

COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Estimates

TUESDAY, 18 OCTOBER 2016

CANBERRA

BY AUTHORITY OF THE SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Tuesday, 18 October 2016

Members in attendance: Senators Brandis, Dodson, Fawcett, Hinch, Kakoschke-Moore, Lambie, Lines, Ian Macdonald, McKim, Pratt, Reynolds, Rhiannon, Scullion, Siewert, Waters, Watt, Wong.

ATTORNEY-GENERAL'S PORTFOLIO

In Attendance

Senator Brandis, Attorney-General

Attorney-General's Department

Executive

Ms Katherine Jones, Acting Secretary

Mr Iain Anderson, Deputy Secretary, Civil Justice and Corporate Group

Ms Leanne Close APM, Deputy Secretary, Criminal Justice Group

Ms Jamie Lowe, Acting Deputy Secretary, National Security and Emergency Management Group

Auscheck

Mr Michael Pahlow, Assistant Secretary

Australian Government Solicitor

Ms Louise Vardanega PSM, The Australian Government Solicitor (Acting)

Mr Matthew Blunn, Acting Chief Operating Officer

Daryl Adam, National Manager, Corporate Support Services

Civil Justice Policy and Programs Division

Ms Tamsyn Harvey, Acting First Assistant Secretary

Ms Toni Pirani, Assistant Secretary, Royal Commission Commonwealth Representatives

Ms Petra Gartmann, Assistant Secretary, Office of Legal Services Coordination

Dr Albin Smrdel, Assistant Secretary, Courts, Tribunals and Administrative Law Branch

Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch

Ms Kathleen Denley, Assistant Secretary, Legal Assistance Branch

Ms Esther Bogaart, Acting Assistant Secretary, Legal Assistance Branch,

Ms Amanda Lilley, Principal Legal Officer, International Family Law Section, Family Law Branch

Mr Stephen Still, Principal Legal Officer, Policy and Legislation Section, Family Law Branch

Ms Bridget Quayle, Acting Principal Legal Officer, International Family Law Section, Family Law Branch

Civil Law Unit

Mr Andrew Walter, Assistant Secretary

Corporate Services Division

Mr Trevor Kennedy, Acting Chief Financial Officer

Counter Terrorism and Intelligence Unit

Mr Anthony Coles, Assistant Secretary

Countering Violent Extremism Centre

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Ms Catherine Jones, Acting Coordinator

Ms Elizabeth Brayshaw, Deputy Coordinator

Criminal Casework

Mr Stephen Bouwhuis, Assistant Secretary

Mr Mark Gray, Assistant Secretary

Criminal Justice Policy and Programmes Division

Ms Kelly Williams, Acting First Assistant Secretary

Ms Brooke Hartigan, Acting Assistant Secretary, Criminal Law Policy Branch

Senate

Mr Chris Collett, Assistant Secretary, Transnational Crime Branch

Emergency Management Australia

Mr Mark Crosweller AFSM, Director General

Mr Rob Cameron, Assistant Secretary, Crisis Management Branch

Mr Aaron Verlin, Assistant Secretary, Disaster Recovery Branch

Ms Elizabeth Quinn, Assistant Secretary, Disaster Resilience Strategy Branch

Mr Mike Norris, Assistant Secretary, Protective Security Coordination Branch

Human Resources

Ms Helen Daniels, Assistant Secretary

Information Division

Mr Stephen Andrew, Chief Information Officer

Ms Ayesha Perry, Acting Assistant Secretary

International Legal Assistance

Ms Karen Moore, Assistant Secretary

National Security Division

Ms Sarah Chidgey, First Assistant Secretary

Ms Anne Sheehan, Assistant Secretary, Security Communications Branch

Ms Samantha Chard, Assistant Secretary, Critical Infrastructure and Protective Security Branch

Office of Constitutional Law

Mr James Faulkner SC, General Counsel

Office of International Law

Mr John Reid, First Assistant Secretary

Ms Sue Robertson, Assistant Secretary

Ms Jesse Clarke, Acting Assistant Secretary

Mr Bill Campbell QC, General Counsel (International Law)

Royal Commission into Institutional Response to Child Sexual Abuse

Mr Philip Reed, Chief Executive Officer

Strategy and Delivery Division

Mr Matthew Minogue, First Assistant Secretary
Ms Ayesha Perry, Assistant Secretary
Portfolio Agencies
Administrative Appeals Tribunal
Ms Sian Leathem, Registrar
Ms Elizabeth Connolly, Executive Director, Registry Operations
Ms Jacqueline Fredman, Executive Director, Corporate Services
Australian Criminal Intelligence Commission/Australian Institute of Criminology
Mr Chris Dawson APM, Chief Executive Officer
Ms Nicole Rose PSM, Deputy Chief Executive Officer
Mr Col Blanch, Executive Director Intelligence
Mr Lee Walton, Executive Director Technology and Innovation
Mr Paul Williams, Executive Director Capability
Australian Federal Police
Mr Andrew Colvin APM OAM, Commissioner
Mr Andrew Wood, Chief Operating Officer
Mr Michael Phelan APM, Deputy Commissioner, National Security
Ms Justine Saunders APM, Acting Deputy Commissioner, Operations
Mr Ramzi Jabbour APM, Deputy Commissioner, Capability
Australian Human Rights Commission
Professor Gillian Triggs, President and Acting Aboriginal and Torres Strait Islander Social Justice Commissioner
Dr Tim Soutphommasane, Race Discrimination Commissioner
Ms Megan Mitchell, National Children's Commissioner
Mr Alistair McEwin, Disability Discrimination Commissioner
Mr Edward Santow, Human Rights Commissioner
Ms Kate Jenkins AO, Sex Discrimination Commissioner
Dr Kay Patterson, Age Discrimination Commissioner
Ms Padma Raman, Executive Director
Australian Law Reform Commission
Professor Rosalind Croucher AM, President
Ms Sabina Wynn, Executive Director
Australian Security Intelligence Organisation
Mr Duncan Lewis AO DSC CSC, Director-General
Ms Kerri Hartland, Deputy Director-General
Ms Heather Cook, Deputy Director-General

Commonwealth Director of Public Prosecutions

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Ms Sarah McNaughton SC, Commonwealth Director of Public Prosecutions Mr Mark Pedley, Commonwealth Solicitor for Public Prosecutions

Ms Gaby Medley-Brown, Chief Corporate Officer

Family Court of Australia

Mr Adrian Brocklehurst, Acting Chief Executive Officer

Mr John FitzGibbon, Acting Principal Registrar

Federal Circuit Court of Australia

Dr Stewart Fenwick, Acting Chief Executive Officer

Mr Steve Agnew, Executive Director Operations

Federal Court of Australia

Ms Sia Lagos, Acting Chief Executive Officer/Principal Registrar

Mr John Mathieson, Deputy Principal Registrar

Ms Catherine Sullivan, Executive Director Corporate Services

Mr Peter Bowen, Chief Financial Officer

Office of the Australian Information Commissioner

Mr Timothy Pilgrim PSM, Australian Information Commissioner

Ms Angelene Falk, Deputy Commissioner

Mr Andrew Solomon, Assistant Commissioner, Dispute Resolution

Mr Brenton Attard, Executive Officer.

Committee met at 09:01

CHAIR (Senator Ian Macdonald): I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee, dealing with budget estimates for 2016-17. I welcome the minister, the Attorney-General, Senator Brandis, and Ms Jones, who is filling in as head of the department, and I will come to the Human Rights Commission later, but welcome all. The Senate has referred to the committee particulars of the proposed expenditure for 2016-17, as I have mentioned, in the portfolio of Attorney-General. The committee has set Friday, 2 December as the date by which answers to questions on notice are to be returned, and we have decided that written questions on notice should be provided to the secretariat by 5 pm on Friday, 28 October.

All evidence is to be taken in public session. I think all witnesses know they are protected by parliamentary privilege. Any questions going to the operations or financial positions of the department and agencies which are seeking funds in estimates are relevant questions for the purposes of estimates hearings. There are no areas in connection with the expenditure of public funds where any person has the discretion to withhold details or explanations from parliament, unless parliament has expressly provided otherwise. The Senate has resolved that an officer of a department should not be asked to give opinions on matters of policy and should be given an opportunity to refer any such questions to superior officers or ministers. That, as we all know, relates only to asking questions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about how and when policies were adopted. Senate

Claims for public immunity should be raised. Witnesses are reminded that a statement that information or a document is confidential or consists of advice to government is not a statement that meets the requirements of the order of the Senate. Instead, witnesses are required to provide some specific indication of the harm to the public interest that could result from the disclosure of the information or document—although, as I say, that is always pretty self-evident.

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).

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(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).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

(13 May 2009 J.1941)

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

The media have requested permission to film the proceedings and there is no objection from the committee. I remind the media that this permission to film can be revoked at any time, may not occur during suspension or after adjournment of proceedings, and should be taken in such a way as does not film the documents or devices of senators or witnesses. I think that is provided in resolution 3, concerning the broadcasting of committee proceedings. That is available from the secretariat if anyone wants it. These relations to filming and media are, of course, subject to any objection from any witness. If a witness does object they should let us know.

Australian Human Rights Commission

[09:05]

CHAIR: We are starting with the Human Rights Commission. I welcome the president and, particularly, an old colleague and friend, Dr Patterson. It is lovely to see you again, Dr Patterson. Congratulations on your appointment. I welcome you and all of your fellow commissioners. Minister, Ms Jones or Professor Triggs, in that order, do any of you have an opening statement?

Senator Brandis: I do not actually have an opening statement, but I thought I would take the opportunity to introduce to the committee three new members of the Human Rights Commission for whom this is their maiden appearance at estimates. There has been quite a lot of change of personnel at the Human Rights Commission in the last 12 months—particularly in the first half of this year—with retirements and new appointments.

I introduce to the committee Mr Edward Santow, the new Human Rights Commissioner. Mr Santow was appointed as the Human Rights Commissioner when the former Human Rights Commissioner, Mr Tim Wilson, was preselected as the Liberal candidate for Goldstein. Of course, as you know, Mr Wilson is now a member of the House of Representatives. Mr Santow comes to the commission with a very distinguished background in the community legal sector has already proven himself to be a very great asset—as has Alistair McEwin, who is the new Disability Discrimination Commissioner. Mr McEwin is a very greatly respected disability advocate of long standing and will continue in that role in the new guise of Disability Discrimination Commissioner. As you already mentioned, Mr Chairman, our former colleague, Dr the Hon. Kay Patterson, is the Age Discrimination Commissioner. Dr Patterson, as well as having a distinguished career in the Senate and in the cabinet, is of course, as those of us who know her well know, has a PhD in gerontology, I

understand, and in areas germane to the role of the Age Discrimination Commissioner. I introduce those three new commissioners to the committee and welcome them.

CHAIR: On behalf of the committee, I welcome the three new commissioners and congratulate them on their appointment. In doing so, I also pay tribute to the commissioners who these new commissioners replace, all of whom this committee had a lot of dealings with over many years, and we want to put on record our appreciation of their service to their country. Ms Jones, did you want to say anything at this stage?

Ms K Jones: I do not have a statement to make, but I note that the secretary of the department, Chris Moraitis, is on leave at the moment, so I am acting for him during that period.

CHAIR: Thanks very much. Professor Triggs, do you have an opening statement?

Prof. Triggs: I do not have an opening statement, but I did also want to reiterate the very warm welcome to the three new commissioners, Dr Patterson, Mr McEwin and Mr Santow. Thank you very much.

CHAIR: Senator Wong.

Senator WONG: Thank you. I also welcome the new commissioners, with a particular welcome to Mr McEwin. I think we went to law school together. I suspect he attended more than I did. He is nodding. That is not going very well, is it, really? Professor Triggs, can I turn first to the public comments that were made about the suspension of anti-discrimination laws during a potential plebiscite debate. You made some public comments, and I will give you the opportunity to go to them, but I want to ask you a few process questions. The first is: at any point has anybody from government, the department or at a political level explored the suspension of any aspects of Australia's anti-discrimination legislation in the context of a plebiscite debate?

Prof. Triggs: No-one has explored it with me or the commission, to my knowledge.

Senator WONG: Professor Triggs, I think it was you who made some public comments that I am quoting from the *Sydney Morning Herald*. I am going to give you the opportunity to respond. The article says:

Responding to the ACL's push to have anti-discrimination laws "set aside" during the plebiscite campaign to ensure free speech, Australian Human Rights Commission President Gillian Triggs said it was a "disgraceful way of dealing with the issue".

Could you tell me the circumstances under which you made those comments?

Prof. Triggs: To be honest, Senator Wong, I do not precisely remember how that interview—assuming there was an interview—was conducted. I can certainly check my own records to see when that interview was given.

Senator WONG: Could you explain to me the reason for the content of your comments?

Prof. Triggs: My concern is essentially that the debate of course should be a respectful, measured one based on evidence, but to suggest that the current law should be suspended in any way to allow statements that under current rules would be illegal was a rather extreme suggestion. In other words, the debate should proceed in a respectful manner, and I could see no reason why we would suspend discrimination laws in order to enable comments that would not otherwise be legal under our current law.

Senator WONG: What are the relevant protections which exist under federal antidiscrimination law which you had in mind when making those comments?

Prof. Triggs: My understanding was that the reference by some within the community has been to the Racial Discrimination Act and, in particular, to sections 18C and D.

Senator WONG: In fact is there any current federal law against vilification on the basis of sexuality?

Prof. Triggs: There is no specific law—

Senator WONG: Sorry, statutory law.

Prof. Triggs: There is no statutory provision that I am aware of that would relate in particular to sexual orientation.

Senator WONG: So under federal legislation at this stage people would be free to say whatever they liked about gay or lesbian Australians?

Prof. Triggs: As I am sure you are aware, Senator Wong, there are many laws that would protect reputation and so on. Were those statements to move into areas of defamation or were they to in any way incite violence then I think it would be a limitation on the ability to make those particular comments. I referred a moment ago to the Racial Discrimination Act. Of course that deals, as you know, with racial matters and questions of national origin, which would not arise in the context of debate about sexual orientation. Nonetheless, the context in which the question was asked I believe was in the context of possibly being some sort of violation of 18C—in other words, there was a conflation, misleadingly, of the two issues.

Senator WONG: Whereas 18C currently—and I do not propose to open that discussion up; I am sure other senators will—provides a protection against vilification on the basis of being Asian, there is no similar protection in federal legislation for being vilified simply because you are gay

Prof. Triggs: Not to my knowledge.

Senator WONG: So you can say all sorts of things about gay people, and there is no protection under the federal law.

Prof. Triggs: There is no specific provision that I am aware of other than the two caveats that I have mentioned to you that if it has slipped over into other areas that would attract either the criminal law or tort law of defamation.

Senator WONG: Has there been any consultation between the government, the Attorney or his office or anybody from the department and the commission about the likely effects of a plebiscite and what the impact on the workload of the commission might be?

Prof. Triggs: Thus far, we are not aware of any change. For example, we would often base an answer to a question of that kind on the numbers of complaints we are receiving. There is no change in relation to those figures that I could point to at the moment, but it may be appropriate for me to pass to Ed Santow, who is dealing in particular with questions of the plebiscite.

Senator WONG: So Mr Santow dealing with questions of the plebiscite?

Prof. Triggs: Since his appointment, in the last few weeks in particular, he has taken over the question of the plebiscite.

Senator WONG: I am happy for Mr Santow to come to the table. Mr Santow, I know my colleague Senator Pratt will come back to this issue. I was just going to be asking a number of questions of Professor Triggs. Do you want to respond and then perhaps I can move back? I have a couple of topics for the president, if that is alright.

Mr Santow: I endorse what the president has said. The only additional point I would make is that we have had ordinary conversations both with the Attorney-General's Department and with the Attorney-General and his office about the plebiscite and the role that we can play to promote a respectful debate in respect of marriage equality. Those conversations have been entirely general.

Senator WONG: When did those conversations commence, Mr Santow? Were they at your request or at the Attorney's request?

Mr Santow: They have taken place since early August. I would have to check the correspondence, but both the department and the Attorney-General's office have been very keen to have these conversations, as have I.

Senator WONG: We might come back to that, if I may. That is very interesting. Professor Triggs, I am sorry to do this, because I am sure you do not want to have to reprise this. I want to ask some follow-up questions. There was quite a lot of evidence given in this room last year about the discussion which occurred between Mr Moraitis and yourself in which you indicated—Mr Moraitis was asked to deliver a message from the Attorney that he sought your resignation. You gave evidence about the fact that your resignation was asked for and you also gave evidence that you understood the conversation to continue to this point that you would be offered other work within the government in some sort of advisory capacity that would be relevant to your expertise as an international lawyer. You recall that very lengthy day of evidence, I am sure.

Prof. Triggs: I do.

Senator WONG: I do not propose to retraverse it, I actually just wanted to know if there has been any follow-up, any further discussions with the Attorney, with the member of the department or any member of the Attorney's office in relation to those matters?

Prof. Triggs: No, there has been no discussion in relation to that matter since that period of questioning before this committee.

Senator WONG: Presumably, you have not been offered anything further.

Prof. Triggs: I have not.

Senator WONG: Thankfully, you are not going anywhere. There was obviously a reasonable amount of dispute and conflict. There were, obviously, issues between the Attorney and you. Do you regard those as having been resolved now?

Prof. Triggs: I think it would be true to say that, since that period, relations with all government departments, particularly the Attorney-General's Department, have normalised. We have been working very effectively with the department, and I have had, I think, one or two meetings with the Attorney since then which have been cordial and we have worked in a professional manner.

Senator WONG: Did you have any opportunity to watch the questioning of Mr Gleeson by members of this committee?

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Prof. Triggs: I was overseas when that took place, but I have since read a fair amount of the transcript of that questioning of the Solicitor-General.

Senator WONG: Does it look familiar?

CHAIR: Senator, these questions are questions about the budget relating to the Attorney-General's Department, including the Human Rights—

Senator WONG: I am not surprised you want to interrupt here. I am not surprised.

CHAIR: Senator, you may think you can go wherever you like, but in any committee I chair, we try to stay within the rules, which allow questions on the budget for 2016-17, and both the Human Rights—

Senator WONG: That was very evident when you bullied the commissioner and when you bullied the Solicitor-General.

CHAIR: Please, Senator Wong. You may be able to shout over the President. You will not shout over me.

Senator WONG: You are a bully. That is the reality.

CHAIR: Senator Wong, if you are not going to play by the rules, I will suspend the proceedings of this committee until such time you are prepared to abide by the rules of the Senate, which means you do not talk over anybody else when they are speaking, particularly the chairman. As I was saying, if you can relate your question to the estimates for the Attorney-General's Department or the Human Rights Commission for 2016-17, go right ahead. But having a commentary on another committee about a different matter hardly fits that bill.

Senator WONG: I refer you to the motion, the privileges resolution, you read out before the hearing started, Chair. I am entitled to ask these questions.

Senator Brandis: Mr Chairman, I think, if I may say so-

Senator WONG: Does the rule apply only to coalition members or to the opposition as well, Chair?

CHAIR: It applies to everyone, Senator Wong, and will be enforced, as I always do. If you-

Senator WONG: Yes. We saw that on Friday. We saw your behaviour on Friday. The whole country saw your behaviour on Friday.

CHAIR: Senator Wong, I was not in charge on Friday.

Senator WONG: We know what your behaviour is like.

CHAIR: I am in charge here. I again say to you: if you are going to shout over me, as you do in the Senate all the time to the President, I will suspend this hearing.

Senator WONG: I am happy to move on with the questions.

CHAIR: I take it Senator Brandis has a comment?

Senator Brandis: Mr Chairman, I simply point out that Senator Wong is treating you and, therefore, the chair with complete disrespect. She is being abusive of you. She is calling you a bully. She is reflecting upon your rulings. I know Senator Wrong was recently counselled by the President of the Senate for her behaviour in the chamber. That behaviour is being

perpetuated here this morning. We will reach a point, Mr Chairman—it is entirely a matter for you—when this committee's work will be impossible to conduct if any member of it, regardless of who he or she may be, does not observe the standing orders of the Senate and the rulings of the chair.

CHAIR: Thanks, Senator Brandis. I already dealt with that before your contribution, but thank you anyhow. I have stopped the clock. Senator Wong, you have three minutes and 25 seconds left in your session, if you do have questions germane to estimates.

Senator WONG: I remind you, Chair, of the motion, the privileges resolution, you read out at the commencement, which, with respect, does not accord with the ruling you are purporting to make. Professor Triggs, have there been any conversations between you and the Solicitor-General in recent times?

Prof. Triggs: None whatsoever.

Senator WONG: Have any members of the profession expressed concern to you, over the period since the day in question, about your treatment by members of the government and government senators, including the chair?

Prof. Triggs: Senator Wong, this is an exceptional period of questioning, as you will remember. It inevitably attracted a very high level of media and public attention and, of course, members of the legal profession were deeply troubled by the nature and the substance of the questioning.

CHAIR: Senator Wong, I will stop your clock. Again, you refer to the rules that I read out at the beginning of this hearing. Can I repeat them: 'The Senate by resolution has endorsed the following test for relevance of questions at estimates. Any questions going to the operations or financial positions of the department and agencies which are seeking funds in estimates are relevant questions for the purposes of estimates.' Asking this witness about another Senate committee's hearing which does not involve the expenditure of funds in this agency is irrelevant to these hearings. I will stop you if you continue along these lines.

Senator WONG: I had actually concluded my questioning. Thank you.

CHAIR: Do you have another question?

Senator WONG: I just said for the third time, I have actually concluded my questioning. I am happy for you to go to another senator.

CHAIR: There are another two minutes for Labor Party time, if anyone else wants to do it. Senator Pratt.

Senator PRATT: Commissioner, can I ask your view on proposed changes to 18C of the Racial Discrimination Act, proposals to remove 'insult' and 'offend', as put forward by some members of the Senate and the House of Representatives?

Dr Soutphommasane: Thank you for your question. I have spoken frequently about the Racial Discrimination Act during the past two years. My view has been consistent. I do not believe there should be changes to the act in its current form.

Senator PRATT: Do you think the impact of the proposed changes on hate speech in this country could have the potential to affect Australia's national security?

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Dr Soutphommasane: It may embolden people to vent racial prejudice and intolerance and, to the extent that may undermine cultural harmony, that could have some bearing upon national security but no direct bearing.

Senator PRATT: How many complaints have you had under section 18C since you have become Race Discrimination Commissioner?

Dr Soutphommasane: I became commissioner in August 2013, so I will take that question on notice to give you a precise answer.

Senator PRATT: And if you could consider how many of those complaints were for people who have been insulted or offended?

CHAIR: Your time is up.

Senator PRATT: My next question was for Senator Brandis to ask him if he would rule out changes to section 18C.

CHAIR: No, we will have to come back to that.

Senator PRATT: Senator Brandis might be happy to take the question.

Senator Brandis: I am happy to answer. I am in your hands.

CHAIR: We will take that later. I try to be very fair in these hearings and try to give everyone 15 minutes, so people know how long they have to develop their argument. I do try to stick by that. I think it is in everyone's interests if we do it that way.

Senator FAWCETT: Good morning, Professor Triggs.

Prof. Triggs: Good morning.

Senator FAWCETT: When a complaint is received by the commission, what process do you apply to do the initial investigation?

Prof. Triggs: Perhaps I could begin by saying that under our statute, when we receive a written allegation of a violation of human rights or antidiscrimination law, for all practical purposes we must accept that complaint. Once we have received it there will be an attempt to talk through the matter with the complainant to investigate the facts and, as it evolves, to engage the respondent in an attempt, ultimately, to conciliate a matter. It can be a lengthy process or it can be resolved within a few weeks; it really depends on the complexity of the matter. But, in essence, once we receive that written complaint or query, we will then investigate and, ultimately, attempt to conciliate.

Senator FAWCETT: You have used the word 'allegation'. My understanding is that that means something that is unproved. Would that be your understanding, as well?

Prof. Triggs: Yes. Indeed, the legislation uses that word. It is an allegation made by a complainant, and that needs to be investigated both factually and to determine what the legal basis of any formal complaint might be further down the track.

Senator FAWCETT: If your next step is then to speak to both parties in terms of acting as a mediator to conciliate an outcome, does that imply a degree of independence or neutrality on behalf of the commission?

Prof. Triggs: The commission is certainly independent—that is absolutely vital to all of our work. The complaints are confidential, and we attempt to assess the evidence to assess the

relationship to the relevant law and to discuss the matter with the complainant—and, ultimately, the respondent—to see if we can get a conciliation.

Senator FAWCETT: If you are to be independent and therefore, by extension, neutral in that conciliation, would prejudging an outcome be inappropriate?

Prof. Triggs: Certainly, as you may know, the question of handling complaints is a matter exclusively for the president, and I am very careful not to comment on any complaint that is currently before the commission. In broader terms and outside the context of a complaint, a commissioner or I might comment on whether we felt an act was consistent with our international obligations under human rights law or under the antidiscrimination laws that are passed as part of Australian law.

Senator FAWCETT: If you are the person who is responsible for taking the initial steps of handling a complaint, can you tell me how many complaints are resolved or terminated at the initial investigation stage?

Prof. Triggs: I think about a third. Perhaps I should take this on notice to be precise, but my understanding is that about a third have no jurisdictional base, are frivolous or vexatious, or the complainant withdraws, as quite frequently happens. Much further down the track, we—or I, ultimately, as president—will decide to terminate a matter if it is not possible to achieve a conciliation. That then enables the respective parties to go to the Federal Court if they choose to do so.

Senator FAWCETT: In the media recently there has been some discussion around the rate of cases that have been dismissed, and I think the period 2001 to 2005 was compared with 2011 to 2015. Are you able to give the committee any figures from your perspective as opposed to what is reported in the media about the percentage of cases that are dismissed?

Prof. Triggs: I will take that on notice but, broadly speaking, matters come to an end for any number of reasons. Sometimes, as I say, they are withdrawn; sometimes we terminate them because there is no reasonable prospect of conciliation. But I am very happy to give you those precise figures on notice.

Senator FAWCETT: The allegation was that, I think, it was three in 10 in that earlier period that were dismissed but that, more recently, only around one in 20 has been dismissed. In broad terms, does that sound correct?

Prof. Triggs: No, it does not sound correct.

Senator FAWCETT: Okay. I would appreciate it if you could come back to us with some details on that. Can you confirm some details, then, around the Bill Leak cartoon: when did you receive the complaint for that?

Prof. Triggs: As I mentioned a moment ago, I am afraid I cannot comment on any of the complaints that come before the commission. It is absolutely vital to the process that the matters are confidential. Certainly parties may choose to take the matter to the media, but that is a matter for them. I do not have any capacity to speak about those confidential matters.

Senator FAWCETT: Would you expect the same standard of your commissioners?

Prof. Triggs: There is a very significant difference between my role as president and the role of the seven commissioners. My role as president is to conduct an investigation and conciliation process through the staff of the commission. The commissioners, by contrast,

have no function whatsoever with regard to the complaints process and they have a quite strong advocacy role to promote the legislation that falls within their mandates. So the roles are very, very different indeed, and there are effectively Chinese walls between the complaints mechanisms of the commission and the advocacy and educational work of our commissioners.

