



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE

ESTIMATES

(Supplementary Budget Estimates)

MONDAY, 19 OCTOBER 2009

CANBERRA

BY AUTHORITY OF THE SENATE

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS**LEGISLATION COMMITTEE****Monday, 19 October 2009**

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Feeney, Fisher, Ludlam and Marshall

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Abetz, Barnett, Bishop, Brandis, Feeney, Fierravanti-Wells, Fisher, Hanson-Young, Heffernan, Hutchins, Ludlam, Marshall, McLucas, Milne, Parry, Trood and Xenophon

Committee met at 9.00 am

ATTORNEY-GENERAL'S PORTFOLIO**In Attendance**

Senator Joe Ludwig, Special Minister of State

Senator Penny Wong, Minister for Climate Change and Water

Attorney-General's Department**Management and Accountability**

Mr Roger Wilkins AO, Secretary

Ms Renee Leon, Deputy Secretary, Strategic Policy and Coordination Group

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

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

Outcome 1—An equitable and accessible system of federal civil justice**Program 1.1 Access to Justice and Social Inclusion****Sub Program 1.1.1 Access to Justice**

Ms Alison Playford, Acting First Assistant Secretary, Access to Justice Division

Ms Catherine Fitch, Acting Assistant Secretary, Administrative Law Branch

Ms Vicki Parker, Assistant Secretary, Marriage and Intercountry Adoption Branch

Mr Matt Minogue, Assistant Secretary, Justice Improvement Branch

Ms Toni Pirani, Assistant Secretary, Family Law Branch

Mr Andrew Henderson, Acting Assistant Secretary, Federal Courts Branch

Ms Sandra Power, Special Adviser, Federal Courts Branch

Sub Program 1.1.2 Social Inclusion

Mr Kym Duggan PSM, Acting First Assistant Secretary, Social Inclusion Division

Dr John Boersig PSM, Assistant Secretary, Human Rights Branch
Ms Amanda Davies, Special Adviser, Human Rights Branch
Dr Albin Smrdel, Assistant Secretary, Legal Assistance Branch
Mr Peter Arnaudo, Assistant Secretary, Indigenous and Community Legal Services Branch
Ms Tamsyn Harvey, Assistant Secretary, Claims and Legislation Branch, Native Title Unit
Ms Kathleen Falko, Acting Assistant Secretary, Future Acts and System Coordination
Branch, Native Title Unit

Program 1.2 Legal Services

Sub Program 1.2.1 Civil Law

Dr James Pople, First Assistant Secretary, Civil Law Division
Ms Janette Davis, Assistant Secretary, Office of Legal Services Coordination
Mr David Bergman, Assistant Secretary, Bankruptcy Policy Branch
Mr Richard Glenn, Assistant Secretary, Personal Property Securities Branch

Sub Program 1.2.2 Classification and Copyright

Mr Julian Yates, Acting First Assistant Secretary, Territories and Information Law Division
Ms Jane Fitzgerald, Assistant Secretary, Classification Operations Branch
Ms Helen Daniels, Assistant Secretary, Copyright and Classification Policy Branch
Ms Kathryn Reidy, Manager, Education and Communications, Classification Operations
Branch
Dr Susan Cochrane, Principal Legal Officer, Copyright and Classification Policy Branch

Sub Program 1.2.3 Legislative Drafting and Publishing

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

Sub Program 1.2.4 International Law

Mr Bill Campbell QC, First Assistant Secretary, Office of International Law
Mr Stephen Bouwhuis, Assistant Secretary, International Law and Trade Branch
Dr Annemarie Devereux, Assistant Secretary, International Security and Human Rights
Branch

Sub Program 1.2.5 Constitutional Policy and Law Reform

Mr Iain Anderson, First Assistant Secretary, Priorities and Coordination Division
Mr James Faulkner PSM, Assistant Secretary, Constitutional Policy Unit

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

Program 2.1 National Security

Sub Program 2.1.1 National Security Resilience Policy

Mr Mike Rothery, First Assistant Secretary, National Security Resilience Policy Division
Mr Michael Jerks, Assistant Secretary, Critical Infrastructure Protection Branch
Mr Alex Webling, Acting Assistant Secretary, Protective Security Policy Branch
Mr David Prestipino, Acting Assistant Secretary, Emergency Management Policy Branch
Ms Sheridan Evans, Assistant Secretary, Identity Security Branch
Ms Marcella Hawkes, Acting Assistant Secretary, E-Security Policy and Coordination
Branch

Sub Program 2.1.2 Emergency Management

Mr Tony Pearce, Director General, Emergency Management Australia
Mr Mark Carpenter, Assistant Secretary, Crisis Support Branch

Mr Jim Dance, Assistant Secretary, Crisis Coordination Branch

Mr Aaron Verlin, Acting Assistant Secretary, Protective Security Coordination Branch

Mr Kevin Rheese, Director, Relief and Recovery Section

Mr Aiden Collie, Assistant Director, Special Projects, Crisis Support Branch

Sub Program 2.1.3 National Security Capability Development

Mr Martin Studdert, First Assistant Secretary, National Security Capability Development Division

Mr Peter Channells, Assistant Secretary, Emergency Management Capability Development Branch

Sub Program 2.1.4 National Security Law and Policy

Mr Geoff McDonald PSM, First Assistant Secretary, National Security Law and Policy Division

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

Ms Belinda Moss, Assistant Secretary, National Security Policy Branch

Ms Annette Willing, Assistant Secretary, Security Law Branch

Dr Karl Alderson, Assistant Secretary, AusCheck Branch

Program 2.2 Criminal Justice

Sub Program 2.2.1 Criminal Justice

Ms Elizabeth Kelly, First Assistant Secretary, Criminal Justice Division

Dr Dianne Heriot, Assistant Secretary, Border Management and Crime Prevention Branch

Ms Sarah Chidgey, Assistant Secretary, Criminal Law and Law Enforcement Branch

Mr Anthony Coles, Director, Financial Crime and Border Management Section

Sub Program 2.2.2 International Crime Cooperation

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

Mr Steven Marshall, Assistant Secretary, International Crime Policy and Engagement Branch

Ms Alex Hutton, Special Adviser, International Legal Assistance Unit

Ms Susanna Ford, Acting Assistant Secretary, International Crime Cooperation Central Authority

Outcome 3—Assisting regions to manage their own futures

Program 3.1 Services to territories

Mr Julian Yates, Acting First Assistant Secretary, Territories and Information Law Division

Mr Stephen Clay, Acting Assistant Secretary, Territories West Branch

Ms Alison Green, Acting Assistant Secretary, Territories East Branch

Strategic Policy and Coordination Group

Finance and Property Division

Mr Stephen Lutze, General Manager, Finance and Property Division

Mr Trevor Kennedy, Assistant Secretary, Financial Management Branch

Priorities and Coordination Division

Mr Iain Anderson, First Assistant Secretary, Priorities and Coordination Division

Mr James Faulkner PSM, Assistant Secretary, Constitutional Policy Unit

Mr David Finlayson, Assistant Secretary, Public Affairs Branch

Mr Matt Hall, Assistant Secretary, Cabinet and Ministerial Coordination Branch

Mr Greg Manning, Assistant Secretary, Strategic Policy and Law Reform Branch

People, Information and Technology Division

Ms Michele Kane, Acting General Manager, People, Information and Technology Division

Australian Crime Commission

Mr John Lawler APM, Chief Executive Officer

Ms Jane Bailey, Executive Director, People and Business Support

Australian Customs and Border Protection 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

Mr Steven Groves, Chief Financial Officer

Ms Jaclyne Fisher, National Director, Cargo

Ms Jan Dorrington, National Director, Passengers

Ms Sue Pitman National Director, Trade and Compliance

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

Dr Ben Evans, National Director, Law Enforcement Strategy

Australian Federal Police

Mr Tony Negus APM, Commissioner

Mr Roman Quaedvlieg, performing the duties of Deputy Commissioner, Operations

Mr Tim Morris, performing the duties of Deputy Commissioner, National Security

Mr Paul Jevtovic, performing the duties of Chief Operating Officer

Australian Government Solicitor

Ms Louise Vardanega, Acting Chief Executive Officer

Mr David Riggs, Chief Financial Officer

Australian Human Rights Commission

The Hon. Catherine Branson QC, President and Human Rights Commissioner

Mr Graeme Innes AM, Disability Discrimination Commissioner and Race Discrimination Commissioner

Ms Elizabeth Broderick, Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination

Mr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner

Ms Susan Roberts, Executive Director

Mr David Richards, Manager, Finance and Services

Australian Law Reform Commission

Emeritus Professor David Weisbrot AM, President

Ms Sabina Wynn, Executive Director

Australian Security Intelligence Organisation

Mr David Irvine AO, Director-General of Security

Deputy Director-General

Australian Transaction Reports and Analysis Centre

Mr John Schmidt, Chief Executive Officer
Mr Thomas Story, Executive General Manager
Ms Amanda Wood, General Manager, Banking and Finance
Mr Alf Mazzitelli, General Manager, Corporate and Chief Finance Officer

Classification Board

Mr Donald McDonald AC, Director
Ms Olya Booyar, Deputy Director

Classification Review Board

The Hon Trevor Griffin, Deputy Convenor

CrimTrac Agency

Mr Ben McDevitt, Chief Executive Officer
Ms Nicole McLay, Chief Finance 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 Peter Bowen, Chief Finance Officer
Mr Gordon Foster, Executive Director, Corporate Services

Federal Magistrates Court of Australia

Mr Richard Foster PSM, Acting Chief Executive Officer
Mr Steve Agnew, Acting Deputy Chief Executive Officer
Mr Grahame Harriott, Acting Chief Finance Officer

High Court of Australia

Mr Andrew Phelan, Chief Executive and Principal Registrar
Ms Carolyn Rogers, Senior Registrar
Mr Jeff Smart, Manager, Corporate Services

Insolvency and Trustee Service Australia

Ms Veronique Ingram, Chief Executive and Inspector-General in Bankruptcy
Mr Bob Morison, Chief Finance Officer
Mr Matthew Osborne, Principal Legal Officer

National Native Title Tribunal

Ms Stephanie Fryer-Smith, Registrar
Mr Hugh Chevis, Director, Service Delivery
Mr Poolin Malde, Senior Accountant, Principal Registry

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

Office of Parliamentary Counsel

Mr Peter Quiggin PSM, First Parliamentary Counsel
Ms Susan McNeilly, General Manager and Chief Finance Officer

ACTING CHAIR (Senator Marshall)—I declare open this public hearing of the Legal and Constitutional Affairs Legislation Committee. The Senate has referred to the committee the particulars of proposed expenditure for 2009-10 and related documents for the Attorney-General's and Immigration and Citizenship portfolios. The hearing today is supplementary to the budget estimates hearings held in May. The committee has before it a list of agencies and outcomes relating to matters for which senators have given notice. The committee has set 11 December 2009 as the date by which answers to questions on notice are to be returned.

Under standing order 26, the committee must take all evidence in public session. This includes answers to questions taken on notice. Officers and senators are familiar with the rules of the Senate governing estimates hearings. If officers or senators need assistance, the secretariat has copies of those rules. I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009 specifying the process by which a claim for public interest immunity should be raised and which I now incorporate into *Hansard*.

The extract read as follows—

Public interest immunity claims

That the Senate—

- (a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;
- (b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;
- (c) orders that the following operate as an order of continuing effect:
 - (1) If:
 - (a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and
 - (b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.
 - (2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.
 - (3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.
 - (4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

- (5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
- (6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.
- (7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).
- (8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(Extract, Senate Standing Orders, pp 124-125)

The committee will commence examination of the Attorney-General's portfolio and will begin proceedings with some someone in the first batch of witnesses listed on the agenda. I welcome Senator the Hon. Penny Wong, representing the Attorney-General and the Minister for Home Affairs, and officers of the Australian Human Rights Commission, when they arrive. Minister, would you like to make an opening statement?

Senator Wong—No, thank you, Chair.

ACTING CHAIR—Mr Wilkins, would you like to make an opening statement?

Mr Wilkins—No, thank you, Chair.

ACTING CHAIR—Okay. Who do we have before us who is going to kick off the Attorney-General's Department or the agencies?

Mr Wilkins—Just the Attorney-General's Department, I think, is here.

ACTING CHAIR—We were going to start with the first batch of agencies, which is the Australian Human Rights Commission, the Australian Law Reform Commission, the Australian Transaction Reports and Analysis Centre, Family Court of Australia, Federal Magistrates Court, Federal Court of Australia and the National Native Title Tribunal. Are any of those bodies here this morning?

Mr Wilkins—I understand that they are detained at the airport. There has been some problem with the aeroplane or getting them here.

ACTING CHAIR—On that basis, with the concurrence of other senators, we should move to the Attorney-General's Department, outcome 1, an accessible and accessible system of federal and civil justice. We will go to general questions there. Senator Barnett.

Senator BARNETT—Thank you, Mr Chair, and thank you for being a good acting chair, filling in for Senator Crossin. Thank you to the agency and Mr Wilkins. It is good to see you and your colleagues again. Senator Wong, greetings. Perhaps you could let us know when one of those agencies arrive. We have on our schedule the Australian Human Rights Commission as the first agency to appear before us, and then the list as per the chair's indication, which I understand is on the public record as well. We do have questions prepared for them and ready

to go. Let us go to the department, and perhaps we could check, Mr Wilkins, with respect to your annual report: when will it be tabled, and can you advise the committee as such.

Mr Wilkins—We are expecting it to be tabled on Wednesday.

Senator BARNETT—All right. You may have read in the legal and constitutional affairs committee report on annual reports that we do appreciate receiving the annual report prior to estimates. Here we are without your annual report, if it is to be tabled on Wednesday, and the same applies not just to your department but across all the agencies and, indeed, all government departments. So there is a level of frustration on the part of many senators and, I think, others. We would appreciate those annual reports prior to estimates, as they would inform senators more comprehensively.

Mr Wilkins—I appreciate that. We are complying with the time frames that have been set by law, so it might be something which the parliament might like to look at in terms of what the actual timing requirements are, because I assume there are lots of people who would like to see it earlier than it is required. But I appreciate your point.

Senator BARNETT—Thank you. The time frames required by law are maximum time frames—they are to be tabled by a certain date—which provides the discretion and the opportunity for them to be provided before the last date when they are required. So that is noted. Thanks, Mr Wilkins. Perhaps we could go to the staffing arrangements in terms of how many staff have been recruited since budget estimates, what level these staff are and how many temporary positions exist or have been created since budget estimates. Perhaps you could provide a status report on the overall staffing numbers.

Mr Wilkins—We will have to take that on notice and get back to you.

Senator BARNETT—Is that today?

Mr Wilkins—I think we could do it today, yes.

Senator BARNETT—Thank you. While you are taking that on notice, since budget estimates how many employees have been employed on contract and what is the average length of their employment period? Have staff numbers been reduced as a result of the efficiency dividend and/or other budget cuts? If so, where and at what level? Are there any plans for staff reduction? If so, please advise us of details.

Senator Wong—I assume you are reading these straight through just to put them on notice.

Senator BARNETT—I would like, in terms of the staffing numbers—

Senator Wong—You have not stopped between the questions, so I am wondering—

Senator BARNETT—Mr Wilkins said that he had to take that on—

Senator Wong—That is fine. So all of these are being placed on notice, with the request that the staff numbers come back today—is that right?

Senator BARNETT—Correct. That is why I advised those questions as such.

Mr Wilkins—Do you have the questions there, Senator?

Ms Leon—It is just that we have not been able to write those down.

Mr Wilkins—Can you go through them again.

Senator BARNETT—Sure. Do you have the first three?

Mr Wilkins—No.

Senator BARNETT—Okay. How many permanent staff have been recruited since budget estimates? What level are these staff? How many temporary positions exist or have been created since budget estimates?

Mr Wilkins—Do you mean new positions?

Senator BARNETT—Yes.

Mr Wilkins—So, if we are just filling a vacancy, you are not asking about that.

Senator BARNETT—No, we are talking about new positions.

Mr Wilkins—So when you say, ‘How many permanent staff?’ you mean: how many new positions for permanent staff have been created and filled since budget estimates?

Senator BARNETT—Correct, yes—how many new positions and then how many temporary positions exist or have been created since budget estimates.

Mr Wilkins—‘Exist’ or ‘have been created’?

Senator BARNETT—Both. We need to know how many temporary positions there are and how many have been created.

Mr Wilkins—Since budget estimates?

Senator BARNETT—Since budget estimates.

Mr Wilkins—Okay.

Senator BARNETT—Then you need to give us an overview on staff numbers compared to the previous 12 months.

Mr Wilkins—Right—so just the—

Senator BARNETT—You must know how many staff you have.

Mr Wilkins—We can answer that.

Ms Leon—Senator, I can answer that part of your question. At September 2008 the department had a total of 1,450.49 FTE. At 10 September 2009 the department had a total of 1,391.35 full time equivalent employees. The reduction is 59.14 FTE in the last 12 months.

Senator BARNETT—Is that because of the efficiency dividend or for other reasons?

Ms Leon—It is a combination of the termination of programs that were due to terminate in any event and some impact of the efficiency dividend.

Senator BARNETT—Can you be more specific with respect to the impact of the efficiency dividend?

Ms Leon—I cannot specify the breakdown at this stage, no. I can inform you of what programs have terminated; we can take that on notice.

Senator BARNETT—Yes, I will be getting to that, but you have jumped ahead, so thank you for that. Can you advise on the programs affected by the impact of the efficiency dividend?

Ms Leon—The efficiency dividend applies across all areas of government.

Senator BARNETT—I am aware of that, and that is why I am asking what programs have been affected.

Ms Leon—We find efficiencies throughout the department, not always through the reduction of staff numbers.

Senator BARNETT—Can you be more specific? We have asked this question at previous estimates, and you have advised on previous occasions that certain programs have been either cut back or abolished altogether.

Senator Wong—I think there is an assumption in your question which perhaps should be clarified, Senator. I am sure that Ms Leon can indicate to you which programs have concluded. I think that for you to interpolate that that is all as a result of the efficiency dividend is incorrect. Obviously this department, like all departments—except one, I think—is subject to an efficiency dividend. They will make decisions about how to best meet that overall, which may or may not involve programs, which may involve other efficiencies. I think that is what Ms Leon was expressing. I think it is important to be clear that we do not accept the assumption that is behind the way in which the question is phrased.

Ms Leon—I think I said, Senator, that the programs that terminated are ones that were scheduled to terminate. So some funding is provided in the budget for programs that have only a fixed term. For example, measures that terminated on 30 June this year were: funding for the China free trade agreement, funding for the Japan free trade agreement, funding for the Clarke inquiry, funding for the Cole inquiry, and funding for some aspects of closing the gap. These were one-off measures that were provided within 2009-10: funding for natural disaster mitigation and funding for the national security public information campaign.

Senator BARNETT—What was the last one again?

Ms Leon—There was additional funding provided in 2009-10, but the original funding that was terminated at 30 June 2009 was for the national security public information campaign. These were re-funded in 2009-10.

Senator BARNETT—They were re-funded—

Ms Leon—In the 2009-10 budget. But the first three that I mentioned were measures that terminated and were not the subject of new funding.

Senator BARNETT—The China free trade agreement and the Japan free trade agreement: excuse my ignorance, but that funding for those negotiations is completed?

Ms Leon—There was specific funding for the negotiators for those agreements.

Senator BARNETT—What is the status of the China free trade agreement?

Mr Wilkins—This is simply money for our department. Clearly the China free trade agreement and the Japan free trade agreement are not run out of this department, but the department contributes to some aspects of the negotiations, so it is simply a question of mainstreaming that—

Senator BARNETT—How many people have you had involved in the China and Japan free trade agreements? Can you specify?

Mr Wilkins—I cannot specify how many. It is sort of the wrong way of looking at it. The international law people have been involved in it.

Senator BARNETT—You must know who is involved in the negotiations.

Mr Wilkins—I will let Mr Campbell answer your question, Senator.

Mr Campbell—There are two or three areas of the department that are involved in the free trade negotiations. One is the Office of International Law, which provides general advice on the form of the agreement and also dispute settlement. There are issues surrounding intellectual property, which the copyright area of our department is involved in, and also issues surrounding trade in services, such as legal services. So we do have a good deal of input into the trade negotiations and they are led, as the secretary said, by the Department of Foreign Affairs and Trade. If you are looking at the negotiations themselves, the department would normally be represented at the negotiations by one or two people. They might be represented by more if they were in Canberra, but if a round takes place overseas it would be represented by one or two people.

Senator BARNETT—That is why I am a little surprised as to why we have withdrawn that funding.

Mr Wilkins—No, we have simply absorbed it into our funding for international law and other areas of the department. It is not a special program. We will still do what is required in relation to those negotiations, but we have absorbed them. Departments have to make efficiency gains, and that is one way of doing it. They are not large sums of money by the standards of—

Senator BARNETT—Do you want to identify the sums of money involved?

Ms Leon—The China free trade agreement funding was \$0.208 million—about \$200,000. The Japan free trade agreement funding was \$0.450 million.

Senator BARNETT—Over that 12 month period to 30 June 2009?

Ms Leon—That is right.

Senator BARNETT—Was it funded the year before that?

Ms Leon—I do not have those figures with me.

Senator BARNETT—You might take that on notice. So what you are saying is that we have had a special allocation to pay for those people involved in those free trade agreements and those negotiations. You are now withdrawing that funding.

Mr Wilkins—No, we are not.

Senator BARNETT—You have said the funding has ceased.

Mr Wilkins—No, I have said I have absorbed the funding. I absorbed the need to provide funding and resources for this purpose. You do not need special dollops of money from the budget to do a function. There is a large discretionary budget that the department has, and you can draw on that.

Senator BARNETT—Why was it allocated in the first place?

Mr Wilkins—That is the decision of the government of the day, but they can still require certain functions to be carried out. You do not need to have an extra—

Senator BARNETT—Will the same people still be involved in the negotiations?

Mr Wilkins—Possibly. That will be an operational decision that will be made by me and my deputies—Mr Campbell, for example.

Senator BARNETT—It is not very transparent, is it?

Mr Wilkins—It is a very fine-grained issue about the way you run a government department. I do not imagine that you would want to know who the photocopiers are and who goes off and—

Senator BARNETT—No, but it is a principle that is being set here. We have had specific allocation of funds for providing human resources with respect to the China and Japan free trade agreements.

Mr Wilkins—Yes, and I have explained to you—

Senator BARNETT—Now you are saying those specific funds were terminated at 30 June 2009 but that the work will be absorbed and will be paid for in other parts of the department.

Senator Wong—Before Mr Wilkins comes back to explaining how the program ending has been absorbed, I understand from Ms Leon's point previously that this was a terminating program—that is, it was only budgeted through the forward estimates period, to conclude at the end of the previous financial year. Ms Leon might be able to indicate to you when that funding decision was made.

Ms Leon—Senator, we will just have to take on notice for you the year in which the budget decisions were made.

Senator BARNETT—We have many other questions to pursue today, and I do not want to pursue it any further, Mr Wilkins, but it does perhaps raise the question as to the sense of priority with respect to addressing the China and Japan free trade agreements. It also raises the question of how the budgets are actually operated and managed and the transparency of those budgets.

Mr Wilkins—I will just make a more general comment. Whether or not there are specific programs does not really reflect whether or not government departments are going at the functions.

Senator BARNETT—Indeed. Why would you have the program in the first place?

Mr Wilkins—That is a decision by the government—

Senator BARNETT—But that does not explain it.

Mr Wilkins—and the budget committee. In fact, it can actually create boundaries and impediments to proper use of the discretionary budgets.

Senator BARNETT—Indeed. Why didn't you advise the government of that in the first place?

Mr Wilkins—I do not think I was here at that point.

Senator BARNETT—That is hardly an answer that is going to satisfy the committee. Nevertheless, I think I am complete on that. We have some questions on notice, and I understand there are a number of officers from the Human Rights Commission. I notice in the—

Senator Wong—I am happy to go to that, but you made a couple of comments there, Senator, which I think deserve a response. I can recall that when your party was in government there were many occasions on which, for example, I asked questions in other estimates about the functions of the employment department, how much was being spent on advocacy, how much was being spent on various Work Choices campaigns and so forth, and I regularly got an answer that this was not separately costed. It is consistent with the way in which Mr Wilkins has responded to you.

ACTING CHAIR—So you are happy, Senator Barnett, that we now move back to the agencies and then resume general questions at the end of that.

Senator BARNETT—Correct.

ACTING CHAIR—Thank you. We will now resume on the written program.

[9.20 am]

Australian Human Rights Commission

ACTING CHAIR—I welcome officers from the Australian Human Rights Commission to the table. Ms Branson, do you have anything you would like to say to the committee before we commence with questions?

Ms Branson—I would like to apologise for the late arrival of two members of the commission and I. We were travelling up from Sydney this morning and, unfortunately, our flight was delayed. We apologise for delaying the committee. The second matter that I thought the committee may be interested in is changes to certain statutory appointments held by members of the Australian Human Rights Commission since our last appearance in this place. Mr Tom Calma's initial appointment as Aboriginal and Torres Strait Islander Social Justice Commissioner was a term ending on 11 July 2009. Mr Calma's appointment as Social Justice Commissioner has been extended until 31 January 2010. Mr Calma's appointment as Race Discrimination Commissioner also came to an end on 11 July 2009.

The Attorney-General announced on 26 June 2009 that Mr Graeme Innes would be appointed Race Discrimination Commissioner with effect from 12 July 2009 for a term of three years. Mr Innes holds that appointment concurrently with his appointment as Disability Discrimination Commissioner. Mr Innes resigned the statutory office of Human Rights Commissioner with effect from 11 July 2009. On 26 June of this year the Attorney-General also announced that I would be appointed Human Rights Commissioner with effect from 12 July 2009 for a term that will end at the same time as my term as president of the commission ends—that is in October 2013. These changes were welcomed by the commission. They reflect the very significant workload attached to the office of the Social Justice Commissioner and it is this workload that renders it undesirable that the holder of this office should also hold concurrently another statutory appointment. Thank you.

ACTING CHAIR—Thank you.

Senator BARNETT—Thank you for your opening remarks. I have a number of questions for the Human Rights Commission today. I want to start with the human rights charter which has been given a good deal of airing over the last many months in light of Father Frank Brennan's inquiry and the report that has now been tabled. Would you like to perhaps as an opening gambit respond to the report and your views with respect to the report by Father Frank Brennan?

Ms Branson—The Australian Human Rights Commission welcomes the report of the National Human Rights Consultation Committee. In particular we are delighted with the two key recommendations of the report, first that there should be greatly enhanced human rights education in Australia and second that there should be an overarching instrument in the form of a human rights act for Australia.

Senator BARNETT—Before we get into some of the detail of the report and the recommendations, can you advise what resources you have committed to being involved in the inquiry, the making of your submission and related matters.

Ms Branson—The Australian Human Rights Commission made a substantial submission to the national consultation, which, as I am sure you are aware, is available on our website as well as on the consultation's website. We engaged in the process of dealing with children and young people to help them understand the nature of the consultation and to play a role in it. The expenditure involved in that work was covered by a grant of up to \$50,000 from the Foundation for Young Australians, which was given to us for engaging children and young people in the National Human Rights Consultation.

Senator BARNETT—What is the Foundation for Young Australians and who funds it?

Ms Branson—I am advised it is an NGO. It was funded by the previous government when the previous government was in office.

Senator BARNETT—If you are happy to provide further and better particulars on notice that would be appreciated.

Senator Wong—We will see what we can do. Mr Innes may be able to assist. I was not clear whether it was funded through this portfolio or perhaps through Youth.

Mr Innes—The Foundation for Young Australians is a body funded not through this portfolio but through other portfolios. It is a foundation which has been functioning for some years. It was initiated and funded by the previous government when they were in office with some large one-off funding, but I cannot give you the details of that. My understanding is that it has an independent board and functions with investments from that funding. It was keen to ensure that consultation around human rights in Australia was made available to young people. Because the commission was conducting consultation in relation to the human rights consultations and preparing materials to facilitate participation in those conversations, the foundation formed the view that the best way to ensure that young people were involved in the consultations was to provide supplementary funding to the commission to do that. I initiated those discussions with the foundation, which resulted in a grant to the commission, as President Branson said, of \$50,000.

Senator BARNETT—Was the foundation aware of the position of the Human Rights Commission in support of a human rights charter at the time of the funding?

Mr Innes—Absolutely.

Ms Branson—To make it clear, the grant was for an amount of up to \$50,000. The amount actually expended in engaging with children and young people by the commission was \$35,880. Additionally, the commission spent a total amount of \$54,400 in general engagement concerning the Human Rights Consultation.

Senator BARNETT—For children or generally?

Ms Branson—In addition to that spent with respect to children. That involved some design, printing and distribution of materials; some engagements with community groups and others in various places around Australia; legal seminars held in most states; my own engagements; venue hire for workshops and meetings; hospitality and catering for those events; some interpreting services; and some travel charges. As I have indicated, those two amounts added together lead to a total expenditure for commission activities of \$90,280.

Senator BARNETT—So the total cost to the taxpayer was \$90,280 for the Human Rights Commission involvement and advocacy of your views with respect to the charter.

Ms Branson—I do not think it could fairly be said that all of that was spent on advocacy because a great deal of activities went to simply assisting people in understanding the nature of the consultation, what human rights are about, how they could participate in the consultation. I am unable to divide this figure into an amount for advocacy and an amount that was simply for community engagement for the consultation.

Senator BARNETT—Ms Branson, it has been pretty clear for a long period of time now that the position of the commission is in support of the charter.

Ms Branson—Yes, it is. It has been.

Senator BARNETT—Have you been advised of the official date of that position in support?

Ms Branson—Is the question when it was first adopted?

Senator BARNETT—Yes.

Ms Branson—At the time of the last estimates you asked me this and I advised that that was our position in general but that the details of our position would only become known when our submission was approved by all commission members.

Senator Wong—We can provide you with a date.

Ms Branson—We can provide you with a date.

Senator Wong—It would be on the public record I would have thought.

Senator BARNETT—Do you still have a view that Australia is required to have a charter of rights to meet its international human rights treaty obligations?

Senator Wong—Is the 'you' the commission?

Senator BARNETT—Sorry, I was asking the question of Ms Branson.

Ms Branson—Are you asking whether there is a legal obligation on Australia to have one overarching instrument of protection?

Senator BARNETT—Yes, that is what I am asking.

Ms Branson—Australia has undertaken obligations to protect a range of human rights. I am not aware of an obligation to protect them in one instrument but there is an obligation to protect them, and the United Nations has expressed criticism of Australia's position as the only Western democracy without one overarching instrument protecting human rights.

Senator BARNETT—I will ask the question again: is Australia required to have a charter of rights to—

Senator Wong—You are asking the same question and she has answered it.

Senator BARNETT—Let me ask it another way and I will see if I can see what Ms Branson says. Is Australia required to have and enact a bill of rights to meet its international obligations?

Senator Wong—With respect that is precisely the same question and it has been answered.

Senator BARNETT—It has not been answered directly and I am asking Ms Branson again if she is willing to answer it.

Senator Wong—Ms Branson may not be giving the answer in the way you would like it but she has answered the question.

Senator BARNETT—Minister, you have taken a very interventionist approach. We have only been here 32 minutes and it seems to me that if we are going to be going along like this till 11 o'clock tonight it is going to be quite a drawn out affair. Can the witness not answer the questions?

Senator Wong—Yes, she can.

Senator BARNETT—Would you allow her to?

Senator Wong—And she has. I am making the point, if I may respectfully suggest, that simply asking the same question again is not particularly sensible questioning. It has been answered.

ACTING CHAIR—Let me intervene here. Ms Branson, is there anything further you can add to assist Senator Barnett.

Ms Branson—I do not believe so.

Senator BARNETT—Let me move on. How will a bill or a charter of rights assist in making sure Australia meets its international obligations?

Ms Branson—Senator Barnett, these are issues I think that I did canvass previously and in some detail in our submission to the national consultation. But what we recommended in our submission to the national consultation and what, as we read, its report recommends is that Australia have a human rights act which would require the parliament when considering the making of laws to consider their compatibility with human rights which would require those who administer those laws to be cognisant of human rights in their administration and that would require the courts when interpreting the laws of the parliament to also interpret them

consistently with the human rights protected in a human rights act to the extent that that is possible, consistent with the apparent intention of the legislature.

Senator BARNETT—Is the Northern Territory intervention legislation in breach of any international law, as far as you are aware?

Ms Branson—The Racial Discrimination Act has been set aside to enable the intervention to take effect, and, to that extent, that is inconsistent with Australia's obligations as a signatory to the convention on racial discrimination.

Senator BARNETT—What is required to ensure that it is not in breach of those international obligations?

Ms Branson—The government has indicated a wish to make it unnecessary for the Racial Discrimination Act to continue to be set aside. If that is done, there will be no difficulties.

Senator BARNETT—Have you advised the government of your views with respect to what it must do to ensure that it is not acting in breach of its international obligations?

Ms Branson—Would you be happy, Senator, if I ask the Social Justice Commissioner to answer your question?

Senator BARNETT—Of course I would.

Mr Calma—In our original submission to the one-day Senate inquiry under the previous government we made it very clear at that time that suspension of the Racial Discrimination Act was unacceptable, based on the race of one group of Australians citizens and that all citizens, if we are to abide by the rule of law and treat all people fairly and equally, should have the same protections. From 2007 onwards we have maintained that position, and made very clear, that we need to have the Racial Discrimination Act suspension lifted so that all Australians can be protected equally and fairly.

Senator BARNETT—Thank you for that. I would now like to move on to another topic—Australia's antiterrorism laws. Are they currently in breach of our international obligations?

Ms Branson—There is always an element of judgment involved when rights are to be balanced one against the other. The commission's view is that there are aspects of the security legislation where the balance is unduly in favour of protection and insufficiently sensitive to the rights of individuals.

Senator BARNETT—Which aspects, Ms Branson?

Ms Branson—I am sorry but I do not have in front of me a detailed memo with respect to this but, for example, the period of time that someone can be held for questioning when taken together with what is known as downtime is, in our view, an excessively long period of time.

Senator BARNETT—What is that period that you believe is excessive?

Ms Branson—Could you excuse me for a moment, or we could—

Senator BARNETT—I am happy to wait.

Ms Branson—Senator, may I ask Mr Innes to answer that question?

Senator BARNETT—Certainly.

Mr Innes—We recently made a submission to the review of terrorism laws, which dealt with this issue. There is no specific period of time, because of the stop time or dead time, when the clock stops. That was one of the concerns that was expressed in our submission. Our proposal was that there should be a maximum limit of seven days in which a person could be held without charge. That is the issue to which President Branson refers.

Senator BARNETT—Have you met with and expressed your views directly to the Attorney-General?

Mr Innes—I have certainly met with officers of the Attorney's department and, in my previous role as Human Rights Commissioner, I expressed concerns in this area to the Attorney-General, yes.

Senator BARNETT—In very recent times, the Attorney-General has flagged new laws with respect to enhancing police powers and holding people accordingly. Have you expressed your views in recent times—in, say, the last couple of weeks—with respect to the Attorney-General's most recent plans to change the law?

Mr Innes—That was the submission to which I was referring. Whilst we did not have concerns about a number of the new areas of law that are raised in that discussion document, the stop time or the time that a person could be held without charge was one of our areas of concern set out in that submission. I do not have the data of that submission, but it was—

Senator BARNETT—That is fine, Mr Innes. I think that is on the public record.

Mr Innes—It is.

Senator BARNETT—Ms Branson, what other aspects of the antiterrorism laws do you believe are in breach of our international obligations?

Ms Branson—I am not now in a position to answer that. If you wish me to provide that on notice, I am happy to do so.

Senator BARNETT—You advise you have a range of concerns with respect to our antiterrorism laws and that you believe they do not adequately meet our international obligations.

Ms Branson—The topics on which we have concerns are identified in the submission which Mr Innes has identified. If you would like me to summarise them from that document and provide it to you on notice, I am happy to do so.

Senator BARNETT—Thank you, if you could. Can you confirm your views to the Senate with respect to our current laws on gay marriage being inconsistent with our international obligations in not allowing same-sex marriage?

Ms Branson—The commission has recently made a submission to the inquiry into the marriage bill. We indicated in that submission that we consider that a non-discriminatory approach should be adopted to marriage and the same marriage options should be available to same-sex couples as are available to opposite-sex couples. We see that supported by the rights to equality.

Senator BARNETT—Do you see that as consistent with our international obligations with respect to human rights?

Ms Branson—This is an area where international jurisprudence is still developing. I do not think it can be firmly said one way or another at the moment whether there is an international obligation to allow same-sex marriage. But as increasing numbers of jurisdictions do so, it may be that international law is moving. But we are persuaded that the principle of equality and nondiscrimination suggest that there should be the same options available to same-sex couples as to opposite-sex couples.

Senator BARNETT—If that law is passed, would you see that as being consistent with our international obligations?

Ms Branson—I would.

Senator BARNETT—If it is not passed, would that mean we would be acting inconsistently with our international obligations?

Ms Branson—I do not think we are able at this stage to say that.

Senator BARNETT—Not categorically?

Ms Branson—No.

Senator BARNETT—Do you have a view that we are close to the edge in terms of being in breach?

Ms Branson—I do not think that I can add to what I said before. I do not think international law is clear on this issue at this time.

Senator BARNETT—Thank you for that. What is the view of the Human Rights Commission on the appropriateness or otherwise of conscription?

Ms Branson—I do not believe the Human Rights Commission has a position on conscription. It has not come before us for decision.

Senator BARNETT—Have you expressed your views to the government since the tabling of the Frank Brennan report?

Ms Branson—No.

Senator BARNETT—Apart from supporting two key recommendations in the report, would you like to share any other views with respect to the report?

Ms Branson—I have indicated that there are two key recommendations, and one involves human rights education. There has been communication between the commission and the Attorney-General's Department on the topic of enhanced human rights protection and the role the Australian Human Rights Commission might play in enhancing human rights education in that nation. I do not believe there have been any other formal communications between the commission and the Attorney-General or his department since the publication of the report.

Senator BARNETT—Can I read from an article from the *Australian* on 16 October headed 'Charter plan changes again'. I am sure you would have seen it. It states:

THE Human Rights Commission would not be the "appropriate" body to inform parliament that a court had found legislation conflicted with the proposed charter of rights, according to the head of the government's advisory committee.

Father Frank Brennan said that while the committee's report flagged such a role for the commission, he said he preferred the role be given to "a small quorum of either house of parliament".

Father Brennan has also expressed doubts about giving the High Court power to issue declarations of incompatibility over legislation—another committee recommendation—saying this "might not be workable".

The report goes on to say:

Father Brennan also suggested that legislation covering the Northern Territory intervention, terrorism and migration might be "in trouble" under any charter.

Perhaps we can start at the top. Do you have a view as to the appropriateness or otherwise of the Human Rights Commission informing parliament as to the appropriateness of any legislation?

Ms Branson—My preferred position would be for the courts to play the role by issuing what in other jurisdictions are known as declarations of incompatibility. I have gone on the public record as saying that I believe that there is no constitutional difficulty with that. I was gratified to find legal advice from the Solicitor-General attached to the national consultation committee's report expressing the same view. However, if there were thought to be constitutional difficulties, all that needs to be identified is a means of advising the parliament of the views of the court. The commission is a body that could do that because it monitors decisions of courts touching on human rights, but it is easy to envisage other bodies or agencies that could perform the same role. All that is required to make this aspect of a dialogue model of human rights work is that the parliament be advised when the court finds that it is unable to interpret legislation of the parliament consistently with the human rights act.

Senator BARNETT—So the commission would be quite willing to perform that role.

Ms Branson—It is a role that the commission has the capacity to perform and subject to budgetary restraints would be happy to perform, but it is not the commission's preferred option.

Senator BARNETT—Your preferred option is that the High Court perform that role.

Ms Branson—Our preferred option is that courts give declarations of incompatibility.

Senator BARNETT—In instances with respect to many of these matters would that not be the High Court?

Ms Branson—The High Court is a court that could make such a declaration and it is the court that is recommended to make the declaration by the report of the national consultation, but other courts could of course do so.

Senator BARNETT—What is your view? Do you think it should be the High Court or another court?

Ms Branson—I am not sure that the commission itself has a position. My preference would be for any superior court in Australia to be able to make a declaration.

Senator BARNETT—Can you advise the names of the superior courts you are referring to?

Ms Branson—The supreme courts of every state, the Federal Court of Australia, the Family Court of Australia and the High Court of Australia.

Senator BARNETT—But it is recommended that it be the High Court in the report.

Ms Branson—That is the report's recommendation.

ACTING CHAIR—I would prefer if we stuck with views of the Human Rights Commission being put to the committee.

Senator BARNETT—Are you aware of Father Frank Brennan's views with respect to the High Court fulfilling that role? I do not want to misconstrue his words and I have not got them in front of me, but I think he indicated it would be impractical.

Ms Branson—I read in the press a report that Father Brennan had said that.

Senator BARNETT—'Impractical' and 'not workable' were words that he may have used. You do not agree with him?

Ms Branson—The acting chair has counselled me not to give my own views, and the commission has not considered that view.

Senator BARNETT—But you have indicated the view that you think it should be a superior court, and the High Court is one of those. Is it practicable and workable for the High Court to fulfil that function?

Ms Branson—Again, it would be a personal view that I would give if I answered that, and I understand the acting chair to have asked me not to do that.

Senator BARNETT—Can you answer it on behalf of the commission?

Ms Branson—No. The commission has not considered it.

Senator BARNETT—So the commission does not have view.

Ms Branson—The issue has not come before the commission.

Senator BARNETT—Many of these areas are highly controversial, whether they be migration detention, terrorism laws, conscription or gay marriage. Your commission has strong views one way or the other with respect to those issues, yet you are indicating to this committee that you would be willing, as a commission, to accept the role to advise the parliament and, indeed, the public with respect to the appropriateness or otherwise of any future legislation as it may impact on human rights. Can you understand and see the concerns that perhaps arise as a result of that?

Ms Branson—I am not sure that I understand your question. Are we still talking about declarations of incompatibility and the role of the commission?

Senator BARNETT—Yes.

Ms Branson—The only role of any person dealing with the issue of incompatibility is a formal one of conveying information about what has been said by a court to the parliament. It involves no input or judgment of that party of any kind. I do not see that being in any way a controversial issue.

Senator BARNETT—Perhaps other people might see it differently. I notice that you support the dialogue model. I notice the former High Court judge, as referred to in the same article in the *Australian* which no doubt you would have read, bill of rights enthusiast Michael McHugh told the commission he was pessimistic about the prospects of a dialogue model being upheld by the High Court.

Senator Wong—Is bill of rights enthusiast a quote or are they your words?

Senator BARNETT—I am reading from the *Australian* newspaper article by Michael Pelly dated 16 October. So you do not have the same views as the former High Court judge?

Ms Branson—All I am able to say about the views of the former High Court judge the Hon Michael McHugh QC is that he was a signatory to a document prepared by a roundtable that was convened at the commission. Sir Anthony Mason, a former Chief Justice Australia, was also a signatory to the document and the content of the document indicated that a human rights act could be drafted for Australia that did not face constitutional difficulties.

Senator BARNETT—What about the issue of separation of powers? Do you concede that there would be a major shift in the separation of powers as a result of the enacting of a charter of rights?

Senator Wong—Just before Ms Branson answers, I have not intervened much here, Senator, because the commission is independent of government, as you know, and they are entitled to put their views publicly, as they do through various submissions and so forth, but we really are getting to a point where you appear to be asking Ms Branson, I presume on behalf of the commission, to comment on a range of other views. I am not sure that is really an appropriate way to proceed. The commission's views on these issues are on the public record through a range of submissions to which Ms Branson has referred. I am not sure that getting into a theoretical debate in which you request that she respond to every alternative view, other than returning you to the submission that has been made public I am not sure how much further she can assist you.

Senator BARNETT—Minister, thank you for your intervention. I am happy to respond and to indicate that this is entirely not theoretical. The report has been tabled. The government is now actively considering the report. We have been advised. The commission has made a submission with respect to the report but it also has very strong views with respect to a whole range of issues whether they be gay marriage, antiterrorism laws, NT intervention laws and migration laws. It has a very specific view which I would suggest to you, Minister, is at least at minimum controversial and concerning for a full range of Australians. My questions to the commission—which may be under this report put up as an entity which will decide the appropriateness or otherwise in terms of compatibility with our human rights obligations under international law—are directly relevant to the future prospects for this human rights charter coming into being.

Senator Wong—With respect, Senator you have asked questions about all of those issues that you just listed and Ms Branson has responded. My point is that you have gone beyond that and you now putting to her other opinions from other commentators or other parties and asking her to respond to those. I humbly suggest, Chair, that that is beyond the remit of what Ms Branson ought be required to respond to. If you wish to make speeches about that in the

Senate, you are most welcome to do so but to put Ms Branson into a position where she is asked to respond to whichever commentator out of the media you wish to put to her, with respect, does not seem to be an appropriate set of questions for her in these circumstances.

Senator BARNETT—My question was on the separation of powers.

ACTING CHAIR—I think the minister has made the point and that Senator Barnett has taken that on board.

Senator BARNETT—I have. I think Ms Branson may have not heard my last question, which was: do you concede and accept that there is a significant shift in the separation of powers as a result of an enacting of a human rights charter?

Ms Branson—No.

Senator BARNETT—Fascinating. Why is that?

Ms Branson—Included in the aspects of a human rights act, which I understand you have in mind, would be first a provision, which has been recommended, that Australian courts be advised by the parliament that parliament wishes its legislation to be construed consistently with the protection of human rights identified in the human rights act, unless it is impossible for that to be done consistently with the intention of parliament. That is a rule of construction, first, that would be known both to the parliament and to the courts and it is a rule of construction of precisely the same kind as the rule that currently prevails, which is that courts will interpret the legislation of the parliament consistently with fundamental common law rights and freedoms unless it is impossible to do so. It would be in my view a modest expansion of this rule of construction and not one of the character that you have given it.

Senator BARNETT—I was simply asking if there would be a shift in the separation of powers, and you have indicated no.

Ms Branson—You asked me if there would be a major shift, and I answered no.

Senator BARNETT—So you are conceding there would be a shift?

Ms Branson—There would be a minor shift.

Senator BARNETT—There would be a minor shift? Right. I would like to know your views in further detail in terms of how minor. Do you concede that there would be a shift from the powers of the parliament to the judiciary?

Ms Branson—Could you excuse me for a moment.

Senator Wong—What is the context in which—of which factual scenario?

Senator BARNETT—We are talking about the Father Brennan report and recommendations. Ms Branson has been sharing her views on that report and the views of the commission, which I appreciate and the committee appreciates. If it is enacted—which the government is actively considering, we have been advised—what would be the extent of the shift in powers from the parliament to the judiciary? That is my question.

Ms Branson—I sought to identify that in my previous answer.

Senator BARNETT—It has not provided a great deal of detail. You have said a ‘minor shift’. Can you be more particular?

Ms Branson—I will try to explain it, and I apologise if I cannot do this clearly. Courts already construe parliament by reference to certain rules that are ideally understood both by the parliament and by the judiciary. A common understanding of these rules is necessary, obviously, for the good working of a democracy in which one arm of government makes laws and the other arm interprets them. There is a well-known common law rule that the courts will interpret legislation consistently with fundamental rights and freedoms unless it is impossible to do so consistently with the intention of the parliament. What is proposed under the proposed human rights act is that parliament also advise the courts that it wishes its legislation to be construed consistently with the protected human rights unless the courts find it impossible to do so consistently with the intention of parliament. It is that increase that would give some, I suppose, it could be said, modest increase in the powers of the courts, but an increase of a character entirely consistent with the character of the power that courts already have.

Senator BARNETT—Do you concede that there would be a lot more work for the courts and indeed for the High Court? I refer to former High Court judge Ian Callinan who says that the High Court and courts will be clogged with more cases and with work to do. Do you concede that?

Ms Branson—I do not concede that. First, it must be entirely a matter of speculation, and that speculation can be informed by looking at the experience of other jurisdictions: other countries that have legislation of this kind have not found their ultimate courts of appeal bogged down, and experiences closer to home, in the state of Victoria and the territory of the ACT, are that very limited amounts of litigation are coming to the courts under their human rights acts.

Senator BARNETT—All right. Let us move on to one of the last questions in this area. Is the audit of incompatibility of the laws a function that the commission would be willing to undertake?

Ms Branson—Just to clarify, Senator, do you mean the audit of existing federal laws for their compatibility?

Senator BARNETT—Yes.

Ms Branson—It is a task that we could undertake. To do every law would be a very substantial task, but of course we could do it.

Senator BARNETT—Thank you. Perhaps we can go to the next topic, which relates to a follow-up to our previous estimates, where I think you were not available, Mr Calma. Ms Branson answered questions on your behalf with respect to the Durban declaration. We had quite an interlude—there is no doubt about that—at the last estimates. Ms Branson, at the time you described the outcomes document from the Durban II conference as one ‘which we have applauded the contents of’. You put that on the record on 25 May. Do you recall that?

Ms Branson—I do.

Senator BARNETT—The outcomes document opens with an explicit reaffirmation of the Durban Declaration and Program of Action as it was adopted in 2001, and it said it:

Reaffirms the Durban Declaration and Programme of Action ... as it was adopted at the World Conference ... in 2001.

It was precisely the likelihood that the Durban Review Conference would reaffirm the 2001 Durban Declaration and Program of Action in its entirety that was the major concern of the Australian government, which led to the government boycotting the conference. That was set out in the Hon. Stephen Smith's media release of 19 April 2009. Do you recall that, Ms Branson?

Ms Branson—Yes.

Senator BARNETT—He said at the time:

Australia, however, cannot support a document which reaffirms the 2001 Durban Declaration and Program of Action in its entirety—as is currently the case. The 2001 Declaration singled out Israel and the Middle East. Australia expressed strong concerns about this at the time. The Australian Government continues to have these concerns.

So my question for you, Ms Branson, is: do you disagree with the view of the Australian government that the 2001 Durban Declaration and Program of Action unacceptably singled out Israel and the Middle East?

Ms Branson—The commission does not read the original document in the same way as the minister apparently does. We did not see it in the same way as is expressed in the statement you have just read to us.

Senator BARNETT—Let me ask you another question. Do you disagree with the Australian government's concern that the Durban Review Conference was likely to—and, in the event, did—reaffirm the Durban Declaration and Program of Action in its entirety? Do you stand by your view that the outcomes document of the Durban Review Conference is deserving of applause by the Australian Human Rights Commission?

