismissal complaints?

Mr von Doussa—They are discrimination complaints. As I have already indicated, over the last nine months the rate has been increasing. We see no reason to think that is going to drop off in the period between now and 2010. In fact, our assessment is that some part of this increase is not just because of the Work Choices legislation but because we are becoming better appreciated as a source of conciliation et cetera. We are getting complaints and included among them are employment complaints that have nothing to do with dismissal. They are disability complaints of one sort or another, sex discrimination complaints and so on.

Senator SIEWERT—How do you foresee being able to deal with them when the budget has been cut and you are still expecting the number of complaints to increase, by the sounds of it, until 2010? How do you foresee dealing with them with the budget cut?

Mr von Doussa—We understand that a primary part of our statutory mandate is to ensure that there is an efficient, effective and timely complaints mechanism. We will do our level best to ensure that we continue to provide that service with the funds that we have. But obviously we have a shortfall. Effectively, there has been about a 12.5 per cent drop in our appropriation allowance from the original 2007-08 budget to the 2008-09 figure. The difficulty that I have as the CEO of the organisation is to work out how we are going to manage that significant drop in funding and still continue to meet our core statutory obligations. My present intention is to spread that loss across all units of the commission rather than let it fall entirely on the complaints section. If we were to do that, that would mean that the complaints section would not be able to provide an efficient and timely service and we might lose staff and some of the expertise that we have there. At the very least, we would have a backlog of complaints building up that would take a long time to unwind even if some money came back to us. My decision presently is to spread it across the whole of the commission. The units within the commission will have to work out how they are going to manage the drop, which may be reflected in some of the projects that they have in mind; it may be reflected in some other ways.

Senator SIEWERT—Will the cuts be spread evenly across the units?

Mr von Doussa—That is my present intention. That means that it will touch the public affairs section, the president's section, the office and so on.

Senator SIEWERT—Am I correct that the units have yet to work out how they will be cutting their cloth?

Mr von Doussa—At this stage, I am still to go to the units and discuss with them the implications of that decision, so you are quite right. The units have not worked through and then discussed with us exactly how that cost is going to be borne in their forward planning.

Senator SIEWERT—Is it likely that you will have to cut staff?

Mr von Doussa—We will do our level best not to. Hopefully, with attrition and so on, we can make some savings. But that is not a decision that has yet been worked out.

Senator SIEWERT—Can I interpret that to mean that there may be staff losses if you cannot—

Mr von Doussa—The budget papers suggest that there will be, but we will do our level best to try to and avoid that insofar as it is possible to do so.

Senator SIEWERT—Thank you. Mr Innes, could I ask you about captioning. A paper was released by the department on captioning a couple of—

Mr Innes—Yes, about three or four weeks ago.

Senator SIEWERT—Yes. It was a result of a promise made by the former government in response to an inquiry for which Senator Stott Despoja was putting up terms of reference in the Senate, and the government made a commitment to undertake a review. In that paper, it refers to the exemptions from captioning for the free-to-air television broadcasters. On page 8 of the paper it says:

When the temporary exemption expires in May 2008, the free-to-air television broadcasters may again be subject to complaints under the DDA. The broadcasters would also be able to apply to HREOC for a further exemption.

And it leaves it at that. My obvious question is: have they applied for an exemption and have they met their requirements? I understand the exemption was for five years. Have they used that five-year exemption to actually meet the requirements of the DDA?

Mr Innes—There were two major conditions on the five-year exemption which was granted and which, incidentally, ends tomorrow. Those conditions were, firstly, that the free-to-air TV operators—that is, the three commercial networks, the ABC and SBS—would gradually ramp up captioning from around the 35 per cent to 37 per cent that it was at five years ago, on programs between 6 am and midnight, to 70 per cent in the fifth year of the exemption. It is my understanding from reports produced by Media Access Australia, an independent assessor of these things, that the free-to-air television networks have met that condition of the exemption.

The second subsidiary condition of the exemption was that in the fifth year of the exemption they would commence negotiations with the deafness sector towards a continued approach on captioning—possibly a further application. The free-to-air networks were sluggish to commence those negotiations. In fact, they have applied for a further exemption for a six-month period, and they are not offering any further increase in captioning for that six-month period. That exemption application was received some 10 days ago. As is the commission's normal practice, we are seeking submissions on that exemption. Once that submission period is completed, the commission will make a decision as to whether or not to grant that exemption. I am on the record in Monday's *Australian* newspaper as saying that I

was disappointed that the exemption application was not made earlier so that there would not be, as it were, a break in which people could lodge complaints between the old exemption and a possible new exemption, if it were to be granted, because I think that continuity would have provided clarity and consistency for the disability sector, the deafness sector and the free-to-air television networks. However, that was not a matter that was in my hands.

Senator SIEWERT—They are applying for an exemption. What are they committing to do in that six months?

Mr Innes—They are not committing to doing anything. They are committing to maintain captioning at its current levels.

Senator SIEWERT—So what happens after the end of six months?

Mr Innes—As will be the case after tomorrow the issue will be open to complaint so any person who was deaf, or had a hearing impairment, would be able to lodge a complaint under the Disability Discrimination Act if a particular program was not captioned. That will be the case as from tomorrow anyway because the new exemption has not been granted and is not likely to be granted for several weeks—or a decision is not likely to be made for several weeks—because the consultation period will not have ended. After tomorrow free-to-air networks are open to complaint, if a person chooses to lodge a complaint.

Senator SIEWERT—Maybe I am being a bit slow on the uptake here—

Mr Innes—I have probably not explained it clearly.

Senator SIEWERT—No. If they are applying for an exemption, does that mean that they have it in mind that they will actually then meet the required standard within six months? Is that—

Mr Innes—No. The first exemption set percentage targets for captioning for programs between 6 am and midnight each year for the five years, and the fifth-year target was 70 per cent. The second exemption is not seeking to increase that target—it is not a target; it is more than a target, as it is a level of achievement—it is just seeking six months more of a complaint holiday while the government discussion paper is completed.

Senator SIEWERT—That is the link that I wanted. Why do we want to give them a holiday if there is nothing coming at the end of that holiday period?

Mr Innes—I suppose that is a decision the commission has to make when it determines whether or not it will grant the exemption.

Senator SIEWERT—Yes. Do you have an understanding, or is it the industry's understanding, that at the end of six months the consultation process over the discussion paper and the decision-making process will have been finalised and there will be a new standard set for the industry?

Mr Innes—I am not in a position to comment on what the industry's understanding will be, but I would have to say that, in my view, it is unlikely that by that time the government will have completed its processes and made any decisions as to how it wants to set standards. However, I would be very happy for the government to prove me wrong.

Senator SIEWERT—I appreciate that they have had an exemption from complaints, but in talking to the hearing impaired and deafness community they have a strong sense of frustration with where captioning is up to at this stage. In fact I am sure other senators who have had a level of interaction with the community would be aware of that and that is why the reference was tabled in the Senate in the first place. I would have thought there were some issues that the industry needed to address.

Mr Innes—I think it is true to say that the deaf and hearing impaired community in Australia has a degree of frustration with the levels of captioning, not just in free-to-air television but in pay television and particularly in movies—which are the three areas in which we work. Bearing in mind the experience in other similar countries—the US, Canada and the United Kingdom, where captioning and audio description levels are well above those in Australia—I think there is some justification for that frustration.

Senator SIEWERT—Where we are up to now is that HREOC is considering the exemption; and then we will wait to see what the outcome from the government inquiry is going to be.

Mr Innes—HREOC will consider the exemption. If the exemption is granted, there will be a further six-month block on complaints. If the exemption is not granted then complaints about any program which is not captioned will be able to be made. They will be determined through the normal complaint investigation and conciliation process and then, if pressed, through the Federal Court if conciliation is not successful—although we have a very good conciliation rate. While that continues the government will receive input on its discussion paper and will then make its determinations. The government has a range of options before it. It may choose to regulate through the DDA or through the Broadcasting Act, or it may choose to not further regulate but to encourage agreements by industry.

Senator SIEWERT—I could very cheekily suggest, too, that if an exemption is not granted the commission has a reduced amount of money with which to deal with an expected increase in complaints.

Mr Innes—Both of those statements are true.

Senator SIEWERT—There is an issue with subscription or pay TV. I understand the exemption there is for another 12 months. Is that correct?

Mr Innes—I do not think that it is quite 12 months; it is just under 12 months. I cannot tell you the exact date. I would have to take that on notice.

Senator SIEWERT—If you could, that would be appreciated. I am not exactly clear what the situation is with cinemas.

Mr Innes—There was never an exemption for cinemas. There was an agreement to provide caption moves in originally eight cinemas two or three times a week, and they are open captioned not closed captioned. The difference is that everyone sees them, rather than just the person who chooses to. The deafness sector have for some time now been pressing for that to increase. The level of captioned moves delivered in Australia is well below that delivered in what I would describe as equivalent countries—the US, Canada and the UK. It is on the public record from a number of the individuals and organisations which have lodged

these complaints—and I make that point because it is HREOC's practice to maintain confidentiality about complaints that are lodged—that they have lodged complaints against different cinemas. I understand that they are at various stages of the process, but I am not in a position to comment on those any further than that.

Senator SIEWERT—Are you in a position to tell my how many that you have had?

Mr Innes—I am not, because it is our normal practice not to comment on complaints that are before the commission and on the number of complaints in a particular area that are before the commission. That is why I was careful to say that the complainants in a number of complaints have publicly stated that such complaints have been lodged.

Senator SIEWERT—Thank you. I appreciate that. Do all cinemas have the loop system in them?

Mr Innes—Not all cinemas. As new cinemas are built, loop systems are being installed and some have been installed in existing cinemas. I would have thought that the percentage of cinemas with loop systems, taken in the context of all cinemas, would still be relatively low in Australia, but it is increasing.

Senator SIEWERT—I am allowed to ask whether you have had complaints about that?

Mr Innes—I am not aware of any public comment on such complaints and I cannot comment from the point of the view of the commission as to whether or not complaints have been lodged.

Senator SIEWERT—Fair enough. Mr Calma, I do not know whether it is appropriate to direct this question to you or to the minister. I understand that the ALP at the election promised to commit to a racial discrimination commissioner.

Senator Ludwig—I do not have any personal knowledge of that—maybe I should have. I can certainly find out for you.

Senator SIEWERT—If you could, that would be appreciated.

Senator Ludwig—Could you provide me with a tad more detail. Do you know whether there was a statement made?

Senator SIEWERT—As I understand it, there was a statement made. I do not have it on me.

Senator Ludwig—I do not recall it being made by the shadow Attorney-General, though.

Senator SIEWERT—I will double check who it was made by.

Senator Ludwig—That would be helpful.

Senator SIEWERT—I will provide further information.

Senator Ludwig—Do you have it there?

Senator SIEWERT—No, sorry; I do not. I will need to chase it for you.

Senator Ludwig—Thank you very much. I will also make inquiries as well.

Senator SIEWERT—If you could. I would also like to know if the government intend to act on that and, if they do, if they will be providing more resources for that position.

Senator Ludwig—As I have said, I do not recollect the shadow Attorney-General making that statement.

Senator SIEWERT—I will give you more background and put that on notice.

Senator Ludwig—That would be helpful.

Senator SIEWERT—Mr Calma, can you briefly report on the United Nations Permanent Forum on Indigenous Issues, which I understand has just recently concluded its latest meeting. How did that forum go?

Mr Calma—The forum was held in New York over a two-week period. It was attended by around 45 Indigenous Australians who went in six or seven different delegations, including a couple who went with the government delegation. The major focus this year was on climate change and the impact of climate change on Indigenous peoples, so Australia had significant input into that debate. In general terms, I think Australia and the government received much recognition for, firstly, the apology that the Prime Minister made and, secondly, the indications that the government would support the Declaration on the Rights of Indigenous Peoples, as well as the general thrust of the government in looking at issues relating to closing the gap on Indigenous disadvantage and inequality. Overall it was a very successful event and I believe that the UN and UN agencies, as well as other states, are seeing Australia in a different light in relation to Indigenous affairs.

Senator SIEWERT—And there was a statement made there about the government reversing Australia's previous position of opposition to the declaration?

Mr Calma—There was a statement made by the Australian representative that the government was considering a position and that at a future time they would make an announcement indicating their support.

Senator SIEWERT—Was a statement actually made by the government?

Mr Calma—Yes, the government did provide a response to a number of questions that were placed by members of the permanent forum.

Senator SIEWERT—Is that statement publicly available?

Mr Calma—I believe it would be. I think it is on the FaCSIA website.

Senator SIEWERT—Were there comments made around the intervention?

Mr Calma—Yes, a number of the parties there did express views about the intervention. They were the Indigenous parties. Other member states also raised their concerns about the way the Northern Territory intervention was being applied. The principal concern is that it did not conform to the standard UN conventions on non-discriminatory practices.

Senator SIEWERT—In other words, that it breached various discrimination conventions?

Mr Calma—That was a view expressed, yes.

Senator SIEWERT—Did the Australian government make any response to that?

Mr Calma—Yes, in the formal response by the Australian government delegate, he indicated that there would be a review of the NT intervention, to take place, I believe, some

time this year after one year of the intervention. From recollection, he indicated that terms of reference were being developed. They should become public shortly.

Senator SIEWERT—This leads me to another issue. The review has been referred to quite extensively and, in fact, there was an ad placed the weekend before last for an element of that review. So some of that is already out there. Have you or HREOC been consulted about the terms of reference for that review?

Mr Calma—In my position as social justice commissioner, no, I have not, and I do not believe HREOC has received anything. Have we been invited to participate in the review? No.

Senator SIEWERT—Obviously, I will be following this up through other avenues in estimates, but you are unaware at this stage what the terms of reference for that review are?

Mr Calma—No idea.

Senator SIEWERT—So, that is despite the fact that you have made some pretty significant comments already on issues around exemptions from the Racial Discrimination Act, and you have made some pretty significant recommendations in your social justice report. I would have thought there were some significant areas that should be included in the terms of reference that relate to the comments that you have made in your report, which was tabled in parliament just a couple of months ago.

Mr Calma—That is something the government will have to determine.

Senator SIEWERT—The issues around exemptions from the Racial Discrimination Act and the implications of that were discussed at the UN forum, were they?

Mr Calma—Yes, there was a general discussion. The major concern was the suspension of the Racial Discrimination Act as it applies to elements of the Northern Territory intervention and the suspension of the Northern Territory Anti-Discrimination Act.

Senator SIEWERT—There are two aspects to this: there are the special measures and then there is the blanket exemption. Was the issue of special measures also discussed?

Mr Calma—Not special measures in themselves at the permanent forum, not that I was aware of.

Senator SIEWERT—Part of the debate, as you would be fully aware, has centred on not only the exemption but also whether the measures actually qualify as special measures. Was there any consideration of those issues?

Mr Calma—I have not had any formal advice that any of the UN treaty body committees are considering it. In my social justice report, the 2007 social justice report, I raised it as an issue, and our interpretation of the international conventions indicates that it might not meet the criteria for a special measure. In fact, in the report that we made to the Senate inquiry before the legislation was passed, we raised the same issues.

Senator SIEWERT—Yes, I do very strongly recall that. You would have looked at the current bill, the consolidation bill, and, I presume, be aware of the fact that the new provisions will not be exempt from the Racial Discrimination Act. So now we have a piece of legislation, the majority of which is exempt from the RDA and a part of which is not. Have you looked at

the consistency of that legislation or looked at the implications for the legislation and the fact that the government seems to acknowledge that it is not appropriate that the provisions are exempt from the RDA? It seems to me the acknowledgement is implicit in the fact that it is not seeking to exempt them.

Mr Calma—No, I have not looked at that closely. I am keen to see what the review in fact finds and reports.

Senator SIEWERT—In your latest social justice report you made a series of recommendations, and one of them relates to how you could amend the acts—and I am not even going to attempt to say the type of clause; you could perhaps do that. You recommended:

That the Parliament amend each of the following Acts by inserting a *non-obstante* clause—

I am not a lawyer!—

in order to ensure that the NT provisions are subject to the protections of the RDA in the exercise of all discretions under the legislation ...

Is that a fairly simple way that you could fix that legislation in order for it to then comply with the RDA?

Mr Calma—I think there needs to be a reinstatement of the RDA and the effect of the RDA in the Territory. That can be done through amendments to the legislation where it actually exempts the application of the RDA.

Senator SIEWERT—That would then have significant implications for the way some of the measures—for example, income quarantining—are being applied, though, wouldn't it?

Mr Calma—One would suspect that would be the case. If people chose to lodge a complaint about the way it is being applied then we would consider that complaint.

Senator SIEWERT—Do I understand from what you have just said that the government could amend the legislation and wait till a complaint came in to then look at how they would have to change the measures to make sure they complied?

Mr Calma—I do not believe the government has to wait for the complaint.

Senator SIEWERT—I am going for a worst-case scenario rather than the government in fact amending the provisions straightaway. I obviously would prefer that they amend the provisions straightaway, but they could wait until a complaint was made before they actually changed them.

Mr Calma—They could. Somebody lodging a complaint and HREOC considering that complaint does not necessarily mean that that will have any effect on the way that the government applies legislation.

Senator SIEWERT—I take your point. At the last estimates I asked you what research you were undertaking into representative bodies. You mentioned that at the time. I am aware that Mick Dodson has been appointed. Could you clarify for me when you expect that research to be finished.

Mr Calma—Just to clarify: it was not Mick Dodson; it was the National Centre for Indigenous Studies at ANU that was granted the contract.

Senator SIEWERT—I beg your pardon.

Mr Calma—Professor Mick Dodson is the project leader of that. In the tender that the NCIS won, I asked them to do some research on three specific areas. I have received the preliminary report and have gone back asking for some additional information. Once I get that, that will be considered, with other research that I have done, and I will compile a discussion paper for the minister to consider options in relation to a national representative body.

Senator SIEWERT—So that is the advice that is going to be provided to the minister, rather than released publicly as a report.

Mr Calma—Yes, that is the case. You may recall that it was in my 2006 *Social justice report* that I indicated that I would provide the government with some advice on options.

Senator SIEWERT—Yes, I do recall that. We would then have to ask the minister to release it for us. Is that right?