Senator FAWCETT: Have you made any comment on the cartoon that was in *The Australian*?

Prof. Triggs: I have not.

Senator FAWCETT: No comments to the media?

Prof. Triggs: None whatsoever.

Senator FAWCETT: In your view is a cartoon that portrays an officer of the law, clearly sober, in authority, taking a very reasonable action, not a good image to portray of members of our Indigenous population?

Prof. Triggs: I am afraid, Senator Fawcett, that I cannot possibly make any comment in that regard. If you would like to explore the law in relation to cartoons, there are many Federal Court decisions that would assist in answering that question.

Senator FAWCETT: Given that you cannot comment, perhaps I will put the question to the Race Discrimination Commissioner. Is that not a very positive portrayal of members of our Indigenous population?

Dr Soutphommasane: Cartoons will be subject to all matter of public debate. It is a healthy part of our democracy that we have that debate.

Senator FAWCETT: Indeed. Isn't it therefore a bad thing that people who seek to stimulate that debate are potentially being shut down by the operation of 18C and the fact that complaints can be made a legitimate political statement?

Dr Soutphommasane: I do not accept your characterisation of anyone being shut down.

Senator FAWCETT: That is fine. I think you will find there are many people in the Australian population who would not. Is it fair to say that you have made comment to the media about this cartoon?

Dr Soutphommasane: I have.

Senator FAWCETT: Do you think it is your role to prejudge the decision of the president of your commission?

Dr Soutphommasane: There is no prejudgement that I make. I have a role as defined by the Racial Discrimination Act to promote public understanding and acceptance of the act and compliance with the act.

Senator FAWCETT: So is it correct that on 4 August you made comments to Fairfax and I believe others that:

Our society shouldn't endorse racial stereotyping of Aboriginal Australians or any other racial or ethnic group.

Dr Soutphommasane: Yes.

Senator FAWCETT: Did you further say that 'a significant number' of people would agree the cartoon was a racial stereotype?

Dr Soutphommasane: I was responding to a question about the cartoon and that was a reflection of the concerns that were expressed on that day by many people in the public domain, including by your colleague, Senator Nigel Scullion, the Indigenous affairs minister.

Senator FAWCETT: Okay. But you did make the comment that you felt 'a significant number' of people would think that that was racial stereotyping?

Dr Soutphommasane: As I said, I did, and it reflected the statements that were made that day in the media and in the public domain.

Senator FAWCETT: Do you accept that that also then prejudges the situation?

Dr Soutphommasane: No, I do not, for two reasons. One, I have no role in handling complaints that are received by the Australian Human Rights Commission; and, two, the commission makes no legal determinations about matters that are brought before it in the form of complaints. So there is no judgement that the commission or I make.

Senator FAWCETT: Chair, I will leave the questioning there, but I will come back to this issue later.

Senator REYNOLDS: Good morning, Professor Triggs—I extend the Chair's welcome to all of the new commissioners. I think we all look forward to working with you.

Professor Triggs, I would like to move to an interview that you gave to *The Saturday Paper* which was published on 23 April this year. I just want to explore some of the issues that you raised in that interview. You were quoted as saying:

A shocking phenomenon is Australians don't even understand their own democratic system. They are quite content to have parliament be complicit with passing legislation to strengthen the powers of the executive and to exclude the courts. They have no idea of the separation of powers and the excessive overreach of executive government.

I assume you were quoted correctly in that?

Prof. Triggs: I do not have access to the interview on which that edited piece was written.

Senator REYNOLDS: Okay. We will get a copy, so when I get my time back we can explore that further. But does that sound something like an opinion that you have?

Prof. Triggs: I have expressed concerns in public speeches about the rise in the level of executive discretion in Australian laws, and I am, and remain, concerned that we do not educate Australians in the Constitution and the way that it works and in the way that parliament works, and that this has in some ways led to the rise of executive powers and discretion.

Senator REYNOLDS: When you were talking about the separation of powers, were you referring to the traditional tripartite separation between the legislature, the executive and the judiciary?

Prof. Triggs: Yes.

Senator REYNOLDS: Could you just expand on that a little further, in terms of what your thoughts are on that? Or your concerns, in a bit more detail?

Prof. Triggs: As I am sure you are aware, the doctrine of the separation of powers underpins our contemporary democracy. They are separate as a matter of the Westminster system that Australia inherited, and they have been adopted in our Constitution.

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Senator REYNOLDS: So, given your role and that of your commissioners, where do you see yourself sitting in relation to the separation of those three powers?

Prof. Triggs: We are an independent statutory body of the government, but we have a relatively unusual position of independence in accordance with the Paris Principles of the United Nations.

Senator REYNOLDS: So in that sense—can you just explain that a bit further? An independent statutory authority established by the government—would you say that you are part of the judiciary, the legislature or the executive government? Where do you see that you sit? In another way: who do you see yourself being accountable to?

Prof. Triggs: Under the statute that regulates all the activities of the commission, I report through the Attorney-General to parliament. So I think in that sense one would say it is a body created by a legislative instrument, accountable to parliament.

Senator REYNOLDS: I might just need a little more explanation, because the way you have just described it makes it almost sound like a fourth arm. You are accountable to the parliament? Or to the executive? Or are you saying both?

Prof. Triggs: My understanding is that I report to parliament through the Attorney-General.

Senator REYNOLDS: Okay. So in that sense you are saying that of the three, it is more as part of the legislature, rather than the executive?

Prof. Triggs: Yes, in the sense that we are bound by the precise terms of our statute.

Senator REYNOLDS: So as human rights commissioner, and then along with your organisation, how would you characterise your role in terms of human rights? Obviously, there are many human rights and there are many democratic principles. We do not have a Bill of Rights here in Australia; how do you see your role? Which ones do you see you are responsible for overseeing, or managing? How would you characterise your role in the oversight, or management or implementation of those freedoms and human rights?

Prof. Triggs: My role as President of the commission and the roles of the commissioners are defined by the Australian Human Rights Commission Act. It is not really for me to characterise them in any way; it is a matter of reading the statute and applying that statute. Perhaps what your question is getting to is: what is our mandate in terms of human rights and anti-discrimination law? That is defined in the statute.

Senator REYNOLDS: I will come back to this, but perhaps I can give a bit of time for Professor Triggs to think about this. If you were speaking to the average Australian, who—you have asserted in quite pointed remarks—does not understand our democratic system or their role within it, how would you in plain English explain your job in terms of what you are responsible for, overseeing, implementing and reporting through the Attorney-General to parliament?

CHAIR: Perhaps you can think about that, Professor Triggs. I would like to move on to Senator McKim.

Senator McKIM: Thank you, Chair. I will allow Senator Siewert to commence this block of questions.

Senator SIEWERT: I am not sure whether this question should be directed to the Attorney-General or to Professor Triggs. I am after an update on the next appointment to the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner.

Senator Brandis: I can advise you about that, and perhaps Ms Jones can add to my remarks. Mr Mick Gooda, who, I am sure those who join me at the table would wish to record, was a very fine servant of the Human Rights Commission, resigned as Aboriginal and Torres Strait Islander Social Justice Commissioner on 1 August 2016. I approved a selection process in accordance with Australian Public Service merit and transparency guidelines on 5 August and, pending the outcome of the selection process, Professor Triggs was appointed as the acting Aboriginal and Torres Strait Islander Social Justice Commissioner on 17 August. In that capacity, I understand Professor Triggs is being assisted by Deputy Commissioner Ms Robynne Quiggin.

A panel was constituted in consultation between me and the secretary of the department. The position was advertised from 24 August in the national press. Expressions of interest were received by the closing date, which was 9 September from 22 persons. The panel met and prepared a short list on 16 September. On 6 October interviews of the shortlisted candidates were conducted, and I am now in receipt of the report of the panel. I will have to make a decision as to which name to recommend to cabinet in coming weeks. I have not yet made that decision, but it is my intention to take a name to cabinet in coming weeks.

Senator SIEWERT: Thanks for that. Do you have an expected time for announcing that?

Senator Brandis: I would hope to have it done before the end of the year. The matter has to go to His Excellency the Governor- General and we do not ordinarily announce these appointments before they have been approved by the Federal Executive Council as a matter of courtesy to His Excellency. I expect all of that will be done before the end of this year and an announcement will be made before the end of this year. That is my current expectation.

Senator SIEWERT: Professor Triggs, I would like to ask you some questions in your acting role. I am particularly interested in the debate around the justice targets and whether the commission has been doing any work in that space. Have you considered the issue and have you provided any advice to government about justice targets as part of the Closing the Gap targets?

Prof. Triggs: Thank you very much, Senator Siewert. It is an important question. The commission has over many years, particularly, of course, recently under Commissioner Gooda, made recommendations in relation to justice targets, and we have reported recently to that effect.

Senator SIEWERT: To whom?

Prof. Triggs: In our Social Justice Report last year, and I believe we are doing the same this year as well.

Senator SIEWERT: In the report that will be coming this year?

Prof. Triggs: That is right. It is just being finalised now.

Senator SIEWERT: What I am after is: has your advice been sought most recently given the current debate that is on at the moment? Has your advice been specifically sought for both national and state and territory targets?

Prof. Triggs: As I understand it, no. But perhaps, if it would help you, I could take that on notice to look at when we were last asked this question and give you a fuller report on when and how we have raised the issue of justice targets. But I know it has been a matter very much on the mind of Mick Gooda throughout his term.

Senator SIEWERT: Okay, thank you. I would be particularly interested, too, in who asked you for that advice.

Prof. Triggs: We would be very happy to provide that. Thank you very much, Senator.

Senator SIEWERT: Could I please ask some questions of Dr Patterson. Congratulations on your appointment.

Dr Patterson: Thank you very much.

Senator SIEWERT: I am interested in an update on the work that Susan Ryan has been doing on mature age employment, in particular the willing to work project that has been undertaken on both mature age workers and people with a disability. Could you provide a quick update on what stage the work is at? I am presuming that you are continuing on with that work.

Dr Patterson: I feel very strongly that a lot of reports are written and there is not much action on them. I have made a commitment with the Disability Discrimination Commissioner to work together on areas that overlap, and there are quite a few areas overlapping. We have discussed the approach we will take together on those overlapping issues, and I have also been working with my very small staff of two to look at an adviser in the commission and to look at how we can effectively respond. I have also been in discussions with the Attorney-General as to when there will be a response from the government on the report. There are some very important recommendations within that. There are also the recommendations that apply to business and that apply to the states in the public service. I have discussed those with the other commissioners from around the states last Friday at a meeting we had, and I am very determined to work on that assiduously. When the report on elder abuse that the Australian Law Reform Commission is doing under instruction from the Attorney-General is released, that will also get the focus of my attention. So, rather than writing any more reviews, I think my term will be implementing, in particular, those two reports.

Senator SIEWERT: That is where I was going with that question. In terms of the program of implementation of those issues, what is the priority in that case?

Dr Patterson: There are a number of priorities. There are priorities in looking at whether, for example, we can have some form of reporting like we do about the number of women in senior positions in the public service or the government on the number of people with disability and the number of older people. I must say one of the reasons we are able to have older people working in the public service is because we fought for that issue over a number of years, including two private member's bills I had, so it has been a long time coming. But we need to do a lot more work in ensuring that the public service, both at a Commonwealth and state level, sets an example.

Senator SIEWERT: Thank you. Professor Triggs, could you provide any data on how many complaints you are receiving in terms of mature age workers and discrimination due to age?

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Prof. Triggs: I can. I could take it on notice and give you a full set of figures, but I can give you the most recent figures, which have slightly increased this year to 152 complaints, up from 149 the year before. I am sure you understand these things spike for particular reasons during any one year, but we have a slight increase in the age discrimination complaints.

Senator SIEWERT: Do you have figures with you for the year before that?

Prof. Triggs: Yes. If you like, I can read this out to you: 2011-12 is 196; 2012-13 is 157; 2013-14 is 184; 2014-15 is 149; and then we come to this last reporting year, 152. The average over the last five years is 168 complaints.

Senator SIEWERT: In the time remaining to me, I would like to ask Mr McEwin some questions. Could I start with the number of complaints—and it may be a question for Professor Triggs—you are receiving in terms of disability. I am interested in the numbers that relate to workplace discrimination or issues to do with employment of people with disability.

Mr McEwin: I will hand over to Gillian in a minute, but what I can say is that complaints on the basis of disability discrimination continue to be the highest amongst all the complaints that we receive, and employment also is amongst the highest.

Prof. Triggs: This has always been a consistent feature of the work of the commission on complaints. I know you have been following this for many years. Two-thirds of our complaints across the commission concern employment or the delivery of goods and services, and that is reflected also in the disability discrimination statistics. The most recent I have are that employment for those with disabilities constitutes 35 per cent of the complaints, and, with regard to goods, services and facilities, 33 per cent. So you can see that we get to 68, which pretty much reflects the kind of balance we have had in the complaints work of the commission for a number of years.

Senator SIEWERT: Is that remaining at approximately the same levels? You have seen a decrease?

Prof. Triggs: No, it is not decreasing at all. Again, if I may, I will take it on notice to give you a fuller set of those figures.

Senator SIEWERT: Can I clarify: the relationship to employment—that is of people with disability?

Prof. Triggs: That is right. It is by far the biggest category.

Senator SIEWERT: That is across the board?

Prof. Triggs: Across the board, in relation to every aspect of our antidiscrimination work, at least a third of complaints concern employment in one form or another.

Senator SIEWERT: So it is the same for the number of complaints you are getting from people with disability—a third are related to employment?

Prof. Triggs: It is approximately the same. It is just that in numerical terms the number for those with disabilities is significantly higher than any other category.

Senator SIEWERT: Are you starting to get complaints about the NDIS in relation to people with disability?

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Mr McEwin: We have a small number at the moment, but it is too early to comment on the nature of those complaints.

Senator SIEWERT: When you say a 'small number', what is the quantum?

Mr McEwin: I do not have exact figures. I am happy to take that on notice.

Senator SIEWERT: If you could. I am also particularly interested in whether you have received any complaints relating to the NDIS, particularly in relation to hearing.

Prof. Triggs: I know we have had some, but, again, I will have to get back to you very precisely with that information. We will be very happy to do that in a comprehensive report about these statistics.

Senator SIEWERT: I am careful in terms when I ask about the nature of complaints, but could you provide some indication of the nature of those complaints?

Prof. Triggs: Yes, we will give you rather more detailed information within each category of disability about where those complaints lie. Again, there tends to be a spike in certain areas for reasons across a year. I have every expectation that with Alistair McEwin's position we probably will give greater public understanding of those with hearing disabilities and their rights under the law, and I think it is quite likely we will actually see more of these kinds of complaints arising.

Senator SIEWERT: That would be appreciated. In the very little time I have left, could I ask: have you been involved in any response on, or what are your comments on, the CRPD committee report on Mr Marlon Noble and the lifting of the conditions on his release?

Prof. Triggs: We are of course well aware of that. It has been a very important determination under the CRPD processes. Of course, it follows on the work of the former Disability Discrimination Commissioner, Graeme Innes. You might be aware of a particular film that the Australian Human Rights Commission produced that detailed the story, which is a very sad one and a very worrying one, but also one that we have been concerned about at the commission over some time. The detention of those with cognitive disabilities in maximum security prisons is the core of the concern by the committee. I have no further remarks to make about that other than that it is always important to the work of the commission that our findings are ultimately confirmed by the relevant United Nations monitoring committee.

Senator WATT: You will probably be familiar with some reports that emerged last year about expenses that were claimed by the former Human Rights Commissioner, Tim Wilson. There was quite a degree of concern about the size of those expenses Mr Wilson had claimed in that role.

Senator Brandis: Senator Watt, that is not the truth. The issue was raised; there was no concern expressed at all. When the matter was explored in this committee, it was revealed how relatively modest, compared to the expenses of other commissioners, the expenses were.

Senator WATT: Thank you, Senator Brandis. We had an extended debate about the meaning of the word 'consult' the other day; let's not get into an extended debate about the word 'concern'.

Senator Brandis: I just think it is important that you tell the truth when you put questions to witnesses.

Senator WATT: I am happy to table the report I am referring to. That report from July last year was that Mr Wilson had run up more than \$77,000 in taxpayer funded expenses in his first year on the job. Professor Triggs, are you able to advise the committee of the amount of taxpayer-funded expenses that Mr Wilson ran up in his second year on the job?

Prof. Triggs: I will have to take that on notice to give you precise details. I think you will notice that we have also answered earlier questions on notice that set out those sums and explain the circumstances in which the expenses were incurred.

Senator WATT: I am still getting across all of the answers to questions on notice that were tabled prior to the hearing, but I take it they include a breakdown of all expenses associated with Mr Wilson, including any family reunion travel or costs that were incurred?

Prof. Triggs: Absolutely. We gave quite a detailed response to the last questions on notice and we will do the same on this occasion in light of your question.

Senator WATT: Is there a ceiling for individual commissioners as to the total travel expenses they can claim in any one year?

Prof. Triggs: Absolutely, partly reflecting our very, very limited budget. Each commissioner has a budget and they must work within that budget. There are no funds available once that budget has been expended. A commissioner will determine their priorities for the year and their travel relative to those priorities. If they do not have funds for further travel towards the end of a year—if they have not budgeted appropriately—then that is the end of their funding. That's by way of a general warning to anybody who happens to be listening!

Senator Brandis: Mr Morrison would be very pleased with you, Professor Triggs!

Senator WONG: Is that a global budget or is it disaggregated between aspects—a global budget for a whole range of things a commissioner might do to promulgate the act principles et cetera or is it disaggregated into constituent parts so that a commissioner might have a particular budget as to how much she or he can spend on travel or taxis?

Prof. Triggs: The total budget, to give you the information, is \$30,000 for each commissioner, and the commissioner will determine within that budget where the priorities lie, so in that sense it is global.

Senator WONG: Thank you.

Senator WATT: So \$30,000 for every individual commissioner to spend on items including travel, taxis—

Prof. Triggs: That is correct. The total budget for all of their work must be within that cap. Perhaps I could also point out that there tends to be a relatively higher level of expenditure by new commissioners in the first six months or so of their appointment because they, quite properly, travel extensively throughout Australia to meet stakeholders and to understand their portfolio. It tends then to be pulled back a little, and it might be in the second year that the funds might go to particular priorities. So there is a very high level of discretion for each of those commissioners as to how they expend that capped budget.

Senator WATT: That \$30,000 annual budget is substantially less than the \$77,000 that Mr Wilson racked up in his first year on the job if I am comparing the same figures.

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Prof. Triggs: May I take that on notice? One thing that I have not mentioned is family reunion amounts, which would be in addition to that cap. So perhaps I could come back to you to explain that kind of expenditure.

Senator WATT: Are there any items apart from family reunion travel that are in addition to that \$30,000 cap?

Prof. Triggs: Yes. Under the Remuneration Tribunal there are very particular provisions on living away from home allowances which would also increase the total amount when you are reviewing these financial statements.

Senator WATT: Okay. When was this \$30,000 individual cap brought in as a policy?

Prof. Triggs: Certainly for the time that I have been at the commission it has been at the level of \$30,000. I cannot speak for my predecessor, but I can again confirm that with you on notice.

Senator WATT: Okay. I suppose I am still interested in why, if there was such a budget for \$30,000, Mr Wilson more than doubled that amount. Was that something that was of concern to the commission?

Prof. Triggs: It was not of concern. Those moneys were expended in the early part of his appointment, and it was reasonable for him to spend the larger amount in that early period, but I would like, if I may, to take it on notice to review exactly what the composition of that additional fortysomething-thousand was and why it was expended. We will certainly get back to you with a very full description of what comprised that additional amount.

Senator Brandis: It is highly relevant, of course, to know that the commission's headquarters are in Sydney and Mr Wilson lived in Melbourne.

Senator WATT: I am sure there was not anyone living in Sydney qualified for the job?

Senator Brandis: I am sorry; are you suggesting that, because the commission's headquarters are in Sydney, we should only consider people who live in Sydney for appointment to the Human Rights Commission? That is a rather preposterous proposition.

Senator WATT: No. On Friday you had various attempts at trying to mischaracterise what I was saying.

Senator Brandis: You just made the jibe, 'I am sure there was not anyone living in Sydney qualified for the job?' I am merely pointing out that your suggestion that somehow preference at least should be given to people from Sydney is preposterous. I do not think I need go on.

Senator WATT: Professor Triggs, what criteria are there that need to be met for commissioners to validly claim back the cost of their travel? For us, travel has to be related to parliamentary business, electorate business or official business. Are there similar criteria that need to be met for commissioners to make a valid travel claim?

Prof. Triggs: Without question. All travel must be related to the portfolio of the particular commissioner.

Senator WATT: So in Mr Wilson's case any travel needed to be related to the very general topic of human rights—

Prof. Triggs: That is right.

Senator WATT: or freedom.

Prof. Triggs: Indeed. The commissioner does have a very wide portfolio in principle. Of course, in practice the Human Rights Commissioner will usually—or to the extent that I can say 'usually'; it has been a relatively recent phenomenon—identify some priorities. Mr Wilson did identify priorities, and his expenditure within his capped budget accorded with those priorities that had been agreed by the commission decision-making processes.

Senator WATT: What were those priorities?

Prof. Triggs: I think he was primarily concerned with LGBTI rights, but he was also working on the right to freedom of religion, particularly in the context of that debate. But he also worked with Mick Gooda, the Commissioner for Social Justice, on looking at ways in which native title and other Indigenous property rights could be used in a freer way to encourage the economic engagement of Aboriginal and Torres Strait Islanders in the economy of Australia. That was, I think, seminal work along with Commissioner Gooda.

Senator WATT: Are you able to confirm that Mr Wilson did not undertake any political campaigning or participate in any fundraisers as the Human Rights Commissioner while he was still on the payroll of the Human Rights Commission?

Prof. Triggs: I know that this matter was raised and Mr Wilson made what I as President believed were appropriate answers to those questions about attending any political event, for example. The answers that he gave were satisfactory answers to me as President, but I cannot answer that question more fully without undertaking an examination of any facts that might arise in relation to that period of his role as Commissioner. But certainly I was alert to this in relation to all commissioners. Our work is not political in that sense; we comply with our statute and we speak up for the human rights and antidiscrimination laws that are part of our mandate. Of course, many of our activities are interpreted in political ways, but so far as I am aware none of Mr Wilson's activities breach what I would see as an appropriate role of a commissioner. But obviously I have not put that question directly to him in relation to all of his activities, and it would be a question that would really need to be directed to Mr Wilson.

Senator Brandis: Your word here, of course, Senator Watt, but I might remind you—and thank you very much, Professor Triggs, for that answer—that Mr Wilson's position, as was explained at the estimates in which this matter was pursued with him and which, as the President has said, was acceptable to her, is that, as the Human Rights Commissioner, he was available to and indicated a willingness to attend gatherings of all political parties, and he did so. Mr Wilson had been previously a member of the Liberal Party, of course. He did attend gatherings of the Liberal Party, but he also attended gatherings of other political parties to speak about his role as the Human Rights Commissioner, and he made himself available to attend gatherings of any political party which wished to invite him to do so.

Senator WATT: So while Mr Wilson was the Human Rights Commissioner he did attend and speak at Liberal Party functions and fundraisers.

Senator Brandis: He attended gatherings—what the nature of the gatherings was I do not know—of various political parties, including the Liberal Party in pursuance of his advocacy function under the Human Rights Commission Act.

Senator WATT: Mr Wilson attended and spoke at Liberal party events and fundraisers while on the public purse, claiming his travel costs from the public?

Senator Brandis: No, I did not say that. You deliberately misquoted me, which is a very dishonest thing to do. I said that while he was the Human Rights Commissioner Mr Wilson attended gatherings of a number of different political parties—

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CHAIR: Senator Wong, can you please stop the commentary which you indulge yourself in in the Senate chamber. I will not allow that here. I expect witnesses and senators to be able to ask questions and answer questions without a running commentary from you.

Senator WONG: It is just very difficult to—

Senator Brandis: I have not finished my answer.

CHAIR: Sorry about that.

Senator Brandis: That is all right. You are not responsible for the bad behaviour of others.

Senator WATT: Only for his own.

Senator Brandis: Mr Wilson attended gatherings of various political parties in pursuance of his advocacy role under the Human Rights Commission Act and he made clear that he was available to, and indeed very happy to, attend gatherings of any political party, including the Labor Party, if they wanted to engage with him on human rights issues. Whether he attended or was invited to any Labor Party gatherings to speak about human rights issues, I am not aware.

Senator WATT: You mentioned that Mr Wilson, as well as attending Liberal Party events while employed by the taxpayer as the Human Rights Commissioner—what other political party events did Mr Wilson attend as the Human Rights Commissioner?

Senator Brandis: He did give particulars of other political party events at the last estimates. I recall that, among others, he referred to attending a Greens party event. His evidence was that none of the events he attended, whether Greens party events or Liberal Party events or the events of other political parties, were fundraisers.

Senator WATT: Did he attend any National Party events?

Senator Brandis: I do not remember him saying so. Do you want me to take that question on notice?

Senator WATT: Yes.

Senator Brandis: I will take that question on notice.

Senator WATT: Professor Triggs—a related question—can you confirm that Mr Wilson concluded all of his Human Rights Commission activities (events, travel and so on) prior to his commencing campaigning for preselection or as a Liberal party candidate?

Prof. Triggs: I can. He was meticulous in discussing this with me and resigning when it would be clear that he would then embark on the process of campaigning for preselection. He was very careful in phoning me to discuss that matter and to ensure that he had stepped down before he began any activities relating to a possible preselection.

Senator WATT: And no further expenses were claimed from that point on?

Prof. Triggs: To my knowledge, none whatsoever. Again, I can check that but I believe I would be correct in saying that no expenses were claimed subsequent to that period. In fact he resigned, and resigned very quickly.

Senator Brandis: It will be obvious to you from the President's response to your questions that nobody in a position to know anything about Mr Wilson's conduct has any criticism to make of it at all. His conduct as the Human Rights Commissioner was exemplary. Mr Wilson has been in touch with those who advise me, and I can give you a slightly fuller answer. Mr Wilson wrote to the state secretaries of all major political parties—which includes the Greens, obviously—indicating his willingness to attend, if invited, any gathering or event they proposed to host. The Greens took him up on that offer and he attended a Greens event, as I told you. The Liberal Party took him up and he attended at least one Liberal Party event. The Labor Party never responded to his correspondence. I should also add, for completeness, that in the letter he wrote to the state secretaries of all major political parties—including yours— he indicated that, though he was prepared to speak about the work of the Human Rights Commission and his own work as the Human Rights Commissioner, he was not prepared to participate in fundraisers.

CHAIR: Thank you very much, Professor, and Senator Brandis.

Senator WONG: There is a follow-up to that, Chair.

CHAIR: It should be the government's turn, but I have indicated to Senator Lambie, who has other estimates commitments, that she could ask some questions now.

Senator WONG: Chair, if I could just indicate that we do have a follow-up question. I am just raising it as it is a timetabling issue.

CHAIR: Senator Wong, the issue at estimates is we keep asking questions until all of the questions have been asked, so we will come back to you.

Senator WONG: I am just flagging something with you, Chair, as the usual courtesy. There is a follow-up to Senator Brandis's comments—which appear not to be consistent with a question on notice answer. I am assuming the Attorney will be staying, so I am asking if we can come back to this at the appropriate time, after you have circulated through the various parties. Thank you.