Ms Branson—I stand by the latter statement.

Senator BARNETT—That you applaud the outcome?

Ms Branson—Yes.

Senator BARNETT—That seems to be in direct contradiction to the views of Minister Stephen Smith.

Ms Branson—I regret that.

Senator BARNETT—You regret that, do you, Ms Branson?

Ms Branson—Yes.

Senator BARNETT—Have you expressed your views to the minister?

Ms Branson—No.

Senator BARNETT—Have you had any communications with the minister since we had this discussion in May?

Ms Branson—No.

Senator BARNETT—What about with the Attorney-General or with any other government official?

Ms Branson—On this topic? No.

Senator BARNETT—So do you see any reason for a parliamentary committee such as ours, or members of parliament, to be concerned that you have a view which is diametrically opposed to the minister's? He stands up and expresses concern that there should be a boycott of this conference because of his concerns about racism, as it were, and views expressed—antagonism against Israel in particular—yet you have a view that, in fact, applauds the outcome of the document, which he totally opposes.

Ms Branson—I am not sure that I can answer the question which I think you have put to me. The Australian Human Rights Commission does not accept that the Durban outcomes document did attack Israel or that it supported anti-Semitism. We do not read it that way.

Senator BARNETT—Do you read Durban I as anti-Semitic and to be condemned?

Ms Branson—We do not read the Durban outcomes document as anti-Semitic. If we did, we would condemn it. We do not so read it.

Senator BARNETT—Durban I and Durban II?

Ms Branson—Durban I and Durban II.

Senator BARNETT—Right. I have noted here a report to the commission from Margaret Donaldson, supplied to the committee as an appendix to a letter from Ms Branson dated 3 June 2009. There was no hint in this favourable report of the controversial nature of either document. I cannot see any documents on file that you have provided to us that express any concern about that, which is really what you are saying to us right now.

Ms Branson—We do not believe anti-Semitism was expressed in either document. The commission is strongly opposed to anti-Semitism, as it is to all forms of discrimination, xenophobia and other forms of intolerance.

Senator BARNETT—Does the commission, in hindsight, have a view of the speech of the President of Iran at that time? That was a conference which—

Ms Branson—The commission has not considered the speech of the President of Iran.

Senator BARNETT—Mr Calma appeared on your behalf, Ms Branson—with the greatest respect—at that conference, where the President appeared. I understand Mr Calma was not in the audience at the time, but it created a huge amount of interest and publicity in Australia. Surely the commission has a view.

Ms Branson—The topic has not come before the commission on any commission agenda.

Senator BARNETT—You are advising this committee that the commission spent about \$11,000, I understand—I now have the figures here. I have answers to questions on notice. Here we go: \$8,850.54 for the Race Discrimination Commissioner—that was the cost of the airfare—and, for the Race Discrimination Unit director, \$2,774.52. So it is over \$11,000. That is the airfares. I am interested in the total cost as well, and I do not seem to have that in an answer to a question on notice. Perhaps you can advise us of that either now or very shortly. So you are advising us, Ms Branson—notwithstanding the cost of sending the commissioner and an officer and being fully aware of the publicity, the government's media release, the boycott of the conference by the government and the speech from the President of Iran, which

was condemned all around the world—not only that the commission is not willing to condemn it but that you are willing to say that you applaud the outcome of that conference. Is that correct?

Ms Branson—I think much of this was covered last time. The Australian Human Rights Commission does not regard it as its role to comment on matters touching on foreign policy, which we believe to be the responsibility of the Department of Foreign Affairs and Trade. We had staff and the commissioner attend the Durban Review Conference. They were not present when the President of Iran spoke. They were involved in valuable work with other national human rights institutions in their endeavour to learn all they could about appropriate ways to fight racism, xenophobia and other forms of intolerance. We have not considered it necessary to put on the commission's agenda the subject matter of the speech of the President of Iran, whose views we do not regard as helpful in this area.

Senator BARNETT—Is that the best you can do, Ms Branson?

Ms Branson—That is my answer.

Senator BARNETT—That the views of the President of Iran are not helpful in this area? That is the public contribution that you have made in response to the views—

ACTING CHAIR—There was a fuller answer than that.

Senator Wong—Let us remember that Ms Branson has publicly made a statement—and I think everyone in this room would have the same views—about the unacceptability of any form of xenophobia, including anti-Semitism. You are inferring that there is somehow a lessening of that. You may have different views—and clearly the government has a particular view about the Durban conference—but I do not think it is helpful to try and infer anything from the answer given that she has clearly indicated the commission's views on these issues of prejudice.

Senator BARNETT—Minister, would you care to make a contribution? A taxpayer funded entity, the Australian Human Rights Commission, has applauded the outcome Durban I and Durban II and sent its officials to the Durban II conference notwithstanding that the Australian government boycotted it and Mr Stephen Smith has put his views on the public record on behalf of the government. Do you have any concerns about this dichotomy?

Senator Wong—As you are aware, the commission is independent. I am advised that the decision for Mr Calma to attend was a decision of the commission and the Australian government's position is that as outlined by the Minister for Foreign Affairs.

Senator BARNETT—Minister, please. Do you have any concerns that there is a diametrically opposed view held by the commission with respect to important matters, particularly with respect to the state of Israel and the views of the government?

Senator Wong—The Australian government's position on the state of Israel and on the conduct of the Durban conference are as outlined by the Minister for Foreign Affairs, and you are aware of those views because you have referred to them today in your questions.

Senator BARNETT—In light of the time we will move to the next topic but, Ms Branson, I advise you that I consider this incredibly important and serious. I am deeply disturbed that the commission applauds both Durban I and Durban II notwithstanding the views of the

Australian government which you are fully aware of. The next topic is your inquiry into freedom of religion and belief. Can you provide a status update with respect to that and the cost to date for that inquiry.

Ms Branson—I refer your question to Mr Innes.

Mr Innes—This is the project which we are conducting in partnership with the Australian Multicultural Foundation, RMIT and Monash University. The consultation has now been completed. Submissions have been received and are being correlated to draw out the views that have been expressed in the submissions, and we are currently in the writing phase. The report which will be prepared will be a substantial executive summary and a series of papers setting out the findings of the consultation. The report itself which will go to the commission will not include recommendations. The commission may decide once we have seen the report that we want to include recommendations with the report. That will be the decision of the commission, and it is my expectation that the report will be released early next year.

Senator BARNETT—How many submissions have been received?

Mr Innes—2, 022 submissions.

Senator BARNETT—Can you provide a breakdown of those submissions and categorise them in any way, shape or form as to the source of the submissions and whether they are all one page, rote submissions from the GetUp campaign and so on?

Mr Innes—I do not know that there were many—if any—from GetUp. There were 146 submissions from organisations and 1,879 from individuals.

Senator BARNETT—Are they all on your website?

Mr Innes—Many of them are. We have not put all of them there because, unfortunately, some included references which were offensive and we have a policy which does not allow us to put that sort of material on our website but, subject to that, we are putting all of the submissions on the website.

Senator BARNETT—Thank you. You have answered a question on notice from me. There is a contract for a total of \$27½ thousand each between the AMF and Monash University, Professor Gary Bouma, and between AMF and RMIT University, Professor Des Cahill, signed in January 2008 and March 2008 which will expire in February 2010.

Mr Innes—That is correct. I cannot add anything to the information you have already received on that.

Senator BARNETT—There are no further contracts or funding for those people.

Mr Innes—No, not apart from what was set out in that answer to the question on notice.

Senator BARNETT—If there is, would you let me know on notice?

Mr Innes—There is nothing further.

Senator BARNETT—Thank you. I am interested in terms of the total cost of the inquiry and I am happy for you to take that on notice if you do not have it with you.

Mr Innes—It is not an inquiry to start with. Inquiries are very specifically prescribed in our legislation. This is not an inquiry.

Senator BARNETT—What do you call it?

Mr Innes—It is an investigation or a consultation for which there will be a report but an inquiry raises certain functions under our act and this does not fall into that category, so we are always quite conscious of that.

Senator BARNETT—Can you advise the cost of your consultation and report on investigations.

Mr Innes—The total cost to date is \$286,417.

Senator BARNETT—Can you give a breakdown of that on notice or do you have that there?. I am happy for you to take that on notice if you do not have the answer.

Mr Innes—We do have the answer but I want to be clear on your question. We have the previous year's expenditure, this year's expenditure and the total expenditure but you were looking for a breakdown of that expenditure?

Senator BARNETT—You have \$27 ½ thousand for each of the AMF people, Professors Bouma and Cahill. I am interested to know the breakdown of the costs.

Mr Innes—I want to be clear what we are taking on notice. Are you looking for the cost for this financial year?

Senator BARNETT—The costs since the report and investigation commenced.

Mr Innes—So 2008-09 and 2009-10—two financial years. I can take that on notice.

Senator BARNETT—You indicated that the report is being prepared by those two consultants and then it will go to the commission—how will that work please?

Mr Innes—It is a larger committee than that. It is a committee which includes experts drawn from partner and contracted agencies as well as others with relevant knowledge and experience in the area including the University of Otago, the University of Western Sydney, the Australian Institute of Aboriginal and Torres Strait Islander Studies, the University of Queensland and the Australian Multicultural Foundation and. As I say, there are various authors for the different sections of the report. That material will be prepared and made available to the commission, but it will not include recommendations, as I have said, and then the commission will decide—

Senator BARNETT—Why have you not allowed them to include recommendations?

Mr Innes—The approach that was taken was that it would better to, if you like, draw the information together in the report and for the commission to decide whether it wanted to make recommendations. That was the research consultation approach that was taken.

Senator BARNETT—Could you take on notice and provide further and better particulars in terms of who is drafting the report and which people for which sections please?

Mr Innes—Yes, I can take that on notice.

Senator BARNETT—Thank you. You have said that it will be in the first half of next year but probably the first quarter. Can you provide further details as to when you expect the report to get to the commission and, secondly, when the commission is likely to release it publicly?

Mr Innes—I expect the report to get to the commission in the first quarter of 2010 and to be released in the second quarter.

Senator BARNETT—In an answer to a question on notice on 25 May, question No. 14, regarding the Sydney Gay and Lesbian Mardi Gras, it was stated that the total cost for the commission's participation was \$2,424.08. Can you provide a breakdown of those costs, please?

Mr Innes—That was in my area of responsibility at the time. I thought the answer to the question on notice provided a breakdown.

Senator BARNETT—No, it does not. It says:

Additional costs were met by voluntary staff contributions towards their participation in the parade.

It also says:

... Graeme Innes ... Tom Calma ... participated in the parade. Commissioner Innes made the decision to participate, as it fell within his area of responsibility. The other members of the Commission were informed of the decision but the matter did not go to the Commission for a decision.

Mr Innes—That is correct.

Senator BARNETT—Why would that be?

Mr Innes—Because it fell within my area of responsibility. It was an area of community participation which had occurred previously, so I took that decision. I informed my colleagues, but it was a decision that I took.

Senator BARNETT—If you can provide a breakdown of those costs—travel, accommodation, functions, dinners or whatever—that would be appreciated. I am happy for you to take that on notice.

Mr Innes—The costs will relate to the preparation of the vehicle et cetera. I can take that on notice.

Senator BARNETT—I have previously asked the commission what efforts you have undertaken with respect to attending church and Christian events and you have answered that on notice, so I will not pursue that any further at the moment.

ACTING CHAIR—As there are no further questions for the Human Rights Commission, I thank you, Ms Branson, and your officers for your attendance at estimates today.

Proceedings suspended from 10.22 am to 10.40 am

Australian Law Reform Commission

ACTING CHAIR—The committee will resume. I welcome officers from the Australian Law Reform Commission. Do you have any opening remarks before we move into questions?

Prof. Weisbrot—Thank you. This will be my last appearance at Senate estimates after 10½ years. I would like to thank senators over that time for their interest, support and courtesy at all times when the ALRC has appeared.

ACTING CHAIR—We would like to thank you for your contribution to this process.

Senator LUDLAM—I have a couple of questions that relate to the government's national security legislation discussion paper. Can you tell us whether the ALRC was consulted?

Prof. Weisbrot—Not specifically, no. The only area in which the ALRC has worked in that broad field was in respect of the sedition laws. We produced a report which got a government response. Some years ago we did a report on classified and national security legislation, but in recent times, no, we have not worked in that area.

Senator LUDLAM—Would you be expected to be consulted on a piece of work of this scope?

Prof. Weisbrot—Not necessarily. We are an advisory body to government in a sense that we work on terms of reference that we are given by the government. We are very project oriented; we are not a freestanding advisory body.

Senator LUDLAM—I understand. Given then that the government did not call in the ALRC for comment on this paper, have you still undertaken to review the discussion paper and have you formed any views on it?

Prof. Weisbrot—No.

Senator LUDLAM—So you have not reviewed it?

Prof. Weisbrot—No.

Senator LUDLAM—Specifically, have you looked at what it said about sedition, for example?

Prof. Weisbrot—I am not aware there is anything specifically on sedition in there.

Senator LUDLAM—The name has been changed and there are some recommendations that go directly to the sedition provisions.

Prof. Weisbrot—That follows ALRC recommendations and our report *Fighting words*. The government responded to that and accepted 25 of the 27 recommendations that we made, and disagreed with one and accepted one in part in principle. We are still awaiting legislation to implement that government response.

Senator LUDLAM—You are aware that there is a draft bill that accompanied that discussion paper?

Prof. Weisbrot—No.

Senator LUDLAM—Is that something you would undertake to review or is it out of your terms of reference until the government called in your expertise?

Prof. Weisbrot—Normally what would happen is that if there is a Senate inquiry looking at work arising out of ALRC reports, we would make a submission to that Senate inquiry and appear if called.

Senator LUDLAM—Were you satisfied with the government's response to your *Fighting words* paper?

Prof. Weisbrot—Yes.

Senator LUDLAM—Would you talk us through the recommendations you made that the government chose not to take up?

Prof. Weisbrot—It was recommendation 12-1 which the government supported in principle but did not pursue further. That was in relation to the ‘defence of good faith’. The ALRC thought that using the term ‘good faith’ was probably inappropriate in the context that we were talking about, and most of the submissions that we received were along those lines as well. The government response chose to, instead of ditching the defence, expand it, alter it. I do not have any particular problem with that. Similarly, in relation to recommendation 12-2 of that report, which looked at incorporating artistic, political, scientific and other kinds of public affairs reporting, the government supported that in principle but suggested it would implement it in a slightly different manner. Again, as long as when we see the legislation that matter complies with the thrust of the ALRC recommendation, I do not have any particular problem with that at all. Those are the only two. So I think the general pattern of recommendations was accepted in full.

Senator LUDLAM—You are obviously aware that there is a very substantial package of reforms to the counterterrorism legislation on the table. Is that something that the ALRC intends to engage with?

Prof. Weisbrot—I am sorry. I did not hear you. I have a bad cold, so it may be me.

Senator LUDLAM—You are aware obviously that this discussion paper is on the table; there is a substantial package of reforms proposed. Does the ALRC intend to engage with that process and provide comment either way or will you be waiting until there is a bill?

Prof. Weisbrot—Again, the normal manner in which we engage, beyond giving the government our report, is by making submissions to Senate or other official inquiries. So we would be waiting for that sort of opportunity.

Senator LUDLAM—I have a number of other questions for you, which I will put on notice given that you have indicated that you have not read that discussion paper. Perhaps you can provide a response to some of those.

Prof. Weisbrot—Yes.

Senator FISHER—Professor, I will kick off with your annual report 2008-09. What is the status of that?

Ms Wynn—It has been delivered to the Attorney-General’s Department, but I do not believe it has been tabled yet.

Senator FISHER—I am having a bit of difficulty hearing the responses.

Prof. Weisbrot—Sorry. I will repeat that. We prepared and delivered our annual report some time ago, but it has not been tabled in parliament yet and therefore is not a public document.

Senator BARNETT—When did you deliver it?

Ms Wynn—On about, I think, 26 September.

Senator FISHER—Have you had any discussions with the government about when it might be tabled?

Ms Wynn—No.

Senator FISHER—Are you aware of why it has not been tabled?

Ms Wynn—No, I am not.

Senator FISHER—You might not know this, but your current website directs users to your 2008-09 report, and you find there, of course, the 2007-08 report in lieu. So you might have a look at that. You will recall, Professor, that at last estimates we talked about the apparent downgrading, in the then relevant PBS statements, of the agency's KPIs relating to website hits compared with your 2007-08 annual report, which projected an increase in website hits. We talked about why you might have a KPI that actually downgrades the website hits. You talked, I think, about being in a 'learning process to use the website more effectively' and said that 'how the usage is measured is also something we are still learning'. I am wondering how you are going in your determination about how to measure the level of hits on the website. Firstly, what does 'usage' mean for the effective achievement of your KPIs? Secondly, how are you proposing to measure it?

Ms Wynn—I believe that in the last estimates one of the issues that we talked about was that in the previous year we had released for your information the report on privacy, and that received a lot of attention. We had a spike in people coming to our website to download and review information provided in that report. We knew that we were coming into a period when we were not going to be producing final reports—we were involved in two inquiries, but there would be no final report—and that we would probably see fewer people coming to the site. So the reduced KPI in that area reflected that. Our comment about learning the way people are seeing our website was not so much that we were learning about how people gain information or how you measure hits to a website; it was more just being aware of the ebbs and flows of people coming to our website which follow the release of final reports. But we are now in the process, as you have referred to, of tendering for a new website. We want to use the website more effectively for consultation and for providing access to all our materials and reports; we want to do that more quickly and effectively. We certainly have the standard ways of measuring people who come to various parts of the site. We can measure what reports are being viewed et cetera.

Senator FISHER—I think your website says the new website is to be rolled out in the six months to May 2010. Is that still your plan?

Ms Wynn—Yes, it is.

Senator FISHER—Have you invited tenders and released information about that?

Ms Wynn—Yes, we have. We have a tender on AusTender.

Senator FISHER—What is the budget allocated for it—both the tender itself and anything that follows?

Ms Wynn—The budget allocated is around \$50,000 to \$70,000.

Senator FISHER—For which component?

Ms Wynn—That is for the whole project, so it will be divided up into different stages of development. The project is to have a whole new website and the ability for people to do their submissions online et cetera.

Senator FISHER—Okay. Thank you. How many staff do you have working on the development of the website?

Ms Wynn—We have one website manager.

Senator FISHER—And that is it?

Ms Wynn—Yes.

Senator FISHER—Okay; thank you. On your current reviews, last time you were talking about—and you have again referred to—your reviews of the Royal Commissions Act and of secrecy laws, which I understand are intended to be delivered to the government by the end of October. Are you still on track to achieve this?

Prof. Weisbrot—With royal commissions we are still on track. I do not think we will have the final bound copy, but the report will be completed by the end of the month and transmitted in a PDF file. With respect to secrecy, I have written to the Attorney-General relatively recently—a week or two ago—saying that we had received 24 late submissions, including from major stakeholders—most of those were major government departments—and we needed their advice in order to complete the review, so I have asked for another six weeks in order to complete that project.

Senator BARNETT—Sorry; on which report?

Prof. Weisbrot—The review of secrecy laws.

Senator FISHER—So, were the AG to agree, that would take the due date to mid-December.

Prof. Weisbrot—I believe 11 December, yes.

Senator FISHER—And you are yet to hear from the Attorney-General, are you?

Prof. Weisbrot—That is right.

Senator FISHER—What about the inquiry into family violence?

Prof. Weisbrot—That has just commenced and it has a reporting deadline of the end of July.

Senator FISHER—Have you released a discussion paper?

Prof. Weisbrot—No, there is something in preparation at the moment.

Senator FISHER—For release in March next year?

Ms Wynn—Yes.

Senator FISHER—So that leaves some few months between then and the end date. What about the projected review of freedom of information laws which we talked about, I think, at last estimates? Has the government referred that to you as a prospective inquiry yet?

Prof. Weisbrot—No, it came up in the public domain via a speech that the then responsible minister, Senator Faulkner, made, but we have had no further communication about that.

Senator FISHER—So you have not had any discussions with the government about it at all?

Prof. Weisbrot—No.

Senator FISHER—I have some questions about consultancies which I will put on notice for you.

Senator BARNETT—I want to ask you about your privacy report. The government responded to it on 14 October and has announced its plans to establish a single set of binding privacy principles. It has also announced that it has accepted most of your recommendations. Can you advise the committee on the recommendations the government did not accept.

Prof. Weisbrot—Yes, there are 197 recommendations that were part of this first tranche in the response.

Senator BARNETT—Out of 295?

Prof. Weisbrot—Yes, out of 295. And when the report was released last August the government foreshadowed that it would respond in two stages. The first stage would include the privacy principles and core matters, including the office and the powers of the Privacy Commissioner. The second tranche, which will hopefully be replied to next year, will involve exemptions, exceptions and the proposed course of action for serious invasions of privacy. About 90 per cent of the recommendations that were responded to were accepted, and we are delighted about that. The remaining 10 per cent fall into two categories. There were a few recommendations which were superseded by activity, so we made some recommendations about change definitions which were accomplished in the interim by changes to the act's interpretation act. We also made some recommendations about reorganisation of the Office of the Privacy Commissioner, but given that that will be impacted upon by the creation of an information commissioner's office the government will also deal with that in a different way and quite appropriately.

In the areas that the recommendations were not accepted, one of them related to the three or four recommendations in relation to deceased persons. The ALRC sought to extend privacy protections in certain circumstances. I think we were right in principle. We did recognise that it would present some practical difficulties of application and I think those were put in the too-hard basket and were not accepted. We also made a basic recommendation of the model that we wanted which was a high-order privacy act that included the principles that would be of really general application to the ordinary user of the privacy act and to simplify it so that small business owners, individuals and others would be able to see a relatively high-order and clean act. There was quite furious lobbying from some sectors that wanted to see their particular interests represented in the body of the act rather than in regulations. In particular that is true of health privacy which is a large and important but complex area. We thought that was better dealt with in a separate code, but in the event the government has decided to put those health privacy principles into the body of the act and into the privacy principles generally. It is not of massive significance. We thought our three-stage model would probably

be a bit more user friendly for the ordinary person rather than the expert consulting the act, but it is a perfectly plausible way to do it.

Senator BARNETT—Sure. We will be having legislation heading our way in, I think, the first half of next year. Is that your understanding?

Prof. Weisbrot—Yes, that is my understanding.

Senator BARNETT—You have said on the public record that 141 of the 197 recommendations have been accepted in full or in principle, with another 34 recommendations accepted with qualifications and two further recommendations noted. In light of the time, I am wondering if you would be happy to take a question on notice for those that were not accepted. You have just outlined your general views. Could you give us further and better particulars as to the reasons and the concerns that you may or may not have with respect to the government's response to those recommendations?

Prof. Weisbrot—I would rather do that after I see the legislation, frankly. I am happy to do that if you think it would be valuable. Once we see the actual draft legislation, I think the ALRC would probably be in a better position to provide more informed comments, particularly in the areas where the government accepted in principle the ALRC recommendation but is doing it in a slightly different way. It is a bit difficult to know in the abstract whether that is a significant shift or a mild shift.

Senator BARNETT—I am happy to go down that track if you are happy to take it on notice now and do it at the time.

Prof. Weisbrot—Sure.

Senator BARNETT—But, apart from what you have just espoused to the committee, there is nothing concerning or deeply worrying to you that the government has not accepted in terms of your recommendations? You have put them up and they have not been accepted. We would like to know the reasons that you have espoused in the broad. Are there any others that you would like to highlight to us that you would prefer to have been accepted?

Prof. Weisbrot—The only area that occurs to me is with regard to research, particularly health research and particularly in epidemiological research. At the moment, human research ethics committees are allowed to approve research that may technically infringe personal privacy where it believes that the public benefit substantially outweighs any detriment to privacy. The evidence the ALRC received was that a lot of human research ethics committees found that standard quite high for 'substantially outweighing privacy interests' and that they were therefore taking a cautious approach to authorising what we saw as valuable epidemiological research that was in the public interest. So our recommendation was that these should be more evenly balanced and the research ethics committees be authorised to approve it where they thought that the public interest 'simply outweighed' rather than 'substantially outweighed' privacy interests—to put those on a slightly more level pegging. I still prefer the ALRC approach. It may be interesting to ask questions of, say, the NHMRC and others regarding the extent to which they think that not following the ALRC recommendations may compromise some beneficial research in future.

Senator BARNETT—We are advised that the remaining 98 recommendations made by the ALRC will be considered in stage 2 of the Australian government response. Can you give us a time frame as to when that is likely?

Prof. Weisbrot—It is not a matter for me, but I believe that the minister's announcement said it would be next year or in the first half of next year. Again, the timing of that is—

Senator BARNETT—We know the bill is coming, it says, in the early part of 2010. I do not know if the minister can advise any better particulars other than what has been announced—that is, in the early part of 2010.

Senator Wong—I understand from Ms Leon that this is now in fact being led by PM&C. Is that correct?

Ms Leon—That is correct.

Senator BARNETT—That is fine. Professor, there has been quite a bit of publicity over the last—

ACTING CHAIR—Just before we go there: Professor, you have taken a question on notice. The committee has set a date for return of questions taken on notice as 15 December. I gather from the way that you took that question on notice that you may not be able to comply with that date—it really is out of your hands. I just wanted to make it clear that the committee is therefore not necessarily expecting that answer to be returned by 15 December.

Senator BARNETT—That is well noted, Chairman. There is a date by which answers must be provided. So, Professor, perhaps you could—

ACTING CHAIR—If the professor undertook to conduct that task—and not necessarily take the question on notice—would that be satisfactory?

Senator BARNETT—I am happy for the professor to do it either way. He can take it on notice and provide the best answers possible. Professor, you have espoused your concerns today, but we would prefer if you could provide an undertaking to refer your views to this committee once the legislation is provided. Are you willing to do that?

Prof. Weisbrot—I am happy to do both. I can provide you with, as best as I can, a response by 15 December.

ACTING CHAIR—Sorry, I have misled you. It is 11 not 15 December.

Senator BARNETT—Two areas of serious concern that have been raised publicly and are obviously of concern to me and indeed others are missing persons and the right to obtain help in finding those missing persons. Can you provide your views as to the appropriateness or otherwise of that recommendation and the government's response?

Prof. Weisbrot—The ALRC made recommendations that would facilitate greater information exchange in relation to missing persons. We made similar sorts of recommendations in relation to child protection. While in one general sense our mission was to upgrade privacy protections, there was a common-sense recognition that in many circumstances we need better information sharing for good public purposes. As far as I can recall—and I am pretty sure this is the case—the government accepted without reservation the

recommendations that we made in respect of missing persons and in the child protection context.

Senator BARNETT—I understand about 35,000 Australians go missing every year and close to 2,000 people disappear and cannot be contacted by their families. Does that correlate with your figures or your research?

Prof. Weisbrot—I cannot recall the exact figures. They are mentioned in the report, which takes them from public sources. We certainly heard both from families and from government agencies that were involved in this area that they were being hampered in their cause by restrictions or perceived restrictions that made the job difficult. We endeavoured to provide, as I say, a common-sense way through that tangle.

Senator BARNETT—On the issue of creditworthiness, I understand on your recommendations the government plans to allow authorised bodies to access financial data, Centrelink data, ATM records, credit card statements and the like. Can you clarify if that is correct? Why is it appropriate that, say, financial entities be enabled to access that type of information?

Prof. Weisbrot—I think you might be referring to the front-page story in the *Daily Telegraph*, which was wildly inaccurate—and not for the first time. We recommended that the regime we have in respect of credit reporting be freed up a bit. Australia is unusual in the world in restricting the amount of information that can go to a prospective lender. It was limited to things like the number of applications for credit a person had made and did not include whether any or all of those applications had been successful not. What we tried to do was bring together the banks, the credit-reporting agencies and the leading consumer credit people to try, again, to find some sort of common-sense halfway house. We recommended that prospective lenders be authorised to have four or five bits of additional information which seem to me to be quite central to their task of responsible lending and making prudent risk assessments in each case. We did not give the banks and others the open slather that some, although not all, were asking for. They wanted access, as you say, to almost every bit of financial information. We tried to provide enough information so that good risk management practices could be followed, but also respecting the boundaries that we thought should be maintained in relation to personal privacy.

Senator BARNETT—It is a matter of where you draw the line. In terms of access to information for personal records, whether it be credit card usage and so on, providing that information to those financial institutions without them having to undertake proper and thorough searches would seem perhaps a little bit over the top and maybe even a Big Brother approach.

Prof. Weisbrot—I think we actually did not favour that. What we said was that we did not give banks or credit reporting agencies access to continuous current balances and so on. At the moment our law really only allows negative information to be included. What we thought was sensible was that if a person had a good credit history, they were responsible in their use of credit and they made repayments responsibly, then that positive information should be available for risk management as well. A number of the banks and credit reporting agencies again argued for much more information to be available. They pointed particularly to the

examples of the US and the UK, where basically they do have open slather, and suggested that that allowed for much better risk rating practices. That was on the eve of the global financial crisis. So when we saw the kinds of problems that can occur there, even where there is a lot of information available, we thought that it was not wise to extend our information regime into areas that would in fact compromise personal privacy.

Senator BARNETT—But you indicated that they can access information, credit worthiness, of people who have got a good credit record. What about those whose credit record is not so good?

Prof. Weisbrot—They have had access to defaults and so on previously.

Senator BARNETT—But this will make it easier for them to access it. Is that right?

Prof. Weisbrot—It may, in certain circumstances. They would find out about declined loan applications, for example, and things like that, but that seems to me to be a perfectly sensible thing for a prospective lender to be able to have. Again, we are talking not only about banks here. It may also be small businesses that extend credit, and others that rely on proper risk management in order to run their businesses effectively.

Senator BARNETT—All we have got so far is this media release of the Attorney and your statement on 14 October, where it says:

These days, information privacy touches almost every aspect of our daily lives, including our medical records and health status, our finances and creditworthiness, the personal details collected and stored on a multiplicity of public and corporate databases, and even the ability to control the display and distribution of our own images.

The question is, firstly, how far do we go in providing that information to the relevant authorities, and, secondly, who decides who the relevant authorities are? That will all be set out in the legislation, I presume.

Prof. Weisbrot—Yes. That is why we have a big and complex privacy act. Again, what we did not propose is a one-size-fits-all solution. We looked at the specific context of health and medical privacy—for example, children's privacy, credit reporting, missing persons. All of those required slightly different tweaking in order to make them work effectively. That is why our report was so large, and the act is large as well.

Senator BARNETT—Do you have any role in reviewing the draft bill or in reviewing the bill as it is being prepared?

Prof. Weisbrot—We received a steady stream of phone calls from the officers who were doing that, with queries like, 'Why did you say that in paragraph X?'

Senator BARNETT—Which officers?

Prof. Weisbrot—People who were working in PM&C who were preparing this government response. We have not had any around-the-table further discussion. Our report speaks for itself and stands for itself. But we have answered some questions where there were ambiguities or perceived ambiguities.

ACTING CHAIR—Are there any further questions for the Australian Law Reform Commission? If not, thank you, Professor, to you and your officers for your attendance at the estimates proceedings today.

Prof. Weisbrot—Thank you.

ACTING CHAIR—The committee will now move to the Australian Transaction Reports and Analysis Centre. Welcome. Do you have any opening remarks you would like to make to the committee?

Mr Schmidt—I have a very brief comment. I am pleased to make my first appearance before the committee since my appointment as the new chief executive of AUSTRAC. I have been in that position for just over four weeks now. I would like to acknowledge the work of my predecessor, Mr Neil Jensen, who retired in July after serving 20 years with the agency. In my first few weeks as CEO, I have been undertaking meetings with our key government partners to ensure AUSTRAC is adding its maximum value to their corporate and operational goals. I have also been meeting with representatives from key industry associations to hear their views concerning the operation of AUSTRAC and the AML legislation. Finally, I would like to take this opportunity to reiterate the invitation we have made to members of the committee to visit one of AUSTRAC's premises for a more detailed presentation of our intelligence capabilities and supervisory responsibilities. I know that Mr Story wrote to the senators in August, and I believe the presentations which have been given to members of the parliamentary joint committees on the Australian Crime Commission and intelligence and security have been very well received. Thank you.

Senator FISHER—Thank you and welcome. In your four weeks with AUSTRAC, have you had the opportunity to sort out when the 2008-09 annual report will be tabled?

Mr Schmidt—We have completed the report and it has been passed, as I understand other agencies have said this morning, to the Attorney-General's Department for the next step in the tabling process.

Senator FISHER—Do your officers know when the annual report was provided to the Attorney-General?

Mr Schmidt—I am not quite sure. It was either the last few days of September or the first few days of October.

Senator FISHER—Do you have any expectation as to when it might be tabled? If you do, on what basis?

Mr Schmidt—No.

Senator FISHER—You referred to your information sessions for members of parliament, but your organisation has also been doing some hundreds of industry awareness sessions, according to some media. Is that right? Can you tell us how many you have been doing and over what time frame you have been doing them?

Mr Schmidt—I will make a broad statement first and then perhaps pass it to one of my colleagues. The 2006 legislation has been in its implementation phase. We are on the cusp of the move from implementation to business as usual and, as part of that process, there was an intensive awareness and education program run by the organisation. As I understand it, there

were numerous presentations and various materials made available to industry participants to advise them of their obligations et cetera.

Mr Story—The figure was in the hundreds.

Senator FISHER—The media reports suggest 800. Is that about the mark?

Mr Story—We would have to clarify that figure for you. The education program commenced in January 2007, and it ran intensively through to December 2008. It covered all the industries that were subject to the tranche 1 reform, so I do not have the exact figure. We are happy to provide it on notice.

Senator FISHER—Please provide the number, the time frame for delivery, the cost of delivery and the cost for delivery in the 2008-09 financial year, given the program ended in December 2008. Given that you are, as you said, on the cusp of transitioning from implementation to business as usual, what is your process and timeline for implementing or perhaps phasing in the compliance obligations?

Mr Schmidt—The regime as it was established was subject to some ‘policy principles’—I think that was the correct title—which the former minister introduced, as he was entitled to under the legislation, which set out the parameters in which we could take compliance action. The gist of that was that, as the different requirements were being phased in, there would be an educational period, or a period of approximately 15 months, during which, unless there were exceptional circumstances, we would not be taking harsh compliance action. But we could, if circumstances warranted. We are now getting to the end of those, and they are being phased out. You will have seen already that at the end of the last financial year two enforceable undertakings were offered to us by two financial institutions, regarding the reporting to date. One of the things that I am now looking at within the organisation is winding up and extending our approach more in ensuring compliance is being met by those industries we regulate. I think that is an expectation that those people who are doing the right thing within the industry would expect of us.

Senator FISHER—Has the parameter that said ‘not harsh compliance unless ...’, and the other parameters that have restricted your activities, been totally lifted—with effect from early August, is it?

Mr Schmidt—I will pass that to Mr Story.

Mr Story—The parameter is that, if the entity is taking reasonable steps towards compliance, AUSTRAC will not issue a civil penalty order during this phase-in period. The phase-in period is 15 months from each of the statutory deadlines. The last of those deadlines was 12 December 2008. If we add 15 months to that, that will take us to March 2010. That deadline is in relation to the new anti-money-laundering reporting regime. So, if there is a failure to comply with those provisions after March 2010, then the AUSTRAC CEO can take a civil penalty order.

Senator FISHER—Can you take on notice: since the expiration of the respective grace periods for the respective other areas, how many civil penalties has AUSTRAC issued, on what basis were they issued and how much were they?

Mr Story—We have not issued yet any civil penalty orders.

Senator FISHER—That is a simple answer.

Mr Story—Yes.

Senator FISHER—I want to return now to your supervision strategy of 2009-2010. Can you take on notice: how is AUSTRAC performing against the microlevel KPIs outlined in the strategy—there were some five of those—the number of assessments, the number of presentations and that sort of stuff? That supervision strategy outlines the supervision plan for each industry sector that is subject to AUSTRAC's jurisdiction. Your supervision strategy talks about the numbers of 'estimated reporting entities' in what you characterise as the 'gambling and bullion sector', which is kind of the pubs and clubs et cetera. Of those estimated 5½ thousand, how many have registered with you? How many do you know about?

Mr Story—We would have to take the precise figure on notice, but approximately 80 per cent of that sector has enrolled with AUSTRAC. The enrolment is a voluntary process. In addition, they have to provide compulsorily a compliance report each year. Once again, we see that metric at about 80 per cent compliance right now.

Senator FISHER—Once they have volunteered to tell you about their existence they are then required to report to you each year?

Mr Story—Annually.

Senator FISHER—You believe—and perhaps you might confirm on notice—that about 80 per cent of what you characterise as the 'gambling and bullion sector' have voluntarily enrolled with you. Is that right?

Mr Story—Yes. The total enrolment right across the population is 92 per cent. For small and micro-entities—and in some of the gambling the segments are small—we find that the compliance is a little lower than that average.

Senator FISHER—Are you talking about the population of what you characterise as 'gambling and bullion' sector?

Mr Story—No, I am talking about across the board. The gambling sector, as I said, will be a little weaker.

Senator FISHER—I would like to stick with the gambling and bullion sector, and have you answer on notice the precise number of enrolments in that sector of the estimated 5½ thousand reporting entities. A story in the *Australian Financial Review* by Patrick Durkin on 4 August suggested that of underground brokers and foreign exchange dealers only about 1,100 of 5½ thousand had registered with you. Was that an incorrect figure or a confusion of the categories? It certainly does not correlate: 80 per cent of 5½ thousand is going to be way more than 1,100, which is about 20 per cent.

Mr Story—I think it is both an incorrect figure and perhaps a confusing categorisation. It sounds like it is primarily a reference to the remitter sector. We are talking about money transfer businesses, and they have to compulsorily register with us.

Senator FISHER—They are those referred to in your supervision strategy as the 'money services businesses'?

Mr Story—That is correct.

Senator FISHER—On page 12 of your supervision strategy you estimate that there are about 7,000 of those?

Mr Story—We have revised that figure recently. We have 5,554 of those entities registered with AUSTRAC, and we estimate the population at about 6½ thousand.

Senator FISHER—You have got some 5½ thousand enrolled of an estimated 6½ thousand?

Mr Story—Which is about 85 per cent.

Senator FISHER—So at the moment you think you are aware of the whos and wheres of about 80 per cent of the money services business, and you also think that you are aware of the same in respect of 80 per cent of the gambling and bullion sector. Is that right?

Mr Story—Yes.

Senator FISHER—Could you, on notice, confirm both of those figures? I understand this is a transition process and you are in relatively early days, but how much should we be concerned about the fact that AUSTRAC cannot do what it needs to do in respect of various organisations if you know not who they are or where they are? And how much should we be concerned about that, given that on your own say so the two lots of 20 per cent, if you like—gambling and bullion and what you call ‘money services businesses’—may well be those most needing to be targeted by you in any event?

Mr Schmidt—I will make some observations, the first one being that, if I turn to the remitter sector, they are a very fluid population. They are a group in the community that are not required to be licensed by anybody. It is not as though there is an absolute figure out there which you can point to and say, ‘That’s how many you should have.’ They are very small operators. They come and go. One of the areas that I am asking people to examine is how we can cleanse the data, in a sense, to try to find out if there are duplications and, if there have been small corporate entities that have gone into liquidation, how accurate the results are.

Jumping to the other end of the equation—and this is in the area of compliance—one of the challenges for an organisation such as ours is how we demonstrate how we are securing compliance with the requirements. In the short period I have been with the organisation it has become apparent to me that there are two ways. There are the matters you have touched upon so far, which are the up-front civil penalty or other actions we can take. Another very interesting area is what I call ‘proxy compliance’, where it may well be that AUSTRAC never appears in the public domain, or has not appeared in the public domain to date, as having taken action against a person who may have done the wrong thing. It is because we are providing the intelligence to the law-enforcement agencies, who will take that action out there. A person may be convicted of a particular activity and otherwise dealt with but it is not apparent that AUSTRAC has had involvement.

Recently there have been some media reports which suggest that AUSTRAC’s involvement is becoming more prominent. Some of the work that we do through our intelligence will actually identify people who have not registered, but we may not want to go out there and draw attention to the fact that we have identified them and they may well be or have been part

of ongoing investigations by the law enforcement agencies. So it is a balancing action. We are a slightly different organisation in that we straddle fields of both regulation and intelligence.

Senator FISHER—I understand that you would not want to identify that last group of people or organisations. Are you able to provide us on notice the numbers of them in your various categories?

Mr Schmidt—The difficulty there would be that we provide reports to the various law enforcement agencies for their usage. We may not know why they have asked for that information and who they have in mind. Sometimes they will come back to us and ask for further information. Sometimes we are working with some other task force. I do not believe I would be able to give you an accurate figure.

Senator FISHER—With regard to the effect of the so-called global financial crisis, or what is certainly some economic downturn, on compliance activity, your general manager of supervision, Amanda Wood, was quoted by Marsha Jacobs in a *Financial Review* story of 15 October as suggesting that compliance resources are a target for cost-cutting in the downturn. Can you comment on that?

Mr Schmidt—Yes. This issue was canvassed at the last estimates hearings where we were talking about the efficiency dividend that has been applied across the board. A range of saving measures were identified to the committee, including some to do with staffing. The observation I would make there—and I have extensive experience in New South Wales in regulatory regimes from a lengthy period with the Department of Fair Trading—is that with regulatory agencies the more resources you are given the more you can do, but of course there is always more that can be done. What is incumbent upon the agency, with the ebbs and flows of government finances at any one time, is to ensure you are getting the best bang for your buck with what you have. I understand that we had made some staffing changes to reflect the efficiency dividend, which all government agencies are required to meet. So be it. That is the way it is done, and it is incumbent on us to make sure that we are doing our job as efficiently as we can.

Senator FISHER—Do you have any basis for assessing whether the level of the activity you target as a breach of the law has increased since the implementation of the efficiency dividend?

Mr Schmidt—I am not aware of any indication that there has been an increase in non-compliant activity.

Mr Story—All I can add around that is that for the 2008-09 financial year AUSTRAC completed 205 on-site assessments and 149 desk reviews. For the next year we are aiming for roughly double that figure—600 assessments. They will include on-site assessments, desk reviews and reporting reviews. At this time we are trying to move more resources into direct supervision of these entities.

Mr Schmidt—During this period the volume of reports which we have been receiving has been increasing too.

Senator FISHER—There was a *Financial Review* story on 12 October talking about a potential expansion of the anti-money-laundering laws. Has AUSTRAC had any information

from the government about that potential expansion? The story was talking about 'expansion of anti-money-laundering laws to cover lawyers, accountants, real estate agents and jewellers'.

Mr Schmidt—You are referring to what are commonly known as the tranche 2 amendments. AUSTRAC is a regulatory and intelligence agency, not a policy agency. The government has previously stated that a further decision will be made on that tranche 2 set of amendments in December. We are in discussion with the Attorney-General's Department regarding government proposals, but they are matters of policy at the moment.

Senator FISHER—Have you got any expectation as to what they might be and the timing of implementation to ensure that you are going to have the resources to adequately deal with that?

Mr Schmidt—We would talk about the whole range of issues which would be thrown up as part of the development of the government's position. I could not comment further.

Senator FISHER—I have some questions about consultancies that I will place on notice. Thank you.

ACTING CHAIR—Thank you for your attendance on the Senate today.

[11.37 am]

Family Court of Australia

ACTING CHAIR—Welcome. Do you have any opening remarks you would like to make to the committee?

Mr R Foster—I do not, thank you.

ACTING CHAIR—We will move straight to questions then.

Senator BARNETT—Could you give us a summary from your perspective of where things are at regarding the Semple report?

Mr R Foster—The chief justice received a letter from the Attorney-General last week in relation to the progress of the legislation. It advised the chief justice that because of the High Court's decision in *Lane v Morrison* that the Australian Military Court was unconstitutional:

The Government is considering how it will respond to this decision. This may have implications for the proposed restructure of the Federal Court. As a result, the introduction of a Bill to implement the restructure of the federal courts has been delayed.

... ..

As a result it is now my intention that the legislation will be introduced as early as possible next year. While unfortunate, the delay is necessary to ensure a fully considered approach to the restructure of the federal courts.

It is the court's understanding that any proposed legislation will not be happening until next year. That letter was received by the chief justice late last week.

Senator BARNETT—Do you have a date for that letter?

Mr R Foster—Unfortunately the letter is not dated.

Senator BARNETT—When did you receive it?

Mr R Foster—We received it on Thursday or Friday of last week.

Senator BARNETT—Could you please table the letter.

Senator Wong—As a matter of courtesy, I wonder if I could have the opportunity to take that on notice. If I am able to assist with that in the course of the hearing, I will.

Senator BARNETT—All right. This is a very important matter. The shadow Attorney has arrived and I am happy to pass to him. We have only just commenced questioning in terms of the Semple report. Did you hear the response from Mr Foster?

Senator BRANDIS—No, I did not, actually; I was just outside. What was that, Mr Foster?

Mr R Foster—It was just to say that the Chief Justice received a letter from the Attorney-General late last week setting out an update on where the legislation in relation to the merger of the courts is at, because of the decision in Lane and Morrison. I will read from one paragraph, if I may.

Senator Wong—We are happy to table that.

Senator BARNETT—So, in summary, it is on hold, Mr Foster, based on the advice from the Attorney-General as a result of the High Court case of Lane and Morrison and that legislation is also on hold, as you advised. So you are in a state of flux, as it were.

Mr R Foster—In relation to the legislation, that is entirely a matter for the government. But, certainly, following up on the questions that I was asked at the last estimates hearing in relation to the courts administration, more work has been done in that regard. Now the administrations of the two courts, the Family Court of Australia and the Federal Magistrates Court, have largely been merged.

Senator BRANDIS—Mr Foster, when can we see the letter from the Attorney to the Chief Justice?

Senator Wong—I just indicated that we were happy to table it.

Senator BRANDIS—That is why I was wondering whether we could have it now so that I can look at it, because it bears on the set of questions I want to ask.

ACTING CHAIR—The secretariat staff is getting it now and we will make some copies for you, Senator.

Senator BRANDIS—Thanks. Mr Foster, I have asked you this before, but I would appreciate your advice on this, particularly in view of the changed circumstances resulting from Lane and Morrison. Why was the administrative consolidation or integration of the two courts proceeded with in the absence of a decision by the parliament to legislate for this outcome?

Mr R Foster—I think my answer is the same as I gave last time—that is, that this was a decision made by the Chief Justice and the Chief Federal Magistrate, largely in an attempt to overcome some of our financial pressures. It was thought—and I believe—that the merging of the administrations would not impact on the structure of the courts in any significant way and what we have done will not have any adverse effect on whatever decision government makes in relation to the structure of the courts.

Senator BRANDIS—Or that the parliament makes.

Mr R Foster—Or parliament makes.

Senator BRANDIS—So, in the event that either the government decides to abandon the recommendations of the Semple report, particularly in view of the new situation presented by Lane and Morrison, or the parliament decides not to pass whatever legislation is appropriate to legislatively enact that, the Federal Magistrates Court and the Family Court can proceed as they are?

Mr R Foster—That is my view. I would say yes. The decision was primarily made around reducing duplicated costs in administration.

Senator BRANDIS—I understand that. Can we just pause for a second while we quickly absorb this letter? The copy I have been given does not appear to bear a date. I wonder if somebody could look up the date of the letter, please.

Senator Wong—The advice I have is that it was sent on Friday.

Senator BRANDIS—Thank you.

Senator BARNETT—And received on Friday?

Mr R Foster—Yes.

Senator Wong—That was Mr Foster's evidence.

Senator BRANDIS—I have two questions arising from this letter, either to you, Minister, or to Mr Foster—I am not sure which. The last sentence of the second paragraph reads:

As a result, the introduction of a bill to implement the restructure of the Federal Courts has been delayed.

Do I correctly read that to mean that the delay in the introduction of the bill is the result of a decision to delay it following Lane and Morrison or had it been the subject of an existing delay?

Senator Wong—I do not think Mr Foster can answer that unless—

Senator BRANDIS—Can you answer, Minister?

Senator Wong—Can finish? Obviously he did not write the letter nor did I. I can take on notice your question as to what was meant. I cannot add to what was in the letter.

Senator BRANDIS—You are a member of the cabinet.

Senator Wong—Let's not do this, Senator Brandis. I am certainly not going to talk to you about what may or may not have been discussed in the cabinet.

Senator BRANDIS—I am not going to ask you to.

Senator Wong—I will take it on notice if there is anything additional other than the letter which I can provide.

Senator BRANDIS—Was there a decision made by the government between the time of the High Court's decision in Lane and Morrison and the writing of this letter to delay the legislation?

Mr Govey—I do not think the position is quite as black and white because—

Senator BRANDIS—That is why I am asking these questions, Mr Govey.

Mr Govey—The Attorney-General has made a decision to delay the legislation which is what is reflected in that letter. But the government did not make a precise decision as to when the legislation would have been introduced anyway. We had been working on the preparation of the legislation. I think from memory that there were some elements of delay prior to this decision but this has tipped it over so that it will not be possible to introduce legislation this year.

Senator BRANDIS—Thank you very much, Mr Govey, for your frankness. That is the very reason I am asking these questions because I must say it seems to me that what the Attorney-General is seeking to do is to use the High Court's decision in Lane and Morrison as a basis to excuse the delay. But the delay, as you have told us, was a pre-existing delay.

Mr Govey—That is certainly not the impression that I was intending to give you, so I apologise if I did not make that clear.

Senator BRANDIS—That is fine, Mr Govey. I understand your answer.

Senator Wong—Senator Brandis, with respect I do not think your construction of the answer was what Mr Govey said.

Senator BRANDIS—You are entitled to your opinion, Senator Wong, but I am not directing this question to you.

Senator Wong—Can I finish? I had the call and I was responding.

Senator BRANDIS—I was asking the question of Mr Govey.

Senator Wong—I will listen to you but I had not finished. My comment was that your construction in my view, I would suggest, was not a fair and reasonable construction of Mr Govey's answer. If you have that opinion, that is your opinion.

Senator BRANDIS—And if you have that opinion, that is your opinion and that opinion is irrelevant to me, Senator Wong. We know that there had been delays with the Semple report. I would not like the public to get the impression that the only source of delay was the fact that the High Court made a decision in relation to the Australian Military Court. That is the point I was trying to reach. I will move on to the penultimate paragraph of the letter:

As a result it is now my intention that the legislation will be introduced as early as possible next year. While unfortunate, the delay is necessary to ensure a fully considered approach to the restructure of the federal courts.