Mr Calma—Yes. The minister has indicated that, on receiving the report and considering it, she will then go through a process of national consultations with Aboriginal and Torres Strait Islander people. I guess it would have to become public to have the consultations.

Senator SIEWERT—I realise that the NT legislation is exempt, so I appreciate that there is no formal role for complaints. Have people been contacting HREOC and complaining about the intervention anyway, even though it is exempt?

Mr Calma—Yes, they have. We consistently receive emails or telephone concerns. During the visits that we make to the Territory we do receive feedback from people. In fact, Commissioner Broderick and I, as part of the listening tour, visited the Northern Territory. In Darwin in particular we had a range of meetings with the public and in every forum the issue of the intervention was raised by both Indigenous and non-Indigenous people.

Senator SIEWERT—What were the main issues that people brought up?

Mr Calma—The key one was the quarantining of welfare, of the benefits. You could categorise it by saying that, firstly, there is a lack of information out there about what the intervention is about. There is a lot of confusion because it is easily referred to as ‘the intervention’ but there are a dozen different components of the intervention. People do not understand that in real terms.

There are concerns about the distance from shops and where people can purchase food and about having to travel and spend part of their food money on taxis to be able to get the food back. A lot of it was around quarantining. There were concerns—and confusions, in fact—about the breakfast programs or the school lunch programs and what was a requirement of somebody on welfare. There are obvious situations where an Indigenous person within a defined area—in our case, the Bagot or Kulaluk areas in Darwin—came under the intervention, whereas people on the other side of the fence were not Aboriginal or Islander people, so there was this discriminatory element that people were very concerned about. They could not understand why.

CHAIR—I think that, because it is 6.30 pm, we will stop for dinner. We will ask HREOC to come back after dinner.

Mr Govey—I have some answers that were sought earlier and that I will quickly put on the record.

CHAIR—Yes, sure. That will be fine.

Mr Govey—We were asked about the solicitors who were approached for the Clarke inquiry. They were Blake Dawson Waldron, Sparke Helmore and Clayton Utz. We also spoke with AGS, but we did not proceed with that because of their prior involvement in work on related matters. I will just state for the record, too, that Sparke Helmore have offices in a wide range of places, not just those we have mentioned before. They are in Adelaide, Brisbane, Canberra, Melbourne, Newcastle, Perth, Sydney and the Upper Hunter. We were also asked about the agreement with Sparke Helmore and whether that was finalised. I am informed that details have been settled but that the documentation is still being finalised. That is expected to be completed very shortly. Finally, I can confirm that the department did seek advice from AGS in relation to defamation as part of the preparations for the Clarke inquiry and that that advice was provided by AGS on 4 March 2008.

CHAIR—Thank you very much for that.

Proceedings suspended from 6.34 pm to 7.41 pm

CHAIR—We have a quorum now, so we can commence. We were questioning the Human Rights and Equal Opportunity Commission.

Mr Innes—I would like to add to an answer that I gave before the dinner break. It was in relation to Senator Siewert's question in relation to the pay TV captions exemption. I need to clarify that. In fact, you were correct and I was wrong. The exemption runs until 4 June 2009. It contains a reporting requirement each year as to the level of captions. In the fourth year, which will rollover next week, there is an expectation for a report on consultation with the deafness sector as to what plans are in place for when the exemption ends in June 2009. At this stage, the commission has not received that report, but it is not until 4 June, which is next week.

Senator SIEWERT—If I understand it correctly, they should have already been consulting with the community around that.

Mr Innes—That would be my expectation, because they would need to be able to do that in order to report on what the outcome of the consultation had been. I am not aware that those consultations have occurred, but I am not suggesting that they have not. I just do not know.

Senator SIEWERT—Thank you very much for that clarification. Mr Calma, I will go on from where we left off. I would like to ask you some questions about your *Social Justice Report 2007*. I am looking at the section in chapter 2 on page 23 that goes through the Indigenous community education and community development initiatives. It goes through a number of positive case studies. You outline what has been occurring in those case studies. Could you articulate what you see as the key characteristics of a successful program from the work that you have done.

Mr Calma—I do not have the report in front of me. I identified 10 key areas from the case studies that we did. They related to community engagement, community generated issues, the solutions and partnerships with government particularly. They were the principle issues, along

with ensuring that there was adequate funding provided for the projects as they were identified. From the human rights perspective, we need to ensure that those people who are going to be affected by policies are actively engaged in the whole process. Engagement, free prior informed consent and government or other sources providing adequate funding were the main issues.

Senator SIEWERT—What implications do you think that that has for an evidence-based approach to policy development, which approach the government is now committed to?

Mr Calma—I think it is critical. I note that the government have on a number of occasions indicated that they require now strong evidence to be able to support policy development, which I fully concur with. It is going to be important. Too often in the past we have seen money going into projects and very often those projects have been directed by people other than the recipients and therefore we have not had successes. There have not been the follow-ups and the learnings. One key area we talked about was the COAG trials that went around the country which had significant investment by government but very little reporting and monitoring of the outcomes. We are at the stage now where they are virtually no longer being run as COAG trials.

Senator SIEWERT—I think it was the Auditor-General's report that was released just prior to the election—

Mr Calma—Yes.

Senator SIEWERT—Do you have any comments on the findings of that report?

Mr Calma—Only to the extent that I thought the report focused a lot on things being evidence based and the need to do monitoring and follow-up. The report particularly focused on the government policy of the day on the implementation of government programs and how that was not being adhered to. Whilst we had a policy framework there that was supported by government, the implementation of programs did not necessarily follow that policy.

Senator SIEWERT—So, in other words, the projects themselves and their implementation were not consistent with the government's framework?

Mr Calma—Yes.

Senator SIEWERT—That leads me on to another question. Monitoring and follow-up should be built into the design of projects in the first place. In terms of the intervention, although there is going to be a review shortly, I do not think any of that was built into the front end of the project. Would that be a fair comment?

Mr Calma—From my analysis that was not, so that would be a correct statement.

Senator SIEWERT—I am wondering whether there has been baseline information collected. What are they going to assess it against if that baseline information is not there? Or is it there?

Mr Calma—At the time that I compiled the report there were no structures in place to collect the data and to establish the benchmarks so I questioned how the government was able to identify whether the elements of the intervention were successful or not if there were no specific targets and if there were no known benchmarks or time frames to be achieved. The

time frame was five years, but there are no intermediate time frames on which to determine whether there has been any advancement.

Senator SIEWERT—How should that be addressed now? How do we make sure that the review is going to deliver a useful outcome if that was not built into the front end?

Mr Calma—I do not believe it is too late to do that. As part of the intervention a survey was done of all the prescribed communities, identifying what the needs were in relation to education, health, housing et cetera. That could form the base data. From there we need to have targets. I suggest the *Social justice report 2007* would give the review team adequate guidance as to what needs to happen to make sure that the intervention complies with the human rights based framework and our international obligations.

Senator SIEWERT—So use that human rights based framework as the framework for the review?

Mr Calma—Yes.

Senator SIEWERT—That is what you propose in here.

Mr Calma—What we recommended, yes.

Senator SIEWERT—Going back to our earlier interaction, you have not been asked to articulate any further than what is in your report.

Mr Calma—No. There has been no discussion about whether the report would be used as part of the review anyhow. I hope that the government will consider the report, as it was a report to parliament. I think it will be a useful report to reference in any review process.

Senator SIEWERT—Earlier I referred to the Senate inquiry where we were looking into the consolidation bill. It was interpreted by the media, and referred to the committee, that access to fresh fruit and vegetables has increased in the stores as a result of the intervention. I asked for that evidence and, as it so happens, I got it today, which is very timely. I was wondering if you have seen or are aware of that research. Also, are you aware that in conducting that research they phoned 10 stores and asked if their sales had increased—six said ‘yes’ but they did not provide any evidence of it; one said ‘no’; and I think three were ‘unknown’? In your opinion, is that a satisfactory basis for an evaluation of whether the intervention has been successful and people are getting fresh fruit and vegetables?

Mr Calma—Firstly, I am not aware of the survey or the review, and I have not seen the outcomes. If it was just a phone call to the store manager, I would suggest that a more rigorous process might have been more beneficial.

CHAIR—Senator Siewert, I think that was actually reported as an article on the front page of the *Australian* at one stage, was it not?

Senator SIEWERT—Yes. It was about six to eight weeks ago. It was reported to the committee that the intervention had been successful because they were having positive outcomes in communities.

CHAIR—In buying?

Senator SIEWERT—More fresh food.

Mr Calma—I have seen various newspaper reports, but I have not seen the outcomes of the review or survey.

Senator SIEWERT—I am happy to send you that information. Are you aware of how many additional child protection officers or community support officers have now been employed as part of the intervention? Has anybody discussed that with you?

Mr Calma—Nobody has discussed it and I have not had the opportunity to monitor that.

Senator SIEWERT—I am pretty certain that in the *Medical Journal* there were reports on the health checks that had been undertaken in the communities. I think it was at the beginning of May. There was a reference to a spokesperson from the Australian Indigenous Doctors Association who commented on the issues around the health checks. There was some commentary about the survey being undertaken before some of the health checks were carried out, and the fact that apparently that has not been published. Would that be the survey that you were talking about earlier when you said that there had been some survey work of the prescribed communities? Secondly, there has been comment in the media, predominantly from medical people, about the fact they do not think the checks are actually proving to be as effective as they could be.

Mr Calma—The survey I was referring to was in relation to infrastructure, not specific elements of it. What concerns me is the amount of information that is in the public domain, and trying to ascertain what is and what is not accurate is proving very difficult. I am aware of the Indigenous Doctors Association's comments, and they have been actively involved in the Close the Gap campaign that we have taken further in that process. There are concerns that, firstly, there are still many Indigenous children who have not had medical checks. In more recent times, I have identified that many of the issues that have been identified still have to be addressed, and there are concerns about whether they can get the specialists out there to address some of the issues. But the government has undertaken two major initiatives to bring children into Alice Springs from the desert areas to have ear, nose and throat work done there. So that is a very positive initiative.

Senator SIEWERT—I am changing tack a little bit—I am still staying with the NT stuff, though. Firstly, there have been some reports of increased petrol sniffing going on in Central Australia again, after the successful Opal rollout. Are you aware of those? Secondly, some of the comments that have been made—again, in the media—by those involved are that they are concerned about the rollout of what are commonly called diversionary programs. Are you aware of those issues, and have you done any evaluation of those diversionary programs?

Mr Calma—I have not done any recent surveying in the Territory. I am aware of the newspaper reports. I have quarterly meetings with most of the major agencies, and my next one is scheduled for the Office for Aboriginal and Torres Strait Islander Health in a couple of weeks and, following on from that, with FaHCSIA and the Office of Indigenous Policy Coordination. So I will be better informed in a couple of weeks, I hope, on a number of these issues.

Senator SIEWERT—I will have to ask you in October, then. Thank you.

Mr Calma—Next time, yes. Thank you.

Senator NETTLE—I want to go back to some of the issues that Senator Barnett was raising earlier. I missed some of your answers to questions, Minister, as I was walking up here. Did you give a time commitment in relation to the removal of discrimination as it relates to family law?

Senator Ludwig—No; you might have to refresh my memory as to what that question was.

Senator NETTLE—Senator Barnett was reading from the budget statement in relation to the areas that the Commonwealth will remove relating to discrimination and where it says ‘except in relation to family law matters’.

Senator Ludwig—I am with you now. No, I did not give a date. The only date I did give was the implementation date of 1 July 2009, and that is obviously subject to parliament.

Senator NETTLE—Is that for all the changes, including family law changes?

Senator Ludwig—That is the package that the Attorney-General has now got, which goes to a range of—I think Senator Barnett then indicated there were about 100 pieces, but do not hold me to that—but not family law. There is the first tranche and then I think there was a second tranche. Some of the evidence from the other end of the table was that the legislation that I was referring to related to the legislative changes that will provide for equality of treatment in a wide range of areas including government superannuation, taxation, veterans affairs, social security, workers comp, Medicare and pharmaceutical benefits. With that, it was anticipated that all the changes would be implemented by mid-2009. I put a caveat on it that that is obviously subject to parliament. So that does not include the issue of family law that you were referring to. You may need to be a bit more specific rather than just saying ‘family law’. Is there a part of that—

Senator NETTLE—I mean in relation to the Family Law Act, because that is the bit that is stipulated:

... except where they rely on the Family Law Act 1975 definitions and presumptions ...

That is the exemption.

Senator Ludwig—Was it the part which related to adoption, IVF and surrogacy law?

Senator NETTLE—I think some of those would fall—as I understand it, and others understand it better—

Senator Ludwig—We might come back. I will say this again for your purposes: in terms of adoption, IVF or surrogacy law, the government has not made any decision regarding the status of same-sex couples. I think I have said this, that they are primarily matters for states and territories. But I have also added that they are complex issues and will require extensive consultation. In terms of the more specific question that I think you are raising, I now have Mr Duggan here, who might be able to recollect some of the earlier conversation that transpired between him and Senator Barnett.

Mr Duggan—In relation particularly to the family law amendments, I think you are referring to issues relating to parentage et cetera within the Family Law Act. The government’s view is that they do raise significantly complex issues, particularly related to things concerning IVF, assisted reproductive technology and surrogacy issues, which are the

subject of a number of engagements with state and territory governments. The government's view is that some of those need to be given time to work so that there can be a uniform approach to these issues. At the moment there is not a uniform approach to these issues.

Senator NETTLE—Is there a time commitment in relation to those changes about adoption, IVF and surrogacy?

Mr Duggan—Not that I am aware of at the moment.

Senator NETTLE—Do you know of a time commitment, Minister?

Senator Ludwig—No, I do not.

Senator NETTLE—So, in terms of working with states and territories, which states and territories have removed the discrimination that same-sex couples face in those areas?

Mr Duggan—It varies between the different states and territories. The main area that we are looking to work with the states and territories in—which covers a whole lot of these areas—is surrogacy. That raises a whole lot of issues concerning assisted reproductive technology and things like parenting presumptions, those sorts of issues. That process has a way to go. A discussion paper is about to be released in relation to issues raised because of the surrogacy concerns. It will be some time before there is some uniformity in relation to the way these are dealt with between the states and territories. Some states have dealt with these issues but other states have not.

Senator NETTLE—Has any state or territory removed the discrimination same-sex couples face in all of those areas?

Mr Duggan—I will not guess. I would have to take that question on notice. I apologise, but I just do not know the answer.

Senator NETTLE—My sense was that we are not very far down the track in terms of states and territories making changes in relation to those areas. That is where I am concerned about what the impact will be federally.

Mr Duggan—I cannot take it any further than I have taken it at the moment because the minister has obviously been briefed in relation to these issues. The government's position is as I have outlined it to you—that it believes these are complex issues. Indeed, they are issues where there needs to be a harmonised approach between the states and territories to ensure proper coverage of all of the issues. The government takes the view that these processes need to be given time to work before a final decision is made. That is the position the government has taken on this issue.

Senator NETTLE—What is the government doing in order to reach agreement with the states on those issues?

Mr Duggan—As I have indicated to you, the surrogacy working group, which is part of the Standing Committee of Attorneys-General, is working actively on a whole range of these issues. I understand that they are likely to release fairly soon a discussion paper which will outline a whole range of concerns and issues that need to be considered by both governments.

Senator NETTLE—Is that just in relation to surrogacy or other issues around adoption?

Mr Duggan—It is predominantly relating to surrogacy. But the surrogacy issue does raise issues relating to assisted reproductive technology generally and how the states deal with that. At the moment it is primarily in relation to the surrogacy issue.

Senator NETTLE—Does it deal with adoption?

Mr Duggan—No.

Senator NETTLE—The discussion paper?

Mr Duggan—No.

Senator NETTLE—I want to understand the implications of not removing the discrimination in relation to family law. Maybe HREOC can help me here as well. In what areas would there still be discrimination for same-sex couples? If you do not remove it in relation to family law, will there still be discrimination in relation to child support?

Mr Duggan—Yes. It is a question of the definitions of these matters. But certainly it means that the same recognition that is being given in other areas does not apply to child support. That is true.

Senator NETTLE—And custody?

Mr Duggan—The Family Law Act is premised on a notion of parentage, which is effectively the biological parent. So to the extent that decisions are made on things like, for example, shared parental responsibilities, presumptions apply—they apply to parents. The way the legislation is currently drafted, it relates to biological parents. So the only difference to that is the operation of section 60H, which brings into play the presumptions that operate under state law, where assisted reproductive technology operates. Of course, those provisions were not enacted when it was considered there might, for example, be co-mothers or co-fathers of a child. So, whilst they may potentially be adaptable for some of those circumstances, it is unlikely they will be adaptable for all of them, and the government is aware of that.

Senator NETTLE—So, section 60H is that part of it. What is the time frame for that?

Mr Duggan—In terms of the amendment, that is part of the process I was indicating to you previously.

Senator NETTLE—That is part of the one that does not have a time?

Mr Duggan—That is right.

Senator NETTLE—Would it be before the next election?

Senator Ludwig—It is a matter for the Attorney-General as to the timing of these matters. I think we have indicated as much as we can. We have given an outline of what is likely in the short term—that is, by mid-2009. Obviously the evidence today is that there is a consultative process, matters are in hand and they are being proceeded. I think that is the advance in the last 11 years, quite frankly. You can see the Attorney-General is keen to work through these areas and bring them forward. I think he should be congratulated for that, quite frankly.

I have said that the issues that you are now going into are complex. I can reiterate it, although I do not think I need to. They do have interaction between the states and territories.

They are matters that need wide consultation, and the Attorney-General is undertaking that. As to the time, it is still a matter for the Attorney-General to determine.

Senator NETTLE—My recollection of the election commitment from the opposition prior to the election was that it would remove all discrimination except in regard to marriage. My sense is that it has been a long time in terms of states not making those changes in relation to surrogacy, adoption and IVF.

Senator Ludwig—I do not mean to cut you short, Senator Nettle, but we have been moving very quickly for a new government in all of these areas. We have not been slow at all, quite frankly. If you look at the pace of change in the last 11 years in this area and compare it to what we have done in six months it is quite significant. I am sure the Attorney-General will have more to say on it.