CHAIR: Senator Wong, if you had seen how this committee operates, or if you had understood the rules of the Senate, you would know that you can ask whatever questions you like—providing they are germane to the estimates process—for as long as you like. As we have proved in this committee, for as long as you have questions, we will stay here.

Senator WONG: Thank you.

CHAIR: You don't need to flag them, we will come back to you sometime. But we try to be fair here, Senator Wong, and give every senator an opportunity. That is what I am now doing—Senator Lambie, over to you.

Senator LAMBIE: Professor Triggs, I would like to take a few minutes to hear what you have to say about private members' bills where I propose to give parents—working with family doctors and others, if that is what it takes—the right to involuntarily detox their ice-addicted children. At the moment, Australian parents do not have the right to involuntarily detox drug-addicted children. I realise involuntary detox and medical treatment involve a breach of human rights, but I bring to your attention the use of involuntary mental health orders, which can be applied to people who are suffering from a mental health condition which makes them dangerous to themselves and others. So I simply ask, why can't the same legal precedent and ethical codes which apply to people with serious mental health problems

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also apply to our ice-addicted children, who are also often dangerous to themselves and others?

Prof. Triggs: Thank you very much, Senator Lambie. I think you raise a very important issue, and you make the point of contrast with mental illness and sectioning as a form of involuntary detention. I cannot answer your question precisely. I am sorry to disappoint, but I will need to take that on notice. I can only complete what I am saying by recognising that you raise an issue of very great concern to many members of the Australian community, and of course you do raise, ultimately, the concern of the right to good health and access to health services.

Senator LAMBIE: The Hippocratic oath famously states that doctors should do no harm. Just sitting back and waiting for an ice-addicted child to agree to medical treatment—isn't that actually doing harm to our children?

Prof. Triggs: If I may, Senator Lambie, I will take that as a rhetorical point.

Senator LAMBIE: Okay. And don't our children deserve the right to a life without a harmful drug addiction?

Prof. Triggs: I think there is virtually no answer to that except of course, you are right.

Senator LAMBIE: I guess I am asking here: can't we simply ignore the human rights textbooks in order to bring about a much-needed early medical intervention—in order to protect our children from a cheap, easily bought and highly addictive and harmful drug that is now threatening our children?

Prof. Triggs: I am not sure that your premise is correct. I think that one can use human rights law to achieve the outcome that you would like—which is an earlier intervention, particular with children who are at risk or who are addicted to seriously damaging drugs. Again, I will take that on notice. It is an important question and we will respond to you fully from the commission.

Senator LAMBIE: Thank you, Professor Triggs. I have a couple of questions for you, Attorney-General. I understand that as of May 2009 the government is a party to the Optional Protocol to the Convention against Torture, or OPCAT, but that it will not be ratifying the protocol. Can you tell me why it will not be ratifying that protocol?

Senator Brandis: It is not correct to say that. I want to express this with appropriate care, so just bear with me for a moment, would you? The government supports the principles in OPCAT. The government is considering ratifying the optional protocol. There are a number of procedural steps that are required before the optional protocol can be ratified, in particular, most importantly, consultation with the state and territory governments because, of course, the obligations under the torture convention and the optional protocol are obligations which affect state and territory governments and state and territory law. That process has commenced. I wrote to the state and territory attorneys-general on 25 February this year. I can let you know, Senator, because it is a very timely question, that OPCAT is on the agenda of Friday's ministerial council of attorneys-general . That is the Law, Crime and Community Safety Council, which is the COAG ministerial council which includes the Commonwealth, state and territory attorneys-general.

Senator LAMBIE: What funding does the Australian government provide for initiatives aimed at eliminating human trafficking and slavery?

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Senator Brandis: This is an issue in which the Australian government, of course, takes a very close interest and we have very strong laws in relation to the matter. In relation to actual funding, I might ask the officials responsible for this area to respond because they are probably in a better position than me to give you the particulars of programs. Ms Close, perhaps.

Ms Close: I do have some details of that, but if I could just take it on notice I will find those details for you.

Senator LAMBIE: I will liaise with you because I imagine this will carry on. But in connection with that question, how many programs does the government fund to combat human trafficking and slavery in Australia.

Ms Close: I will take that on notice.

Senator LAMBIE: Can you tell me whether slavery in happening in our own backyard in Australia?

Ms K Jones: If I could note that there is an ongoing mechanism that our department is involved in in terms of engaging around the issues of human trafficking with a range of non-government organisations here in Australia that meet on a regular basis to address a range of issues associated with human trafficking domestically. Of course we are engaged in a range of mechanisms internationally through processes such as the Bali Process to work with countries in the region to address trafficking issues.

Senator PRATT: Is it true that you have cut their funding?

Ms K Jones: Which funding would that be?

Senator PRATT: I am thinking of some of the anti-trafficking organisations like the Scarlet Alliance that does work in the sex industry and some of the Catholic organisations. They have all raised concerns about their funding cuts to do outreach work.

Senator Brandis: Rather than speaking vaguely, we will find you the specific information.

Senator LAMBIE: That is okay. I have finished that part of the questioning. Attorney-General, I want to go back to the detox for our children who are on ice. I want to know what you personally think about my idea of giving the parents the right to be able to involuntarily detox their own children.

Senator Brandis: It is something that I would like to think about. It was not, so far as I am aware, a recommendation of the National Ice Taskforce. Let me check that, but I am not aware that it was a recommendation of the National Ice Taskforce. Let me consider it and perhaps have a conversation with you about it, so we can have a full discussion.

Senator LAMBIE: Did the National Ice Taskforce recommend the ice rooms?

Senator Brandis: I will just get a brief up to the committee room. I do not have in the brief here the National Ice Taskforce's recommendations. Perhaps we could revisit that after the morning tea break. I will have it checked in the meantime.

Senator LAMBIE: Are you considering raising this subject at COAG? Is that on Friday? I heard you say that was Friday.

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Senator Brandis: There is a ministerial council. This is an area that my junior minister, Mr Keenan, who is the Minister for Justice and is responsible in particular for the Australian Federal Police, deals with. He also attends that ministerial council in that capacity as the minister of the Commonwealth government responsible for the Australian Federal Police and he deals with his counterpart state and territory police ministers. So if it is raised it would be being raised by Mr Keenan rather than by me.

Senator LAMBIE: Ice is a highly addictive drug. If the kids are taking it at 12 or 13, I do not believe at the federal level we are being nearly proactive enough to do something about that.

Senator Brandis: I have got a little bit more information with some dates to put around this to show you how proactive the Commonwealth has been. On 8 April last year Prime Minister Abbott established the National Ice Taskforce to develop a coordinated national response to the ice problem. The task force publicly released its final report on 6 December 2015. COAG adopted a National Ice Action Strategy. All of the law enforcement options recommended by the National Ice Taskforce are being or will be implemented through that strategy, which was adopted on 11 December 2015. I should interpolate to say that, because this is a national strategy, obviously it involves the Commonwealth as well as state and territory governments, but from the Commonwealth's point of view over the next four years the Commonwealth Department of Health will deliver \$241.5 million in funding addiction—there will be an additional \$24.9 million to address ice use specifically at a community level.

Senator, you raised this issue with me in the Senate in the last sitting week, as I recall. The point I made to you then and I will make to you again is that there is no insufficiency in our laws in relation to prohibiting the importation, trafficking or supply of dangerous drugs, including ice. There are very strong laws with very strong penalties that deal with such matters. It is partly a health issue, partly a law enforcement issue and partly a community education issue. On each of those three fronts, through the National Ice Action Strategy, the government, in collaboration with state and territory governments, is addressing the problem.

Senator LAMBIE: How do you address it when you are the parent of a child who is 12 or 13—and you have no rights and they are running around in the streets? That is what I am asking you, because I do not see that the Ice Taskforce actually hit this section at all. That is the problem I am having—if they are running around in the streets and the parents have no rights. We are not leading by example here.

Senator Brandis: As I said, that is an issue I would be very glad to discuss with you. It is an issue that obviously raises a range of potential legal complications, including the rights and responsibilities of parents in relation to children, rather than merely issues of the treatment of the addiction. Let us have a conversation about that. I will get those from my department who are responsible for policy implementation in this field, and perhaps relevant officers of the Australian Federal Police, in to have a good constructive talk with you.

Senator LAMBIE: Do you have concerns about breaches of human rights when considering involuntary detox for those kids 17 years and under?

Senator Brandis: I do not approach ice addiction as primarily a human rights issue, I must confess. I can understand how one could construct an argument that there are human

rights dimensions—because in any exercise of law enforcement there are potentially human rights issues of course. But I think this is primarily a health and addiction issue rather than a human rights issue.

Proceedings suspended from 10:36 to 10:57

CHAIR: I call back to order this hearing of the Senate Legal and Constitutional Affairs Legislation Committee, which is inquiring into the 2016-17 budget. We are dealing with the Australian Human Rights Commission. I pass to Senator Reynolds.

Senator Brandis: Before Senator Reynolds begins, could I provide an answer to Senator Pratt in relation to a question she asked before the adjournment. Senator Pratt suggested there had been funding cuts for NGOs that deal with anti-slavery programs. There have not been. On 25 March 2014 the Minister for Justice, Mr Keenan, announced a total of \$1.44 million funding for 2014-17 under the Grants to Australian Organisations Program to Anti-Slavery Australia, Australian Catholic Religious Against Trafficking in Humans, Project Respect and the Scarlet Alliance, to address human trafficking and slavery. As well, on 14 July 2014 Mr Keenan separately awarded a total of \$485,925 to three NGOs to progress outreach education and awareness-raising activities on forced marriage. The Australian Catholic Religious Against Trafficking Humans, or ACRATH, received \$61,000. The Australian Muslim Women's Centre for Human Rights were funded \$69,532 to address forced marriage. Anti-Slavery Australia received \$355,393 to address forced marriage. That is a triennium commencing in 2014 and that funding has been constant during that triennium.

CHAIR: Thank you, Senator Brandis. Thank you for coming back to the committee rather than taking that on notice. We appreciate that.

Senator REYNOLDS: Welcome back, Professor Triggs.

Prof. Triggs: Thank you.

Senator REYNOLDS: I would like to continue on with the theme that arose from the interview that you did. Did you get a copy of that article I was referring to?

Prof. Triggs: I did.

Senator REYNOLDS: That was your interview with Ramona Koval on 23 April this year. This section I was quoting was towards the bottom of the second page of that document. You were quoted as saying:

A shocking phenomenon is Australians don't even understand their own democratic system. They are quite content to have parliament be complicit with passing legislation to strengthen the powers of the executive and to exclude the courts. They have no idea of the separation of powers and the excessive overreach of executive government.

Ramona Koval is then quoted in this as saying:

Sisyphus comes to mind.

After which you said:

Well, it's quite true.

I share your concern about the lack of civics education, and I think you have addressed a very important issue confronting Australians today, which is one of the reasons why I have great respect for the Human Rights Commission and also your position, because you do have a very important role to play in a country that is not always very au fait with our constitution. I do

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not think I quite share your cynicism and your opinion about the Australian people that is reflected in that, but I am just wondering if you could explain to the Australian people through the committee now how you see your role. I think we talked before the break about the tripartite separation of powers. So we have got the legislature, which clearly you would agree that a member of, not being an elected representative, is that right?

Prof. Triggs: That is quite right.

Senator REYNOLDS: And you are not a member of the judiciary in this position.

Prof. Triggs: Yes. After the High Court's decision in Brandis, the commission, while it once saw itself as having a judicial role, it categorically does not have that judicial role.

Senator Brandis: Brandy.

Prof. Triggs: Brandy—I am sorry.

Senator REYNOLDS: I was just about to say, 'Brandis?'

Prof. Triggs: I beg your pardon, Attorney-General.

Senator Brandis: Brandy v HREOC 1995.

Senator REYNOLDS: I guess, by a process of elimination, that would make you and your commission a member of the executive because you have been set up by the executive?

Prof. Triggs: That is true. It is an executive function carried out by reference to a legislative instrument.

Senator REYNOLDS: You have obviously talked quite publicly about democratic freedoms and about human rights. In layman's language, I have a feeling that in public life a lot of Australians conflate the two. They conflate their understanding of our democratic rights—which are principles that are not codified and go back two and a half thousand years—along with the legislation. Your organisation is very clearly bound by the legislation that the government either implements itself or ratifies internationally to codify the standards of the day. That is my perception of it. Is that a shared understanding? How do you see the difference between democratic freedoms and legislated human rights?

Prof. Triggs: There are certainly very significant differences between international obligations, to which Australia is a party, and our domestic legislation. These principles, that one might argue have arisen through the common law process from about the 12th century, are also not a legislated part of our national laws, but, in certain circumstances, the courts will reach out to those common law principles of freedom and apply them through the technique of presumptions under statutory interpretation. But, perhaps I should say, it is not really for me to talk about, subjectively, what I view my role to be. My role and the role of all of us at the commission is determined by the terms of the legislation.

Senator REYNOLDS: To help the Australian public understand your role, it is not to actually protect, per se, democratic freedoms, but it is to oversight the implementation and the legislation that codifies human rights in Australia.

Prof. Triggs: That is broadly true, but so broad that it is perhaps not entirely helpful. Just by way of example, there is an overriding provision that the duty of the commission is both to deal with the indivisibility and universality of human rights—that is the first point. The second point is that under our statute we are bound to acknowledge the principle that every person is free and equal in dignity and rights. So this is a reflection of very well-established

language. Then, under section 11 of our statute, we find very precise statements as to the roles of the commission and in particular the role of the president in carrying out certain of those functions.

Senator REYNOLDS: Just going back to our Constitution, as I understand it from my readings, when our own version of the founding fathers were putting our Constitution together they very deliberately did not give us a bill of rights. They looked at it very carefully, had a look at what the Americans had done, but under a responsible Westminster-style government they believed that the responsibility lay with Australian citizens of the day to set particularly the ultimate protector of democratic freedoms. That was exercised in our responsible government through the legislature. My understanding of my role as a member of that legislature is that I, along with my colleagues, are ultimately responsible for ensuring that the laws of the day, including the ones that you oversee, reflect the values of the day. But that responsibility sits with the legislature on behalf of Australian citizens. Do you agree with that?

Prof. Triggs: I am not a constitutional law expert but your analysis is one that I agree with. It has taken me, if I may say so, some time to understand this process in the way that it has evolved the last four or more years that I have been in this position.

Senator REYNOLDS: It is not easy, is it?

Prof. Triggs: It really is not easy. And I come at this as an international lawyer, where my emphasis has always been on understanding the international legal obligations. But to come back to your questions, I think your understanding of it is accurate so far as my experience has been-in brief, that is. The Australian approach to the protection of human rights or fundamental freedoms has been essentially one for parliament. We do not have the instruments that almost all other countries have. Our Constitution, as you correctly say, protects certain rights: the right to freedom of religion-and I am paraphrasing, obviouslythe right to vote, the right to have your property compensated if it is taken in certain circumstances and a right, broadly speaking, of trial by jury on indictment. Apart from those rights we have known that it has been up to the High Court to interpret freedom of speech by reference to the notion of the right to political communication. We have no bill of rights, unlike every common law country in the world. When you start to understand the Australian process-an exceptional process-it is one in which the protectors of human rights is a function of parliament. That is a crucial feature of understanding the way in which Australia protects and seeks to protect basic rights, whether you define them as common law rights or wider international freedoms.

Senator REYNOLDS: Just on that: again, as I understand it—and we obviously have a shared understanding of the history of this—our founding fathers deliberately did not do it because even back then they understood that society values change over time. Had they codified a bill of rights 115 years ago, the values of 100 years ago would be what would be in our bill of rights today, and I think a number of the things that they would have codified would probably be quite abhorrent to us today. That is why I think they understood that we need to keep updating and changing our laws to protect our freedoms, because society values change over time. Is that your understanding?

Prof. Triggs: I think one of the objectives has been to ensure that the parliament of the day can exercise protection of fundamental freedoms according to the mores of the time. That

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would be I think one of the underlying expectations of the parliamentary system and, as I said, the exceptionalist approach by Australia to the way in which we protect rights.

Senator Brandis: If I could add to that, I think there is another consideration, too. It is interesting that you referred to the founding fathers—or the founders, as the people refer to them these days, in non-gendered language; they were all gentlemen. There is another reason as well, and that is that at the time the Constitution was being drawn up in the 1890s there was not the equivalent of the Bill of Rights that the United Kingdom, for example, has today. There were two famous statutes that were, in an extremely piecemeal way, a bill of rights. There was Magna Carta, of course, of 1215 and then there was the Bill of Rights of 1689, which secured the settlement of the Crown after the glorious revolution of 1688. But neither of those would be regarded as comprehensive bills of rights. So they are a bit like our Constitution, which has, as Professor Triggs has said, piecemeal acknowledgements of particular rights.

In addition to the rights that she mentioned, we should also remember the right to freedom of trade, commerce and intercourse with other states as a human right. If Mr Wilson were here he would certainly be reminding us that economic rights and property rights are very important human rights, too. It just was not the frame of reference in which the founding fathers thought about establishing a democratic polity in the 1890s.

Senator REYNOLDS: Finally on that point before I move back to your particular roles, my understanding, which I wanted to explore with you, is that they also had concern and they understood that once you codify something the words sometimes take on a life of their own, and can sometimes subsume the intention of the philosophy underneath. Obviously, we have had some debate about that in relation to 18C and in relation to other freedoms which are, by necessity or by fact, constrained by the legislation we introduce. Do you have any thoughts on that particular aspect—the tension between the words and how they may or may not, over time, take a different meaning from the intent of the underpinning philosophy?

Prof. Triggs: You raise one of the key questions of the jurisprudence of law, really, over many centuries; that is, the role of parliament is to pass laws. When parliamentarians do so they usually have a pretty clear idea in their own minds as to what those words mean, and that is true of constitutions as well. But what happens over the decades and years after that legislation or constitution is created is that the words become interpreted in different ways. I would say that that has been the lifeblood of the common law, because judges and parliamentarians have either found the words to be no longer appropriate and new laws have been passed, or the words have been interpreted in a way that reflects contemporary issues.

Senator REYNOLDS: In terms of the Human Rights Commission and in terms of your role and the role of your commissioners in the conduct of your daily responsibilities, how do you deal with that inherent tension? As you have said, as lawyers you are much more familiar with the history and the case law, but how do you deal with the issues? If you have freedoms, our democratic freedoms, for which we do not have a bill of rights and which have clear intent about freedom of speech and others, but then you are responsible for overseeing, implementing and making decisions about the words and the letter of the law, how do you balance them? They are competing tensions. Again, with freedom of speech, no speech is truly free, and we have laws that do restrain speech. How do you balance people's right to

freedom of speech, or any other freedom, with what is the word of the law? I would imagine it is quite challenging.

Prof. Triggs: It is challenging. Perhaps I can answer first by saying that we do not determine anything. We are not a judicial body. We attempt to investigate and conciliate matters according to the law as we understand it so, in that sense, we have to look at how these things are balanced when we are talking to those who have made complaints or when we are making a submission to a joint parliamentary committee, for example, on legislation coming through.

We would state or explain the law by reference to our understanding of it, and that raises your point: what do we do when you have either got competing interests or where the language is not clear? This is a constant aspect of dealing with any area of law. How do we deal with it? Partly, we deal with it on the basis of precedent—how we have dealt with matters in the past. But we take particular guidance from either parliament itself, where we might look at second reading speeches—I am sure you are aware of all of these processes—but also, on some areas in particular, we would look at the views of the relevant court. You have mentioned 18C; we look meticulously at the views of the Federal Court and, ultimately, the High Court.

You have mentioned freedom of speech. I refer you to the Monis decision of the High Court of Australia. You might recall that it was a decision that split equally three judges arguing for a freedom of speech point of view and three judges—interestingly, the women members of the court—arguing that the criminal prosecution of Mr Monis was valid and was a valid burden on the right to freedom of speech. I raise that case, controversial though it certainly is, because you have three of our finest judges taking one view and three of our very finest judges taking another view. That illustrates how extremely difficult it is. If parliament is not satisfied that the courts are interpreting these laws in the way that they intend, then it is for parliament to amend the laws to make them clearer and to explain, in the parliament's view, how the contemporary values should be reflected in the words that are chosen.

Senator REYNOLDS: That goes back to the parliamentary-

Prof. Triggs: Indeed. It always comes back to parliament.

Senator Brandis: I will just add something to that. What Professor Triggs has said reflects I think a quite fundamental philosophical difference between us. I do not say that in an antagonistic way; I say it in an academic way for Professor Triggs is an international lawyer who comes at this issue primarily through the portal, as it were, of international law and international human rights law. These are primarily legal issues, and she refers to the judges of the High Court in the Monis case for example. I know all the judges of the High Court and, with the exception of Justice Gageler, who was deeply schooled in political philosophy, I would not regard one of them as a political philosopher, and do not think that one of them would regard themselves as a political philosopher, fine lawyers though they are.

I approach this as primarily a philosophical question; a question not primarily of law but primarily of political philosophy. The question of where what rights ought to be acknowledged and where one right begins and another right ends are primarily questions of a political character, not a legal character—although, when a right is clothed in an act of parliament or principle of the common law, then obviously courts have to interpret them and

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apply them and therefore they have to, up to a point, engage in the same exercise in a practical sense that political philosophers do in academic debate.

The reason I, and the Labor Party ultimately agreed with me, came to the view some years ago that Australia should not have a bill of rights is that I do not like the idea that the primary location of the human rights debate should be at court and that the ultimate arbiters of human rights issues should be judges. I thought that the primary location of the human rights debate should be the parliament, and that one did not have to be a lawyer or a specialist human rights lawyer to have a philosophically articulate view about human rights.

In particular, Professor Triggs talked about the universality of human rights, which I acknowledge, but there is one phrase that is not used in the act that is integral to this debate and that is the 'contestability' of human rights. I grew up on Isaiah Berlin. I met him at Oxford, I dined with him and I quoted him in my maiden speech. Isaiah Berlin was the great 20th century liberal philosopher of pluralism, and one thing that he taught us was that fundamental rights can be inconsistent with one another and the task of reconciling competing rights is as much a political philosopher's task as a court's task, and the narrow education lawyers receive—I do not mean to speak against my own profession—analysing human rights as if they were purely propositions of law rather than the embodiments of broader values and embodiments of contending political philosophies, is what makes human rights lawyers sometimes take the least methodologically narrow view. Lest you think that this is an academic discussion, we see it every day. We see it in 18C, where there is a debate about the extent to which a person's right to freedom from being offended needs to be balanced against another member of society's freedom of speech. That is, ultimately, a philosophical question on which lawyers, in my humble opinion—speaking as a lawyer—have no better insight than other people do.

CHAIR: That is a very long answer to a question asked some time ago, but I appreciate—

Senator Brandis: It is the very high quality of your committee that enables these highminded thoughts.

CHAIR: It helps me as an uneducated person—as one significant commentator once said of me and my colleagues—so I have learned something from the debate.

Senator SIEWERT: I wanted to follow up on the issue of Mr Marlon Noble—the specific recommendations that related to him in the latest report, which were about the lifting of the conditions on his release. Have you made any comment on that or do you intend to?

Prof. Triggs: I realise I did not fully answer your question earlier. I have only relatively recently read the views of the CERD. Of course we would agree with the recommendation that those conditions be lifted—subject of course to proper advice from medical and legal authorities and proper judicial supervision. Those matters are beyond my knowledge, obviously. But, in principle, if properly supervised, it does seem time to consider lifting of those conditions.

To answer your question, we have not yet made any statement or recommendation on it, but I will certainly be doing so—at least in my temporary position as acting Aboriginal and Torres Strait Islander Social Justice Commissioner. This is a phenomenon that, sadly, affects Aboriginal and Torres Strait Islanders more than any other Australians. That is a matter of deep concern. We are also coming across a number of cases at the Human Rights Commission of incarceration for very long periods of people with intellectual or cognitive disabilities. That is an issue that I think needs to be considered—and indeed could be in part addressed by ratification of OPCAT.

Mr McEwin: For the record, I have spoken publicly—as Professor Triggs has said, we have not made any specific recommendations to the government—and highlighted the importance of addressing the issue raised by the United Nations.

Senator SIEWERT: Mr McEwin, I wanted to ask you about issues of representation for people with moderate or, in particular, severe intellectual disability in various decision-making bodies. Have you given consideration to how that should occur and be improved?

Mr McEwin: Do you mean across federal and state jurisdictions?

Senator SIEWERT: Yes.

Mr McEwin: I have not considered it deeply, but, as part of being newly appointed to this role, I am consulting with many stakeholders, including civil society, and the issue has been raised with me, so I am taking that into consideration. For now I would say I am happy to take it on notice, but I have not actually had a chance to consider it deeply.

Senator SIEWERT: That would be appreciated. It is an issue that is coming up more and more.

Senator McKIM: Attorney, I want to follow up on an answer you gave to Senator Lambie regarding the process for ratifying OPCAT. You said you had written to state and territory attorneys on 25 February. I presume you have had replies. Could you just describe the nature of your letter and, if you are able to, the nature of the responses you have had from state and federal attorneys?

Senator Brandis: I will see if there is a copy of the letter available—I am sure I do not have all the responses here, so that part I will take on notice.

Senator McKIM: It is fair to say it has been a long-running process—probably going back six or seven years, I think. When I was Minister for Corrections in Tasmania, this was on my agenda, and that was a few years ago now.

Senator Brandis: It has been a long process. I do not have the letter, so I will take that on notice. I do not see any reason why we could not—I am happy to give you a copy of my letter to the states and territories, and I will ask those who advise me to think about this carefully, but I myself would not have any particular objection to releasing to the committee their replies.

Senator McKIM: Thank you, Attorney, so I will take it that you have taken it on notice. Are you able, in very general terms, without referencing any specific reply, to say whether there were significant concerns raised with you during that consultation around the potential for OPCAT to be ratified by Australia?

Senator Brandis: I might ask Mr Walter to address that, because he is the officer of my department who has been in charge of the process.

Mr Walter: It is important to appreciate where we are in the process. So the Attorney-General's original letter was really kicking off those discussions with the states and territories. Those discussions have continued at officer level throughout this year, and are going to continue, as the Attorney said, on Friday. Essentially, if I can paraphrase the responses we

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have got from the states and territories, they want more detail on what implementation in Australia will look like, and that is the discussion to be had with the states and territories. So I do not think there is opposition as such or anything like that; it is more wanting to know in concrete terms what ratification will mean, how will we implement the protocol and then they will make a final decision.

Senator McKIM: Has the department or the Attorney responded to those requests in providing further detail about the implications of ratification?

Mr Walter: Certainly there have been discussions, including at the last meeting of Attorneys-General. There have been discussions in general terms, but really what we are in the process of now is settling at the government level what that will look like and then having those negotiations and discussions with the states and territories. So there is no firm view yet.

Senator McKIM: Thank you, Mr Walter.