May we take it that the legislation in the form which it ultimately takes will now, in addition to whatever other considerations were in the mind of the government, have regard to the consequences of Lane and Morrison as well?

Mr Govey—The government's decision will have regard to that, but no decision has been made as to whether there will be any impact on the legislation itself.

Senator BRANDIS—I understand that. You see, Mr Govey, I am sure you are aware that the opposition was saying before Lane and Morrison that it was a bad idea to abolish the Federal Magistrates Court for a number of reasons and that one of those reasons was that there was a utility in having a general, Commonwealth court of lower jurisdiction.

You are probably aware—though you may or may not be—that after the Lane and Morrison decision was delivered the opposition, through me, said that Lane and Morrison illustrated the very reason why it was useful to have a lower court of Commonwealth jurisdiction which could be divisionalised and could perhaps take the form of a division which could replace the Australian Military Court. I invited the government in light of the Lane and Morrison decision to reconsider its decision to abolish the Federal Magistrates Court. What I am getting at is: has the government reconsidered whether or not it proposes to abolish the Federal Magistrates Court in light of the outcome of the decision in Lane and Morrison?

Mr Govey—I do not think I can take it further than saying that we and the Attorney-General are looking at the implications of the decision—

Senator BRANDIS—Sure.

Mr Govey—We are having discussions with Defence, but no further decision has been made at this point.

Senator BRANDIS—I do not want to pressure you beyond where it is appropriate for me to take you, of course—and perhaps Mr Wilkins might be able to contribute as well. But would it be fair to say that, in view of the issues exposed by the High Court's decision in Lane and Morrison, whether or not the Federal Magistrates Court should be abolished is one of the options being considered by the government?

Mr Govey—I think that is a matter for the Attorney, rather than me, to say.

Senator BRANDIS—Mr Wilkins or Senator Wong?

Mr Wilkins—I think that is right.

Senator BRANDIS—It is a simple point.

Mr Wilkins—It is intruding in issues that have to do with cabinet submissions et cetera, and it is a matter of policy for the Attorney.

Senator BRANDIS—I am not asking about cabinet submissions; I am asking about what may be on the mind of the government. What I would like to know is whether—given that we have been told by the Attorney, through this letter, that the government is reconsidering this legislation in light of Lane and Morrison—one of the options that the government will be addressing in this reconsideration is the abolition of the Federal Magistrates Court, which was a principal recommendation of the Semple report. Is that going to be revisited?

Mr Wilkins—The answer still is: I think that it is a question you need to the Attorney-General.

Senator BRANDIS—Let me put it to Senator Wong.

Senator Wong—I do not think that what is on the mind of the government is really something that you and I can have a chat about, Senator Brandis.

Senator BRANDIS—I can certainly ask you whether or not a particular option is an option under consideration.

Senator Wong—I have nothing further to add to the evidence that has been given.

Senator BRANDIS—Given that there has been no evidence given, in response to the question I just asked, could you please answer my question. Or, if you do not know the answer and want to take it on notice, please do, by all means.

Senator Wong—I have nothing further to add, Senator.

Senator BRANDIS—You have not said anything.

Senator Wong—And you are trying to canvass a range of options—

Senator BRANDIS—No, no.

Senator Wong—Actually, you are. You are trying to canvass whether or not a particular option is—to extrapolate from what you said—'on the mind of the government'. I do not have anything to add on that.

Senator BRANDIS—You have told me nothing. You have not objected to the question. All I want to know—and, if you do not know the answer, by all means feel free to say you will take it on notice—is whether one of the options on the table is reconsideration of the decision to implement the Semple report so far as concerns its recommendation to abolish the Federal Magistrates Court.

Senator Wong—I personally do not know that.

Senator BRANDIS—Will you take it on notice, please?

Senator Wong—I can take it on notice if you press it, but I suspect, Senator, that, just as when you were in government, the answer will be that these are decisions that the government will make in due course.

Senator BRANDIS—I do press it. Thank you for agreeing to take it on notice. If there is an objection to the answer from the Attorney-General, then we will deal with that in due course. Mr Foster, what instructions have you been given from the government in relation to this delay? By that I mean, given we now know that a process that was underway and expected to be brought to fulfilment by a particular time may now be brought to fulfilment at an unspecified later time, certainly not before the end of this year, have you had any dealings or discussions with the department in relation to the delay, and are there any administrative or cost implications of this delay for an unspecified period of time?

Mr R Foster—Certainly, the delay does not really impact on the merger of the administration at all. It is really about eliminating unnecessary duplication and waste. That has now been achieved as far as we can possibly take it.

Senator BRANDIS—Right.

Mr R Foster—There is an issue in relation to the appropriations because the Federal Magistrates Court has no allocation as from 1 January. There have been some discussions with the Family Court's chief financial officer, who is also the acting CFO for the Federal Magistrates Court, the department and Treasury about how we might work through those processes. My understanding of it, and I am sure Mr Harriott will correct me if I am wrong, is that as from January there will be an invoice arrangement, where the Federal Magistrates Court will invoice both the Federal Court and the Family Court of Australia for services that it provides on its behalf, and for those monies to be repaid into their budget.

Senator BRANDIS—What sort of money are we talking about?

Mr R Foster—I will not talk about the Federal Court, in relation to positions that are being transferred, but basically it is the majority of their budget in relation to payment of staff, payment of federal magistrates, operating costs in relation to family reports, registrar services and the like. It is entirely across the whole gambit of their operational budget.

Senator BRANDIS—I am not going to press you on this right now, but would you be good enough to take on notice a question to provide fully costed particulars of each of those cost items that you have referred to in that answer?

Mr R Foster—Yes, certainly.

Senator BRANDIS—Has there not been a protocol agreed to between the Family Court and the Federal Magistrates Court in relation to the division of family law work between them in this interim period?

Mr R Foster—Yes, there has.

Senator BRANDIS—Is that a public document?

Mr R Foster—I cannot see any reason why it could not be made public. In fact, the courts are about to send a copy of it to the various peak legal bodies and the Family Law Section of the Law Council of Australia.

Senator BRANDIS—Do you have a copy of it available?

Mr R Foster—I certainly do.

Senator BRANDIS—Could that be tabled, please? While that is being copied for the committee, perhaps I could move on to another issue?

ACTING CHAIR—It is still being considered; there has been no response to the question whether it can be tabled yet. But we will wait for that response; you can continue and we will come back to that point.

Senator BRANDIS—I am sorry—I thought that Mr Foster said he was happy to table it.

ACTING CHAIR—It is able to be tabled? Thank you.

Senator BRANDIS—I think on the weekend before last there was an advertisement placed in several newspapers advertising for expressions of interest in judicial appointments: two to the Family Court in Sydney and Parramatta and three to the Federal Magistrates Court in Parramatta, Melbourne and Darwin, the closing date for expressions of interest being 6 November 2009. Are you familiar with that advertisement?

Mr R Foster—Yes, I am.

Senator BRANDIS—Mr Foster, given that one of the bases upon which the implementation of the Semple report was going to take effect was the gradual running down of the number of Family Court judges in this consolidated court so that they would eventually equate to the appropriate number for the complex trial and appellate division of the new court, and given that Mr Semple quite explicitly says that at the moment, for the purposes of the new court, there are more Family Court judges than there need to be to staff the appellate and

complex trial division, so the plan was to run them down through retirement or natural attrition, why are we advertising for two more Family Court judges?

Mr R Foster—There is enormous pressure on the workload for the Family Court in the New South Wales basin, which includes Sydney, Parramatta and Newcastle. The court's numbers have reduced significantly over a period of time. By way of example, there are currently 35 judges in the Family Court, including the Chief Justice. Just as a snapshot, in June 2005 there were 44, so the numbers are coming down significantly.

Senator BRANDIS—But they are still above what Mr Semple envisaged would be an appropriate staffing level for the complex trial and appellate division, are they not?

Mr R Foster—They are, but we are very aware of impending retirements which have not yet been announced. That is a matter for individual judges, but it is the view of the court that, whatever the final number is in terms of what is appropriate for the Family Court judiciary, the number that we have currently got can be reduced over a fairly short period of time.

Senator BRANDIS—It just seems very strange to me that, since the plan is to run the numbers down, you are recruiting new people. Are you saying that the number of imminent resignations or retirements from the court is so great that it would take you below where the Semple report anticipated would be the needs of the appellate and complex trial division so that you have to augment them by another two at this point?

Mr R Foster—Over a period of time, obviously, if there were no replacements, the figure would be reduced to a very small number. But the workload in New South Wales is such that, with the retirements in New South Wales, to get through the work in New South Wales requires some additional appointments.

Senator BRANDIS—Couldn't judges be transferred?

Mr R Foster—They are now. We do fly judges around the country on a regular basis, but it is a very expensive way of doing things. It is also a question of whether the mix between the federal magistrates and the judges is right in each location. In some sense, it is taking a while to get the balance right. The existence of the protocol is going to be very helpful to identify which court does which work.

Senator BRANDIS—All right. I will come back to the protocol, but it does seem, I must say, Mr Foster, to be a terrible mess when the government, so far as we are told, is still planning to implement the Semple review and consolidate these two courts into one, that that implementation which had already been delayed has now been further delayed as the government considers the implication of a High Court decision and that, although we know that part of the plan is to run down the numbers of existing Family Court judges, lo and behold, the government, in the middle of this somewhat long transition period, is actually recruiting new judicial officers to two courts that are about to be abolished—and, in relation to one of those, beyond the staffing level that the Semple plan ordains is appropriate for it. Would you like to comment on that?

Senator Wong—Chair, I am not sure, as the minister at the table, if there was a question in that. There was a series of propositions—

Senator BRANDIS—There was a question at the end, when I said, ‘Would you like to comment on that?’ That was the question.

Senator Wong—If I could finish, Senator Brandis, there was a series of propositions and an invitation for the officer to give an opinion. I am not sure that is an appropriate set of questions for an estimates hearing.

Senator BRANDIS—I was rather hoping that we could do this faster, but let us take them one by one. Originally your expectation was, wasn’t it, Mr Foster, that the Semple report, having been adopted by the government, would have been in operation by now?

Mr R Foster—If the government achieved its program then that would be my understanding, based on the funding transfers from 1 January.

Senator BRANDIS—So Semple, had there not been delays, would have been in place now, assuming that the parliament agreed to the appropriate legislative changes—and nobody is suggesting that there has been any hold-up in parliament, because no bill has been presented to the parliament yet, so it is still entirely in the in-tray of the Attorney-General, as it were.

Senator Wong—You never know how long it might take the opposition to get a position on this, Senator Brandis.

Senator BRANDIS—Please do not make political points, Senator Wong.

Senator Wong—‘Pot and kettle’, I think, comes to mind, Senator Brandis.

Senator BRANDIS—Please do not make political points, Senator Wong; that is unworthy of you.

Senator Wong—There are some who can play that card, Senator Brandis; you are not one of them.

Senator BRANDIS—Mr Foster, given that there has been no parliamentary delay—the delay that has occurred is entirely within the executive government, for reasons that might be perfectly understandable, including the Lane v Morrison decision—you would have thought, would you not, that this new consolidated court would have been in operation now.

Mr R Foster—For what my opinion would be worth on that matter—perhaps I should not give an opinion—

Senator BRANDIS—I am not asking for your opinion; I am asking for your understanding as the CEO as to when these arrangements were meant to have begun by.

Mr R Foster—What I started to say a few seconds ago was that, based on the appropriation bills, I would have expected the thing to be in place by January 2010.

Senator BRANDIS—Given that we now know that that is not going to happen and given that we are almost at the end of 2009—so we are now very, very late in what should have been the implementation phase and are almost at the eve of the commencement of the new court—had these delays not happened, you would not have been advertising for new Family Court judges and new Federal Magistrates Court magistrates in October 2009, would you?

Senator Wong—Senator, you are asking an officer to comment on a set of hypotheticals. You can make those assertions in public—I am sure you will—but you cannot ask Mr Foster to give an answer based on a set of hypotheticals.

Senator BRANDIS—I can actually ask a witness to address a hypothetical proposition, but I do not think it is. Let me try and rephrase it. Mr Foster, if the new court were commencing, as was originally the plan, on 1 January 2010, you would not have been advertising for new Family Court judges and new federal magistrates in October 2009, with applications to close in early November 2009, would you?

Senator Wong—How is that not hypothetical?

Senator BRANDIS—I am sorry; he is shaking his head, so I assume he is about to respond.

Senator Wong—Chair, how is that not hypothetical? ‘If this were the case then wouldn’t this be the case?’ That is the question.

Senator BRANDIS—Mr Foster, if everything had gone according to plan and the new court were about to start on 1 January 2010, this advertisement would not have been placed here now, would it?

Mr Wilkins—Senator, part of the answer about the new Family Court judges—we have been through that discussion—has to do with the particular demographic requirements in New South Wales, so I suspect that probably would have gone ahead irrespective of what was being contemplated in terms of merger.

Senator BRANDIS—And the federal magistrates?

Mr Govey—On that, I think it can be said that obviously, if the new structure had been in place, they would not have been advertised as positions for that particular court, but there is no reason to believe that they would not have been needed in the so-called general division for the Family Court. Given that it is proposed that relevant people be offered commissions in the court assuming the transfer goes ahead as has been announced, what can be said is that it would have made no difference.

Senator BRANDIS—But if this new court were on time and were starting on 1 January 2010, the transition or preparation phase for the assumption of the new jurisdiction on 1 January 2010 would be at a very late stage now, and you would have a clearer idea than you obviously have as to how many additional judicial officers would be required, because, for example, you would know how many were prepared to take commissions in the new court, how many retirements or resignations were going to be triggered by the imminent implementation or commencement of the new court and so on. That is right, isn’t it, Mr Govey?

Mr Govey—No, I do not think so. My point was that there is a certain amount of work to be done. The work is to be done either at the complex and appellate end or at the general end, and the mix of judicial officers and the total number would not have altered regardless of whether they were in the one court—that is, a combined Family Court—or, as continues to be the case, they were in the two separate courts.

Senator BRANDIS—But my point was you would have a clearer idea of personnel needs because you would have a clearer idea than you currently have as to how many people would drop out, as it were, by either not accepting commissions, retiring or resigning.

Mr Govey—We have not worked on the basis that there will be any drop out, as such, from the Federal Magistrates Court—

Senator BRANDIS—Have you not? That is interesting.

Mr Govey—and, to the extent that that court could not be abolished while there were judicial officers serving, there would need to be some arrangement for them to continue to undertake family work. It was never envisaged that there would be federal magistrates in that court who were not fully occupied. That was the basis for me saying that there was no reason why a decision could not be made to recruit new judicial officers for the Federal Magistrates Court at this point. That had regard to the current and forecast workloads for that court and for the Family Court.

Senator BRANDIS—When last you were before this committee and we were addressing this issue, I was asking you some questions about the very deep divisions within the Federal Magistrates Court in relation to the Semple report and the implementation of it—the proposed future direction of the court. Are those divisions still, in your observation, in being among the federal magistrates?

Mr Govey—I do not think I am in a position to comment upon that.

Senator BRANDIS—Surely when you reconsolidate or merge two institutions you do ruffle a lot of people's feathers. It is not universally popular—and it is common knowledge that this certainly could not be said to have been universally popular—among the federal magistrates, and these personnel and morale issues do matter. You accept that morale issues do matter among the personnel of two institutions that are about to be merged, do you not?

Mr Govey—I am sure that that would be a relevant consideration for the courts.

Senator BRANDIS—Mr Foster? Is that a relevant consideration?

Mr R Foster—I would agree with what Mr Govey has said: that would be a relevant consideration. But I guess some decisions not everyone is going to be pleased about.

Senator BRANDIS—I understand that, and I am not suggesting you or the government have done anything wrong because there are some disgruntled people, but nevertheless I think it is a matter of public concern that there are all these disgruntled federal magistrates running around. In your judgment, have these morale issues been somewhat addressed satisfactorily?

Senator Wong—Through you, Chair: I ask you to consider whether that question is in order. Senator Brandis has a range of political points to make. He is entitled to make them. But he is asking questions of officers about their opinion of other people's morale. Is that really an issue that goes to the function of these agencies—and, therefore, is it an appropriate question for estimates?

Senator BRANDIS—May I speak to that, Mr Chairman, before you rule?

ACTING CHAIR—I was not necessarily seeking to rule. I was going to say that, insofar as those matters have been considered by Mr Foster, I think it is a fair question. Insofar as

those matters have not been considered about individuals, I think you are probably right, Minister, that it is not in order, but—

Senator Wong—With respect, I would also add to that that witnesses are not asked for matters of opinion.

Senator BRANDIS—That is not right. You should know that, Senator Wong. Heavens above, you've been a senator for long enough! Officers are not asked about matters of opinion about government policy. They are certainly asked for their opinions about matters within their very official responsibility.

ACTING CHAIR—Again, I think some of the evidence before us is that these matters have been issues that have been considered. In terms of any formal consideration of those matters, I think the question is fair. If it is about particular individuals' states of mind or morale, which you could not possibly answer, I think you cannot answer that and you need to be clear about that.

Senator BRANDIS—Thank you, Mr Chairman. Mr Foster, I am not going to ask you about other individuals' states of mind. We know you are the CEO. I think it is agreed that the morale of the personnel is a relevant matter and it is something which is an issue for you as the CEO. The parliament is interested in knowing, given that it is common knowledge among the legal profession and people interested in this matter that there was a lot of disgruntlement among the federal magistrates—I see you are nodding—and that there was a morale issue in relation to some of these men and women, whether that, in your professional opinion as the CEO, has been sufficiently addressed.

Senator Wong—That is a matter of government policy.

Senator BRANDIS—No, it is not.

Senator Wong—You are asking Mr Foster's opinion as to whether or not the government has sufficiently addressed this issue. Is that not correct?

Senator BRANDIS—I did not ask him whether the government has sufficiently addressed the issue.

Senator Wong—Who else would you be asking about?

Senator BRANDIS—Please stop interrupting. Mr Foster, did you understand my question?

Senator Wong—I am intervening.

Senator BRANDIS—I know you are busy saving the world, but would you stop running interference on this.

ACTING CHAIR—The minister has every right to make sure that the question being asked is being understood by those at the table.

Senator Wong—Senator Brandis asked Mr Foster whether in his opinion this matter is being suitably dressed. I then intervened and said: 'That is a question about government policy. Clearly it is an issue as to whether the government has addressed it.' Senator Brandis then said no. If that is the case and he is asking whether other people have addressed it, he should so clarify.

Senator BRANDIS—I do not think a clarification is necessary, because I did not ask about the government. You may be aware that there is this principle called the separation of powers in which the legislative and executive arms of the government are different from the judicial arm.

Senator Wong—I have never come across it before!

Senator BRANDIS—I am asking about whether within the court the matter has been sufficiently addressed.

ACTING CHAIR—Could you re-ask the question. That will clarify it for everybody.

Senator BRANDIS—I am not asking you about government policy, Mr Foster. I am asking you about the way in which an admitted, acknowledged morale problem among some of the men and women affected by this proposed merger of the federal magistrates is being addressed. What I am asking you, in your professional opinion as the CEO of both of these courts, is whether you are satisfied with the way in which that morale issue has been addressed within the court.

Mr R Foster—It becomes a bit difficult when you are wearing two hats. I am now sitting here with my Family Court of Australia hat on, which I do not think I am in a position to—

Senator BRANDIS—Let us start with your Federal Magistrates Court CEO hat on.

Mr R Foster—I am speaking in my capacity as the acting CEO of the Federal Magistrates Court. At the end of the day, under the legislation the Chief Federal Magistrate is responsible for the administration of the court and all that it entails. He or she is assisted by the chief executive officer, who at this stage happens to be me. So the responsibility for those things does not really lie with me but with the Chief Federal Magistrate.

Senator BRANDIS—But you, of course, are the person who answers to the parliament for the court, not the Chief Federal Magistrate.

Mr R Foster—But I think in these circumstances that I would take this question on notice. It is something that I would need to consult with the Chief Federal Magistrate on before providing any response to, as at the end of the day he has the responsibility. I assist the Chief Federal Magistrate. In fairness to me in this position, I would like to take that question on notice, consult with the Chief Federal Magistrate and provide a response.

Senator BRANDIS—I am not sure that is good enough for my purposes. I can understand why you might be reluctant to answer the question without consulting with the Chief Federal Magistrate or, in your other capacity, without consulting with the Chief Justice of the Family Court, but I am really asking for an opinion you hold about the organisation which you administer. You must have an opinion, and if you do have an opinion I think the parliament is entitled to hear it.

ACTING CHAIR—Mr Foster has not said he will not give you that opinion. He has said he would like to take that on notice and give it further consideration, which I think is normal practice and appropriate.

Senator BRANDIS—Do you have an opinion, Mr Foster?

ACTING CHAIR—This question has been taken on notice.

Senator BARNETT—The first paragraph of the protocol that has been tabled raises a concern—that is, whether this merger is happening by stealth. The second line says:

... final orders ordinarily should be filed and/or heard in the Family Court of Australia (“FCoA”), if judicial resources permit, otherwise the matter should be filed ... in the Federal Magistrate Court (“FMC”).

You then have nine criteria, and No. 7 says ‘complex questions of jurisdiction or law’. With respect, that could mean just about anything. It seems to me that the protocol that you have established or that has been promulgated is setting up a system whereby most matters are headed to the Family Court of Australia and subject to ‘resources permitting’. Does that sound accurate to you?

Mr R Foster—No, and certainly that would not be my interpretation of the protocol at all. In fact, it is an attempt to ensure that the diminishing judicial resources of the Family Court are only doing work that is appropriate to it and not doing work that would be more appropriately placed in the Federal Magistrates Court. There are places where the resources, in my view, have not reached a balance. There might be a place, such as in Darwin, where there is a resident federal magistrate and by reason of necessity she might be required to do work that in other places might be done by a judge of the Family Court. It is a protocol; it is not legislation. It is an attempt to try to identify the appropriate work for each court. I certainly do not read it in the way that you are suggesting.

Senator BARNETT—It may be, but the protocol does establish some guidelines whereby the Family Court deals with all those matters set out in criteria one to nine, judicial resources permitting. That is what will happen; isn’t that right? That is what the protocol says in the first paragraph.

Mr R Foster—The majority of the work is in trial work with children’s matters. Some of these international child abduction matters, for example, are matters that are dealt with by superior courts throughout the world. Some of these cases are not of such enormous workload but they are serious matters within themselves. The majority of the work is in relation to property in children’s matters, and the only way in which we are trying to split up the work is that if a matter goes for longer than four days then perhaps it requires the attention of a judge to enable the federal magistrates to do the vast majority of the work, the 80 per cent of the filings which exist in that court.

Senator BARNETT—Thank you, Mr Foster. Who promulgated this protocol, how was it promulgated and has it been agreed by the Attorney-General?

Mr R Foster—It was agreed at the Family Law Courts Advisory Group, which is the Chief Justice, the Chief Federal Magistrate, Federal Magistrate Michael Baumann and Justice Watts from the Family Court. I am also a member of that group. Basically, it was discussed after a review between Justice Watts and a federal magistrate from Melbourne, who provided some thoughts as to what might be the best way to divide up the work between the courts. That work was examined at the Family Law Courts Advisory Group, and the outcome of that was this protocol, which was signed off at the last meeting of the Family Law Courts Advisory Group, which was on 7 May. The protocol has been distributed between the judicial officers of either court. It is yet to be sent to the various peak bodies of the legal profession. There is a

letter being drafted basically as I speak, which will go from both the Chief Justice and the Chief Federal Magistrate to the various peak legal bodies, advising them of the protocol.

Senator BARNETT—Has the Attorney-General seen it and signed off on it?

Mr R Foster—The Attorney-General has seen it, but it is really a question between the two courts. It is a matter—

Senator BARNETT—When did he see it?

Mr R Foster—I am not sure of the exact date that the Attorney-General saw it. It has certainly been with the department, because Mr Govey is also a member of the Family Law Courts Advisory Group.

Mr Govey—Senator, I cannot recall whether the Attorney has seen it or, if so, the date, but can I just emphasise—

Senator BARNETT—Mr Foster just said that he had seen it.

Mr R Foster—I thought he had but I might be wrong.

Mr Govey—And that may well be right. I am just saying that I cannot independently say. We can certainly check that, but the point I would make is that if it were seen by the Attorney-General it would have been on the basis that it was for information, because the workload division between the two courts, subject to there being any legislative description or limitations, is a matter for the two courts to sort out, because they have powers of referral of matters up and down.

Senator BARNETT—Thanks for that. Perhaps over lunch you could check the date of the information being made available and when the Attorney-General signed off on it.

Senator Wong—We will take that on notice and if we are able to provide it in the time frame we will.

Senator BRANDIS—Mr Foster, what do you regard as the status of this document? Is it to be regarded by federal magistrates and Family Court judges as, in substance, a direction to them in relation to the allocation of cases?

Mr R Foster—I do not see it as a direction. No-one can direct.

Senator BRANDIS—That is what I am getting to.

Mr R Foster—It would require legislation to do it. That is why it is a protocol for division of work; it is not a direction.

Senator BRANDIS—That is the very point I am getting at. Notwithstanding that everybody is merrily going along expecting the Semple report one day, eventually, to be implemented, until that happens, until there is a new court combining the functions of these two, you have completely, constitutionally separate courts, each established under their own acts of parliament, which have, as we know, very significant jurisdictional overlap. If an application in relation to a particular case which falls within that area of overlap were brought in one court and there were to be an application made by a party to transfer the case to the other court, that application would have to be heard and determined by the Federal Magistrate or the Family Court judge—whichever it was—applying ordinary judicial decision-making

techniques and with the total independence of the exercise of their judicial decision being respected, would it not?

Mr Govey—I think I am right in saying that, from the first day that the Federal Magistrates Court began operation, the number of judicial officials—and this has continued—in both courts meant that you always had to consider whether or not the division of work rested with just because somebody filed a matter in one court or the other, and there has been a capacity to transfer matters between the courts, not just at the instance of the parties but also at the instance of the courts themselves.

Senator BRANDIS—I think I know that, Mr Govey, but I am really trying to get to a deeper issue, and that is: to what extent it is appropriate, or even lawful, to try and govern or bind the exercise of a judicial decision in relation to issues of transfer of matters by this protocol. If I am Federal Magistrate and I am seized of a particular matter which could equally be dealt with by my court or by the Family Court and one of the parties to the proceeding makes a transfer application to remove the matter to the other court, what I am obliged to do is to deliver a judgment on that transfer application, supported by reasons for judgment, and in arriving at that decision my discretion cannot be properly interfered with. This might be a matter of administrative convenience from a bureaucratic point of view but I cannot fail to see how this is other than an interference in the independence of the judicial officer seized of such an application. Do you see my point?

Mr Wilkins—I do not think that can be a correct analysis. If there is such a case where it is contested, you are undoubtedly correct that this is a matter—

Senator BRANDIS—I am assuming a contested case.

Mr Wilkins—If there is, but this is just the common-sense way in which courts are trying to organise their work, and they have done so for some considerable point of time. If there were a case of that sort, then, yes, you are right, but they are few and far between.

Senator BRANDIS—But let us take such a case, because those cases do exist.

Mr Wilkins—But they are very rare.

Senator BRANDIS—That is hardly an answer, Mr Wilkins. The fact is that they do exist.

Mr Wilkins—The fact is, Senator, with due respect, that you asked what this is—and it is a way of organising business, unless something like that arises, obviously.

Senator BRANDIS—But, to the extent to which, if at all, this seeks to direct a judicial officer how to resolve a contested transfer application, this would be quite an improper interference with the independence of that judicial officer, would it not?

Mr Wilkins—Possibly. I do not think it is intending to do that.

Senator BRANDIS—Perhaps it is not intending to, but we will come back to that after lunch.

Proceedings suspended from 12.29 pm to 1.38 pm

ACTING CHAIR—We will continue with the Family Court of Australia. Mr Foster, on our first attempt to resume, when we realised we were not being recorded, you indicated that you had some further information that you would like to provide in relation to questions that were asked of you prior to the lunch suspension, so we will go straight to you.

Mr R. Foster—I would like to read a statement into the *Hansard* which has been approved by the Chief Justice and the Chief Federal Magistrate in relation to the protocol:

The fact is the government established two courts with overlapping jurisdiction. The former government established the Federal Magistrates Court to do the simpler and less complex work. That assumes that the superior court is to do the more complex and not simple work. If there were not some delineation of this work there would be no point in having two courts at all and no point in having an FMC which is not fulfilling its role to do the less complex work. The efficient operation of the two courts would have this happening, and the protocol simply seeks to describe the appropriate work of each court to ensure as far as possible that each is fulfilling its correct role.

The courts have always had a protocol about work in relation to divorce and child support; maintenance; contraventions in the FMC; and cases of two days or less. This protocol was agreed between the former Chief Federal Magistrate and the chief justice in 2000. There was not just a single document, but there was a practice direction in the Family Court of Australia, and the two-day rule was inserted into the Federal Magistrates Court Rules. The focus in 2000, when there were fewer FMs, was what work would be done by the FMC, with the rest coming to the Family Court. That balance has now shifted, and what is identified is the work coming to the Family Court, with the rest going to the Federal Magistrates Court—hence the way the current protocol is worded.

The profession and litigants want some idea about which court in which to file matters. That will continue while there are two separate courts. If there is not some cooperation between courts then legislation may be required. The courts were hoping to avoid this. Whilst clearly understanding that individual judicial discretion cannot be fettered in a particular matter for the smooth operation of the courts, in ensuring that the less complex work goes to the Federal Magistrates Court and conversely that the more complex work goes to the Family Court, the heads of jurisdiction have continued to provide guidance to the profession and litigants. Various provisions in the Family Law Act and the Federal Magistrates Act identify, as a factor for the transfer of cases between courts or refusal to transfer, the interests of the administration of justice. The heads of jurisdiction have sought to give meaning to this phrase in the belief that it is in the interests of the administration of justice to have each court doing the work intended by government for it.

ACTING CHAIR—Thank you, Mr Foster. Is that in a position where it can be circulated to senators?

Mr R Foster—It is mostly a scrap of paper.

Senator Wong—There are some scribbles, so perhaps we could have that cleaned up.

ACTING CHAIR—It may be useful if some work is done to put that in a form that can be circulated.

Senator BRANDIS—I am happy to disregard the issue, because I want to ask questions about that document right now and I think it would be more helpful if I could quote from it rather than quote from my recollection.

Senator Wong—We can ask someone to go away and type it.

Senator BRANDIS—I do not want to hold up proceedings; I will just disregard the scribbles. That is okay.

Senator Wong—I am not happy with it being circulated in its current form.

Senator BRANDIS—It has just been read onto the record.

Senator Wong—I am entitled to say that; I do not need to justify it. If you wish it to be circulated, we will ask if the secretariat could possibly type it up.

Senator BRANDIS—All right, Senator Wong, if we must be like that. I hope I am in order, Mr Acting Chair, in addressing Mr Foster in his joint capacities as the acting chief executive of the Federal Magistrates Court and the chief executive of the Family Court, because the questions I want to ask bear upon both of them and this overlap issue. I have studied the protocol over lunch. Were all of the federal magistrates and all of the Family Court judges, respectively, consulted before this protocol was agreed to?

Mr R Foster—My understanding is that not all were consulted.

Senator BRANDIS—Taking the respective courts in turn, are you able to tell me—if you cannot give me a precise figure, an approximate one will suffice—how many Family Court judges were consulted?

Mr R Foster—I would have to take that on notice. I would not like to hazard a guess.

Senator BRANDIS—Would it have been at least half?

Mr R Foster—I just need to take it on notice.

Senator BRANDIS—You just do not know.

Mr R Foster—No, I am not certain.

Senator BRANDIS—So you know that they were not all consulted but you are not able to tell us how many were and were not—is that right?

Mr R Foster—All I know is that some were consulted and perhaps some were not, but I cannot take it any further.

Senator BRANDIS—Would your answer be the same in relation to the federal magistrates?

Mr R Foster—Yes.

Senator BRANDIS—Mr Foster, I listened carefully to the statement you read. I suspect I touched a raw nerve if we got both the Chief Federal Magistrate and the Chief Justice to agree on a joint statement in the course of the luncheon adjournment!—but I do want to pursue this. You are familiar, of course, with the Federal Magistrates Act and the Federal Magistrates Court Rules?

Mr R Foster—I am aware of the rules and the act, but in terms of all of their content the answer would be no, I am not sure what is contained in them.

Senator BRANDIS—You administer these two courts, particularly in relation to the bits that are largely of a procedural character.

Mr R Foster—Yes.

Senator BRANDIS—I hand up to you a copy of the relevant extract of the Federal Magistrates Act and part 8 of the Federal Magistrates Court Rules, concerning the transfer of proceedings. Have a look at those two. You do not need to read all the way through them, but familiarise yourself with those two documents. You will see under part 5 of the Federal Magistrates Act that there are powers vested in federal magistrates to transfer proceedings to the Federal Court or the Family Court. That is both section 39 and section 40. There is a rulemaking power conferred upon the federal magistrates. Do you see that?

Mr R Foster—Yes.

Senator BRANDIS—And I think it is uncontroversial that the extract from the rules that I have given you is an exercise of that rulemaking power in relation to the transfer of proceedings.

Mr R Foster—Yes.

Senator BRANDIS—You will see that under rule 8.02 there are certain matters of which the federal magistrate seized of a transfer application—and we are talking about a contested transfer application here—shall have regard. Do you see that?

Mr R Foster—What subsection are you referring to?

Senator BRANDIS—Really the whole lot, but in particular subrule (4), which refers back to section 39(3) and (4) of the act and then identifies other, more particular matters.

Mr R Foster—Yes.

Senator BRANDIS—In fact, for completeness I should ask you to look at subsections 39(3) and (4) of the act. My question is: having regard to the observation of the Chief Justice and the Chief Federal Magistrate in the joint statement from them you have just read, whilst clearly understanding individual judicial discretion cannot be fettered in a particular matter, how can this protocol do anything other than fetter individual judicial discretion in relation to a particular matter—that is, a contested transfer application brought in the Federal Magistrates Court—since this is a mutual decision by the courts as to how the particular federal magistrate is to dispose of the matter? How can that not be a fetter of individual judicial discretion?

Mr R Foster—I think the only comment I can make to that is that, going back to the provisions of the Family Law Act and the Federal Magistrates Act in relation to the interest of the administration of justice—

Senator BRANDIS—I saw that.

Mr R Foster—and the purpose of the protocol is to give meaning to this phrase, in the belief that it is in the interests of the administration of justice to have each court doing the work intended by government for it. In relation to your direct question, I would have to take that on notice and get some advice. I do not know the answer to that question.

Senator BRANDIS—You may need to take a few of these questions on notice, Mr Foster. In the manner of your response to my last question, you really make my point, because the person who has to decide and to apply—in the interests of the administration of justice criterion in sections 39(3) and (4) of the act—is the magistrate himself or herself, before whom the application is brought. It is his or her decision. It is not the decision of a third party, not conducting the case, and yet this protocol, if it is to have any meaning at all, purports to direct the judicial officer as to how a discretion, which vests exclusively in him or her, is to be exercised. You see that, don't you, Mr Foster?

Mr R Foster—I do not necessarily agree that there is a direction about it. It is a protocol, which is not a direction.

Senator BRANDIS—Let us then establish what the status of this document is. First of all, we know that it is not a rule of court. Secondly, in the statement you read before, there was a reference to the arrangements that were agreed to—a pre-existing protocol—in 2000. But the words that follow are very revealing. The statement goes on to say, 'We didn't have a single document but there was a practice direction.' This is not a practice direction, is it?

Mr R Foster—No, it is not a practice direction.

Senator BRANDIS—You understand the difference, don't you, Mr Foster, between a practice direction and a protocol?

Mr R Foster—Yes, I do.

Senator BRANDIS—A practice direction is effectively a rule of the court.

Mr R Foster—That is right.

Senator BRANDIS—This is not a rule of the court.

Mr R Foster—No, and I understand that.

Senator BRANDIS—It has no status as a law or a rule of court whatever, does it?

Mr R Foster—And I think the object of the protocol was to try to avoid that—to have an appropriate break-up of the work without resorting to legislation. That is what the protocol is. It is not a direction, it is not compelling in that sense.

Senator BRANDIS—Except, Mr Foster, with all due respect, a practice direction is hardly like the Carbon Pollution Reduction Scheme Bill. It is not going to tie up the Commonwealth parliament for a period of time. A practice direction can be resolved on a quiet Monday afternoon by the chief magistrate or the chief justice, and promulgated. The promulgation of a practice direction is no more complicated than the promulgation of a protocol, is it?

Senator Wong—It might be if it involved the National Party, I suppose.

Mr R Foster—All I can do is take those issues back to the jurisdictional heads; and if, in their view or whatever the view is, there needs to be a practice direction, that is entirely a matter for them. It is a judicial matter; it is not a matter for me as the CEO.

Senator BRANDIS—I understand, and I always feel a little hesitant to put you and other CEOs of courts on the spot, Mr Foster, because indeed you are not a judicial officer; but you are the person who must answer for the court to the parliament. So I feel unashamed about

putting these questions to you, but I perfectly well understand why you might need to take them on notice. I do not want to belabour the point, but the proposition I put to you, and I would ask from both courts for a considered response—

Mr R Foster—I understand the proposition, Senator, and I will take it back.

Senator BRANDIS—is that by dealing with this matter by way of a protocol—which is not a practice direction or a rule of court—what inevitably the practice direction does is to seek to, in an entirely inappropriate manner, influence the exercise of a discretion by a judicial officer exercisable under the act and under the rules. Do you see my point?

Mr R Foster—Yes, I do. I can take that on notice.

Senator BRANDIS—Thanks. Item 3, under the subheading ‘Transfers and Uplift of Power’, states that there will be no right of appeal from a decision as to transfer. Is there a right of appeal under the Family Law Act?

Ms Filipello—Perhaps I could address that question for the record. The Family Law Act provides that there is no right of appeal.

Senator BRANDIS—There is none. So this adds nothing to the existing law.

Ms Filipello—That is correct.

Senator BRANDIS—I am aware that there is no right of appeal under the Federal Magistrates Court act. Thank you. That is all I have on this issue.

ACTING CHAIR—We might go to Senator Barnett and then come back to Senator Brandis.

Senator BARNETT—Mr Foster, Senator Brandis asked earlier about the Semple report and the fact that we are in freeze mode at the moment in light of the letter that you tabled earlier. Could you advise of your understanding of the situation regarding judges’ pay and the decision by the Remuneration Tribunal to put on hold its decision on the payment of family law judges and magistrates over the next 18 months.

Mr R Foster—I am not really in a position to provide much clarification around that. I have just read the statement, probably the same as you have. I guess that is a question for the Remuneration Tribunal.

Senator BARNETT—Which statement are you talking about?

Mr R Foster—The statement that was put out in relation to the six per cent pay rise for federal judges and FMs over the period to May 2011. Is that the one that you were referring to?

Senator BARNETT—I have not read that particular statement. I am advised of a report, and I was wondering if you could put on the record the current arrangements regarding judges’ pay in the Family Court and, perhaps in your other capacity, in the Federal Magistrates Court.

Mr R Foster—As I understand it, there was a general increase of three per cent for all federal court judges and federal magistrates from 1 October, subject to the tabling of agreement in both houses of parliament. Subsequent to that, as I understand it, there was a

statement, or a report, from the Remuneration Tribunal that indicated a six per cent pay rise for federal court judges and federal magistrates, with 1.5 per cent from, I think, 1 November and three subsequent increases of 1.5 per cent up to May 2011. That is about as far as I can go with that.

Senator BARNETT—Can you I draw to your attention, if you have not already seen it, an article in the *Australian Financial Review* of 16 October, which says:

The federal government's controversial restructure of federal courts has delayed a final determination by the Remuneration Tribunal on pay rises for family-law judges and magistrates over the next 18 months, and an expected 6 per cent increase for federal judges has been postponed because of the economic downturn.

Could you clarify for the record the exact arrangements?

Mr R Foster—The arrangements, as I understand it, are the 1.5 per cent increase from 1 November, subject to tabling in both of houses of parliament, and then three further 1.5 per cent increases at staged intervals up until May 2011.

Senator BARNETT—Right. The article goes on:

High, Federal and Family Court judges had been hoping for an immediate 6 per cent pay increase this year, which the tribunal flagged in November would be appropriate but later refused because of "economic circumstances".

Do you think it was the global financial crisis that they were referring to?

Mr R Foster—I would not know.

Senator BARNETT—You cannot comment. Have you had any feedback from judges in either the Family Court or the Federal Magistrates Court in respect to their concerns regarding the pay rise?

Mr R Foster—Certainly not in any formal way. If you get a proposed nine per cent pay rise, you would be pretty happy with it, I would have thought.

Senator BARNETT—So the pay rise over the next 18 months is as you have outlined. What does that total, with those 1.5 per cent increases through to May 2011?

Mr R Foster—Six per cent.

Senator BARNETT—Do the current arrangements where a federal magistrate receives 78 per cent of the amount of a Federal Court and Family Court judge remain the same?

Mr R Foster—The parities remain the same.

Senator BARNETT—And if the Attorney goes ahead with this and it passes through the parliament, you would expect that parity to remain the same until that date?

Mr R Foster—I do not think that is really a matter for me, Senator.

Senator BARNETT—I can see that you probably cannot comment on that, but is that what it has been for a good period of time?

Mr R Foster—Yes.

Senator BARNETT—So the administrative functions have all merged and you are still acting in your other capacity?

Mr R Foster—Yes, I am.

Senator BARNETT—We will probably come to that shortly, once we get to the Federal Magistrates Court. I do not think I have any further questions of the Family Court.

Senator ABETZ—I have a question for Mr Foster. I was wondering if you could enhance the services of the Family Court at Hobart by abolishing the registrar's position and backfilling it from Melbourne. That is a bit of a tongue-in-cheek question in preparation for our next topic—and I think you would have some difficulty with it.

Mr R Foster—I think I might step back from that question, Senator—but thank you.

Senator ABETZ—It was rather a rhetorical, Chair.

ACTING CHAIR—Do you have any further questions, Senator Abetz?

Senator ABETZ—Not of the Family Court but of the Federal Court.

Senator BARNETT—In an answer to question No. 28 at estimates there was a reference to the family consultants and registrars terms of reference and the review and it cost \$114,000 in professional fees plus expenses. I was wondering if you could provide a copy of that report to us. I presume that is now concluded.

Mr R Foster—Yes, it has. There is no reason that we could not provide a copy of that report.

Senator BARNETT—Thanks very much for that. Finally, with respect to your answer to my question No. 26 regarding the refurbishment of the chief justice chambers and associated areas in the Family Court in Melbourne—at a cost of \$916,352—can we conclude that that has all been completed and undertaken and there are no further costs in addition to those that you have referred to?

Mr R Foster—No; none.

Senator BARNETT—We have previously asked about the complaints arrangements. I notice in an answer to question No. 22 that in the last paragraph you say:

In any event the complaint is not referred to the Judge while the matter is ongoing ... and the complainant is notified that the Judge will not be told about the complaint until the matter is finalised.

Is that a protocol that is accepted and etched in stone in your court and, to the best of your knowledge, in other courts?

Mr R Foster—It is certainly a practice that is followed very closely in the Family Court of Australia. I cannot speak for the other federal courts, as I do not really know, but certainly my experience in the state jurisdictions is that that is the case.

Senator BARNETT—So how is it etched in stone? Is there a protocol or a code?

Mr R Foster—It is just a practice, basically. That is the procedure.

Senator BARNETT—Is it written down anywhere?

Mr R Foster—I would have to check the policy to see whether it is written down, but that is certainly the practice that the Deputy Chief Justice adheres to.

Senator BARNETT—I put to you that this is a very important matter and that complainants need to have confidence that there is an independent, objective assessment being made of their complaints and if the hearing is current then they are reluctant to make those complaints. I get feedback in this regard, so I am interested to know if you have a policy and, if so, what it is—in writing. So I would appreciate it if you could check that for us.

Mr R Foster—Certainly.

Senator BARNETT—You answered in terms of the number of judicial complaints in the 2008-09 financial year to date on 25 May, so could you provide an update status on that? You said on 5 June that at 1 July 2008 there were 17 complaints, and then to 31 December 2008 there were 11. Can you provide the number of complaints to date for this year—if you have got them?

Mr R Foster—I have got them here. To date there were 202 non-judicial complaints, and there were 50 in relation to judges for 2008-09.

Senator BARNETT—Can you provide a status report in terms of the complaints in 2008 and 2009? I am happy for you to take that on notice. What happened to them—have they been resolved? Was there any counselling of relevant judges and so on?

Mr R Foster—I will take that on notice.

Senator BARNETT—That is all I have in light of the time. We could go further in terms of the complaint-handling mechanism, which you know is a concern for me, but I will leave it there for now.

ACTING CHAIR—What are the workload comparisons for this year compared to an equivalent time last year for the Family Court?

Mr R Foster—The application for final orders across both courts has actually reduced since 1998-99 by around 18 per cent. So the workload in final order applications has reduced because of the commencement of the Federal Magistrates Court. The latest figures I have got for the Family Court are that it was 7,800 in 2006-07; in 2007-08 it was 4,457 and in 2008-09 it was 3,834. So you can see that the workload figures for the Family Court have reduced significantly. In the Federal Magistrates Court—

ACTING CHAIR—Just before you move on; without actually writing those figures down it would appear that is a fairly straight line trend?

Mr R Foster—We think now it is a flat line. There has basically been a reduction of almost 20 per cent since 2000, when the FMC was introduced. But I think now we are seeing signs of that trend flattening out. I can give you a diagram which shows those numbers in a trend line, if that can be of any help to you.

ACTING CHAIR—If you could table that, it would be good. Are there any other measures that you would use when you look at the overall workloads?

Mr R Foster—There are a whole range of measures.

ACTING CHAIR—What about filings?

Mr R Foster—They are the filings, yes.

Senator BARNETT—Where is the annual report?

Mr R Foster—The annual report for the Family Court was provided to the Attorney-General's Department on 21 September, and for the Federal Magistrates Court on 15 October.

Senator BARNETT—We will get to the department and the minister about that. Finally—and I am happy for you to take this on notice—regarding effectiveness and efficiency of the court and the average waiting time for the case to be heard: what is, currently, the longest waiting period for the case to be heard, the current number of judges on the Family Court and the current amount of vacancies?

Mr R Foster—For the last bit of the question, there are currently 35 judges in the Family Court. If we define 'vacancies' as an advertisement for further appointment there were two for the judges in the press last weekend. So in effect there are now 35 judges in the court as at today, with two calls for interest in new appointments.

Just a point of clarification in relation to the other: do you mean by each registry, or across the court as a whole average? Which would you prefer?

Senator BARNETT—I am happy with across the court, to make it easier for you. We need a key performance indicator. Waiting times are one of the benchmarks. I get feedback from constituents and one recently talked about a lengthy delay in the hearing of the case.

Mr R Foster—I can give you some data in relation to final orders. It may not be sufficient for you, but it is a start. In 2008-09, 75 per cent of final order cases were disposed of within 18.8 months. In 2007-08 that figure was 18 months, so the delay has, in fact, gone out by a period of some months.

Senator BARNETT—You will have a lot of that in your annual report, will you not?

Mr R Foster—Yes.

Senator BARNETT—We do not have that, which is why I have to ask the questions. Finally, in terms of the actual trial, do you have figures for the period from the conclusion of the trial to the handing down of the judgment?

Mr R Foster—We do, but there are so many factors that affect getting a matter to trial. Yes, we do have those figures. I would be able to tell you how long it takes, on average, from lodging a final order to when you get a judgment. But there are a whole range of factors that impact on those figures.

Senator BARNETT—Yes, but I am talking about a hearing, where they put their arguments, they make their case and they walk out the door and then it is almost 18 months before a judgment is actually given.

Mr R Foster—That is for a determination by a judge, but of course most cases do not get that far.

Senator BARNETT—I know. I am saying that, in terms of those where there are hearings before a judge, I would like to know the average time to when the judgment is handed down and then the longest periods of time, because I have been hearing that some of them are incredibly lengthy, including 18 months.

Mr R Foster—Okay. I understand.

Senator BARNETT—Does that worry you?

Mr R Foster—I think it is far too long, and it worries the court.

Senator BARNETT—Indeed. Thank you for that.

ACTING CHAIR—Senator Brandis, do you have more questions for the Family Court?

Senator BRANDIS—Not to Mr Foster, who has been very helpful. Thank you, Mr Foster.

Mr R Foster—Thank you, Senator.

ACTING CHAIR—Thank you, Mr Foster, and your officers—

Mr R Foster—Sorry, Chair, there is just one point I need to raise. I mentioned that I thought the minutes of the meeting of the Family Law Courts Advisory Group on 13 August, where the protocol was signed off, had been sent to the Attorney-General. They have not as yet been sent, and I think I said earlier that they were sent.

ACTING CHAIR—Thank you for clarifying that.

Senator BARNETT—Does that in some way answer what Mr Govey was going to get back to us on?

Mr Govey—The protocol minutes had not been sent to the Attorney-General.

Senator BARNETT—Right. So I ask it in another way: was the Attorney-General aware of the protocol?

Mr Govey—Not as far as I am aware, because that would be the way in which he would have been informed.

Senator BARNETT—Was the department made aware of the protocol?

Mr Govey—Certainly the department was, because I am a member of the Family Law Courts Advisory Group.

Senator BARNETT—All right. Thank you.

ACTING CHAIR—Mr Foster and your officers: thank you for your appearance before this estimates committee.

Mr R Foster—Thank you very much, Chair.

ACTING CHAIR—Before we move to the Federal Magistrates Court, I will go to you, Ms Leon. You said you had some further information for the committee?

Ms Leon—Senator Barnett this morning asked for some information about staff movements since the budget estimates hearing. While I cannot provide you with the information about how many staff have been recruited, because that would require a more manual count than is possible in the time frame, I can tell you what the figures were at budget estimates and what they are now, which will give you an indication of the net movement, though not of how many staff have been recruited and how many have left.

At budget estimates the permanent staff was 1,305. As at the end of September—so, close to this period—the permanent staff was 1,291. At budget estimates, the non-ongoing staff number was 162. As at 30 September, the non-ongoing staff number was 98. We do not have numbers for contractors, because contractors are not treated as employees within the HR

system, so it is not a figure that we collect. Since budget estimates there has been a net reduction in staff of 78, but that now brings us below our budgeted FTE of 1,404, so there is recruitment on foot to bring those staff levels back up.