Senator NETTLE—Is the commitment to remove discrimination right across the board, or are family law matters excluded? I am trying to get a sense of that. I accept that the legislation that we are about to see covers other areas. But will the discrimination in relation to family law be removed?

Senator Ludwig—When you say, ‘family law’, the difficulty I have is that there is such a length and breadth of it. If you mean those areas of adoption, surrogacy and IVF contained in the family law, as I have said, those parts are constantly being negotiated. They have an impact on state and territory law as well. They are quite complex and the Attorney-General is working through them. In the positive sense he is working through them. As to saying in a carte blanche way what the Attorney-General will do tomorrow, I am not able to say. I can take it on notice and ask the Attorney-General if there is anything he can add that may be helpful.

Senator NETTLE—That would be helpful. What about access to the Family Court? Is that part of the package that does not have a time frame or is it separate from that?

Mr Duggan—I take it you are talking about the operation of the potential de facto legislation for same-sex couples?

Senator NETTLE—Yes.

Mr Duggan—The government has not made a formal announcement since the election in relation to that issue. We understand such an announcement is not far away, but no announcement has been made. The Attorney has indicated his view that consideration should be given to legislation covering same-sex couples. That is, of course, a matter for the government to finally determine, but at this stage no formal announcement has been made.

Senator NETTLE—Is that a question of waiting for states and territories to make changes in that area as well?

Mr Duggan—No, Senator.

Senator NETTLE—That is a separate one? But we do not have a time frame for the announcement.

Mr Duggan—There is not a formal announcement by government at this stage.

Senator NETTLE—Okay. Maybe HREOC could help me in working out the implications in relation to the areas where discrimination would still exist whilst ever the discrimination exists in relation to family law. We have talked about child support, custody, adoption, surrogacy and IVF. Property disputes presumably are part of that until you change the access to the family law court. Are there other areas as well?

Mr Innes—It is a little hard to answer that question until we see the first two bills. But I think you have probably covered in board terms the areas that I could think of.

Senator NETTLE—Thank you. There were also some questions in relation to the costings associated with this. I wondered if there were figures about the number of people who would be financially better off and financially worse off as a result of these changes. Are there estimates for that in the budget calculations?

Mr Hall—There are figures against the budget measures in the budget paper. Those figures consolidate in some situations—where there is a saving in one area in that portfolio and possibly an expense as well. In terms of a breakdown between savings and expenses, we do not have those details here. Those would need to be taken up with the relevant department. If it is helpful, I could explain the way the budget measures will work in each portfolio and the sorts of things it picks up. But I could not give you a breakdown of the precise figures.

Senator NETTLE—Are the figures of how many people will be financially worse off something that you could take on notice?

Mr Hall—I could certainly do that. I am talking in terms of the costs that arise from measures. In some cases those will represent savings, where there may be cases where people have fewer financial entitlements than they would have had and others where people will gain financially. I can take that on notice. I may not be able to provide figures in terms of the precise numbers people that that would affect.

Mr Govey—But we could ask the agencies.

Senator NETTLE—It would be helpful if you could do that.

Mr Innes—One of the difficulties is that at the last census the question with regard to same-sex couples was voluntary. I think that there is going to be some difficulty in being able to be specific, because in the work that we did it was difficult to establish solid numbers in this area.

Senator NETTLE—I recognise that. Is there intended to be a transition period in relation to their entitlements? Can someone explain that?

Mr Hall—Depending on the measures, there are different time frames for implementation. The anticipation—as I think the minister has already said—is that the changes will be implemented by July 2009. That will be staggered so that the first set of changes will be with respect to Australian government defined benefit superannuation schemes. Those are expected to take effect at the earliest possible date within this financial year, at a date which is yet to be announced, following the passage of the first tranche of legislation. The remaining changes will take effect on 1 July 2009, except for Medicare and the Pharmaceutical Benefits Scheme safety nets, which will take effect on 1 January 2009, and changes to fringe benefits tax, which will come into effect on 1 April 2009. The reason for the staggering of implementation

is primarily with respect to either aligning, for example, changes to tax legislation with the beginning of the tax year or in the case of the social security and related reforms to enabling agencies—in particular, Centrelink—to have their IT systems and procedures in place in order to implement the reforms. That is basically how it will work.

Senator NETTLE—You mentioned superannuation in relation to government schemes. Will the legislation cover not just government schemes and not just government employees?

Mr Hall—There will also be changes made to related legislation, primarily the SI(S) Act, the Superannuation Industry (Supervision) Act. The aim of those changes is to put funds that fall under that scheme in a position where, should they choose to do so, they can recognise same-sex partners and the children of same-sex relationships in a similar way to the Commonwealth schemes. But, of course, that depends on the trust deed of the scheme and whether or not it chooses to do that.

Senator NETTLE—Is there a date for that one or not?

Mr Hall—There is not a date—other than that it will be as soon as possible in this coming financial year. The date has yet to be set for the implementation of those reforms. But the superannuation reforms should come into place at the same time.

Senator NETTLE—The government reforms and the others should come in at the same time?

Mr Hall—That is right.

Senator NETTLE—That is hoped to be this financial year or next?

Mr Hall—Next financial year—2008-09.

Senator NETTLE—Okay. Thank you.

Mr Hall—I should say that we expect that to be soon after the passage of the legislation. It is just that the precise date is yet to be set.

Senator NETTLE—I want to ask about whether the legislation will recognise the state and territory based relationship registers.

Mr Hall—In the first set of changes that relate to superannuation, there will be amendments made to enable relationships registered under state based registers to be evidence of a relationship for the purpose of superannuation.

Senator NETTLE—Will that be conclusive evidence?

Mr Hall—It should have the same status as currently applies. For example, currently a marriage is not conclusive evidence of a relationship, but it is evidence that is taken into account in deciding whether or not there is a relationship between two people for the purposes of superannuation. State based relationship registration would have the same level of evidentiary value.

Senator NETTLE—What is the Commonwealth doing to encourage states and territories to implement relationship registers?

Mr Hall—The Attorney-General has written to all state and territory Attorneys-General encouraging all states to implement relationship registers in a nationally consistent way.

Senator BARNETT—When will that be?

Mr Hall—That letter was sent on 24 December 2007.

Senator BARNETT—Can you advise the committee of the content of the letter? Can you either give us a copy of that letter or provide us with the thrust of its contents?

Mr Hall—I think in terms of the content I may have to take that question on notice. I can advise you in general terms that the letter noted that there are some existing schemes in states and territories for registering relationships and that it would be beneficial for the purposes of Commonwealth legislation—and also, of course, at the state level—if there was a nationally consistent scheme that enabled relationships to be registered. That is the thrust of the letter.

Senator BARNETT—How would it be beneficial at the Commonwealth level?

Mr Hall—If, for example, Commonwealth legislation enables registration under a state scheme to be evidence of a relationship, then, once a person has registered in that way, they can use that as evidence to access entitlements under Commonwealth laws—the sorts of laws that are being amended.

Senator BARNETT—Are you happy to take on notice whether we can have the letter? If not, can you provide further and better particulars of the content of the letter in a format that you are satisfied with?

Mr Hall—I am happy to do that.

Senator NETTLE—Is there any proposal for a national relationship registry?

Mr Hall—It partly depends on what is meant by a national register. There are various possible ways one could have a nationally consistent scheme. I think I would have to say that that is a matter that the Attorney has put on the table for the states and territories to discuss. Certainly, various options for national registration could form part of those discussions, but they have not been held yet.

Senator NETTLE—Is there any proposal for discrimination legislation that deals specifically with sexual orientation or gender identity?

Mr Hall—At this stage that is not the subject of the current range of reforms. One thing I would say is that the government has made a commitment to conduct a national human rights consultation process, which will look broadly at how best to protect human rights in the Australian community. During that consultation, of course, you would expect the adequacy of existing protections to be discussed. That is probably the focus for discussions or developing ideas around substantive human rights protections at this stage.

Senator NETTLE—Does HREOC support amending discrimination legislation to include sexual orientation and gender identity?

Mr Innes—We recommended in our report that sort of legislation in the area of employment. I have publicly supported more broad discrimination legislation in the area of sexual orientation since the presentation of our report. So the short answer is yes.

Senator NETTLE—Thank you. I want to ask questions in relation to same-sex marriage. Currently the requirement is that at a marriage ceremony the celebrant reads out that marriage is between a man and a woman. Does the government have any plans to change that?

Mr Duggan—The short answer is no, at the moment.

Senator NETTLE—Similarly, I understand that another part of the Marriage Act says each party must take the other to be ‘my lawfully wedded wife’ or ‘my lawfully wedded husband’, or words to that effect. Guidelines were issued by the department in November 2005 to say that the words ‘husband’ and ‘wife’ could not be replaced with the word ‘partner’. Is there any proposal to change that?

Mr Duggan—No.

Senator NETTLE—Is there any proposal from the government in relation to recognition of same-sex marriages that have occurred overseas—that is, having them recognised in Australia?

Mr Duggan—No.

Senator NETTLE—Is there any record of the number of Australians who have entered into a same-sex marriage overseas?

Mr Duggan—There would be no way that we would know that here.

Senator NETTLE—As I understand it, when people are getting married in another country they ask the Australian embassy to provide a certificate of no impediment to marriage. I understand that the Attorney-General’s Department—it may have been last year—told embassies that Australian law does not allow the issuing of a certificate of no impediment to marriage to persons wishing to enter into a same-sex marriage. Is that still the case? Is there any proposal to change that?

Mr Duggan—Yes, it is still the case and no change is proposed. The definition of marriage was introduced into legislation in 2006 with bipartisan support. It indicates that marriage is between a man and a woman.

Senator NETTLE—There was an article in the *Age* on 14 January 2006, in which ANU senior law lecturer Wayne Morgan said:

There is nothing in Australian law that would prevent a Certificate of No Impediment to Marriage [being issued] in such circumstances.

This is an internationally accepted document that has nothing to do with the validity of the marriage back in the couple’s own country.

I understand what the legislation is in terms of the situation in Australia, but I do not understand why that prevents the issuing of a certificate of no impediment to marriage overseas.

Mr Duggan—The certificate is issued in relation to an impediment in the home country.

Senator NETTLE—Right.

Mr Duggan—In the home country it is not possible for those people to marry. That is what the certificate attests to.

Senator NETTLE—I thought the certificate said that they were not already married in Australia. That was why you needed to get one—to check you could get married in another country.

Mr Duggan—I can only indicate what I have indicated: our understanding is that the certificate is about what impediment you may have in your home country. That is what the other country wants to know, effectively.

Senator NETTLE—Yes.

Mr Duggan—The certificate simply indicates that it is not possible to marry in the country of origin—in Australia. That is what it says. That is why it says that, because of the definition introduced into the legislation by the parliament.

Senator NETTLE—I also want to ask about whether the Attorney-General's Department was involved in travel documents for someone who is going overseas to have gender reassignment surgery. Under the previous government, you were not able to receive a passport in your intended gender if you were going overseas for gender reassignment surgery.

Mr Duggan—It is not a matter that I could deal with, and I am not aware of whether anyone else in the department would be able to deal with that matter. It is more a matter for the Department of Foreign Affairs and Trade, of course.

Senator NETTLE—Yes. I am happy to ask them. I just thought the Attorney-General's Department might have been involved.

Mr Innes—The commission has just released to interested community groups in that area a discussion paper on gender diversity issues. The issue of travel and other identification documents is one of the four possible topics which we may look at in a project over the next six months.

Senator NETTLE—Is that discussion paper for the purpose of a following inquiry, or will you make a decision about that?

Mr Innes—We do not envisage conducting an inquiry in the strict sense that HREOC legislation determines an inquiry. We envisage doing a less formal project in the area of gender diversity. That discussion paper is currently on our website. It was put up there about two or three weeks ago.

Senator NETTLE—Does that cover the whole range of issues that relate to gender identity? Is that across the board?

Mr Innes—It lists four possible areas for investigation. We have not determined which of those areas we will look at because we want to make that determination with the benefit of feedback from the gender diverse community.

CHAIR—As there are no other questions, we will move on. Just before I call our next witnesses and before I release HREOC, I want to place on record our thanks to you, Mr von Doussa, for the work that you have undertaken as President of HREOC. I understand this may well be your last estimates hearing.

Mr von Doussa—Thank you, Chair.

CHAIR—If only the people behind you could see the big smile on your face. They are all behind you saying, 'Lucky thing.' I know I can speak on behalf of Senator Payne. She is not here, but she has been a terrific chair of this committee in previous years. Thank you for the representations you have made to us, not only at estimates hearings but also to all inquiries

that we have undertaken, and for the advice you have given from HREOC. You have appeared before us many times, particularly in Sydney, when we have undertaken a range of inquiries. I think I can say quite confidently that all of the senators appreciate your work. Your absence will be a sad loss to HREOC. I am disappointed you are not seeking another term. Perhaps we can take you out the back and twist your arm! I have to say that the biggest smile I have seen on your face all night was when I mentioned that this would be your last estimates hearing.

Mr von Doussa—Thank you, Chair.

CHAIR—I am sure that you will enjoy whatever challenge you take up next. I hope we see more of your work because you are a great advocate for human rights. You have a terrific, sound knowledge of the law in this country. It has certainly been appreciated by the Legal and Constitutional Committee, not just with us in government. I certainly think it has been so over the many years I have been involved with this committee in this parliament. I place on record our absolute and utmost thanks, appreciation and admiration for the work that you have undertaken.

Mr von Doussa—Thank you, Chair.

Senator Ludwig—I would like to associate myself with those remarks, having appeared on the other side of the table to that of the Hon. John von Doussa. I do appreciate immensely the work that the president has done in the sense that he has contributed significantly to the Australian way of life.

CHAIR—Thank you very much, Minister. I thank the HREOC officers for their appearance before us.

Senator BRANDIS—Chair, before we move on: in view of the time, I indicate that I am happy to put questions on notice, if senators do not have any questions for the High Court.

CHAIR—Thank you, Senator Brandis.

[8.35 pm]

Federal Magistrates Court

CHAIR—I welcome representatives from the Federal Magistrates Court. Before we begin questioning, do you have an opening statement you wish to make?

Mr Mathieson—No, Chair; I do not have an opening statement.

CHAIR—Thank you very much. We will proceed to questioning.

Senator BRANDIS—Mr Mathieson, how are you faring, having regard to the cutbacks to the Federal Magistrates Court in the budget? I see from Budget Paper No. 4 that the allocations to the Federal Magistrates Court have been reduced from \$57.8 million to \$56.9 million, which is a reduction of about one per cent in actual terms. When we factor in the budget assumptions of inflation of 3¼ per cent over the coming fiscal year, you seem to have suffered a reduction of about 4¼ per cent in real terms. What measures will it be necessary for the Federal Magistrates Court to take to deal with the cutbacks in your funding?

Mr Mathieson—In the current year, the year that we are now in—

Senator BRANDIS—This is 2007-08, yes.

Mr Mathieson—we anticipate having an additional reduction beyond what we had budgeted for at the commencement of the year of about \$255,000. We have been able, through looking at our expenditure and saving wherever we can, absorb that reduction.

Senator BRANDIS—On top of that you have a further reduction in the next financial year.

Mr Mathieson—Yes.

Senator BRANDIS—Of about 4¼ per cent. Is that right?

Mr Mathieson—Yes. In the next financial year the savings over and above what we were assuming we would need to budget for and have planned for are about \$1.1 million. We are still working through as to how we are going to cope with that, or make those savings. That can be done in a variety of ways.

Senator BRANDIS—Look, we are pressed for time, so let us just cut to the chase here.

Mr Mathieson—If I can cut to the chase, I am reasonably confident that we can make those savings through reductions that will not involve redundancies.

Senator BRANDIS—All right. How many federal magistrates are on the establishment of the court now?

Mr Mathieson—Fifty-three. However, we had a retirement late in January and there was a death late in November and those two numbers are included in that 53.

Senator BRANDIS—So there are currently 51 magistrates?

Mr Mathieson—Fifty-one serving.

Senator BRANDIS—Do any of those magistrates have dual commissions with other courts?

Mr Mathieson—No.

Senator BRANDIS—So you have 51 working magistrates, in effect, including those who might be on long-service leave and so on.

Mr Mathieson—Yes.

Senator BRANDIS—Will the two magistrates—the magistrate who retired and the magistrate who died—be replaced?

Mr Mathieson—That is a matter for the government. There was some evidence given earlier in the day in relation to some processes that were in place.

Senator BRANDIS—Well, what will happen with the court? I mean, you have to find all these extra savings. You have two fewer magistrates than you had six months ago. As we established at the last estimates hearings, the workloads of those magistrates is expanding, particularly in relation to family law matters and including some complex family law matters. What are you going to do?

Mr Mathieson—I may have misled you. I think that the number that I am actually talking about today is 53. The number was 55.

Senator BRANDIS—Be that as it may, you are down two magistrates.

Mr Mathieson—That is right.

Senator BRANDIS—How many magistrates in your view is the appropriate establishment of the court given its current jurisdiction and workload?

Mr Mathieson—I think that is really a question for government.

Senator BRANDIS—No, it is not just a question for government. It could be a question for government. But you, as the chief executive officer of the court, are entitled to have a view. Surely you do have a view from a managerial point of view as to the appropriate number of magistrates to deal appropriately with the volume of work. Do you have such a view?

Mr Mathieson—The difficulty with making that sort of assessment is that you have to make a number of assumptions about an appropriate length of delay and movement of matters. As you may recall, we spoke at the last Senate estimates to the movement of filings in family law as between the two courts with jurisdiction in that area—the Family Court and the Federal Magistrates Court.

Senator BRANDIS—Of course, and all of these things are based on assumptions. We know that. Those assumptions can vary, and we know that. But I am putting to you that you, as the chief executive officer of the court, must have a view, allowing for reasonable assumptions as to delay and all of those things about the appropriate establishment of the court, having regard to its workload and jurisdiction. Ultimately, it is for your political masters, the government—although I suppose the judiciary does not have political masters—to decide what resources they will give you. Nevertheless, you must have a view and you are entitled to have a view. You would not be doing your job properly if you did not have a view. I want to know what your view is.

Mr Mathieson—I am not sure that I can quantify a number. Perhaps I can answer it in a different way.