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Senator Brandis: I might add a bit more information. So the consideration of the ratification of OPCAT began with the coalition government. There were attempts to-let me correct myself: there were attempts during the previous Labor government to advance ratification, but the model for ratification proposed by the Labor government was completely unacceptable to the states and rejected by them. So ratification for that reason did not go ahead. We revived the process-or I revived the process. I am optimistic of a much better outcome than my political predecessors were able to achieve. As I said in answer to the earlier questions, it is essentially under consideration, but under favourable consideration, by the Commonwealth.

Senator McKIM: Thank you, Attorney, for that extra information. What is the process from here: Do you have an indicative time frame in mind for the next steps and, ultimately, ratification?

Senator Brandis: I do not have an indicative time line to give you, but the process is bedding down these issues with the states and territories that Mr Walter has adverted to.

Senator McKIM: And the last question for you on this, Attorney: do you require the cooperation of the states and territories in order to ratify?

Senator Brandis: In a federal system, yes. Because OPCAT-

Senator McKIM: It would require changes to state and territory legislation potentially?

Senator Brandis: It will impose obligations that are obligations that will have effect at every level of government.

Senator McKIM: Professor Triggs, has the commission been involved in any discussions with government or the AGD around the ratification of OPCAT?

Prof. Triggs: We have been arguing for ratification of OPCAT since it was first signed and, particularly in the last few years, we have reiterated those requests, because, were there to be ratification of OPCAT and a national monitoring mechanism put in place, that would help to ensure that proper standards are met-whether you are talking about elder Australians held in institutions or those with cognitive disabilities or children in detention, criminal facilities, juvenile detention, et cetera. It would be a remarkably valuable means of ensuring proper monitoring and inspection of our detention facilities across the country.

Senator Brandis: Senator McKim, I can add to that answer. I have been progressing this with Mr Santow, the Human Rights Commissioner, and we have spoken about this a couple of times very recently.

Senator McKIM: Thank you, I am very pleased to hear that. Professor, I do not want to put words in your mouth, but I will ask you a leading question. Would it be fair to say that the commission is a little bit frustrated at the length of time that this process has been underway?

Prof. Triggs: It really is not from me to express those emotions. I am sure you are aware that the ratification process is always more difficult in a federal structure. In fact, one of the first things I did when I became President was to write to the attorneys all the states and territories to ask if they saw any particular legal impediments. I received responses from most, not all; and the responses were that they already were prepared for ratification of OPCAT as soon as that was possible. So I think we see the enormous importance of that convention and its implementation in Australia. At least in my early inquiries about this, I saw very little concern at state and territory level, although obviously I am not privy to the current discussions and, of course, states and territories will ask the question: what is this actually going to look like? How will it interfere with what we already do? How will that build on what we are already doing? That is particularly the case in Western Australia, where they have quite an advanced process of monitoring.

Senator McKIM: As an international law expert, is it your understanding that OPCAT would apply to our onshore immigration detention facilities, which would include Christmas Island? I am assuming it would have no effect at all for the offshore facilities on Nauru and Mannus Island.

Prof. Triggs: That would be my understanding.

Senator Brandis: That follows from the High Court's decision, inevitably.

Senator McKIM: Amnesty International released a report yesterday, entitled *Australia: Island of Despair.* Have you had the opportunity to read that?

Prof. Triggs: I have not read that; I have read extracts of the report and I have heard parts of it read out, indeed, at these hearings.

Senator McKIM: You together with the commission conducted a report, *The Forgotten Children* report. Could you refresh the committee's organisational memory about the methodology used to gather the evidence that informs that report?

Prof. Triggs: We held a formal inquiry as part of my powers as President. We held five public hearings to listen to evidence that was taken on oath. We called for submissions from the public and received something in the order of 240 submissions. We conducted monitoring visits to 13 detention centres, some of them several times, and I visited Christmas Island three times. We had interviews with—and I stand to be corrected and would like to take it on notice—something in the order of, I think, 1300 to 1500 parents and children over about a one-year period. Linked to the methodology also was the integrated role of medical practitioners, child psychiatrists and paediatricians. That was a key part of our methodology, to make sure that, whatever judgements we were making, ultimately, in relation to the mental health of children, their medical advice would be highly credible and support the commission's report.

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Senator McKIM: I want to put to you a couple of quotes from the executive summary of this report and ask you for a response. Firstly, this committee heard evidence yesterday that Australia is not in breach of the refugee convention, but the Amnesty International report says:

The report exposes how the Government of Australia has flouted the Refugee Convention, undermining its purpose and the values for which it stands by subjecting children, men and women who have sought protection in Australia to egregious abuses ...

Could you comment specifically in regard to the refugee convention and whether the commission or you have a view about whether Australia is in breach?

Prof. Triggs: We have long been on the record in numerous reports over many years, and by my predecessor, raising concerns that aspects of Australian treatment of asylum seekers and refugees breaches the refugee convention. We have a chapter of our report on the forgotten children that deals specifically with Nauru and the children who continue to be held there, and we have couched concerns by reference to the refugee convention and its obligations, particularly the discriminatory aspects of the policy.

Senator McKIM: It is not reasonably contestable, is it, that Australia is in breach of the refugee convention? It is a bit of a no-brainer—wouldn't you say?

Prof. Triggs: As I say, we have consistently reported that the policies within Australia and the policies for which Australia is responsible on Manus and Nauru breach the refugee convention.

Senator Brandis: Senator McKim, the government does not accept that as being an accurate—

Senator McKIM: Sorry, Attorney, are you mounting an argument that we are not in breach of the refugee convention?

Senator Brandis: Australia is not in breach of the refugee convention.

Senator McKIM: So we are not refouling refugees?

Senator Brandis: We are not refouling refugees. The people who are sent home are the people who have not been found to be refugees.

Senator McKIM: By turning boats back at sea, we are not refouling refugees? Is that seriously your argument?

Senator Brandis: The refugee convention is a series of obligations in relation to the treatment of people who come to a country of refuge. The turn-back that policy of the government, which has now belatedly been adopted by the opposition, produces the outcome that Australia's refugee obligations are not engaged because the people do not come to Australia; they are turned back. You can mount a humanitarian critique of that, by the way, and I understand your argument and you have heard my argument, and we can have that policy argument. I would argue that by destroying the people-smuggling trade, we have saved thousands of lives and that that is a better humanitarian out of harm than the alternative. However, from a legal point of view, the government's position is that the turn-back policy does not constitute a breach by Australia of the refugee convention.

CHAIR: Hang on. I am dealing, belatedly, with Senator Reynolds' point of order that this is turning into a debate. Whether it is or it is not, your time has expired and we can come back to you later, Senator McKim.

Senator WONG: Professor Triggs, you said you had filed some answers to questions. We have 50 questions which were answered this morning and we have 99 questions which are still outstanding, the majority of them from February. So it may be that your answers are in that lot in relation to Mr Wilson's travel and other issues. Certainly there was a question that Senator Collins asked regarding your approval of Mr Wilson's travel asked in February—AE\003. Have you provided an answer to that?

Prof. Triggs: Excuse me, while we—

Senator WONG: Sure. I am talking across the portfolio, so I will be asking questions of A-GD as to why they are not complying with the Senate's directions on this, but I did want to give you the opportunity to tell us whether you had actually provided these answers.

Prof. Triggs: I am advised that we did respond to that question.

Senator WONG: When did you do that?

Prof. Triggs: I wonder if you could give us a few minutes just to clarify that and maybe allow you to use your time more effectively.

Senator WONG: You want me to come back to it?

Prof. Triggs: Would you mind, and then we can be clear?

Senator WONG: That is fine. Can you just remind me to, in case I forget?

Prof. Triggs: Yes, I will.

Senator WONG: Senator Brandis, in answer to a question that I think I asked, a chamber question, No. 2758—I asked about Mr Wilson's attendance at what was described on the flyer as 'An Evening with Tim Wilson', hosted by the Liberal Party's Essendon SEC on 11 August 2015—in that answer you said: 'Mr Wilson has not attended Liberal Party fundraising events in his capacity as Human Rights Commissioner. He has attended a number of Liberal Party events in a private capacity, as the guest of his partner.' I am just trying to square that with your answer—do you want a copy of that answer?

Senator Brandis: No. I remember the question.

Senator WONG: I have not asked a question actually. If I could finish-

Senator Brandis: You said, 'Do you remember the question?'

Senator WONG: I am about to ask you a question.

Senator Brandis: You asked me, 'Do you remember the question?' and I said I did. So you did ask me a question, which I answered.

Senator WONG: Thank you.

Senator Brandis: You can go on with the rest of your primary question if you like.

Senator WONG: Thank you. I appreciate that. When we were last asking questions, when my colleague Senator Watt was last asking questions of you, I think you gave an explanation that Mr Wilson contacted the secretariats of all parties and said, 'I'll come along if you want

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me to,' and obviously only the Liberal Party—and apparently the Greens—asked him to come along. Do I understand—

Senator Brandis: That is probably because they are more interested in human rights than the Labor Party.

Senator WONG: I am trying to square away both answers. I just want to put something to you.

Senator Brandis: Do you mean reconcile? When you say 'square away', do you mean reconcile both answers?

Senator WATT: It is always a difficult task with your answers.

Senator WONG: Would you just like to be pompous for the whole day or only for this question?

Senator Brandis: There is no point in being abusive, Senator Wong.

CHAIR: Senator Wong, we have been going fairly well so far.

Senator Brandis: Senator Wong, you are becoming boorish now.

Senator WONG: No, I am not. I would just like to ask a question without being corrected.

Senator Brandis: You remind of Donald Trump—

CHAIR: Order! Order! Senator Wong, Senator Brandis, order please!

Senator WONG: Can I ask a question?

CHAIR: We have been going fairly well—

Senator WONG: Thank you. I am trying to get to my question.

CHAIR: perhaps because I have not started yet!—but can we just go back to your question, Senator Wong? Can you repeat the question perhaps?

Senator WATT: She has not had a chance to get to it.

Senator WONG: I have not actually had a chance to get to the question.

Senator Brandis: Senator Wong, I am really trying to be helpful. When you say 'square away', do I understand you to mean how I reconcile those answers? Is that what you mean?

Senator WONG: If you would like me to use that, I am happy to use that.

Senator Brandis: I just want to make sure that I am-

Senator WONG: I am very pleased to be-

CHAIR: Okay, well, that has clarified that.

Senator WONG: Can I finish my question?

CHAIR: Senator Wong, can you please proceed with your question.

Senator WONG: I am trying to.

CHAIR: Well, please do.

Senator WONG: Thank you. Do I understand these two answers to mean-

Senator Brandis: It's like a Harold Pinter play!

CHAIR: Senator Brandis, order!

Senator WONG: Do I understand the answers to be reconciled in this way: Mr Wilson attended party events that he was invited to; he also attended fundraiser events of the Liberal Party in a private capacity, all whilst he was a commissioner of the Human Rights Commission?

Senator Brandis: I do not think that is quite right. My understanding—and I will check with Mr Wilson, who, although no longer answerable to this committee, is of course now a member of this parliament, and I will check with him—is this. The position when Mr Wilson was the Human Rights Commissioner was that he had been a member of the Liberal Party; he resigned from the Liberal Party when he was appointed Human Rights Commissioner and was not a member of the Liberal Party at any time during his incumbency. I will not go over it again but I have explained to you what his position was in relation to being available to all political parties and indicating to all major political parties that he was available to attend to speak about the Human Rights Commission generally and his work as Human Rights Commissioner in particular, and some were interested, like the Liberal Party and the Greens, and others, like the Labor Party, were not. My understanding is that, during the period that Mr Wilson was the Human Rights Commissioner, his fiance was a member of the Liberal Party, and on occasion Mr Wilson accompanied his fiance to Liberal Party events that his fiance was attending—in effect, as a plus one.

Senator WONG: So in this period when he is paid for by taxpayers in what is supposed to be a nonpartisan position, he is attending Liberal Party events ostensibly as the Human Rights Commissioner and then he is also attending Liberal Party events in a private capacity, including fundraisers, and headlining them. Is that right?

Senator Brandis: Sorry; what was the last one?

Senator WONG: And headlining them.

Senator Brandis: What does that mean?

Senator WONG: I am not sure I have a lawyer's definition, but maybe you should get out more.

Senator Brandis: I do not know. I am not familiar with the wording you—

Senator WONG: The pamphlet says 'An evening with Tim Wilson' and has a lovely picture of Mr Wilson. I think I attached it to the question that I asked.

Senator Brandis: I do not remember that document, so I cannot comment on it. But it is pretty simple, Senator: people who are human rights commissioners are entitled to be engaged or married and they are entitled to accompany their fiance or spouse if the fiance or spouse is a member of a political party. I remember some years ago there was a High Court judge, Justice Michael McHugh, whose wife, Jeannette McHugh, was a minister in a Labor government. Indeed, it would be a violation of the terms of the Sex Discrimination Act—as you should know, Senator—a violation of a person's human rights, to attack them or criticise them for their relationship status, which is what you seem to be doing, Senator.

Senator WONG: No, I am not, and you know it.

Senator Brandis: Yes, you are, Senator.

Senator WONG: No, I am not.

Senator Brandis: You, of all people, should know better.

CHAIR: Order!

Senator WONG: Thank you, Chair. I appreciate it. He does not have a human right to use his position to generate funds for the Liberal Party. The pamphlet says, 'An evening with Tim Wilson' and reads—

Senator Brandis: Why don't you show me the document?

Senator WONG: I am getting a copy for you. It reads:

The Essendon SEC (State Electoral Conference) in conjunction with Essendon West Branch and Moonee Ponds Branch would like to invite you to an intimate cocktail function with Tim Wilson, Australia's Human Rights Commissioner. Here about his thoughts on his role and the future of Rights in Australia ... Cheques: Payable to Liberal Party of Australia, Victorian Division, Essendon SEC.

He was not attending as a partner of a member-

Senator Brandis: How do you know?

Senator WONG: He was attending as the drawcard for a Liberal Party function and using his position as such. None of that can be reconciled with your answers.

Senator Brandis: Let me see the document, Senator Wong.

Senator WONG: May I put this to you: how can this be reconciled with the standards we ought expect of our statutory officers?

Senator Brandis: Senator Wong, I think your attack on Mr Wilson because of his relationship status is absolutely a disgrace.

Senator WONG: I am not doing that, and you know I am not.

Senator Brandis: I will examine the document and I will respond to your question.

Senator WATT: The document was attached to the question on notice you have answered already.

Senator Brandis: Chair, how far away are we from seeing a photocopy of the document? Senator Wong said that it had been made available. Was that true, Senator Wong.

Senator WONG: I thought I had attached it to the question in the chamber. If not, I have asked my office to bring you a clean copy. I do want to say this: it is all very well for you to bluster about me attacking—

CHAIR: Senator Wong, that is inappropriate.

Senator WONG: Chair, I have been accused of attacking someone on the basis of their partner. That is not the case.

CHAIR: Senator Wong!

Senator WONG: Senator Brandis is seeking to avoid answering the question.

CHAIR: The committee hearing is suspended.

Proceedings suspended from 11:49 to 11:54

CHAIR: This hearing of the Legal and Constitutional Affairs Legislation Committee is resumed—

Senator McKIM: Chair—on a point of order—

CHAIR: Yes?

Senator McKIM: Thank you. Just very quickly, Senator Brandis has made a very serious accusation against Senator Wong, which you allowed to occur without any interruption at all from the Chair—

CHAIR: What was that?

Senator McKIM: That she is attacking someone's human rights on the basis of a relationship. It is a serious accusation and when Senator Wong attempted to respond to that you did not allow that to occur. I just urge you to allow Senator Wong a reasonable opportunity to respond without interruption to that accusation.

CHAIR: There is no point of order. I was intending to do that. Why I suspended the hearing was that both Senator Wong and Senator Brandis were shouting over each other and, more importantly, shouting over me! I will allow everyone their say, which I intended to do, but I will not have anyone shouting over anyone else. That happens too often in the Senate chamber and it will not happen in my committee.

So there is no point of order there. Senator Brandis, do you have a point of order?

Senator Brandis: I am sorry, I did not think I was shouting at anyone as a matter of fact. But just to be perfectly clear, I do say that. I do not say it lightly, but in view of the evidence before this committee what Senator Wong has done has been to attack Mr Wilson because of his relationship status.

Senator WATT: That is completely untrue!

Senator Brandis: That is a disgraceful thing to do!

Senator WATT: That is yet another—

CHAIR: Thank you, Senator Brandis—

Senator PRATT: Do you have any evidence-

CHAIR: Senator Pratt, can you please be quiet? Thank you, Senator Brandis. Now, I will allow Senator Wong to continue and to respond, should she so wish, for the final four minutes of her time.

Senator WONG: Thank you, I do have some questions. My only response is that that is demonstrably untrue and beneath contempt, that he would say that.

Senator Brandis: I can understand-

CHAIR: Senator Brandis!

Senator WONG: I want to ask questions now—

Senator Brandis: Sensitive about this, Senator Wong—

CHAIR: Senator Brandis—order!

Senator WONG: Chair, may I ask a question?

CHAIR: Order! Just stop again.

Senator Brandis: You are the one who said it!

CHAIR: Stop again. Senator Brandis, please do not interrupt as the senators are asking questions. If you want to make a comment afterwards, you will have your opportunity.

Senator Brandis: I would like to, yes.

CHAIR: Okay. Senator Wong?

Senator WONG: I appreciate that, Chair. I have provided to the Attorney a copy of the file which was in fact tabled in this committee previously. It is quite clear from this that this is not Mr Wilson attending as a guest of his partner; it is Mr Wilson headlining a fundraiser.

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Now, the question I have here is—

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Senator Brandis: I do not accept that it is clear, by the way.

CHAIR: Order! Senator Brandis.

Senator Brandis: I do not think that that is an either/or-

CHAIR: Order, Senator Brandis! You will have the opportunity to answer.

Senator Brandis: Thank you.

CHAIR: At \$40 it would hardly be a fundraiser, but anyhow, that is-

Senator WONG: Well the cheques are payable to the Liberal Party of Australia, so I assume that there is somebody who is—

Senator Brandis: According to this document you have to pay for the drinks, Senator.

CHAIR: Senator Brandis, please! You will have the opportunity to answer.

Senator WONG: I assume you are stopping the four minutes on the clock while he keeps interrupting?

CHAIR: Yes, I am. I will.

Senator WONG: I appreciate that, thank you, Chair. My question in this is, and it is to both the president and, if necessary, to the Attorney: can we please, on notice, obtain what public moneys were spent by way of travel expenses associated with Mr Wilson's attendance with events, whether that is the attendance at this event or any other political fundraiser or other meeting of the Liberal Party? I want to know what he spent on attending party political events, whatever the context was in which he attended them, in terms of public moneys.

Senator Brandis: Senator Wong—

Senator WONG: Can I—

Senator Brandis: I am sorry; I thought you had finished. I was just going to say that because, happily, Mr Wilson is now a member of this parliament and is in the building at the moment I will speak to him over the lunch adjournment and, even though he is not answerable to this committee, I will get you an answer.

Senator WONG: Professor Triggs, do you want me to come back to you on that other question?

Prof. Triggs: Yes, thank you very much. We have answered the question, and we transmitted that question to the secretariat on 15 March this year.

Senator WONG: To the secretariat of this committee?

Prof. Triggs: I am sorry—I beg your pardon—it was to the department.

Senator WONG: Right. So the department has had your answer since 15 March. We are now in October and we still do not have it. Perhaps I could flag with the department that when we get to cross portfolio that will be one of the questions I will ask. Thank you, Professor Triggs; thank you, Chair.

Senator Brandis: I have now been provided with a copy of this document. This is why I always insist on seeing documents rather than relying on what Senator Wong reads out. What this document does not say, although the necessary implication of the question is otherwise, is that Mr Wilson was aware of or party to the fact that this was a fundraising function.

Senator WATT: An innocent abroad!

Senator Brandis: This is a function that is being promoted by a particular branch of the Liberal Party. Now, Senator Wong, as I understand, is suggesting—

Senator WATT: He's been duped!

CHAIR: Senator Watt, please: you do not help by interjecting.

Senator Pratt interjecting-

CHAIR: You either, Senator Pratt.

Senator Brandis: Senator Wong is, as I understand her, suggesting that there would be something wrong with Mr Wilson, in his capacity as the Human Rights Commissioner, raising funds for a political party. And I agree with that, but there is nothing at all in this document to suggest that Mr Wilson was aware that this was a fundraising function.

Senator WONG: There is a [inaudible] cheques to the Liberal Party of Australia.

CHAIR: Senator Wong.

Senator Brandis: As I have said before—but let me make it perfectly clear, and I understand from Mr Wilson that these arrangements were acceptable to Professor Triggs—Mr Wilson attended public events, including events of all political parties, and of whatever character, to, in his capacity as a Human Rights Commissioner, promote the work, to explain his thoughts about human rights in Australia. That may have been what he was doing here; I will ask him. But he also happened to be engaged to a person who was a member of the Liberal Party and attended functions with his fiance during that time.

Senator Watt interjecting—

Senator Brandis: Senator, might I simply refer you to section 6 of the Sex Discrimination Act, which makes relationship status one of the prohibited characteristics protected by the Sex Discrimination Act, and section 25, which applies that protection to clubs—

Senator WATT: Are you seriously making this argument?

Senator Brandis: and section 4, which defines a club to include a political association.

CHAIR: I will take that as an answer to that question, and with that we will suspend for one hour.

Proceedings suspended from 12:02 to 13:08

CHAIR: I call back to order the budget estimates sitting of the Legal and Constitutional Affairs Legislation Committee inquiring into the 2016-17 budget. We are still dealing with the Australian Human Rights Commission. Professor Triggs, I hope you were able to find some food this time so that we are not starving you. Like all senators, we find our own food; it is not supplied by the committee as your interview might have suggested. I hope you did find somewhere to eat.

Prof. Triggs: I am really delighted that you are concerned about our dietary needs on this occasion.

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CHAIR: I had not read your interview before, Professor, and I was shocked to see that you were suggesting that we had starved you at that hearing two years ago that I think we all want to forget. I just wanted to make sure you were not in that same predicament again.

Senator REYNOLDS: Professor Triggs, I have a very brief issue. I would like to ask questions of Commissioner Mitchell, if I could, in relation to children. Ms Mitchell, I have a very quick issue that I want to raise with you, and I understand that you will probably have to take it on notice. Yesterday I raised with the AFP the issue of what we call 'paper orphans' and sham orphanages internationally. I will refer you to the *Hansard* from yesterday, but in short there is a situation now where transnational crime is setting up orphanages all across the world. They are trafficking children into these orphanages, giving them paper documents. The long and the short of it is that they are subject to sexual exploitation and all of the things that we know make residential care so bad for children, but nobody really appears to be addressing it internationally. I have some questions on notice for the AFP. I know your remit is here, within Australia, but given that it is an enormous abuse of the rights of children internationally, which inadvertently Australians in many cases are unknowingly facilitating, I wonder whether you are aware of the situation and whether you have any information from your counterparts in the region.

Ms Mitchell: Thank you for the question, Senator. Yes, I am aware that this is an issue, and it has been raised in particular with me by international non-government organisations, who operate domestically and internationally, like Save the Children and UNICEF—those kinds of organisations. I work quite closely with them. You are correct in saying that my remit is children in Australia. Having said that, if Australians are travelling overseas to participate in, or are supporting, something which inadvertently or deliberately is seeking to exploit children, that is of concern to me and it will be to the commission more generally, given we are party to several conventions that protect the rights of children. As a commission we have relationships with a number of countries in our region in particular where some of this is occurring and also with their human rights institutions, where they exist. That would provide an opportunity for us to explore that further. But I would like to get more information from you, have a look at the transcript from yesterday and follow that up with you, if that is all right.

Senator REYNOLDS: Thank you very much. I understand it is a question out of left field a little bit. I will pass some information to you perhaps through the secretariat. There is an extensive body of information on this now internationally. The question I posed, which is perhaps a rhetorical question, to the AFP commissioner yesterday was: why should Australia not take the lead? Somebody needs to stand up internationally now and pull all this together and highlight it, certainly for Australians who are probably unwittingly supporting transnational criminals exploiting kids—or at least so that people make better choices when they go overseas to assist children.

Ms Mitchell: Let's have a discussion about that and what we can do as a leader in this area of the world. Also, may I note I have some links with Anti-Slavery Australia and I have been working on a project on cybersex crime involving children with them as well.

Senator REYNOLDS: I can see some very fruitful discussions coming here. Thank you, Commissioner. Professor Triggs, I want to come back to where we left off on the broader issues about the remit and where the Human Rights Commission fits constitutionally and

practically now in society. If I remember correctly, the Attorney-General very generously provided an explanation of the difference between where the legislature and the executive sit in terms of political policy and the greyness and the challenges of issues there versus your role in interpreting and implementing the legislation that we pass.

I just want to come back to another quote from that interview you did with Ramona Koval. I am just after that section where you were quite critical, if not concerned, about Australians' understanding of the Constitution and separation of powers. You then go on to make some perhaps rather unflattering remarks about those of us in the legislature. What you actually said—or are quoted as saying, anyway—is:

One can be astonished at the very simplistic level at which I need to speak. Our parliamentarians are usually seriously ill-informed and uneducated. All they know is the world of Canberra and politics and they've lost any sense of a rule of law, and curiously enough for Canberra they don't even understand what democracy is. Not an easy argument to make, as you can imagine: me telling a parliamentarian they need to be better educated. [laughs] But it's true.

I am just wondering if you could explain a bit further about where that has come from as an opinion.

Prof. Triggs: Well, as you correctly said—

Senator REYNOLDS: I do not take it personally, because I understand you were expressing your opinion of all of us in this, but it is quite a serious thing to say. Could you just explain it a bit further to us.

Prof. Triggs: As you have said, this is an extracted article. It is written by a journalist, and the comments were taken out of context from a much larger and considered interview. I think the tenor of the comments is related to the first, and that is that there is very little understanding of international law and very little understanding of our treaty obligations and why those obligations are not respected in Australian law, as an almost exceptionalist position. So that was the tenor of the remarks, although not the precise language.

Senator REYNOLDS: And not quite the intent, possibly?

Prof. Triggs: I am sorry?

Senator REYNOLDS: And not the intent—or at least not, obviously—

Prof. Triggs: My message was, frankly, apropos of a concern that the parliamentarians were not reading reports and were not aware of issues that, had they read the reports, they would have been aware of.

Senator REYNOLDS: These issues are very important, absolutely, but in the environment that the Attorney-General talked about before there are many, many important issues that come before us. I am on nine committees, including the human rights committee, so I am trying to learn quickly, thanks to your little book here. But the tenor of your comments, to me—this is just my possibly biased reading—is obviously that you are reflecting on me and every other parliamentarian. Is your point, then, that human rights are more important than all of the other issues that we face and deal with and the complexities of policies that we deal with? Are you making a subjective judgement there?

Prof. Triggs: I am not making a subjective judgement at all, and I am certainly not saying that one issue is more important than another. What I am saying is that, as president, I have a legislative obligation to carry out the terms of the statute, the Human Rights Commission Act,

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and that act specifically asks me as president and, in appropriate circumstances, commissioners with their jurisdictions to call to account—using that language loosely, but basically to monitor, to call to account, to educate in the public arena or to stimulate public discussion—about Australia's compliance with our international treaty obligations on human rights, which we have accepted and ratified, and also with domestic legislation on, predominantly, the four pieces of anti-discrimination legislation.