Senator BARNETT—To 1,404?

Ms Leon—Our budgeted FTE is 1,404.

Senator BARNETT—Okay. I will come back to that later.

Mr Govey—Chair, before we start on the Federal Magistrates Court, there was one matter concerning the Rem Tribunal decision that we could perhaps clarify. Ms Playford has the information.

Ms Playford—The Remuneration Tribunal's announcement on 13 October, following its review of the relativities among the federal courts, stated that the three further 1.5 per cent adjustments between now and March 2011 will be subject to the tribunal's consideration of the general economic situation and the restructure of the family law courts, specifically to be confident that the developments expected to occur in the family law system occur.

ACTING CHAIR—Would you happen to have the determination number handy?

Ms Playford—At this stage it is a statement by the tribunal. We understand that the tribunal expects to issue a determination shortly to give effect to its statement of 13 October. That has not happened yet and would of course be disallowable. The statement is a public statement and I have a copy of it that I could table.

ACTING CHAIR—Does that assist you, Senator Barnett?

Senator BARNETT—It does and it is illuminating. I have not actually read it; I have only read about it. If you have it, tabling it would be helpful. To make it clear, you have indicated that they have said that there are two reasons. One was the economic circumstance, which we can assume is the global financial crisis. Did they specifically name the Semple review in their report? It seems that we now have two reasons for their decisions, not the one—that is, the global financial crisis.

Ms Playford—I am not sure they specifically named the Semple review, but they certainly talked about the government's announcement of the restructure.

ACTING CHAIR—Let us table the report. Then we will not have to guess what it says.

Senator BARNETT—What was the wording?

Mr Govey—It might be useful if we came back to you on that. There are quite a few pages we would have to go through.

ACTING CHAIR—Yes. We come back to this outcome a bit later on anyway.

[2.16 pm]

Federal Magistrates Court of Australia

ACTING CHAIR—Welcome. Are there any opening statements?

Mr R Foster—No, thank you.

ACTING CHAIR—Are there any questions?

Senator BARNETT—I think we are done. Could you take on notice those same questions I asked in terms of complaints and waiting times?

Mr R Foster—Absolutely.

ACTING CHAIR—Once again, Mr Foster, thank you to you and your officers.

[2.18 pm]

Federal Court of Australia

ACTING CHAIR—Welcome.

Senator ABETZ—It is unfortunate that I have to be back here. Last estimates I hoped that I would not have to be because a certain decision would not be taken in relation to the Hobart registry. It will not surprise you that I have a few questions about that. First of all, did the registry have any input into the writing of the letter of His Honour the chief justice to the President of the Senate of 19 August 2009?

Mr Soden—I hesitate to answer that question. I see many letters that the chief justice writes. I do not recall having a close hand in that letter. That is my recollection.

Senator ABETZ—Could you take on notice as to whether His Honour was provided with a draft from the registry, whether His Honour just wrote it himself and sent it off or whether, after having drafted such a letter, he passed it by you for any additions.

Mr Soden—I am happy to take that on notice.

Senator ABETZ—His Honour responds to a motion passed by the Senate. I confess that this is a strange coalition:

Senator Abetz, also on behalf of the Leader of the Australian Greens (Senator Bob Brown), pursuant to notice ... moved ... That the Senate calls for the full retention by the Federal Court of Australia of its registry services in the State of Tasmania.

So we were calling for the full retention, yet His Honour, in his letter, says:

It has never been proposed—and will not be proposed—that the Tasmania District Registry should be closed.

I am just wondering where he got that idea from. The motion did not say it and nobody has ever argued for it, so it is one of these examples of setting up a straw man to be knocked down, denying something that nobody has ever alleged. It sounded very non-judicial to me—that is all—and I was wondering whether he had been provided with information from the registry to have put such an inclusion in his correspondence. So perhaps you could specifically, when you take my previous questions on notice, have a look at whether or not the registry had any input into that inclusion in the correspondence.

Last time, Mr Soden, you told us that things were going to be better and bigger with less. First of all, what savings are going to be made by the changes in the Hobart registry?

Mr Soden—Specifically for Hobart, there will be a saving of about \$210,000 per annum.

Senator ABETZ—How is that calculated?

Mr Soden—By a combination of two things: the cost of a full-time district registrar and some savings in relation to one other position that would not be required.

Senator ABETZ—But there will then be offsets with people having to fly to Hobart, won't there?

Mr Soden—I took that into account when I gave you that figure, Senator. There were travel costs associated with the district registrar in Hobart. He often went to Melbourne to assist because he had the time to assist.

Senator ABETZ—Because there was no need in Melbourne, of course, so he just went over there on a frolic of his own to fill in his time.

Mr Soden—No, I did not say that.

Senator ABETZ—'Because he had time on his hands' is, with great respect, a reflection on the former Tasmanian registrar and, I would have thought, on the way the Victorian registry does business.

Mr Soden—I did not see it that way.

Senator ABETZ—All right. What did he do whilst he was at the Melbourne registry?

Mr Soden—I understand he did a range of registrar related work. I think the bulk of what he did was to assist with taxations. That was a matter of helping reduce the time it takes for the taxations to be done.

Senator ABETZ—If Mr Parrott had not done those taxations—

Mr Soden—They would have been done by people in Victoria.

Senator ABETZ—Why incur the expense of flying him over to Melbourne in the first place? Were those people who would otherwise have done these taxations then sitting idly at their desks twiddling thumbs and not doing anything?

Mr Soden—No, of course not. They had plenty of other—

Senator ABETZ—What were they then doing? They were fully occupied, were they not?

Mr Soden—Yes.

Senator ABETZ—And therefore there was a surplus of work in the Melbourne registry that had to be taken up by people that were not in the Melbourne registry.

Mr Soden—I would not describe it as a surplus. It was timing issues.

Senator ABETZ—There was not a surplus of work, but they were all fully occupied. If they were all fully occupied at all times when Mr Parrott was over there undertaking taxations, do you understand that what you are asserting does not logically flow?

Mr Soden—You are assuming that everything is done within a particular period of time. Things can be done over a broad range of time, and having someone come in and help meant that the times were reduced. I would not describe that as a surplus of work.

Senator ABETZ—Because there was a shortage of person power, to be politically correct, to undertake things in a timely fashion in the Melbourne registry.

ACTING CHAIR—Before we go on, I am happy for you to ask these questions, but the nature of them does require you to allow Mr Soden to completely finish his answers.

Senator ABETZ—Absolutely.

ACTING CHAIR—I ask you to respect that.

Mr Soden—I was going to say that there are ebbs and flows, peaks and troughs. It is not constant. You might get a rush of a category of work. It is not unusual for us to move resources around the country to do things in a timely manner.

Senator ABETZ—So when there is a rush of work at the Melbourne registry and everybody is fully occupied what is going to happen to the Hobart registry?

Mr Soden—It will be a matter of priorities, as always.

Senator ABETZ—Yes, and that is what I fear. I daresay a Melbourne registrar may well take Melbourne issues as a priority over Hobart issues, which would not be uncommon.

Mr Soden—I would not think the district registrar in Melbourne would take too kindly to that. It is a matter of dealing with the priorities. Doing the work in Tasmania is a high priority. Some other things in Melbourne are a lower priority in the scheme of things. I am very confident she would have the capacity for what needs to be done where and when to maintain the services.

Senator ABETZ—Was there any surplus of personnel in the Melbourne registry prior to this decision being taken?

Mr Soden—As I said, it is not a question of surplus; it is a question of doing what you can with the resources for the peaks and troughs of the work that occur.

Senator ABETZ—I asked whether there was a surplus of personnel. I would have thought the answer would be either yes or no.

Senator Wong—Wish respect, Mr Soden can answer the question as he sees fit.

Senator ABETZ—And I am allowed to follow up as I see fit, and that is what I am doing.

Senator Wong—But, with respect again, what you are saying is, ‘This is how you should answer the question.’ He is entitled to answer it as he sees fit.

Senator ABETZ—I am aware of that, but Mr Soden is before us and has to answer questions for us. How he seeks to do it will reflect, undoubtedly, in the future. I simply ask whether or not there was a surplus of personnel—

Senator Wong—What does that mean? ‘Will reflect, undoubtedly, in the future’? What are you seeking to imply?

ACTING CHAIR—I am concerned about that. Maybe you could clarify what you meant by that, Senator Abetz, so we could then move on.

Senator ABETZ—We will go through some other answers that we were given last time around and we will see how they turn out. I ask, in relation to the Melbourne registry before the decision in relation to the Hobart registry was taken, if there was a surplus of personnel or personnel hours?

Mr Soden—As I said before, for the peaks and troughs of the work that come and go I would not describe it as there being a surplus. There was a managed flexibility to deal with the peaks and troughs and the particular time frames for the work that needs to be done.

Senator ABETZ—So if there were no surplus of personnel you had exactly the right amount of personnel to undertake all the work at the Melbourne registry.

Mr Soden—I do not think I said that.

Senator ABETZ—With great respect, you are trying to suggest to this committee that there was not a surplus of personnel in the Melbourne registry yet, miraculously, you can use these same people to backfill in Hobart but there must then be caused a shortage in Melbourne during the concentration on Hobart issues.

Mr Soden—I do not accept that proposition.

Senator ABETZ—Can I say, Mr Soden, with great respect: a lot of the legal fraternity in Hobart have read the short Senate estimates discussion we had last time around, and I must say that I do not think it reflected well in relation to the evidence that was given. Can I say to you very seriously that we are going down the same track again today. There is no surplus of personnel in the Melbourne registry but it can take up all the work that the former registrar in Hobart undertook. It just does not add up. For those of us who have run legal practices, et cetera, we do know about personnel movements, we do know about ebbs and flows in practices, we do know about surplus staff from time to time and being able to backfill, but to say that you have got the right complement of staff in Melbourne, yet you can do extra work in Hobart, just does not add up.

Senator Wong—Chair, I invite you to reflect on the first part of Senator Abetz's contribution there. I am not sure what he was implying about Mr Soden's previous evidence, nor the evidence he is giving now, but I would invite the chair to perhaps consider, after the hearing is concluded, whether the first part of what was put on the record by Senator Abetz is appropriate.

ACTING CHAIR—We can have a look at what was said, but I guess I just make the observation as chair that people can come to any conclusions that they would like to come to, after looking at the evidence. But I believe Mr Soden is being responsive to your questions, Senator Abetz, and there should not be judgments made about that. So, if you have got more questions, let's keep going.

Senator ABETZ—It will not surprise you that I do have, and it is very nice for the *Hansard* record to now show that the Labor senator in charge of this committee, chairing it, thinks that these responses I have been getting are responsive to the questions. Can I say with great respect that most people will not consider them to be responsive to the questions that I have asked. But it is right—

ACTING CHAIR—That is an opinion you are free to form, and other people are free to form whatever opinion they would like after reading the record themselves.

Senator ABETZ—Absolutely.

ACTING CHAIR—But just because you are not getting the answers that you seek does not mean that the answers are not responsive to you.

Senator ABETZ—When they are, with respect, illogical and defy common sense, then it is appropriate for that sort of commentary to be made.

ACTING CHAIR—Again, that is a conclusion you are free to come to, but just because you say it does not make it true.

Senator BRANDIS—May I raise a point of order, Mr Chair?

ACTING CHAIR—I hope it is helpful.

Senator BRANDIS—I am trying to be helpful. The point of order is this: Senator Wong is not a member of the committee. Senator Wong is a witness before the committee. If Senator Wong—or indeed any other witness before the committee—is of the view that a senator’s question to her or to another witness is in breach of the procedural guidelines or that it is in some other recognisable sense an improper question, then she is perfectly at liberty to take the point. But the conduct of this proceeding is in your hands, Mr Chair, and it is not appropriate for the minister at the table—or, for that matter, any other witness at the table—to offer a running commentary on whether or not she thinks, or they think, that a particular senator’s questions may or may not be appropriate.

ACTING CHAIR—I think it is actually appropriate if the minister wishes to draw those things to my attention, and I do not think there have been excesses—

Senator BRANDIS—Unless she is in breach of the procedural rules—

ACTING CHAIR—I think, Senator Abetz, there was one set of words in particular on which I did seek your clarification, because I was concerned about what they meant and I think you may have clarified that. Nonetheless, let’s see if we can move forward. I do not think the minister’s interventions have been at all excessive or unwarranted at this point in time. Let us proceed.

Senator ABETZ—Labor chairs never do. On the second page of the chief justice’s letter he says:

I would also draw attention to the fact that the disposition rate of 95 per cent of all applications finalised within 18 months is even better than the Federal Court’s national average.

That is talking about Tasmania. He then goes on to say:

I do not expect these excellent figures to change, other than to improve.

How are we going to improve these figures with fewer personnel?

Mr Soden—I think the figures the chief justice was talking about are the disposition performance of the judges of the court, who visit Tasmania from Melbourne—the two judges.

Senator ABETZ—Right. So he was talking about the Federal Court decisions of judges when we are talking about the registrar’s work; he then conveniently puts in his correspondence the judges’ work, which was not part of the Senate resolution and not part of Senate estimates discussions. That is a very helpful contribution.

Mr Soden—I might assist you in terms of your understanding of the workload of the district registrar. It may have been overlooked, but a large proportion of the work that was undertaken by the district registrar was work performed for the AAT, not the Federal Court. That work is not going to be done by our Melbourne registry, it is going to be done by the AAT.

Senator ABETZ—So we have got a bit of cost shifting now as well, have we?

Mr Soden—I am just bringing it to your attention.

Senator ABETZ—I was aware that Mr Parrott did a lot of AAT work. Did the AAT make a contribution to Mr Parrott's salary and other on-costs?

Mr Soden—No, they did not make any contribution.

Senator ABETZ—Was any request made, that the AAT should, in fact, share this cost?

Mr Soden—Yes.

Senator ABETZ—And the response?

Mr Soden—They were reluctant to do so.

Senator ABETZ—So they did not deny it, and they did not reject it; they were only reluctant?

Mr Soden—In the discussions that we had with the AAT, they were not willing to share the cost of the district registrar. They would prefer to provide the services themselves.

Senator ABETZ—Minister, was the Attorney-General ever made aware of this? Now, given your decision, the AAT will have to fund the work that is undertaken in the Hobart registry.

Senator Wong—I might ask Mr Govey to respond on that.

Senator ABETZ—The AAT will now have to fund that work that is undertaken—

Senator Wong—You asked a question, and I said I might ask Mr Govey to respond on that—perhaps before you give some commentary on it.

Senator ABETZ—I have not even asked the question yet.

Senator Wong—You asked me the question.

Senator ABETZ—I have got the answer from Mr Soden, that the AAT declined.

Senator Wong—I am sorry, Chair, maybe I misunderstood. I thought the Senator asked the minister at the table, ie me, if the Attorney-General was aware. I said I would ask Mr Govey to respond on that and he has not yet let him respond to that.

Senator ABETZ—Sorry—I thought you were representing the Attorney-General, but that is fine. Mr Govey—

Senator McLUCAS—That is what the minister said.

ACTING CHAIR—I think we might be at cross-purposes.

Senator McLUCAS—I think you are being very generous, Chair.

ACTING CHAIR—Do you believe you have a question to answer, Mr Govey?

Mr Govey—I do.

ACTING CHAIR—Good; then you can answer it and we will move on.

Mr Govey—I do not, in fact, know whether or not the Attorney-General was made aware of that request, but the department was informed in general terms of the issue and the request that was made.

Senator ABETZ—Are we going to see the Administrative Appeals Tribunal? They are not on the list. Minister, you would have been aware from the last estimates that this was a situation of the princely sum of \$200,000 being saved, and that this was an issue that had excited the interest of the Senate. A resolution was passed in the Senate prior to this decision finally being made. If part of the reason was the AAT's reluctance to share in the cost of a service that was being provided to it, I wonder whether the Attorney-General involved himself in any helpful hints or suggestions as to how the AAT might conduct itself. I would assume that you, Minister, personally would not be aware of that, but if you could take that on notice that would be very helpful for us.

Senator Wong—I would like to respond on two matters. Firstly, I had a little reminder before about the doctrine of the separation of powers. Obviously there are matters which are not the decision of the government but the decision of the relevant bodies. Mr Govey has indicated the knowledge of the department. I obviously do not have any knowledge personally of the Attorney-General's knowledge of this. I can take on notice whether or not there has been any dialogue between the Attorney-General and the AAT. In relation to why the AAT is not before the committee, I am advised by the department they were not called.

Senator ABETZ—I was not aware of that particular aspect—

Senator Wong—I was not making any comment. I just wanted to put on the public record why they were not here.

Senator ABETZ—but it still does not justify the Federal Court's decision. I would have thought that might have been an issue that would have been raised at the May estimates and elsewhere and pursued with some more vigour. When was that decision put into practice? We are talking about option 3 of the number of options that were available.

Mr Soden—The decision to implement the recommendations of the review?

Senator ABETZ—Yes.

Mr Soden—The decision date was 9 July.

Senator ABETZ—That was basically implementing option 3.

Mr Soden—Yes.

Senator ABETZ—That was your preferred option already in May.

Mr Soden—It was the recommended option in May.

Senator ABETZ—And your preferred option?

Mr Soden—I was fairly clear then as I am now that I had not made a decision about which option to implement, but I knew recommendation 3 was the preferred recommendation.

Senator ABETZ—Page 97 of the *Hansard* reads:

Senator ABETZ—Do you support option 3 as the preferred option?

Mr Soden—I support option 3 as the preferred option ...

But then when I asked you what savings might be obtained from option 3 you said you did not go into that detail because you wanted to keep an open mind on the issue. So you supported

option 3, although you never knew what savings might actually be obtained by pursuing option 3, because you wanted to keep your mind clear from those sorts of considerations.

Mr Soden—I had an idea at that time what the savings might be.

Senator ABETZ—What was your idea at that time?

Mr Soden—I am relying on my memory now and I cannot be precise as it was some time ago, but I knew the option had a recommendation in it to abolish the district registrar position and I had an idea about how much that would save. There was another position, so I could mentally add them together and come to a conclusion approximately as to what the savings were likely to be.

Senator ABETZ—Last time you told us:

... I have not seen the details of what those savings might be. I thought it was probably appropriate not to go into the details and to keep an open mind on the issue.

But now you are telling us you had a fair idea as to the round, ballpark figure that might be achieved by pursuing option 3.

Mr Soden—There were different details. There were details of the particular positions. I knew that the district registrar's position was one of the positions. I did not have in my mind when I was last before the committee the details of the other positions. I had a rough idea about what the costs might be, but I did not have the details in my mind because I had yet to put my mind to whether or not to make a decision to implement option 3.

Senator ABETZ—On page 150 of the *Hansard* you say, 'I am still waiting for the report,' but of course that was some time after you had indicated to us that you had supported option 3. I asked:

And you have indicated to us you have an open mind. So which other of the four options have you still got an open mind about?

You answered me:

Senator, my mind is so open about the matter, I cannot tell you what the other options are because I have not studied this paper, waiting on the results of the consultation process.

Nevertheless, you preferred option 3.

Mr Soden—I did not say that I preferred option 3. I thought my comment was very qualified.

Senator ABETZ—Page 97 of the *Hansard* of Monday, 25 May 2009—roughly 10 or so lines up from the bottom—reads:

Senator ABETZ—Do you support option 3 as the preferred option?

Mr Soden—I support option 3 as the preferred option but ... it is subject to consultation ...

That is what you told us. Unfortunately, the decision is made—

Senator Wong—I think it would be fair to allow Mr Soden the opportunity to get the *Hansard* in front of him.

Senator ABETZ—Sure.

Senator Wong—I am not sure that the pages correlate. That sometimes happens, Senator, when you print from a computer as opposed to the printed version.

Senator ABETZ—I full accept that, Minister. That is only fair. It would be about two and a bit pages in after the heading ‘6.20 pm Federal Court of Australia’.

Mr Soden—I am reading that now. As I said just a moment ago, I did qualify that by saying:

... but, as I said, it is subject to consultation and testing as to its viability. I have not got the benefit of advice about that yet.

And I had not. I had to wait from further advice from the review team as to the results of their consultation.

Senator ABETZ—So why did you prefer option 3 without the benefit of advice?

Mr Soden—I said I supported it; I did not say I preferred it. That might be semantics, but—

Senator ABETZ—You said, ‘I support option 3 as the preferred option.’ With great respect, Chair and Minister, I think you might now be starting to understand the way the legal fraternity in Tasmania read the *Hansard* from last time—and I think how they will be reading the *Hansard* from this estimates.

Senator McLUCAS—Senator, the verb was ‘supported’.

Senator ABETZ—Pardon?

Senator McLUCAS—The verb in the sentence that the witness gave was ‘supported’.

Senator ABETZ—Yes; the preferred option.

Senator McLUCAS—That is the adjective.

Senator ABETZ—Yes; he supports a preferred option, which was option 3.

Senator McLUCAS—Let us hope the legal fraternity read that as well.

Senator ABETZ—It is great that another Labor senator is coming in to the defence, but I am not sure it is actually helping Mr Soden. I would like to ask a final question. Mr Soden, if the legislation is altered, requiring the Federal Court of Australia to have a full-time registrar positioned in Hobart, you would be given no choice but to provide such a position?

Mr Soden—If legislation specified that a full-time position was required, of course, the court would have no choice. But I would like to hope that there would be some discussion about what that might mean, how it might be done and what alternatives there might be.

Senator ABETZ—Oh, what alternatives there might be—such as was suggested in fact to you before the decision was taken. That would not be seen as a breach of the separation of powers if the federal parliament were to require the Federal Court to have a fully-fledged registrar stationed in Hobart?

Mr Soden—I do not know the answer to that, Senator.

Senator ABETZ—Thank you very much.

ACTING CHAIR—Mr Soden, with respect to that line of questioning, a number of things have been put to you. If you feel that there is anything you wish to clarify in writing to the committee at a later stage I make that invitation open to you.

Senator BARNETT—Just to pursue this, Mr Soden, could you advise the committee of the level of consultation that you have had with the Law Society and the legal fraternity in Tasmania regarding this matter? Senator Abetz referred to Labor senators—you are aware that the Hon. Duncan Kerr is of the same view as Senator Abetz and I and Senator Bob Brown and others with respect to your decision regarding the Federal Court in Hobart?

Mr Soden—Yes, Senator, I have heard that. I take that other part on notice. We can provide that information comprehensively.

Senator BARNETT—Have you had consultation with the Law Society and the legal fraternity in recent months?

Senator Wong—He just took that on notice, Senator.

Senator BARNETT—The answer is yes. In terms of the times, dates—

Mr Soden—The times, the dates, the people.

Senator BARNETT—All right. How much have you spent on the capital upgrade of the Federal Court in Hobart?

Senator ABETZ—There was a \$1 million upgrade wasn't there of the federal courtroom?

Mr Soden—I will just find the figure.

Mr G Foster—I do not have the exact details in front of me but my understanding of it is that there was a major contract let on the Hobart Commonwealth law courts building. The original contract was in the order of about \$800,000 plus and there was some additional work that was done as a second package on top of that that probably took it slightly over \$1 million.

Senator BARNETT—Has that all been completed?

Mr G Foster—It has, yes.

Senator BARNETT—Could you take on notice as to the exact amounts and when they were paid and to whom and when it was completed.

Mr G Foster—Certainly.

Senator BARNETT—Can you recall when it was completed?

Mr G Foster—Again to give you an indication I suspect it was around June or July but I would need to get you the precise dates.

Senator BARNETT—Has there been any further work undertaken since completion?

Mr G Foster—No, there is not.

Senator BARNETT—Just the usual maintenance and the like?

Mr G Foster—Yes.

Senator BARNETT—I raised this matter personally with the attorney in August and wrote to him on 10 August. He has written back in line with the similar advice that we have received

today. Have you received any correspondence from the Law Society or others in the legal fraternity in the last two months, Mr Soden, on this matter?

Mr Soden—No.

Senator BARNETT—You know there is a Senate inquiry into access to justice? Are you aware of that inquiry?

Mr Soden—Absolutely.

Senator BARNETT—Those terms of reference are broad. It is considering a range of issues and this matter may very well find itself within that Senate inquiry terms of reference. Are you aware of that?

Mr Soden—I have heard that, Senator

Senator ABETZ—If I may ask a few questions that will undoubtedly need to be taken on notice. Can you tell us the full staff budget for the Melbourne registry? You operate on financial I assume

Mr Soden—Yes, Senator.

Senator ABETZ—For 2007-08 and 2008-09 and also for the Hobart registry for the same two years together with the travel budgets and all the on costs of both registries because we might do a comparison next time we meet.

Mr Soden—I am happy to take that on notice.

Senator BRANDIS—How many judges have you got at the moment who are actually sitting as opposed to on leave or otherwise?

Mr Soden—I would have to take that on notice. Judges take leave from time to time, variable leave, long leave.

Senator BRANDIS—I mean long leave; obviously, people go on holidays. I am wondering how many full-time judicial officers are engaged in the federal court at the moment.

Mr Soden—I would have to take that on notice. It varies from day to day

Senator BARNETT—How many Federal Court judges are there at the moment?

Mr Soden—There are 45.

Senator BRANDIS—How many of those are on leave or secondment to another court?

Senator Wong—I think that is what he is taking on notice.

Senator BRANDIS—You do not know.

Mr Soden—I would have to take that on notice. That varies from day to day.

Senator BRANDIS—Are there any vacancies at the moment?

Mr Soden—There are a number of vacancies.

Senator BRANDIS—Where are they?

Mr Soden—There are some vacancies in Sydney and Melbourne.

Senator BRANDIS—How many in each city?

Mr Soden—There are three judges that have not been replaced in Sydney and two in Melbourne.

Senator BRANDIS—Is it intended to replace all five of those judges?

Mr Soden—It is our expectation that announcements will be made very soon about appointments to be made.

Senator BRANDIS—Does that mean that it is your expectation that all five of them will be replaced?

Mr Govey—I think I can probably assist on this. A process to appoint five Federal Court judges is currently being finalised. My understanding is that the Attorney-General is hopeful that he will be able to announce the names of the appointees sometime this week.

Senator BRANDIS—I see. That is very current.

ACTING CHAIR—Of all five?

Mr Soden—That is correct.

Senator BRANDIS—When was the last time that consideration was given to expanding the complement of judges in Brisbane, Adelaide and Perth?

Senator Wong—To whom is that question addressed?

Senator BRANDIS—To anyone who knows the answer.

Senator Wong—But is that a question of the department or of the court?

Senator BRANDIS—I imagine that either of them could helpfully respond, but let us start with Mr Soden. When was the last time that consideration was given to expanding the number of judges sitting in Brisbane, Adelaide and Perth?

Mr Soden—I am hesitating because it would be some years since that issue was considered.

Senator BRANDIS—Does that reflect the fact that, relative to the larger registries in Sydney and Melbourne, the case flow or commencement numbers through the Brisbane, Adelaide and Perth registries has remained constant over those several years of which you speak?

Mr Soden—No, because there have been some changes to both workload and judicial numbers, particularly in Brisbane, for example. Justice Reeves, as you might recall, is now in Brisbane, having moved from Darwin. At the same time, there is added activity in the native title work, so more work needs to be done and coincidentally Justice Reeves is there. There has not been a flat line of incoming work in any of those places. It has had peaks and troughs, as does occur. I think it is fair to say that Brisbane is feeling the pressure at the moment because of the native title work and the acceleration that is taking place there.

Senator BRANDIS—I am entitled to be parochial, just as Senator Abetz is, so I am interested in the case load in the Brisbane registry of the Federal Court.

Mr Soden—That is why I mentioned it first.

Senator BRANDIS—Please elaborate.

Mr Soden—Before I do I should say that Perth is far enough away to often be overlooked easily, and they are very busy in Perth.

Senator BRANDIS—That is what Western Australians will always tell you.

Mr Soden—That is true; I am aware of that. The South Australians will always say, ‘Don’t forget us either,’ and they are very busy, particularly looking after the native title jurisdiction in the Territory.

Senator BRANDIS—That is all very delightful. Now let us get down to the raw numbers. What are the pressures in Brisbane, Perth and Adelaide as you assess them?

Mr Soden—I think general workload is steady. I have to take the details on notice, but I will give you a perception. General workload is steady, but the increased activity and responsibility and the acceleration of case management processes for native title in those places, where most of the native title cases are, is increasing the burden on the judges; there is no doubt about that.

Senator BRANDIS—Is it increasing the burden on the judges in those particular native-title-heavy jurisdictions relative to the burden on the judges in Melbourne and Sydney?

Mr Soden—I think there are different—

Senator BRANDIS—Is that a comparison across registries or across time?

Mr Soden—There are different pressures.

Senator BRANDIS—Is there a common standard by which judicial workload is judged by the court—or for that matter, Mr Govey, by the department—such as number of court days per judge per annum or some other formula by which you make comparative judgments about workload across courts or across time?

Mr Soden—We have a number of indicators—

Senator BRANDIS—What is the main one you use?

Mr Soden—We have got the individual docket system, and that is an indicator of something as simple as the number of cases per judge at any particular time—both inputs and outputs. We have got to be very careful about relying on that, for a whole lot of obvious reasons in terms of different sizes of cases and different types of cases. That is one of the factors. Then you have a look at other factors in terms of timeliness of throughput, timeliness of reserved judgments, the case mix, some judges are on panels with a different mix of cases compared with other judges, so it is not easy to be very simple in terms of the—

Senator BRANDIS—I am not suggesting it is, but nevertheless these statistics are taken out for a reason, and that is to give you the best indication that is able to be derived as to where the demands on the court are and where, if any, the slack is. What I am interested to know is, using those indicia that you have mentioned, what you have to say about the workloads in the different registries I have identified. You said, I think impressionistically, that Brisbane is getting busier, and that is largely because of the pressure of the native title work—

Mr Soden—But interestingly, what you will not find is the native title cases, because they have been managed as large clusters by different judges and not part of judges' overall case responsibility in the docket system. You have got to take that into account.

Senator BRANDIS—Let us put it at its simplest. Is it your view that the pressures are such in the Brisbane registry that there is a need for another judge there?

Mr Soden—I have not come to that conclusion, Senator, no.

Senator BRANDIS—How far away from it are you? Do you imagine that will be the case in the next year or two, perhaps?

Mr Soden—I cannot say, Senator. It will all depend on what happens with the incoming work, the type of work, any new jurisdiction—we will have to look at that. We do not look at just Brisbane, obviously.

Senator BRANDIS—I was going to ask you the same question in relation to Perth and Adelaide as well.

Mr Soden—Absolutely. And we do that all the time.

Senator BRANDIS—The reality is that most of the work of the Federal Court goes through Melbourne and Sydney—that is understandable—but a disproportionately greater amount of it by comparison with the relative populations of those centres. Would you not agree?

Mr Soden—Yes, in relation to proportionate populations. There are different business drivers in Sydney and in Melbourne, as there are in Brisbane, Perth and Adelaide.

Senator BRANDIS—Would you take on notice for me, then: I would like the best evidence you can provide, on whatever statistical basis—whether it be throughput of cases, commencements, judge days or whatever indicium you choose as the most reflective of judicial workload in the Federal Court—in each of the five big centres of Brisbane, Sydney, Melbourne, Adelaide and Perth, over the last, let's say, five years for which the statistics are available.

Mr Soden—I would be happy to do that, Senator. There will be one particular qualification you will need to look out for, and that is a large number of cases transferred to the federal Magistrates Court, particularly the migration case. That will all be footnoted, but on the raw figures it might look as if there has been a huge drop in the caseload.

Senator BRANDIS—I am sure we will be able to interpret the data. Thank you. Mr Govey, would you like to have a go at my question? Do you know when the last time was that consideration was given to increasing the number of federal court judges at the Brisbane registry?

Mr Govey—No, I don't.

Senator BRANDIS—Would you take that on notice, please? Is it something that the department would be able to respond to meaningfully?

Mr Govey—I am not sure, because, for all the reasons that Mr Soden mentioned, it is not something that is capable of having a black-and-white answer.

Senator BRANDIS—I understand that, and Mr Soden has been very good in explaining the various matters, but presumably, whenever there is a demand for an additional judicial position a particular registry, that is a matter of discussion between the court and the department. That would be right, would it not?

Mr Govey—That is certainly the case, yes.

Senator BRANDIS—So I want to know when the last time these discussions happened in relation to Brisbane, what the outcome was and, if there are documents available that minute those discussions, if they could be provided as well, please.

Mr Govey—Certainly.

Senator TROOD—Mr Soden, when you say that there has been an increase in the activities of the court in Brisbane as a result of native title activity, is that a consequence of the recent changes to the Native Title Act or is it a change that has been taking place over a period of time?

Mr Soden—No, primarily the recent amendments which gave the court the responsibility for managing all that workload have meant that there is a lot of activity in calling up all the cases, reviewing matters, arranging forums with parties and practitioners to have a look at what needs to be done and where—it is managerial-type work rather than actually hearing cases, but it is all very time consuming for a judge, of course.

Senator TROOD—Do I take that to mean that you are undertaking a comprehensive review of all the native title cases that are currently before the court?

Mr Soden—Yes, across Australia.

Senator TROOD—As a result of the legislation.

Mr Soden—As an initiative we think we should take as a result of the legislation. It is not a requirement of the legislation.

Senator TROOD—I understand. I know the legislation and I know it is not a requirement of the legislation, but you have decided that it is appropriate to undertake that review in light of the legislation. Is that right?

Mr Soden—Yes.

Senator TROOD—How far through that review are you?

Mr Soden—We are substantially through it. I think there are a couple of states yet to finish their reviews, but at a guess I would probably say 85 per cent through the process.

Senator TROOD—Have you finished it in the Queensland registry?

Mr Soden—No, I do not think so, but we have certainly had a very substantial forum with rep bodies and interested respondents—very, very successful. There are ongoing working groups as a result of the forum in relation to some of the particular problems. From our perspective there is a general sense of a very strong commitment to doing things differently, finding solutions and speeding up the whole process.

Senator TROOD—What are you anticipating to be the outcome of this review that you have undertaken?

Mr Soden—Prioritising the cases that are the ones that could best benefit from a range of different options, whether it be an ADR option, a trial or whatever; looking closely at what needs to be done; putting them into categories; and grouping them into regions, clusters and relationships—for a whole lot of different purposes.

Senator TROOD—So at the moment no judge of the court has had to endure an increased burden as a result of the title amendments. But is that likely into the future?

Mr Soden—Their activity is increasing in managing the cases: call-ups, directions hearings and looking at every case not only in the courtroom but in preparation—these are huge matters with lots of documents. That is quite time consuming. But if you specifically mean a trial, no.

Senator TROOD—At the moment. But that is possible?

Mr Soden—That is possible. If we can avoid that and bring to bear through the case management processes a non-trial resolution, that is the preferred option.

Senator TROOD—I see. And you are satisfied at the moment that this is not impinging critically on the resources that are available to the court?

Mr Soden—Right at the moment we are managing, but we will have to keep a very close eye on this because, if there does need to be some serious trial work to progress some of these cases—particularly a lead matter where a whole lot of other matters are relying on a decision—and we want to do that more than one at a time, that could be a burden.

Senator BARNETT—Two further questions. To follow up: you indicated there were five vacancies—three in Sydney and two in Melbourne—and that an announcement will be made next week. I want to go through the process with you. In answer to question No. 38 that I put in May, the department answered with regard to the process. I assume in regard to those vacancies advertisements were put seeking nominations.

ACTING CHAIR—This was actually Mr Govey's evidence.

Mr Soden—Yes.

Mr Govey—That is correct. The positions were advertised and the Attorney-General wrote to a number of people inviting them to nominate people they thought should be considered. The advertisement also invited nominations as well as direct expressions of interest from people who would be interested in being considered for appointment.

Senator BARNETT—When were those ads?

Mr Govey—I am told they were 3 April for the *Financial Review* and 4 April for the *Weekend Australian*, *Sydney Morning Herald* and the *Melbourne Age*.

Senator BARNETT—How many nominations did you receive?

Mr Govey—We had 78 nominations and 136 expressions of interest. That probably included people who had previously indicated that they would have been interested in an appointment to the Sydney position and had not withdrawn their expression of interest.

Senator BARNETT—Is that nominations plus expressions of interest?

Mr Govey—No, 136 plus 78. There were 78 nominations but of 63 different people—in other words, some people were nominated by more than one organisation.

Senator BARNETT—That is what I am trying to work out.

Mr Govey—The total number for both Sydney and Melbourne was 182.

Senator BARNETT—Your advisory panel was then convened?

Mr Govey—That is correct.

Senator BARNETT—They then considered those nominations. How many would they consider? Did they consider all of them?

Mr Govey—We considered everybody.

Senator BARNETT—Then what happened? Did you then put a list of recommendations to the Attorney-General?

Mr Govey—That is right. We do not put recommendations saying, ‘You should appoint the following three people or the following two people.’ A list of suitable people was provided to the Attorney-General.

Senator BARNETT—How many?

Mr Govey—I cannot remember offhand .

Senator BARNETT—Approximately? You have to fill five, I presume you would give him more than five.

Mr Govey—I really would need to take that on notice. It was quite a while ago that the report was provided and of course there were some for Sydney and some for Melbourne.

Senator BARNETT—So you are happy to take that on notice?

Mr Govey—I am.

Senator BARNETT—The process for a High Court judge is a different process. You have indicated that a submission was provided to the Attorney-General containing a summary of persons identified through the consultation process. For one High Court judge position, how many would you submit to the Attorney-General?

Mr Govey—We would tell the Attorney-General about everybody who had been nominated.

ACTING CHAIR—Senator Barnett, do you have much on this because this is not the appropriate area for the High Court? If you only have one or two questions, we can deal with it.

Senator BARNETT—Okay. Mr Govey, do you want to add anything?

Mr Govey—No. The process is the same. The Attorney-General writes out to a wide range of people and on the last occasion, as I recall it, we provided the Attorney-General with the details of people who had been nominated.

Senator BARNETT—You do not provide a short list?

Mr Govey—From memory, we did not do that.

Senator BARNETT—Can you let me know on notice how many you had on the short list and any further particulars regarding that process?

Mr Govey—Certainly.

Senator BARNETT—Mr Soden, question 37 on notice was about the SAN storage solutions and eLodgement system vulnerability assessment. You have provided details regarding the STRATSEC report on access to network vulnerability assessment and application vulnerability assessment. Your answer states:

... work will be completed by the end of June 2009 and a copy of the executive summary will be then provided.

I have not seen it. It may have been provided. Could you take that on notice and provide that? I would actually like the report, not just the executive summary.

Mr Soden—We will chase that up. I do not see any problem with that at all.

Senator BARNETT—Thank you.

ACTING CHAIR—Thank you, Mr Soden and other officials from the Federal Court, for appearing before the Senate estimates. Again, I remind you that if you have anything further to add by way of further information or explanation, I am happy to accept that. We will now move to the National Native Title Tribunal.

[3.15 pm]

National Native Title Tribunal

ACTING CHAIR—Ms Fryer-Smith, do you have any remarks that you would like to make to the committee before we go to questions?

Ms Fryer-Smith—No, thank you.

Senator BARNETT—I note that in a Senate committee report on the Native Title Amendment Bill 2009, handed down in May 2009, we reported that the committee heard that 145 determinations were made by the National Native Title Tribunal from 1994 to the end of 2008 and the average time to finalise these was about six years where the application was by consent or seven years where the outcome was litigated. About 475 claims were currently on foot in the system, over a quarter of cases had been current for at least 10 years, and it was estimated that the last of the cases currently active will not be concluded until 2035. Could you provide an update to the Senate of the number of matters before the National Native Title Tribunal in terms of those figures and statistics.

Ms Fryer-Smith—Certainly. At the moment, in terms of claimant applications which have been filed in the Federal Court, there are 451 current applications, which is 21 fewer than in May 2009 and 46 fewer than this time last year, October 2008. So there has been a 9.2 per cent reduction in claimant applications. In relation to other applications, there are 20 non-claimant applications in the system and seven compensation applications. Currently filed in the Federal Court are 478 native title applications of various sorts. In terms of dispositions, 67 claims were disposed of in the last financial year, between 2008 and 2009, of which approximately 50 per cent were dismissed rather than proceeding to determinations. Of the

claimant applications which are still current, 234, or 52 per cent, are with the tribunal for mediation but the rest are not.

Senator BARNETT—If I can just come in there, how long does that mediation ordinarily take?

Ms Fryer-Smith—It can take an awfully long time. Matters can remain in mediation for quite some considerable time, depending upon a range of factors and variables including the resources of the parties and their own priorities. As you know, there are many parties in native title matters, so the prioritisation of resources can be a major issue. It can be many, many years, unfortunately.

Last year there were nine consent determinations, which compares with about eight in the previous year. So, in terms of matters proceeding to determination, it is not as speedy as many of the stakeholders would wish, but at the same time there is considerable activity in other parts of the native title system—for example, entry into Indigenous land-use agreements—and this reflects both the parties' own desire and the thrust of the legislation, which is to encourage agreed outcomes.

I think you were asking about the length of time in which matters are resolved. It would appear that there has not been a lot of shift from the data that you have referred to. In other words, for a matter to be disposed of by way of determination after first filing: if it is by consent, five years, nine months; if it is a litigated outcome, six years, 11 months. Non-claimant applications typically are disposed of much faster, in 12 months or so.

Senator BARNETT—That is a very good summary. Is there anything else you want to add to that?

Ms Fryer-Smith—Probably not.

Senator BARNETT—We have expressed our views in the Senate report, which you have obviously read at some length. Are you confident in the Federal Court judges' ability to handle the native title matters?

Ms Fryer-Smith—That is absolutely not for me to comment.

Senator BARNETT—Are you confident that the matters that are before your tribunal are being dealt with in the most expeditious manner?

Ms Fryer-Smith—They are being dealt with in the most expeditious manner to the extent that the parties' resources and priorities are aligned and to the extent that everyone can engage in a mediation process at the same time and with the same amount of commitment. The nature of the matters are so complex. For example, frequently a party, rather than wishing to progress a matter through to a determination, may indeed be applying resources to procedural rights which they have acquired by virtue of having a registered native claim—so, rather than being focused necessarily on a native title determination, they may indeed be pursuing their right to negotiate. Typically, parties do not have the resources to do everything simultaneously, and the alignment of resources is a major aspect of the native title system. Getting everyone's priorities aligned is a major task. But certainly the tribunal is resourceful and innovative in attempting to bring the parties together and to progress their interests.

Senator BARNETT—You submitted to our Senate committee that the reason you would prefer that the decision making remain with the National Native Title Tribunal rather than be with Federal Court judges is that you are across the brief, you are aware of the detail, you understand the complexity of the matters before you. Is that one of the reasons you put that view to our Senate committee?

Ms Fryer-Smith—I am not certain that the president expressed our position in exactly those terms; I do not have them in front of me. Certainly we are a specialist native title tribunal whose *raison d'être* is to deal with native title and related matters and certainly we expressed concerns about the breadth of the discretionary judicial power to refer broadly to mediation.

Senator BARNETT—Exactly. Is that one of the reasons you would be concerned about the Federal Court's ability to properly administer the mediation measures, which they have just been asked to do?

Ms Fryer-Smith—I really cannot comment on that.

Senator BARNETT—That is fine. Let's go to the funding issue. The answer to question on notice No. 177 from me says:

The 2009-10 Budget provides an additional \$50.1 million over four years to build a more efficient native title system.

This consists of \$45.8 million to improve the capacity of Native Title Representative Bodies to represent native title claimants and holders and \$4.3 million to streamline the operation of the system and improve the rate of claim resolution.

How confident are you that that can be achieved with those funds? Is it realistic?

Ms Fryer-Smith—I really cannot comment on the realism or otherwise in terms of monetary allocation. The situation does not simply boil down to how much money there is. As I have indicated there are often significant demands on the native title parties, on the respondent parties, on the capacity for example of a state government or a territory government to be a party to so many matters and to actually progress all these matters simultaneously. There are just so many variables that have to be brought into the mix. The availability of anthropologists for example, so much of progressing a matter through to determination depends upon the concept of connection, proving the continuity of traditional association with land or waters and there is a scarcity of anthropologists. Then there is what is referred to colloquially as the connection process which is the preparing of anthropological reports, the vetting of anthropological reports by respondent parties and the submission of further questions. It is an iterative process which can literally take six or seven years. Even if they were unlimited money, for example, that would still be a difficult matter to be managing.

Senator BARNETT—Does the tribunal have a role in the providing of funds to the representative bodies or does that go direct through the department?

Ms Fryer-Smith—As you know, this financial year we have had a reduction in budget of \$2.47 million out of our lapsing funding which went to the native title representative bodies through FaHCSIA. We do have a role with the native title representative bodies, we do engage in capacity building with native title representative lawyers because we have a specialist legal unit to assist them and indeed we have specialist research units and geospatial units of course.

So we have the infrastructure and the expertise which is necessary to assist the parties as much as possible in these complex cases.

Senator BARNETT—Just on that are you under or over budget at the moment? Are you meeting your objectives within the budget?

Ms Fryer-Smith—At the moment, at the end of the first quarter, we have managed to keep to our budget. We have had to institute some very tight financial controls and, indeed, our discretionary spending has been cut very severely. As I mentioned last time it is a priority for us to ensure that we can do well with less funding and we are very concerned about service delivery being affected by these budget cuts. We have made cuts in a wide range of areas including the conducting of face-to-face meetings, non-operational travel, printing and publication expenses, catering and venue hire when we are conducting mediations. We have had a very drastic reduction in our staff development budget, which we have concerns about it, and which we would not like to be a sustained strategy but we are determined to continue providing high-quality services albeit with a diminished budget. We have also been very carefully monitoring and managing our employee numbers. I think I mentioned last time we committed to reducing our numbers somewhat under our portfolio budget statement.

Senator BARNETT—Have you done that and what are they?

Ms Fryer-Smith—Yes we have. It was a bit of a struggle for the first couple of months of this financial year but we have now managed to decrease those numbers through natural attrition, resignations and expiry of contracts basically. We are now down to a 233 head count or 211 full-time equivalents.

Senator BARNETT—From what?

Ms Fryer-Smith—We had a 246 head count and a 226 full-time equivalent in June of this year. With respect to those reductions, there has been no particular area that has been targeted. It has been a fairly wide spread. We are very mindful of the need to contain all our expenses. Certainly one of our concerns is that we have absolutely no contingency or special purpose funding for some of the more innovative strategies that we would like to introduce. So we are hoping to identify some funds for that.

Senator BARNETT—In light of the time, I have one final question. The answer to my question No. 177 advised:

The Working Group is due to report back to the Native Title Ministers' Meeting in August 2009.

I do not know if it is best for the department to answer, but I am wondering if we can get a copy of that report that was tabled at that meeting in August 2009.

Ms Fryer-Smith—Which report was that?

Senator BARNETT—It may be best for the department. It is in an answer to question No. 177. The second last paragraph talks about partnerships being 'enhanced through the Joint Working Group on Indigenous Land Settlements', that it was 'established at the Native Title Ministers meeting in 2008' and that it was going to report to 'the Native Title Ministers meeting in August 2009.'

Ms Fryer-Smith—That is a question for the department.

Ms Falko—I can table the communique from the Native Title Ministers meeting if that is helpful.

Senator BARNETT—Thank you. Can you table the minutes of that meeting?

Ms Falko—There were no minutes.

Senator BARNETT—And there was no report tabled at that meeting?

Ms Falko—Can I take that on notice, Senator?

Senator BARNETT—Sure. If you can table the communique, we would appreciate that. And if you can take on notice if there was a report and, if there was, we would appreciate a copy of that report.

ACTING CHAIR—As there are no further questions, thank you for attending the Senate estimates today.

Proceedings suspended from 3.32 pm to 3.50 pm

Classification Board

Classification Review Board

ACTING CHAIR—Mr McDonald, have you got some opening remarks you would like to make to the committee before we go to questions?

Mr D McDonald—I have. Thank you for the opportunity to make an opening statement to give you at the outset some up-to-date information about the board's workload and focus since the May 2009 committee hearings. The conclusion of the 2008-09 financial year saw the board's workload remain steady despite the global financial crisis. Interestingly enough, it would seem that, although there were some sharp variations throughout the year, overall no discernible impact was apparent. In 2008-09 the board received 7,036 applications. That figure includes applications for classifying 4,792 films, 1,095 computer games and 197 publications. Consistent with recent years, the viewing time per application increased. This means that, although the total quantity of applications decreased slightly, the amount of time the board is required to devote to each application has increased. Primarily this is due to the continued trend of the release of boxed sets of television and other DVD material.

On 1 July 2009 a new industry based scheme commenced, joining the existing authorised assessor scheme for computer games, the additional content assessor scheme for DVDs and the authorised television series assessor scheme. The new scheme, known as the advertising scheme, means industry representatives can be trained and authorised as assessors. Once this has been done, they are able to assess the likely classification of an unclassified film or computer game so that it can be advertised before it is classified by the board. The scheme comes with appropriate training courses delivered by the Attorney-General's Department and with built-in safeguards.

Since May the board has continued its focus on investigating adult publications. I know these continue to be of concern to some community members as well as to some senators. In 2008-09 the board investigated 127 publications. These investigations resulted in 42 revocations and 48 call-in notices. In the current year, to 12 October the board has investigated or is investigating 32 publications. Nine audits have been conducted; six passed

the audit, two have been revoked and another is in the process of being revoked. Twenty-three call-in notices have been issued. In 2008-09 I called in 386 unclassified films for classification, and in the first quarter of this financial year the figures are already 441. I also called in one computer game and revoked the classification of another in 2008-09. I should make it clear that none of the call-in notices for adult publications have been complied with, and the majority of film call-ins have not been complied with either. However, in each and every instance the Attorney-General's Department notifies the relevant law enforcement agency of this failure to comply. I will, however, continue to use my call-in powers in circumstances where I believe it is warranted.

The committee may also be interested to note that the board has recently classified the wholly online game *World of Warcraft*. While this is not the first online game to be classified by the board, *World of Warcraft* is arguably the most popular online game in the world, and the fact that it was not classified attracted industry and media interest. The classification act does not exclude online games from the definition of computer games. The board must classify a computer game, including one with online content, upon receipt of a valid application.

On another aspect of computer games, I recently wrote to the minister regarding my concern that some so-called mobile phone applications, which can be purchased online or either downloaded to mobile phones or played online via mobile phone access, are not being submitted to the board for classification.