Senator BRANDIS—Let's not answer it in a different way. Let's stick to the nice hard turf of quantitative assessment. Let's do a reductio ad absurdum. If you had two magistrates, that would be manifestly too few. If you had 150 magistrates, that would be manifestly too many. You have 53. How far short is that of a reasonable number according to your reasonable standards of delivery of services to litigants—approximately, of course?

Mr Mathieson—It is in part affected by geographic spread—

Senator BRANDIS—Of course it is.

Mr Mathieson—and decisions that only government can make in relation to the distribution of the judicial resources across the jurisdictions.

Senator BRANDIS—Yes.

Mr Mathieson—Our particular court, sharing jurisdictions with two other courts, is susceptible to the influence of those sorts of decisions in a fairly significant way.

Senator BRANDIS—Yes.

Mr Mathieson—My own view is that, overall, there are currently an inadequate number of judicial resources available in family law.

Senator BRANDIS—I want to clarify this: that is your view in relation to both the Family Court and the Federal Magistrates Court exercising family law jurisdiction?

Mr Mathieson—That is so.

Senator BRANDIS—Do go on.

Mr Mathieson—However, there have been a number of retirements in the Family Court and there has been one retirement and one death in the Federal Magistrates Court. Action is under way to recruit—if I can use that term, but it is not strictly correct—additional appointments to the Federal Magistrates Court. But no decisions have been made at this stage in relation to any of the retirements in the Family Court as far as I am aware.

Senator BRANDIS—I can understand, Mr Mathieson, why you are being careful and guarded in your answers; I understand that perfectly. Everybody who has the remotest familiarity with the federal judicial system knows that your court, largely as a result of very significant escalation of its jurisdiction—especially although not exclusively in family law matters—is grossly overtaxed at the moment. That is one of the reasons we have the Semple review. I am interested in your own view, given the current workload and jurisdictions of the court and the demands upon its members, about how far short of a reasonable establishment it is.

Mr Mathieson—If the process that is currently in train results in the appointment of five or close to five additional federal magistrates, and if the appointments funded in last year's budget in anticipation of the passage of the de facto property legislation are made—I think from memory there were four federal magistrates proposed in that legislation, but they are subject to the passage of the legislation—and if they are correctly distributed, that would go a long way to addressing the current concerns, or my current concerns, about the deficiencies in judicial strength in the Federal Magistrates Court.

Senator BRANDIS—So, what I gather from that is that, if you had five more federal magistrates than you currently have, assuming the de facto property legislation goes through, you will have another four on top of that.

Mr Mathieson—Yes.

Senator BRANDIS—So, if you have another nine, that would go a long way to addressing the current deficiencies?

Mr Mathieson—If correctly distributed.

Senator BRANDIS—If correctly distributed. You are so careful; I really admire and respect your circumspection. However, if I can cut to the chase, what you are telling us is that you need to increase the size of the court from 53 to 62—an increase of nearly 20 per cent—to go a long way towards redressing the current deficiencies. Is that the position?

Mr Mathieson—That would also enable the court to have capacity to deal with additional jurisdictions which it does not yet have but which we anticipate it will have.

Senator BRANDIS—But which you anticipate.

Mr Mathieson—Of course, we would welcome more appointments than that, but that is a matter for government.

Senator BRANDIS—We know that. I can understand why you feel you the need to say that, but you do not need to say it to me, because I understand that. Did you say this to the Semple review?

Mr Mathieson—No, I have only briefly spoken to Mr Semple at this stage. I will be talking to him further later this week.

Senator BRANDIS—I see. But you will present a written submission to the Semple review, won't you, as well as doing an interview with Mr Semple?

Mr Mathieson—Certainly from my point of view. No decision has been made in that respect. The court is contemplating what it will do in terms of a written submission to Mr Semple.

Senator BRANDIS—If my memory serves me correctly, at the last estimates in February you told us that about 88 per cent of the workload of the Federal Magistrates Court at the moment is family law matters. Is that still the case?

Mr Mathieson—I think in February I told you that 78 per cent of the filings in family law, if you excluded the registrar-type work, were in the Federal Magistrates Court.

Senator BRANDIS—Contentious or potentially contentious matters?

Mr Mathieson—Yes. That has increased further and, on my most recent figures, I would say that that number is now closer to 79 per cent.

Senator BRANDIS—So it has gone up a little. That has been a uniform trend since the court was created.

Mr Mathieson—It has been more marked in recent times. From the point of creation of the court, there has been an increase, sometimes more marked than at other times.

Senator BRANDIS—It is only three months since the last estimates round, and there has already been a noticeable increase since then. Do you have some figures there in relation to the caseload of the court in family law matters and non-family law matters?

Mr Mathieson—Yes, I have.

Senator BRANDIS—Would you be good enough to table that?

Senator Ludwig—While that is happening—

Senator BRANDIS—Yes, Senator Ludwig.

Senator Ludwig—So that you are not inadvertently led down a difficult path, Mr Mathieson, my recollection is that you were asked related to the de facto law legislation, that there would be four and then you added that to the other total, which gave you nine. Then, I think—and the record may show that and your recollection may be better than mine—you said that they would then need that now. But, of course, the de facto legislation has not passed.

Senator BRANDIS—I understand.

Senator Ludwig—It has not been in parliament yet. So, the argument that you put—that an increase of 20 per cent is needed now—would not hold.

Senator BRANDIS—No, I did not say that.

Senator Ludwig—That is what I recollect.

Senator BRANDIS—I think you misheard me. What I said was that, given the assumption that the witness very carefully made, including the assumption of the imminent needs of the court, having regard to the de facto legislation, the required increase in the establishment to go a long way to meeting a proper number would be known. In any event, will you table that document, Mr Mathieson?

Mr Mathieson—Yes, I will. I have a document which shows current filings in both family law and general federal law during the current year. The 79 per cent that I mentioned before is, of course, the national figure, which is consistent with the document that you will see in a minute. Of course, the filings are not consistent registry by registry.

Senator BRANDIS—No, I would not have thought that they would be.

Mr Mathieson—There are fluctuations. In one registry it could be as low as 55 per cent and in another registry it could be as high as 95 per cent.

Senator BRANDIS—Of course there will be variations between different registries. I understand that. I am interested in national figures. Of course, one would anticipate that that percentage will increase still further once the Family Court is vested with de facto property jurisdiction.

Mr Mathieson—Once the Federal Magistrates Court is vested with that jurisdiction?

Senator BRANDIS—Once the court is vested with de facto property jurisdiction.

Mr Mathieson—I think that would be speculation at this stage. I am certainly not confident of the likely increases and where that increase might fall, particularly in the early days of that added jurisdiction.

Senator BRANDIS—But the caseload is bound to go up, isn't it?

Mr Mathieson—I expect so; I do not know that.

Senator BRANDIS—I see you have pie charts. I like pie charts, they are very helpful. So, bankruptcies are 6 per cent, migration is 1.8 per cent, and other general federal law is 0.6 per cent. According to the first half of the document, national filing statistics from 1 July 2007 to 31 March 2008 show that the total percentage filed in family law matters is 91.6 per cent.

Mr Mathieson—That is of the total filings of our court.

Senator BRANDIS—Follow me. The total for non-family law matters is 8.4 per cent, principally bankruptcy and to a lesser extent migration.

Mr Mathieson—That is correct.

Senator BRANDIS—Your point is that those filings include registrar's matters. If you only have regard to contentious or potentially contentious matters, the percentage of family law matters comes down to 79 per cent. Is that right?

Mr Mathieson—In family law, the figures excluded the registrar's work, if I can put it in those crude terms. In general federal law, it is largely in the bankruptcy jurisdictions, which registrars work in.

Senator BRANDIS—Okay. Thank you very much. I think I know the answer to this question, but why not tell us on the record. What do you want to see out of the Semple review?

Mr Mathieson—I am not sure that I am in a position to comment.

Senator BRANDIS—If the court has not finalised its public position, I suppose it is not fair to press you.

Mr Mathieson—No.

CHAIR—Thank you, Mr Mathieson. It does not seem that we have any other questions for you. It is much appreciated.

This will give me an opportunity to let officers from the High Court know that apparently questions to you can be put on notice. I apologise for not being able to tell you this earlier and for keeping you here most of the day. So we will not need officers from the High Court of Australia. Thank you, but you get an early mark, even though I suspect that you have sat here most of the day. Now we require officers from the Family Court of Australia.

[8.57 pm]

Family Court of Australia

CHAIR—Mr Foster, welcome to our estimate hearings. Do you have an opening statement you wish to make?

Mr Foster—Thank you, Madam Chair. We do not have an opening statement.

Senator BARNETT—Thank you for being here and for waiting. We appreciate it. In terms of the jurisdiction, I understand there is some discussion at the state and territory level—the department or the minister can respond if you are not able to—in terms of the referral of powers for family law matters from state jurisdictions to the federal jurisdiction. It would have an impact on your workload. Are you able to respond to that, or confirm or deny it, or would someone else be able to respond?

Mr Foster—I will defer that to the department.

Senator BARNETT—Thank you.

Senator Ludwig—When you say ‘referral of powers’, is there any greater specificity you can add?

Senator BARNETT—No. The advice I have received relates to marital disputes, family disputes with and without children, and some of these matters are dealt with at the state level—not all of them are dealt with at the Family Court level.

Senator Ludwig—That is helpful. I think we have identified the area.

Ms Leigh—A number of states have referred power to the Commonwealth in relation to de facto property matters. That is the resourcing issue referred to in the evidence given while the Federal Magistrates Court was present. Funding has been allocated depending on the passage of legislation giving such jurisdiction to the Family Court and the Federal Magistrates Court for additional judicial resources to both courts to discharge that responsibility.

Senator BARNETT—Does that relate to what we were discussing earlier with regard to the de facto property legislation that is about to be promulgated, as it were?

Ms Leigh—I would not say it is about to be promulgated, but, yes, it is de facto property legislation. That is how it would be described.

Senator BARNETT—Is it fully resourced?

Ms Leigh—That was in last year's budget.

Senator BARNETT—Mr Foster, is that your view: do you believe that that is accurate—that resourcing is adequate to meet the needs of the court?

Mr Foster—In relation to de facto property?

Senator BARNETT—Yes.

Mr Foster—We had provision for an additional judge plus registrar, which we believe would be sufficient.

Senator BARNETT—I have two other areas of questioning. Earlier in the day we had some discussion with respect to the appointment process for the Federal Court and the Federal Magistrates Court, this new process that the government is pursuing, and the advertisements in the *Australian* and the *Australian Financial Review* for those positions. Have you been advised as to the appointment process that is applicable to your court?

Mr Foster—Not at this stage, Senator.

Senator BARNETT—Without that instruction, can we assume that you would expect new judges to be appointed in accordance with past—

Mr Foster—I am sorry. Can I correct that, Senator? The Attorney, at the family law conference in Brisbane in April, made an announcement about that process and sent a copy of that speech to the Chief Justice. So in that sense we have been advised.

Senator BARNETT—What is the content, in summary, of that announcement? Could you table that particular speech, or make it available to the committee?

Ms Leigh—Yes, I could table a copy of that speech, Senator.

Senator BARNETT—What is the intent of the speech in terms of the appointment process for Family Court judges?

Ms Leigh—It was outlined earlier today, Senator, but I am happy to go through it again.

Senator BARNETT—The outline we received earlier today was that no decision had been made. If the position is different, I am very anxious to find out.

Ms Leigh—The speech outlined the same procedure in relation to the Federal Court and the Family Court. Currently there is no process underway in relation to the Family Court.

Senator BARNETT—Based on what you have advised, we can assume that the procedure will be the same. Has a panel been appointed?

Ms Leigh—No, Senator, because there is no process underway. We have not reached such a point in relation to the Family Court.

Senator BARNETT—When can we expect the process to commence?

Ms Leigh—That is entirely a matter for the Attorney.

Senator BARNETT—What is the size of the panel? What can we expect in terms of the size of the panel?

Ms Leigh—The Attorney has indicated that it would be the Chief Justice of the relevant court or their nominee, a retired judge and a senior member of the department. That would be the core of the panel.

Senator BARNETT—All right. Okay, thank you. We will await further advice on that. Mr Foster, could you advise if you have any vacancies?

Mr Foster—In the court, we currently have 39 judges. We have had three recent retirements, one in Sydney and two in Melbourne. We have two judges have indicated their intention, and have informed the Governor-General of their intent to resign their commissions, one in Brisbane from 8 July and another in Melbourne from 18 July. As at and from 18 July, we will have had five retirements from the court.

Senator BARNETT—When were the first two? When did they retire?

Mr Foster—If you like, I can table details of our judges, appointments, resignations and retirements, since 2000, if that would accelerate the process.

Senator BARNETT—That would be excellent, but in any event how long ago did the two judges retire in terms of the vacancies?

Mr Foster—Justice Steele resigned on 15 January 2008, Justice Kay in Melbourne retired on 25 February 2008, and Justice Guest in Melbourne retired on 5 May 2008.

Senator BARNETT—Thank you very much for that. Notwithstanding we have two retirements and two vacancies coming up in July, that will be four by the end of July—

Mr Foster—We currently have three retirements, with another two coming in July, to make a total of five.

Senator BRANDIS—Who are the two imminent retirements?

Mr Foster—Justice Carmody in Brisbane on 8 July and Justice Carter in Melbourne on 18 July, for a total of five retirements.

Senator BARNETT—Could you table that?

Mr Foster—Certainly.

Senator BARNETT—That would be most appreciated.

Senator BARNETT—Notwithstanding what is know to us and known to you, we still do not have a process for the appointment of Family Court judges underway and commenced.

Ms Leigh—That is correct, Senator.

Senator BARNETT—Thank you. For Tasmania, who is the Family Court judge?

Senator Ludwig—I think it is worth adding that we have the existing process that has been in place for a long time now.

Senator BARNETT—I am sorry?

Senator Ludwig—The existing process is still in place, if the Attorney-General wished to exercise it. I do not think it is correct to say there is not a process. The issue might be whether the Attorney-General has turned his mind to having a similar process to that which is in other courts, but I cannot add anything to that. I can certainly seek the Attorney-General's view about that. I just want to make sure that you are not left with the apprehension that there is nothing in place.

Senator BRANDIS—Like Senator Barnett, I must say I am a little curious as to why the protocols for selection and the requisite qualities for appointment that have been listed for the Federal Court and the Federal Magistrates Court have not also been listed for the Family Court. I suppose I can understand why, for the High Court, it may be a little different, but why is that?

Ms Leigh—Senator, perhaps I could help with that question. There are two parts to the answer: the first part is that those qualities were listed in the speech that the Attorney gave in February as applying to all courts.

Senator BRANDIS—But what is the status of a speech by a minister? Do speeches by ministers now constitute decisions of government, do they, even though they do not necessarily announce decisions of government? If the Attorney-General says, 'These are the qualities I will be looking for in a judge,' is that canonical now, is it?

Ms Leigh—The Attorney announced in that speech the process that he intended to follow, and he sought feedback in relation to that process.

Senator BRANDIS—And that applied to the Family Court too, did it?

Ms Leigh—That is correct. Regarding the specific list that I handed up in relation to the Federal Court and the specific list I handed up in relation to the Federal Magistrates Court, the reason why I had specific lists for those courts is that they were the documents that appeared on the website in conjunction with the public notices of the appointment processes that were specifically to be undertaken for appointments in Sydney to the Federal Court and in those five locations to the Federal Magistrates Court. They were part of the documentation that went with that public notice for each of those courts, and they reflect the list that the Attorney set down in that speech in February that he stated would apply to all courts.

Senator BRANDIS—Okay, thank you.

Senator BARNETT—In terms of the advertisements, I place on the record that, again, you are advertising in the *Australian Financial Review* and the *Australian* but you have five, Adelaide, Hobart, Brisbane, Melbourne and Sydney, where there are places. I can advise you, and I am happy to receive your response, that people in Tasmania would find it offensive that that is the process. I draw that to the department's attention. There are people who may or may not miss out on being aware of the vacancies if advertisements are only in the *Australian Financial Review* and the *Australian*, notwithstanding that you are writing to these 30 other special entities around the country. I draw that to your attention, particularly with Family Court matters that are heard all around the country. Perhaps you can reconsider that approach.

Senator Ludwig—What papers do you want? I can pass that information on to the Attorney-General.

Senator BARNETT—In Tasmania we have three dailies, the *Mercury*, the *Examiner* and the *Advocate*. That would cover it.

Senator Ludwig—You only want the national and the three dailies.

Senator BARNETT—I am not an expert on other states. You will have to speak to my other colleague senators. But the *Australian Financial Review* and the *Australian* do not cover all of the country. It covers the *Australian* and the *Australian Financial Review* and perhaps those in Melbourne and Sydney who read it.

Senator Ludwig—It does not cover Tasmania?

Senator BARNETT—The *Australian* is a national paper—

Senator Ludwig—That is what I thought it was.

Senator BARNETT—But if you want to get to people, and make them aware, particularly those in the legal fraternity, you have to advertise in the newspapers that are read in the relevant jurisdiction.

Senator Ludwig—They do not read the *Australian* and the *Australian Financial Review*?

Senator BARNETT—The *Northern Territory News* would be one. I draw that to your attention. I just think it is a matter of courtesy.

Senator Ludwig—That is why I am asking, so I can pass that information on to the Attorney-General.

Senator BARNETT—I ask you to reconsider. Just quickly in terms of Tasmania—

Mr Foster—Justice Robert Benjamin is the judge in Hobart, Senator.

Senator BARNETT—And there are no plans for retirement?

Mr Foster—No. He was appointed only a couple of years ago.

Senator BARNETT—Yes. I have met him. What about in terms of covering the jurisdiction north of Brighton, as it were, or north of the Derwent River, as in Launceston, Burnie and Devonport?

Mr Foster—Justice Benjamin does not circuit to anywhere other than Launceston. He goes to Launceston on a circuit basis, as required.

Senator BARNETT—Is he meeting the needs and the demands of the state as far as you are concerned?

Mr Foster—As far as I am concerned he is. The judge has some spare capacity to work in other locations as well. Quite clearly, he is serving the needs of the community.

Senator BARNETT—Thank you.