Senator REYNOLDS: Do you see it as our role as legislators to be subject matter experts on all of this legislation? I note here that, in this very helpful booklet that the Human Rights Commission has produced, there are about 300 pages of international conventions alone. So are you suggesting that it is our role to be intimately familiar with all aspects of domestic and international law?

Prof. Triggs: I would not say 'intimately familiar with every aspect'—that puts it too high—but I would say very strongly that for the reasons that you have, if I may say so, very helpfully teased out, because of the very exceptional approach that Australia takes to human rights, the responsibility lies with parliament predominantly. When parliament fails to exercise its historical and traditional restraint in passing laws that breach fundamental freedoms, that becomes a matter of great concern.

Senator REYNOLDS: When you say fundamental freedoms, are you referring to international laws and domestic laws, or are you referring to democratic freedoms, which are expressed in the legislation?

Prof. Triggs: The answer is all of them—in other words, the treaties to which Australia is a party. We have a legal obligation to comply with those standards, and I think it is the responsibility of parliamentarians to familiarise themselves with those treaties. Critically, of course, it is parliamentarians that pass the laws, so I think it is incumbent on them initially, in order to pass those laws appropriately, to familiarise themselves with Australia's obligations, both internationally and at common law. Frequently, those common law rights and freedoms are overridden, as indeed the Australian Law Reform Commission so amply demonstrated in its report earlier this year.

Senator REYNOLDS: That is in relation to opinions about us—but you have explained the reason for your, some may say, hurtful, but those of us who have been around for a long time and have had a lot worse things said about us by trolls on Twitter accept that that sort of language is focused at us. In terms of your public discussions in this whole area we have been talking about today—rights, freedoms and bills of rights—I notice that in a speech you gave on 29 September this year for the State of the Profession Address at the Law Society of New South Wales you were also quite probably professionally challenging the lawyers but you were also quite critical of your own profession, particularly those lawyers and barristers who work on behalf of the Commonwealth. I want to read some of these out to you. They are being circulated around now.

Senator WONG: Point of order. Has this been tabled?

Senator REYNOLDS: Can I table this article?

CHAIR: Can you just explain what it is and what you are distributing it for?

Senator REYNOLDS: I just wanted to give Professor Triggs the courtesy of a copy of the article I am quoting from. This article was in *Lawyers Weekly*.

CHAIR: To answer Senator Wong, as I understand it you are not tabling it? Are you going to ask Professor Triggs—

Senator REYNOLDS: If you like I can seek leave to table the article.

CHAIR: Do you want to table it?

Senator REYNOLDS: Previously I quoted Professor Triggs from an interview she gave, and Professor Triggs asked for a copy, so I gave her and the committee a copy of the article I was quoting from. This is another article.

CHAIR: If you are going to quote passages to a witness you should give them a copy of it, and you are doing us the courtesy—

Senator REYNOLDS: And Professor Triggs does have a copy.

Prof. Triggs: I have a copy.

CHAIR: That is fine, so unless you want to table it?

Senator REYNOLDS: No. I was just giving her the courtesy—

Senator WONG: I just wanted to understand the status of it.

CHAIR: That is what it is—it is a courtesy.

Senator REYNOLDS: But if it needs to be tabled I can seek to do it.

CHAIR: No.

Senator REYNOLDS: Okay. The article said you called for the country to have a 'serious conversation' about a bill of rights, which, as we have discussed, is a live issue and something that is important of the nation. The article then quotes you as saying that 'lawyers and the courts have continually failed to protect fundamental freedoms'. The article continues:

Australian lawyers seem to have lost their focus as protectors of the most vulnerable, according to Professor Gillian Triggs.

...

"There seems to be some kind of fatigue among the profession, and we're walking and sleepwalking into accepting the unprecedented rise outside wartime of executive power and governmental discretions that are not fully subject to judicial scrutiny or the rule of law."

I am not sure if this is a rhetorical question or whether you are asking this of the lawyers who were in attendance, but you are then quoted as saying:

"What kind of a lawyer would work with the government to remove the illegality through context, in the way of a retrospective provision, to arguably make legal something which is probably illegal?"

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"I do not believe that it's acceptable for our courts to ignore the legal regime ..."

I will just stop there, because those were obviously clear references to a large cohort of people in your own profession. Could you explain the reasoning behind this speech?

Prof. Triggs: Firstly, again, I have to point out that this is a report by somebody who was listening to my speech. It is disjointed and it is out of context. It is not in the context of the cases. I went into a great deal of detail discussing some of the major decisions of the High Court of Australia and made some observations accordingly. So this is a very short-hand, and on occasion inaccurate, statement of what I said at that lecture. If it is of any interest to you, I am the patron of the New South Wales Young Lawyers Association, and they want to be a

little edgier than perhaps the profession is—they wanted something that was going to cause them to think, and that was my task for that day. And I took that challenge. I have a full text of that speech if you would like it.

Senator REYNOLDS: That would be helpful.

Prof. Triggs: It puts all of those remarks in the context of particular decisions of the High Court. Probably boring my audience, I went into a great deal of detail as to the elements of the decision that did not pick up on the very issues that you have been raising. Why is the court not referring to common law principles? Why is the court never, in the cases I mentioned, referring to international legal principles? And why are these broader concepts underpinning our democracy not referred to?

Senator REYNOLDS: So you see this as your role in protecting both the democratic rights and freedoms that are the responsibility of Australian citizens, and also your official mandate in terms of the law itself?

Prof. Triggs: My mandate is the human rights under the international treaties, and that was the dominant point that I was making. We have treaties to which Australia is a party that are not forming part of the law enforcement or jurisprudence of Australian courts and practice of lawyers.

Senator REYNOLDS: In your opinion?

Prof. Triggs: I have an opinion—well, it is not an opinion—I have a statutory obligation to call into account the compliance or otherwise of Australia with human rights, as defined by the legislation. That includes, of course, treaties such as the International Covenant on Civil and Political Rights.

Senator Brandis: Can I—

Senator REYNOLDS: Before you do, I want to follow this point. In here you go on to criticise the High Court for their impartiality in this matter, saying that they show a preference to 'shy away from reference to international legal obligations'. So you are passing an opinion on the professionalism of the High Court here, not just your legal colleagues.

Prof. Triggs: I am not passing judgement at all on the professionalism of the court. They are the highest qualified lawyers in the country and I deeply respect them. My concern is that other courts, for example, the courts under other the chief justices, have regularly referred to Australia's international legal obligations, particularly in relation to human rights, and indeed that underpins the Mabo decision by the Australian High Court. What I am concerned about is that of recent years the High Court has chosen not to do so. That is my concern. We have had decades in Australia where we have made references to the very active role that Australia has played in negotiating international treaties, from the time of Dr Evatt to the 1990s, and that informed the common law, to use the language of Sir Gerard Brennan. However, over recent years that has not been the case. So part of my statutory mandate is to promote an understanding in the public arena of the way in which human rights are implemented in Australian law, and that is exactly what I am doing in speeches of this kind.

Senator Brandis: Senator Reynolds, I do not want to break your train of thought-

CHAIR: You will, because we are finished in this segment. We can come back to it.

Senator Brandis: Mr Chairman, I think it is important to say this at this point if I may have your indulgence, because probably not many of the people listening to the proceedings of this committee are lawyers, so I think it is very important to explain, as all lawyers know, that because Australia signs up to a treaty, like a human rights treaty, that does not make the provisions of that treaty part of Australian domestic law. There is a debate between lawyers, which Professor Triggs has adverted to, as to the extent to which regard should be paid to the terms of a treaty by courts, for example, or by administrative decision makers. But nobody should think that because Australia signs a treaty the provisions of that treaty thereupon become part of domestic law. They do not. There was a decision of the High Court in 1995 called Teoh's case, which might be regarded as perhaps the high-water-mark of the view that obligations in the international instruments have some municipal legal meaning. The jurisprudence in the last 20 years or so-and I think this is probably what Professor Triggs is adverting to-has rather moved away from that. A lot of more-conservative black-letter lawyers thought Teoh's case was almost close to heretical. I heard Justice Keane of the High Court, for example, in the days before he was a member of that court, give a scathing conference paper about the erroneous reasoning of Teoh's case. So I agree with Professor Triggs that the trend is away from giving the degree of salience in municipal or domestic law of international obligations, but unlike Professor Triggs, being more of a black-letter lawyer myself if I may say so, I am with Justice Keane, and others, who think that that is a good thing, not a bad thing.

CHAIR: I will take that as a further answer to Senator Reynolds's last question for this segment. We can come back to Senator Reynolds later if she has other questions.

Senator HINCH: After the Nauru files came out in *The Guardian*, the Greens had a proposal about refugees. I put an amendment onto that calling for an independent child administrator on Nauru. Yesterday, I asked Secretary Pezzullo if in fact the government had laid any groundwork or done any modelling or done anything towards that. In fairness to him he said no they have not and, no, the government did not intend to. I am wondering what your commission's attitude would be towards an independent child administrator on Nauru?

Prof. Triggs: We have repeatedly reported and advised the government that it is imperative there be an independent guardian for the children. At the moment the Minister for Immigration is the guardian for the children and we think that that is a conflict of positions and we have argued very strongly against it. I believe I am correct in saying that some of the relevant United Nations bodies have made the same point. But I think were you to pursue that suggestion it would certainly have the strong support of the Australian Human Rights Commission. May I also mention that my colleague Megan Mitchell has I believe argued for exactly the same thing in her own work in attending detention centres at which children are being held indefinitely.

Senator HINCH: Secretary Pezzullo raised the issue that Nauru being a sovereign nation you would have problems there. But private companies are there and it is our operation. Surely there is no impediment to having a government sanctioned child administrator?

Prof. Triggs: I think there would be no impediment whatsoever in establishing that. It is of course sovereign territory for the sovereign state of Nauru, but it is manifest, from what you have already described and what we all know, that Australia is to a very high degree paying for these activities. It is largely, to use international law term, in effective control of

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what is happening with regard to these children. It would present no practical difficulty whatever to appoint an independent guardian who could oversee the treatment of these children.

Senator WONG: I want to ask about the Marrakesh treaty, which might be Mr McEwin.

Senator Brandis: Are we coming back to the questions you asked about Mr Wilson, because, as promised, I have obtained some information over lunch that I am sure will satisfy your concerns.

Senator WONG: Can I ask this question first please.

Senator Brandis: Sure, as long as we have the opportunity to set the record straight on the other issue.

Senator WONG: I am reasonably new to this area in this committee, but I understand the treaty was ratified by Australia last year and came into force just this month gone, or the September prior. Is that right?

Mr McEwin: Yes, on 30 September it came into force.

Senator WONG: I understand there is a set of amendments to domestic law, that is copyright law, which is required. I just want to understand what engagement there has been with the commission on these amendments.

Mr McEwin: As you can appreciate, most of this engagement was before my time, but what I can do is give you a very quick recap. The commission has spent extensive time liaising particularly with organisations such as Vision Australia and others in the civil society who focus on issues that affect people who are blind or have vision impairment. We supported the signing of the treaty. Our position, currently, is that we call upon the government to enact that into domestic legislation as soon as possible.

Senator WONG: Have you been advised by the government how long this domestic amendment process might take? To be fair, Mr McEwin, I think your colleague is seeking your attention.

Mr McEwin: Thank you. I have written to the relevant minister, and perhaps the department can answer that.

Senator WONG: I am happy to take it now, Mr Walter. I was proposing to ask this after dinner, but do you want to respond on that point?

Mr Walter: Thank you, Senator. A couple of issues. One is, being a copyright treaty, it is now the responsibility of the department of communications.

Senator WONG: Of course.

Mr Walter: It was in this department, but it moved some time ago. Formerly, I was responsible for copyright. When we took the treaty through the Joint Standing Committee on Treaties, our position was that we were compliant with the Marrakesh Treaty. However, there were some things that could be done to the Copyright Act that would improve its implementation in Australia. I think that is still the position but, unfortunately, you would have to ask the department of communications—

Senator WONG: But the legal position is: we are compliant but there are a range of what you described as best practice arrangements—perhaps, that is a reasonable label—

Mr Walter: Yes.

Senator WONG: or reasonable description—that the government is seeking to progress through the amending bill you described.

Mr Walter: And any further questions, really, would have to go to the Department of Communications and the Arts now. It has been a while since—

Senator WONG: That is fine; of course. I am happy to put some on notice. Do we have a time frame—this hasn't been introduced yet into parliament, has it?

Mr Walter: I don't think so but, again, it is for the Department of Communications and the Arts.

Senator WATT: Professor Triggs, I have a few questions about funding to the commission. Earlier this year there were some media reports in which you raised concerns about the impact of a series of funding cuts on the commission, cuts under this government. Could you please outline the impact of these cuts, including in relation to the statutory obligations of the commission?

Prof. Triggs: This is a matter of very profound concern for me as president and for the commission as a whole. The funding cuts have been very deep and they have affected the work of the commission. One area that is most important, I believe, to the Australian community generally is the access-to-justice provisions through our complaints process.

We receive something in the order of 20,000 inquiries a year, some of which crystallise into formal complaints—about 2,000 of those. It is an enormous amount of work, and that work must be done. That is the priority for the commission because that is our interface with the public and, I might add, it saves hundreds of millions of dollars, in terms of matters that would otherwise have to go straight to the Federal Court.

If you will excuse me for a moment, mentioning, of the matters that we try to conciliate we succeed in conciliating well over 70 per cent of them, with a very high rate—in the 90s—of satisfaction not only of the complainants but the respondents are also satisfied of the service. I stress this because this is a function that we cannot allow to decline. Recently, over the last few weeks, I am advised that we are now starting to get a backlog of cases. For the last four years we have been on top of those cases, and it has been a real effort by commission staff to do that. But now—because we have not been able to replace staff and we have lost many members of staff—we are finding, for the first time, I believe, in four or five years, that we are establishing a backlog. That is the most obvious example.

With regard to the rest, we have seven commissioners, one of whom has no budget base at all, and the others, where money was taken away—my executive director, Padma Raman, will correct me—we had money for two positions, originally, disability and sex discrimination. One of those was taken away when the Hon. Susan Ryan was made joint commissioner for both aged discrimination and disability, and we lost that budget for one of those positions. That has not been returned to us. So we are, effectively, funding two commissioners without any budget at all as well as the very significant and direct cuts of moneys that have gone from us to the royal commission on sexual child abuse. We fully support the work of that royal commission, but there is a huge point of difference.

We have an annual budget of about \$15 million as our core budget, and I think you all know that that commission is extremely well funded. There was no basis whatever for taking

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those moneys from us, nor for failing to return the funding that underlay the position of the Disability Discrimination Commissioner. We, of course, are delighted to have those positions back in place, but to have them without funding has meant that cuts have been far deeper for our agency than I believe they have been across the board for other agencies. It is a matter of deep concern to me, personally, that the commission should be reduced in the way that it is. We have a miniscule budget and we are performing—our staff are performing—an extraordinary task.

To be more precise about answering your question in relation to other matters, we are now attempting to work across commission on projects that are agreed by the commission so that instead of having commissioners able to choose, pretty much, whatever projects they might have liked to have taken on, they are now agreeing to take cross-commission matters. And many matters are cross commission. If we took, for example, children in detention or those in detention who have, sometimes, disabilities, they predominantly concern Aboriginal and Torres Strait Islanders and they concern, in many cases, youths and children. So you can see that in this way we are able to pick up issues that cross the commission portfolios.

The other work of the commission has to keep on going. All our submissions to the relevant parliamentary committees, scrutiny role and the various submissions on new legislation have to continue as part of our statutory obligation. And we do perform those tasks, I believe, to a high standard, but it is becoming increasingly difficult to meet those standards.

Senator WATT: So from within your relatively small annual budget of \$15 million you have had to find the funding for one extra commissioner—

Prof. Triggs: In effect, two.

Senator WATT: Two commissioners. You have had some of that money taken away for the royal commissioner. Presumably, there have been other funding cuts or efficiency dividends that have applied across the Public Service.

Prof. Triggs: That is correct.

Senator WATT: The net effect is that that is reducing the service provided to members of the public through your conciliation service.

Prof. Triggs: That is my view. We can demonstrate that, objectively, if you would like me to report to you—

Senator WATT: You mentioned a backlog in those complaints. Is there any time frame?

Prof. Triggs: I have been advised by the director of that unit that the numbers are increasing but I do not have those numbers at my fingertips. I can certainly get those figures for you, because that is the canary in the coalmine. It is a very good indication that we are slowly starting to slip backwards in our ability to handle these matters as quickly as we can. And you would be aware, of course, that some matters, particularly those in the public arena, are taking a great deal of time, on behalf of the staff.

Senator WATT: I would appreciate it, if you could take that on notice: the figures around the backlog, how long complaints are taking to get to conciliation and conclusion, and some of the more precise details about the funding cuts that you have been talking about.

Prof. Triggs: I would be very happy to do that.

Senator WATT: Apart from the impact on complainants and respondents, in these matters being prolonged, you mentioned that there is also a spillover effect into the courts. Resolving matters in conciliation keeps people out of court, which is a lot more expensive. Do you have any sense about what sort of impact that is placing on our courts and additional expenditure?

Prof. Triggs: By delaying the result, of course, we are actually delaying a matter going to the courts—so that is actually keeping it out of the courts, which perhaps would please the Federal Court. But it is hardly in the interests of justice for Australians. Can I stress that this is a very, very important part of access to justice in Australia. It costs the complainant nothing to make the complaint, and it costs the respondent nothing to deal with it. In that way, and because of confidentiality, these matters can be resolved with a very high rate of success through conciliation.

Senator WATT: Thank you. If you could take those few matters on notice, that would be much appreciated.

Prof. Triggs: Thank you very much.

Senator PRATT: I have a quick question for the Sex Discrimination Commissioner. Australia's response to CEDAW was due, I think, in 2014. I was wondering whether you had made inquiries with government as to when that response would be expected.

Ms Jenkins: I have not made any inquiries as yet.

Senator PRATT: Could you briefly comment on our progress in relation to CEDAW?

Ms Jenkins: No, I could not make any comment at the moment.

Senator PRATT: Perhaps you could take that on notice. That would be useful.

Senator WONG: If I could just follow up on that, Ms Jenkins: I am sorry, what is the reason you cannot make any comment on our progress against CEDAW?

Ms Jenkins: Since I have started, I have done a whole range of activities within the country to look at the issues that exist within Australia, but I have not been required before next year to really examine Australia's position on that.

Senator WONG: You cannot give the committee, as the commissioner, some assessment of our progress towards some of the matters that CEDAW sets out. Is that correct?

Ms Jenkins: Not in this forum, but I am happy to take that on notice and come back to the committee.

Senator WONG: That would be useful. It is not just a point in time assessment, is it? Although that may be how it is reported, it is how we are tracking against the various equality objectives. I hope at some point we will get some sense of where you think we are going. Are we tracking the right way or the wrong way? Is that possible?

Ms Jenkins: Yes.

Senator WONG: How would you like me to phrase the question on notice?

CHAIR: It is a matter for you, Senator.

Senator WONG: I am trying to be helpful.

Ms Jenkins: So the question was: how are we tracking against CEDAW?

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Senator WONG: That is correct, thank you.

Senator PRATT: I have a brief question for the Children's Commissioner—I will try and make it brief. We have two royal commissions before us currently in this country that are relevant to the rights of children. I am interested really to get your views, Commissioner, heading out the other side of those royal commissions. Clearly, some of the reasons such systemic abuse has existed in our country is because institutions and organisations and individuals have not seen fit to give children access to their human rights, and to express them and to have full access to them. What do we look towards—post- these royal commissions—to put those days behind us as a country?

Ms Mitchell: It is a great question. We do at the current time have two royal commissions operating which should give us some very strong guidance in how to better protect children in Australia, and under the care of adults in particular.

In terms of the Royal Commission into Institutional Responses to Child Sexual Abuse, the Human Rights Commission has been closely aligned with that commission as it has gone about its work. We have made several submissions to it, in particular around how to standardise, harmonise and nationalise Working with Children checks so that we can give greater protections to all children consistently across the country. That is one area where we have made strong representations—also in terms of creating child-safe organisations that respect and honour the rights of children. You are quite correct; I think the Royal Commission into Institutional Responses to Child Sexual Abuse has revealed that in the past many institutions did not have child rights as their focus, and hence children were silenced and were not encouraged to speak up or be visible and have a voice. That is very important in terms of the Convention on the Rights of the Child, which we ratified 26 years ago. It is very strong in noting our obligations to ensure that children have a voice, that they are not discriminated against, that their survival and development is assured, and that adults act in children's best interests-those are the guiding principles of that convention. Following up the discussion we had before, as we do not have a bill of rights in this country those sorts of rights that we have promised to children are not always reflected in domestic law, and so we really need these kinds of processes to take us forward in changing practice and cultures-and, wherever we can, to reflect our commitment to those rights in our domestic laws.

In terms of the other royal commission, the one in the Northern Territory—we were all very shocked to see those abuses against children happening today in our country. I really commend the government for its quick and speedy action on that in setting up a royal commission. It so happens that I have been looking into the oversight of juvenile justice in this country as part of my major work this year. The findings of that work will be part of my statutory report to parliament at the end of this year. As part of that work, it also looks at the extent to which we might be ready to ratify OPCAT, and the greater surveillance and oversight and consistency and standards of treatment of children. It looks at to what extent we are ready to become OPCAT-compliant. So hopefully that will be helpful to the states and territories, and to the Australian government as it considers ratification of OPCAT, which I really believe would strengthen the protections of children's rights.

CHAIR: Thanks very much, Ms Mitchell. It is a very important subject which we might have to return to later.

Senator REYNOLDS: Professor Triggs, I want to pick up where we left off. Can I clarify: in your previous work, you have practised as a solicitor and barrister, is that correct?

Prof. Triggs: I have.

Senator REYNOLDS: Was that at the bar in New South Wales?

Prof. Triggs: In Victoria originally, and then I joined the bar in New South Wales.

Senator REYNOLDS: We were talking about the speech that you gave to the New South Wales Young Lawyers. I am just wondering if you could tell the committee what a lawyer's professional obligations are under the relevant conduct rules—for solicitors in New South Wales? I am presuming they are very similar to other states.

Prof. Triggs: What are the responsibilities of a solicitor?

Senator REYNOLDS: Yes. So the young lawyers you were talking to—who presumably were solicitors, mostly—what are their professional conduct rules?

Prof. Triggs: In fact, I think this question was asked a few days ago. And I have the same answer: that their first duty is to the court—as I am sure you know, Senator—and their second is to their client. And, if one wants to put it in an order, to the rule of law. But the core, fundamental obligation ultimately is to the court: to ensure that the arguments you make to the court are accurate, not misleading, and that they are done with an intention of assisting the court in reaching a rule-of-law based result.

Senator REYNOLDS: So you would say that the two biggies are to the court and to the client who engages them?

Prof. Triggs: Yes.

Senator REYNOLDS: Do these professional obligations apply to government lawyers at all?

Prof. Triggs: They certainly do—although I should say that many government lawyers would not hold practising certificates, so they would not in the instant have a particular responsibility to the court, because they are not practising—but many are, as government lawyers. It really depends.

Senator REYNOLDS: And they would still have responsibilities, if not directly to the court, to their client?

Prof. Triggs: They would have a responsibility to the client within the rule of law.

Senator WATT: Could Senator Reynolds explain how this is relevant to the operations or expenditure of the Human Rights Commission?

Senator REYNOLDS: I will get right to that question. It was my next question—thank you very much. Obviously the conduct of what the Human Rights Commission does costs money. It is taxpayers' money on what they do, how they prioritise their work and how they provide advice and conciliation.

Senator Brandis: Senator Watt, you asked questions about what Mr Wilson did as the Human Rights Commissioner. Now the senator is asking about what the president has done.

Senator WATT: I have not heard those questions. I would be interested to hear them.

Senator Brandis: Maybe you were not here for those questions, Senator Reynolds.

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CHAIR: Order!

Senator REYNOLDS: In the public record account of the speech that you gave to the young lawyers, you referred to a High Court decision, M68/215 v Minister for Immigration and Border Protection. My reading of what you said in that address is that you asked what kind of lawyer would advise the government in relation to the laws the subject of plaintiff M68's case in the High Court. Could you clarify what you mean by 'what kind of lawyer'?

Prof. Triggs: My general concern is that there is a responsibility to the rule of law for all lawyers. Whether you are a government lawyer or a practising solicitor, you still have an obligation to reach the highest standards of the legal profession. Those standards of the legal profession include an ethical appreciation of your work. I think there are some matters, particularly where legislation is passed retrospectively in the fear that a challenge will be successful in the High Court, that are at least questionable. That is all I was doing: questioning the ethical and professional standards of those who advise retrospective laws to make lawful that which is probably unlawful.

Senator REYNOLDS: So it was your intent to question the professionalism of government lawyers?

Prof. Triggs: I am not necessarily talking about them. I am talking about all lawyers. I was really using it to talk about the ethical obligations of the profession. That was in the context of some new practice rules that had been adopted by New South Wales, and I think Victoria as well, so I was really addressing—and that was my purpose in speaking to this group—the recently adopted rules of practice for what was originally intended to be a national legal profession but is now, as you may know, Victoria and New South Wales.

Senator REYNOLDS: So the words might have been a little colloquial. I assume it is not a legal term, 'What kind of lawyer'. If someone said 'What kind of politician' or 'What kind of lawyer' or 'What kind of Attorney-General' would do something like this, we would take it as pejorative and could take it very personally. If one of those lawyers who had dealt with that M68 case in the High Court had been in attendance, do you think they might have been offended that you were questioning their professional integrity by saying that?

Prof. Triggs: I am calling attention to their primary duty to the law and to the standards of the legal profession. If somebody in that audience had been concerned that I was stimulating them to think about the nature of their own practice, then that was very much the purpose of the speech.

Senator REYNOLDS: So you said something that could be interpreted as quite professionally offensive to lawyers, particularly as you have said that some of the government lawyers may have direct responsibilities to the court and others may not be registered but have a duty to their client. If I were a lawyer for the government and I heard what you said, knowing that I had a duty to my client, which is the Commonwealth, do you not think that that would be highly professionally offensive?

Prof. Triggs: No, and in fact my hope would be that they would question whether their work was within the ethical standards and the rule of law to which those lawyers are subject.

Senator REYNOLDS: You were again quoted as saying in that speech: 'I don't believe it's acceptable for our courts to ignore the legal regime of obligations under international law. We should be alert and alarmed—' not 'might be', 'should be', 'consider'—'at the failure of our

legal system and lawyers to protect fundamental rights, especially the failure by parliament and the courts to protect the rights and freedoms that have evolved over millennia.' Obviously you are going to have a look at the transcript of your speech, but do you stand by the intent that is very clear to me in those statements?

Prof. Triggs: I do not believe there is a transcript of the speech. I think that was a reporter who was sitting in the audience. It was a public discussion.

Senator REYNOLDS: But do they reflect your thoughts that we should be alert and alarmed at the failure of our legal system and our lawyers?

Prof. Triggs: Yes, I think that there is a real slipping back in Australia over the last few years in our commitment to the rule of law and our commitment to fundamental freedoms. Perhaps I could again refer to the Australian Law Reform Commission report, which gives hundreds of examples of how and why this is happening.