There is one last matter to which I would like to draw your attention. In recent times I have become increasingly concerned about the need to do more to better educate the community about the significance of consumer advice that is issued with most classifications. The classification act requires the board to provide consumer advice about the content of films and computer games it classifies, except at the G level. For G-rated products, consumer advice is optional. The aim of consumer advice is to help consumers make informed choices about what they, or minors in their care, might want to see. During 2008-09, the board took steps to provide greater consistency in decision making about consumer advice by trying, where possible, to use consistent terminology for consumer advice. Despite this, a couple of recent cases in particular have confirmed in my mind the need to do more.

The board received many complaints about the classification of the film *Bruno* at the MA 15+ level. This was despite the fact that the consumer advice for the film left little to the imagination. It was 'strong sex scenes and nudity, crude humour and coarse language'. Virtually all of the complaints evidenced an unfamiliarity with the advice in question. Similarly, the film *Land of the Lost* attracted a large number of complaints. The consumer advice issued with this film was 'drug references, sexual references, mild violence and coarse language'. Many of the complaints again demonstrated that the complainant was not aware of this additional guidance about the film's content. The board is working with the Attorney-General's Department to examine what more can be done to provide better access to consumer advice prior to the purchase of tickets for a film as well as at the point of sale itself. I will update senators about this matter at the next estimates hearing.

Finally, I would like to reiterate that, because of the cooperative nature of the national classification scheme, it is not the board's role to enforce classification laws. Its primary role

remains to classify the many thousands of publications, films and computer games submitted to it every year. However, I note that the department has improved communication lines with enforcement authorities at the state, territory and Commonwealth levels. That said, I would like to reassure senators that the board takes its responsibility very seriously and will continue to do everything in its power to increase compliance with Australia's classification laws and protect the integrity of the classification scheme.

ACTING CHAIR—Thank you, Mr McDonald.

Mr Griffin—Mr Acting Chair, as Deputy Convenor of the Classification Review Board, I apologise for the absence of the convenor. She is, I understand, unwell. The new convenor is Ms Victoria Rubensohn, and I think it is one of her hopes that she should be well enough to attend next time.

ACTING CHAIR—I am sure it is our hope too. Did you have anything you wanted to say to the committee before we go to questions?

Mr Griffin—No, thank you.

ACTING CHAIR—Mr McDonald, you indicated that you had used your call-in powers on a number of occasions and on none of those occasions had they been complied with, and you have then referred those matters off to the relevant law enforcement agencies. You did not give us any information about what action you believed has or has not been taken or what feedback you received from those agencies.

Mr McDonald—The department may be able to better answer that question, Senator. I am aware of some instances of police response to that, but I will defer to the department for advice.

ACTING CHAIR—I am happy to hear from them, but maybe you could just take me through the process. I understand that you would be the one making the formal complaint—

Mr D McDonald—Yes.

ACTING CHAIR—And then is that the end of your involvement and the department would then take over, or would you as the complainant have an ongoing role in that?

Mr D McDonald—I can take an interest in, say, a publication or a film, because it will be drawn to my attention in various ways. One, it may very well be by a complaint from a member of the public. That is an extremely valuable source of information. Two, it may be the department's own officers. Their classification liaison service officers may encounter some product in the pursuit of their duties. Or I may simply become aware of something myself, or some other board member.

If I have reasonable grounds, I will call in that product, and that begins the legal process in relation to it. The purpose of calling it in is to classify it. If they do not submit to that call-in notice then that is another step in the legal process. If they fail to do that, that may well be an offence, and that is why the police, mostly, or some other department in some states, then are informed of that.

ACTING CHAIR—Is that the end of your role?

Mr D McDonald—That is the end of my role, unless they finally succeed in making an application, and then we classify.

ACTING CHAIR—The department can tell us what they know about what has happened after the complaint has been made about failure to comply with the call-in notice.

Mr Yates—Regarding action for enforcement, that is referred to the relevant state and territory police service. In terms of the details, I might refer to Jane Fitzgerald, who has more detailed knowledge.

Ms Fitzgerald—In relation to call-ins, in particular, if there is non-compliance with the call-in notice the department refers each and every instance of that to the relevant enforcement body. What they then do as a consequence is that they do not report that back to us as a Commonwealth agency, but we keep informal contact with the relevant agency. They may require, for instance, some further information or they may come back to us and ask for further details about other matters relating to that particular potential offender. For instance, over the past few months we have had dealings with New South Wales Police, Surry Hills local area command, about the sale of unclassified publications through local retailers there. We have had dealings with Miranda local area command in August 2009 about the sale of unclassified film and the sale of X rated films, which are of course illegal to be sold in New South Wales. We have had dealings at the end of 2008 with the Victoria police and Bendigo police about the sale of unclassified films. It is not part of the scheme that the law enforcement agency reports back to the Commonwealth Attorney-General's Department. We have been looking at ways that we can improve our liaison with police so that we are able to get a better understanding of where any potential law enforcement action is up to as a consequence of action the board may have taken or indeed the department may have taken through the Classification Liaison Scheme.

Senator BARNETT—Mr McDonald, have you prepared an annual report and submitted it?

Mr D McDonald—We have prepared an annual report.

Senator BARNETT—When was it submitted to the department?

Mr D McDonald—By the due date. I would imagine it will soon be tabled, but the department may be able to answer that.

Senator BARNETT—On what date was it submitted to the department?

Mr D McDonald—Mid September—I think 12 September.

Senator BARNETT—Could you take it on notice to confirm that date?

Mr D McDonald—Yes.

Senator BARNETT—Mr McDonald, much of what you said in your opening remarks I would assume is in your annual report. Would that be correct?

Mr D McDonald—Much of what I said to you is actually more up to date than the annual report. I sought to put some focus on what had happened in this current year.

Senator BARNETT—Absolutely. But the annual report would include information to the date to which you have it?

Mr D McDonald—Absolutely, yes.

Senator BARNETT—So the department has been sitting on that report since that time and what you have delivered to us today verbally is confirmation that we have a system error where into the community is being put pornography, filth, offensive material, which you have called in with, in the case of 368 call ins, nil response and then you indicated 441 call ins and another nil response. This material is getting into the community with no comeback. We have a system error. At estimates in May I said to you and to the department that we have a system failure. Yet it seems that as at today we have not got our systems together and we are not on top of it because this filth is still out there in the community. I know you have a certain role and so I am not pointing the finger directly at you because you have certain functions, but I would like your response as to whether you believe we have a system failure with this material. It seems to be getting worse or better in terms of the figures that you provided to us today. Can we start there? Are the figures getting worse not better and do you believe there is a system failure?

Mr D McDonald—Firstly, as to the figures and the apparent growth in them it may be that I am more aggressive in my call in than some of my predecessors. Calling in is I think in the minds of some people an administrative pain in the neck, you have to put advertisements in the Commonwealth Gazette and all the rest of it. As far as I am concerned it is the only legal power available to me, so it may look as though it is ineffective, but I have no other way to start the process. Whether we have a system failure I think the ‘we’ has to be then viewed as all of the states and territories and the Commonwealth. Ours is not merely a cooperative legislation that we operate under, but it is legislation that requires cooperation at the enforcement end that may well be and nearly always is a step away from the minister who is responsible at state or territory level for censorship matters. So the ‘we’ is really the society and it certainly is the states and territories and the Commonwealth together if your proposition is accurate. As a proportion of what we do, there is a high level of compliance but of course at the extreme end people who are producing material that is likely to be refused classification are therefore unlikely to willingly enter the system.

Senator BARNETT—And there is a high level of non-compliance.

ACTING CHAIR—That is a question I was going to ask. Would you say nearly exclusively that the material you are calling in could not be classified.

Mr D McDonald—If I can give you an example in respect of the several hundred films that I have called in this year our knowledge of those is from a very elaborate colour brochure. Certainly from the covers of those DVDs that are reproduced in that brochure I would say that overwhelmingly they would be likely to be refused classification or at the very least they would be X18+.

Senator BARNETT—Just to focus on the call ins for the moment and your role regarding the call ins, how does that come about? Can you confirm with us exactly how it comes about that you actually undertake an effort to call in these publications or films and is it based primarily on community feedback? That is what I would like to know.

Mr D McDonald—It is a mixture of community feedback and knowledge that comes via the departmental officers. It would be fair to say that in respect of the films it is

overwhelmingly departmental information, because in the discharge of their duties those officers visit premises where brochures or leaflets are available.

Senator BARNETT—Is that their job?

Mr D McDonald—They have a range of duties. As for publications, it would probably be about half public complaints and half reports by departmental officers.

Senator BARNETT—This is the problem. Part of the system error is that you have to rely on community feedback from parents who are appalled by the material that is before them in the public arena, whether it is in a newsagent, a petrol station or some bookshop. They complain, you get those complaints—and who knows how long it takes before you then act on it and do a call-in—and then there is a noncompliance. Is that basically what happens?

Mr D McDonald—You say: who knows how long before I act on it? I act on it very promptly. The ‘who knows’ could well apply to: who knows how long the product has been out in the marketplace? But we act very promptly.

ACTING CHAIR—Are there any sanctions against legitimate businesses for selling unclassified material, and what process are you involved in?

Mr D McDonald—That would vary from state to state.

ACTING CHAIR—Is that a role that you are involved in?

Mr D McDonald—No.

Senator BARNETT—That is part of the system error, in my view. You have no role in assessing that at all. You leave it up to the law enforcement agencies of each state and territory.

Mr D McDonald—The department may well wish to add to that.

Senator BARNETT—Let us move on to the letters from the Hon. Bob Debus to all the law enforcement agencies on 4 February that were kindly tabled at the last estimates. I have the letters here to New South Wales Police Commissioner Mick Keelty and other state and federal police commissioners and law enforcement agencies. You are aware of the letters I am referring to?

Mr Yates—I believe so.

Senator BARNETT—They refer to the very legitimate concerns of the minister. You have seen the letters, Mr McDonald?

Mr D McDonald—Yes.

Senator BARNETT—The fourth paragraph says:

I understand that after recent audits, the Classification Board has revoked number of serial publication declarations as many of the titles audited contain material that Board considered to be Refused Classification. Other audited titles, although marked as Category 1 restricted, were found to be unclassified.

Then it talks about you doing the call-ins. The last sentence on page 1 says:

This low level of compliance with classification enforcement laws by retailers and distributors of adult publications is a matter of serious concern. As one means to increase compliance I believe it is important that police—

et cetera. It goes on:

I seek your assistance in achieving this.

So the minister put out a call to the law enforcement agencies. The letter goes on to mention the Classification Liaison Scheme, and the minister calls for action and involvement and notes that a working group has been set up. Can you please advise of the response to those letters from the various law enforcement agencies?

Senator Wong—Perhaps I can assist. I am advised of a range of responses received. I would like to take on notice whether or not we provide those. I think that the minister would like to consider that. It obviously involves correspondence in relation to compliance and other matters from state and territory governments. In the circumstances I would suggest it would be appropriate for us to ensure there was some consultation with them. I am happy to take the issue on notice.

Senator BARNETT—Thank you. Can you advise that you have received a response from each and every state and territory and, if so, when?

Senator Wong—I cannot. The advice I have in front of me would suggest that the majority of states and territories have responded, but I do not believe it is all at this point.

Senator BARNETT—Can you nominate which states or territories have not responded?

Senator Wong—The advice in front of me suggests that as at the date of this advice we were awaiting a response from the New South Wales Minister for Police but it is possible that that has come in since the date this advice was prepared.

Senator BARNETT—What is the date of your advice?

Senator Wong—I do not have that in front of me, but I am just indicating that. It may have occurred since. Only because I assume this was prepared for the estimates hearings, so I do not have advice about the date.

Senator BARNETT—So very recently. But you have received a response from the other states and territories law enforcement agencies?

Senator Wong—That is correct.

Senator BARNETT—Can you advise the thrust of that response?

Senator Wong—With respect that is actually going to the issue I have taken on notice. I have indicated that the government is willing to consider your request. It is not unusual, particularly with letters from other parties, for the government to consider and possibly consult with those parties. I do not propose to go to the content of the letters in the absence of that process being undertaken.

Senator BARNETT—Let us take another route. What progress has been made by the Commonwealth state and territory compliance and enforcement working party which is developing proposals to improve compliance with the National Classification Scheme for offensive publications and films?

Mr Yates—I will just ask Helen Daniels to come and provide you with some information on that one.

Ms Daniels—The working party was established following the censorship ministers meeting in April 2009. It is developing proposals to strengthen and harmonise classification offences and penalties, reforming serial classification declarations and considering other means to regulate offensive publications including replacing the category 1 restricted and category 2 restricted classifications with a single restrictive classification and also looking at issues of sale and display of restricted publications.

Senator BARNETT—What was the last one and can you expand on it?

Ms Daniels—It is about limiting the sale and display of restricted publications to adult-only premises. They are some of the issues that the working party is looking at. The working party has met three or four times since it was established, once in person and that was this month, and the other ones have been via teleconference.

Senator BARNETT—Can you advise on notice where, when and who was in those meetings?

Ms Daniels—I could take that on notice.

Senator BARNETT—Thank you. So what have you come up with so far?

Ms Daniels—We are still working our way through all these issues and our plan is to be able to deliver something to censorship ministers prior to their meeting in 2010.

Senator BARNETT—When is that?

Ms Daniels—It is in the SCAG ministers meeting in April 2010.

Senator BARNETT—April?

Ms Daniels—I think so, yes. That is what we are working towards.

Senator BARNETT—We have not progressed very much have we, Mr Wilkins, since May. This has been a very high-profile concern for I know members of the community across the board. It would appear based on the letter from Minister Debus that he had serious concerns. He said it in his letter and that letter is dated February and we are sitting here in October.

Mr Wilkins—I think that depends on what you mean by progress.

Senator BARNETT—Could you tell us what further progress has been made since February 2009?

Mr Wilkins—We have explained the nature of this scheme. It is a Commonwealth-state scheme. The Commonwealth has certainly been doing what we can and you have heard from the Classification Board about their actions.

Senator BARNETT—From your point of view at the Commonwealth level, Mr Wilkins, what has the Commonwealth been doing since February 2009, apart from being involved in the working group that Ms Daniels just referred to?

Mr Wilkins—Our role is precisely the development of policy, and that is what we have been attempting to do, as is working in close cooperation with the Classification Board,

making sure that complaints are handed to the states and territories, and that is precisely what we have been doing. This is a cooperative federal scheme. Some of the statistics you have been quoting do reflect some concern, as you say, with the system, but that is not necessarily the fault of the Commonwealth or this department.

Senator BARNETT—When you say that you have been developing policy, what policy have you been developing?

Mr Wilkins—A number of things. For example, we have been working on an area that we do have some purchase over, which is the way in which Customs treats material that is imported in the country or exported from it. We have been working with Customs to see what we can do to develop a better system for ensuring that these items are identified and classified.

Senator BARNETT—Mr Wilkins, page 89 of the budget estimates *Hansard* of 25 May shows that, in an answer to a question from me, you said:

The department is working with the Australian Customs Service to develop amendments to the customs regulations to increase the penalties for the import of commercial quantities of objectionable goods.

Has that happened?

Mr Wilkins—Yes, it has happened. They are in draft.

Senator BARNETT—They are in draft?

Mr Wilkins—Yes.

Senator BARNETT—How draft is draft? When will they be promulgated?

Ms Daniels—If I can assist, they have been drafted and they are presently with Customs to go through the internal Customs consultation mechanism. When the comments come back from Customs, we will look to finalising them and doing any further consultations we need to.

Senator BARNETT—And they simply increase penalties, do they? Is that all they do?

Mr Wilkins—That, you will recall from our previous discussions at previous committee meetings, is one of the critical areas in this because the penalties, in some cases, are so low that they are simply a cost of doing of business as far as a lot of companies are concerned. So the idea of trying to increase the penalties is not simply window dressing. It actually goes to the incentive system of the work here.

Senator BARNETT—I do not want to think, as a Senate committee, that we are going around in circles. We had the same discussion in May about a very serious, concerning issue. You said yourself, Mr Wilkins, at the time:

The minister has considered options to strengthen harmonised classification offences and penalties.

Since then, what options have come forward to strengthen harmonised classification offences and penalties?

Mr Wilkins—I think we have just gone over that territory.

Senator BARNETT—So that is the extent of the options and the policy development to date?

Mr Yates—I can assist with a further bit of information. Our classification operations branch also provides relevant intelligence to Customs, as we discussed at the May estimates.

We are putting more effort into trying to provide them with timely advice on information about objectionable material. We are also putting more effort into training Customs staff to increase their capabilities. This is in addition to the work with them on regulations.

Senator BARNETT—Mr Wilkins, does it concern you that these call-ins that have been made by Mr McDonald have been complied with in respect of your compliance?

Mr Wilkins—Yes.

Senator BARNETT—Have you considered any options to address those matters specifically?

Mr Wilkins—I think we have just been over that territory—that we are trying to address those through looking at what we can do with the states and territories through informing the states and territories. The minister has written to the states and territories and we are trying to work with Customs to do that.

Senator BARNETT—Okay. He did send those letters out in early February this year. It is now October, and we are talking about a submission going to the ministers' SCAG meeting in April next year. There would be a lot of people in the community who would say that we are dragging our feet as a parliament and as legislators in protecting our children and our community from filth and offensive material.

Thank you for your answer to question on notice No. 21, where you listed the 337 publication referrals that had been made to law enforcement agencies in 2008-09 and gave a breakdown of them. You then indicated:

To provide the list of all publications would require publication of titles containing explicit language that would be offensive to members of the community.

That is well noted. Are you suggesting that all of the titles would be offensive to members of the community? In the past, I understand, you have provided details on the public record, but I am happy to be led by you with respect to the appropriateness or otherwise of providing that information.

Mr D McDonald—I am happy to provide the committee with all of the titles and to have the committee decide whether publishing all or any of them is likely to give offence.

Senator BARNETT—It may be best that we handle it in a separate committee meeting rather than requiring it here. If you do not mind, I would foreshadow to the committee and to yourself that that is my intent and that, if necessary, we would receive that evidence in camera and then make a decision after that.

Mr D McDonald—I would be very happy to do that. As you would expect, it is a sort of marketing tactic that these titles are none too subtle.

ACTING CHAIR—Sure, and Senator Barnett is right in terms of these proceedings. Everything during these proceedings must be made public. So, not as a result of taking a question on notice but as something that happens consequently to these hearings, you can simply send that information to the committee chair.

Mr D McDonald—We certainly have no wish to be secret about it.

ACTING CHAIR—Yes, but in order for us to be able to make that decision about what should be released and what should not, it needs to come to us through that avenue rather than as a consequence of these proceedings.

Senator BARNETT—Mr McDonald, thanks again for your introductory remarks today and thanks to Ms Booyar and Mr Griffin for being here. These matters are deeply concerning and no doubt we will have further discussions about them.

Mr D McDonald—Thank you.

ACTING CHAIR—Thank you to you and your officers, Mr McDonald, for your presentation to the committee today. We will have a five-minute suspension while there is a change of officers at the table.

Proceedings suspended from 4.28 pm to 4.32 pm

ACTING CHAIR—We are now with the Attorney-General's Department, outcome 1, and we are in general questions.

Senator Wong—Acting Chair, I have other matters I have to attend to. Senator Stephens will replace me for a period of time, and then it will be Senator Ludwig and/or Senator Evans. I wish you well with the remainder of your hearing.

ACTING CHAIR—Thank you, Minister.

Senator BARNETT—Won't we see you again?

Senator Wong—I think some of your colleagues may require me in finance and public administration for the climate change estimates after dinner.

ACTING CHAIR—Welcome, Parliamentary Secretary.

Senator Stephens—Thank you.

Senator BARNETT—Mr Wilkins, we have heard from a range of agencies this morning regarding annual reports that were forwarded to the department as long ago as early September, in one instance. It is now 19 October and here we are at estimates without any annual reports from Attorney-General's or its agencies. In our annual committee report on the annual reports we strongly encouraged agencies of the department to table annual reports before Senate estimates. No doubt you have read that annual report of the legal and constitutional affairs committee. Is there a particular reason why these reports have not been tabled and made available to our committee prior to these estimates?

Mr Wilkins—There is no reason of that sort. I take my obligation to be to comply with the law, and the law says it needs to be in by the 31st, as I understand, and that is what we are working towards. I cannot see any annual reports that were sent to us early in September. We are talking about the last week or so and the last couple of weeks at the most.

Senator BARNETT—You were here earlier when a number of the courts and agencies indicated that they had provided to the department their reports by a certain date. If not, they were to take it on notice.

Mr Wilkins—They are late September or October.

Senator BARNETT—Can you table the advice that you have in terms of when they were provided to the department and, secondly, when they were provided to the minister's office for approval for tabling?

Mr Wilkins—Yes, we can do that. I will not table the advice I have in front of me because it does not deal with that issue.

Senator BARNETT—Is it fair to say that each of those reports was received by you and forwarded to the minister's office?

Mr Wilkins—I do not know the answer to that. They do not come to me personally.

Senator BARNETT—Does Mr Govey know the answer?

Mr Govey—I have the dates on which the federal courts' annual reports were received by the department but not the dates for those that have gone forward to the Attorney-General. Some of them will have come directly to the department; others may have been sent to the Attorney-General in the first instance, but of course they have to come back to the department for processing. Do you want the dates?

Senator BARNETT—I am happy to put that on notice because we got the dates from the agencies this morning when we were asking them. If you could take on notice to provide us the dates and the dates for when you sent or will send it to the minister, that would be appreciated.

Mr Wilkins—Okay. I take my portfolio responsibilities seriously. The key issue for us is making sure that they are tabled within the statutory time, and you will probably find that is a general view of secretaries. As I said to you, if you have a report that says something different, maybe it is a good idea to actually flag that in the law. A lot of people would like to see annual reports before they are required to be produced—there is no doubt about that—but do you want them in June, for example? I do not think so.

Senator BARNETT—If they were provided to the department a month ago—

Mr Wilkins—Most of them were not provided a month ago. It is a matter of the last little while.

Senator BARNETT—It is the last several weeks, based on what I recall from this morning. That notwithstanding, we have put it in our annual report. Together with other committee members, I take my position on the committee seriously, and that is why in our annual report on annual reports we strongly encourage them to be tabled as soon as possible so that we can consider them before estimates. Please bear in mind the views of our committee.

Mr Wilkins—I have taken that on board.

Senator BARNETT—Thank you.

ACTING CHAIR—I am shocked you have not read our annual report on annual reports!

Mr Wilkins—But I am sure somebody has read the annual report on the annual reports!

Senator BARNETT—I have a question on legal costs. Do you want to deal with that now in general questions? Is that possible?

Mr Wilkins—Whenever you like.

Senator BARNETT—Maybe I will kick it off with legal costs. It follows on from a question I asked on notice which you kindly respond to regarding legal costs for 2007-08, and I am really wanting an update for 2008-09. In question No. 169 of 27 May 2009 I said:

What portion of the \$510 million spent last financial year on Federal Government legal cost was to external sources? Please provide details of to whom, the nature and time of the advice and related information.

You kindly answered that, providing the fact that some 63.1 per cent of the total reported legal expenditure was for those outside agencies or external legal services, being a total of \$310.9 million. That is a lot of money and it is a big percentage. I thought it would be less than that, but that is what it is for that financial year. Can you provide an update for 2008-09?

Mr Wilkins—We can do that.

Senator BARNETT—Do you have that available?

Mr Wilkins—We do. What information do you want, precisely?

Senator BARNETT—Let us start with the legal costs for 2008-09.

Mr Wilkins—Total legal services expenditure for FMA Act agencies for 2009-09 was \$555.2 million, including GST.

Senator BARNETT—How many agencies would that cover?

Mr Wilkins—That is the FMA agencies.

Senator BARNETT—That is the same list as last year, so there is no reason to think that we are not comparing apples with apples.

Mr Wilkins—Dr Popple has some information which might throw some light on that question.

Dr Popple—In the 2008-09 figures that the secretary just quoted there were nine agencies that reported for the first time, effectively, and one agency that reported in relation to activity that it had not reported about previously. The total amount there was \$36.8 million. In other words, of that total, \$36.8 million is newly reported. Apart from that, you can compare those as apples and apples.

Senator BARNETT—Were there some agencies deleted from the list?

Dr Popple—No. Some agencies had not properly reported in earlier years. One of the changes that the Attorney made was to requirements on reporting legal services. This is the first financial year that those changes apply to. In the course of complying with the new template that the Attorney issued, some agencies realised that they had been incorrect in their previous reporting. As a result, some of this information is newly reported information from agencies that had not previously properly reported.

Senator BARNETT—You have indicated there are nine agencies that have reported for the first time. How many agencies have been deleted? Any at all?

Dr Popple—I would have to count the various lists. Obviously department responsibilities change with the Administrative Arrangements Order. I am not aware of any other significant change.

Mr Wilkins—We can check that. The probable answer to the question is there have not been any that have dropped off the list, but we will check.

Senator BARNETT—My understanding is Commonwealth legal spending has increased from \$408 million in 2006-07 to \$510 million in 2007-08 to \$555.2 million, as you have just advised, for 2008-09. Is that accurate?

Dr Popple—That is very close. The \$510 million figure is now closer to \$512 million, on account of the extra reporting that I just referred to.

Mr Wilkins—What you are beginning to see if you look at those figures is probably partly a result of better reporting, not necessarily a result of more spending.

Senator BARNETT—Res ipsa loquitur: the facts speak for themselves.

Mr Wilkins—Clearly if there are nine agencies now reporting \$32 million worth of expenditure which they did not last year—

Senator BARNETT—\$36.8 million.

Mr Wilkins—Yes—that has something to do with it.

Senator BARNETT—Dr Popple, do you have a list like that you provided to me for 2007-08 of the Australian government legal service expenditure that you could table for the committee?

Dr Popple—I have a list of all the agencies and their external and internal spend. Is that the list you are referring to?

Senator BARNETT—Yes.

Dr Popple—This is the FMA Act agencies. I can table that.

Senator BARNETT—Thank you. As you are tabling that and it is being copied, can you advise the figure for external legal expenditure? It was 63.1 per cent last year, according to your answer; what was it in 2008-09?

Mr Wilkins—You mean as a percentage or as a number?

Senator BARNETT—As a percentage.

Mr Wilkins—I do not have it as a percentage, actually.

Senator BARNETT—Either way, we can work it out. Have you got it as a number?

Mr Wilkins—Yes. It is \$307,680,459.09.

Senator BARNETT—I do not have my calculator with me, but it is obviously under 60 per cent. If somebody has one, could they give me it as a percentage; otherwise, I will work it out. Is it your estimation that the legal costs will continue to go up in terms of the trend that we are seeing before us today?

Mr Wilkins—There are complicated answers to that question. One is that, as we have just discussed, there has been variable reporting. We now think that our reporting regime is

probably better reflective of the state of affairs than previous reports. That is the first thing. There are reasons to believe that as the law becomes more complex and ramified then, yes, both at a corporate level and in government there will be more need to get legal advice in some way or other. But the Attorney-General has commissioned a report on this issue and will be looking with interest at what the cost drivers are, at what the drivers are in relation to the use of legal services and, as we looked at in the access to justice report, at some of the alternatives to using legal advice or lawyers in the normal way. So, in terms of trends, it is difficult to be black and white on that.

Senator BARNETT—What about the trend in the use of external legal services? Is that likely to stay about the same?

Mr Popple—Senator, if I could perhaps interrupt. Ms Leon has just crunched the numbers, and the percentage you wanted to know is 55.4 per cent. External legal expenditure is 55.4 per cent of the total, which you will note is a reduction in the previous proportion.

Senator BARNETT—From 61.3. Thank you. Is there a policy or plan to reduce the level of external legal services?

Mr Wilkins—No, there is no plan to reduce the use of external legal services.

Senator BARNETT—Perhaps we can go on to another matter. As yet, I still have not received the document.

Mr Wilkins—What document is that?

Senator BARNETT—It is being photocopied, I think. We will come back to it if need be. Perhaps we can go back to the issue of the National Human Rights Consultation. The allocated budget for expending on the National Human Rights Consultation over the two years was originally estimated at \$2.8 million. The 2008-09 budget papers stated that \$35,000 had been spent in 2007-08 and that \$2.099 million was allocated in 2008-09. The additional estimates reported that \$200,000 was rolled over from 2008-09 to 2009-10 because the consultation was extended to 31 July. So how much in total has been spent on the National Human Rights Consultation? If possible, a breakdown would be appreciated.

Mr Wilkins—Senator, \$2.97 million was spent on the consultation. As you correctly said, \$2.8 million was allocated in the budget. It exceeded the \$2.8 million by around \$172,000 because the committee required an extra two months to properly consider the views put forward in the 35,000 submissions received. I do not know what other sort of break-up you are talking about. Do you have specific—

Senator BARNETT—The obvious questions relate to travel, payments to committee members, salaries and wages of support staff, accommodation. I am happy for you to take that on notice if you do not have it with you.

Mr Wilkins—We will take it on notice. Do you want to go through those areas that you are interested in again?

Senator BARNETT—No, I am happy to receive it if you take it on notice.

Mr Wilkins—I want to make sure that we identify the particular breakdowns that you are talking about.

Senator BARNETT—Travel and accommodation, payments to committee members and any fees or costs that they have incurred and salary and wages of support staff and related costs. Exactly how many submissions were made in the consultation? How many were made by Commonwealth agencies? Which agencies made submissions?

Mr Wilkins—There were 35,000 submissions. The report does not tell us where they came from.

Mr Boersig—There were just over 35,000 submissions. You will see the statistical breakdown at the back which gives an indication of the kinds of places that they came from but not particularly in relation to government departments. I would have to take that on notice.

Senator BARNETT—We know the Australian Human Rights Commission has put in a submission. I am interested to know what other government agencies, if any, have put in a submission. Secondly, I am aware of the 35,000 submissions. I am wondering why not all of them were put on the website.

Mr Boersig—The submissions that were put on the website were those where people provided us with permission to do so. There were a selection of submissions which, because of either the offensive nature or the particular content in that regard, were not able to be published and there were a few submissions that referred to third parties that were not published. But all the submissions of those persons who requested that their submission be published were generally published.

Senator BARNETT—I will move on to the report and the government's response to it. I have seen the statement saying that the government is actively considering the report. I would like to know if the High Court has been consulted on the report and its recommendations either before or after the tabling of the report.

Mr Wilkins—It has certainly not been consulted by us. I do not know whether there were informal consultations with the national consultation.

Senator BARNETT—But not by the department?

Mr Wilkins—No.

Senator BARNETT—And not by the minister, as far as you are aware?

Mr Wilkins—As far as I know, not by the minister.

Senator BARNETT—And can you say the same with respect to the Human Rights Commission and its role?

Mr Wilkins—I think there have been some discussions about the recommendations in relation to education and human rights with the Human Rights Commission.

Senator BARNETT—Can you provide further and better particulars?

Mr Wilkins—I cannot.

Mr Boersig—I would have to take that on notice. There have been regular discussions in regard to a range of issues. We would have to check the dates and times.

Senator BARNETT—Did you discuss with the Human Rights Commission the issue of the declaration of incompatibility over legislation?

Mr Boersig—The discussions have not been directly in relation to matters of that nature. As the secretary indicated, they were primarily around issues of education.

Senator BARNETT—Does the department believe that Australia requires a charter of rights to meet its international obligations?

Mr Wilkins—You are asking a legal question.

Senator BARNETT—It is.

Mr Wilkins—No, we do not think you need a charter of rights to fulfil our international legal obligations.

Senator BARNETT—Would a charter of rights assist Australia to meet its international obligations?

Mr Wilkins—Maybe. It depends what is in it and how it is structured.

Senator BARNETT—Are you familiar with the view of former High Court judge Ian Callinan that the High Court will be clogged up and that it would transform the legal landscape? He said, ‘I think there will be so much pressure on the High Court to take rights cases that the court will have less time to deal with all the other cases it deals with.’

Mr Wilkins—I am not familiar with his particular views but I have heard those views expressed by a number of people, yes.

Senator BARNETT—Does the department have a view with respect to the appropriateness of the High Court making—

Mr Wilkins—We no doubt have a view, which we will put to the Attorney-General.

Senator BARNETT—You will?

Mr Wilkins—Yes.

Senator BARNETT—Have you put a view to the Attorney-General as yet?

Mr Wilkins—No, I have not.

Senator BARNETT—Has anyone in the department put a view to the Attorney-General?

Mr Govey—We have had some discussions with the Attorney-General, Senator.

Senator BARNETT—When were the discussions?

Mr Govey—It was about two weeks ago, I think.

Senator BARNETT—You can let us know exactly?

Mr Govey—Certainly.

Senator BARNETT—Who was in that meeting?

Mr Govey—There was a range of people from across the department, representing different areas of the department that have been involved in this issue and that will be involved in considering it for the future. I can provide details of the areas. It was probably in the order of a dozen or so people from the department who were present.

Senator BARNETT—Was that meeting at the request of the Attorney?

Mr Govey—That is correct. I think it was the Attorney; certainly, the message came from his office, so I assume it was the Attorney.

Senator BARNETT—Yes, of course. But you were in that meeting?

Mr Govey—That is correct.

Senator BARNETT—What was the purpose of the meeting?

Mr Govey—To have a preliminary discussion about the report.

Senator BARNETT—Were there any minutes of the meeting?

Mr Govey—I suppose in essence there were some notes prepared, but—to go to the next question—they were very much part of the deliberative process and it would not be appropriate at this time to provide them.

Senator BARNETT—Mr Wilkins, you are sort of leaning forward there; are you wanting to make a contribution?

Mr Wilkins—No; I agree with that, Senator.

Senator BARNETT—Have you had a subsequent meeting, Mr Govey?

Mr Wilkins—Senator, we have regular meetings. I certainly have regular meetings with the Attorney-General. We discuss all sorts of things at those meetings, as you would expect. The department has a lot of exchange with the Attorney-General. I have discussed aspects of the report with the Attorney-General on a variety of things when we have met, as you would expect. It is a significant issue in the portfolio.

Senator BARNETT—So you have had several discussions with him since the tabling of the report?

Mr Wilkins—Yes.

Senator BARNETT—About the report and its recommendations?

Mr Wilkins—Yes.

Senator BARNETT—Not just the group of up to 10 or 12; you have had separate meetings?

Mr Wilkins—Yes.

Senator BARNETT—Were you at the first meeting two weeks ago?

Mr Wilkins—No, I was not.

Senator BARNETT—Why weren't you at that meeting?

Mr Wilkins—I do not need to be at all the meetings that are held on these issues.

Senator BARNETT—Okay.

Mr Govey—Senator, I am advised that the meeting was on 6 October.

Senator BARNETT—Thank you. You were sitting here when we heard evidence this morning from the Australian Human Rights Commission when they provided their views, and

confirmed their views on the record, with respect to a whole range of issues, like migration, detention, gay marriage and the Northern Territory intervention legislation. They made it very clear what their views were, and yet on the other hand they indicated their willingness to express their views on the declaration of incompatibility or any conflict with current Australian law with any possible charter of rights. Do you see a possible conflict of interest here—with a taxpayer funded entity expressing and holding strong views on certain perhaps controversial matters and being granted a right to determine whether certain federal legislation is contrary to our human rights charter?

Mr Wilkins—They have opinions on that. Successive governments have taken the view that there should be an independent human rights commission, and they are presumably exercising the privileges and rights and the functions that they are given under that legislation. It is not for me to say whether you should have such a body or not, but it seemed to me that they were within their competency to say what they said. Whether we necessarily agree with them is a different question.

Senator BARNETT—I am asking whether the department sees any conflict of interest or potential conflict of interest with an entity such as the Human Rights Commission—which I would say is bordering on a law unto itself, but that is an opinion that I have expressed—undertaking a role to conduct an audit of federal legislation with regard to whether that legislation is compatible or not with the charter of human rights.

Mr Wilkins—That is one of the suggestions in the report. It is an option that has been put up by the consultation committee, and I am not going to express a view on that. It is something which the government is actually looking at at the moment.

Senator BARNETT—I am sure they are looking at it very closely. Do you agree that the charter of rights, if enacted, would impact on the separation of powers and shift the power from the parliament to the courts?

Mr Wilkins—It depends very much on what the charter of rights does.

Senator BARNETT—What if it were enacted as set out in the report and recommendation, which you have, by Father Brennan and his committee?

Mr Wilkins—I think, as the President of the Human Rights Commission said, it would marginally shift the balance of power, if you want to call it that. It would give the courts a little more leverage in terms of interpretation of statutes.

Senator BARNETT—And how the statute is written would determine the extent of that shift in power to the courts. Is that correct?

Mr Wilkins—Absolutely. That is obvious.

Senator BARNETT—Is the department aware that in recent weeks Australia has been listed as in the top two countries that support and revere freedom?

Mr Wilkins—I was not aware of it, and apparently Mr Govey was not aware of it. Dr Boersig was not aware of it either.

Senator BARNETT—Well, I am aware of it.

Mr Wilkins—You asked if I was aware of it.

Senator BARNETT—I think that is relevant to the question of to what extent we need a human rights charter. Finally, are you aware that Australia has been nominated as second to Norway as the best place in the world to live?

Mr Wilkins—No, I was not aware of that either.

Senator BRANDIS—Norway?

Senator BARNETT—Norway, yes. I will leave it there for the moment. I know Senator Brandis has some questions regarding the charter of rights.

Senator BRANDIS—This might be one for you, Senator Stephens. Can you tell us please what the government's current intentions are in assessing the Brennan committee's report? Perhaps Mr Wilkins can help. Is it the intention of the government to deal with this promptly—before the end of the year, for example—or are we looking at a longer time frame, or has that not yet been decided?

Mr Wilkins—To quote the Attorney, he is talking about considering it 'in the coming months'.

Senator BRANDIS—I read the transcript of his press conference when the report was delivered to the government. Presumably the issue of the charter of rights will be a stand-alone issue, by which I mean that, irrespective of how many of the other of the numerous recommendations of Father Brennan's committee are adopted, whether or not the government decides to adopt his recommendation in relation to a charter of rights is something that does not depend on what it does with other recommendations.

Mr Wilkins—I suspect that is right. I am not entirely clear. There are some other issues that are obviously interrelated with that.

Senator BRANDIS—Sure. But my point is that the government could decide to take a number of Father Brennan's committee's recommendations but not adopt the charter of rights. This is not a 'take it or leave it' report.

Mr Wilkins—No, that is right. That is correct.

Senator BRANDIS—The opposition has said that were the government minded to move to a charter of rights given what we say would be the very profound impact on the separation of powers and the rebalancing of the constitutional system which such a charter would involve on the model recommended by Father Brennan's committee, that should not be done unless there were to be a referendum or perhaps a plebiscite so that the people could have the final say. I have not, Senator Stephens, seen any response by the government to the opposition's insistence on a referendum or a plebiscite in relation to the charter of rights issue were the government so minded. Does the government have a position on that?

Senator Stephens—I am not aware that the government has made any response to that, Senator Brandis.

Senator BRANDIS—Even in the absence of my statement on behalf of the opposition, does the government have a view at all about whether or not the adoption of a charter of rights, were the government to move in that direction, should be conditional on the support of the public at a referendum or a plebiscite?

Senator Stephens—They are exactly the kinds of issues that the Attorney-General has indicated that he is taking under serious consideration.

Senator BRANDIS—He has not, actually. He has not said that the question of implementation through a plebiscite or a referendum is something that he would, for example, take to cabinet. As far as I am aware—and I am inviting anyone to correct me if my understanding is imperfect or I have missed something here—my understanding is the Attorney-General has not said anything about the matter.

Senator Stephens—I think the Attorney-General has been very clear that he is saying that he is taking into account not only the recommendations of the report but also the public discourse that has occurred since the release of the report.

Senator BRANDIS—Do the opposition's views qualify as public discourse?

Senator Stephens—I would assume you would hope so.

Senator BRANDIS—No, it is a serious question given that this is not a common or garden policy matter. It is an issue on which there are strongly held views in opposition, on both sides of politics. There are strongly held views in support largely on the part of one side of politics—namely yours, Senator Stephens—and one can have an argument about matters of degree but it would be a profound change to the Constitution to some degree at least, so this is out of the bounds of the ordinary debate we might have in parliament about whether a particular policy is a good policy, which is why I am wondering what the government's approach to consideration of the recommendations of this report and in particular the charter of rights recommendation is going to be.

Senator Stephens—Senator Brandis, I cannot give you any more information other than what the Attorney-General has publicly said. The government takes this report very seriously and will be taking all of those recommendations into consideration.

Senator BRANDIS—What I want to know specifically, Senator Stephens, is will the government consider, if it goes along with the idea that there should be a charter of rights, putting the issue up at a referendum or a plebiscite?

Senator Stephens—I cannot answer for the Attorney-General. I am sure that his staff are monitoring this discussion and that they will be able to take that up with you at a later date.

Senator BRANDIS—Will you take it on notice?

Senator Stephens—I cannot refuse to take it on notice but I am saying to you that it is a very serious issue. Your contribution to the debate is a very serious contribution and the Attorney-General is taking all of those contributions very seriously, so I am sure that as part of what he is considering those kinds of options are being played out.

Senator BRANDIS—I am really trying not to be argumentative. I appreciate the good faith and spirit of cooperation which the Attorney-General has afforded the opposition in relation to this matter, but I just want to nail down one specific point. When it comes to considering the charter of rights recommendation from the Brennan committee, in the event that the government adopts that recommendation will the government give consideration to whether or not there should be a referendum or a plebiscite? Is that an issue to which the government will turn its mind and make a decision in that context?

Senator Stephens—It is a hypothetical question.

Senator BRANDIS—It is not a hypothetical.

Senator Stephens—The way in which you have just framed it, it is quite hypothetical. As I have said, I will take the question on notice.

Senator BRANDIS—Do you support a charter of rights?

Senator Stephens—As a personal opinion, no.

Senator BRANDIS—Why not? Senator Stephens is very sensible, like Mr Hatzistergos, Mr Carr and many others.

Senator BARNETT—Including Labor members of federal parliament.

Senator BRANDIS—Thanks, Senator Stephens, but I do want a response to this issue about whether contemplation of a referendum will be part of the issues the government specifically addresses if it decides to adopt the charter recommendations.

Mr Wilkins—I am sure the Attorney will treat your views with great seriousness, so that will be taken into account.

Senator BRANDIS—How much has been outlaid for the National Human Rights Consultation committee's work to date?

Mr Wilkins—We have just gone over that.

Senator BRANDIS—I am sorry.

Mr Wilkins—I am happy to do it again.

Senator BRANDIS—I do not want to delay the committee. Have you provided those numbers to Senator Barnett?

Mr Wilkins—We have.

Senator BRANDIS—What about the salaries or emoluments to individual members of the committee?

Mr Wilkins—Senator Barnett has asked for a breakdown. I do not have that with me and we have taken it on notice.

Senator BRANDIS—In relation to Father Brennan's emolument, was that emolument paid to Father Brennan, a religious order or some other third party?

Mr Wilkins—Can we take that on notice?

Senator BRANDIS—Sure.

Mr Wilkins—One issue has to do with whatever confidentiality arrangements we might have made with Father Brennan, and the other is I do not know the answer to the first part of the question.

Senator BRANDIS—In the previous estimates you were perfectly happy to provide information as to the fee for each of the members of the committee. I have no criticism of quantum of that fee, but because of Father Brennan's particular position as a member of a

religious order I just wondered whether this was a fee that was going to him personally, his order or some other third party.

Mr Wilkins—If it is okay with you we would want to check our agreements with Father Brennan.

Senator BRANDIS—Sure.

[5.14 pm]

ACTING CHAIR—We are now moving into outcome 1 proper.

Senator BARNETT—This may not take very long, because with the Australian Law Reform Commission we touched on the new privacy principles that have been announced by Senator Joe Ludwig. I wondered if the department had a review with respect to the easing of privacy laws not applying to people who wish to stay missing. Some people wish to stay missing, and I wondered if that is a matter that the department has considered.

Mr Wilkins—Not to my knowledge. I do not think I have considered that.

Senator BARNETT—What we do know is that the law, based on what the minister has advised, will help families of missing people find the missing people. But I am asking the question: how does the easing of the privacy laws not apply to people who wish to stay missing?

Mr Wilkins—This is not really our area of policy, as you know. It is a matter for the Prime Minister's department. I do not know that we have taken a position within the department on this matter.

Senator BARNETT—It is a Law Reform Commission report, and they expressed their views this morning.

Mr Wilkins—But it has gone to the Department of the Prime Minister and Cabinet to deal with.

Senator BARNETT—That is why I said this might be brief. The second and final part relates to financial institutions accessing people's personal creditworthiness or financial positions. Has the department expressed a view to the minister as to the appropriateness of that or not?

Mr Wilkins—Quite possibly. I do not know the answer, but I will take it on notice if you want.

Senator BARNETT—All right. I would also be keen to know what view you have with regard to the appropriateness of that occurring. Senator Abetz has some questions on outcome 1.2.4.

Senator ABETZ—I think it was last estimates I asked about the Elizabeth and Middleton islands and the impact of a resolution by the UN Convention on the Law of the Sea body, whatever that is called. Mr Campbell, can you assist?

Mr Campbell—I can. As I recall, it was the equivalent estimates day last year in October that you raised that matter. The issue that was raised was the effect on Elizabeth and

Middleton reefs of the views expressed by the Commission on the Limits of the Continental Shelf, established under the law of the sea convention.

Senator ABETZ—Do you accept that there is a risk, albeit a very minimal risk, that the Ure-Chan claim on the reefs may be upheld?

Mr Wilkins—Successive governments have gone over and over this issue and have taken the view which we which we have repeatedly written to these people about and have announced here to the Senate committee. This is a position that successive Australian governments have taken, so I am not quite sure where you want to take this line of questioning?

Senator ABETZ—The good news is you do not have to worry about that.

Mr Wilkins—I do, I am head of the government department.

Senator ABETZ—No, all you have to do is answer the questions I pose. What I might do with the answers is up to me. If you want to provide some gratuitous advice to me as to what to do with answers, I would be more than willing to accept that advice. I am not sure I would necessarily act upon it, however. Mr Campbell, would you please answer the question as to whether you accept that there is a risk, albeit even a minimal risk, that the Ure-CHAN claim in relation to the reefs may be upheld?

Mr Campbell—There are a couple of issues there. The first is by whom would it be upheld? I go back to the answer that the secretary has given, and that is that successive Australian governments have rejected the claims to ownership by the Ure-CHAN group over Elizabeth and Middleton reefs and islands. Obviously, they would have done that on advice.

Senator ABETZ—Yes, but I am asking you about the element of risk.

Mr Campbell—You are asking me to provide, in essence, a legal advice about it, so I am not prepared to do that to this committee.

Mr Wilkins—As in the case with any legal proposition you can always mount some sort of argument to the contrary, but—

Senator ABETZ—There is always some risk attached, isn't there?

Mr Wilkins—There is always some risk attached. It could be 99.9 per cent correct but there is always some risk attached to it, and that is with any proposition of law.

Senator ABETZ—We accept that there is some risk attached, and I understand that you have now been provided with the benefit of Bret Walker SC's advice and consideration in relation to this matter—is that correct?

Mr Campbell—Yes, I have.

Senator ABETZ—And Mr Wilkins, you have seen that as well?

Mr Wilkins—I have seen that too.

Senator ABETZ—And you have seen it as well, so I think we could be agreed, could we not? Possibly I should not ask you to comment on the capacities of another senior counsel, but I think most people would accept that Mr Bret Walker is a distinguished SC and somebody whose opinions possibly are worthy of consideration.

Mr Campbell—Yes, I agree that is so, but I also should point out—and I hesitate to do so—that I have been working in this area of continental shelf and Australia’s maritime zones for a period of nigh on 30 years, and I have some expertise in it as well.

Senator ABETZ—Yes, and that is why I asked about the question of the risk factor. Unless you, Mr Campbell, consider yourself to be infallible—and I think Mr Wilkins has answered for us—there must be a risk factor when two eminent QCs/SCs disagree on a matter. The average punter would say, ‘Chances are, there is a risk factor involved in this when two eminent people have a divergence of opinion.’ I would have thought that is not an outrageous proposition to put forward.

Mr Wilkins—I always find the logic of the position more interesting. I do not like arguments from authority; I think the logic of the legal position is always more compelling than who says it.

Senator ABETZ—In other words, you are asking Mr Campbell to withdraw the assertion of his 30 years of experience, that that is irrelevant to the consideration—

Mr Wilkins—No.

Senator ABETZ—it is just the logic of the discussion.

Mr Wilkins—We can put it on the scale, but I find the position the Australian government has put and adopted over a number of years to be compelling as a matter of logic.

Senator ABETZ—Are you aware of the views of Professor Moore in this matter?

Mr Campbell—I am aware that Ure-chan have had a succession of legal advisers, some of whom still advise them, some of whom do not. I am also aware of the eminence of those advisers and I am aware that Professor Moore, in combination with others, has given legal advice on this matter. But the issue is not who gave the legal advice; it is about whether Ure-chan have a claim or not. Our view is that they do not have a claim.

Senator ABETZ—Yes, but you have accepted that there is a risk that may?

Mr Campbell—I have not personally accepted that there is a risk.

Senator ABETZ—I think Mr Wilkins is senior to yourself in this department, is he not?

Mr Campbell—Yes, he certainly is senior to me.

Senator ABETZ—Mr Wilkins has acknowledged that there is a risk factor. You are trying to countermand Mr Wilkins. Can you have that discussion behind closed doors. I do not want to see the untidiness of that.

Mr Campbell—No, I am not.

Senator Chris Evans—Point of order, Acting Chair. Senator Abetz can draw his own conclusions, but the officer is entitled to give his view. The officer has given his view and he does not accept the interpretation Senator Abetz chooses to place on it, but that is not the point, in a sense. The officer has given his view and if Senator Abetz wants to characterise it that way that is his prerogative. The officer has made clear his view and I think that should be it.

Senator ABETZ—Before you came in, Minister, and this might be a bit embarrassing for you, Mr Wilkins did acknowledge that there was a risk. Mr Campbell is now saying that as far as he is concerned, as a junior officer to Mr Wilkins, there is no risk and, with great respect, I think the secretary might—

Senator Chris Evans—Even if he did, what is the point? The officer has given his evidence and that is his evidence. If you want to interpret it in a particular way, that is obviously your prerogative, but he has given his evidence.

Senator ABETZ—I know that. I accept that his evidence is contrary to that of the secretary.

Senator Chris Evans—That is not right.

Mr Wilkins—No, not at all.