Senator BRANDIS—One obscure fact on the list has attracted my attention, Mr Foster. Justice Bell in Queensland was appointed on 27 February 1976.

Mr Foster—He is a lifer, Senator.

Senator BRANDIS—I was going to say: is he the last remaining member of the federal judiciary not subject to the 70-year retirement curfew?

Mr Foster—I cannot speak for the Federal Court, but he certainly is the last Family Court lifer.

Senator BRANDIS—Yes. I think you might find he is the last member of the federal judiciary.

Mr Foster—Possibly.

Senator BARNETT—Mr Foster, I thank you for this document: it is most informative.

Mr Foster—Thank you.

CHAIR—Just before you go, Mr Foster, can I ask you about judges coming to the Northern Territory. They are sourced from Adelaide. Is that correct?

Mr Foster—That is correct.

CHAIR—Okay. But the registrars and all the administration is based in Brisbane. Is that correct?

Mr Foster—Yes.

CHAIR—Are there any plans to review or reassess that?

Mr Foster—It has been a reasonably recent innovation. It is just that the capacity in Brisbane is greater than it is in Adelaide to do the administrative support for the judges, but there are no steps of which I am aware at the moment to change the arrangements with judges from Adelaide sitting in Darwin.

CHAIR—And no plans to put administrative support in Darwin?

Mr Foster—There is administrative support there.

CHAIR—Yes, very small.

Mr Foster—But there is not a full-time registrar, for example.

CHAIR—No.

Mr Foster—Some professional staff need to come in from other places, as required.

CHAIR—Yes. The staff in Darwin are only on contract. Is that correct?

Mr Foster—No, no. They are full-time public servants, but they are more on the client-service angle. It is basically running a registry without the additional professional services which a judge needs. We just fly that resource in when it is required.

CHAIR—Sure. I see. Are there any other questions?

Senator BRANDIS—Yes, I have some questions, though I will keep them very brief in view of the hour. Have you yet made your submission to the Semple review?

Mr Foster—The Chief Justice has had several meetings with Mr Semple, as have I. At the judges' annual conference in Adelaide in April this year, Mr Semple met with the judges as a body and had a discussion about the review. As far as this court is concerned, now the consultation process is complete. We are satisfied that the process has been adequate, but we do not intend to prepare a formal position paper for Mr Semple.

Senator BRANDIS—All right. How are you getting on with the Federal Magistrates Court in relation to the family law jurisdiction? I explored this in the February estimates and I will not go over old ground, but since I asked that series of questions of you three months ago, have there been any developments in that relationship of significance about which you think you ought to inform the parliament?

Mr Foster—I think with the establishment of the Family Law Court's board, that has been an instrument that has really helped to develop the relationship between the two courts. Certainly from my perspective, I think relationships are pretty good. There is a great sharing and understanding of each court's resource and other requirements.

Senator BRANDIS—So you think things are getting better?

Mr Foster—In my view, I do not think things really have always been that bad. I think the relationship has been pretty reasonable at a strategic level.

Senator BRANDIS—It all depends on who you talk to, I suppose. Thanks.

Senator BARNETT—I have just one other question for the minister. Does the government plan or intend to allow access for same-sex couples to the Family Court?

Senator Ludwig—I will get further particulars about that particular point. I do not have any direct material on that. We will take it on notice.

Senator BARNETT—That is okay. To assist you, Minister, I read in the *Australian* of Friday 23 May where that question is floated, under the headline, 'Childless de factos in Family Court win':

De facto couples without children will be given access to the Family Court to settle property disputes ...

That is what we were discussing earlier. It states:

It is understood the Government will also extend access to the Family Court to same-sex couples on the basis that they will now be regarded as de facto couples on equal footing to heterosexuals.

Can you assist me with that?

Senator Ludwig—That is helpful because in respect of the de facto relationships and the Family Court, I think that is right: the government is currently considering the reference of power that several states have given on property settlement and spouse maintenance issues affecting de facto couples when the relationship breaks down. But in respect of the second matter, I prefer to apprise myself of what the Attorney-General's view is on that.

Senator BARNETT—No problem. Thank you.

CHAIR—If there are no other questions for the Family Court, I thank you very much for waiting during the day. I now ask officers from the Classification Board and the Classification Review Board to come to the table.

Just before I welcome Mr Donald McDonald, I want to clarify something. As far as I know, we have no questions relating to services to the territories. I will take it upon myself to release officers from Outcome 3.1.

I understand we have questions on natural disaster relief and mitigation lasting about five minutes, for the information of people concerned. I am anticipating we should do that before

we go to outcome 1. After we deal with that, we can move on to outcome 1, which will probably be straight after this. We will do this and then output 3.2 and then we will go to outcome 1.

Mr Cornall—Madam Chair, could I just make one response to a question asked by Senator Brandis, which was: what is the status of a speech by the Attorney-General to the judicial conference? I just wanted to bring to the senator's attention that in the House of Representatives on 19 February this year, in response to a question on notice about judicial appointments process, the Attorney outlined in the course of that answer the process that he was intending to put in place in relation to judicial appointments for the future. In talking about the panel, he said:

That panel will assist in the selection of candidates according to criteria which have been published on the department's website—criteria determined to achieve not only selection on the basis of merit but personalities who have empathy with litigants who appear before them.

That is on page 11 of the chamber *Hansard* of that date.

[9.20 pm]

Classification Board

Classification Review Board

CHAIR—Mr Donald McDonald, welcome to our estimates hearing this evening. As you introduce yourself, I also ask you to indicate whether you have an opening statement to provide.

Mr D. McDonald—No, Senator. We have no opening statement.

CHAIR—All right. We will proceed to questions. Senator Barnett?

Senator BARNETT—Thank you, Chair. Hello, Mr McDonald. I thank you, and Ms Shelley and Mr Griffin, for being so patient in waiting for your turn. I do not have many questions, but I would like to ask about computer games. Does your board classify computer games?

Mr D. McDonald—Yes, Senator, we do.

Senator BARNETT—On what basis is that—the same basis as films, or, if not, on what basis do you do that?

Mr D. Mc Donald—Yes, it is. The guidelines for films and computer games are very similar.

Senator BARNETT—All right. In what respect may they be different?

Mr D. McDonald—They are different in respect of assessing impact because of the interactivity of games and there are elements that are different. As far as games are concerned, there is no category of R18+ for games. Games can be classified up to MA15+ or then they are RC.

Senator BARNETT—That is what I wanted to ask about and seek your confirmation of. At the moment there is no category, is there, for R18+.

Mr D. McDonald—No.

Senator BARNETT—It is illegal in Australia to have a computer game if it is not categorised?

Mr D. McDonald—Yes. If it cannot be accommodated at MA15+, it is refused classification. Therefore it is not permitted to be sold in Australia.

Senator BARNETT—Right. I am with you—very good. I understand there is some discussion among the various states. There has been a SCAG meeting. I am happy for the department to answer these questions. I would like to know if a discussion paper has been prepared with respect to the possibility of an R18+ rating for computer games. Perhaps before I ask that question, I will ask, Mr McDonald, if you have been consulted with respect to that possibility.

Mr D. McDonald—No, we have not, and we would not expect to be. That is a matter of policy for governments to determine. We will of course be interested in the process but the department would be better placed to answer in respect of the discussion paper.

Senator BARNETT—You have not had any input? You have not made a submission or written letters or given advice with respect to that matter?

Mr D. McDonald—No, we have not, and we would not.

Senator BARNETT—Thank you very much. Perhaps the department could respond.

Ms Davies—At the last meeting of the Standing Committee of Attorneys-General censorship ministers at the end of March, ministers agreed that there would be a consultation process on the question of whether there should be an R18+ classification for computer games introduced into the national classification scheme. Victoria is the jurisdiction which has the lead on developing the discussion paper, which will be released. Officers are working together at the moment to develop that discussion paper, but it has not yet been finalised. Once a draft has been finalised by officers, it will then be provided to state, territory and Commonwealth censorship ministers for their approval, and then released for public consultation.

Senator BARNETT—Before we get to the discussion paper, can you advise the committee as to how this topic got onto the agenda? Who is pushing or promoting the merits of an R18+ classification computer game?

Ms Davies—It is an issue that has been discussed on and off over quite a number of years by censorship ministers. I understand it is an issue that is raised with all ministers in correspondence at regular intervals from the general public and from industry groups, with views in both directions, I should say. As I say, Victoria is the lead jurisdiction on the current item in terms of developing it, but I do not think it would be fair to say that any jurisdiction is actually pushing for the introduction or otherwise in that sense; it is something that ministers have decided that they need a consultation process for, to assess community views on the issue, which is one that is raised with them quite frequently.

Senator BARNETT—Indeed. All right. When you say that Victoria is taking the lead, does Victoria have a position? What is it?

Ms Davies—The issue as it was put to ministers was that there should be a consultation to assess views. Victoria has not put an active position in that forum.

Senator BARNETT—Okay. Let us go to the draft discussion paper. They are preparing the draft. That is referred to the other states for comment. How is it pulled together? When can we see the first draft?

Ms Davies—The process that occurs generally across most SCAG items or issues is that a group of officers works together on a paper, usually with one jurisdiction leading the actual drafting work. In this case, as I say, Victoria is leading the drafting of the paper. They are consulting with the group of officers who are essentially designated as censorship officers in that context. Drafts, comments and bits of input are circulated between the officers until we have a draft that officers agree is an appropriate draft to go to ministers for agreement to release it.

Senator BARNETT—Does that discussion paper have to be approved by the various Attorneys-General in each state and territory before it is released publicly?

Ms Davies—That is the process that we will be following, yes.

Senator BARNETT—Right. When can we expect the discussion paper to be released publicly?

Ms Davies—The aim at the moment is to have a draft finalised and sent to ministers certainly within the next couple of months, hopefully sooner than that.

Senator BARNETT—Do you have a draft that we can consider?

Ms Davies—Not at this stage, no.

Senator BARNETT—You have not seen a draft?

Ms Davies—There is draft text being circulated between officers, but there is not a draft that we could provide that is a draft that represents anything other than pieces of input.

Senator BARNETT—You cannot table the draft text you have received? Can you do that for us?

Mr Govey—Senator, it has not gone to ministers yet, so I do not imagine that we would be in a position to provide a draft until it was one that was settled by ministers.

Senator Ludwig—I think the committee understands that that would be the normal course of events. I certainly would not think that the previous government would have enjoined in that process. These are matters that will have to go through the proper process. They will be available when they can be made available.

Senator BARNETT—The federal department, the Attorney-General's Department, is consulted in the same way as are the state and territory departments. Is that right?

Mr Govey—That is correct.

Senator BARNETT—You are fully consulted and you are allowed to make comment and have input?

Mr Govey—That is correct.

Senator BARNETT—Minister, would you like to share your view on R18+ classification computer games?

Senator Ludwig—There is a process in place for that. That is where the appropriate comments can be made and circulated. The Attorney-General, through his department, will make the necessary comments. He is supported by the department in respect of that.

Senator BARNETT—So your government supports the process?

Senator Ludwig—The process is in place.

Senator BARNETT—Okay. We have a couple of months. You said within two months you hope to have it distributed to the Attorneys-General.

Ms Davies—That is what we would hope. Obviously I cannot control the time frame that it takes for each of the jurisdictions to agree that the paper is finalised for that purpose.

Senator BARNETT—Sure. Do you know how long it would take for it to be made public after that process?

Ms Davies—We would envisage not terribly long. I should just mention too that while in most instances they are the Attorneys, the group of ministers is actually those ministers who are responsible for censorship matters. They are generally referred to as censorship ministers. At the Commonwealth end, it is the Minister for Home Affairs, not the Attorney-General.

Senator BARNETT—Has there been an agreement or an understanding with respect to consultation? Once the discussion paper is released publicly, what happens then?

Ms Davies—At the moment we envisage that the paper will be released on or linked from each of the jurisdictions' websites, including our department's. It would also be drawn to the attention of key stakeholder groups. There will be a process of a call for submissions, in effect. We are currently investigating the most effective and efficient means of coordinating that—whether we will have one email address and one postal address, with the facility to forward things.

Senator BARNETT—Will there be public hearings?

Ms Davies—No. I would not envisage public hearings. It will be simply a process of providing submissions on the paper.

Senator BARNETT—Right.

Ms Davies—I am not aware of any SCAG consultation process that has involved public hearings.

Senator BARNETT—How will families and family organisations be advised of this discussion paper?

Ms Davies—There are a number of family type organisations who have corresponded with our minister and other ministers on this matter. We would certainly be drawing it to their attention directly. We would expect that there would be media releases about it. It will be as widely publicised as we are able to do.

Senator BARNETT—How will they decide what is appropriate? Will they consider 100 submissions here and 500 there, and say that 500 outweighs the 100, so it can proceed? How will it work?

Ms Davies—That is a matter for ministers, how they actually evaluate the material that is put before them in the context of the consultation. Officers will provide a report to ministers on the submissions received, but it is a matter for ministers what weight they place on what factors.

Senator BARNETT—When would their next meeting be?

Ms Davies—November.

Senator BARNETT—Do you know a date?

Ms Davies—I believe it is 6 and 7 November. I think that is a Thursday and Friday.

Senator BARNETT—If it is different from 6 and 7 November, you could let us know?

Ms Davies—Certainly.

Senator BARNETT—Where will that be? Do you know where that will occur?

Ms Davies—Brisbane.

Senator BARNETT—Okay. I appreciate that very much. It has been most informative.

CHAIR—Mr McDonald, I want to ask you about the provision of R18+ videos or DVDs—movies—that can be purchased only in the Northern Territory and the ACT. Is that correct?

Mr D McDonald—Did you say R18+? It is X18+.

CHAIR—X18+. Is that the classification?

Mr D McDonald—X18+ can only be legally purchased in those two territories.

CHAIR—I take it that if you were found in possession of an X18+ movie or video, whatever, in other states, you would be in breach of state or federal laws?

Mr D McDonald—That would be a matter for the state jurisdiction.

Ms Davies—In general, the prohibitions that relate to X18+ material in the states relate to the sale or display of that material, not to possession. There may be some offences relating to possession in the presence of a minor, but in general it is not unlawful to possess that material in the states; it is unlawful to sell it.

Ms Shelley—Could I add a clarifying remark, Chair?

CHAIR—Yes, Ms Shelley.

Ms Shelley—It is illegal to possess it in Queensland, but not in the other states. Queensland is different.

Senator HEFFERNAN—Well, we know that.

CHAIR—That is not the matter I want to go to. What I want to ask is: given the fact that the Northern Territory intervention is now nearly nine months on, has either of the boards been involved in any discussions about banning the sale of this material in the Northern Territory?

Mr D McDonald—That would not be a matter for the Classification Board, Senator. That also would be a matter for governments in either jurisdiction.

CHAIR—Ms Davies, can I ask you if that has been a matter for your area?

Ms Davies—Yes, it has.

CHAIR—To what extent?

Ms Davies—The amendments that were made last year to the Classification Act which prohibit the supply or possession of certain high-level material, including X18+ films in prescribed areas in the Northern Territory. We had input to those amendments, clearly.

CHAIR—That is true, but I understand you can still purchase this kind of material in Darwin, for example.

Ms Davies—Yes. It is still legal to sell that material in areas of the Northern Territory, other than the prescribed areas of the Northern Territory.

CHAIR—Yes. Has there been any discussion with you or the department about banning the sale of the material right across the Northern Territory?

Ms Davies—I am not aware of any discussions.

CHAIR—Who would set predominant legislative requirements for that? Would it be at the territory or federal level at this stage?

Ms Davies—In general, the legislation dealing with any restrictions on the sale, et cetera, of material at different levels is in state and territory legislation.

CHAIR—Has anything been raised at the SCAG meetings about looking at the availability and the sale of this material across areas such as the ACT and the Northern Territory?

Ms Davies—No.

CHAIR—So X18+ has not been raised as an issue at all, despite the focus on the objectives of the intervention in the Northern Territory?

Ms Davies—It may have been touched on in general discussion, but it is certainly not an item that is under consideration.

CHAIR—All right, thank you.

Senator HEFFERNAN—That would be too sensible.

CHAIR—It is a bit of a gap. Mr McDonald, thank you very much for your time. It is appreciated. We will now move to outcome 3.2.

Senator BRANDIS—What about outcome 1, Madam Chair?

CHAIR—We decided just a while ago that because there is only five minutes of questioning we would deal with 3.2 now for five minutes and then those officers could go.

[9.38 pm]

CHAIR—I welcome officers attending in relation to outcome 3.2, Natural disaster relief and mitigation. Senator Barnett, do you have questions?

Senator BARNETT—Yes. I appreciate officers being present tonight. I want to draw your attention to the Australian Strategic Policy Institute's report which was released on 7 May, Building a More Resilient Australia. I am wondering whether you have had a chance to look

at the report and its recommendations, and whether you have had a chance to respond to those?

Mr Pearce—As I said earlier, we have looked at the report, only so far at the moment as to have identified which of the recommendations we already have processes in place for dealing with and those that we have not. We are currently still analysing that to identify what we think the strategy should be from EMA's and the government's perspective.

Senator BARNETT—Can you be more specific? If not, can you take it on notice in terms of which recommendations you are responding to?

Mr Pearce—We can certainly take it on notice. I can get that to you fairly quickly.

Senator BARNETT—That would be good. In your response, can you flesh out the plans that you have to respond to the recommendations?

Mr Pearce—Yes, we can.

Senator BARNETT—I draw your attention in particular to a couple of areas: firstly, the tsunami, and our preparation, as to whether we are prepared for a tsunami and whether the warning system is adequate; and, secondly, technology being in place to detect a tsunami, but how do we convey messages to the communities? It is alright having the technology, but how do we get the information out? I know that was quite a big issue at the time. Is that an area on which you would be focusing?

Mr Pearce—It is indeed. There is already work going on with the development of the Australian tsunami warning system, which is the front end. There is also a lot of work going on in the area of community information and warning systems, which is the end that you are talking about at the moment. We can provide advice to you on that.

Senator BARNETT—Thank you. I will try to be quick because I know that there are other questions that need to be asked, including some from Senator Heffernan. There is a view about high-level command and control arrangements that there may be confusion about the roles and who has authority.