Senator Brandis: Can I, on just one small point there, voice a slightly different view from Professor Triggs. It was before Professor Triggs was the President of the Human Rights Commission, and her predecessor Justice Branson was the chair, that, in this forum, when I was shadow Attorney-General, I voiced concern that the Human Rights Commission was not focusing on fundamental freedoms, that almost all of its construction or approach to human rights was about some sorts of human rights—in particular, antidiscrimination rights or rights associated with identity—but that it was, to put it in the vernacular, asleep at the wheel when it came to fundamental freedoms. I do not remember whether it was—

Senator REYNOLDS: As in democratic freedoms?

Senator Brandis: Well, liberal freedoms: freedom of speech, freedom of worship, freedom of thought—those sorts of freedoms, classical liberal freedoms. I cannot remember whether it was Justice Branson during Justice Branson's presidency or early in Professor Triggs's presidency, but it was in the last year of the unlamented Labor government, when there was an attack on press freedom, which was mercifully abandoned. I remember saying to the then president, 'Why haven't you defended press freedom?' Whether it was Professor Triggs or Justice Branson, I cannot remember now. But answer came there none.

I think one thing that we have done as a result of my advocacy and advocacy of my colleagues and the appointment of Mr Wilson as the Human Rights Commissioner, a position that had not been filled for years by a full-time commissioner—we gave him the nickname 'freedom commissioner' to pursue these fundamental freedoms. I think there has been, in the last three years since Mr Wilson was appointed as the so-called freedom commissioner, a greater focus by the Australian Human Rights Commission on freedom as a fundamental human right, not to the exclusion of other rights but as a very important right. I am glad of that and I want to congratulate the commission for it, just as Professor Roslalind Croucher, the Chair of the Australian Law Reform Commission, last year produced, in response to a reference I sent her, a very important and, I think history will record, milestone ALRC report on the erosion of freedoms by legislation, which is in a sense in conformity with something Professor Triggs said.

So I think the reorientation of the human rights debate in Australia in the last three years away from purely antidiscrimination related rights or identity related rights to balance in the discussion classical liberal rights and traditional freedoms has been a very desirable thing. To Page 60

the extent to which the Australian Human Rights Commission has participated in that, that is a good thing.

Senate

While I am, metaphorically speaking, on my feet, can I also point out that the person who argued the M68 case on behalf of the Commonwealth and who advised the government in relation to it was Mr Justin Gleeson, the then Acting Solicitor-General.

Senator WATT: I could not see that one coming!

Senator Brandis: I do not know if he was within the ambit of Professor Triggs's reflection in that speech.

Senator WATT: Wow-how tricky! I could not see that coming at all!

CHAIR: Well, I could not—

Senator WATT: You could not see that coming?

CHAIR: but I am uneducated!

Senator WATT: Have a bit of a giggle!

CHAIR: Sorry—is there a point of order or something? Perhaps—

Senator Brandis: I am not sure whether I was really agreeing with it or disagreeing with it. I think, by and large, I was agreeing with her, or at least commending the Human Rights Commission, particularly—

CHAIR: Thank you, Senator Brandis. I might have to get you to repeat that answer because I doubt that Hansard would have heard it. I am sure Senator Reynolds would not have heard the answer over the interjections—

Senator WATT: Why do you not just attack Gleeson directly rather than-

CHAIR: I remind you again, if you are going to continue with these interjections, we will suspend the committee because I am not having this turn into a rabble. Could you repeat the answer, Senator Brandis?

Senator Brandis: What—the last bit?

CHAIR: Yes.

Senator Brandis: All I said was that, on this issue of the human rights debate being as much about freedom as equality—which is what this boils down to—there has been a rebalancing in the last three years. To be honest, I would not say it was led by Professor Triggs, but I think it is has been helped along by Professor Triggs, and I want to thank her for that. I think it was led by Mr Wilson and is now being led by Mr Santow because that is the particular function of the Human Rights Commissioner in the Human Rights Commission. That is why, after it had been in abeyance for donkey's years—throughout the entire time of the Labor government—we filled it. We have a number of commissioners who are focused on protecting different identified groups from discrimination, which, of course, is a good thing. We have a President, who presides, as the name suggests, at the very top. We have at least one of the seven commissioners whose main focus is to ensure that traditional rights and freedoms—the UN CCPR rights, if you like—are a vocal and relevant part of the human rights debate, and I think that is a very good thing.

Senator REYNOLDS: Thanks, Attorney. Professor Triggs, just listening to that comment that you made—I will not repeat it—how do you imagine the in-house lawyers at the

Solicitor-General's office, at the Australian Government Solicitors and at the department of immigration would feel about that comment?

Prof. Triggs: I hope that they listened to it and thought about it.

Senator REYNOLDS: You do not think that they have been professionally negligent? My interpretation of what you said was that you were implying very strongly that they were professionally negligent.

Prof. Triggs: That is not the interpretation at all. I was calling upon all of the profession, but particularly the younger ones—which was the point of that speech—to think about their ethical and legal responsibilities to the rule of law. If my speech, as it was intended, should encourage them to do that then I feel that that was an important outcome.

Senator REYNOLDS: By challenging them, you also used the expression 'the ethics of such a retrospective provision'. What do you mean by that? I am not a lawyer. What does it mean to the layman?

Prof. Triggs: The usual position at common law is that laws should not be retrospective and criminal law should never be retrospective. Technically, it is possible to pass laws which are retrospective—and that was, indeed, the view of the High Court—but I think there are very real difficulties in doing so in the face of a live action before the court to prevent a decision that might otherwise have gone in a different way.

Senator REYNOLDS: You were obviously referring to those groups of solicitors who work for the government to, arguably, make legal something which is probably illegal. That is certainly challenging them to a very large extent—probably beyond the bounds of what most people would expect to be a professional challenge. What did you mean by saying they are probably making something legal illegal?

Prof. Triggs: A very high probability is that the challenge would have been successful and, indeed, that was the view of one of the judges in particular— and so the legislation was necessary to have an effect retrospectively; otherwise, the challenge would have been successful.

Senator REYNOLDS: Given that you clearly thought that there were human rights issues in relation to M68, did you seek permission to intervene in these proceedings in the High Court, because I understand that you can seek leave to do so?

Prof. Triggs: I think I will have to take that on notice. Again, because of the problems with our resources, we have to make very particular decisions as to which matters in the Federal Court or High Court we will agree to intervene on. We very often intervene at the request of the court, particularly the Family Court, but I will have to take that question on notice.

Senator REYNOLDS: I was just wondering because you singled this issue out as being of such high importance—

Senator Brandis: My recollection is that the Human Rights Commission did intervene in M68 to put—

Senator REYNOLDS: Sorry, did or did not?

Senator Brandis: My recollection, but I am just having a check-

Senator REYNOLDS: Could you perhaps take that on notice?

Prof. Triggs: As I said, I will take it on notice.

Senator Brandis: is that the Human Rights Commission did intervene in M68.

Senator REYNOLDS: Thank you, Professor.

Senator McKIM: Professor Triggs, this will be my last group of questions. It has been a reasonably long day already, and I do not wish to make it unnecessarily longer. The first matter I would seek your advice on is whether the commission or you are aware of the legislation that has been tabled by the government to provide for post-sentence detention of certain categories of people—in broad terms, those who have been convicted of offences against national security. Firstly, are you aware of that? Secondly, was the commission consulted during the drafting of that legislation?

Prof. Triggs: We are certainly very well aware of it. We have made a submission in relation to it.

Senator Brandis: Senator McKim, just so that we can have a little bit more focus in this discussion, you referred to people who have been convicted for offences against national security. The category of offenders to which the legislation is limited are people who have been convicted for serious terrorism crimes.

Senator McKIM: That is your categorisation.

Senator Brandis: No, it is not my categorisation. That is the definition in the bill.

Senator McKIM: Yes, I understand that, but the discussion will come about what is a serious offence.

Senator Brandis: There is a definition section in the bill, and the jurisdiction is exercisable—

Senator McKIM: Have you read Professor Williams's submission?

Senator Brandis: only in relation to serious terrorism crimes, and what a serious terrorism crime is is defined in the bill by reference to the high-end terrorism crimes provided for by the Commonwealth Criminal Code Act.

Senator McKIM: Yes, and I am not going to have the debate that we will have when that matter comes on in the full Senate.

Senator Brandis: Sure. I am just saying it is a definitional issue; it is not a rhetorical issue.

Senator McKIM: Well, it is potentially a semantic issue in terms of what you think the word 'serious' actually means and whether it is a reasonable definition of 'serious' in that legislation. But I am not going to have that debate with you now. There you go—I have done you a favour, Attorney. I have flagged one of the lines of argument that we will no doubt have.

Senator Brandis: That is right. I just think we should know what we are talking about here—that is all.

Senator McKIM: But we all understand the legislation, and Professor Triggs has confirmed that she understands the legislation that I am referring to. Forgive me, Professor Triggs, is your submission a public document?

Prof. Triggs: Yes, it is.

Senator McKIM: Yes, and I apologise-

Prof. Triggs: I should correct myself. It is possibly not on the web yet.

Senator McKIM: I think someone is nodding behind you.

Prof. Triggs: It is on the web.

Senator McKIM: It is? My apologies. I was not aware of that, and I have not read your submission.

CHAIR: You have not read something!

Senator McKIM: No, I have not.

CHAIR: How awful!

Senator McKIM: Chair, I know the point you are making.

CHAIR: I am not making any point.

Senator McKIM: My view on these matters is that if I have not read something I should be clear about that and explain the reasons why, which I have done, and I have apologised to Professor Triggs for not reading it. However, just in very broad terms, could you categorise your concerns, if any, with this legislation or can any of the other commissioners?

Prof. Triggs: Senator McKim, I really would prefer to take that on notice.

Senator McKIM: Okay.

Prof. Triggs: As you know, I did the work on this before Christmas last year. The Attorney could correct me, but I have done the work on it and was prepared to make an oral submission in relation to it. But I really would need to refresh my memory before I speak in particular on it. May I say one thing, and I believe that this is accurate: I was very pleased indeed to see that there is judicial supervision of this proposal, and one of the things that I have spoken about before at the Joint Committee on Intelligence and Security—and it has been a longstanding concern to me and others at the commission—is that some of the counterterrorism legislation has not had judicial supervision. I notice that, with regard to this, judicial supervision has been included, and that we are very pleased indeed to see because the concept is so important as a matter of principle. If that is now understood as a critical part of legislation that quite properly protects Australia's national interest, then we at the commission feel that there has been a step forward.

Senator McKIM: Yes, I certainly agree. If we are going to go down this path, it would be better done with judicial oversight. Thank you for taking that question on notice.

Senator Brandis: Thank you for that, Professor Triggs. Might I say, by the why, as the person who was effectively the author of this bill, it was never my intention to approach it otherwise than through a judicial process.

Senator McKIM: It seems that, as Professor Triggs has just said, there have been a number of pieces of national security legislation in the past that have not contained provisions for judicial oversight.

Senator Brandis: That is true, but the bills to which you refer actually were not my bills. But, in relation to this one, there was never any question in my mind that the appropriate authority before whom an application for the extension of a period of detention should be brought was a judge.

Senator McKIM: Thank you, Attorney. I appreciate that clarification. Professor, before we leave that subject, in your response on notice I would be very grateful if you could consider, if it is not contained in your submission, the burden of proof—I guess that is the correct usage—that will need to be cleared before post-sentence detention can be actioned under this legislation. I will leave it at that for now.

Senate

Prof. Triggs: Thank you, Senator McKim. You raise an important question, again, because in general we have been very concerned at the shifting of the burden of proof, whether it is evidentiary or persuasive. I will look at this in particular, and we will get back to you on that particular point.

Senator Brandis: The standard of proof—not the burden of proof—is 'a high degree of probability' and the burden of proof lies upon the applicant.

Senator McKIM: You are right, Attorney. That is the second time you have corrected me in relation to legal nomenclature, and I appreciate it.

Senator Brandis: I think it is an important point, because I do not like reverse onuses and I do not like lowering the standard of proof. I think that should only ever be done in an exceptional case, and there will be exceptional cases. That is why I sent that reference to the Australian Law Reform Commission.

Senator McKIM: I appreciate that, Attorney. But because you have raised it, I will just respond to you very quickly in the form of a question: would you not agree that, unless they have pled guilty, the people who have been convicted of the offences which will be caught by this piece of legislation will, in the event that they have pled not guilty and proceeded to trial, have been convicted on a standard of proof of 'beyond reasonable doubt'?

Senator Brandis: Correct.

Senator McKIM: And you are proposing to lower that standard of proof in this legislation, are you not?

Senator Brandis: Well, it is a different standard of proof; you are right.

Senator McKIM: It is a lower standard.

Senator Brandis: Yes, I accept that: it is a different and lower standard of proof. But the question is a different question, because what the court is being asked to determine is not guilt or innocence. Guilt or innocence will have been determined years earlier at a criminal trial.

Senator McKIM: No, Attorney.

Senator Brandis: Yes. The court is not being asked to determine-

Senator McKIM: No. You are not resentencing them for the same crime, certainly, but-

CHAIR: Senator McKim, please let the Attorney finish.

Senator Brandis: You are not resentencing them.

Senator McKIM: No.

Senator Brandis: Correct—and this is not an extension of a sentence.

Senator McKIM: That is right.

Senator Brandis: It is the imposition upon a person who has served their sentence of a form of detention because the court is satisfied as to a high degree of probability on an issue

of public safety—that is, that they, and this is not a technical term but a vernacular term, 'continue to pose an unacceptably high risk to public safety'—and I have made it very clear that this will only be resorted to in an exceptional case. The standard of proof, although not the criminal standard of proof, is not the civil standard of proof either, which is 'on the balance of probabilities'. It is an intermediate standard of proof: lower than the criminal standard but higher than the civil standard. It has to be done on the basis of admissible evidence, and it is reviewable on a regular basis. Some of the points you make are quite right, Senator McKim, and I do not walk away from them, but the analogy you seek to draw between an application under this proposed piece of legislation and a criminal prosecution is quite wrong.

Senator McKIM: That may be your view, Attorney.

Senator Brandis: It is.

Senator McKIM: Clearly they are different circumstances, and, as you have admitted, there is a different and lower standard of proof in your legislation compared to the standard of proof which would need to be cleared for a criminal conviction. You have said it is lower than a criminal standard but higher than a criminal standard. There is a standard in between those, which is 'comfortable satisfaction', which is something that I am familiar with. I am not a lawyer, as you know.

Senator Brandis: I thought you were.

Senator McKIM: No. I am doing a reasonable impression!

Senator Brandis: You have, if I must say so, a much better familiarity with legal concepts than some senators I know who have LLBs.

Senator McKIM: Thank you, I appreciate that. Where does 'high degree of probability' sit vis-a-vis comfortable satisfaction?

Senator Brandis: I would want to consider that. It is a very, very good question. I would have thought probably higher, but I want to reserve my answer to that and reflect upon it. Traditionally, there have only been two standards for ultimate proceedings—there is also the prima facie standard for committal proceedings—the civil standard, 'balance of probabilities', and the criminal standard, 'beyond reasonable doubt'. In the last several decades, other intermediate standards of satisfaction have crept into the law. I make no comment on the desirability of that. The standard we have adopted, which we took from the Queensland legislation—which was upheld by the High Court in Fardon's case about 10 years or so ago—uses the expression 'a high degree of probability', which is now a reasonably familiar standard on which the courts have interpreted several times.

Senator McKIM: In Australia?

Senator Brandis: In Australia—whether overseas, I would need to check. But it is a very good question, and thank you for putting me on notice so that we can have this debate in the committee stage of the bill.

Senator McKIM: I am very much looking forward to it. Professor Triggs, are you or any of the other commissioners familiar with the amendments to the Tasmanian Anti-Discrimination Act that are lying on the table in the Tasmanian House of Assembly at the moment?

Prof. Triggs: We are aware of those amendments. We are very conscious of them, as a matter of fact. Obviously they are not within our jurisdiction, but we will watch with great interest how those amendments proceed.

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Senator McKIM: Do you or the commission have a view about what the effect of those amendments might be, were they to be passed by the Tasmanian parliament?

Prof. Triggs: We have not expressed a view, although my colleague Dr Soutphommasane may want to raise—apparently not. We really would not comment on that process.

Senator McKIM: Thank you.

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Senator WONG: The Labor Party does not have any more questions. We would like to get to the next agency, when you are ready.

Senator Brandis: If you have no more questions-

CHAIR: I do, and so does—

Senator WONG: I understand that the government does.

Senator Brandis: I wanted to provide a fuller answer to a question Senator Wong asked of me before lunch in relation to Mr Wilson. Would it be appropriate for me to do that now, Senator Macdonald?

CHAIR: It would. I would prefer it if you could get them out without putting them on notice.

Senator Brandis: A series of questions were asked in relation to a flyer or an advertisement, 'An Evening with Tim Wilson', hosted by the Essendon SEC in conjunction with the Essendon West and Moonee Ponds branches of the Liberal party in Victoria. It was suggested that this was a fundraising function. I have made some inquiries during the lunch adjournment. It was not a fundraising function. The cost that was advertised—\$40 per person—was to cover the costs of the function, with no margin for profit at all.

Senator WATT: Who was the cheque payable to?

Senator Brandis: With no margin for profit at all, so it was not a fundraising function.

Senator WATT: So it was a Liberal Party event?

Senator Brandis: Yes, it was a Liberal Party event, but not a fundraising function. When Mr Wilson was the Human Rights Commissioner—and I am told that this was done with the authority of the president and the CEO of the commission—this statement, which I will table, was agreed to and issued. I will read it onto the record for those who are listening:

Commissioner Wilson will speak at functions to educate members of political parties about the role of the Human Rights Commissioner, key human rights issues, and to seek feedback and views from all Australians about human rights issues that concern them. The purpose of Commissioner Wilson's engagement with political parties is solely for the purpose of community education and consultation.

So long as it is practicable, Commissioner Wilson is happy to speak to any political party. However, Commissioner Wilson will not speak at party political fundraising events.

The conditions for Commissioner Wilson's attendance at an event are:

- Any costs (flights, accommodation, taxis or public transport) are incurred by the political party and not the Australian Human Rights Commission.
- The event is not a fundraising event for the political party.

• There is no unnecessary charge for attendees, although cost recovery for room hire and light refreshments is acceptable.

Commissioner Wilson regularly travels around Australia in his official capacity. Therefore, it is possible to organise a speaking event allied to his attendance in a city for other purposes and so avoid the travel costs.

Commissioner Wilson will ordinarily only know his travel arrangements approximately a month in advance of travel. Consequently, it is not always possible to determine when he will be in a particular city, which may leave limited time to attend an event.

That is the entirety of the document. That document, I am told, was approved by the Human Rights Commission. This function was in Melbourne, where Commissioner Wilson lives, so there was no issue of travel costs. He drove there at his own expense. It was not a fundraiser. The \$40 for venue hire at the San Lorenzo restaurant, including cocktail food, plainly falls within the description of cost recovery for room hire and light refreshments.

CHAIR: Are there any follow-up questions on that at all? All right, thank you, Attorney. Professor Triggs, can I refer to your interaction with Ramona Koval in something that is dated 23 April 2016 and looks like a transcript of a radio interview. I understand, from what you said before, that that was not a radio interview.

Prof. Triggs: No. If I remember, it was an interview in which she asked me questions personally.

CHAIR: It is done in a strange way, then, because it has:

Ramona Koval: Did you think this was going to be hard when you started?

Gillian Triggs: [laughs] No, I had absolutely no idea.

The whole article is in that form of questions and answers, with names of people recorded. That is why I thought it was a radio or TV interview.

Prof. Triggs: It is an edited, extracted, subedited piece from an interview.

CHAIR: From a face-to-face interview with a print journalist?

Prof. Triggs: That is correct.

CHAIR: You are reported as saying in relation to the issue I have alluded to about not being able to get lunch:

The senators and members of the committee were all going off and having lunch. We'd had no breakfast, no morning tea and no lunch and I thought I'd faint, but these wonderful people were coming in and we were grabbing the food and eating it and they were saying [sotto voce], "You do realise that we are not responsible for this, don't you?", because some might think the secretariat had fed them these questions.

Assuming that is an accurate report—

Prof. Triggs: It is not accurate.

CHAIR: Isn't it? Okay. What was actually said?

Prof. Triggs: I do not recall the specific language and, may I say, Senator Macdonald, that—and I have just been given the information—I have hundreds, hundreds of media requests in a year. I have no record of myself—I do not record what I say—and I cannot remember every detail of every one of those interviews. I think responses are probably, again, in the hundreds.

CHAIR: Okay. I had never seen this transcript until earlier today. Now I know why I got all the hate mail about not reading reports. It all falls into place now.

Senate

Senator Brandis: Hate speech of which you were a victim.

CHAIR: Exactly.

Senator Brandis: I know the feeling.

CHAIR: Professor, my concern about this report, unchallenged, is because, if it is half accurate, it seems to suggest that the secretariat staff here, who are fiercely independent and of a very high calibre and very professional, were wandering around telling witnesses that they did not agree with the senators—

Senator WATT: She has just said that that is not an accurate report.

CHAIR: I am raising this because it is in the public domain. I am asking Professor Triggs what her view—

Senator WATT: She has denied it.

CHAIR: Well, I am asking her: did this not occur at all? You have no recollection and, having read this document, it does not refresh your memory on anything?

Senator WONG: Point of order, Chair.

CHAIR: Look, I am asking Professor Triggs a question.

Senator WATT: There is a point of order, Chair.

Senator McKIM: There is a point of order, Chair.

CHAIR: What is the point of order?

Senator WONG: The point of order, Chair, is relevance. You chided me for asking questions earlier, on the basis that they were not relevant to the estimates hearing. You are now asking the commissioner, who has been here for some time responding, yet again, to very lengthy questions from government senators, to respond to a media report about another hearing.

CHAIR: There is no point of order. Professor Triggs, having read this, do you have any recollection of that comment?

Prof. Triggs: No. But I do have recollection of the fact that people I believed to be members of the secretariat provided us, eventually, with some sweets. It was a light remark that they provided us with some sweets—that is all—and I do have a strong recollection of them saying, 'We are not responsible for this tone and style of questioning.' Now, that is simply a memory of mine from what I think was now two years ago or 18 months ago—quite a long time ago.

CHAIR: You do not think that might put those members of the secretariat at the time into some sort of difficult position, with you disclosing publicly that they made adverse comments about the senators that they serve fiercely independently and very professionally?

Senator WONG: At some point you are going to give this person a break, aren't you? I mean how many questions—

CHAIR: Senator Wong, please do not interrupt. If you have a point of order, raise it.

Senator WONG: The point of order—

CHAIR: Otherwise, please be quiet and treat other senators with the same respect you were given when you were asking questions?

Senator WONG: I have a point of order.

CHAIR: Well, what is your point of order.

Senator WONG: My point of order is, can we please treat this statutory officer with a little more courtesy than we appear to be doing.

Senator Brandis: Like you treated the official secretary to the Governor-General last night with your disgraceful reflection on his integrity. Imagine you, of all people, saying that, Senator Wong.

CHAIR: Thank you, Senator Brandis, but there is no point of order. Professor Triggs is able to answer these questions herself without you running interference, Senator Wong.

Senator WONG: Chair, I am asking you to behave appropriately.

CHAIR: Did it not concern you that secretariat staff were put in an invidious position?

Prof. Triggs: I was not aware and I do not believe that they were in an invidious position at all.

CHAIR: You do not think the suggestion that they were being partian against the senators that they serve would not have put them in a difficult position—

Senator WONG: She has answered that question.

CHAIR: had this been known at the time?

Prof. Triggs: I believe I have answered that—

Senator McKIM: You cannot possibly place that construction on those words.

Senator WATT: How many times are we going to have the same question?

CHAIR: Professor Triggs?

Prof. Triggs: I think that you will recall last time I was questioned over about nine hours. I think this time it has been for 5½ hours, apart from the breaks, obviously. I think that I have done my best to answer your questions in good faith and as honestly as I possibly can, but I cannot recall the details of every comment that has been made. If I have in any way revealed something about the behaviour during that period of questioning, I certainly regret any harm that might be done to those members of the secretariat, especially when their gesture was such a kindly one.

CHAIR: You obviously were not aware of the cafes around Parliament House that could have got you lunch at the time.

Senator WATT: Is this really what we have got to—

Senator McKIM: Are we reduced to this?

Senator WATT: the location of cafes?

CHAIR: Senator McKim, if you have a point of order, raise it, otherwise please be quiet or leave the room. Professor Triggs, this record also says—not that you said it:

I knew I could have responded and destroyed them—I could have said, "You've asked me a question that demonstrated you have not read our statute. How dare you question what I do?"

Do you recall saying that to the journalist?

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Prof. Triggs: No. I do not. I believe that that was something that was put in by the subeditor. My concern at the time was very much that the reports of the commission, including our forgotten children report and including another report that related to the steel chair restraints of Aboriginal Australians held in detention, had all been ignored by parliament. That was the essence of my comment. I remain deeply concerned that these reports are not being read or responded to. Indeed, had they been read I think we would not have been quite so surprised by the CCTV footage in the Northern Territory, because one of the cases I reported on-

CHAIR: I am not interested in the CCTV footage of the Northern Territory.

Senator Brandis: Can I add to-

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Senator McKIM: Point of order. Chair, please, point of order!

CHAIR: You will wait till I have finished.

Senator McKIM: Point of order.

CHAIR: I do ask Professor Triggs to answer the questions I ask and not divert.

Senator McKIM: What sort of rabble are we running here? Point of order.

CHAIR: Senator McKim, if you keep using that sort of language you will be ignored. What is your point of order?

Senator McKIM: Chair, my point of order is that you asked Professor Triggs a question. She was responding to it in a civil and reasonable way-

CHAIR: What is your point of order?

Senator McKIM: and then you spoke over the top of her and denied her the opportunity to respond to the question that had been put.

CHAIR: There is no point of order.

Senator McKIM: I simply ask you to show her a bit of courtesy, for goodness sake.

CHAIR: There is no point of order. Professor Triggs, I do ask that you answer my questions and not extend them to something else you might like to say because otherwise we will be here all night.

Senator Brandis: Senator Macdonald, can I add to Professor Triggs's answer please?

Senator McKIM: She has not finished yet.

Senator Brandis: I am sorry. I thought she had. Have you finished, Professor Triggs? Prof. Triggs: Yes.

Senator McKIM: She was rudely interrupted.

Senator Brandis: Can I add to Professor Triggs's answer please?

CHAIR: Yes, you can-well, I am not sure that you usefully can, but let us have a go.

Senator Brandis: I just want to put a fact on the public record here. I speak as a member of a government that found 1,992 children in detention and released every one of them-

Senator McKIM: They are still detained on Nauru.

Senator Brandis: In that process, superintended by two ministers, I am not aware of Professor Triggs's report contributing to the thinking of the government. It was our commitment to release those children and we did.

CHAIR: And it had happened beforehand.

Senator Brandis: And it happened during the Howard government when also the number of children in detention inherited from the previous Labor government was reduced to zero.

CHAIR: Thanks.