Mr Campbell—If I could say something, Senator—

ACTING CHAIR—Just a minute, let us get back to questions and answers. I would ask you, Senator Abetz, to enable the officers at the table to complete their answers before asking another question.

Senator ABETZ—Mr Wilkins, will the *Hansard* disclose that previously you indicated that there was a risk associated with this issue?

Mr Wilkins—The *Hansard* should disclose that my view is that any legal opinion always has some element of risk.

Senator ABETZ—As I indicated earlier, I think that is an eminently sensible position to take.

Mr Wilkins—Okay. Even the proposition that you own a certain block of land, for example.

Senator ABETZ—That is right. We are now talking potentially about property rights, so that is a good example. It is a pity that Mr Campbell does not share our view in relation to the possibility of risk.

Mr Wilkins—I think he probably does.

Senator ABETZ—In that case, it would be nice for us to hear that from him. Mr Campbell, I will ask you again—

Senator Chris Evans—No. I do not know why you insist on trying to verbal the witnesses. It is a petty point that is not taking you anywhere. The officer—

Senator ABETZ—You do not even know the case, Minister, so do not embarrass yourself.

Senator Chris Evans—No, I do not. Senator Abetz, your performance at estimates is one of embarrassment, not mine. You are on the record. What I will say is this: do not try and bully the witness. Let the witness answer and do not try and characterise his evidence unfairly.

Senator BARNETT—Point of order, Acting Chair.

Senator ABETZ—You are now trying to bully me, Minister, and it will not work and you know that.

ACTING CHAIR—Senator Barnett?

Senator BARNETT—I think the minister's interjection was unfounded and unnecessary, and I would ask you to call him to order.

ACTING CHAIR—That is hardly a point of order.

Senator BARNETT—Senator Abetz was in no way verballing the witness.

ACTING CHAIR—There is no point of order. You just want to have a chop in the discussion as well. Let us get back to questions and answers. Senator Abetz, do you have a question?

Senator ABETZ—I have indeed a number of questions. In relation to the commission that made the determination, do they have the authority to make a legal determination as to ownership, or do they deal with the science of the continental shelf?

Mr Campbell—They deal with the issue of the entitlement of a state to a continental shelf beyond 200 nautical miles from the territorial sea baseline. They deal with that on the basis of a legal definition of that area in the law of the sea convention, and they take into account scientific matters such as geomorphology and geology.

Senator ABETZ—Is it up to the discretion of the state seeking to make the claim as to whether or not an island is capable of supporting economic activity, or is that something that is determined by the commission?

Mr Campbell—The commission does not get into, nor is it its role to get into, the area of where the territorial sea baselines are located.

Senator ABETZ—If their consideration does not deal with legalities of ownership, how do we justify Minister Ferguson's release of 21 April in which he talked about:

... findings from the United Nations Commission on the Limits of the Continental Shelf ... confirming Australia's jurisdiction over—

the seabed? They did not determine the ownership, did they?

Mr Campbell—As I said before, the function of the commission is to confirm a state's entitlement to a continental shelf beyond 200 nautical miles. That is precisely what they did in this case. They made recommendations confirming Australia's entitlement to a shelf beyond 200 nautical miles. The law of the sea convention then sets out what Australia's entitlement in that area of the continental shelf is. Fundamentally, the entitlement in that area is to exercise sovereign rights in relation to the resources of the seabed. To elaborate, countries do not strictly own the continental shelf. They have an entitlement to exercise sovereign rights over the continental shelf and the resources it contains, and those sovereign rights are defined in the convention.

Senator ABETZ—It would be fair to say that the resources that are in question are quite substantial.

Mr Campbell—That depends which area of the extended continental shelf we are talking about. Some areas have no prospectivity; others have a higher prospectivity. On the question of prospectivity of particular areas, that is an area you would have to put to the department of resources.

Senator ABETZ—I will be asking Geoscience about that, but surely you are aware of the potentially rich resources in the particular area of these two reefs and islands.

Mr Campbell—I am not aware of how resource rich that area is. What I am talking about are the resources of the seabed beyond 200 nautical miles. The commission does not deal with the seabed within 200 nautical miles, only that part beyond.

Senator ABETZ—But Minister Ferguson's release talks about the significant oil resources, gas resources, biological resources et cetera.

Mr Campbell—As a proposition that is correct. I think what he was talking about were the resources of the 2.63 million square kilometres of continental shelf that were confirmed by the commission in relation to Australia, not just the area adjacent to Elizabeth and Middleton reefs.

Senator ABETZ—Given the rich resource nature of this particular area, the fact that there is, even potentially, a very minimal risk of the advice in relation to this not necessarily holding up, it could become magnified in dollar terms quite considerably. I am just wondering why we do not seek to negotiate a settlement with Ure-chaan in relation to this matter to ensure that there is no possible difficulty in the future?

Mr Campbell—First of all, I did not say there are significant resources adjacent to there. I said that question should be addressed to the resources portfolio. On the second issue, successive governments have said that Ure-chaan have taken the position that Ure-chaan does not have a legal entitlement to the islands, and hence have chosen not to negotiate with Ure-chaan.

Senator ABETZ—Do you accept that Professor John Norton Moore is an extremely eminent American lawyer?

Mr Campbell—I accept that he is an eminent lawyer who is professor of international law at the University of Virginia, yes.

Senator ABETZ—At the University of Virginia's Center for Oceans Law and Policy.

Mr Campbell—That is correct.

Senator ABETZ—And he is one of the world's leading experts in this area?

Mr Campbell—He is an expert on the law of the sea, yes.

Senator ABETZ—Would you put yourself in the same category?

Mr Campbell—I would be far too modest to do that.

Senator ABETZ—Possibly for good reason.

ACTING CHAIR—Let's just get back to questions, please.

Senator Chris Evans—A bit of modesty around the room would not go astray either.

Mr Campbell—What I will repeat is that I have had 30 year's experience in dealing with law of the sea matters, and hence gained some knowledge and expertise out of that.

Senator ABETZ—And I daresay the good professor has as well.

Mr Campbell—I think you will find he probably has longer experience.

Senator ABETZ—Do you agree with paragraph 25 of Mr Bret Walker SC's opinion that the sovereignty of Australia over the islands was basic, fundamental and critical for Australia's ECS case at the CLCS concerning the Lord Howe Rise region and that the CLCS recommendations do not establish that sovereignty? You could take that on notice, because I am asking you to comment on somebody's opinion.

Mr Campbell—In the evidence that I gave then, and also in the question on notice that you followed that up with after the earlier hearings we are discussing, the Attorney-General said in response that Elizabeth and Middleton reefs were not critical to the determination of the outer limit of the continental margin in that particular area. In fact, the commission referred to 'islands' and it said principally the inhabited islands of Lord Howe Island and Norfolk Island.

Senator ABETZ—That is why I refer to that paragraph 25 concerning the Lord Howe Rise region in my previous question. You do not want to take on notice whether or not that paragraph 25 is a matter you would want to comment on?

Mr Campbell—I am happy to take it on notice to comment on it, but I have restated the position that—

Senator ABETZ—When do you say that Australia asserted its sovereignty over that area—over those two reefs or islands?

Mr Campbell—It is states that assert sovereignty and not organisations such as Ure-chan. The second issue is that I can tell you when those islands were made part of the Coral Sea Islands Territory: I think that was in 1989. I would have to check on this, but I believe they may have been made part of a nature reserve prior to that.

Senator ABETZ—The name Henry Burmester would undoubtedly be known to you?

Mr Campbell—Yes, it is.

Senator ABETZ—Are you aware of his article 'Outposts of Australia in the Pacific Ocean'?

Mr Campbell—I am aware of its existence.

Senator ABETZ—Is the thesis of that learned article something that you have had occasion to exercise your mind about?

Mr Campbell—Not recently.

Senator ABETZ—Not when you received Mr Bret Walker's opinion in which he refers to that article? Did you consider it then?

Mr Campbell—I did not reread the article, no.

Senator ABETZ—That was an opinion dated 15 May 2009.

Mr Campbell—I know Mr Burmester had discussions with Professor Moore, but Mr Burmester was acting for the Commonwealth.

Senator ABETZ—That is right. I want to know whether you have taken that into account. We have Bret Walker SC, we have a professor and we have Henry Burmester's views. I would have thought there may be an element of risk in relation to this if it were challenged. I am

wondering what the Commonwealth's risk management strategy is in relation to this matter given the wealth that has potentially come to us by this determination?

Mr Campbell—I have already stated that successive Commonwealth governments have rejected the Ure-chan claim and have not sought to settle the matter.

Senator ABETZ—Sorry?

Mr Campbell—Have not sought or had discussions to settle the matter.

Senator ABETZ—You referred in an answer to a good deal of discretion within the coastal state. Are you saying the coastal state has a discretion whether such formations are islands or rocks and whether they satisfy the special requirements in relation to human habitation and economic life?

Mr Wilkins—Can I just make this point. I think we are beginning to get into an area where you are basically asking the Commonwealth to put on the table its legal position in a situation where we may be confronted with some claim or litigation—in other words, you are asking us to reveal a whole range of opinions on a whole range of matters that are, as you say, in Mr Walker's advice. If this does go to litigation, if there is a claim against the Commonwealth, we will have actually made clear some of the positions that we may wish to argue and some of the propositions that we may wish to contest—

Senator ABETZ—And that is a valid concern.

Mr Wilkins—and I am worried about where we are going on this and that is why I asked you before. We are beginning to answer questions that might prejudice the position of the Commonwealth in future litigation.

Senator ABETZ—You are now not dismissing as a ridiculous suggestion—

Mr Wilkins—I never—

Senator ABETZ—the proposition of legal action in this and you are now, I think, quite rightly, counselling that we should not be pursuing this matter further in the event of legal action. That is in fact the point that I was hoping to get to that you and the Commonwealth would acknowledge that there is a potential litigation issue here—

Mr Wilkins—There is always potential.

Senator ABETZ—and therefore we do have a genuine risk issue and that is why I come back to the question as to why the Commonwealth does not seek to mitigate the risk here and try to resolve it.

Mr Wilkins—Because the government is confident of its advice. As I say, that hangs on the logic of the position taken, not necessarily on the eminence of the great list of professors or whatever who have given the advice. It rests on the logic of the advice, and as Mr Campbell and I have said, successive governments have taken that view. I just think it would be imprudent now to continue to put a position, because people run actions sometimes for not very good reason at all, but you do need to defend them.

Senator ABETZ—If possible, you seek to avoid them.

Mr Wilkins—I am just trying to safeguard the government's position.

ACTING CHAIR—Now that you have raised that, Mr Wilkins, I need to ask you, Senator Abetz where you wish to take this matter now?

Senator ABETZ—I have now got—and I have just indicated that—the acknowledgement that there is an accepted risk in relation to this matter and the potential of court proceedings. I do not want to canvass this further, but there was a flat denial at the beginning about the possibility of any risk. Can I ask about Australia's case at the commission: was the status of the islands important for locating the boundary between the EEZ and the ECS?

Mr Campbell—Middleton Island was used as a base point in the delimitation with France in relation to New Caledonia.

Senator ABETZ—Yes, and without Middleton Island being part of Australia's case, our EEZ and our ECS would have been more limited? Because without it, the delimitation between France and Australia—

Mr Campbell—Can I put it this way: first you have to determine where the continental margin is, and the boundary between Australia and France is not relevant. That is what the commission looks at, where the continental margin is, and that extends well to the north of that boundary. But then the boundary comes in because of an agreed boundary between France and Australia to say where Australia's jurisdiction stops vis-a-vis France.

Senator ABETZ—And without us claiming Middleton Island, would that have been prejudicing where our joint boundary was with France?

Mr Campbell—If France had not agreed that we could use that, we could not have used it, and the boundary with France may have been to the south of there.

Senator ABETZ—Yes. It would still be with France, but further south.

Mr Campbell—We negotiated a boundary with France. One of the base points in that boundary—it was an agreed delimitation—was on Middleton Reef. That boundary determines where the maritime zones of France start and where the maritime zones of Australia start, and that was well before the matter was taken to the Commission on the Limits of the Continental Shelf.

Senator ABETZ—And undoubtedly on the basis of representations as to Middleton Reef. I have taken up more than my allocated time on this so thank you very much.

ACTING CHAIR—Mr Campbell, I think you were cut off a couple of times earlier, probably including by me. If there is anything you need to add or clarify after reading the *Hansard*, I invite you to forward that information through to the chair.

Mr Campbell—Thank you.

ACTING CHAIR—Are there any other senators who have indicated they have got questions in outcome 1?

Senator BARNETT—I will ask a question. I am not sure if it is outcome 1, but it may be, so let us clear that up before we go on. Are the shared parenting laws under outcome 1?

Mr Govey—Yes.

Senator BARNETT—All right, perhaps I will pursue that. The government has six formal inquiries underway, I understand, into shared parenting laws, which may be indicative that the government is planning to roll back shared parenting legislation introduced by the Howard government. Could you confirm if that is the case and, if so, could you please provide the details such as dates, costs, who has been commissioned and what submissions have been received for all those current inquiries the federal government is conducting into shared parenting laws?

Mr Govey—I will ask Ms Pirani to give the details, but I can say at the outset that I do not think it would be appropriate to characterise all of the work that is underway as a formal inquiry.

Ms Pirani—There was mention in the press this morning that some interest groups had referred to there being six inquiries underway into shared care. The six inquiries that they were referring to I have listed here, although the department would not describe all of these as inquiries as such. The first is the Family Courts Violence Review by Richard Chisholm, which commenced on 27 July 2009. The review is not directly considering issues around shared parenting or shared care. However, it is looking into all aspects of family law and court practice and procedures that might impact on the way that the family law system responds to the needs of families experiencing domestic violence. That review is due to report by 27 November 2009. I do have a list of people who were invited to make submissions to that particular inquiry. The list of groups that were invited is quite lengthy, and Professor Chisholm has attempted to invite anyone who has any interest in the subject and in fact has also invited public submissions in relation to that inquiry.

Senator BARNETT—Have you got a list of the submissions there?

Ms Pirani—There is a list of people who were invited and also meetings that Professor Chisholm has held with various people.

Senator Chris Evans—The officer has just found the list. There is some concern to make sure there are not individuals who might have submitted. Can we just have a look at the list and come back to you after dinner? If it is fine, we will table it for you. I just want to be careful that we are not drawing attention to a particular case or what have you.

Senator BARNETT—That is fine.

Senator Chris Evans—We will come back after dinner and table it if we can.

Senator BARNETT—Thank you very much. So you are checking the list of submitters and those that were invited?

Ms Pirani—Yes.

Senator BARNETT—All right, thanks for doing that. The report by Professor Chisholm is due by 27 November 2009. Have there been any interim reports presented to the government to date?

Ms Pirani—No.

Senator BARNETT—Has he conducted any of those hearings in a public forum?

Ms Pirani—Not that I am aware of. He has met with some individuals and with some groups.

Senator BARNETT—Has he met with all the key stakeholder groups to your knowledge?

Ms Pirani—I understand that he has either met with them or sought submissions from them.

Senator BARNETT—Could you advise the cost of the inquiry to date?

Ms Pirani—We are actually paying Professor Chisholm an hourly rate.

Senator BARNETT—Which is?

Ms Pirani—I will have to find that. It is capped at a certain amount for the entire period. It is capped at around \$72,000 for the entire review.

Senator BARNETT—I am happy to wait until after dinner if you need time to look for it. I would like to know the total cost to date and the hourly rate.

Ms Pirani—I do not have the total cost to date, but I do have the hourly rate. I do not know how we are paying in terms of instalments, so I would not have that cost with me.

Senator BARNETT—Is that something you can check over the dinner break?

Mr Wilkins—We will attempt to do that, but it might require a little more time than that actually.

Senator BARNETT—I hope you understand that it is not an unfair question to know the total cost to date of the inquiry.

Mr Wilkins—If we can, we will get that.

Senator Chris Evans—The department will do what they can by dinner, otherwise they will take the rest of it on notice.

Senator BARNETT—Thank you.

Ms Pirani—The hourly rate is \$165.

Senator BARNETT—Do you know how many hours he has undertaken to date?

Ms Pirani—We have estimated approximately \$1,320 a day and he works three days a week.

Senator BARNETT—When did the inquiry commence?

Ms Pirani—It was announced on 27 July by the Attorney and it commenced quite shortly thereafter.

Senator BARNETT—Can you table the terms of reference?

Ms Pirani—Yes, I can.

Senator BARNETT—Thank you. Can you outline the other reports or investigations, if we are not calling them inquiries? Please let me know what they should be called.

Ms Pirani—There is also another inquiry being conducted by the Australian Law Reform Commission. This was announced on 24 July and is due to report by July 2010.

Senator BARNETT—I am interested in the terms of reference and the purpose of that inquiry.

Ms Pirani—I have a copy of the terms of reference for that inquiry.

Senator BARNETT—I am happy for you to table that. Can you broadly tell me the terms of reference?

Ms Pirani—The terms of reference for the ALRC are to look at the interaction between state and territory domestic violence laws and the Family Law Act, and also to look at the impact of any inconsistent interpretation or application of those laws in the context of either sexual assault or family domestic violence.

Senator BARNETT—I am happy for you to table that after dinner.

Ms Pirani—I have a note on it that I need to take off.

Senator BARNETT—Okay. Go on?

Ms Pirani—The next is the evaluation being done by the Australian Institute of Family Studies. This is not an inquiry as such, but it is an evaluation of the 2006 reforms to the family law legislation. The evaluation commenced in May 2007 and is expected to report by the end of this year.

Senator BARNETT—Does that have terms of reference?

Ms Pirani—It has an evaluation methodology that is available on the A-GD website; no terms of reference as such.

Senator BARNETT—Are they funded separately by the department?

Ms Pirani—Yes. It is actually jointly funded by the Attorney-General's Department and FaHCSIA.

Senator BARNETT—What is the cost?

Ms Pirani—I will have to look that up. I do not have it readily at hand, but I can provide it after the break.

Senator BARNETT—And the fourth one?

Ms Pirani—The next two are actually research projects that have been funded by the department. The first is research into shared care parenting arrangements that have been entered into since the 2006 family law reforms. The idea of that research is to look at the circumstances under which shared care works or does not work in the best interests of the child. That report is due in March 2010.

Senator BARNETT—Who is undertaking that for the department?

Ms Pirani—That is being conducted jointly by the University of New South Wales, Sydney University and the Australian Institute of Family Studies.

Senator BARNETT—And the cost?

Ms Pirani—I can provide that after the dinner break. I just have to double-check it.

Senator BARNETT—All right. And when was that commissioned?

Ms Pirani—It was commissioned earlier this year.

Senator BARNETT—Do you have a date?

Ms Pirani—I do not have a date.

Senator BARNETT—You will take that on notice?

Ms Pirani—I can get one.

Senator BARNETT—Was that specifically commissioned by the Attorney-General?

Ms Pirani—Yes, by the department.

Senator BARNETT—Do you have the terms of reference for that?

Ms Pirani—I do not have it with me, but a description of it is available on our website—it is not a terms of reference as such, but there is a description of the research project. We did go to public tender for the researchers to conduct that.

Senator BARNETT—Let us just ask the department a little bit more specifically: was that research undertaken at the request of the Attorney-General, or in consultation with the Attorney-General? Can we assume that the Attorney-General was fully aware of the research?

Ms Pirani—Yes, the Attorney-General was fully aware of the research.

Senator BARNETT—And supported it?

Ms Pirani—I will just be clear: we do not know where any of the findings of that research are yet.

Senator BARNETT—No, of course, but the Attorney-General supported the research being undertaken, we can assume?

Ms Pirani—That is correct.

Senator Chris Evans—He authorised it, as I understand it.

Senator BARNETT—It was authorised by him. Are there any others? You said that was a joint one, and I have got those details, but is there a further research project?

Ms Pirani—Yes, there is another research project into family violence. This is also due to report in March 2010.

Senator BARNETT—You did not give me a date for the other one, you said early—**Ms Pirani**—These two were commissioned at around the same time, and I just have to check the date.

Senator BARNETT—Sorry, you did say March 2010.

Ms Pirani—They are both due to report in March 2010.

Senator BARNETT—Who is doing this one?

Ms Pirani—This one is being done by Monash University and the University of South Australia.

Senator BARNETT—Cost?

Ms Pirani—I will just have to double-check that.

Senator BARNETT—Thank you. Any others?

Ms Pirani—That is five in all. The other one that was being referred to is not actually one being conducted by this department. It is actually a reference to a review that is being done by the Child Support Agency.

Senator BARNETT—Do you have the details of that?

Ms Pirani—I do not have details about it.

Senator BARNETT—It is a review of what?

Ms Pirani—It is a review of the decision making and quality assurance process of the Child Support Agency.

Senator BARNETT—Does that reflect directly on shared parenting arrangements?

Ms Pirani—I do not know.

Senator BARNETT—Do you know when that commenced and when it is due to report?

Ms Pirani—No, I do not.

Senator BARNETT—Sorry—that was FaHCSIA?

Ms Pirani—The Child Support Agency is in the Department of Human Services.

Senator BARNETT—They are the six, as far as you are aware?

Ms Pirani—They are the six that were referred to.

Senator BARNETT—Thanks very much for that. I am wondering whether the minister might assist in a question here. There are obviously six reports that relate directly or indirectly to the importance of shared parenting and the appropriateness or otherwise of shared parenting laws. They commenced this year, either in the middle of the year or in the first part of the year, and are to report toward the end of this year or in the first part of next year. Could the minister advise the committee as to the reasons why, firstly, it has undertaken and is funding six reviews to start with and then, secondly, its intent with respect to what the future holds for shared parenting laws in Australia?

Senator Chris Evans—Firstly, as the representing minister I do not pretend to be across the detail, but I understand from advice from the secretary that the reviews are not all into shared parenting per se, so I think he can clarify that for you in terms of the purpose of the reviews. In terms of the legislation, you might recall that the legislation was passed by the parliament with bipartisan support for many of the measures. It is the case that if there were to be a change in legislation it would be a matter for the parliament if it were to be introduced. If there were any changes proposed, obviously it would be a question for the parliament to determine whether or not any laws were changed. I am sure that the Attorney-General is monitoring the implementation of the shared parenting arrangements, as would be prudent for any government to look at how that is going. I understand that the inquiries referred to are broader than that. I do not know how it is best described, Mr Wilkins.

Mr Wilkins—We have just been through them—

Senator Chris Evans—Yes, but in terms of the breadth—

Mr Wilkins—I think that to characterise them as all about shared parenting is probably oversimplifying and bowdlerising the long conversation that has just been had.

Senator BARNETT—I did not do that. I hope you are not suggesting that I did, either directly or indirectly.

Mr Wilkins—No, I am sure you would not do that, Senator.

Senator BARNETT—Can you advise the committee: what is the intent behind the government's putting considerable resources into these inquiries, reports and investigations over a long period of time.

Mr Wilkins—You have just been through the variety of things they are looking at. When you make policy you should do it on the basis of empirical investigation. Most of these inquiries are trying to see what works and what does not work across a range of areas. People have made changes to the law or are contemplating making changes to the law in relation to domestic violence; there are various programs et cetera. It makes sense to go and see if it is actually working.

Senator BARNETT—Sure. Is the government planning to introduce legislation to reflect the outcomes of the reports before them?

Mr Wilkins—The reports before them will quite often come up with empirical information which will then have to be assessed. I think that the short answer to your question is: the government will, of course, look at these reports and take other matters into consideration and come to conclusions about what, if anything, needs to be changed in the law.

ACTING CHAIR (Senator Barnett)—Thank you. I am happy to leave it there. I understand that Senator Ludlam is at the table and is ready to ask questions. I think I am chairing for the moment, so away you go.

Senator LUDLAM—I have just got a few questions about the strategic framework for access to justice document that was produced in September. Can you tell us how much this exercise cost from its establishment in January to the production of the report that we have today?

Mr Minogue—The cost to 30 September was in the order of \$410,241. That does not include what would have been the cost of an officer who was made available to the task force from the Treasury but it does include the Attorney-General's Department costs. If you want more detail as to how that was apportioned—

Senator LUDLAM—That could be helpful. We do not have to go through it line by line. If you want to table that for us, that would be great.

Mr Minogue—Up to the end of September the total employee cost was in the order of \$385,996, travel was \$5,905, IT cost, in terms of support provided by the department, was \$4001. Some office expenses, stationery, gearing up and that kind of thing as well as all the office provisions was \$5,644, \$2,294 was communication expenses. There was nothing for legal expenses. On top of that would be something in the order of between \$20,000 and \$25,000 for typesetting and printing of the report and the summary.

Senator LUDLAM—Okay, plus you said an officer of the Attorney-General's Department.

Mr Minogue—Yes, we had access to an officer from Treasury for about five months, so that person was made available to the task force.

Senator LUDLAM—Thank you. I note that this inquiry was established after and reported before the legal and constitutional affairs committee inquiry, which Senator Barnett is chairing into the same subject. I am just wondering whether any material provided in submissions or in evidence to the current Senate inquiry was considered by the task force?

Mr Minogue—It was actually established prior to the formal initiation of the Senate inquiry. My involvement started on 14 January of this year. In terms of when it might have been announced by the Attorney that might have been different, but I understood that the Senate reference was a little later than that.

Mr Wilkins—To make it clear, it was established well before the Senate announced its inquiry.

Senator LUDLAM—You did get the jump on us. Can you tell us the precise date of when it was?

Mr Wilkins—It was back in January or February.

Mr Minogue—I started on 14 January, but there certainly were discussions prior to that. I had returned from leave.

Mr Wilkins—I had discussions in December.

Senator LUDLAM—I think we initiated legal and cons inquiry in February, so I stand corrected. If you can just go to the question of what crossover there was and how you considered the evidence that was being taken on similar subject matter by that committee.

Mr Minogue—From time to time we certainly did look at the submissions that were being made available to the Senate committee. We also made a submission to the Senate committee and, subsequent to the release of the report by the Attorney, we also wrote again providing copies of the report. In a formal sense, we did not sit down and study all of the submissions, and I cannot recollect which ones, but there were certainly some from the Senate committee process that were published that we thought were helpful.

Senator LUDLAM—Okay, so some of that was reviewed. Did you say that you are providing your report as a supplementary submission from the Attorney to the Senate inquiry?

Mr Minogue—Yes, and that has been done.

Senator LUDLAM—That has been done, thank you. I found it a little bit difficult and a bit opaque to get a sense of the efforts of the task force and the work that it was doing. Can you tell us what sort of outreach and consultation activities you undertook to arrive at your conclusions?

Mr Minogue—Certainly. In terms of ‘opacity’, if that is the word generally, the Attorney did talk about the work of the task force on any number of occasions since its establishment—raising awareness of it, what it was intended to do and some of the early directions. In terms of consultation we essentially did targeted consultation both within government, if you like, with relevant agencies but also externally to statutory agencies, officeholders, the courts and

tribunals as well as other organisations. In terms of public or non-government people or agencies, we spoke with quite a few. I have a list that I can read from.

Senator LUDLAM—Can you table that for us? I am just aware that we are running a little bit short of time.

Mr Minogue—I am happy to do that rather than read through it.

Senator Chris Evans—I was just wary earlier about having names of people submitted and drawing attention to their case, but they are all professional bodies.

Mr Minogue—People who are working in the field, for example the peak bodies representing Legal Aid, lawyers—PIAC, PILCH that kind of thing.

Senator LUDLAM—So some of the advocacy groups, presumably community legal centres and some of their advocates, community legal services and so on.

Mr Minogue—Certainly that sector.

Senator LUDLAM—This may be buried somewhere in the report but I could not find it. I noticed there are nine names listed as members of the task force but no details listed about their expertise or their status. Were they all staff of the department?

Mr Minogue—Yes, they were.

Senator LUDLAM—So nobody external to the department?

Mr Minogue—Sorry, the only one external was the officer from Treasury, Mr O’Toole, who is listed there. Essentially, it was just a listing of the officers who worked on it.

Senator LUDLAM—How were they chosen? How was that group selected?

Mr Minogue—The way the public sector processes are put together there is a merit process but we were also looking to target people with relevant skills, so there are some people from the access to justice division because that is the core of the work. Other officers came from the social inclusion division which is responsible for legal assistance services and those types of issues, so we were looking to target those skills. Other officers were drawn from a merit process, a normal selection process within the department.

Senator LUDLAM—The report contains quite a bit of useful information. One of the things that has come through most strongly in the inquiry that this committee has undertaken into some of the broader issues is that the community legal sector is stretched to breaking point and probably beyond. You have noted in your research here that more than a quarter of a million Commonwealth funded advice and information services every year are provided by that sector, but nowhere could I find a strong recommendation and advice that they should be funded commensurate to the extraordinary effort that they put in. If that is in here somewhere, if that recommendation has strongly been made, can you point to it for us.

Mr Minogue—You will not find a recommendation along those lines. We were quite conscious of not trying to recommend a particular level or apportionment of funding. What we did attempt to do, though, was in making recommendations about how the system works overall point to those things that were effective and more likely to be effective than waiting until matters become entrenched and escalate. That is a formula we used from time to time throughout it, so programs or service modes that give greater emphasis to the capacity for

early intervention and the capacity for early resolution are certainly ones that we spoke a lot about in the report. But you are right. We did not recommend a ranking of particular organisations or elements of the sector.

Senator LUDLAM—One of the recommendations quite early on in the list is that the Productivity Commission should be tasked to review the efficiency of the civil justice system, including that the department should adopt models for full cost pricing for hearings. Given the work that this committee is doing which has established enormous asymmetries in access to justice depending on wealth and access to resources and so on which I presume you would not find too controversial, I am wondering why you would recommend that the Productivity Commission be brought into it and whether this signals a shift to more of a user pays system which may in fact further entrench the asymmetries that are in our justice system already.

Mr Minogue—I think they are directed to two separate elements of what we were looking at. One of the problems we faced, as if I am sure the committee does, is there is a lack of reliable, consistent empirical evidence upon which to base decisions. So one of the things we looked at was what evidence we could find and where the shortfalls were in that and then we attempted to put in place a process that would overcome that in time, and that was the attraction of some further work by the Productivity Commission in building in better measures, better data capture processes and the types of things that should be measured to get a better system picture of the justice system over time.

That of itself was not necessarily directed to cost recovery; we did look at that separately. One of the things we looked at was how the system works overall and where the incentives are—the price incentive and those kinds of things. Yes, we did say that cost recovery and full-cost pricing were appropriate to consider given the large public contribution people make to the justice system and how expensive certain elements of it can be. Then you get into the discussion about public good versus private good. The public good of course are those things that support the rule of law, so it is a very real public good. We certainly looked at that and we thought it was appropriate to consider full-cost pricing in more detail.

Senator LUDLAM—It will be very interesting to see what the Productivity Commission comes up with.

Mr Wilkins—Can I just add to the Productivity Commission point. The Productivity Commission, as you know, already does major reports on government service provision and does comparative studies with the states and territories that they produce every year that include a whole bunch of performance indicators and productivity indicators on hospitals, schools, community services, police and courts. They are trying to also look at refining their methodology. We are interested in better data capture in terms of efficiency and effectiveness of various tribunals and courts et cetera. So it would make sense for them to be involved in some of this study looking into the types of indicators that maybe the community and governments should be expecting to measure in terms of how well courts or other forms of dispute settlement are performing. That is one of the bits of logic about getting the Productivity Commission involved.

Senator LUDLAM—I am sure that will be an interesting contribution. What sort of process flows from here and what is the time line we can expect for a government response to this report of the task force?

Mr Wilkins—The government has already agreed to the policy framework. There is a process of consultation going on at the moment and discussions with the states and territories as well. I think that the matter is going back to cabinet later in the year and, in any event, the variety of steps pointed out in the report will be implemented through a series of cabinet considerations. Cabinet will consider those matters. As you can see they are broad, generic types of recommendations, so they will need to be further fleshed out and there will need to be further consultation. That is the process that the Attorney and the cabinet envisage on this.

Senator LUDLAM—I will leave you with the proposition that the inquiry of this committee will probably also be making some fairly strong recommendations within that time frame, so I hope there is room to incorporate those findings as well.

Mr Minogue—Thank you.

Senator BARNETT—This crosses over outcomes 1 and 2. It relates to the five Sydney terrorists who were arrested after simultaneous home raids in November 2005 and have been found guilty of terrorism offences. Based on reports I have read, the police investigation cost over \$18 million, the trial went for 10 months and there were 300 witnesses and 3,000 exhibits. Most of the men, according to these reports, are known to have attended bush training camps in rural New South Wales for paramilitary exercises. I am interested in the cost of the case. It is said to be the most expensive legal case in Australian history. I am specifically interested in the taxpayer funded legal aid defence of the five guilty men.

Mr G McDonald—I do not have those figures here. We would need to consult the various agencies and bodies involved in it. I know that these were very expensive cases, but I would have to take that question on notice.

Senator BARNETT—I have one report which says that the legal aid defence was about \$27 million, and I see another report that says it was almost \$30 million, so perhaps they are similar. I am wondering if you can corroborate or confirm those estimates.

Mr Wilkins—Senator, your inquiry is on how much legal aid was involved in this matter. I think we need to take that on notice for a couple of reasons. One is that we need to check the quantum. The second thing is that there seems to be an arrangement with state legal aid offices that we do not give out that sort of information. That may be why you have such disparate estimates—because people are simply speculating. Can we just take that on notice and come back to you about that issue.

Senator BARNETT—All right.

Mr Wilkins—Your question is: how much was the total legal aid in this matter?

Senator BARNETT—That is right. Perhaps you can help us with, let us say, a daily fee. This has been going on since 2005, just in terms of legal aid costs. Can you give the committee an indication of the fees paid to the relevant—

Mr Wilkins—I do not think we would be able to do that, and that is a matter for state legal aid offices anyway, not for the Commonwealth.

Senator BARNETT—I know Professor Norman Raeburn, from the Legal Aid Commission, would assist us if he were here, but I would have thought that perhaps your officers who are responsible for legal aid under outcome 1 would have an understanding of the—

Mr Wilkins—This is the officer who is responsible for legal aid.

Senator BARNETT—All right. Perhaps the officer can advise of the fees payable to lawyers before a court in proceedings such as the ones to which I refer.

Mr Wilkins—We will see what information we can give out. This is a matter of Commonwealth-state relations, basically, in terms of what the protocols are and what matters we have agreed that we can and cannot reveal. But we will do what we can.

Senator BARNETT—All right. Is it correct that this is the longest running and most expensive trial in Australian history? Do you know that for a fact?

Mr Wilkins—No.

Senator BARNETT—Do you know? Can somebody confirm that?

Mr Wilkins—No.

Senator BARNETT—You do not know?

Mr Wilkins—No.

Senator Chris Evans—I suspect a couple of the corporate ones would have been more expensive in terms of what they pay their QCs. But the officers do not know.

Senator BARNETT—Is that something you could take on notice? You must have an idea of the most expensive legal cases. This is the Attorney-General's Department.

Mr Wilkins—We could google it or something, but this is not something we normally keep track of—what is the most expensive case in Australia's history.

Senator Chris Evans—Is that how we get our legal advice from the Attorney-General's Department? You google it? I am rapidly losing confidence.

Senator BARNETT—That is a bit of a worry, isn't it, Minister?

Senator Chris Evans—I hope the A-G does not read the transcript!

Senator BARNETT—Can you comment on the views of Mr Negus? I know we have the AFP here after dinner, but he is quoted here in the *Australian* of Saturday, 17 October as saying:

We're talking about the capability here to effect a significant atrocity on Australia.

Then New South Wales police commissioner Andrew Scipione is quoted as well on the enormous potential downside for Australia as a result of the impact of this terrorist attack if it were to occur.

Mr Wilkins—I can only concur with what they say. They are closer to the actual facts and motivations and what was actually involved in the modus operandi.

Senator BARNETT—Has this particular case been given careful consideration by the Attorney-General's Department in terms of its implications for Australia if it were to proceed?

Mr Wilkins—If you mean, ‘Are we looking at prevention mitigation?’ then of course.

Senator BARNETT—I am interested to know if we have learnt any lessons. This case has been going on since November 2005, apparently. Here we are in October 2009—it is nearly four years and there must be some lessons you have learnt. I am eager to know what they are.

Mr Wilkins—There are a range of lessons that have been learnt, and a range of actions that have been taken in terms of the way in which agencies in the Attorney-General’s department within the portfolio organises itself. There are some changes to the law which are being contemplated, and issues around even different programs that one might look at. It is not simply a result of this case, there are a whole range of things that you are always reflecting on and taking into account in terms of policy development.

Senator Chris Evans—I think it is important to say that all of that feeds into a constant consideration by this government both through the NSC and cabinet, as it was under the previous government. This is a very real security threat—

Senator BARNETT—Sure.

Senator Chris Evans—and I think that governments of all persuasions treat it with the utmost seriousness. But that is part of the normal work of the agencies, to keep making recommendations to government on lessons learnt from these trials and other activities. I think you can be reassured, as you would expect, that it is very high on the agenda because of the serious threat that it poses.

Senator BARNETT—I am sure it remains under active consideration, and I fully agree with everything you have said. I am really asking if there is anything specific that the department can advise the committee that we have learnt from this particular case that has been going on for nigh on four years.

Mr Jordana—In cases of this kind the Australian Federal Police, obviously, would routinely do evaluations of lessons learnt after cases are completed—that is a common practice that they would do. Such evaluations would obviously have both operational and, potentially, policy implications for them. This one will be no different to that.

Senator BARNETT—We have will have the AFP after dinner, and I am happy to foreshadow that with the AFP when we come to them. One final question in this outcome: in terms of legal aid budgeted for boat people, can you provide the committee with the budget allocation for boat people for last financial year and for this financial year?

Senator Chris Evans—I assume you mean asylum seekers?

Senator BARNETT—Yes. It is referred to in the document that we have under outcome 1 point something or other as boat people, but they would be asylum seekers. I have got it here somewhere—program 1.2: Legal services, legal aid: boat people. That is what I have got.

ACTING CHAIR—I haven’t.

Senator Chris Evans—I think that must be your own list, I would be very surprised if the Attorney-General’s Department referred to asylum seekers in that way.

Senator BARNETT—That must be my list I would imagine.

ACTING CHAIR—I do want to clarify that very clearly—the official committee document does not talk about that—1.2 is legal services.

Senator BARNETT—I have a subsection under 1.2 and so you can blame me, Minister.

Senator Chris Evans—Can I leave the question of what services AGs might provide, but advice to asylum seekers is generally funded through the IASSS scheme under my department's portfolio of immigration. I just query whether it is IASSS? IAAAS—I knew it was wrong.

Senator BARNETT—What does that stand for?

Senator Chris Evans—I will take that on notice! I should know, but we always use the acronym, which I always get wrong. But it will be under my portfolio. I do know whether AGs provides any legal aid per se, but we will deal with immigration tomorrow and I will be able to give you the details of the costs tomorrow.

Senator BARNETT—We will certainly have questions on it tomorrow and we can do that.

Senator Chris Evans—I am just not sure about the AG's portfolio.

Dr Smrdel—There is not a specific program for funding refugee applicants through legal aid. It is basically all covered under the annual services payments to the states and territories. To the extent that the IAAAS is available, legal aid commissions do not provide that service. But where the IAAAS is not available, legal aid commissions would handle information and advice services through provision of their normal annual services payment from the Attorney-General's Department.

Senator BARNETT—Can you advise us on notice of the legal aid allocation in the past financial year and in this financial year for that information and advice service for refugee applicants and/or asylum seekers?

Mr Wilkins—I do not think we can actually advise you of that because I do not think we have got that breakdown from the states and territories.

Senator Chris Evans—The vast majority of it is done under the immigration funded scheme. In terms of, say, facilities on Christmas Island, the advice is provided under that scheme. I know occasionally Victoria Legal Aid and couple of others that have come to my attention have done some advice, but I think primarily what you are looking for is within my portfolio under the specific scheme that has been in place for many years that provides that assistance.

Senator BARNETT—All right. I am happy to address that matter tomorrow, unless there is anything further you want to say, Dr Smrdel?

Dr Smrdel—I will just indicate that community legal centres might be in a position to provide some of that sort of advice as well in some situations.

Senator BARNETT—Thank you.

ACTING CHAIR—Mr Wilkins, earlier today you could have knocked me over with a feather when you said you had not read our report into annual reports! We have searched and you may be surprised that we still have a copy. So I will make sure you get a copy during the lunch break.

Senator Chris Evans—I will certainly make sure that the Secretary's failure to do so will be brought to the attention of the AG when his performance pay is considered!

ACTING CHAIR—I did assume you would hang off every word from this committee!

Mr Wilkins—It has just been brought to my attention that I have read the report. It is just something that did not stick in my mind; for what reason, I do not really know!

ACTING CHAIR—Thank you. We will now suspend and recommence with outcome 2.

Proceedings suspended from 6.37 pm to 7.42 pm

ACTING CHAIR—We are in outcome 2.

Senator BARNETT—I have questions about the Cyber Security Operations Centre and cybersecurity generally. I wonder if somebody can assist me in answering some of those questions.

Senator Ludwig—Whilst we are doing that, there were some questions that we were asked to come back on before the dinner break dealing with family law, and the officer is available for that. Acting Chair, do you want to do that now?

ACTING CHAIR—Yes.

Ms Pirani—I have a copy of the terms of reference for the ALRC family violence inquiry that I can table and also a list of the organisations consulted as part of the Family Court's violence review by Professor Chisholm.

Senator BARNETT—What do you have from Professor Chisholm?

Ms Pirani—The list of organisations that were consulted in relation to that.

Senator BARNETT—Were they consulted, were they invited or did they submit—

Ms Pirani—It is a mixture of entities that were invited to make submissions or that made submissions in response to the public invitation.

Senator BARNETT—What I am interested to know is who was invited and who submitted.

Ms Pirani—I would have to get that information from Professor Chisholm, but the full list of people who either made submissions or who he spoke to is there. But I can get that information; it would just take a little longer.

Senator BARNETT—Sure. Just to make it clear and so you know, I am interested in knowing who was invited to make a submission so that the key stakeholders have been covered. That is important. I am interested in knowing who made the submissions. Thirdly, could you advise who was consulted at these various meetings that he has had? Could you advise that, the details of those meetings and where and when they were held?

Ms Pirani—In relation to the commencement and cost of the various reviews, the evaluation by the Australian Institute of Family Studies commenced in May 2007. The contribution of the Attorney-General's Department to that is \$4,612,000, and FaHCSIA has contributed \$1.157 million.

Senator BARNETT—You did not have terms of reference for that one, did you?

Ms Pirani—It is a methodology and framework for the evaluation. It is quite lengthy and it is available on the AGD website.

Senator BARNETT—But what is it about? Is this about shared parenting?

Ms Pirani—It is about all of the reforms in 2006. It attempts to evaluate the effectiveness of those changes to the legislation and also the new services that were introduced at that time.

Senator BARNETT—Is it fair to say that a substantial component of that review relates to the reforms in 2006 relating to shared parenting?

Ms Pirani—That is certainly a significant aspect of the evaluation, yes.

Senator BARNETT—Thank you.

Ms Pirani—The research into family violence commenced in June 2009, and the budget for that is \$299,778. The research into shared care parenting arrangements commenced in June 2009.

Senator BARNETT—Who is undertaking that one?

Ms Pirani—That is the Social Policy Research Centre. It is the University of New South Wales along with the University of Sydney, and the total budget for that is \$300,000.

Senator BARNETT— Thank you. Were you going to give me the details regarding the Chisholm review? You have the hourly rate of \$165—\$1,320 per day three days a week. Do you have the cost to date?

Ms Pirani—We do not have to date what we have paid. I would need to get that during business hours, so I will take that on notice.

Senator BARNETT—Can you advise us how many days he has undertaken his work?

Ms Pirani—Not exactly.

Senator BARNETT—Can you advise when he commenced exactly?

Ms Pirani—He commenced on 27 July 2009 and he has been working three days a week since then.

Senator BARNETT—So you will take that on notice and let us know the total cost to date not just for him but for the inquiry. I presume he has had support and, if that is the case, please provide those details.

Ms Pirani—Yes.

Senator BARNETT—My point is—and I suppose I can ask the minister here—that it beggars belief that we have six report, inquiries, investigations or however you want to refer to them into directly or indirectly shared parenting but there is not something going on in terms of what is inside the government's mind about affecting a change here. The reforms under the Howard government, yes, were significant and substantial, but clearly the government has commissioned these reports and is substantially funding them: two lots of \$300,000, effectively, \$4.6 million for the Australian Institute of Family Studies, who knows what the cost is of the Australian Law Reform Commission inquiry and then the Chisholm inquiry, which no doubt will be very substantial.

Ms Pirani—The AIFS evaluation was commissioned as part of the reforms. It was always a design feature of those reforms that they would be evaluated in a very significant way. Much often turns on anecdote in this area, and it was really important that we gathered some evidence about what is really happening.

Senator Ludwig—That is my recollection too. As the Minister for Human Services, I and Minister Macklin made a range of comments around continuing to monitor the development of the reforms to the child support program. As you correctly identify, it was a significant reform. It certainly was a matter that we had turned our minds to quite extensively, and that is reflected in the way we are now ensuring that it operates well.

Senator BARNETT—We are talking millions of dollars in taxpayers' money being expended on reviewing these reforms. I notice the terms of reference for Professor Chisholm specifically say:

The review will take into account the case involving Darcey Freeman ...

That was a tragic case and I am not going to go into it now, but it is specifically referred to in the terms of reference. What is inside the government's mind is what everybody would like to know. Simply having a review for the sake of a review is probably not a very good excuse. There is probably something else inside the government's mind that we are not being advised of at the moment.

Mr Govey—It is important to look at each of these reviews and the reasons that they were commissioned. Lumping all six together like the report in the *Australian* did today probably ends up giving you a misleading picture. As I say, if you look through each one you can see the genesis of each one. With the exception of the AIFS report—which is the one which was commissioned under the former government and has some links back into the other research projects which have been commissioned through the couple of universities that were mentioned—the inquiries and the reports are really quite separate. For example, the Chisholm Family Court violence review was commissioned in light of concern about violence. The Law Reform Commission inquiry is again quite separate and is forward looking, looking at the interaction between state and territory domestic violence laws and the Family Law Act, not looking at shared parenting directly. If you look at each one you get quite a different picture.

Senator BARNETT—Thank you. Acting Chair, I am concluded on that matter.

ACTING CHAIR—There is no-one else here, so just continue to plough through.

Senator BARNETT—Mr Rothery, can you provide an update on the department's involvement in the Cyber Security Operations Centre?

Mr Rothery—The department has the lead agency role in cybersecurity policy for the Commonwealth. As part of the range of measures that were announced as part of the defence white paper, the government announced a Cyber Security Operations Centre to be formed inside the Defence Signals Directorate as one of the new innovations of the defence white paper. It was one of the major recommendations of the e-security review that was conducted by the Attorney-General's Department last year. It was one of the new capability areas that were recommended for that. I understand the Cyber Security Operations Centre is now active inside the Defence Signals Directorate.

Senator BARNETT—When did it become active?

Mr Rothery—July this year.

Senator BARNETT—Thank you.

Mr Rothery—That is still in reasonably early stages of development. I think more detailed information would be available from the Department of Defence. The Attorney-General's Department has no management authority over the Cyber Security Operations Centre, but it is one of the major elements of current government arrangements.

Senator BARNETT—What involvement did the department have in the development of the operations centre?

Mr Rothery—In the hands-on development, or the technical development—none. But, from a policy point of view, it was a capability that was recommended by a review conducted by this department.

Senator BARNETT—Do you now have a role in reviewing the functions of the operations centre?

Mr Rothery—The Attorney-General's Department has an ongoing role in the coordination of the implementation of the government's e-security policies, of which that capability is one element. We will on a regular basis be providing advice to government on the effectiveness of the overall arrangements, including the interaction between the Cyber Security Operations Centre and other capabilities within government. But I have to make it clear that the Cyber Security Operations Centre also contributes to overall defence capability and therefore it has the Australian Defence Force as a client as well. I will not be in a position to form a view as to their success or otherwise in fulfilling that part of their mission.

Senator BARNETT—A report in the *Financial Review* on 11 September stated:

A spokeswoman for the Attorney-General's Department said the Cyber Security Operations Centre had dispatched advisers to help agencies that had been targeted to monitor and respond to the threat.

It goes on to refer to the Prime Minister's website being 'unavailable for a short time'. The headline is 'Geek army crashes Kevin09'. Is that accurate—that you dispatched advisers to help agencies that had been targeted to monitor and respond to the threat?

Mr Rothery—My understanding is that advice was provided to several Australian government agencies that were experiencing increased traffic that was believed to be associated with an attempt by a group of computer hackers to overload government websites. This is a normal and extant capability within the Defence Signals Directorate. It has been one of the roles of the directorate for some time and is reflected in the Intelligence Services Act, which describes the roles and functions of DSD. So that function would have predated this occurrence, and would have happened in that way, with or without the creation of the Cyber Security Operations Centre, the difference being that the Cyber Security Operations Centre has given government a 24 by seven capability which we did not have before.

Senator BARNETT—In the second last paragraph of the media release of Joel Fitzgibbon, former Minister for Defence, on 2 May, says:

Whole-of-government coordination will be achieved through the representation of relevant Government agencies in the Centre. This will include the Attorney General's Department as the lead agency for e-security policy across Government, as well as the Australian Federal Police and other agencies of the Australian intelligence community.

Is that accurate?

Mr Rothery—That is the intended operation of the centre. A number of agencies, including the Attorney-General's Department, are in the process of identifying and raising the security clearance levels of their personnel to allow them to work in the Cyber Security Operations Centre.

Senator BARNETT—How secure are government websites?

Mr Rothery—Different websites attempt to achieve different things. Some websites just provide information; there is no two-way interaction with the user. Other websites provide opportunity for people to logon or download material or upload particular material. Depending on what the mission is, there are different levels of security—in terms of whether the emphasis is on preventing unauthorised access or whether it is about ensuring the availability of websites. Basically, any website can be overloaded. It is almost impossible to prevent a website from being overloaded, the more computers—

Senator BARNETT—When you say overloaded, are you talking about closing it down for a short time?

Mr Rothery—I am talking about occupying the computer with inquiries so that the next inquiry does not get answered which makes it appear that the computer is offline or unavailable when in fact the computers are usually there, it is just that they are busy dealing with either legitimate or illegitimate inquiries. Sometimes you can see a phenomenon that might take place for a few seconds or sometimes there have been cases where websites that have been targeted around the world have been unavailable for several days.