Mr Pearce—I will respond to that now. I am certainly aware of Mr Bergens's comments in relation to the command and control arrangements. But I think that is actually one of the areas where (a) we are leaders internationally with our command and control and coordination arrangements; (b) those arrangements are very clearly understood by all emergency management agencies and emergency service organisations; and (c) the relationship with the Commonwealth, states and territories is very well understood. That is one area where I would simply say that people are entitled to their views and perceptions, but the reality is that it is very clear.

Senator BARNETT—Good. The third and penultimate point is public communication and warnings. We have touched on those in respect of realistic testing and exercising. Do we know our limitations?

Mr Pearce—That is exactly the process that we have just started the development of at the moment. The Ministerial Council for Police and Emergency Management has directed that EMA chair a working group that is looking at how to enhance our current arrangements. The first meeting of that group is in Adelaide on Friday of this week.

Senator BARNETT—Excellent. Regarding the issue of business engagement and involving them in the planning and thinking about this, what specific arrangements currently exist?

Mr Pearce—As I mentioned earlier, that is one of the areas in which we are analysing what our current engagement levels are and identifying whether we need to enhance those. That will be part of a recommendation to government, depending on the outcome of that finding.

Senator BARNETT—Thank you very much.

Mr Pearce—It is not a problem. Thanks, Senator.

Senator BARNETT—I appreciate your taking that on notice and being able to get back to us.

Mr Pearce—No problem.

Senator BARNETT—In the light of the time, I will conclude right there.

CHAIR—All right, thank you very much, officers. We do not have any other questions for outcome 3.2.

Mr Pearce—Thanks very much, Chair.

CHAIR—Thank you very much for being here with us today and for your time.

[9.43 pm]

CHAIR—We will now move to outcome 1, equitable and accessible system of federal civil justice. I call the officers to the table. We will deal with general questions first.

Senator HEFFERNAN—Thank you very much. I just want to raise the issue the Judicial Commission, of which both Ms Leigh and Mr Cornall would be aware. Before I do so, I want to obtain some guidance on what is a fit and proper person. You may not be in a position to answer this, but yesterday I raised in another estimates hearing the issue of a person who is a lawyer who could go on to become a judge because he is a lawyer and who ran a brothel. He was convicted of running a brothel, putting the people in the brothel on the payroll under false names, putting the lease for the brothel under a false company name, opening a bank account to which he was a signatory, as Edward Potter, under a false name, and of course undertaking transactions in that process. Would that person be regarded as a fit and proper person to be a lawyer?

Mr Cornall—Senator, it would certainly, in my mind, give significant cause for reviewing the person's entitlement to practise.

Senator HEFFERNAN—It says something about the system that this person is now the prominent secretary of a semi or quasi-government body and is still a lawyer. If he is convicted of running a brothel and opening a bank account in a false name, et cetera, et cetera, I am seriously propositioning the government that there needs to be a process in the federal judicial jurisdiction to deal with people who are found, for whatever reason, to be under question. You are aware of some of the documentation that you kindly returned to me, noting that it has not been copied, which I might say I sent to the AFP 2½ half years ago, in November 2005, and asked, simply, 'Could you please authenticate these documents.' It was

nothing more complicated than that. How would you authenticate a legal or a police document? How would you go about that?

Mr Cornall—I am sorry, could you repeat the question, Senator?

Senator HEFFERNAN—I have a document here, for instance. I sent a pile of documents to you. You did not attempt to authenticate them. But how would you go about it? What would be a reasonably sensible way to authenticate a document that has a signature, a file number and a date on it?

Mr Cornall—If it is a matter that might go to some criminal offence, I think it would be a matter for an appropriate form of police inquiry.

Senator HEFFERNAN—No. I do not want to make a judgement on the document. I just want to know if it is a true document.

Mr Cornall—I do not know that there is a process for doing that.

Senator HEFFERNAN—All right. I will test you. I have a document here which was written to Mr Frank Hutchinson, service solicitor, New South Wales Police on 25 August in a certain year. It is dated and it has a file number. It raises allegations against 27 people, including 18 lawyers. It is signed by Gary Crook, QC, counsel assisting. Would you not just ring up Gary Crook and say, 'Is this a fair dinkum document?'

Mr Cornall—Well, you could do that.

Senator HEFFERNAN—Why has anyone not done it?

Mr Cornall—I have no idea.

Senator HEFFERNAN—For 2½ years I have been patiently waiting for an answer.

Mr Cornall—I am sorry, but I mean, to whom was that document addressed?

Senator HEFFERNAN—This document that I want to authenticate is addressed to Mr Frank Hutchinson.

Mr Cornall—We cannot answer for Mr Hutchinson.

Senator HEFFERNAN—No, no, but you could ring Mr Gary Crook, QC, and say, 'Did you send it to him?' It is quite a serious document.

Mr Cornall—Senator, the Commonwealth has no responsibility or authority in relation to the registration—

Senator HEFFERNAN—Can I just bring you to that. In this document there are five judges who have allegations of criminal activity against them under police intelligence. Would that not be of interest to the government?

Mr Cornall—We have been over this before. In the event that judges are the subject of allegations of criminal activity, they should be investigated in exactly the same way as any other citizen.

Senator HEFFERNAN—That is not the way it works. Mr Keelty has said they have to put up a case for criminal activity. Do you think the only disqualification for a judge would be a criminal conviction?

Mr Cornall—No. The judge can be removed for serious misconduct or proven incapacity.

Senator HEFFERNAN—We have been through this before. I told you I would be very patient and I am being very patient. I am trying to remain calm, but it has been going for 2½ years. Would a judge who wrote an opinion, in part or full, for a solicitor and then sat in judgement on his own opinion be a person who has a problem?

Mr Cornall—I answered this question several years ago.

Senator HEFFERNAN—But I am going to go a bit harder this time because I am going to start to bring some hard evidence.

Mr Cornall—Okay.

CHAIR—Senator Heffernan—

Senator HEFFERNAN—So, what is the answer?

CHAIR—Senator Heffernan, order!

Mr Cornall—I think I expressed a view at the time that I thought that would be the case.

CHAIR—Mr Cornall!

Senator HEFFERNAN—Right. Thank you very much.

CHAIR—Order! Senator Heffernan, I am beginning to become worried about relevance of your questions in relation to budget estimates.

Senator HEFFERNAN—This is in relation to the establishment through the budgetary process of a Judicial Commission.

CHAIR—All right.

Senator HEFFERNAN—Thank you very much.

CHAIR—But I am just saying that I am urging caution here.

Senator HEFFERNAN—That is fair enough, but I have raised this matter consistently over 2½ years and I have never had a caution. Mr Cornall, I agree with you—that would be a serious matter. In these documents that no-one wants to authenticate, I have a police running sheet. The case is Strike Force Corry and it is an interview that is conducted at premises and it is documented. I am going to be very discreet. It has a file number and date on it. It goes through activities at a certain address.

It says, and I will just say the lawyer and the judge: ‘The lawyer who appeared extremely nervous through the interview went on to say that he retired as a solicitor during’—and I will not give you the year—‘and went into retirement. During ...’—a certain year, which is about six years later—‘he was approached and recommended by a very senior judge to travel to London England to manage a fraud prosecution involving the sum of \$US60 million in trust funds on behalf of the government of the South Pacific island of Nauru. By his own admission he saw this as an opportunity and a personal challenge to see if he still had the capacity to function successfully as a lawyer and that the monetary consideration was secondary. He then travelled to England to initiate the inquiries. By his own admission he then advised that the case was substantially more complicated than he had been led to believe. He subsequently sought the assistance of the judge’—who recommended him to do the job—

‘who assisted him to draft a submission to the lawyers in England. The lawyer then advised that this report was rejected initially but after some mutual modifications was accepted and the judicial process concluded. According to the lawyer the final report didn’t differ a great deal from the original one he had submitted with the judge’s assistance. The prosecution apparently was successful ...’

I have to say that I have interviewed a person who personally lost \$1 million in the prosecution. That person did not want to proceed because he had matters in the same court before the same judge and did not want to spoil his chances. It goes on: ‘and by the lawyer’s own admission, he was well paid for his services’—and this is the police interview that no-one wants to authenticate, but I know it is authentic—‘Prior to terminating our interview with the lawyer he indicated rather sheepishly that the judge wouldn’t want it to be known that he was involved, and gave certain advice in the matter concerning Nauru as there would be some matters arising in the nature of an appeal which would involve the judge and be a clear conflict of interest where the judge is concerned.’

He sat in judgement on his own advice. That is a police document, which I patiently gave to the AFP and you fellows 2½ years ago. It involves a judge sitting in judgement on allegations by the person involved in the case. By the way, that particular person involved in that particular case also was found by the Wood royal commission to have represented a person in court under a false name as the solicitor. So I wrote to the police on 5 March 2005 and said, ‘Why didn’t they do this fellow?’ They wrote back, along with a whole lot of other stuff, and said: ‘On the material provided by yourself the only evidence that supports the allegation is the finding by the royal commission. Any such potential prosecution would require a fresh investigation. I am advised that the prosecution always retains a discretionary power not to proceed with an indictment notwithstanding there may be a reasonable prospect of conviction.’

What kind of crap is that? This is the same fellow. I would have thought that that judge should have been thrown off the bench. What are we going to do about it? What is the process? I have had Mick Keelty sitting where you are and he said, ‘Senator, there’s nothing I can do about it.’ It appears there is nothing I can do about it, either, because I have not the capacity to convene both houses of this parliament to set up an argument. I cannot even prosecute the argument to get them to meet.

Why the hell do we not have a judicial commission so we have got a civilised process to deal with a bloke who sat judgement on his own advice, which cost a lot of people millions of dollars, yet here it is in a police file? The police cannot do anything about it. I have been patiently asking the question for some years. I am very patient. I have been very careful.

I have another file that I have not given yet. I would just like to do this in a civilised fashion. Anyone listening to this evidence would know, if the person involved in the court case admits not only in this police interview but in a recorded press interview that he got the advice part written by the judge who heard the case, we have a serious problem, and there is no way to deal with it. This concerns a very high court in this land in the federal jurisdiction.

Mr Cornall—Senator, you sent me these documents some years ago.

Senator HEFFERNAN—Do you think I should send them back to you and you have another read?

Mr Cornall—I went through them very carefully, as you know. They were photocopies of documents and they were a miscellaneous lot of documents—

Senator HEFFERNAN—They were.

Mr Cornall—From all sorts of sources—

Senator HEFFERNAN—They were.

Mr Cornall—And they were clearly not a comprehensive file of a matter from start to finish.

Senator HEFFERNAN—I can give you a more comprehensive file.

Mr Cornall—Some of them had been matters considered by the royal commission, as you pointed out, and some of them were police documents, all of which indicated, and as I said to you in my letter as I recall, that the appropriate place for them to be responded to was through the royal commission or through the police. I thought that collectively those documents did not establish any particular matter that could be brought forward as a charge against a particular judge.

Senator HEFFERNAN—So that is your opinion.

Mr Cornall—No. That is what I said to you. Then, as a result of that, the proposal was to refer the matter to the Australian Federal Police. That is what you did.

Senator HEFFERNAN—Yes.

Mr Cornall—I understand that the Australian Federal Police put some resources into trying to make some—

Senator HEFFERNAN—That was other matters, Mr Cornall. They did go overseas and they did a few other things.

Mr Cornall—They did.

Senator HEFFERNAN—But in the matter of a judge sitting in judgement on his own advice, it is not a matter for the police; it is a matter for the legal system, for the Attorney-General and the government. It is blindingly obvious that sitting in a court here somewhere is a judge who is cold-blooded enough to sit in judgement on his own advice.

Mr Cornall—Well, if you say these are new documents, then I say—

Senator HEFFERNAN—No, no, these are not new; these are the documents I sent you, and you sent them back saying that they were of no interest to you.

Mr Cornall—No, I did not put it in those terms. I can find the letter and I can table the letter, if you would like me to.

Senator HEFFERNAN—Mr Cornall, I greatly appreciate by the way your assistance—

Mr Cornall—Thank you.

Senator HEFFERNAN—and the manner in which you have put up with me. But this is a New South Wales Police document. You would have to agree that there is nothing the police

can do about this. Mick Keelty sat there where you are and said the same thing, 'It's not a matter for us, Bill.' Well, who the hell is it a matter for? You said, 'Go and see the cops.' I have been to see the cops.

Mr Cornall—Well, at that point you were talking about authenticating the documents.

Senator HEFFERNAN—Yes, well, well—

Mr Cornall—That seemed to be an appropriate way to treat the matter.

Senator HEFFERNAN—Well, they are authentic because I have talked to the author. But to verify that, it would not be very difficult, Ms Leigh, to just ring the guy up because he is still in the service.

Mr Cornall—If you want to resend the documents to me, I will have another look at them, but I am not saying that I will give you a different answer.

Senator HEFFERNAN—But in a police interview, formally taped and transcribed, a very senior solicitor says to the cops, 'Oh, this got too hard so I got my old mate so-and-so to assist me, but for God's sake don't tell him I told you that because he would have had to have said, "Hey, hang on, I shouldn't be hearing this case".' I mean, how much more evidence do you need?

Mr Cornall—Senator, you know full well you could not base a prosecution on that sort of evidence alone. You would have to have a far more significant case to bring forward than that.

Senator HEFFERNAN—How would you make that more significant than the guy who was the beneficiary? Would you say, 'We don't believe you'?

Mr Cornall—That is one possible answer, yes. A prosecution has to be brought to a stage where there is a very reasonable prospect of obtaining a conviction.

Senator HEFFERNAN—Let's go to the point that that is not good enough.

Mr Cornall—Yes.

Senator HEFFERNAN—Surely it is good enough to have a process established, which I think should be a judicial commission, where people like me can take these sort of complaints and have them dealt with without having them out there in the public domain. Try hard, Ms Leigh.

CHAIR—Mr Cornall, would this not be an appropriate place for ACLEI to deal with a complaint of this nature?

Mr Cornall—No, Chair. ACLEI has authority only in respect of the Australian Federal Police and the Australian Crime Commission.

CHAIR—I see.

Senator HEFFERNAN—There is no process, Madam Chair, to deal with this at the present time in the Australian government.

Mr Cornall—Senator, we have discussed this before. In the case of clear improper conduct by a judge or proven incapacity, a judge can be removed. Now, that has never happened in the federal jurisdiction. It has happened in Queensland and I have a feeling it might have

happened in another place. In some other jurisdictions, processes have been commenced to remove judges, and the judges have resigned.

Senator HEFFERNAN—That would be the nice way to do this. This bloke is approaching that stage in his life. But this is a cold-blooded approach to ordinary Australian citizens. Senator Ludwig, Ms Lynch and Mr Cornall would know that you cannot be a judge and sit in judgement on your own advice.

Mr Cornall—Senator, you cannot mount a prosecution of the type you are talking about on one document with one witness.

Senator HEFFERNAN—I am not asking you to mount a prosecution; I am pleading with the government to give consideration to a process. Mick Keelty sat there and said, ‘Bill, there is nothing that we can do about it. We think this is real but, mate, there is nothing we can do about it.’

Senator Ludwig—I take it that you raised this issue with the Attorney-General in the former government?

Senator HEFFERNAN—Yes. Let me tell you what the former government did. It said, ‘Please note that we have not copied these documents. We do not think that they are within a jurisdiction that we can deal with. Please find enclosed. Goodbye.’

Senator Ludwig—I was going to go on to the issue of whether you asked for a judicial commission of some description. You have been pressing for that.

Senator HEFFERNAN—I have. For 2½ years I have been asking at estimates why we cannot have a judicial commission to deal with this sort of trash. This is trashing the legal system.

Senator Ludwig—What has been the response to date?

Senator HEFFERNAN—‘Go and bite your backside.’

Senator Ludwig—I can ask the Attorney-General—

Senator HEFFERNAN—That is code for ‘go away’.

Senator MARSHALL—‘No’ would have been easier.

Senator HEFFERNAN—I know, but it is late at night and they are all going to sleep.

Senator Ludwig—I did not take it to heart, Senator Heffernan. I was going to ask you whether you had raised the issue with the current Attorney-General.

Senator HEFFERNAN—That is why I am here tonight.

Senator Ludwig—Right. Then I can take that question on notice and raise it with the Attorney-General. But, as I have said, I cannot give you an answer.

Senator HEFFERNAN—That is fair enough. I do not give up easily. These poor buggers were involved in this case. Adrian Powell got away with it and a whole lot of people lost a whole lot of money. This bloke, who is a prominent Sydney lawyer, admitted rather sheepishly in a police interview—and this was a side issue in the interview—that it had happened. He also gave an interview—I have the transcript and the tape—under full consent to a journalist, setting out the details of how this happened.

Senator Ludwig—Let us be clear that the question on which I will ask the Attorney-General to comment relates to the establishment of a judicial commission and whether or not he has a view about that.

Senator HEFFERNAN—That is fair enough, Senator. With great respect, for me it is almost a prison felony not to go to a lot of trouble to deal with this. Clearly, this is improper and inappropriate behaviour by a judge. I think the same thing applies to everyone in the system, including the people at the front table. It is inappropriate for them not to do something about this when there is clear evidence to proceed in that way. There might not be enough evidence for it to stand up in court, but there might be enough for a judicial commission to go to the bloke, tap him on the shoulder, and say, 'Mate, it might be time.' I do not want to see anyone hanging from a tree in Hyde Park but I would like to think that people have confidence in the system.

Senator Ludwig—I understand the issue that you raise. I understand that it has not been dealt with in the past. At least I have undertaken to put to the Attorney-General the issue that you have raised.

Senator HEFFERNAN—God bless you. I will be in contact. Thank you very much.

CHAIR—Are there any questions under outcome 1?

Senator BRANDIS—I have some questions on another matter.

CHAIR—Under outcome 1?

Senator BRANDIS—Yes. Mr Cornall, can I take you to Budget Paper No. 2, page 85. This is the budget measure concerning human rights, civil responsibilities and national consultation.

Mr Cornall—Yes.

Senator BRANDIS—It states:

The government—

through your department—

will provide \$2.8 million over two years from 2007-08 to facilitate national public consultations about the recognition and protection of human rights and the recognition of civil responsibilities. The consultation process will also facilitate discussion of possible frameworks to address these issues.