Senator Brandis: Secondly, speaking as one of the three ministers who, along with the Prime Minister and Senator Scullion, the Minister for Indigenous Affairs, made the decision promptly to establish the royal commission into the child protection system in the Northern Territory I can assure you that nothing that Professor Triggs or the Human Rights Commission had had to say about the youth detention system in the Northern Territory contributed one iota to our decision to establish that royal commission.

CHAIR: Thank you, Senator Brandis. Professor Triggs, just getting back to my questioning. I have read you two passages out of this. I think one of my colleagues alluded before to a comment allegedly made by you. I will put this to you so that you can either confirm or deny it. It says:

Our parliamentarians are usually seriously ill-informed and uneducated. All they know is the world of Canberra and politics and they've lost any sense of a rule of law—

Senator Pratt interjecting-

Senator WATT: We have been over this!

CHAIR: It continues:

... and curiously enough for Canberra they don't even understand what democracy is.

Did you say that?

Senator WATT: She has been asked this question.

CHAIR: Please be quiet, Senator Watt. If you cannot control yourself, please leave the room. Senator Triggs—sorry, Professor Triggs; I would not call you 'senator' because you would be in the group of 'seriously ill-informed'—do you remember saying anything like that?

Senator PRATT: Senator Macdonald—

Senator WATT: Point of order, Chair.

CHAIR: What is the point of order?

Senator PRATT: I ask you to withdraw that last comment. That was completely inappropriate for you to make that remark, particularly from the chair.

CHAIR: There is no point of order. Do you remember saying that, Professor Triggs?

Prof. Triggs: I believe I have answered that question very fully.

CHAIR: Can you remind me what your answer was?

Prof. Triggs: I am sure it is—

Senator Watt—

Senator WONG: She is entitled to—

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CHAIR: There is no need for a response by the Labor Party on every suggestion they give of an answer.

Senator WONG: Point of order, Chair.

Senator McKIM: Point of order ...

CHAIR: Can you remind me what your answer was, Professor Triggs? What is your point order?

Senator McKIM: Tedious repetition.

CHAIR: I might note in passing, it is typical of the left that whenever you try to question anyone, you are stopped at every opportunity. Your point of order, Senator Wong; on what grounds?

Senator WONG: The witness is entitled to answer the question as she sees fit. If she says she has answered the question, she is entitled to put that answer and, as chair, you continue to badger.

CHAIR: There is no point of order. Professor Triggs is very capable of answering questions and I have asked her if she could remind me. If she chooses not to remind me then that is her position. You are not choosing to remind me?

Senator WATT: We have started again?

CHAIR: You can do what you like. You have 15 minutes after I am finished. Professor Triggs, can you remind me what your answer was?

Prof. Triggs: I have answered that question very fully to Senator Reynolds.

CHAIR: All right. So you are refusing to answer.

Senator WATT: That is not an accurate comment.

CHAIR: Now, Professor Triggs-

Senator WATT: Point of order. You should withdraw that comment made to this independent statutory witness. That is a disgraceful slur on her. She said nothing of the sort.

CHAIR: There is no point of order.

Senator WATT: And you should withdraw that, Chair.

CHAIR: Please. Now, Professor Triggs, you have denied on several occasions passages I have taken from this—

Senator WATT: Unhelpful. There you go. You cannot help yourself. Every estimates hearing, you bring her in and bully her, every time.

CHAIR: You have denied—talking about bullying, you have a look in a mirror yourself, Senator Watt.

Senator Brandis: You were not there last night in Finance and Public Administration estimates when Senator Wong behaved in such a boorish and bullying way to the Official Secretary to the Governor-General.

Senator WATT: Senator Brandis, please do not lecture us about appropriate conduct. Please do not lecture us.

CHAIR: Senator Watt, would you please leave the room.

Senator Brandis: It was disgusting.

Senator WATT: What power have you got to—

CHAIR: I have continually asked you to stop—I will suspend the hearing after I finish this. Professor Triggs, there are three—

Senator WONG: We can suspend—

CHAIR: passages—

Senator PRATT: Chair.

CHAIR: Professor Triggs, there are three passages of this alleged recorded interview that I have asked you about—

Senator McKIM: Point of order.

Senator LINES: Point of order.

CHAIR: that you have denied. Did you—

Senator McKIM: Committee members have asked for a suspension of this hearing. In fact, I believe that there is a majority of committee members who want a suspension of this hearing immediately.

Senator PRATT: That question is before the chair.

CHAIR: It is not before the chair.

Senator McKIM: I move:

That the committee suspend.

CHAIR: Professor Triggs-

Senator McKIM: I move:

That the committee suspend.

Senator PRATT: Chair, you have an obligation—

CHAIR: I am asking Professor Triggs if she denied three-

Senator McKIM: Chair, I move:

That the committee suspend.

CHAIR: Senator McKim, would you either be quiet or remove yourself from the-

Senator McKIM: I am moving that the committee suspend. I will not remove myself from the hearing, no.

Senator PRATT: There is motion before the chair that the committee suspend.

Senator WATT: There is a motion before you.

CHAIR: Can I point out again that every time a government senator seeks to ask a question that is slightly embarrassing to the Greens or the Labor Party, they continue with a process of intimidation of the committee and of disruption of the committee.

Senator Brandis: It is the standard technique of the left. It is also called 'no platform' in other contexts.

CHAIR: My question is very simple, Professor Triggs.

Senator McKIM: Professor Brandis, I don't think you ought to be lecturing anyone on integrity at the moment.

Senator PRATT: Senator Macdonald, you have a question before you-

CHAIR: Did you speak to the journalist and ask for the record to be corrected?

Prof. Triggs: No, I did not.

Senator McKIM: There is a motion before you, Chair.

CHAIR: Professor Triggs, on three elements of-

Senator WONG: Point of order, Chair.

CHAIR: this particular report, you have denied them and I have asked you-

Senator WONG: Point of order, Chair.

Senator LINES: Point of order.

Senator McKIM: Point of order.

CHAIR: if you wanted to-

Senator WONG: There is a motion before you from the deputy chair moving a suspension.

CHAIR: Sorry, what? I did not hear any suspension. Have we a record of a motion?

Senator WATT: Wow!

Senator PRATT: I move:

That the committee suspend.

That has been seconded by Senator McKim.

Senator McKIM: Seconded.

Senator PRATT: We have attempted a number of times to ask you to put that question before the committee.

CHAIR: I think I can put it now. There is a motion to suspend. Those in favour of the motion? Those against? It is three all. I will cast my vote against the motion, and we will continue.

Senator WONG: We seek a private meeting under the standing orders.

CHAIR: What standing order is that?

Senator WONG: Where you ask for a private meeting. You should take some advice from the secretary.

CHAIR: Without your help, Senator Wong, I have already sought advice from the secretariat.

Senator WONG: It appears from your behaviour that you need a fair bit of help chairing this committee.

CHAIR: We have dealt with the motion moved, and there has been-

Senator WONG: No, we are seeking a private meeting as is—

CHAIR: a subsequent motion for a private meeting. I am asking under what standing order the request for the private meeting comes under.

Senator WONG: We would like a private meeting.

CHAIR: I will seek some advice from the secretary. I will not be bullied away, by members of the Labor Party and the Greens, from hearing this committee. I am asking what the standing order is that requires a private meeting if it is asked for by one senator. Is there a standing order that provides that?

Senator PRATT: It could be done by courtesy of the chair, perhaps.

CHAIR: There has been no courtesy shown to this questioner, in spite of the fact that, all morning, the Labor Party and the Greens have asked questions without interruption. When a government senator attempts to ask questions, he is continually interrupted and shouted down. If there is no reference to a standing order, I will continue. Professor Triggs, my question was whether you sought to correct the record with Ms Ramona Koval?

Prof. Triggs: I have already answered that. I am sure it is in *Hansard*. But the answer again is: no, I did not.

CHAIR: There are three elements of that interview—and perhaps many others that you cannot recall having said—and it is on the public record. It has generated a lot of hate mail to me. But you did not seek to correct that with the journalist?

Prof. Triggs: I think it would be fair to say that there are comments from me or about me in the newspaper virtually daily. I could not possibly correct all the remarks and comments that are made that are inaccurate. It is, I am afraid, a phenomenon that a great deal of the work we do is misreported.

CHAIR: I want to go on with the final ten minutes of my time as ten minutes was taken up by deliberate intervention. In that record of interview—and it has been mentioned by other senators, including Senator McKim earlier—there is reference made to your report, *The forgotten children: national inquiry into children in immigration detention*. According to that record, and it is probably not accurate from what you have told us, you quote me as saying, 'I have not read that report'—which is an accurate reflection of part of what I said. But I want to ask you about that report and about this incident and about the record. Do you recall a letter from the Secretary of the Department of Immigration and Border Protection dated 27 October? You will not remember it from that description, but I will tell you what was in it. It was a five-page letter with a seven-page attachment which, in effect, went through and disagreed with many of the comments in the draft version of your report. Do you remember that letter?

Prof. Triggs: I do remember that letter. It was actually appended to the final report.

CHAIR: It was sent by the secretary of the department to you—it says here it was by email to you, so I cannot see how it was appended to the report.

Prof. Triggs: We reproduced that letter in our *Forgotten children* report submitted to parliament—so the views of the secretary were transparent and open.

CHAIR: Do you agree that it had this paragraph in it?

The current draft report lacks objective reference to the considerable information and documentation that has been provided to the commission by the Department and its contracted service providers. Where information provided by the Department has been used, this appears to have been selected in order to support the position taken by the Commission, rather than having been used to contribute to an accurate, balanced and contextualised description of the matters to be investigated.

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The report appears to rely on subjective statements which are largely unverifiable by the Department. It appears to be selective in its use of information in support of its findings. The preliminary findings make broad statements regarding immigration detention and provide little clarity regarding the methodology that the Commission has used to collect and test its information in coming to those conclusions. Nor does the report make any specific and practical recommendations for improvement or change, beyond the immediate release of all children held in immigration detention.

Do you remember those two paragraphs from that letter?

Prof. Triggs: Yes, I do.

CHAIR: Do you remember that there was an attachment A which contains seven or eight pages of information or advice by the department—example one, example two, example four, going up to many of them—where the department, in fact, demolishes most of the conclusions or the direction of the draft report? Do you remember that? I am not asking whether you agree with it, but do you remember that the department issued a very lengthy critique of the draft report?

Prof. Triggs: Yes, of course I do remember that.

CHAIR: According to the department, who read the draft report in detail, this was a report not worth reading. They are my words, but clearly the department thought it was entirely inaccurate. Would you agree with that summation?

Prof. Triggs: I am sorry, what is the question?

CHAIR: The department indicated in quite lengthy detail that the report was inaccurate and, in my words, would not be worth reading, because it was so inaccurate as to not warrant anyone's time. Would you agree with that summation?

Prof. Triggs: I certainly would not agree with it. Indeed, the response that we get from the department to almost all of the reports that we make on these issues is they are rejected. So it was not at all surprising. That is why I have been asking relevant parliamentarians and ministers to read the report, because when you read the report it will be clear that those criticism are ill-founded.

CHAIR: It means we either accept your version or the department's version. I know which one I would rather accept!

Prof. Triggs: That is a matter of judgement for you.

CHAIR: That is right. On your criticism of me not reading your report, that is why—because I would not waste my time on a report that the department had clearly said was so far removed from the truth that it was not work looking at.

Prof. Triggs: That is a matter of judgement for you.

CHAIR: Yes. As a result of that lengthy critique, did you do anything when the final report came out?

Prof. Triggs: Yes—for example, we were unaware of some of the particular examples that the department wanted us to use, and we included those in the report. That, again, is why it is so important that you, among others, read the report, because you will see how the report responds to the consultation process with the department. Indeed, in all of the matters where we either report through the through the Attorney to parliament or report independently we always consult with the relevant stakeholders and, in these issues, obviously the Department

of Immigration and Border Protection. We always will adjust a document if we feel that any of their comments are well founded. We tried to take in as many of their rational recommendations as we possibly could, and you would know that if you had read the report.

CHAIR: Do you also recall a second letter from the Secretary of the Department of Immigration and Border Protection relating to the same matter, in which two paragraphs are as follows:

In its response to the draft report and preliminary findings, the Department has already identified a wide range of concerns regarding the manner in which evidence and information provided to the Inquiry has been evaluated and utilised and has provided the Commission with a range of thematic concerns, supported by specific examples. A copy \of that response is enclosed at <u>Attachment A.</u>

Whilst the Department acknowledges that the Commission has made some substantial changes to the findings and has also made some changes to the final report, I note that these changes appear to only partially address the specific examples raised and do not appear to address the underpinning thematic issues which the examples were intended to illustrate.

Do you remember that?

Prof. Triggs: I do.

CHAIR: The report then became public, with the department—who had read the draft report and the final report in detail—clearly having very great concerns about the report. Do you remember that?

Prof. Triggs: You are only reading out a particular part of the second letter. I think there were other parts of it that were far more responsive to the accuracy, the balance, the objectivity and the evidence based recommendations that were in the final report. That also, I think, was included in our final printed version of the report. So everything was as transparent as we could possibly make it.

CHAIR: Clearly, and this has come up in estimates subsequently, the department had very little regard for what was in your report, and I take Senator Brandis's comment earlier. Do you think the report was the reason the government has now got rid of every child out of immigration detention?

Prof. Triggs: It is impossible for me to make a judgement as to how effective the report was. But one can certainly put the timescale together that the numbers of children, which had remained static for about four or five months, started to decline as we began the inquiry and when there were five public hearings, so there was quite a degree of media attention to it. Ultimately, of course, we now have virtually all of the children out in Australian mainland detention centres. I could not possibly comment on whether or not the report contributed to that—

CHAIR: That is fair enough.

Prof. Triggs: and the Attorney may be entirely correct in his views.

CHAIR: When you started the report—

Senator Brandis: Senator Macdonald, can I add: it is not 'virtually every child'; it is 'every child'. There are no children in detention, and there have not been for some months now. Every child on Nauru and Manus Island was put there by the Gillard or Rudd governments, not by this government.

CHAIR: And supported by the Greens political party.

Senator Brandis: And I can give you a direct and brief answer to the question: the report contributed not one iota to the government's thinking or decision-making.

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CHAIR: Finally, in this segment, Attorney, I was going to chance my arm at guessing these, but you might have the—

Senator WATT: He could not tell you; he hasn't got the clock on.

Senator PRATT: His timer is not going.

Senator McKIM: No, the clock is not running.

CHAIR: It never does run when there is interference for any senator asking questions, and the same applies now. Senator Brandis, do you have the figures? I was going to chance my arm at approximates. As I recall, at the time the commission decided to start its inquiry, the number of children in detention had fallen from something around 1,900 to about 800. And, by the time the report was tabled, I think it was down to about 400. Do you have these figures in front of you?

Senator Brandis: I only have one of them, and I will look up the others. I think you are approximately correct. The number of children in immigration detention in Australia peaked shortly before the 2013 election at 1,992. Going through the legacy caseload inherited from the Labor government, earlier this year, as a result of the work of Mr Morrison and Mr Dutton, with the strong support of prime ministers Abbott and Turnbull, that number was steadily reduced to zero, which is where it is today.

Senator McKIM: Attorney, there are children in detention in mainland detention centres, as you said. Is that not the truth?

Senator Brandis: Just as I might say, Senator Macdonald, at the time-

CHAIR: Senator McKim, if you cannot control yourself, please leave the room.

Senator McKIM: I am pointing out that the Attorney has just misled the committee.

CHAIR: We do not accept interjections in this hearing. Senator Brandis, could you continue, please?

Senator Brandis: Just as, at the time the Howard government went out of office in 2007, the number of children in immigration detention was also zero.

Senator McKIM: You have misled the committee, Attorney, and you will have to come back and correct that later, I am sure.

CHAIR: That finishes my segment of this questioning. I understand Senator McKim has no more questions—

Senator McKIM: I do have a question now, Chair.

CHAIR: I understand Senator Fawcett does have other questions.

Senator McKIM: I do have a question.

CHAIR: You told me before that you did not.

Senator McKIM: That was before the Attorney misled the committee.

Senator Brandis: I am just telling you what the number of children in immigration detention is: zero.

Senator McKIM: Wrong, Attorney.

Senator Brandis: That is my latest information.

Senator McKIM: Could you please check that and come back and clarify it if you need to.

Senator Brandis: I will. That was certainly the position last time I looked at the figures, which was very recently. I am not aware of any children who have been—

Senator McKIM: I think you will find there are two children in detention on mainland Australia as we sit here.

Senator Brandis: I will check that, and if you are right I will acknowledge it. Two is a lot better than 1,992, but let me check it.

Senator McKIM: It is a lot more than zero.

Senator Brandis: Senator McKim, it is my belief that the number is zero. I do not accept at face value what you say, but I will have it checked.

CHAIR: Thank you, Senator Brandis. I have more questions I want to direct to the Age Discrimination Commissioner and also in relation to an answer to a question on notice. I will go next to Senator Fawcett. Do you have any questions, Senator McKim?

Senator WONG: The government continues.

CHAIR: I will go to Senator Fawcett, then Senator Reynolds and then I will return, but I will be very brief next time.

Senator FAWCETT: Could I take you to your annual report for last year—page 136. I will give you the figures that are written there. I just want to extrapolate from those if I can. On page 136, it says the commission had 2,388 complaints in that year and that 24 per cent of those complaints related to the Racial Discrimination Act, which gives us roughly 574. If you then go to page 144, it gives some breakdowns specifically to the RDA about how many were conciliated and some other categories. Conciliated ones were 51.5 per cent, which is about 296. Then there is a category where it says no conciliation was possible, and that is about 144, based on the percentage table and the total numbers. I am aware this is for all sections of the act, but could you just explain to the committee: when it says no conciliation is possible, what does that actually mean in practice for both the claimant and the respondent?

Prof. Triggs: What it means is that efforts to conciliate the matter between the two parties have failed. We try various avenues and various mechanisms, but in the end it becomes necessary to say that the parties will not agree on a compromise or on a position and we can assist no further. On that basis, the matter is formally terminated, the parties are advised accordingly and they are then free to go to the Federal Court if they choose to. About two per cent of matters will ultimately go to the Federal Court because, overwhelmingly, most parties choose not to take the matter further even though they are not conciliated.

Senator FAWCETT: For those who do choose to take it further—I am assuming it would generally be the claimant as opposed to the respondent who may choose to take things further—do they have to pay their own court costs or are they supported by legal aid? Does the commission, in fact, ever provide any support?

Prof. Triggs: No. There are some statutory obligations to assist a complainant if they want to provide some written background to the case. I would have to check those provisions, but they are in the act. It is relatively minor. Basically, when it has not been possible to resolve

the matter the parties are free to go to the Federal Court. If they fall within the guidelines on income, and also depending on the nature of the matter that is the cause of the issue, they would get legal aid. But most of course would not, and they would then have to pay their own legal costs to go to the Federal Court.

Senator FAWCETT: For those where there is conciliation that has occurred, what percentage of those cases would involve a payment from the respondent to the claimant?

Prof. Triggs: I would have to take that on notice. The payments can go from \$1,000, typically with an apology, very often with an agreement by the respondent, where appropriate, to achieve some sort of systemic change—typically, again, in an employment context—but others can be very, very significant payment agreements that are a compromise agreement between the two parties.

Senator FAWCETT: Regardless of the size of the payment, how many of the conciliated cases have a non-disclosure requirement placed upon the parties?

Prof. Triggs: That would be a matter of agreement for the parties. Typically, they would want something of that order in place and, as I say, fundamental to the process is confidentiality, in any event. But in some cases, relatively unusually, one of the parties will put the matter into the public arena. But usually, parties value their privacy and confidentiality and, indeed, that is why we have such a relatively high success rate of conciliation—because it is confidential and no materials would be leaked or made available in relation to it.

Senator FAWCETT: That does not quite answer my question. I accept the fact that it may be at the will of one or both of the parties. My question is: how many of the—in this case—296 that were conciliated, in that last year, would have some kind of confidentiality clause around them?

Prof. Triggs: I will have to take that precise question on notice. A very high number of them would.

Senator FAWCETT: Sure. So if one party wanted it and the other did not, would it still have that non-disclosure or confidentiality requirement?

Prof. Triggs: Yes. If it were not possible to be conciliated, most parties would abide by confidentiality—but some do not.

Senator FAWCETT: In your report, you mention—I think it is in about 30 per cent of cases, particularly in workplace situations—that there have been positive measures that have occurred, beyond the complainant, which is a good thing. But clearly there is learning that occurs for the community through these cases, in terms of understanding what may cause offence or what may cause an issue that results in a claim, and learning about how the commission may view that and, where it does go to court, clearly, they learn how the court views it. But where there is a complete confidentiality blanket over that, surely that actually removes much of the positive benefit of any of these cases, because there is no learning for the broader community. Has any consideration been given to—but redacting names or other identifying details—giving examples of what occurred, what the considerations were in conciliation, and what the size of penalties or agreed outcomes were so that (a) the community knows what is going on—you emphasised before the importance you place on transparency—and (b) so that there can be some learning.

Prof. Triggs: That is a very important point, because without other mechanisms to bring these matters into the public arena they would all be confidential, apart from one party or the other choosing to put it into the public arena. But the answer to your question is that we have various mechanisms. One is that we have a register on the website for the Australian Human Rights Commission with anonymous case studies. We give very graphic examples of where the law might be breached or how a matter has been resolved. We try to make them so they are not identifiable in relation to particular parties. So that is one mechanism: through the register and anonymous case studies. Another is that we have recently published a third edition of our book on federal discrimination law, which includes a lot of case law and a lot of examples of how we decide matters. Also, in speeches by the Commissioners-and in my speeches as president—when we are talking to, for example, a business community, about the way in which anti-discrimination law and human rights law works, we will give broad case studies to illustrate how this applies. You are quite right, Senator: it is absolutely critical to the success of the conciliation process that we have confidentiality, and that we defend—and are required to defend under our statute. But to ameliorate the problem that you clearly understand, we have other mechanisms of getting across how these matters are actually resolved. I should also mention the last thing that you mentioned yourself-that is, that many of these matters lead to systemic change. Let's take the case of an employer who will come into our offices. There will be a conciliation process and they will typically say to our conciliators: 'I am the CEO of this company and that behaviour is unacceptable. It does not meet the ethical standards and the code of conduct of this business and it certainly clearly does not meet the law.' They will go back to their factories and companies and you start to see broader change. So there are ways of achieving that. The other way is that we do quite a lot of work, increasingly, with the business community on a better understanding of how the laws work. A recent example, of course, is the amendment to the Sex Discrimination Act on sexual orientation. That has not necessary been an easy one for people to understand and so we are out in the community on that. Others, particularly, again, in the area of disability, where employers or those delivering goods and services do not understand the law and we sometimes have the opportunity to deliver training programs. Some of our staff from the complaints team will go out into the community with training for particular industries and companies. You have made an important point, but the need for public education cannot in anyway jeopardise the confidentiality of the overwhelming majority of the matters that we deal with.

Senator FAWCETT: I accept and applaud the fact that the overwhelming majority of issues that you deal with in terms of, for example, employment et cetera, are very valid and they are a great case. I do have concerns—as you have obviously gathered—around 18C and the offend-type provisions. One area that I cannot find in your annual report in the tables in the annexes is further breakdown of how many of the complaints under the RDA relate to 18C as opposed to other sections.

Prof. Triggs: I will take that on notice. We did produce that for last year. I will obviously give you that information as soon as I possibly can. Perhaps I can reiterate—it is beyond your question, but I might take the opportunity if I may—and say that our statute requires us to accept any written allegation of a breach of these laws. We must accept those matters and we must embark on the process that I very briefly outlined to you at the beginning of this session.

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Senator FAWCETT: So there are two questions that follow from that point: 18D gives some very clear exemptions so that things like the Leak cartoon—that is the current issue of the day—and any number of defences in terms of genuinely held belief, work of art, political comment et cetera, are very clear defences. If that is there, and it is within your remit to put to bed straight away the fact that, yes, we have to consider it but it clearly falls foul of 18D, surely that is a very strong statement to the Australian public about freedom of speech and about the opportunity to make genuinely-held political comment and where that stands in the equation. The longer this drags on, the more doubt it casts in people's minds as to where they may stand in the future. Is there any reason why you have not applied 18D to this already?

Prof. Triggs: As I have explained, I cannot comment on that case or any other case that is ongoing before the commission at the moment. But you are quite right in pointing out that 18D is one of the clearest legislative expressions of the right to freedom of speech in Australia. Those cases that the Federal Court has considered in the past, with regard to cartoons that might be seen as offensive by some on the grounds of race in the public arena, will not fall foul of 18C because they are covered by 18D which sets out a very wide range of bases on which the act will be protected by the right to freedom of speech.

Your question, I think, is going to the time—again, I am not commenting on that particular case. In the early days or weeks of a complaint coming to us, we will usually try to get a clear understanding both from the complainant and, in appropriate time, the respondent to understand whether, on its face, 18C might appear to apply. On the facts available to the commission, 18D might be exculpatory or, at least, a defence to the right of freedom of speech. So, while I cannot comment on the particular matter, I can say that we try to reach that point as quickly as we can.

There is no point in spending the resources of the commission on a matter that is going to fall within the jurisprudence of the Federal Court that would allow even quite strong cartoons—particularly a Western Australian decision, and I can give you all of these cases where cartoons might be seen as offensive by some—which are protected by 18D as being in good faith, based on accurate information, fair comment or artistic works, which may cover a cartoon.

Senator FAWCETT: That Western Australian case, which culminated in 2004, is precisely where I am going. In that case it was your predecessor organisation versus one of the people from the Indigenous group who entered up in the courts. But that resulted in a huge cost both to the taxpayer and to others, whereas the whole process could be nipped in the bud, if you want to use that colloquial term, by you applying a decision very early in the process. The case law in a public space is that, if I go with a complaint to the commission about something that clearly falls foul of 18D or is exempted through 18D, then it is not going to be given even a breath of life.

My concern is that, if it is considered to have breath of life—particularly given comments from commissioners in your organisation and given statements in your annual reports that one of your tasks is to go to court and essentially provide expert advice—and we have already heard from the commission that the commission has made up its mind where this lies, then we know where the expert advice is likely to lie. That creates a chilling effect for people who then ask, 'What risk am I running to actually publish something?' Other cases are being fought and we do not need to mention names, but we are looking at costs in the order of \$200,000 for

one of those cases, let alone the penalty that is being claimed which is a further \$250,000. That is a very chilling effect if there is not a very immediate decision by the commission to say that this does not fall foul of 18C because of 18D.

Prof. Triggs: Senator Fawcett, you raise some very important points. The critical answer and the immediate answer is: we have no decision-making power; we are not judicial body. Our job is very clear: we have an obligation under the statute to investigate the matter and to conciliate it if possible. We are not there to make a judgement as to whether or not the matter does or does not fall within 18C or the defence of freedom of speech under 18D. What I am doing is repeating to you the terms of our legislation.

If parliament is unhappy with the way this legislative process works—because it is not something, to use your phrase, you can nip in the bud with a decision and say, 'We are not taking this any further'—then that requires legislative change. If I may say so, we have made a number of suggestions that might improve the process—I am talking about the process and not the substance. Thus far they have not been achieved. We at the commission are certainly, firstly, extremely experienced in the way this process works, but, secondly, would be very happy indeed to work with you or others who might consider amendments that would meet some of your concerns. So I think it would be very helpful to open up a discussion to examine the powers of the commission in this regard and to take into account some of the matters that appear to underpin your questions.