Senator BARNETT—We are just focusing on government websites for the moment. Let us just start it with, because you oversee these matters, the Prime Minister's website. How long was that down for?

Mr Rothery—The information that we have said publicly is a short time. I understand that to be approximately half an hour.

Senator BARNETT—In that half an hour what action was undertaken by you or your officers to remedy the matter?

Mr Rothery—I understand that there was information that was provided to the security personnel within the Department of Prime Minister and Cabinet who are responsible for the Prime Minister's website. They were aware that there was the potential for an overload at that particular time.

Senator BARNETT—Were they tipped off?

Mr Rothery—They were advised by the Defence Signals Directorate in advance.

Senator BARNETT—That it was likely to go down?

Mr Rothery—Not that it was likely to go down, but we knew that there was an attempt that was likely to be made.

Senator BARNETT—Right.

Mr Rothery—We understand that they then spoke—

Senator BARNETT—So they were pre-warned?

Mr Rothery—Correct.

Senator BARNETT—How soon were they pre-warned—are we talking minutes, hours or days?

Mr Rothery—More than a week in advance.

Senator BARNETT—Right, so they had a week's notice or more. Wow. Go on.

Mr Rothery—They then sought support from their internet service provider to manage an anticipated increase in demand.

Senator BARNETT—And it did not achieve the objectives. Obviously, they failed in their efforts.

Mr Rothery—We understand that a number of measures that were put in place actually contributed to the site being unavailable. So at one point they reduced the number of concurrent users that could connect to the website. That capacity was met very early, because the attack continued for about another 20 hours, over time they turned that capacity up and were able to maintain the website despite the attack. In fact, the attack was less than anticipated and some of the protective measures had been probably unnecessarily strict.

Senator BARNETT—All right. The attack was less than anticipated you are saying, but the attack was over a 20-hour period or was it longer than that?

Mr Rothery—The attack was in two surges. The first was at 7 pm on Wednesday that week and there was another surge at 10 am on the next day—

Senator BARNETT—What time on Wednesday was the first surge.

Mr Rothery—It was at 7 pm.

Mr Rothery—The second surge which was probably a slightly more severe threat actually did not make the site unavailable so that the adjustments that had been made to the settings overnight were able to successfully manage it.

Senator BARNETT—So when did it go down for that 30 minutes. Was it on Wednesday evening?

Mr Rothery—My understanding is that it went down roughly between 7 and 7.30 pm on Wednesday.

Senator BARNETT—And on the Thursday morning there was another surge but the protection measures implemented were successful.

Mr Rothery—There was a better balancing of the arrangements the next morning and, whilst the site became slower, it did not become unavailable.

Senator BARNETT—How can you describe the surge for us? How many emails or how many specific attacks were there during this time? How many people were involved in this attack?

Mr Rothery—My understanding is that it peaked at a few thousand concurrent inquiries to the website.

Senator BARNETT—It does not seem like that many. Surely a website can be appropriately protected from a few thousand hackers.

Mr Rothery—The degree of capacity that you build for a website is based on what you expect the normal traffic to be. Otherwise you are paying for capacity that you are not using. A normal practice for any organisation, be it private sector or public sector is: if you assess that the normal peak demand is perhaps 200 concurrent users, you might buy the capacity for a few hundred more than that so that normal users would not notice any significant degradation should they all be on at the same time. Therefore, if you can exceed that number you will see an effect. Another website, such as one for Centrelink, say, or one that does a degree of service delivery and has many more thousands of inquiries per day, you would anticipate that they would have redundant capacity in excess of that and therefore it would need a bigger attack to have a noticeable effect. The issue is that we do not allocate extremely large amounts of bandwidth, which government departments have to pay for on an ongoing lease basis, without their being a legitimate or identified business need for it. The advice that we give to agencies with regard to how to deal with denial of service attacks, which is the term of that is used for this particular incident, is for them to have relationships with their internet service providers to be able to increase, for a short period, the amount of bandwidth allocated to a particular site until such time as either the attack can be disrupted or the attack wraps up for its own reasons.

Senator BARNETT—How were you tipped off?

Mr Rothery—The group sought publicity. They had actually been covered on Sky News some weeks before the attack.

Senator BARNETT—The matter, I assume, has been investigated, and have any charges been laid?

Mr Rothery—To my knowledge, no charges have been made. I know that inquiries are being made by the Australian Federal Police, and that is all I know at this point.

Senator BARNETT—So you are of the understanding that is under investigation by the Australian Federal Police?

Mr Rothery—I believe the term is that ‘inquiries are being made by the Australian Federal Police’. I do not believe they have used the term ‘investigation’.

Senator BARNETT—To your knowledge, is it a breach of the law?

Mr Rothery—It is definitely a breach of the cybercrime provisions of the Criminal Code.

Senator BARNETT—Right—which we can all understand. Just remind me of the date.

Mr Rothery—It is Wednesday 9 September and Thursday 10 September.

Senator BARNETT—People might be asking, ‘How long does it take to investigate?’ Have you provided a report to either the Attorney-General or, through the Attorney, the Prime Minister’s office?

Senator Ludwig—The Australian Federal Police will be appearing later. Perhaps the question would be better directed there. I know that the witness has indicated that there is a breach of a particular piece of legislation. I am not sure that is the case. These matters are usually left for the usual procedures to be adopted; that is, a referral to the Australian Federal Police. The Federal Police will then decide whether or not they will choose to investigate. If they do investigate, they will have an investigation into the matter. They will then refer it to the Commonwealth Director of Public Prosecutions for consideration if they think there is sufficient evidence to substantiate the matter that they are investigating. The Commonwealth Director of Public Prosecutions, if I am not incorrect about the course I am dealing with, will then decide on whether or not to prosecute if there is a substantive case. All of those things are, of course, not done in a hurry, but in fact they are better dealt with by asking those questions to either the Australian Federal Police or the Commonwealth Director of Public Prosecutions in the event of it being within their remit at this point in time. I do not have any evidence that it is. In addition, it might also be worthwhile directing it to the Attorney-General’s Department if they wanted to comment with respect to the substantive law.

Senator BARNETT—Minister, I always welcome your involvement—I would not call it an interjection—and contribution to the estimates, but frankly you were answering a question which I did not ask. You have made a contribution, but my question to the officer was directly relevant to him and he has answered it accurately as far as I am aware. Your answer relates to a different question. We thank you for your contribution, but it is entirely different. I would like to move on and ask if this matter has been investigated and if a report has been provided or written by the officer or officers to either the department or the Prime Minister’s office.

Mr Rothery—The Attorney-General’s Department coordinated a report on behalf of all of the agencies that were involved in managing the incident, with special emphasis on those arrangements around the protective measures and the mitigation measures. That report was provided to ministers.

Senator BARNETT—When?

Mr Rothery—In the week following the incident.

Senator BARNETT—When you say ‘to ministers’, do you mean to all ministers?

Mr Rothery—The report went to the Prime Minister.

Senator BARNETT—What did it recommend? Can we assume that it recommended further protective measures to ensure that this matter would never happen again? I will ask it that way.

Senator Ludwig—I might suggest that we take it on notice. I am not aware of the status of the document. I have just asked the witness what the status of the document is. I am not sure, unless the witness can inform me, what status it has. It may be a document that reveals information about the type of attack, and you would not want the nature of how you do it and that sort of thing to be floating around out there for others to use it again. It seems that the

organisation that precipitated the attack already provided significant publication of it. We would not want to encourage them again, quite frankly.

Senator BARNETT—What was the name of the organisation?

Mr Wilkins—Which organisation?

Senator BARNETT—The organisation that precipitated the attack. The minister has just referred to the organisation. I am asking for the name of it.

Mr Rothery—We understand that the group that attempted to orchestrate the attack called themselves ‘Anonymous’. That is the label they gave themselves.

Senator BARNETT—Do you know who is behind this group?

Mr Rothery—No, we do not. I personally am not aware.

Senator BARNETT—That would be something that the AFP is inquiring into, I would assume.

Mr Rothery—I cannot comment on the operational inquiries being made by the AFP.

Senator BARNETT—That is okay; you do not have to. So it has been provided to the PM. Did it make recommendations for further protective measures so that this matter would never happen again?

Senator Ludwig—I have indicated that we will take that question on notice and see if we can provide it. I do not know the status of the recommendations or the report. I am representing the Attorney-General at this committee. I would like the opportunity of making sure the Attorney-General has a look at the document to ensure that, if a claim of privilege is going to be made in relation to it, the Attorney-General can be properly informed and advise the committee of that as well. I am not suggesting it may be, but in this instance I am not aware of the type or nature of the document, and prudence would indicate that I should take it on notice. I am trying to assist the committee, and we will take it away and consider it.

Senator BARNETT—That is fine. I thank you. In taking that on notice, could you also take on notice a request for a copy of the report.

Senator Ludwig—Yes, we will.

Senator BARNETT—Thank you. To me it beggars belief that the department and the Prime Minister’s office have had one week’s notice of this proposed attack. The attack or surge then occurs and the protective measures are not in place to protect the Prime Minister’s website. It goes down for approximately 30 minutes. The attack or surge occurs again the next morning and we have a report a week later. There are inquiries by the AFP with no charges laid more than a month later. It is an incident worth noting. We will certainly watch this space and will be asking further questions of the AFP. My final question to the officer is: what other Australian government department or agency websites have failed as a result of inadequate cybersecurity?

Mr Rothery—I am not aware of any incidents of other Australian government websites having been so affected, but I come back to a comment I made earlier about the ability of an organised group of hackers to overwhelm any website. There is no ability to ensure that any website can be kept fully available to users at all times despite the level of denial of service

attack that is underway. It is, effectively, a principle of the technology. The two treatments are to keep increasing the amount of bandwidth available to a website to the point that you exceed the number of concurrent inquiries that are coming in or, in combination with that, to seek to disrupt the attack. A combination of those two is what agencies generally seek to do. In this particular attack there were a number of individuals. There were very few organised networks of computers that were being used to attack the government systems, which meant that disruption was not a realistic option. Therefore, the option was to maintain availability by increasing bandwidth, which is what was done. So, in terms of mitigation, it was successfully mitigated.

Senator BARNETT—Thanks very much. In light of the time, could you take this on notice? You said you are not aware of any other government websites going down. Could you take that on notice, double-check and advise the committee accordingly?

Mr Rothery—Yes.

Senator BARNETT—Thanks.

Senator LUDLAM—I would like to go to emergency management. Could the officers come to the table for subprogram 2.1.2, emergency management? I have a couple of questions about preparedness for the coming fire season. Could we start off with the status of the states and territories' fire risk audits that were requested by the Deputy Prime Minister prior to the coming fire season?

Mr Rothery—The correspondence that you referred to was the matter of a discussion at the COAG meeting in April which resolved that the nature of the information provided would relate to areas of bushfire readiness that would benefit from national coordination, with the intention that that information be discussed at a later COAG meeting in 2009. That COAG meeting has yet to occur. I understand it is scheduled for later this year, and that information is being sought from jurisdictions to inform consideration of the matter at that COAG. At this point the department is working with state and territory officials to make sure that those reports are available for consideration at that meeting.

Senator LUDLAM—Is 5 November the date of the forthcoming COAG meeting?

Mr Rothery—The date that I am aware of is in December.

Senator LUDLAM—We are into the fire season already. I presume fire crews on the east coast would be telling us that. So that meeting is going to come too late to have these documents in place before the forthcoming fire season. Can you clarify for us whether those will be regional audits or whether each state and territory has been tasked with preparing such an audit.

Mr Rothery—My understanding is that the information that has been sought from the states is about those issues of bushfire readiness that relate to matters that would benefit from national coordination, so that would tend to indicate that they are matters to do with Commonwealth-state cooperation or interstate cooperation and they would therefore be unlikely to discuss regional matters.

Mr Wilkins—I just want to alert you to the fact that the Attorney hosted a ministerial meeting on 25 September and the subject matter of that meeting was bushfire preparedness,

so the conversation between the Commonwealth and the states and territories about preparations for the coming bushfire season was at that meeting and there was an extensive amount of conversation on various topics and in various forums in the lead-up to that meeting. I want to give you a bit of a sense that there has been a very large amount of activity in this particular arena.

Senator LUDLAM—That is helpful, but I suppose the risk and readiness audits were really a key part which is why they—

Mr Wilkins—I do not agree with that. I do not think they are necessarily a key part of what was required. I was not, for example, aware of it but there have been extensive negotiations and meetings over the last 12 months or so in relation to a whole range of issues about preparedness for bushfires and they have been through the AEMC committee of officials. There have been extensive meetings on all sorts of aspects and, as the deputy secretary just pointed out, the Attorney has had meetings with his counterparts on this as well, so I would not overstate how critical that is. They have been overtaken a little bit by other ways of dealing with these issues.

Senator LUDLAM—Would it be overstating it to say these risk and readiness audits are not necessary? It doesn't appear that they will arrive in time to be of much assistance this summer.

Mr Wilkins—I am not entirely clear on what role they are going to play in relation to the other work that we are doing, but certainly the Attorney has had discussions with his counterparts and asked them about their readiness and about whether there is anything the Commonwealth can do to assist. The Commonwealth has done a lot of things to assist. There seems to me to be a reasonable amount of activity on this front, which is being properly coordinated. I am just saying that I do not know that I would elevate these issues. They are important, presumably, for longer term planning—for issues around land use planning and longer term issues around things like building codes et cetera. If you are looking at longer term policy, they probably are quite useful.

Senator LUDLAM—So it was not the intention of the Deputy Prime Minister that those would be ready and could be acted upon prior to the 2009 fire season.

Mr Wilkins—Was it?

Senator LUDLAM—I do not know; I am just putting that to you.

Mr Wilkins—I am not sure what her intentions were.

ACTING CHAIR—The officers are trying to get you answers. I am not sure this department can speak on behalf of the Deputy Prime Minister about this.

Mr Wilkins—I am not entirely clear on what the purpose is. I am surmising that it would be useful for medium-term and long-term planning, but the point is that we have been getting on with this irrespective of whether these reports and audits have appeared or not.

Senator LUDLAM—Is it the intention that those will be made public once they are complete?

Mr Wilkins—I do not even know what they are. I assume it is going to be a matter for COAG, actually. Since they have been provided by states and territories, I assume the premiers and chief ministers will have a view as to whether they should be made public or not.

Senator LUDLAM—Would you say that the states and territories are any better prepared in 2009 than they were four or five years ago or in the middle of the nineties? If so, in what regard are we better set up now than we were then?

Mr Wilkins—There are a range of things that we can point to where the Commonwealth has assisted them, not least in terms of, say, having the capacity for early warnings, having better intelligence at their disposal in terms of fire and having better facilities for fighting fire in being able to put aerial firefighting in place. There are a whole range of issues like that, and there are probably a number of other things. I have not got a list in front of me, but they are the things that we have been immediately discussing with them. There have also been a variety of other initiatives through the AEMC and the Ministerial Council for Police and Emergency Management in terms of supporting volunteers and looking at resilience planning. Some of the issues around climate change have clearly caused people to look at their plans and redo them in different ways. I think the answer to your question is, in a whole lot of ways, yes.

Senator LUDLAM—Can you tell us the status of a document from October 2005, *Review of Australia's ability to respond to and recover from catastrophic disasters*? It was not published at the time; it was suppressed for quite a long period. Are you familiar with the document that I am referring to?

Mr Wilkins—Yes.

Senator LUDLAM—Can you tell us what the status of that document is?

Mr Wilkins—I will ask Mr Pearce to respond.

Mr Pearce—That report was recently released under freedom of information to Channel 9. That was just after our previous estimates meeting. It is now available upon request. There have been a number of requests for it, and it has been provided. There was also a briefing provided or offered to this committee after the last estimates committee; Senator Humphries was the one senator who attended the briefing, and I briefed him on the report at the time and provided him with a whole range of details in relation to it.

Senator LUDLAM—That is great. If that is on the record, I can chase that. Can you tell us why the report was not made public in the first place and why it fell to an FOI request for it to make its way into the public domain.

Mr Pearce—There were two issues in there. One was in relation to the fact that the majority of the information actually contained within the report was provided by states and territories specifically relating to some scenarios that were developed. There was a level of discomfort in some areas in regard to whether or not that information should be released just because of the picture that it painted. The issue was that to release the report without actually providing a context to those scenarios. In other words, they had been developed to be so severe that they were actually catastrophic and were, I suppose, realistically possible but

highly unlikely. Had the report been released in that form with the detail that was in it at that time that would have posed some issues for the jurisdictions concerned. There was a lack of comfort about that.

Senator LUDLAM—Okay. It is a report entitled catastrophic disasters. It has now been made available in the public domain. Have there been any instances of panic or the report being read out of context?

Mr Pearce—I could not say whether anyone has read it out of context, but I have not seen anybody panicking, no.

Senator LUDLAM—Perhaps that is useful feedback to go back to the jurisdictions that were concerned about it being released in the first place. Maybe the public is able to assimilate this kind of material without running for the lifeboats.

Mr Pearce—I think that point has been made through the royal commission.

Senator LUDLAM—I expect that it has. Was this report signed off by those jurisdictions in 2005?

Mr Pearce—Yes, the jurisdictions themselves all agreed to the content and were satisfied for it to be contained within the report.

Senator LUDLAM—They were. Okay. That is great. It was a consensus report presumably.

Mr Pearce—Yes.

Senator LUDLAM—It did identify a number of major gaps in Australia's preparedness for catastrophic disasters. Can you tell us whether those things have been addressed in the four years since it was produced?

Mr Pearce—The recommendations themselves were not specifically targeted and addressed in the context of, 'We will address 32 recommendations.' The Secretary has already alluded to the fact that, over the last number of years, a lot of work has been going on in partnership between the Commonwealth and the jurisdictions. A lot of that work has actually subsumed a number of the recommendations that came out of that report. Much of the work has been done, but not directly as a specific result of those recommendations being made.

Senator LUDLAM—Is it really just up on a shelf gathering dust? This report was not released to the public until earlier this year. Was it a document that was under or is under active consideration by emergency management authorities?

Mr Pearce—Yes, indeed it was. In fact, the jurisdictions have actually been using that as their guide to assess their own capability against the findings of that report so that was how the report is actually being used.

Senator LUDLAM—I will draw your attention to recommendation 26 of that report which reads in part:

The working group recommends that the Australian government consider developing an overarching whole-of-government disaster plan that clearly articulates authority roles and responsibilities of agencies, interdepartmental committees and key officials to link the range of existing government disaster plans.

It is pretty clearly worded. Has that recommendation been taken forward?

Mr Pearce—It has indeed. A draft natural catastrophic disasters plan will be presented to the Ministerial Council for Police and Emergency Management at its November meeting.

Senator LUDLAM—I am sure that will be cheerful reading. Can you foreshadow, without giving away too much of the detail, the broad nature of what that will encompass.

Mr Pearce—No, there is a lot of information in it. It is effectively at a very high level as was described in that recommendation about an overarching document that pulls together many of the arrangements that already exist.

Senator LUDLAM—Okay. That is December and a lot of this work is going to come too late for crews and communities battling the 2009 fire season.

Mr Pearce—Sorry, the ministerial council meeting is in November, but having said that the level of the recommendations are not such that they would impact on ground operations coming up to this fire season. It will not impact on the way states and territories respond to this season.

Senator LUDLAM—Okay. I will just put two questions to you and then we will wind up. Because this plan does not exist and Australia is facing probably a pretty serious season of bushfires again are there two commitments that the Attorney-General might be prepared to make in advance of that plan coming into existence? The first is whether the Attorney-General would consider a restructuring of the EMA to include operational fire chiefs. Is that under consideration?

Mr Pearce—EMA is an Australian government division of a department, so state and territory fire chiefs would not be a part of this organisation.

Senator LUDLAM—So that is a no. Would see EMA having a proactive role in national disaster matters in reversing the present onus on the states and territories to request or call in its assistance?

Mr Pearce—Again, in response to that, the Victorian Bushfires Royal Commission actually raised that issue and the Attorney announced that as EMA we were very, very happy to be as proactive as we could within the constitution and the responsibilities of the jurisdictions. The preseason operational fire briefings that were conducted in September was one of the results of the recommendations coming out of the commission. That prebriefing provided the jurisdictions the opportunity to identify ways to be more proactive in a way that works with them with regard to their responsibility. So the work is ongoing with that. It has been recognised, and we are very happy to be more proactive within the bounds of our ability to do so.

Senator LUDLAM—So the constitution says you can. COAG seems to be the place where good ideas fly around moribund for large periods of time. Can you tell us what the pathway forward from the November meeting will be and when you might expect to have such a disaster plan operational?

Mr Wilkins—Senator, just on this national catastrophic plan, can I just explain what it is, because the way we are talking about it makes it sound like there is no plan to do anything in the case of a disaster. This is looking at a situation where a jurisdiction is basically disabled—

a Darwin type situation—where there would not be a jurisdiction capable of responding to the disaster. It will require horizontal cooperation via the states and territories. And the Commonwealth will have to take a leading and facilitating role. That is the paradigm we are talking about. It is not even anything close to what happened, for example, in the bushfires in Victoria. So we are talking about that type of contingency. There are lots of plans that can be triggered, and EMA works across a whole range of possible catastrophes, in the event of disastrous fires or floods or pandemics—you name it—there are ways of dealing with these contingencies. So I do not want to create the impression in your mind that there is no plan in Australia to deal with catastrophes. This is a particularly dire form of catastrophe that would have that sort of debilitating effect.

Senator LUDLAM—Think you. With that caveat on the table, could you maybe come to the question, which was: when would you expect on your current timetable that such a plan would come into force?

Mr Pearce—The COAG meeting is in December, isn't it? My understanding is that the ministerial Council are considering the plan and hopefully will endorse it in November. My understanding is that once the plan is endorsed it would simply go to COAG and it should be endorsed by COAG—unless there is an issue with it, and I cannot see that there would be by that time.

Mr Wilkins—It should be a matter of a couple of months.

Senator LUDLAM—Thank you.

Mr Studdert—Senator, it is probably worth noting that in July this year we conducted a national catastrophic disaster planning exercise. Each of the jurisdictions and the Commonwealth were represented. We went through a scenario that allowed us to consider the impact and ultimately what we would do to coordinate a solution to a catastrophic disaster plan. So it has been quite active in that regard.

Senator LUDLAM—Thank you.

Senator McLUCAS—Mr Pearce, I wonder if I could follow up on that prebushfire briefing that you referred to earlier. Who attended that meeting?

Mr Pearce—From a federal perspective, it was chaired by me. The agencies that provided briefings included the Bureau of Meteorology, Geoscience Australia, Australia Defence Force and a number of others in relation to those that can provide actual capacities on the ground or pre-event information and intelligence, such as weather reporting and that sort of stuff. That was from the federal perspective. The attendees from the jurisdictions were the emergency management council representatives or their delegates, secretaries from a number of the justice departments who have emergency management as their responsibility within their jurisdictions, operational chief officers from the fire services, and police and ambulance services as well. The briefing that was provided was an interactive one, in that we provided them with information on capability and then we hosted feedback on what more we could do and how we could work more collaboratively.

Senator McLUCAS—Were all states and territories in attendance?

Mr Pearce—Yes, they were.

Senator McLUCAS—That is good. There was some coverage in the media of the fact that it had occurred—

Mr Pearce—Yes, I believe there was.

Senator McLUCAS—and it seemed somewhat positive about it in terms of information sharing and preparedness building.

Mr Pearce—Yes, it was—very. The feedback from the jurisdictions was that it was extremely helpful to them as well. This will be an annual event that will occur from now on.

Senator McLUCAS—This is the first time it has been held?

Mr Pearce—This year is the first time it has been held in Canberra, just simply because we were doing it very quickly and the Attorney-General wanted to ensure that we got it up and running as quickly as we could in time for this fire season. From next year on it will be conducted in a roadshow format, effectively in the jurisdiction itself, so if the jurisdiction wants to have 40 people there to listen to the briefing, they can do that.

Senator McLUCAS—They can share it across their agencies in the state or territory?

Mr Pearce—They can share it more widely, absolutely.

Senator McLUCAS—Can you tell me about the national Computer Emergency Response Team plan that is to be created?

Mr Rothery—As part of the May budget, the government announced that it would take responsibility for the national Computer Emergency Response Team from early 2010, and that this would absorb the current activities of the Attorney-General's Department from a unit called GovCERT.au, which is a unit of my division.

Senator McLUCAS—Can you outline progress that has been achieved to this point?

Mr Rothery—We intend to have the new Australian government-run national CERT online in January 2010.

Senator McLUCAS—And its purpose?

Mr Rothery—Its purpose is to coordinate the communication of information about both cyberthreats and vulnerabilities between different parts of the Australian government and different parts of the business community, and through the business community to the broader Australian community. An example of that would be by passing information to internet service providers so that internet service providers can then provide better information and service to normal internet subscribers.

Another important element of the work of the national CERT is to collaborate with national CERTs in other economies to share information about threats and vulnerabilities.

Senator McLUCAS—There must be significant privacy questions that you have to grapple with?

Mr Rothery—Generally speaking, we perform the function of a CERT for some industry sectors now: the banking sector, telecommunications and the energy sector and utilities. We also do work with other sectors of the economy that we think may be targeted for computer based espionage. In that work we share information about the characteristics of the attack. To

my knowledge, I have never seen information that would identify a particular user or anything to do with that user's traffic: the actual content of their emails or other communications. We have not had a challenge in terms of how we would manage the privacy of individuals, and I do not anticipate that it is a likely characteristic of the work of being a national CERT.

[8.44 pm]

ACTING CHAIR—We will now move to outcome 3. I am not sure anyone has indicated they have questions on outcome 3. We did have one indication of some questions on outcome 3, from Senator Heffernan, but we have been trying to track him down since the end of the dinner break without success. So, given the time constraints we are under, I am going to move on. We will now conclude with outcome 3 and move to the Australian Crime Commission. So thank you, officers from the department.

[8.45 pm]

Australian Crime Commission

ACTING CHAIR—Welcome, Mr Lawler. Do you have any opening remarks you would like to make to the committee before we go to questions?

Mr Lawler—No, I do not.

ACTING CHAIR—Thank you.

Senator XENOPHON—Mr Lawler, one of the 17 recommendations made in the 2005 report by Sir John Wheeler into Australia's airports was that the ACC establish:

... a unit on aviation and airport criminality to collect, collate, and analyse relevant information on criminal behaviour, and to produce regular reports, including Criminality Assessments at least quarterly.

You are obviously familiar with Sir John Wheeler's report, Mr Lawler.

Mr Lawler—Yes, I am.

Senator XENOPHON—Can you advise the committee of when a criminality assessment was last conducted?

Mr Lawler—The Aviation Criminal Assessment Team is currently in operation. I do not have the date of its latest report. The nature of the ACAT is to work with other agencies within the aviation context and provide strategic intelligence assessments, which are done on a regular basis. But I will have to take on notice the date of the last report.

Senator XENOPHON—You say these are done on a regular basis. Does that mean they are quarterly, as recommended by Sir John Wheeler?

Mr Lawler—I understand the reports are regular. I will need to take on notice whether there is a report each quarter and the date that the last report was made.

Senator XENOPHON—But you agree with the recommendation? If Sir John Wheeler says they ought to be quarterly, that makes sense in terms of having that follow-through and that ongoing monitoring.

Mr Lawler—There are a range of intelligence capabilities within the aviation environment. The ACC's ACAT role is one of strategic intelligence, which is in a way part of the picture at a strategic level. With strategic documents, the regularity of those is not as

important, because they are dealing with a long-term strategic issue, so I do not know that I would altogether agree with that, but I am aware that the ACAT has provided regular reports. As I said, I will need to take on notice the timing of those.

Senator XENOPHON—Sir John Wheeler also commented on the lack of an ongoing mechanism to regularly collate and assess the threat of crime and criminality at major airports. It was recommended that Customs, the AFP and state and territory police consistently input timely data into the ACC's Criminal Intelligence Database. Is this occurring?

Mr Lawler—The answer to the question is yes, it is—

Senator XENOPHON—How regularly?

Mr Lawler—The reports are updated regularly into the ACID/ALEIN system. This is done by those agencies you identified and also by other agencies. I do have details of uploads to ACID/ALEIN that I could provide to you, but they are not broken down specifically by aviation type; albeit it would be possible, with some effort, to identify those within the many, many thousands of uploads to the ACID/ALEIN system. If I can aid you in the quantum of that: in 2008-09 there were over 700,000 uploads of information to that system by 3,500 ACID users, there were over 650,000 data searches conducted, and over 3.2 million new entity records were created by users. So we have very significant amounts of intelligence being contributed by a wide array of agencies that the ACC works in partnership with, but it would be quite a task to identify, by agency and by type, which of those relate to specific aviation events.

Senator XENOPHON—Can you just clarify: would these uploads also include information on our ports in terms of security issues?

Mr Lawler—Yes, they would. The information that is uploaded—those 700,000 uploads of information—relate to the full spectrum of serious and organised crime and criminality within Australia.

Senator XENOPHON—Further to the issue of our ports, it has been claimed in a report by GHD consultants into the maritime security identity card scheme that the reason Australia's ports remain exposed to organised crime elements is because the existing security regime ignores the criminal intelligence held by the ACC. Would you agree with that assessment by GHD?

Mr Lawler—I have not seen the GHD report. All I can say in response to that is that the ACC did undertake a significant piece of work looking at crime in the transport sector, which was approved by the ACC board. That work was undertaken between November 2005 and June 2008. As a result of that work, we produced 349 maritime intelligence products and 86 formal aviation intelligence products. That information, at both a tactical level and a strategic level, was provided to those agencies that it was relevant to, including law enforcement agencies and the relevant Commonwealth policy agencies.

Senator XENOPHON—So you have not seen the GHD report, which was prepared for the Office of Transport Security. Is that right?

Mr Lawler—I have not seen the report, but I understand that the agency has seen a draft of that report.

Senator XENOPHON—You do not think that a report referring to quite serious security issues and organised crime issues in our ports is something that is worthy of your direct attention?

Mr Lawler—The reality is that security and serious and organised crime is a very important issue and worthy of my attention and receives my attention. What I did say was that that particular report, the GHD report, I have not personally seen. Indeed, the work of the ACC, both in producing its crime in the transport sector determination and report and the work of the department through a number of working groups which are looking to advance that particular report, I am satisfied is providing the ACC attention and input into what is a serious issue, yes.

Mr Jordana—The GHD report, as I understand it—and my colleagues might correct me if I am wrong here—is a report that has gone to the department of infrastructure. That department is organising the response to that report and is responsible for consultations with both industry and other government agencies. So I suspect the ACC might not be the central focal point here. The handling of that report and aspects of the report might be questions best directed at that department.

Senator XENOPHON—As I understand it, a three-year intelligence operation by the ACC which has been recently released revealed that organised crime figures had infiltrated Australia's docks and airports. An example given was associates of outlaw motorcycle gangs and other crime groups working at major airports, including the vice-president of the Outcasts motorcycle gang having a Commonwealth security pass and working as an airport baggage screener. In terms of the ACC's role with respect to other agencies, what role do you see it playing to ensure that people who pose a risk to security at our docks and airports are not working at them? That is one of the issues that were raised by Mr Kessing in his report to customs a number of years ago.

Mr Lawler—I again reinforce what the role of the ACC is. Following authorisation by its board of particular determinations under the ACC Act, the ACC then investigates those determinations. One of those was the crime in the transport sector determination, which is the document you are referring to and relates to the findings you are referring to. That particular determination, as I have said, ran for three years. It involved significant intelligence collection. Our role was to collect intelligence, to factually understand what crime there was in the transport sector and, indeed, to disseminate that intelligence to relevant agencies at a state level, where tactical interventions in relation to known criminals could be undertaken. That work has been completed and those determinations have been made. Indeed, it provided the final crime in the transport sector report to the relevant policy agencies—namely, as the Deputy Secretary of the Attorney-General's Department has indicated, the Department of Infrastructure, Transport, Regional Development and Local Government and also the Attorney-General's Department. The ACC in its intelligence role has since been working with both the department of infrastructure and the Attorney-General's Department in relation to the policy responses.

Senator XENOPHON—The maritime security identification card, or MSIC, scheme, is something that the ACC has had input into in terms of the integrity of that scheme. Is that correct? What role has the ACC played in relation to the formulation of that scheme?

Mr Lawler—As part of the crime in the transport sector determination, issues around the maritime security identification card and the aviation security identification card of course came up, but the work of the ACC was not focused on those particular cards or those systems or processes. They were the subject of, as I understand it, a review by the department of infrastructure, as I indicated earlier.

Mr Wilkins—It might be useful if I indicate how the system works. The architecture for the scheme and the criteria that are applied for the issuing of such certificates are a matter for the department of transport and infrastructure. So the policy is set by the department of infrastructure.

Senator XENOPHON—But don't the input into the bricks and mortar for that architecture rely in part on various other agencies, including the ACC?

Mr Wilkins—I am just coming to that. AusCheck, in my department, actually carry out the checks and issue certificates based on the criteria that are set by the department of transport, and they draw on criminal intelligence from places like CrimTrac—and I think there are now reports also coming from ASIO. That is where the criminal intelligence comes in. Someone who failed to get one of those certificates, they would need to be judged against criteria that are set by the department of transport. That is why I think the critical issue in some ways is the design of the scheme and then the implementation of the scheme is partly a matter for my department and partly a matter for drawing on the intelligence that we have from various criminal sources.

Senator XENOPHON—Given the quite damning OTS report prepared by GHD about a number of fundamental flaws with the current maritime security identity card, including 'a range of offences and behaviours that are known to have linkages with terrorist activity and the unlawful interferences with maritime transport and offshore facilities', is there a problem with the design or in the implementation?

Mr Wilkins—I think it is partly a problem about what criteria you use—in other words, what offences you include in the list. You need to understand that this grew out of what was essentially an antiterrorism measure and now it is becoming something which we would contemplate using for other purposes. So it is sort of expanding its remit. And the government of course has a wider concept of wider security than simply counterterrorism. So it is in the set of criteria that you set for the sorts of offences that would disqualify you from getting a certificate which is the key question. I do not know whether the deputy secretary wants to add something.

Mr Jordana—No, that is perfectly right. Following on from that I just want to note that the infrastructure minister has announced a review of those very criteria. The criminal history criteria—the criteria that determine whether or not someone gets a maritime security identity card—are being reviewed as we speak, and the results of that review are expected relatively shortly.

Mr Wilkins—And we are having input into that review. Input from bodies such as the ACC into that review come via this department into that process.

Mr Lawler—I would like to provide a little more detail, Senator, to your question about the aviation criminal assessment team and just advise that it was formed in February 2006 and to date has disseminated 33 formal intelligence products to partner agencies.

Senator XENOPHON—Thank you.

Proceedings suspended from 9.04 pm to 9.17 pm

ACTING CHAIR—The committee will resume with its questioning of the Australian Crime Commission.

Senator BARNETT—Good to see you, Mr Lawler. I want to ask about salaries for ACC staff. I wonder if you can advise if there has been an increase in salary offered to ACC staff in their EBA negotiations and, if so, what is that increase?

Mr Lawler—Yes, there has been a collective agreement negotiation underway for some period of time. There has been an agreement reached between the ACC management and the CPSU in the following terms: a 2.75 per cent increase payable on signing; a 2.75 per cent increase payable on 1 July 2010 and payment of a sign-on bonus equivalent to a salary increase of 2.75 per cent from 1 July 2009 to the date of signing.

Senator BARNETT—That is a bonus, is it, from 1 July 2009 to if it is signed up next week, as it were?

Mr Lawler—It reflects that the previous collective agreement ceased on 1 July 2009, and given there are certain administrative arrangements that are required, it just reflects a continuation of the next agreement from that date.

Senator BARNETT—Has that all been agreed, sorted and signed? When will that kick in?

Mr Lawler—There is a process to be followed in the context of collective agreements. It involves DEEWR and the Department of Finance and Deregulation, and is then subject to ministerial agreement and a formal vote of staff conducted by the Australian Electoral Commission. Subject to the timing of that process being undertaken and completed we would be hopeful of a settled agreement by the end of the year, but it may be early 2010.

Senator BARNETT—When do you expect that vote?

Ms Bailey—Currently we are submitting the agreement to DEEWR. Then we will submit it to Finance and to our minister for his approval. We are anticipating the vote sometime in the last two weeks of November. Hopefully we can schedule some time in with the Electoral Commission.

Senator BARNETT—Have you received your minister's approval as yet?

Ms Bailey—We have kept the minister informed of the negotiations as they have been progressing, but that happens after DEEWR and Finance give the sign-off. He wants to see their view that it is compliant before he formally gives his approval.

Senator BARNETT—But you are not expecting disapproval.

Ms Bailey—No. The agreement has a small change to the conditions. Really the biggest change in the agreement is the quantum of the pay rise.

Senator BARNETT—Would you say it is pretty much similar to those of other law enforcement agencies?

Ms Bailey—It is in line with the government's bargaining framework and position for public service agencies—that is, around three per cent and for two years. We have to stay in line with those. It is hard to compare across law enforcement agencies.

Senator BARNETT—Are there any consequences to such an increase with respect to possible or likely redundancies?

Mr Lawler—Under the ACC's budget and the forward estimates, a reduction in staff of 35 was always planned for this financial year. We do not believe that the collective agreement will add to that number.

Senator BARNETT—When in this financial year are those 35 leaving, and can you advise us on current staff numbers?

Mr Lawler—The 35 will be lost to the organisation during the course of this current financial year through natural attrition, which will put us in a position at the start of 2010-11 to meet our budget based on the forward estimates. In the context of the current staffing numbers it is important, particularly in the context of the ACC, to advise that we have quite a complicated staffing arrangement, which includes five separate categories under which the staff are employed. They include the Public Service Act, non-ongoing contractors, seconded APS and ACC Act staff funded by the ACC, ACC Act seconded staff funded by the jurisdictions and members of the joint operations funded by the jurisdictions and working on ACC operations but not members of the ACC. In assessing the staffing numbers that I can provide to you, it is important to note that some of the secondment arrangements, by their nature, are classified in the financial statements as supplier costs and not as employee costs. Bearing that in mind, at 30 September 2009 the ACC had 560 staff, comprising 514 APS staff, two contractors, 44 secondees and 16 staff from other agencies who were working with the ACC in joint operations and task forces. Whilst not formally recorded by state and territory or Commonwealth agencies, a large number of police and other staff are utilised when effecting operational resolutions. For example, in one recent case in May this year, in addition to those numbers, in excess of 200 police were utilised in operational and tactical outcomes. That gives you a broad understanding of the staffing complexity.

Senator BARNETT—Thank you. You have given me a broad understanding. In terms of where you need to be by 30 June next year, in accordance with your budget, is that something you could table or take on notice and advise the equivalent numbers that you anticipate to meet your budget requirements?

Mr Lawler—To meet our budget requirements we need a staffing level of about 505.

Senator BARNETT—That is what you are aiming for as at 30 June next year?

Mr Lawler—That is right. That is plus secondees.

Senator BARNETT—In light of the time, I only have one further question, which is on another matter and relates to the implementation of national anti-association laws. I wonder if

you could advise if there are any plans afoot to either investigate or implement those national anti-association laws, which are a follow on to some of the outlawed serious and organised crime groups actions that you have been undertaking?

Mr Lawler—I do not understand the question. Could you provide that again for me please?

Senator BARNETT—The anti-association laws were raised in the report of the Parliamentary Joint Committee on the Australian Crime Commission. A number of recommendations were made, and I refer specifically to the additional comments by the Liberal and Family First members of the committee. For example, on page 1, third paragraph, the report says:

In Italy, anti-association laws in conjunction with unexplained wealth provisions have been pivotal in prosecuting major figures in the Mafia.

My question to you is: are you as the ACC considering, investigating or inquiring into the merit of anti-association laws for Australia?

Mr Lawler—That question might be best answered by the department, as it relates to legislation.

Mr Wilkins—Senator, of course we keep these things under review and we are looking at it. As you know, a number of packages have come before parliament in relation to organised crime. Some aspects of anti-racketeering legislation and anti-association laws would be considered. We have had discussions at the Standing Committee of Attorneys-General about trying to get a uniform approach across Australia. The short answer to your question is: yes, we will look at that.

Senator BARNETT—I am being specific to the ACC and whether you are specifically looking at it as an entity.

Mr Wilkins—We do the legislation on behalf of the ACC. Of course we discuss it with them.

Senator BARNETT—Is the ACC providing input to the department in respect of that?

Mr Wilkins—Yes.

Mr Lawler—Yes, we are. We work closely with the department around matters of legislation.

Senator LUDLAM—I am just wondering if you can tell us whether the Australian Crime Commission has investigated the potential for organised criminals to produce counterfeit Tamiflu or other vaccines at a time of pandemic? Is that a possibility that you have examined?

Mr Lawler—The ACC, as part of its strategic work, is regularly producing intelligence products looking at potential for fraud in such environments in such matters. Whether it has done a specific report on Tamiflu, I will need to take on notice; but it is part of its work to scan the environment and look at where serious and organised crime will potentially try to exploit weaknesses or unforeseen events. The case you mentioned is a case in point.

Senator LUDLAM—Maybe you could provide for us on notice whether you have looked at Tamiflu as a specific case study. But perhaps you could tell us now whether you have

looked at, as a general security threat, the potential for organised criminal organisations to bring counterfeit medicines into Australia at a time of enormous demand, such as during a pandemic.

Mr Lawler—As I indicated, one of the features we see in serious organised crime is its potential to be innovative and to exploit opportunities where significant amounts of money can be made at low risk. The examples you are talking about are matters we have looked at across a broad range of spectrums, and what the implications for the likes of pandemics are, but in relation to Tamiflu I will need, as I said, to take it on notice.

Senator LUDLAM—Okay. I presume I am not the first person who has thought of it. But you are saying you have specifically looked at the issue of counterfeit medications being imported into the country?

Mr Lawler—There has certainly been a report done on serious and organised crime and pandemics, which I believe has picked up that dimension of fraud. I will need to check the detail of the report to be perfectly accurate about fraud in relation to specific medication or other dimensions.

Senator LUDLAM—I would appreciate that. Is the report that you have mentioned a public document?

Mr Lawler—No, it is not. As best I understand, the majority of the ACC reports are classified documents. But let me see. If the report can be made available to you, I will endeavour to do that.

Senator LUDLAM—Or some part of it. Could you also let us know what date that report was prepared.

Mr Lawler—Of course.

Senator LUDLAM—Thanks very much.

ACTING CHAIR—Mr Lawler and Ms Bailey, thank you for your appearance before this committee's estimates this evening.

Mr Lawler—Thank you, Chair.

[9.32 pm]

Australian Customs and Border Protection Service

ACTING CHAIR—We have a hope that we may get as far as ASIO this evening. Personally, I think that is too ambitious. Representatives from the Australian Government Solicitor, CrimTrac Agency, High Court of Australia, Insolvency and Trustee Service Australia, Office of the Director of Public Prosecutions and Office of the Parliamentary Counsel unfortunately will not be required tonight because we will simply run out of time. So those officers can go. I wish I could let ASIO go too, but we live in hope of speaking to you tonight.

Senator Ludwig—Thank you, Chair; you read my mind. I am sure the committee and the officers involved appreciate being given that notice.

ACTING CHAIR—Senator Barnett, will you start the questions of Australian Customs and Border Protection?

Senator BARNETT—I only have a few brief questions. I will ask about the annual report to kick it off. Have you submitted your annual report?

Mr Carmody—It has been a bit of a gestation, but the final copy I signed off on last Friday, and a final tabling minute was sent with the report to the minister today.

Senator BARNETT—Last weekend asylum seekers on two boats—one in Malaysian waters, the other in Indonesian waters—reportedly rang Australian authorities on mobile phones once their boats struck trouble. There was a report in the *West Australian* to that effect on 19 October. It says that a distress signal was conveyed to the Australian Maritime Safety Authority, and a number of other references are made in that article. I wonder if you can confirm that you are aware that these asylum seekers are phoning Australian authorities to this effect. Is this accurate?

Ms Grant—I can confirm that the people on board the vessel off the Indonesian waters were in contact with the Australian Maritime Safety Authority.

Senator BARNETT—What time was that?

Mr Carmody—I do not know that we have the precise details of that nature.

Senator BARNETT—But you do know that they contacted the authority by mobile phone.

Mr Carmody—I understand there was contact by phone to Australian authorities and that that was then relayed to the relevant authorities in Indonesia. As you are probably aware from media reports, there has been an operation conducted in response to that.

Senator BARNETT—Are you involved in that operation?

Mr Carmody—As was reported by, I think, the Minister for Foreign Affairs, under our obligations there was a naval vessel involved and, since then, the people have been moved onto the *Oceanic Viking*.

Senator BARNETT—Does your authority, as far as you are aware have any formal procedure in place for incidents like this?

Mr Carmody—We are regularly involved. I am being reminded that the coordinating authority here is AMSA, but AMSA do call on vessels, including government vessels, in response to those incidents.

Senator BARNETT—Do you have a copy of the protocol that applies to these types of incidents?

Mr Carmody—I do not have a copy of the protocol. It is a well established procedure. We could take that on notice for you.

Ms Grant—I add that AMSA is operating under the International Convention for the Safety of Life at Sea, so they have agreed protocols between their organisation and their counterpart organisation in Indonesia. But any questions of detail about those matters really would need to be referred to AMSA for provision to the committee.

Senator BARNETT—What protocols do you follow when you are engaged in incidents such as people smuggling. You must have some protocols that you abide by.

Mr Carmody—It is a very broad question. Can you narrow it down?

Senator BARNETT—Can you assist me in terms of what protocols you use when you have an engagement?

Mr Carmody—When there is a boarding?

Senator BARNETT—Yes.

Mr Carmody—Yes, we do have protocols involved in that. We could table those if you wanted.

Senator BARNETT—Could you take that on notice and table those protocols?

Mr Carmody—We will.

Senator BARNETT—Thank you. In light of the time, I move quickly to the next question. There has obviously been a significant influx of boat arrivals and boat people in many past months. I wonder if you can advise the committee of the extent of the call on your resources and your services and the extent that that is stretching your ability to operate efficiently in other parts of your agency.

Mr Carmody—Obviously there are significant responsibilities including with respect to our surveillance and patrol activities. In response to that, at the last budget we received funding to support increased surveillance and patrolling, so that has been provided. And, as you know, they have been fully engaged in the course of that.

Senator BARNETT—Has that been acted on and used?

Mr Carmody—Yes. We have increased our patrol and surveillance in response to that. Additional funding was provided for that. Obviously there are intensive operations at the moment, but that does not detract us from the reality that we have broad responsibilities and we are looking to meet those as well.

Senator BARNETT—Can you be more specific about the extent of your increased surveillance and patrol?

Mr Carmody—Yes. I think we had something like 2,215 extra surveillance hours funded for the year, and contracts have been extended for that. That was on top of the 17,000-odd surveillance hours. In addition, there was extension of the contract on the *Oceanic Viking* for four years beyond June 2010. We got funding for two years extension on ACV *Triton* beyond June 2009. In addition, we have received additional funding to increase our representation overseas to work with other agencies overseas and with Australian government agencies at post in support of activities relating to maritime people-smuggling.

Senator BARNETT—Specifically Indonesia?

Mr Carmody—Yes, we received funding for, I think, two additional positions in Indonesia. Also, with respect to the *Oceanic Viking*, which I mentioned the contracts were extended beyond June 2010, there was also provision for funding for an extra 80 days use of that vessel up north.

Senator BARNETT—Will you have representatives at the meetings with the Prime Minister and the Indonesian authorities over the next few days?

Mr Carmody—No, we don't.

Senator BARNETT—Not to your knowledge, or no you won't?

Mr Carmody—No, we will not.

Senator BARNETT—Thank you. I have no further questions.

ACTING CHAIR—We will move to Senator Hanson-Young.

Senator HANSON-YOUNG—Thank you. I have got some questions around the *Oceanic Viking* incident as well, following on from Senator Barnett's. Firstly I just want to confirm: from what we know, there are 76 asylum seekers on board that vessel at the moment?

Mr Carmody—There are 78 in total.

Senator HANSON-YOUNG—Do we know where they are from?

Mr Carmody—Not at this stage. Our concentration has been on dealing with the incident rather than getting accurate details as to where they are from.

Senator HANSON-YOUNG—So we do not know how many women, children or—

Mr Carmody—We can probably help there. There are 78 passengers on board, including five women and five children.

Senator HANSON-YOUNG—Why is it that we have not just brought this boat to Australia?

Mr Carmody—The responsibility for coordination is through the equivalent of AMSA in Australia. The question is: what is the safest destination, what is the safest approach, and there are ongoing discussions with that organisation and agencies in Australia.

Senator HANSON-YOUNG—What constitutes what is the safest option for these people?

Mr Carmody—I guess that is a question that is being discussed at the moment, as to what is in the best interests of ensuring their safety as a result of that incident.

Senator HANSON-YOUNG—So there are 78 people on board a ship at the moment, on board the *Oceanic Viking*—

Mr Carmody—They have boarded onto the *Oceanic Viking* for their safety, yes.

Senator HANSON-YOUNG—Where is the ship located at the moment?

Mr Carmody—I do not have precise details, but you would be aware that broadly it was on the west coast of Sumatra. I do not have precise coordinates.

Senator HANSON-YOUNG—In international waters?

Mr Carmody—Yes. That is where the incident was. I cannot give the precise details.

Senator HANSON-YOUNG—I do not need the precise coordinates. We have, correct me if I am wrong, 78 people on board the *Oceanic Viking*, an Australian vessel, in international waters. Why could we not just bring the boat to Australia?

Mr Carmody—This is a matter that needs to be dealt with in the circumstances and in accordance with the appropriate procedures under safety of life at sea and the responsibilities of those agencies. Those discussions are going on at the moment.

Senator HANSON-YOUNG—How long would it take to get from the west coast of Sumatra to the Australian mainland?

Mr Carmody—I am sorry, I could not tell you that off the top of my head.

Senator HANSON-YOUNG—Christmas Island is obviously on the way.

Mr Carmody—On the way from where? I am sorry; I am not trying to be obtuse. The safety rescue was in waters that, if this is what you were getting to, were far closer to Indonesia than Australia.

Senator HANSON-YOUNG—What do you think the time frame is in terms of resolving the problem and figuring out where is the safest option to take these people?

Mr Carmody—When the vessel was detected, if I can give you the details that we have at the moment, it was around 296 nautical miles north-north-west of Christmas Island and 120 nautical miles from Sumatra.