Am I right in surmising that this is the funding for the community consultation process foreshadowed last December by the Attorney-General with a view to determining whether Australia needs a bill of rights?

Mr Cornall—Yes. It is to fund that consultation on human rights issues.

Senator BRANDIS—Can you or the appropriate officer tell me where that process is at the moment?

Ms Lynch—The department has been providing some advice to the Attorney on possible options for the consultation, but the issues of timing and form are still matters for the government to make a decision on.

Senator BRANDIS—So no decision as to the timing or form of this consultation process has yet been made?

Ms Lynch—No final decision, no.

Senator BRANDIS—Has it been to cabinet yet?

Ms Lynch—I am not sure that it is appropriate for me to discuss whether things have been or have not been to cabinet.

Senator BRANDIS—Yes, it is. I am not asking you what the advice was; I am asking you whether an event has occurred. By the way, questions along these lines were answered earlier in the day without objection in other areas.

Ms Lynch—Can I take that question on notice?

Senator BRANDIS—Do you know the answer or does somebody at the table know the answer? If you know the answer you cannot take it on notice because you do not need to.

Mr Cornall—We do not believe that it has been formally taken to cabinet at this stage.

Senator BRANDIS—It has not been. Thank you, Mr Cornall. That was easy. I do not want to press you beyond what you can fairly say, but is it your expectation that this process will begin later this year, or can you give me a rough estimate as to when you are expecting it to begin?

Ms Lynch—That would be my expectation.

Senator BRANDIS—Later this year?

Ms Lynch—Later this year, but it is a matter for the Attorney.

Senator BRANDIS—Sure. I see from the note in the budget paper that we are providing \$2.8 million over two years. For how long is it contemplated that this period of consultation will go on?

Ms Lynch—I do not have a timetable that shows how long the consultation process might last, but that funding would cover not only the costs of additional departmental staff but also the costs of the consultation process. I think it is just a matter of timing that it is spread across two years; it does not necessarily imply that the consultation process will take two years.

Senator BRANDIS—I understand. Does that figure of \$2.8 million also include fees or payments that are expected to be made to consultants who may be retained by the government to advise it on the bill of rights?

Ms Lynch—It envisages the possibility of the costs of paying people who might carry out the consultations. As I said, the form of the consultations has not been decided, but some of that money could be spent on sitting fees or fees for people who might run the consultation.

Senator BRANDIS—That is really where I am heading. It is not envisaged that all this money will be spent hiring schools of art halls in the various towns of Australia, having community meetings and paying for cups of tea and coffee afterwards while community worthies come along and have their two bob's worth on a bill of rights. This is more than just engaging the general community; this is also the cost of paying experts to advise the government. Is that right?

Ms Lynch—Or the costs of paying people to conduct the process rather than necessarily providing advice to government. It is to conduct a consultative process.

Senator BRANDIS—Let us look at that. Is it expected that people with particular expertise will be engaged to run these public seminars and these public occasions when the public is consulted about the matter?

Ms Lynch—I think that is pre-empting a decision that is yet to be made as to what will be the final form of the consultative process.

Senator BRANDIS—I understand that.

Ms Lynch—Sorry, it could be.

Senator BRANDIS—It could be. Is that is one of the options?

Ms Lynch—I have to say that that is an option for the bench.

Senator BRANDIS—And what would these people be? Would they be facilitators, lawyers, or public relations experts? What would they be?

Ms Lynch—A number of processes have occurred around Australia relating to consultations on human rights in the states, and they have involved various models. If you look at some models you will see that they involved people conducting consultations and then reporting back to government. That might be one model. The money could be used to fund a variety of combinations or permutations of how it might be conducted. But the decision has not been made.

Senator BRANDIS—And might it also be the fees paid to retain the professional services of experts to advise the government directly?

Ms Lynch—It could be but, as I have said, no decisions have been made about that.

Senator BRANDIS—I wish to ask a really simple question which you might care to think carefully about, but I hope you will be able to answer it now. What is the question on which the public is being consulted? Can you frame that question for me?

Ms Lynch—The parameters of any consultation have not been finally determined. On a number of occasions the Attorney has talked about consulting the Australian public about how human rights might best be protected. He has also said on a number of occasions that there is no predetermined outcome from that consultation process.

Senator BRANDIS—That is what I am getting at. There are many people, of whom I am one, who have devoted their entire careers to arguing the case for human rights. I happen to believe that in this country a bill of rights is a very inefficient and potentially inimical instrument for advancing human rights. It might be best if I address this question to you, Mr Cornall. Are you able to give me an assurance that whatever form this process of consultation takes it will be a form of consultation that does not, even by implication, pre-judge the outcome? In other words, if it is a consultation about advancing human rights it will not be a consultation that is biased towards one particular model of human rights protection—for example, a bill of rights—rather than another.

Mr Cornall—I could not give you that assurance because the government has not made a decision on the matter. It is just not possible for me to give you an assurance about a decision that has not yet been made.

Senator BRANDIS—Senator Ludwig, you are the minister. Can you give me that assurance?

Senator Ludwig—To the extent that I represent the Attorney-General I could seek his views in respect of the matter. As I understand it, the government believes that the recognition and protection of human rights and responsibilities is a question of national importance for all Australians. I think you recognised that yourself.

Senator BRANDIS—I think most people in this parliament would be of a common mind in relation to that. They would have been of a common mind in relation to that since the beginning of this parliament.

Senator Ludwig—I think that is self-evident. The government has indicated its commitment to consulting with the Australian community to determine how to recognise and protect human rights and responsibilities. That consultation will provide an opportunity for Australians to have their say about how rights and responsibilities should be promoted.

Senator BRANDIS—From what document are you reading? Are you reading from the Attorney-General's statement? Senator Ludwig, you were reading from a document. From what document were you reading?

Senator Ludwig—I am giving you an answer to your question.

Senator BRANDIS—But you were reading from a document. Could you tell me what is that document?

Senator Ludwig—I am giving you an answer in respect of the question that you asked. That is the answer that I have given you.

Senator BRANDIS—All right. What you were reading to me seemed to be a considered formulation of a proposition. I am, therefore, wondering what its source is.

Senator Ludwig—As I have said, I have provided an answer to the question that you asked in respect of this issue.

Senator BRANDIS—Is it a secret where those words come from?

Senator Ludwig—I have answered the question that you asked earlier.

Senator BRANDIS—I know you have answered it; I am asking you where those words come from. Senator Ludwig, this is not a trick question. If you are reading from a statement that Mr McClelland made in a speech or in a press release just tell me, or do you not know?

Senator Ludwig—You asked a question about this issue and I have provided a response.

Senator BRANDIS—Okay. If you cannot answer the last question, you cannot. Do you give the committee an assurance that in this process there will not be bias or a predisposition to one particular model for the protection or advancement of human rights?

Senator Ludwig—Senator Brandis, I have not seen the final iteration of the consultation or the documents. As I said earlier, I can direct this question to the Attorney-General to see whether he can provide any additional information.

Senator BRANDIS—All right.

Senator Ludwig—However, as I have said, it is a matter of promoting and protecting human rights. There will be a consultative process, but the final form of that consultative process and what might be included in that document will be matters for the Attorney-General.

Senator BRANDIS—Sure.

Senator Ludwig—I am sure that the Attorney-General will take the opportunity to make that announcement in due course.

Senator BRANDIS—Sure.

Senator Ludwig—I think that departmental officials have also pointed you to documents that exist in other states. From recollection, I think there is one in Western Australia and there is also a process in Victoria. They might also help to inform you.

Senator BRANDIS—Documents in every jurisdiction in Australia protect human rights. Some people think—

Senator Ludwig—I am referring, in particular, to the process that is currently of interest to you.

Senator BRANDIS—I am sorry, I misheard you. Senator Ludwig, you know that there are many intelligent, experienced and sophisticated people on both sides of politics, including Mr Carr, the former Premier of New South Wales and Mr Hatzistergos, the current Attorney General of New South Wales, who share the view that I happen to hold that in this country having a statutory bill of rights would, for various reasons, be inimical to the advancement of human rights.

Having regard to the genuine cross-partisan community division about whether the mode apparently favoured by the Commonwealth Attorney-General—a statutory bill of rights—is a good or a bad thing, what safeguards will the government put in place in this consultation process to ensure that it is not predisposed towards the bill of rights model but, rather, gives a fair hearing to all the various points of view about the best way to protect human rights, including the point of view that states that they are well protected by the status quo? What safeguards will you put in place to ensure that?

Senator Ludwig—As I said earlier, I will take those issues on notice and ask the Attorney-General whether he can provide some assistance to you in that regard. It is still a matter for the Attorney-General to announce the process at some point.

Senator BRANDIS—I know that.

Senator Ludwig—I do not want to speculate on the content of that process.

Senator BRANDIS—I can understand why you say that, Minister. It is a fair point but I think that the point of my question is a little different. I am not asking you to speculate; I am

asking you to turn your mind to safeguards so that this process is what we might call value neutral.

Senator Ludwig—I understand the point that you make. As I said, I will seek the view of the Attorney-General in respect of how he would deal with that. I think it is still speculative in nature, but I am happy to take it on notice and seek his views in respect of that matter.

Senator BRANDIS—All right, thank you.

Senator Ludwig—I understand your interest in it.

Senator BRANDIS—It is more than an interest. I believe that they have a wonderful bill of rights in Zimbabwe and, of course, famously there was the most magnificent bill of rights in the former Soviet Union. People who think that having a bill of rights somehow guarantees human rights protection are simple-minded fools. Those who think that the absence of a formal bill of rights is inimical to human rights do not understand the success of the English legal system, as imported into this country. I am very concerned that the simple-mindedness of people who say, 'If we have a bill of rights we are, therefore, advancing human rights, and if we do not we are handicapping their advancement', might be allowed to overtake this debate so that it is conducted purely at a rhetorical level. Do you understand my concern, Senator Ludwig?

Senator Ludwig—I understand the point you are making; I certainly understand that.

Senator BRANDIS—Do you understand the concern that I have about this?

Senator Ludwig—You have indicated a concern about the matter. I have certainly—

Senator BRANDIS—Senator Marshall might be simple-minded enough to do that if I overheard his sotto voce interjection correctly. But I am sure that you would not be, Minister.

Senator MARSHALL—You have made the point more than once. Why don't you keep asking questions rather than making speeches?

Senator BRANDIS—Sorry, Minister, I think Mr Cornall has something for you that might shed some light on the matter.

CHAIR—Let us focus on these issues.

Senator BRANDIS—Yes.

Mr Cornall—I refer to question No. 61 from the estimates on 18 February this year, and to an answer to a question on notice from Senator Stott-Despoja. The twelfth question was:

Has the Attorney-General ruled out the enforceability of any Charter against corporations and private citizens, as reported in *The Sydney Morning Herald* on 1 December 2007?

The answer was:

The Government has indicated that the consultation will consider a range of options for recognising and protecting human rights in Australia and that it will not presuppose any outcome. The Government has also indicated that a legislative charter of rights is one option, but that any new approach will flow from the views expressed by the Australian people.

CHAIR—Mr Cornall, what was the number of that question on notice?

Mr Cornall—It was question No. 61.

Senator BRANDIS—Mr Cornall, that is a very fair statement. Do not get me wrong; I am not saying that, if you were addressing this issue, you would not consider a bill of rights as an option. Of course you would. My concern is that it should not be the only or the privileged option.

Mr Cornall—I think that is what the Attorney just said.

Senator BRANDIS—I think that is right, save for one thing. Will the options include the status quo?

Mr Cornall—It does not specifically say that. It does say ‘any new approach will be guided by the views of the Australian people’.

Senator BRANDIS—That does not really tell us very much, does it?

Mr Cornall—I will reread it. It states:

... any new approach will flow from the views expressed by the Australian people.

Senator BRANDIS—That does not really tell us very much. In a democracy one would assume that that was a given.

Mr Cornall—It does go, though, to a movement from the status quo.

Senator BRANDIS—Yes, all right. I will not go on. Did you want to say something about the bill of rights, Senator Barnett?

Senator BARNETT—Very briefly.

CHAIR—Senator Barnett, do you have any questions?

Senator BARNETT—I would like, briefly, to concur entirely with the views of Senator Brandis on a bill of rights. In 1986 I gave a speech and said that an Australian bill of rights would be wrong. At the time the American Bar Association in New York was flabbergasted. I was not able to convince too many of them of my view, but I said that Australia was different to the United States, essentially for two reasons. First, in my view, a bill of rights confines or restricts one’s rights and, second, it pushes the power over to the judiciary rather than being in the hands of the parliament, where in my view it should remain. I have a couple of questions on other matters, Madam Chair.

CHAIR—Do you have a question specifically on this output, Senator Barnett?

Senator BARNETT—Not on the bill of rights. I have a question about a constitutional matter—the recognition of local government—and I have a question about the issue of compensation.

CHAIR—Senator Brandis?

Senator BRANDIS—Go ahead, but would you leave me about 15 minutes before 11 o’clock, Senator Barnett, to ask questions of the Office for the Coordination of Legal Services?

Senator BARNETT—Very good. I would like to ask the department whether it has received instructions or provided advice to the government with respect to the merit or otherwise of the recognition of local government in the Constitution?

Mr Govey—I do not think we are aware of anything of that sort, Senator Barnett.

Senator BARNETT—I have tried to be specific with my question—that is, whether you have received instructions or given advice with respect to the merit or otherwise of the recognition of local government in the Constitution.

Senator BRANDIS—I hope you have heard something about it. It was one of the recommendations of the much-vaunted 2020 summit, or has that already disappeared down the memory hole?

Mr Govey—As I understood it, the question was whether we had been asked to give advice on that matter. We should take that question on notice because it could have gone to different areas of the department. I am not able to provide any response at this time.

Senator BARNETT—Are you confirming that you have not provided advice, but that you are not aware whether you have received instructions or advice? Is that your response?

Mr Govey—Personally I have not been involved in it but, of course, consistent with the earlier discussion, if the department had been asked for legal advice by another department we would need to refer the matter to the client department or agency. But I am not aware of anything.

Senator BARNETT—Right. Have you prepared any discussion papers or briefing papers on the matter?

Mr Govey—I have not personally, no.

Senator BARNETT—I am asking—

Mr Govey—I am not aware of any.

Mr Cornall—We are not aware of any.

Senator BARNETT—Could you also take that question on notice and advise us accordingly?

Mr Govey—Certainly.

Senator BARNETT—That would be good. I move to the apology that has been given—saying sorry—to Australia's Indigenous people, which was resolved in parliament a month or so ago. I do not have the date with me but you would know to what I am referring. Is that correct? Do you know what I am referring to?

Mr Govey—I do.

Senator BARNETT—Are you aware of the general discussion about its consequences—that is, the possibility or the potential for the Commonwealth, or state and territory jurisdictions, to pay compensation? Are you aware of that?

Mr Govey—We are aware of those issues, certainly.

Senator BARNETT—Have you provided advice to the government with respect to that matter?

Mr Govey—Mr Faulkner is in the best position to deal with that.

Mr Faulkner—The Department of Prime Minister and Cabinet has authorised me to say that that department obtained advice from the Attorney-General's Department and from the Australian Government Solicitor in relation to the apology.

Senator BARNETT—When was that advice provided?

Mr Faulkner—I would ask you to direct those questions to the department that sought and obtained the advice.

Senator BARNETT—That is not my understanding of the advice that I think we received from the Department of Prime Minister and Cabinet earlier today. Your response seems to me to be in breach of that advice. Would Mr Cornall like to comment?

Mr Faulkner—I can provide you with the date of the advice that I gave to the Department of Prime Minister and Cabinet. I can give you the date of advice that I know to have been given by the Australian Government Solicitor to the Department of Prime Minister and Cabinet. The date of the advice that I gave to the Department of Prime Minister and Cabinet was 9 January 2008, and the advice that I know was given by the Australian Government Solicitor to the Department of Prime Minister and Cabinet was 18 January 2008.

Senator BARNETT—Sorry, 18 January?

Mr Faulkner—That is right.

Senator BARNETT—Can you advise the committee whether that advice was consistent?

Mr Cornall—Senator, this goes to the content of the advice. I think we have done exactly what you asked us to do. We have told you who gave the advice, when the advice was given, and to whom the advice was given. I think that meets all the requirements in relation to the arrangements we discussed earlier.

Mr Govey—I should add that my understanding is that we are not aware that that is the only advice that was given. That is the only advice that we are aware of.

Senator BARNETT—Right. Mr Cornall, I entirely respect your response but I am allowed and privileged to ask relevant questions with respect to this advice or any other matters within the purview of the estimates.

Senator Ludwig—You just said that you have gone beyond the original concept and beyond the committee's understanding in respect of legal advice. You are now asking a comparative question about the content of the advice. If you are going to step beyond that my view would be that the officers are not required to answer the question. Quite frankly, that question should be directed to the Department of Prime Minister and Cabinet.

Senator BARNETT—Let us make it very clear, Minister. Let us ask the question—

Senator Ludwig—You cannot have it both ways. You have pressed appropriately for the detail that is permissible, what has been accepted by the committee and what the committee has pressed for some time. You cannot then say, 'Thank you, but I am now going to step beyond that.'

Senator BARNETT—It is not a matter of going beyond anything. I am entitled to ask questions and you have to provide the answers that you deem appropriate.

Senator Ludwig—I answered the question.

Senator BARNETT—Let me clarify the position as I see it from your point of view—that is, that you are refusing to provide the legal advice. Is that correct?

Senator Ludwig—That is correct.

Senator BARNETT—And you are refusing to provide the Australian Government Solicitor's advice to the Department of Prime Minister and Cabinet.

Senator Ludwig—The Australian Government Solicitor is not here to provide an answer to that question or to the answer that they may give. I will not prevent you from asking the Department of Prime Minister and Cabinet.

Senator BARNETT—All right.

Senator Ludwig—Referring to any legal advice that the Attorney-General's Department has, I do not intend to permit them to provide it.

Senator BARNETT—All right. Mr Faulkner, what is your position in the department?

Mr Faulkner—I am the Assistant Secretary of the Constitutional Policy Unit.

Senator BARNETT—In a nutshell, what is your history and background?

Mr Cornall—Is that—

Senator BARNETT—Another way of putting it is: are you a constitutional lawyer? I am trying to be polite and professional.

Mr Faulkner—Yes, I am. For the last 10 years or so I have been the head of the constitutional policy area in the department. Before that I was the head of the constitutional branch of the Office of General Counsel—what has become the Australian Government Solicitor.

Senator BARNETT—How many years is that?

Mr Faulkner—I have been the head of those areas for 12 or 13 years now.

Senator BARNETT—Right, and before that?

Mr Faulkner—I have a background in advisings and general counsel work for about 16 or 17 years now.

Senator BARNETT—Was the advice given by you and signed by you?

Mr Faulkner—It was given by me in writing in a manner that made it abundantly clear that it was my advice.

Senator BARNETT—That it was advice on behalf of Attorney-General's?

Mr Faulkner—Oh yes, by email.

Senator BARNETT—By email?

Mr Faulkner—That is right, which is not uncommon I would say.

Senator BARNETT—Right. Did you seek assistance in the provision of that advice? Did you liaise with colleagues, or is it simply your advice?

Mr Faulkner—It is my advice.

Senator BARNETT—Right. I now ask the minister: If we ask the Department of Prime Minister and Cabinet for that advice, can we be assured that the provision of that advice will also be refused?

Senator Ludwig—I am sorry, you will have to ask them that question. How can I answer on behalf of the Department of Prime Minister and Cabinet?

Senator BARNETT—All right. On what basis are you refusing this committee that advice?

Senator Ludwig—It is long established practice by both this government and previous governments not to provide legal advice.

Senator BARNETT—Yes, but you need to provide the reasons, Minister. In every case you have to provide the reasons. We have received advice from the Clerk of the Senate, which I can read to you if you want me to. I have it somewhere in the papers before me. You need to provide the reason for refusing to provide that advice.

Mr Cornall—Senator, I am sorry, but you are missing one point here. Advice is given to a department or to a minister. The minister or the department that receives the advice considers the request for its release. If the minister of the department that received the advice determines not to release the advice, the position you are putting is that that minister should explain the basis for such a refusal. It is not the requirement of the providing department or the advising department; it is the responsibility of the receiving department. I think that was the substance of the discussion we had earlier today about Mr Moran's letter.

Senator BRANDIS—With respect, it is a little simpler than that. I know that that might be the protocol observed by this government and it might have been the protocol observed by previous governments. However, you appreciate that as long as the question is a proper question, relevant to the estimates and not in breach of either standing orders or the Senate's procedural guidelines, the government has no discretion. That is what the Chair said in her opening statement. The custom of governments, of both complexions, to object to providing legal advice is really an imposition upon the courtesy of the committee and upon the privilege of the parliament. The government does not have the right to withhold the advice.

Mr Cornall—Senator, I thought we got to a point this morning where we agreed that the responsibility for making decisions about releasing the advice was the responsibility of the minister who received the advice, not the agency that provided it.

Senator BRANDIS—You said that. If you are talking about you and me, I do not think we did agree; but we had an interesting discussion. If I might say so, I think it was a very interesting discussion. Nevertheless, it is very simple: if you have a document which is relevant to a proper question, or if you or your officers have knowledge that enables you to answer a proper question, you do not have a right to withhold that document or that evidence from the parliament.

To the extent to which officers, under instructions from the government, choose to do that—and I acknowledge that it has been done by both sides—you are invoking what is said to be a practice or custom of the committee. As you well know, a practice or custom of the

committee cannot prevail over the express language in the standing orders or the procedural rules of the Senate, nor can it impinge on the privilege of the Senate. As Senator Barnett rightly pointed out, there is recent written advice from the Clerk of the Senate—who, although not a lawyer, might at least be regarded as an expert on the issue of the privilege of the Senate—that verifies those propositions.

Mr Cornall—I am glad that you raised that, Senator, because I have a letter dated 22 April from the Clerk of the Senate, which is addressed to me. We had some preliminary discussions about the discussion that we had at the last estimates relating to where we stood on legal advice. In that letter to me, Mr Evans said:

Because advice to ministers by definition belongs to ministers, unless an officer knows that there are some circumstances (for example, the advice has already been published or disclosed, or the minister has indicated that it may be disclosed) which make it unnecessary to refer the question to the minister, an officer when asked to disclose advice given to a minister is always on good ground in referring the question to the secretary of the department or to the minister.

I think that is the position we are taking. I can table this letter, if that would be of assistance.

Senator BRANDIS—I think it would be very helpful if you tabled that letter, Mr Cornall, and that will add to the body of custom and precedent relating to this issue. However, the extract from Mr Evans's letter to you does not address the question of knowledge. Let us assume for the sake of this discussion that it would be right to say that the physical copy of the advice should not be provided other than in the circumstances there referred to. If the officer has knowledge, whatever the source, which enables him to respond to a proper question then he has no right to withhold that knowledge without breaching the privilege of the parliament. It then becomes a question of custom and practice and it becomes a question of whether the committee, or a senator, is prepared to take up the matter on the floor of the chamber and seek to enforce the privilege of the parliament.

Mr Cornall—Senator, if that were correct and if we were only talking about the written piece of paper that constitutes the advice but not the substance of the advice then the instructions that we have been given do not make any sense.

Senator BARNETT—Perhaps If I could come in here, through you, Chair, and alert you to a letter from the Clerk of the Senate to Mr Peter Hallahan, Secretary of our Senate Legal and Constitutional Affairs Committee, dated 19 February 2008. I quote the paragraph that states:

There is nothing in the rules of the Senate which prevents a Senator requesting, or a committee or the Senate itself requiring, the production of legal advice to government. The Senate, like other comparable legislatures, has never accepted the claim that legal advice should not be disclosed as a sufficient basis for not disclosing it in particular cases. Past resolutions of the Senate make it clear that, if ministers do not wish to produce advice, or any other information, they are expected to raise a public interest ground for the consideration of the committee or the Senate. As the advice quoted to the committee indicates, public interest grounds which have been regarded in the past as having some validity include prejudice to legal proceedings, disclosure of Cabinet deliberations or prejudice to the Commonwealth's position in negotiations.

Earlier, when I asked you for reasons for your refusal to provide this advice I was seeking for the minister or for Mr Cornall to advise the committee as to why you were refusing to produce that advice. I think that the letter from the Clerk of the Senate makes it clear.

Mr Cornall—That letter clearly refers to the minister who received the advice making the decision about its release.

Senator BRANDIS—To which letter are you referring, Mr Cornall?

Mr Cornall—The letter from which Senator Barnett just quoted.

Senator BRANDIS—Mr Harry Evans's letter?

Mr Cornall—Yes, the first letter. Following receipt of that letter—and I also got a copy of that letter—I had a discussion with Mr Evans at the 2020 Summit. We discussed this matter in some detail, as a result of which he wrote me this subsequent letter. I think the content of both letters indicates that the minister who receives the advice should be asked for it, and he should make the decision about whether or not to release it and, if he decides not to release it, he has to express the grounds on which he refuses to do so.

CHAIR—Mr Cornall, I would like to clarify the situation as I think we are getting a bit bogged down. As I understand it, the questions that have been asked include questions relating to whether or not you received advice and on what date, and those answers have been provided. As I understand it now Minister Ludwig, on behalf of the Attorney General—

Senator Ludwig—There are two issues. The first related to—

CHAIR—Minister, let me finish. You are not able to provide that advice, so it is your intention to ask the Attorney-General under what public interest ground that advice is not being provided.

Senator Ludwig—We had not reached a position where we had finalised the matter. There were two issues: whether or not the question should be appropriately directed to the Department of the Prime Minister and Cabinet and the relevant minister who is the recipient of the advice. If that is not accepted or they do not wish to do that, I will ask the Attorney-General whether he wants to reflect on the question asked by Senator Barnett. Clearly, it is outside my position. I have not received the advice, so I am not in a position to release the advice, either.

Senator BARNETT—Minister, would you be kind enough to take the question on notice? Tonight you refused to do so. I asked you to provide reasons for that refusal. As you have not provided those reasons I would like you to take the question on notice and respond to it.

Senator Ludwig—Referring to the first part of your question, I said it should be directed to the Department of the Prime Minister and Cabinet. If you take that as a refusal—

Senator BARNETT—That is the view that has been put by Mr Cornall.

Senator Ludwig—No, that is the view that I put.

Senator BRANDIS—Well, it is not a view that is accepted.

Senator BARNETT—It is not a view that is accepted and it is not a view that is shared by some members of the committee.

Senator Ludwig—I do not think you followed what I said. Given that you obviously think there is some controversy surrounding that view, I will take your question on notice and ask the Attorney-General to reflect on the question you put and to see what answer he can provide.

Senator BARNETT—If we adopt Mr Cornall's approach—I respect your view but I have a different opinion—we will be going around in circles. We are asking the department questions about a whole host of things. We will be racing around in circles like headless chooks. I do not think that approach is consistent with our professional role as senators.

Senator BRANDIS—Senator Ludwig, you well know that the estimates for the Department of the Prime Minister and Cabinet have finished. Those estimates finished this evening at 11 o'clock. If you were right, the course that you have recommended might suffice in a non-urgent case. But in a case where there is a criticality about how soon the advice is produced to the Senate, it really is a dodge.

Senator Ludwig—I reject that statement; it is not a dodge. You can still put the question on notice if you want to do so, or I can ask for it to be put on notice.

Senator BRANDIS—You can always ask that it be put on notice; I am not cavilling with that.

Senator Ludwig—Do not give me that. You raised this issue at this late hour; I did not raise it.

Senator BRANDIS—It is really a resumption of an exchange that you will remember occurred much earlier in the day.

Senator Ludwig—It is not a resumption; it is a new request.

Senator BRANDIS—Yes, but essentially it is the same issue. The proposition I am putting to you is this—

Senator Ludwig—We do not agree on this.

Senator BRANDIS—Let me state my proposition. Senator Ludwig, you will recall that, at the last estimates, I had to fight literally for hours in the face of stonewalling. As a result, Mr Moran, the new head of the Department of the Prime Minister and Cabinet, wrote a letter on Friday, which was produced today, which advances the issue somewhat. It has been acknowledged to me informally that it was because of that series of questions that I asked at the last estimates that that response was sought and given. So there is some utility in the Senate pressing these matters of privilege. Let me state the position, Senator Ludwig. Any relevant question which is not, for some other reason, out of order must be answered. It is not a sufficient ground for you or for any witness to say, 'It is more appropriate to ask this in another estimates committee.'

If a witness at the table knows the answer to a proper and relevant question that witness is obliged to provide the answer. These various objections and grounds for refusal are partly covered by exceptions created by the Senate procedural rules, but more commonly created by the custom and practice of committees, which reflects the forbearance of senators in pressing the privilege of the Senate on the executive government. But it is never sufficient for a witness to say in response to an otherwise relevant and proper question to which an answer is

available, 'We choose not to give this answer because we think it could be asked more appropriately in a different estimates committee.' If you know the answer and it is a proper question it is necessary for it to be provided.

Senator MARSHALL—Perhaps I could add to the debate. Under the previous government, in estimates committees not only did the government support officials in not providing the time or whether certain advice was sought. The former government actually supported departmental officials relying on section 13(6) of the Public Service Act as grounds for not providing the detail about the time or whether advice had been sought or provided, let alone the content of the advice. While we welcome your new-found interest in transparency, it is—

Senator BRANDIS—Senator Marshall, I think you are being political. We are trying to debate a constitutional issue.

CHAIR—Order!

Senator MARSHALL—No more than the pompous political speeches we have heard from you all day, Senator.

Senator Ludwig—We are not actually debating—

CHAIR—Order, Senator Ludwig! People have been heard pretty much in silence tonight. We have let people come to the end of their questions, speeches, lectures, or whatever you want to call them. Senator Marshall has the call and I expect you to extend to him the same level of courtesy.

Senator MARSHALL—I think I have made my point.

CHAIR—Senator Barnett, do you have further questions on this issue?

Senator BARNETT—No.

CHAIR—Senator Brandis?

Senator BRANDIS—Not on this issue.

CHAIR—Let us move on to general questions in outcome 1.

Senator BRANDIS—In the time available could I ask questions of the Office of Legal Services Coordination in relation to government procurement of legal services?

CHAIR—Yes.

Senator BRANDIS—Dr Popple, did you hear the evidence that was given earlier in the day relating to the working group? I understand that your office is the lead agency, or the lead entity, concerning the procurement of government legal services.

Dr Popple—Yes, I heard that questioning, which I think referred to the Australian Government Solicitor.

Senator BRANDIS—Mr Govey helpfully gave us eight issues with which that working group is concerned. Given the time, I want you to take some questions on notice, but I will read them onto the record, if that is all right. I will then ask you perhaps one other question. With reference to each of the eight topics listed by Mr Govey—for the purposes of my question you can take it that I am adopting his formulation of each of those eight topics—

what is the position of your office, the Office of Legal Services Coordination? I would like to have details of each of the meetings of the working group which was referred to in earlier evidence. If those meetings were minuted or some record of the discussions and decisions of those meetings was made, I would like copies of those documents. I would like to know—and perhaps you can tell me this now—when it is planned that the working group will be producing some recommendations to government? Perhaps you could tell me that now.

Dr Popple—Senator, I think I can answer some of your questions now. First, there is actually no working group. At the request of the Attorney, we are engaging in a process of consultation involving stakeholders, which means legal service providers, agencies and other people interested in this area. What has been happening—and this was referred to earlier today—is a series of meetings that are being held with stakeholders where those issues and the issues to which Mr Govey referred—

Senator BRANDIS—Could you also give me a list of the participants at those meetings—who each of the stakeholders are?

Dr Popple—We can certainly do that, Senator.

Senator BRANDIS—Thank you.

Dr Popple—I do not think it is fair to say that we have minutes of that meeting. We certainly took copious notes because the whole idea of that process was to get some idea from the stakeholders what they thought about those issues.

Senator BRANDIS—Sure.

Dr Popple—While I think of it, I wish to correct a point made this morning by Ms de Gruchy in response to one of your questions. She indicated that in the consultation process we were seeking answers to these questions by 3 June but it is actually 6 June. If the government decides to adopt some of our suggested reforms we would be hoping to have them implemented by as early as 1 July. However, we do not believe that the proposal to have a single RFT will be implemented until 1 September.

Senator BRANDIS—Will the decisions and the recommendations that are to be made to the government by 6 June be published before the government determines them? Will there be a discussion paper or some other form of public document?

Dr Popple—Senator, as I said, one of the documents that we released for consultation was a draft proposed RFT and some commentary on that proposed draft. It raises several questions that we have asked stakeholders to address and perhaps answer. In that document we have indicated that submissions in response to the questions that we have asked will be considered public documents, unless the submitters indicate otherwise. I suspect that we will probably put them on our website, unless the people who make those submissions indicate that the comments they are making are, for example, commercial in-confidence, which is possible for some stakeholders.

Senator BRANDIS—I understand. In the couple of minutes that are left, you will recall at the last estimates committee hearing that I also asked you a series of questions about efficiencies that your office was seeking to bring about in Commonwealth legal services procurement. Presumably the exercise in which you are now engaged is being engaged in

with a view to seeking those efficiencies. Since the last estimates committee hearings what other steps has your office taken to seek to address those issues of efficiencies, or perhaps some would say inefficiencies, across the whole-of-government and across agencies in the procurement of legal services?

Dr Popple—I do not think there is anything I can point to in addition to the points that Mr Govey iterated this morning, which were fairly broad in their scope.

Senator BRANDIS—All right. Not all these topics are directed to efficiencies, are they? Some of them are directed by other values, for example the question of whether some preference should be given to legal practitioners and firms providing pro bono work. That is not an efficiency measure, is it?

Dr Popple—No, it is not.

Senator BRANDIS—And affirmative action is not an efficiency measure, is it?

Dr Popple—No.

Senator BRANDIS—Whereas some of the measures, for example, the optimal use of ADR, might be thought to be an efficiency measure?

Mr Cornall—Affirmative action policy may increase the available pool of barristers. It may increase competition between barristers.

Senator BRANDIS—A perfectly efficient and transparent market, without any preferencing on grounds other than merit and without any discrimination against people on grounds other than merit, will do that.

Dr Popple—Senator, perhaps I should point out that at no stage in our consultations has anyone suggested an affirmative action policy.

Senator BRANDIS—I should say that affirmative action is my shorthand expression for what—

Dr Popple—If you want to talk about the briefing of female counsel, to my knowledge no-one has suggested that there should be a policy that favours female counsel beyond the existing provisions in the legal service directions, which require agencies to consider the briefing of female counsel before they—

Senator BRANDIS—The first of the eight topics identified by Mr Govey was to establish a whole-of-government legal services panel. Is that the principal measure that you intend to use to address this issue of maximising the power of the Commonwealth as a bulk purchaser or a bulk acquirer of legal services, which we discussed at the last estimates?

Dr Popple—That is one of the proposals that has been put. I do not think it is fair to say that it is the principal measure. In fact, the Attorney is already on record as indicating that he has some scepticism about the capacity of that proposal to deliver significant efficiencies.

Senator BRANDIS—As time is against us, my last question is: what would you say is the principal measure that you are looking at to address that issue?

Dr Popple—It is very hard to pick out one issue. As Mr Govey said, there are at least eight important measures that we are looking at. They will all have some impact if the government

chooses to adopt them all. I do not think it is appropriate for me to choose one from all those measures.

Senator BRANDIS—I will leave it there. Dr Popple, I would be indebted to you if you would take those questions on notice.

CHAIR—That concludes the time for questions for the Attorney-General's Department. I ask that all further questions be placed on notice. Mr Cornall, I thank you and all the officers right across your department for your attendance and your efforts in the estimates process.

Senator BRANDIS—Mr Cornall, at about 4.15 pm I asked the officer concerned with the Haneef inquiry to provide, before the close of these estimates, some information concerning the names of the law firms that were consulted in relation to the legal work for the Haneef inquiry. Was that information provided?

Mr Cornall—Yes, it has been read into the *Hansard*.

CHAIR—Yes, it was.

Senator BRANDIS—Thank you very much.

Committee adjourned at 11.01 pm