Senator HANSON-YOUNG—Thank you. We have 78 asylum seekers including five women and five children on board the *Oceanic Viking* in international waters. Where does that leave our legal obligations in terms of where those people should be brought to?

Mr Carmody—This is the matter of the discussions. Everything is being undertaken under the legal frameworks for safety of life at sea. Those discussions are going on.

Senator HANSON-YOUNG—Do we not have any precedent or protocol that gives us an indication as to what perhaps our legal obligations are when people are on board an Australian ship but in international waters seeking asylum?

Mr Carmody—Obviously, our issues there are their safety and they are being well cared for on the *Oceanic Viking*. As to the international responsibilities under safety of life at sea I am not an expert on that and those matters are being—

Senator HANSON-YOUNG—Is there anybody else who could enlighten us?

Mr Campbell—This was the rescue of a vessel which called out in distress. An Australian vessel went to the vessel that made the telephone call and made sure that the vessel was no longer in distress. At the moment it is a case of finding the safest course for the passengers.

Senator HANSON-YOUNG—I would imagine that the safest course for those passengers would not just in terms of their immediate safety. Clearly, we need to make sure that they are being looked after and that their immediate safety is taken into consideration. I would imagine that we also need to consider their rights under international law in seeking asylum and ensuring their safety. Being given an opportunity to seek asylum in a safe and humane way would have to be taken into consideration, surely?

Mr Campbell—I do not know whether the people on board the vessel would be seeking asylum or not but, assuming they were, there are a couple of fundamental obligations under the refugee convention. The first is not to return a person to a place where they are likely to be persecuted and the second, which is not stated in the convention itself, is that they will have

their refugee status assessed. There are many places in the world where that can happen including Australia and including Indonesia.

Senator HANSON-YOUNG—When do you suspect that there will be some more information? Surely, this boat cannot just be going around in circles for too much longer.

Mr Carmody—We do not want to go around in circles, no. These are always difficult situations, and the primary concern is the issue of the safety of people. Those discussions are being carried out with that in mind and I am sure they will be resolved in the near future.

Senator HANSON-YOUNG—What would be the safety concerns if those 78 people were brought to Australia?

Mr Carmody—I do not think that is necessarily the issue. It is, as I said—

Senator HANSON-YOUNG—There would not be any safety concerns about bringing those people to Australia?

Mr Carmody—Yes, but the general issue is one about where the vessel was intercepted and what is the appropriate response under safety of life at sea. The issue is being coordinated initially by the AMSA equivalent in Indonesia and we are liaising and working with them on what is the appropriate outcome.

Senator HANSON-YOUNG—Just in summary, and correct me if I am wrong: there are 78 people on board the *Oceanic Viking*, waiting to know where they will be set off the boat; the government is considering their safety in terms of deriving a resolution as to where they will disembark and there would be no concerns, really, as to why they should not be brought to Australia?

Mr Carmody—All I can do is repeat what I have said: we are conducting this as a result of the rescue, and those discussions are going on at the moment.

Senator XENOPHON—I have some questions on an entirely different topic. I think we last spoke about the Kessing case, and since that time Mr Kessing has decided not to pursue an appeal to the High Court, or he has withdrawn his appeal. I think that was one factor that was constraining you in your comments in relation to that?

Mr Carmody—It was.

Senator XENOPHON—So you are no longer constrained!

Mr Carmody—An unleashed CEO—it is a terrible thought!

Senator XENOPHON—I hope you are. If someone is accused of a crime in terms of protocols under section 70 of the Crimes Act and the unauthorised release of information, what are the internal protocols of such an investigation? What happens? Is there an investigation, and does that investigation lead to a report, or a memo or some other form of communication going to the Australian Federal Police?

Mr Carmody—Certainly, the Australian Federal Police would be involved in the investigation of that.

Senator XENOPHON—Can we go back a step? Is there an internal affairs body within Customs?

Mr Carmody—We have an Internal Affairs Unit, but I think, from memory, this matter was referred to the Australian Federal Police. I have no doubt that we have would have assisted them in their investigation, but the primary responsibility was taken by the Australian Federal Police, in my understanding.

Senator XENOPHON—Is that what would normally happen in terms of any breaches or alleged breaches of section 70? Would there normally be an internal affairs investigation, or some other internal investigation by Customs before any information was imparted to the AFP? Or did it simply go straight to the AFP?

Mr Carmody—My officer's understanding is that it would be normal for these types of cases to be referred to the AFP. If that is not the case we will advise the committee.

Senator XENOPHON—Perhaps you could take that on notice?

Mr Carmody—Yes, I will.

Senator XENOPHON—Further to that, can you advise in relation to the Kessing case if there was any internal investigation and, if so, were any recommendations made to the Australian Federal Police as a result of that?

Mr Carmody—My understanding is that was not the case, that we actually assisted the AFP but there was not a concluded investigation within the Customs and Border Protection Service before that.

Senator XENOPHON—Can you say now, or on notice, whether Customs provided any recommendations as to whether there ought to be further action or investigation by the AFP in the Kessing case?

Ms L Smith—I am unaware of that. I am not aware that there was any recommendation made. We assisted the AFP in their investigation.

Senator XENOPHON—Mr Carmody, are you familiar with the report prepared for the Office of Transport Security by GHD Consultants, the details of which—

Mr Carmody—I have not seen that report, no.

Senator XENOPHON—This was the report that raised concerns about the maritime security identity card and revealed that the scheme is failing because it does not detect or act on 'a range of offences and behaviours that are known to have linkages with terrorist activity'. It goes on to say that the offences going undetected include those relating to possessing explosives, theft, significant weapons violations, racketeering, blackmail, corruption and bribery and 'offences relating to the death of another human—be it by assassination or murder'—that is quoting directly from the report. That relates to the security of our ports. Is that not something that your department would be directly concerned about in the context of the role that Customs plays?

Mr Carmody—First of all, I have not seen the report. But my understanding—and I would need to check this—is that that was commissioned by the Office of Transport Security and is a contributor to the review that is going on into ASICs and MSICs. I have not seen it. I will need to check whether anyone in my office has seen it. Our responsibilities are not port

security as such but go to the question of goods or people crossing the border, although we do assist other authorities when it comes to ports.

Senator XENOPHON—But, Mr Carmody, if you have people who have got a maritime security card, who have been cleared, who have organised crime links, does that not relate to the integrity of what you are trying to do? It is fundamental, is it not?

Mr Carmody—We are obviously concerned about criminal activity at the ports, to the extent that it goes to attempts to bring illicit drugs, for example, into the country or other issues. So, yes, we do have those concerns, and we have cooperated with the department of infrastructure in the review of those ASICs and MSICs.

Senator XENOPHON—The report by GHD consultants into the maritime security identity card found that the reason that our ports remain exposed to crime is because ‘the existing security regime ignores the vast body of criminal intelligence held by the Australian Crime Commission’. What degree of liaison is there between the ACC and Customs relating to the integrity of the security card identity scheme in the context of your role to prevent illicit goods and unauthorised persons arriving in the country?

Mr Wilkins—This is going back to what we were talking about before. We are coordinating comments from the Attorney-General’s portfolio, including Customs—and, I assume, a range of other agencies such as the ACC. We have sent them the report and we are trying to get changes to the architecture of the scheme which we are talking to the department of infrastructure and transport about. That is roughly what is happening with that report.

Senator XENOPHON—My point is that Customs has a mandate to prevent unauthorised goods arriving in this country—

Mr Carmody—That is right.

Senator XENOPHON—And if people who are authorised, who have got security clearance, have organised crime links, that can compromise the integrity of what Customs is trying to do.

Mr Carmody—As I have noted, we have been cooperating with the review in light of that. We have traversed this ground slightly before and I think it was mentioned this evening. That scheme was set up primarily in response to concerns about terrorism. Broader concerns are obviously now being considered in the context of the review.

Senator XENOPHON—But you have not seen fit to read that report or to be apprised of that report?

Mr Carmody—Not personally, but I can check whether my office has been involved. But, clearly, we have been on the record as expressing concern to address criminal activity on the ports.

Mr Jordana—If I could, I would like to reflect for a moment upon the nature of the maritime security identity card and the types of criteria that are set around it. The need to meet certain criteria goes to criminal convictions. The criteria that are established go to whether or not people have been convicted of particular offences and an assessment is done against that set of criteria. You have used the terminology ‘links with organised crime’. That is a slightly broader concept, of course, and goes to issues of whether or not people might be

suspected of such links. The question of using criminal intelligence, as distinct from people actually having been convicted, is of quite a different order of magnitude and, as you can imagine, raises a whole range of questions about how you actually make such an assessment. From a slightly theoretical point of view, there is a difference between the issue of people who have been convicted of particular crimes and making assessments on whether or not they should receive a maritime security identity card on the basis of what their criminal convictions are and the issue of using criminal intelligence.

Senator XENOPHON—This is a little like Groundhog Day. I am not sure whether I asked you questions at the previous estimates about what system there was in place with respect to those persons that had been convicted of an offence that could be relevant. Apparently there was a self-reporting system and there was a gap there, a hiatus, in that you had to rely on a person advising either customs or the relevant agencies that they had been convicted of an offence. Has that changed since the last time you were here?

Dr Alderson—My branch does the background checking with input from CrimTrac and, through them, state police forces and also ASIO. I can answer your question in two parts. In terms of how the system works now, we get, in terms of criminal convictions, criminal history information through CrimTrac. So when we do the check we do not rely on self-reporting. We get that information from CrimTrac, who in turn work with the various police forces to get that information. There is also an issue about what happens if a person is issued with one of these cards and is then convicted of a relevant offence. At the moment, there are, variously for aviation and maritime, different mechanisms to try and deal with that situation, but there are also arguments that they can be improved in a number of ways. For example, in this current maritime review, one of the areas where we have consulted with our portfolio agencies and provided information into the review process is about options for the government to strengthen those mechanisms in between times. But the actual decision we make on the background check does not rely on self-reporting. We go to CrimTrac and to ASIO to source that information.

Senator XENOPHON—But, once a person has been issued with a security clearance, whether it is at our airports or at our maritime ports, and they are subsequently convicted of a relevant offence, what mechanism is there for that to be noted fairly quickly? People effectively had to do themselves in previously.

Dr Alderson—That is right. That is why the strength of those mechanisms is one of the significant issues for the government to look at in these reviews. For example, on the aviation side of it, there is a criminal offence if you fail to report a relevant offence after you are issued with the aviation card. On the maritime side, there is not an equivalent offence. Similarly, on the aviation side, the background check comes up every one or two years, depending on the situation. On the maritime side, it comes up once every five years. So you can see just from that some of the issues the government will be looking at.

Senator XENOPHON—So it is still a matter of self-reporting either way, with lesser offences in the maritime sector. When will the system be improved so that, if someone is convicted of a relevant offence, they can be detected by the system without—

Dr Alderson—So that it automatically triggers on conviction?

Senator XENOPHON—Yes.

Dr Alderson—That is one of the things that we are looking at. The way the criminal history system in Australia works at the moment, we do not have a mechanism to do that. We are working with the other agencies to scope out and develop such a mechanism so that will be available, but it will not be available in the short term. That is something that involves CrimTrac, the state police forces, the federal police and all the different IT systems we have that pull together criminal history. We are working with them on the possibilities for a system that would allow an immediate alert when somebody was charged or convicted. We do not have that now and the completion of such a system is not imminent.

Senator XENOPHON—Is it years away?

Dr Alderson—It might be.

Senator XENOPHON—Thank you.

Senator HEFFERNAN—I ask the Customs and Border Protection Service: have you done any modelling on climate migration? Mick Keelty said 18 months ago—nearly two years ago now—that the greatest threat to Australia’s sovereignty, without any doubt, was climate change, and he was referring to global human displacement. We know that there are approximately a million people sitting up there wanting to know how that mob that Senator Hanson-Young talked about get on, because there are plenty of followers. At \$10,000 a head, if there are a million then that is a \$10 billion industry. My question to you is: have we done any modelling on how we are going to manage the IPCC prediction that by 2050, if we grow the global population to nine billion, there could be 1.2 billion to 1.6 billion displaced people on the planet?

Mr Carmody—We have not done any modelling on that.

Senator HEFFERNAN—Don’t you think it is time we looked at and thought about it? Given that Mick Keelty put it on the record, can you pursue some modelling on that? It is a huge problem.

Mr Carmody—Yes.

Senator HEFFERNAN—We are here farting around about a few boatloads.

Mr Carmody—I think there are much broader issues than customs and border protection in relation to those issues.

Senator HEFFERNAN—Yes. That is my question, anyhow. I hope you all have a lovely time. I am going to see Penny Wong.

Senator FIERRAVANTI-WELLS—I would like to ask a few questions. Having read a lot about the so-called toughness on people smuggling, I was really interested to read an article entitled ‘Volleyball nets spearhead anti-boatpeople campaign’. Commissioner, are you funding this? Have you hired Saatchi and Saatchi to develop a campaign which is supposed to be going into Sri Lanka and spearheading our campaign there against people smuggling?

Mr Carmody—We did receive funding to conduct campaigns in various countries. In the case of Sri Lanka, obviously we do not do it ourselves; we contracted with the International Organisation for Migration, which is a well-respected organisation giving advice for people in

these circumstances. The organisation has been supported by governments in Australia over a long period. So we contracted with it. My understanding is that as a part of that it contracted some work to Saatchi and Saatchi, but that was handled through it.

Senator FIERRAVANTI-WELLS—Can you tell me how long this campaign has been planned, when it started and what the cost of it has been?

Mr Carmody—The campaign is expected to continue for around six months, with an estimated cost this financial year of \$330,000.

Senator FIERRAVANTI-WELLS—Will you be running campaigns in Indonesia, Afghanistan, Pakistan or Malaysia?

Mr Carmody—I am being advised that this is an issue that we will need to determine in the circumstances, but we will be conducting campaigns in Sri Lanka. We expect to conduct one in Indonesia and Malaysia at this stage.

Senator FIERRAVANTI-WELLS—The reports in the papers that I have read say that the campaign is specifically targeting the Catholic community in that area. Why are you targeting just the Catholics as opposed to other people who potentially—

Mr Carmody—I do not think it is only the Catholics; it is just that that is an influential sector. But I do not think that we are limiting ourselves or that the International Organisation for Migration are limiting themselves at all.

Senator FIERRAVANTI-WELLS—Perhaps you might like to take that on notice and give us a briefing on the issue. I was particularly concerned to read that you were just targeting them. Perhaps it just the way the report is written, but it is rather disturbing if you are just targeting them, given that Catholics are a very small minority of the people who are coming. The bulk of them are of other religions.

Mr Carmody—We are not looking solely at that particular segment, but if there is any further information I can give you I will get that.

Senator FIERRAVANTI-WELLS—What are you expecting will come out of this?

Mr Carmody—I think the issue is to share with people the risks and dangers of people smuggling and an understanding of the circumstances they may be putting themselves in.

Senator FIERRAVANTI-WELLS—And when did you start work on this?

Mr Carmody—It was probably a few months ago that we first started thinking about approaches to getting information out to people in these circumstances, and it has evolved from there.

Senator FIERRAVANTI-WELLS—When the surge became an avalanche—is that what you are saying, Commissioner?

Mr Carmody—No; I am no longer a commissioner! I do not know about ‘surge’ and ‘avalanche’. I think this is a very appropriate issue to be conveying to communities.

Senator FIERRAVANTI-WELLS—Thank you. Commissioners are always commissioners! They stand in the psyche of some of us senators!

CHAIR—Thank you, Mr Carmody and your officers. We will now move to the Australian Federal Police. Welcome and congratulations, Mr Negus. Do you have some opening remarks you would like to make to the committee prior to going to questions?

Mr Negus—Given the time, I would like to say this is my first estimates as the new commissioner and I look forward to providing as much advice as possible to the committee and working with you over the next few years. Thank you for the opportunity.

CHAIR—For as long as possible, I suspect.

Senator BRANDIS—Welcome to your first estimates as commissioner.

Mr Negus—Thank you.

Senator BRANDIS—You may recall that at the last estimates I asked some questions directed to Commissioner Keelty and to you concerning a document entitled ‘Strategic forecast for transnational criminal trends and threats’ to Australia. I take you to the relevant bit of the *Hansard*. This is page L&C 46. I asked the question of Commissioner Keelty. His answer was, ‘I don’t know.’ Then:

Senator BRANDIS—Deputy Commissioner Negus, you might know. Would it help if I identified the document? It is a document entitled ‘Strategic Forecast for Transnational Criminal Trends and Threats’, a document, I am advised, which is commonly referred to in the AFP as a strategic intelligence report. Are you familiar with that document?

Mr Keelty—No, I am not.

Senator BRANDIS—Deputy Commissioner Negus?

Mr Negus—No, I am not.

Then there were some objections from Senator Ludwig as the minister in the chair, after which—this is L&C 47—I went on:

My question, which I invite you to take on notice, is whether a document entitled ‘Strategic forecast for transnational criminal trends and threats’, commonly referred to in the AFP as a strategic intelligence report, was prepared by officers of the AFP in relation to Indonesian based people-smuggling in about September or October 2008.

Mr Keelty replied:

I will take that on notice.

Do you remember that exchange, Mr Negus?

Mr Negus—Yes, I do.

Senator BRANDIS—Subsequently, a written answer was provided to that question, which is answer No. 57, which I will read to you.

The answer to the honourable senator’s question is as follows—

I assume you cleared this answer, Commissioner Negus—

A classified document titled ‘Strategic Intelligence Forecast - Transnational criminal trends and threats to Australia’ was being prepared within the timeframe of the Senator’s question. This document included a component relating to people smuggling. The document was finalised on 27 March 2009 and subsequently disseminated internally within the Australian Federal Police and externally to a number of Australian Government agencies.

Are you familiar with that written answer, Commissioner Negus?

Mr Negus—I am. But, just for the record, I did not clear the response. It was done, I think, through the transition with Commissioner Keelty coming in.

Senator BRANDIS—That is fine. But you are happy with that written answer, presumably?

Mr Negus—Yes. I have seen that and it is accurate.

Senator BRANDIS—Now let me make it absolutely clear to you, to the Chair and to Senator Ludwig that I do not intend to ask you about and I do not want you to reveal to the committee the content of that document. So, in responding to the series of questions I am about to ask you, Commissioner, I do not want you to say anything that reveals the content of that document because I am assuming, I think safely, that the content of that document is sensitive.

Mr Negus—That is correct.

Senator BRANDIS—Thank you. Was the document entitled *Strategic intelligence forecast—transnational criminal trends and threats to Australia* one of a series of documents that are periodically produced within the AFP or was it, as it were, a one-off document?

Mr Negus—Those documents are periodically produced but that is over an extensive period of time—every two years.

Senator BRANDIS—Are the documents produced in relation to particular topics or particular countries, or are they omnibus documents that deal with all relevant topics and all countries within the descriptor ‘transnational criminal trends and threats to Australia’?

Mr Negus—The latter is correct.

Senator BRANDIS—So about every two years the AFP generates the document *Strategic intelligence forecast—transnational criminal trends and threats to Australia*?

Mr Negus—That is correct.

Senator BRANDIS—All right. The questions I was asking were directed to people-smuggling activities in Indonesia, and in your written answer you have said that the document ‘included a component relating to people smuggling’. To the extent to which the document draws upon intelligence concerning that area—that is, people-smuggling activity in Indonesia—may I take it that the product upon which it draws includes material provided to the joint task force?

Mr Negus—Certainly elements of the material would, but some of that would be collected by the AFP independently and then distributed in other ways.

Senator BRANDIS—In your own words please, just remind us exactly what the joint task force comprises, who its personnel are, where it is located and give us a brief description of its function.

Mr Negus—I might ask Deputy Commissioner Quaedvlieg, who actually represents us on that panel, to give that description.

Mr Quaedvlieg—Your question I believe relates to the People Smuggling Strike Team?

Senator BRANDIS—What was described in the last estimates by Commissioner Keelty and then Deputy Commissioner Negus as the joint task force, but we were talking about people-smuggling activities in Indonesia, so I think we are talking about the same thing.

Mr Quaedvlieg—It is a task force that is comprises officers from the Australian Federal Police, from the Department of Immigration and Citizenship and from the Australian Customs and Border Protection Service. It consists of six separate teams: three operational investigative teams, two intelligence teams and one financial investigation team. They are spread geographically across Australia.

Senator BRANDIS—Are these six teams all located within Australia?

Mr Quaedvlieg—That is correct.

Senator BRANDIS—Can you tell us please how many officers each team comprises?

Mr Quaedvlieg—Yes, I can. The respective numbers for the three operational teams are five, six and eight. For the intelligence teams the numbers are seven and 11. For the financial investigation team there are four officers.

Senator BRANDIS—What are the respective roles of the three operational teams? What is the break up between the three operational teams in terms of function please?

Mr Quaedvlieg—In that description you could probably incorporate a fourth team, which is a team that is placed on Christmas Island. There are three operational teams based around Sydney, Melbourne and Canberra.

Senator BRANDIS—So is the only discrimination between them the geographical discrimination—one is in Sydney, one is in Melbourne and one is in Canberra?

Mr Quaedvlieg—Essentially, yes.

Senator BRANDIS—Without revealing any state secrets, I assume that broadly these operational teams are concerned to examine and inform the AFP about people-smuggling activities.

Mr Quaedvlieg—That is correct.

Senator BRANDIS—What about the two intelligence teams?

Mr Quaedvlieg—The intelligence teams are based in Canberra.

Senator BRANDIS—Obviously, the distinction between them is not a geographical one. What is the distinction between the two?

Mr Quaedvlieg—Between the operational and the intelligence teams?

Senator BRANDIS—No, you said there were two intelligence teams and they are both based in Canberra. What are the respective functions of each?

Mr Quaedvlieg—There is a tactical intelligence team—

Senator BRANDIS—What does that do?

Mr Quaedvlieg—It essentially looks at operational and tactical intelligence collection, evaluation and analysis.

Senator BRANDIS—What about the other one?

Mr Quaedvlieg—It is centred around financial investigations.

Senator BRANDIS—And that is as well as what you describe as the financial team?

Mr Quaedvlieg—Yes, that is correct.

Senator BRANDIS—So those two intelligence teams evaluate products sourced from other agencies or other sources, do they?

Mr Quaedvlieg—That is one of their roles; that is correct.

Senator BRANDIS—What are their other roles?

Mr Quaedvlieg—Collection, evaluation, analysis and dissemination.

Senator BRANDIS—So they collect some of their own intelligence too, do they?

Mr Quaedvlieg—That is correct.

Senator BRANDIS—What is the collective name for these various teams that we have been discussing?

Mr Quaedvlieg—That is the People Smuggling Strike Team.

Senator BRANDIS—What is the relationship between the People Smuggling Strike Team and the Indonesian national police or the Indonesian policing authorities who are concerned with people smuggling?

Mr Quaedvlieg—Before I move to that, I just want to clarify that in addition to the People Smuggling Strike Team there are an additional number of investigators attached to people smuggling. In totality we have 68 staff dedicated to people-smuggling activities onshore and 13 staff located offshore on people-smuggling activities.

Senator BRANDIS—Do the 13 offshore include the staff on Christmas Island?

Mr Quaedvlieg—No, the Christmas Island contingent is incorporated in the onshore capacity that I spoke of.

Senator BRANDIS—Are these 13 the people we spoke of at the last estimates who are located respectively in Indonesia, Pakistan, Sri Lanka and—

Mr Negus—That is correct. There have been some additional staff deployed since then. Perhaps I could give you a quick run through.

Senator BRANDIS—Yes, by all means, Commissioner.

Mr Negus—We have 62 on the Australian mainland, six on Christmas Island, six in Indonesia, two in Sri Lanka, two in Kuala Lumpur, one in Bangkok and two in Islamabad in Pakistan.

Senator BRANDIS—Are these all AFP personnel or are they personnel from other agencies as well?

Mr Negus—They are all AFP personnel.

Mr Quaedvlieg—Your question, Senator, was in relation to the relationship between the Indonesian national police and the people-smuggling investigators?

Senator BRANDIS—Yes—more broadly, the Australian people-smuggling investigators under the AFP’s jurisdiction and the Indonesian police.

Mr Quaedvlieg—The interface sits firmly and centre with the six liaison officers that we have attached in Jakarta in Indonesia.

Senator BRANDIS—And they are AFP officers, are they?

Mr Quaedvlieg—That is correct.

Senator BRANDIS—And they do not perform operational activities in Indonesia, do they? They engage in pooling of information, mentoring, exchange of intelligence and activities like that, but they do not actually do any policing within Indonesia, do they?

Mr Negus—That is correct. They do not have any police powers in the Indonesian jurisdiction.

Senator BRANDIS—The description that I have given of their activities: is that a fairly accurate description, or would you like to elaborate on that, Commissioner Negus?

Mr Negus—I think that is broadly their function, yes.

Senator BRANDIS—All right. Of the various officers and teams that you have described, insofar as it bears upon Indonesian based people-smuggling, which of those teams would have had the principal input into the *Strategic forecast for transnational criminal trends and threats to Australia* document?

Mr Negus—It would have been predominantly the intelligence teams but, again, they collect from all of those operatives at various times throughout the intelligence cycle.

Senator BRANDIS—Are they filtered through the intelligence team? Is that the way it goes?

Mr Negus—They are the ones charged with the responsibility for collecting and analysing, as we have just said, the intelligence that is collected.

Senator BRANDIS—Do they also draw from other intelligence agencies, like ASIO and ASIS?

Mr Negus—Yes, they do.

Senator BRANDIS—They are clients of those agencies, are they?

Mr Negus—There is a collaborative effort in the intelligence field, yes.

Senator BRANDIS—All right. What about the six officers located in Indonesia? Did they have direct input into the strategic intelligence forecast document?

Mr Negus—Collectively, material coming from those posts would certainly contribute to the assessments that are made?

Senator BRANDIS—What is the collection point? Within your structure, what is the name of the officer or the team of officers who ultimately are responsible for reducing all of that intelligence input into the conclusions and advice recorded in the strategic intelligence forecast document?

Mr Quaedvlieg—That is a unit called the Strategic Intelligence Services that sits within our intelligence stream.

Senator BRANDIS—That is in addition to the various teams you have told me about, is it?

Mr Quaedvlieg—That is correct.

Senator BRANDIS—Are they also data evaluators, or do they receive data that has already been evaluated by your intelligence teams?

Mr Quaedvlieg—I might ask Deputy Commissioner, National Security, Tim Morris, to respond to those questions.

Mr Morris—Senator, they do both.

Senator BRANDIS—Do they draw product directly from ASIO and ASIS, or does that enter the stream of information at an earlier stage before it reaches that team?

Mr Morris—Information comes from a variety of sources, through a variety of streams—some of which could end up with that team, depending on the subject matter.

Senator BRANDIS—Does the team itself draw product directly from ASIO and ASIS?

Mr Morris—It could, yes.

Senator BRANDIS—Where is that team located?

Mr Morris—Canberra.

Senator BRANDIS—Remind me, sorry. This is called the ‘strategic intelligence team’, is it?

Mr Morris—It is the Strategic Intelligence Services.

Senator BRANDIS—How many personnel are there for it, please?

Mr Morris—I could not be certain off the top of my head, but I think between 12 and 14 at any given time.

Senator BRANDIS—This document that we are discussing—*Strategic forecast for transnational criminal trends and threats to Australia*—is that a document basically produced by Strategic Intelligence Services? Are they the ultimate authors of this document?

Mr Morris—I understand that they would have the day-to-day role of compiling it, yes.

Senator BRANDIS—So they would compile the document from all the various inputs. Is that right?

Mr Morris—That is right.

Senator BRANDIS—As answer No. 57 tells us, the document was finalised on 27 March 2009. Just pausing there, Commissioner Negus, since you have told us that this happens every two years, presumably that is the fulfilment of the two-year cycle and it would draw upon data received over the previous two years prior to its publication.

Mr Negus—That is right.

Senator BRANDIS—The answer goes on:

... and subsequently disseminated internally within the Australian Federal Police and externally to a number of Australian Government agencies.

Taking those in sequence: to which areas or entities within the Australian Federal Police is the document disseminated?

Mr Negus—It is broadly disseminated to the senior executive and to the people who we call the national managers, as part of the executive, to help them formulate strategies and collectively understand the intelligence environment.

Senator BRANDIS—Roughly how big is this document? Is it hundreds of pages?

Mr Negus—We are talking about 25 of 30 pages.

Senator BRANDIS—So 25 to 30 pages. This is obviously a document that must be fairly punchy and state conclusions rather than be a long discursive document.

Senator Ludwig—I think that goes to content, does it not?

Senator BRANDIS—No; it goes to form. Is the form of the document to state conclusions rather than contain a discursive discussion of all the data upon which it relies?

Mr Negus—It is designed to inform broader executive management. So your assessment is correct: it is a broad strategic document.

Senator BRANDIS—Is it always circulated as a whole or do different elements of it go to different parts of the agencies which are directly concerned with those topics?

Mr Negus—In my understanding, it is circulated as a whole. It is a document that is provided in that context.

Senator BRANDIS—When you say that it is circulated to the senior executive service, approximately how many members of the senior executive service receive it?

Mr Negus—Approximately 20.

Senator BRANDIS—Going back to the written answer provided to me, it says ‘and externally to a number of Australian Government agencies.’ Which are those, please?

Mr Negus—Those government agencies are the Australian Crime Commission, the Australian Customs and Border Protection Service, the Australian Taxation Office, the Department of Immigration and Citizenship, the Defence Intelligence Organisation, the Office of National Assessments, Department of the Prime Minister and Cabinet and AUSTRAC. I will stop there because you wanted to take the second part.

Senator BRANDIS—What would be the second part?

Mr Negus—The second part is the New Zealand Police, the Serious Organised Crime Agency in the UK, the Drug Enforcement Agency in the US, the FBI, the Royal Canadian Mounted Police, US Immigration and Customs and also ASIO.

Senator BRANDIS—Did you say the Attorney-General’s Department? Is the document not circulated to the Attorney-General’s Department?

Mr Negus—No, it was not circulated to the Attorney-General’s Department.

Senator BRANDIS—Why not? Is there a reason for that?

Mr Negus—It is distributed to the agencies that are more operationally based than the Attorney-General's Department.

Senator BRANDIS—Is it circulated to responsible ministers?

Mr Negus—No, it is not.

Senator BRANDIS—Why is that?

Mr Negus—Because it is an operationally focused document.

Senator BRANDIS—So it is not circulated to the Department of Home Affairs?

Mr Negus—No, it is not—not to the minister, no. There are agencies within the Department of Home Affairs, but—

Senator BRANDIS—Would it be a matter for those agencies as to whether they transmit or reveal the document to the minister?

Mr Negus—Each of the documents is fixed with a classification and they must not transmit that to other agencies without the express permission of the AFP. That is my recollection. I would just add that an important component of this is that the document that is circulated to all of those agencies I have just mentioned is a declassified document—or, I should say, a sanitised version. It still has a classification but it is a lower classification.

Senator BRANDIS—So the unsanitised or more highly classified version of the document is the one that is circulated with the AFP and the version that is circulated to other agencies externally to the AFP is the sanitised version. Is that right?

Mr Negus—That is right.

Senator BRANDIS—Are the agencies to whom the document is circulated then not at liberty to, for example, communicate the contents of the document to the minister?

Mr Negus—As I said there is a caveat placed on the document that they are not allowed to further disclose that to anyone—

Senator BRANDIS—Does that include the minister?

Mr Negus—Yes, without the express permission of the AFP. They would have to seek permission, which they did not do.

Senator BRANDIS—What about you? Do you disclose the document to your minister?

Mr Negus—No, I do not.

Senator BRANDIS—Has it ever been requested?

Mr Negus—Not to my knowledge, no.

Senator BRANDIS—And if it were requested, what would you do? Do you have a policy in relation to that?

Senator Ludwig—That is a hypothetical question.

Senator BRANDIS—Do you have a policy in relation to dealing with any ministerial requests?

Mr Negus—Again, it is a hypothetical question.

Senator BRANDIS—I am asking whether there is policy.

Mr Negus—Not a written one, no.

Senator BRANDIS—When you say ‘not a written one’ obviously you have an attitude. If it is a bit grand to call it a policy, what is your position?

Mr Negus—In such a circumstance I would not see the need for a minister to be provided with that document.

Senator BRANDIS—So you would decline?

Mr Negus—That is right, but again each case would have to be assessed on its merits.

Senator BRANDIS—Does that therefore mean that the copy of the document that goes to the Department of the Prime Minister and Cabinet cannot be shown to the Prime Minister?

Mr Negus—That is right, not without the permission of the AFP.

Senator BRANDIS—Has the Prime Minister ever sought authorisation to see the document?

Mr Negus—Not to my knowledge.

Senator BRANDIS—Do either of the other officers at the table know the answer to that question?

Mr Quaedvlieg—Not to my knowledge.

Mr Morris—Nor I, Senator.

Senator BRANDIS—Has any request on behalf of the Prime Minister or the Prime Minister’s office ever been made, to your knowledge, for access to this document?

Mr Negus—Again, not to my knowledge.

Senator BRANDIS—This is a quote: ‘Reporting indicates that people smugglers will market recent changes in Australia’s immigration policy to entice potential illegal immigrants. This may cause a rise in the number of attempted arrivals.’ Without asking you about the contents of the document, are propositions in that form the sorts of propositions which the document you are describing contains?

Mr Negus—I think that takes us very close to the wind as far as talking about what the operational intelligence reports would be.

Senator BRANDIS—It does take us close, but not over the line.

ACTING CHAIR—I think it takes us over the line.

Senator Ludwig—I think you may have flopped over the line on that one.

Senator BRANDIS—I am putting it to you that the document we are discussing, the existence of which has been confirmed in answer number 57, did contain those words. I am putting that proposition to you.

Mr Negus—Again, I decline to answer that on the fact that it would disclose the intelligence that potentially may be in that document.

Senator BRANDIS—You do not dispute that proposition though do you?

Mr Negus—Could you restate the proposition?

Senator BRANDIS—That the document contained the words, ‘Reporting indicates that people smugglers will market recent changes in Australia’s immigration policy to entice potential illegal immigrants. This may cause a rise in the number of attempted arrivals.’

Senator Ludwig—At the beginning you indicated quite clearly that you were not going to go to content. You have now gone to content. Have you recanted what you started out by saying which was that you would not go to content? Just let me be plain about this. You made a statement at the beginning where you said you were not going to go to content and you then said ‘Let me be very clear about that.’ You are now going to content. Are you now recanting what you indicated earlier on the record or are you now saying that it does not count—you put it on the record and now feel at liberty to go to content? Let me understand the position that you are putting.

Senator BRANDIS—Senator Ludwig, the way that this committee works is that you do not get to ask me questions. I get to ask you questions and I get to ask witnesses questions.

Senator Ludwig—What I am indicating is that you have provided a position that you are not going to go to it. I think we are now in a position where you are simply going to content and I think, in the interests of public interest immunity, it would be best that we take it on notice.

Senator BRANDIS—You will take that question on notice, will you, Commissioner. The minister has indicated that the question will be taken on notice.

Mr Negus—I have declined to answer the question.

Senator BRANDIS—You declined to answer the first question.

Mr Negus—Can you repeat the second question?

Senator BRANDIS—Let us clarify any confusion here. The question you declined to answer the minister has now taken on notice on your behalf which he is at liberty to do.

Senator Ludwig—And I did qualify it by indicating as to whether a public interest immunity would attach. That is the issue I am going to look at not whether or not you will receive a response to the question.

Senator BRANDIS—Minister, no doubt you will respond on the considered view you choose. The second question I am putting to you is that, with the words I have quoted to you, you are not in a position to dispute that they were words contained in the document we are discussing, are you?

ACTING CHAIR—Again, this goes to the very question of the essence of that. The minister has indicated that question will be taken on notice.

Senator BRANDIS—May I be heard on the question of why not?

ACTING CHAIR—I am not going to allow that question. It goes to the question of content, so I rule it out of order.

Senator BRANDIS—On a point of order, you have made a ruling on the basis that this discloses the content of a document, but the question in fact goes to the question of

authenticity. It would be perfectly proper for the witness to say to me, if it were the case, that the words I have quoted are not authentic. I assert that they are, but if the witness wanted to dispute the authenticity or challenge the authenticity of my question he would be at liberty to do so. I phrased the question as I did—‘Do you dispute the words?’—to give him the opportunity to do so.

ACTING CHAIR—There is no point of order and my ruling stands. At about a quarter to I want to move on to Senator Xenophon, so I encourage you to wrap up so we can proceed.

Mr Negus—There is one piece of information which has not come out to this point. The sanitised version that was circulated to all the agencies I previously listed did not contain a chapter on border operations or people smuggling.

Senator BRANDIS—Presumably you are telling us the unsanitised version did.

Mr Negus—The answer to the question on notice says that quite categorically. But the sanitised version—I will repeat it—did not contain a chapter on border operations or people smuggling.

Senator BRANDIS—I was not really asking you what the relevant differences between the sanitised and the unsanitised versions were. The written answer that has been given to me tells me that the document in some form or other did, which is what is of interest to me. What is the status here? Do you decline to respond to my question asking you whether you are in a position to dispute that the document contained those words?

ACTING CHAIR—I have already ruled that question out of order, and it would be most inappropriate for Commissioner Negus to defy the chair’s ruling.

Senator BRANDIS—On what basis is it ruled out of order?

ACTING CHAIR—Because it goes to the question of content.

Senator BRANDIS—On what basis is that out of order?

ACTING CHAIR—You said you were not going to go to the question of content, and I think it is inappropriate to go to the question of content because it is an operational document.

Senator BRANDIS—On what basis do you say that?

ACTING CHAIR—On the basis that I have just said.

Senator BRANDIS—I direct you to the opening statement and ask you to identify where in the opening statement it is prohibited—

ACTING CHAIR—Then we get to the point that the minister was making. Are you now recanting the position which you made very clear to the commissioner, everyone else at the table, everyone here and to me? In fact, you opened those remarks saying, ‘I want to make it very clear to you’—and you went through a list of people, including the chair—‘that I’m not going to the question of content.’

Senator BRANDIS—I am simply asking you: what is the legal basis of your ruling that the question is out of order?

ACTING CHAIR—Partially your integrity about what you said to me at the beginning. If you have nothing further to go on with, I will then move to Senator Xenophon.

Senator BRANDIS—So the Labor Party is preventing us from exploring this issue. The next sentence I want to read to you, Commissioner Negus—

Senator Ludwig—You seem to enjoy making unqualified statements. It appears that you even make unqualified statements about your—

Senator BRANDIS—Excuse me, Minister.

Senator Ludwig—I get an opportunity as well, and I take exception to the remarks that you make. If you are going to ask questions, ask questions. If you are going to make statements then go outside and make them.

Senator BRANDIS—I am not making statements. I am about to ask a question. Commissioner Negus, let me read you another statement from this document: ‘The introduction of additional classes of Australian’—

ACTING CHAIR—If you are asserting that it is from the document and if you are asking the commissioner to confirm whether it is in or out, I say again that is out of order. We will now go to Senator Xenophon.

Senator BRANDIS—On a point of order, I have not asked a question yet. You cannot rule a question is out of order when I have not asked it.

ACTING CHAIR—I had heard enough of it to know where it was going. Senator Xenophon, you have the call.

Senator BRANDIS—On a point of order, that is a preposterous ruling and I ask for a private meeting.

ACTING CHAIR—At the conclusion of the estimates we will have one.

Senator BRANDIS—You have to have a private meeting now if I ask for a private meeting.

ACTING CHAIR—You have lost that argument once before. You know there is no standing order that requires me to call a private meeting immediately simply because you ask for one.

Senator BRANDIS—You are preventing me from asking a question when you have not yet heard the question. Is that right?

ACTING CHAIR—I had heard enough of the question to know that it was going to the same issue that I had ruled out of order. I told you that at about a quarter to 11 I was going to go to Senator Xenophon. You indicated to me that you did not have long on these matters.

Senator BRANDIS—I do not have long on these matters.

ACTING CHAIR—You have now been going for nearly 40 minutes.

Senator BRANDIS—I have about two more questions to go. If you propose to rule a question out of order, you are obliged to hear the question first. Otherwise you cannot rule it out of order, can you?

ACTING CHAIR—I have made it very clear. You opened your question with, ‘Let me put to you another phrase’—or words to that effect—‘from the document.’ Is that true?

Senator BRANDIS—I have not asked a question yet.

ACTING CHAIR—That is far enough for me. Again, you were going to put—

Senator BRANDIS—So it is your ruling that you can rule a question out of order without hearing what the question is. Is that what you say?

ACTING CHAIR—I have heard enough of the question to be able to make a ruling on that basis consistent with what we have been talking about. Senator Xenophon, you have the call.

Senator XENOPHON—I will be as quick as I can, so that might leave some more time for Senator Brandis. Commissioner Negus, in the 2005 report by Sir John Wheeler on Australia's airport security, he commented on the lack of an ongoing mechanism to regularly collate and assess the threat of crime and criminality at major airports. It was recommended that Customs, the AFP and state and territory police consistently input timely data into the ACC's Criminal Intelligence Database. Can you tell us briefly what the AFP is doing with respect to that. How has it been used to streamline security operations at major airports? Finally, given the recent reports about maritime security, how is that information or the structure of that being used in the context of looking at security overall?

Mr Negus—I will start, and then I will hand over to Deputy Commissioner Quaedvlieg, who in his normal role is in charge of aviation security, so he will have more detail than I will. After the Sir John Wheeler review, we established the Joint Airport Investigation Teams. They are joint teams in all major state and territory airports which look at crime within the airport environment. We also established the Joint Airport Intelligence Group, which again is a team specifically based at the airports looking at criminality within those environments. They have been very successful in their own right in investigating crime in the airport environment. I can give you a couple of statistics about the success of those teams. Just this year—the financial year 2009-10—the Joint Airport Investigation Teams have made 32 arrests in the airport environment and 53 charges for both state and Commonwealth offences. Since 2007, when the teams really got up and running, they have made 189 apprehensions and 584 charges, all of that in the airport environment. Just recently we ran an operation called Operation Lament in Sydney, where we arrested six people, including one former and two current holders of aviation security identity cards, and seized 1.1 kilograms of cocaine—you may have seen that reported in the press—coming in through the air environment.

Senator XENOPHON—But there is also an issue in relation to the aviation security cards and the maritime security identification cards. There was a report prepared for the OTS by GHD that revealed that the system is failing and does not detect a whole range of criminal activities, including linkages with terrorist activity and unlawful interferences with maritime transport and offshore facilities. It goes on to say:

The offences going undetected include those relating to possessing explosives, theft, significant weapons violations, racketeering, blackmail, corruption, bribery—

and a whole range of other, even more serious offences. Are you familiar with the contents of the GHD report?

Mr Negus—Personally I am not. I have heard it mentioned earlier tonight in the estimates hearings. I know that as an agency we have been involved in meetings where this has been

mentioned. However, we have not been an agency that has been predominantly involved in the discussions.

Senator XENOPHON—I know the ACC is not familiar with it, and neither is Customs, and now neither is the AFP. There were front-page stories in newspapers just last month: ‘Security shambles at ports revealed’; ‘Criminals “free to work” despite terrorism links’; ‘Security checks at ports not up to scratch’; ‘Report calls for overhaul of system’; ‘Criminals entrenched in docks and airports’. They are some of the headlines, a lot of them front-page headlines, from just a few weeks ago. Isn’t that something that the AFP would want to be directly involved in and cognisant of given how it will impact on your role?

Mr Negus—Certainly, as an agency, yes. I will pass over to the deputy commissioner just to expand upon our role and what environment we actually have been involved in.

Mr Quaedvlieg—Senator, thank you for that question. Can I say that that is just one report that sits in a very large series of intelligence efforts around aviation and port security. I can extrapolate slightly, to give you some indication of how that all sits together in an intelligence effort, because I think that is important.

Senator XENOPHON—Have you read the GHD report?

Mr Quaedvlieg—I have not read the GHD report.

Senator XENOPHON—Wouldn’t it be something that would be of interest to the AFP?

Mr Quaedvlieg—I think you will find that there are a lot more contemporary reports, in the intelligence sphere in terms of aviation, that are a lot more relevant.

Senator XENOPHON—The GHD report relates to maritime security.

Mr Quaedvlieg—In relation to the MSIC, I believe; that is correct.

Senator XENOPHON—Yes.

Mr Quaedvlieg—That would not be a focus for the AFP.

Senator XENOPHON—So there is an overall structure to deal with these issues; is that what you are saying?

Mr Quaedvlieg—There is an overall intelligence effort which is a combined effort with the Australian Crime Commission, the Office of Transport Security under the aegis of the Department of Infrastructure, Transport, Regional Development and Local Government, the Australian Federal Police and the Australian intelligence community. From the Australian Federal Police perspective, as the commissioner mentioned we have the joint aviation intelligence groups that are placed around the five major airports. We also have a separate aviation intelligence cell that sits in Canberra. Those two aviation intelligence bodies work hand in hand with the department of infrastructure, the Office of Transport Security and the Australian Crime Commission in coalescing the intelligence effort in aviation security.

Senator XENOPHON—Perhaps you could take this on notice: in terms of the recommendations made by Sir John Wheeler in 2005 as a result of the leaked report prepared by Mr Kessing when he was working for Customs, can you advise what parts of that report have been fulfilled and what resources have been committed to that?

Mr Quaedvlieg—I can answer that from an AFP perspective. One recommendation in particular related to the AFP—that was the establishment of the unified policing model—and I can advise that that unified policing model has been implemented in its entirety.

Senator XENOPHON—Perhaps you could take the other parts of the question on notice—in terms of looking at the Wheeler report.

Mr Quaedvlieg—The other recommendations are led by the Office of Transport Security.

Mr Negus—Perhaps we could just phrase it ‘the ones the AFP is responsible for’.

Senator XENOPHON—If you could, I would appreciate that. I asked Customs questions in respect of their protocols with respect to the investigation into the Kessing case. Mr Kessing has abandoned his appeal to the High Court, on advice. My question is: normally, when there is a question of a breach of section 70 of the Crimes Act in terms of an unauthorised release of information, what is the general protocol in respect to that? Would it be a case of the AFP conducting the investigation from scratch? Or is it a case of the AFP relying on the agency—in this case, Customs—to provide a preliminary view?

Mr Negus—It would vary on a case-by-case basis. Sometimes there is an element of work done by the internal investigation agency attached to someone like Customs, where they work it up to a point where they realise there is criminality or potential criminality involved and they would then refer it to the AFP. Sometimes it comes directly to us without any work being done.

Senator XENOPHON—Can you advise—this is something that Mr Kessing has asked me to raise—what happened in relation to the Kessing case? Was there an internal investigation from Customs and recommendations made to you? Or was it a matter of the AFP dealing with it directly without any feedback from Customs?

Mr Negus—My understanding is that Customs had done some preliminary work with regard to the matter and then handed that in total to the AFP who then took over the investigation. Of course, we liaise with the agency involved if we need more information or if there are more things that they can assist us with. In this case I have to take that on notice to give you some detail, but I understand that they referred the matter to the AFP, we took over the investigation and that was proceeded with from that point on.

Senator XENOPHON—On notice, could you provide any documents in relation to that. Did the Customs agency internal investigations make any recommendation one way or the other about the matter being taken up against Mr Kessing?

Mr Negus—My understanding is that it was a preliminary investigation and that no recommendations were made, but I will double-check that.

Senator XENOPHON—Thank you.

ACTING CHAIR—We will now suspend and have a private meeting.

Proceedings suspended from 10.54 pm to 10.56 pm

ACTING CHAIR—We will resume. Apparently there is no requirement for a private meeting and there was no business put on the table.

Senator FIERRAVANTI-WELLS—Previously, Commissioner, you mentioned about the 13 officers posted offshore. I read some reports recently, one in the *Daily Telegraph*, of 17 October, that says:

Rudd needs to talk tough to Sri Lanka.

It made a reference to some Australian Federal Police assistance to Sri Lanka. Can you give me some details in relation to that; is that assistance just for training police officers, or does it include other resources as well?

Mr Negus—In June this year we received funding to set up a liaison post in Colombo in Sri Lanka. Within a few weeks we identified a person and seconded them there. They perform a role which is a general liaison role, so it is wider than just training; it is a normal liaison role as we would have in many other countries around the world. Since that time we have seconded another intelligence analyst, who focuses particularly on people smuggling to that location. So we have two people working there, and at the moment they are predominantly working on people-smuggling issues with the Sri Lankan authorities.

Senator FIERRAVANTI-WELLS—When was the decision made—did you say June?

Mr Negus—In June—I would just have to double-check—

Senator FIERRAVANTI-WELLS—Could you take on notice the background to that secondment? I assume it was additional funds?

Mr Negus—It was, yes. It was announced by the government at the time, as part of the additional people-smuggling efforts.

Senator FIERRAVANTI-WELLS—Can you tell me some history, and when the planning for that began? I also read that there are products: computers and other high-tech gear in various Asian hotspots. Sri Lanka was specifically mentioned. Could you take on notice the nature of that assistance, not just to the Sri Lankan government, police or—

Mr Negus—Certainly. There was a package of measures announced which contained that. I am happy to provide those details.

Senator FIERRAVANTI-WELLS—Did that also include the training of the 145 Indonesian police to identify and detain asylum seekers, and closely working with Indonesia at 12 key set-off points in Indonesia? That is from an article I read in the *Australian* recently. Is that part of the same package?

Mr Negus—That is part of it, however the AFP negotiated quite separately with the Indonesian National Police to provide those resources previously to that. But some operational support was provided by government to fund some of the arrangements around those teams: 145 officers.

Senator FIERRAVANTI-WELLS—When did that—

Mr Negus—Around the same period of time in June but, again, I am happy to provide those details on notice as part of that larger package.

Senator FIERRAVANTI-WELLS—My third question is in relation to an article that referred to working migration experts in Indonesia, talking about major international crime

syndicates moving Afghans and Iranians from Afghanistan, Pakistan or Iran into Australia. Can you provide me with any details in relation to that? Are you aware of that?

Mr Negus—I have not seen that particular article, but—

Senator FIERRAVANTI-WELLS—It was in the *Weekend Australian* on 10 October 2009.

ACTING CHAIR—We are going to have to leave it there. If you provide any further information, Senator Fierravanti-Wells, that could be taken on notice. Thank you, Commissioner Negus for your contribution to today's estimates. You have had the rare privilege of witnessing a Senate private meeting that had no business. These proceedings are suspended until tomorrow morning.

Committee suspended at 11.00 pm