Senator FAWCETT: In your table there are a certain number of complaints where the commission has obviously made a decision that it is frivolous—there is a range of other descriptors—where you have taken a decision to terminate the complaint. It is not explicit, but it is implied, even if the complainant does not see it that way. Clearly, you already feel that you have a head of power, however derived, to terminate some complaints. So in a case such as a cartoon with a political comment which clearly falls under 18D, why can't you exercise that same head of power, however it is derived, so that the commission is sending a very clear message to the Australian community that legitimate free speech will be protected, and they do not face the risk of being hauled before your commission and the courts, facing potentially hundreds of thousands of dollars of costs and the diminution of free speech.

Prof. Triggs: Firstly, it is rare that a matter is clear. It is very rare. Our job is to investigate to get to a position in which as president I would decide that a matter is frivolous or an abuse of the process or that there is no jurisdiction or the facts do not measure up or it is outside a particular legal area. We have to do that preliminary work before that decision to terminate on any one of those grounds that can arise.

I quite understand your point that, if we got to that position earlier, that would be in the best interests of everybody. Perhaps I should point out to you that, once the decision of termination is made and a decision is made, in most cases by the complainant, to go to the Federal Court there will be those costs for the complainant. There are no costs to the complainant or respondent at any stage of the Australian Human Rights Commission process. It is only when they choose to go to court that they start to attract these fees. That again underpins why the processes of the commission are so important.

CHAIR: We might have to you leave that there. If you need to come back to this, Senator Fawcett, we will. We will break for 15 minutes. Senator Reynolds has some questions for the Human Rights Commission, still—although not many, she assures me. I have two or three

which should not take that long. So we will resume with the Human Rights Commission and then proceed.

Senator Brandis: Before we do, can I just add some information to an answer. There was some uncertainty at the table before about whether the Human Rights Commission intervened in the M68 case. It did not.

CHAIR: Thank you, Senator.

Proceedings suspended from 15:22 to 15:37

CHAIR: We are still dealing with the Human Rights Commission. I will just say to other agencies, particularly from out of Canberra, that we did try very hard to have you here early in the program so that you could get back to your homes tonight. We are struggling to do that. We will continue to try to facilitate that, but unfortunately my hands are tied under standing orders of the Senate whereby if anyone wants to ask a question they have to be able to do that.

Senator Brandis: By the way, I just heard Senator Wong say that government senators should stop asking questions. I have some details for Senator McKim about the question of children in detention. Could I read that on to the record?

CHAIR: Yes, you can.

Senator Brandis: As I promised to do, I made an inquiry. As at 7 am this morning, there was one person under the age of 18 years in held detention in Australia and one person detained in a hotel-apartment type of accommodation. There will be occasions when minors transit through immigration detention due to airport turnarounds, people who are in the final stages of removal from Australia or due to criminal security issues. The Department of Immigration and Border Protection will continue to resolve matters involving children and their families in held detention as quickly as possible. Ordinarily, since the legacy case load was cleared, the number of children in detention in Australia has been zero, but from time to time, for very short periods of time, that number increases above zero. There were 8,000 children placed into held detention under the former, Labor, government, which peaked in July 2013 at 1,992. Today the average number is, and has been for several months, zero.

Senator McKIM: Thank you for correcting the record.

CHAIR: I have a question for the age commissioner. Dr Patterson, again, congratulations on your appointment. I want to explore very briefly the role of the age commissioner. Very briefly, can you tell me what your duties are, what your role is?

Dr Patterson: My role first of all is to pay attention to the Age Discrimination Act and to ensure as far as possible that that is being followed; to promote a positive attitude towards older people; to address issues, for example, of discrimination against older people in the workplace; and to look at issues where they may be able to be some reforms in terms of legislation—for example, the sorts of issues that are being looked at by the Australian Law Reform Commission, and I am a member of the advisory committee that is working with the Australian Law Reform Commission on elder abuse. There will be some issues around enduring powers of attorney and powers of attorney et cetera possibly being harmonised across the states. I have already started talking to the state human rights commissioners last Friday at a meeting we had, to address some of those issues which make it easier for people to deal with those issues across states. Sometimes children live in one state and the person writing the will or having a power of attorney made is in another state. My role includes

looking at issues of elder abuse. In particular, the Institute of Family Studies report and some other state reports have come out indicating elder abuse, particularly in financial affairs. And homelessness is another issue I want to pursue.

CHAIR: Okay; that is a good summary for me. As in 18C of the Racial Discrimination Act, in the Age Discrimination Act is there any similar provision to 18C? Some kind colleagues of mine often make reference to my 'young age', and that offends and insults me enormously. Is there a similar provision in the Age Discrimination Act that I can—

Dr Patterson: I am a psychologist, not a lawyer, as you know. But one of the issues is that you cannot discriminate on the basis of a characteristic of a particular age group. For example, if an airline were to say, 'You must dye your hair; you can't be working here with grey hair', for most people—although there are some very young people with grey hair—it is a characteristic of a particular age group. So, there is nothing like 18C.

Senator Brandis: I am just looking at the Age Discrimination Act now. Section 18C is, as you know, in the Racial Discrimination Act—

Dr Patterson: But you cannot discriminate on the basis of a characteristic of a particular age group.

CHAIR: If the government legislates to discriminate because of an age, is that anything you would have authority to deal with under your act or under the rules of the commission? For example, if, hypothetically, the government said, 'These rules apply, but for anyone over 65 there will be a different, less-beneficial set of rules', is that something you have any control or power over?

Dr Patterson: We do not have control over anything. We have the ability to call the situation as it is. If I believed that it was discriminatory then I would be in a position to make my concerns public. But I do not have any legislative power to control anything.

Senator Brandis: If I could add to that answer, the age discrimination commissioner has her own act but is a member of the Australian Human Rights Commission. So, to an extent, the duties and powers and functions—under section 11 of the Australian Human Rights Commission Act 1986, the functions of the commission are, in section 11(1)(a), such functions as are conferred on the commission by, inter alia, the Age Discrimination Act 2004, and one of the more specific functions of the commission is:

to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination; ...

and then more generally by paragraph (g) of subsection 11(1):

to promote an understanding and acceptance, and the public discussion, of human rights in Australia;

...

and so on.

So there is an advocacy function that lies on each of the commissioners, not specifically by reason of their own acts but by reason of their comprising the commissioners of the Australian Human Rights Commission, which is derived from the Australian Human Rights Commission Act 1986. There is also a definition of 'human right' which refers to rights recognised under the various acts as well as from other sources.

CHAIR: I cannot imagine that any government would deliberately legislate to discriminate against people who are over a certain age—not in a beneficial way but in a detrimental way. That is a comment that I assume you would broadly agree with, without being referred to any specific event.

Senator Brandis: I am not a fan of identity politics, so I think it is probably the wrong place to start a discussion of public policy to single out people by reference to identifying characteristics. Nevertheless, of course we accept in Australia that people should not be discriminated against because of their age. There are limits to that rule in this area which we would not recognise in other areas. For example, it would never be acceptable in this country to have a different law for some people on account of, for example, their race or ethnicity. But when one comes to the issue of age then there are other considerations. For example, the age at which a person qualifies for the pension might be regarded as an exception to the general rule that you treat everybody exactly the same irrespective of their age.

CHAIR: That is beneficial, though.

Senator Brandis: Indeed. And at the other end of the age spectrum of course all societies identify an age of majority below which certain rights, including the right to vote, do not exist. So my point is that there is not a purity about age discrimination as there is about, shall we say, racial discrimination or sex discrimination, so that one could never identify a law that applies differently above or below a certain age.

CHAIR: Time is moving on, and perhaps this is something I might explore further the next time we meet.

Dr Patterson: I am happy to meet with you and discuss—

CHAIR: Yes, I might arrange that, to raise some issues that constituents have raised with me. And perhaps we will talk about it at another hearing as well. Finally from me: I have two very quick questions. Professor Triggs, or Ms Raman, thank you for your answer to question AE16/011. Professor Triggs, you said:

I think the general question of the transferring of those seeking our protection under the refugee convention to Nauru and to Manus is a matter that is objectively of great concern to members of the Human Rights Council and to the international community generally. I was at the Geneva meeting of the UPR process and I counted well over 60 countries that raised their concerns and asked Australia courteously to review the policies, particularly with regard to children. ...

I asked on notice if you could give me the list of those 60 countries, which you have given me. I noticed that five of the recommendations came from a country called the Maldives. Professor Triggs, I wonder if you or the Attorney have any information on the human rights record of the Maldives, particularly given very recent happenings in that country?

Senator Brandis: I know a little bit about the Maldives, but only through our colleague and friend Senator James McGrath, who was engaged as a political consultant and campaign director for the liberal democratic, or centre-right, party in Maldivian politics. He ran the campaign of the centre-right party at the Maldivian elections of a few years ago. Senator McGrath, as we know, is a great champion of freedom, and he championed the cause of freedom on the Maldives as in other places, including Australia, of course.

CHAIR: Did I read in the last couple of weeks that there have been people expelled from the country because they were opposition political—

Senator Brandis: I have not read that; I refer you to do Senator McGrath.

CHAIR: I am aware of Senator McGrath's involvement, which is dated now.

Senator Brandis: In the United Kingdom, in Australia, in the Maldives—Senator McGrath is an international freedom fighter.

CHAIR: Sixty nations were—these are my words, not Professor Triggs's—more or less criticising Australia for its human rights record on Nauru and Manus. When I saw that five recommendations came from the Maldives, it made me think of stones being thrown in glasshouses. Professor Triggs, can you tell me anything about the Maldives?

Prof. Triggs: No, I could not make any comment about the Maldives.

Senator Brandis: Senator McGrath just sent me a text message, to say that the government has decided to leave the Commonwealth, which is very sad—a bad decision.

CHAIR: And I think the reason for that was the point I was getting too-

Senator Brandis: I do not know. Senator McGrath, get your fingers working and as soon as you text me the message I will read it to the committee.

CHAIR: If I had realised Senator McGrath was there I would have asked him. My question really relates to those who are urging Australia in human rights areas when they—and I suspect Senator McGrath may be able to confirm this—have an atrocious record with human rights themselves.

Senator Brandis: The jurisdiction of the Australian Human Rights Commission relates to Australian human rights matters, but the commission does have engagement with other nations with a human rights apparatus. Some of those nations have better human rights records than others. Australia has a very fine human rights record. It is not perfect, which is why we have the Human Rights Commission to remind us how we can do better. That is why our human rights record—as a result of the work of members of the commission and former members of the commission, like Mr Wilson—has improved in recent years. We are much more rights respecting in Australia now. Even where we disagree with each other, as we do vigorously on some issues, at least the human rights dialogue is front and centre, which has not always been the case.

CHAIR: My only point was that I would be interested in the human rights record of these countries—the Maldives was one of 60 countries nominated. They are urging Australia to do certain things in relation to Nauru and Manus, as Professor Triggs indicated at the last hearing.

Senator Brandis: According to Senator McGrath, the incumbent government of the Maldives is 'turning into a repressive regime, limiting the basic freedoms including freedom of speech and association'.

Senator WONG: Point of order, Chair.

Senator Brandis: Former President Nasheed has had to take political asylum in the United Kingdom, I am told.

CHAIR: Hang on Senator Brandis, there is a point of order. But before I hear the point of order, can I just indicate there are other commissioners who need to leave to catch planes. I thought we had indicated that was in order. I have one more question, but it is of the

President, so, as far as the committee is concerned, the other commissioners are free to leave. Thank you for your attendance. Now, the point of order?

Senator WONG: The point of order is relevance. The Attorney-General is now reading texts from a government senator about the Maldives. I have a particular interest in that too—

Senator Brandis: Do you?

Senator WONG: which I have discussed with Senator McGrath. But, really, we are in an estimates hearing with quite a lot of public money being spent and all the people who are waiting some $5\frac{1}{2}$ hours or six hours after they were due to come on. So, Chair, I was wondering if it would be possible to at least get a little close to the topic of the estimates hearing.

CHAIR: Thank you, Senator Wong. If you and your colleagues had obeyed the rules earlier we would have been far more advanced than we are now. So thank you for your advice, but I do not need it.

Senator WONG: Chair, we have not asked a question for hours, and everybody watching can see—

Senator Brandis: On the point of order, Chair—

CHAIR: Hang on.

Senator Brandis: You asked a question of me about the Maldives and one of my colleagues was good enough to provide some information.

CHAIR: My question was to Professor Triggs, a very genuine question, about countries that urged Australia to look at their human rights records—and the Maldives is, as I say, far from one that would not. You have helpfully added to Professor Triggs' answer, which was effectively that she was not familiar with their human rights records. So I appreciate you assistance, Senator Brandis. Where you get your information from is of course not of interest to the committee, but I appreciate you advice which you say has come from Senator McGrath. So there is no point of order. Senator Brandis, did you want to say anything else on that?

Senator Brandis: No. Everything that I have to say about the Maldives today I have said.

CHAIR: Finally, Professor Triggs, Senator Fawcett has raised this indirectly, but I can not understand the QUT case. That is the 18C Queensland University of Technology case. I admit that I am uneducated, but it is simply beyond my comprehension that what is reported as the basis for that action could have possibly supported the action. My understanding is that the Human Rights Commission finished its involvement in relation to the QUT case in late August 2015. Is that correct?

Prof. Triggs: I would have to check the exact date, but it was around that time, yes.

CHAIR: But you are out of it now and have been for a year almost.

Prof. Triggs: Yes, because the matter is now before the Federal Court.

CHAIR: And the Human Rights Commission has no involvement one way or another in relation to that. I appreciate that it is before the court, and it may curtail what you are able to tell me. But I was hoping that you could explain this to me. As I understand it—and I may be wrong, and you should correct me if I am wrong—students posted content on Facebook, including the words 'Just got kicked out of an unassigned Indigenous computer room. QUT

stopping segregation with segregation'. There may have been other words, but I am not aware of them. Can you explain to me and to most Australians how that can possibly be the basis of a complaint under 18C or any other act or principle of the federal government?

Prof. Triggs: Senator Macdonald, I think as you are well aware, I cannot comment upon the facts or allegations of that case. But what I can do is to repeat what I think I have said now several times over the last seven hours. Under the statute of the Human Rights Commission I am legally bound to accept any written statement alleging a breach of human rights or antidiscrimination law. When that allegation is made in any legal form—a letter—I and the staff of the commission must proceed to investigate the matter and to seek a conciliation. We do that in all matters where we can proceed to conciliation.

CHAIR: Did I hear you say to Senator Fawcett that there were certain exceptions if you decided the complaint was frivolous—I think you named a number of others, but I wrote down 'frivolous'—and that there were a certain number of cases where, as I understand it, the commission would look at it initially and say, 'There's nothing in this; go away.' Is that right? Do you have that ability?

Prof. Triggs: We do. I can decide, ultimately—or through a delegate—that a matter is vexatious, frivolous or not within jurisdiction or that the facts do not measure up. Another context in which it can happen is that one of the parties withdraws. Quite often what happens is that they will begin something with a letter to us, we start an investigation and then the parties will withdraw. That is a determination, if you like, that I can make where the evidence seems to me to justify a termination on those grounds.

The difficulty, in many cases, is that as a practical matter the threshold for the issue is extremely low. I have asked, on a number of occasions, for that threshold to be lifted, but it has not occurred. Senator Fawcett has raised these points. They are absolutely valid points to be made and discussed, but this is a job for parliament. My job is to apply the law as it currently exists, and that is of a very low threshold. That is why, in honesty, the public could be a little concerned about why some matters are being considered by us when they might say, on what they know from often distorted media stories, that they would not see a justification for the matter. But I cannot defend that in the media. I cannot speak up, because they are confidential and I have to honour the processes that we have within the commission.

Senator Brandis: Can I just add to that answer, very quickly. I think there is a lot of wisdom in what Professor Triggs has just said, but the problem is, of course, that there are some elements of the parliament who have so politicised the human rights discussion that it is almost like a third rail. If I, as the Attorney-General, essayed on a reform of the Human Rights Commission Act, I can hear now exactly what would come from parties of the left: they would say, 'You're attacking human rights; you're attacking fundamental rights.' So unfortunately—and Professor Triggs and I have a common view about this, I think—the Human Rights Commission Act, like a number of other issues of public policy, has become one of those no-go zones of Australian public discussion, of which nothing may be said without bringing down a hullabaloo of misrepresentation and hysterical objection.

CHAIR: Thanks, Senator Brandis, but you interfered with my train. Professor Triggs, you have indicated you have made submissions—I assume to the Attorney or to the government or someone—to raise the standard. Apart from the record of this hearing, is there anywhere the committee could get the—this is an unparliamentary word—guts of your submission? The

Senate

committee, should it choose, might be interested in helping you in your approach to the government. The Attorney seems to agree with it in any case, but perhaps the committee could add its voice to yours in the hope that the government, and ultimately the parliament, might do something about the issue.

Prof. Triggs: I think that would be very helpful. Obviously I will take that on notice to give you the initiatives that we have taken in the past and discussions with the respective attorneys, if I may say so. I think this discussion has been a very helpful one, because it has—at least in this arena—explained why we appear to be dealing with matters that some people would say should not be before the commission. That is something that should be properly discussed, in an informed and courteous way, and I think it is at least open to a suggestion for reform.

There are difficulties, in the sense that not many matters are actually vexatious or frivolous, and we have to look at them seriously. That is going to take a little bit of time, but I will certainly take back to my office, if I may, Senator Fawcett's concerns about the time it might take to get to some of these questions—although I should repeat that one of the difficulties is that we receive 20,000 a year, and very, very few find their way into the media. This is a huge burden on the staff of the commission.

While I quite accept the need to make decisions, in some cases, quickly, I think we have to understand that this is an important process of access to justice and it needs to be properly funded. It is the most important thing, if I may say so, within our statute, and we need the resources to do it. I am afraid the public is aware of two or three major cases, completely forgetting that we are dealing with thousands upon thousands of matters that come into us every day.

CHAIR: I accept that, and thank you for that. I cannot ask you now, but when the court case is finished, we might come back and explore—not in any particular case—what the commission's thought process is in not immediately dismissing claims as being frivolous, vexatious or something else. Not in relation to any particular event, but at a time in the future.

Prof. Triggs: Can I just add one point for clarity. Once the matter is terminated on any of those grounds that we have been discussing, that does not impair the right of the complainant to go to the Federal Court. Their access to justice continues in the court system, it is just that, from then on, they are paying for it.

CHAIR: The courts would deal with it under that section of the act?

Prof. Triggs: They deal with it under exactly the same law as we will, except that they are a judicial body and they can make a determination according to the law as they see it.

CHAIR: As a matter of process, do you know where that case is in the court system at the moment?

Prof. Triggs: My understanding is that a strikeout request has been made, and the judge is considering that at the moment. The court, I am told, has a great deal of work; it is under a lot of pressure and we will have to wait for the judge to determine the matter.

Senator Brandis: I think the strikeout application has been argued. I think it is reserved.

Prof. Triggs: It has been argued. It is reserved, but that was seven months ago.

CHAIR: Perhaps that is another line of questioning. Thank you, Professor Triggs. That is all I have for the Human Rights Commission.

Senator REYNOLDS: I have some more questions, but I will put them on notice. I thank Professor Triggs for going through the questions I had at some detail today.

Prof. Triggs: Thank you. I think you have aired some very important questions.

CHAIR: Thank you, Professor Triggs. You may return to your place of abode, while we continue on until midnight. We might just suspend for a private meeting.

Proceedings suspended from 16:09 to 16:25

Office of the Australian Information Commissioner

CHAIR: We will now resume this hearing of the Legal and Constitutional Affairs Legislation Committee. Apologies, again, to all the public servants and to all those who have come from interstate. We have just had a three-quarters of an hour meeting, called by the opposition, to determine a spillover day because we are wasting time. After three-quarters of an hour in that private meeting, we are back where we were. We will continue with this and get as far as we can before the spillover. My understanding of the standing orders is that it will be at a time that is convenient to the committee but also to the minister and his officials.

Senator WATT: I have a point of order, Chair. You have provided your view and I think it is important that the *Hansard* note that that is a matter in dispute and we are waiting on advice from the Clerk.

CHAIR: I will accept that as a point of order but it is no point of order. I welcome representatives of the Office of the Australian Information Commissioner. Welcome, Mr Pilgrim. Thank you for joining us. Do you have an opening statement?

Mr Pilgrim: For the sake of not wanting to alienate my colleagues at the back of the room, I would like to make a short opening statement. Thank you for the opportunity. Following the announcement, as part of the 2016 budget, that the Office of the Australian Information Commissioner would remain responsible for regulation of both Privacy and Freedom of Information Acts, the OAIC has continued to work to ensure that agencies, businesses and individuals understand their rights and responsibilities provided for in both the Privacy and FOI Acts. Our office is also working to ensure that it is managing its role in the most effective and efficient way.

Some statistics from the 2015-16 financial year highlight the community's engagement with our office and also some of the ongoing improvements and performance that we have achieved in both FOI and privacy. In 2015-16 we handled some 19,092 privacy inquiries, which is an 18 per cent increase from the previous year, and we received 2,128 privacy complaints. In that context, through a combination of improved triaging, conciliation and investigation processes, this has resulted in the OAIC resolving 97 per cent of privacy assessments or audits of regulated entities, received and processed 107 voluntary and 16 mandatory data breach notifications, provided over 230 substantial privacy advises to regulated entities, developed and published 25 new privacy guidance resources and provided 27 privacy submissions on government legislation and policy.

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Turning now to our FOI responsibilities, the OAIC has continued to implement efficiencies in our administration of FOI, particularly in the area of Information Commissioner or IC reviews of government agency decisions. In the financial year just concluded, the OAIC received 510 applications for an IC review, which is up 36 per cent from the previous year. In that same period, we finalised 454 IC reviews, with 87 per cent finalised within 12 months of receipt. This continues to exceed our 80 per cent benchmark. Indeed, 84 per cent, or 212, were finalised within six months. However, in saying that I do note, of course, that there are some complex matters that have taken significantly longer to resolve.

Importantly, of the 454 IC review matters finalised, only 18 per cent required a formal decision to be made by me as commissioner. This reflects our approach to work with government agencies, to build the knowledge and approaches required to resolve FOI requests efficiently and, where a dispute arises, to attempt to reach a mutually satisfactory agreement without the need for a formal decision. To further assist in this area our office is currently working to update the FOI guidelines to assist agencies and individuals alike. Providing clear plain English advice as to the scopes and limits of the FOI rights, as well as clear guidance to agencies as to how to best manage those rights in the first instance, is the priority. This focus on guidance, education and public information is important because, while privacy and FOI formal decisions are occasionally more complex or precedent setting, the vast majority of inquiries to our office revolve around individuals seeking to have rights upheld in circumstances in which the law is clear and well established. What is important in that context then is that there is clear and accessible advice as to what individuals' privacy and FOI rights are and quick and effective mechanisms to uphold those rights. I am confident that the focus that the OAIC is placing on advice, education and conciliation, as well as our achievements in improving the access and efficiency of privacy and FOI systems, will continue to provide effective delivery of our responsibilities to uphold both the FOI and the Privacy Act.

CHAIR: Thank you very much, Mr Pilgrim. Senator Fawcett.

Senator FAWCETT: Thank you for that comprehensive statement. You have given us a lot of figures about what you have achieved in terms of the number of inquiries and FOI requests. Could you give us a comparison with previous years?

Mr Pilgrim: Certainly. Would you like me to start with FOI and go on to privacy or is it just FOI?

Senator FAWCETT: Whichever order suits you.

Mr Pilgrim: I will give you a brief outline of the Information Commissioner reviews that we have received to date. As I said, for the previous financial year, 2015-16, we received 510, that being an increase on the previous financial year, which was 373. The year before that, 2013-14, we received 524. If you would like, I can continue back to the establishment of the office, which was in 2010. I am not sure how far you would like me to go back.

Senator FAWCETT: No, that is fine, thank you.

Mr Pilgrim: Would you like a brief summary of the last couple of years of privacy?

Senator FAWCETT: Yes.

Mr Pilgrim: As I said, in the 2015-16 financial year we received 2,128 complaints. In 2014-15 we received 2,840 and in 2013-14 we received 4,239 complaints.

Senator FAWCETT: So you are across the areas you are responsible for, including freedom of information, and you are happy that the management and government arrangements for that are adequate to deliver that oversight service to the Australian public?

Mr Pilgrim: I am confident that the office as we are currently undertaking our functions under both privacy and FOI are delivering some efficiency, certainly, in the area of our regulatory responsibilities.

Senator FAWCETT: Thank you. Senator Watt.

Senator WATT: My questions in this section are actually to Senator Brandis. Senator Brandis, I understand there are three roles in this general space: an Information Commissioner, a Privacy Commissioner and a Freedom of Information Commissioner. I think Mr Pilgrim was recently appointed to the permanent roles of Information Commissioner and Privacy Commissioner, after a period of time when the government was trying to abolish the role of Information Commissioner. But am I right that the role of Freedom of Information Commissioner commissioner remains vacant and has now been vacant for about 21 months?

Senator Brandis: I am not sure of the time but it has been quite some time, and the government proposes to leave that role vacant. The reason is that there is already, in the absence of a freedom of information commissioner, a comprehensive architecture for freedom of information applications and review of such freedom of information decision-making.

In relation to the Information Commissioner and the Privacy Commissioner, Mr Pilgrim was appointed as the acting Information Commissioner on 19 July last year. That acting position was extended from time to time, until, on 28 September, so only last month, I announced the government's decision to appoint Mr Pilgrim permanently—well, not permanently, but no longer on an acting basis—as Australian Information Commissioner for a period of two years. He had been appointed the Privacy Commissioner on 19 July 2010 for five years. He was reappointed as Privacy Commissioner for a period of 12 months, from 19 October, and he has now been reappointed as Privacy Commissioner for another two years.

I should say that the consolidation into one person, or one officer, of the statutory offices of Australian Information Commissioner and Privacy Commissioner has occurred after discussion with Mr Pilgrim and with his concurrence. The functions that the Freedom of Information Commissioner could have performed may be carried out by Mr Pilgrim as well, in his capacity as Australian Information Commissioner.

There was something of a logjam of positions in relation to, essentially, the same policy space, and we are finding, and I think this is evident from Mr Pilgrim's statement, that now that his position has been regularised—I am very happy about that and I want to congratulate him on his reappointment—that the whole issue of government information and privacy can be disposed of at less expense and much more efficiently. Perhaps Mr Pilgrim might care to add to my remarks.

Mr Pilgrim: I have had discussions, primarily with the Attorney-General's Department, about the current structure and I am of the view that both the functions under the FOI Act and the function of Privacy Commissioner can be undertaken by the one position. This is not an uncommon model in other jurisdictions around the world. If I could turn to that momentarily I would say that in the United Kingdom the information commissioner's office is headed up by the information commissioner—one statutory officeholder—and supported by two deputy

commissioner positions. What I have undertaken to do in our office is that I have recently appointed a deputy commissioner position, and Ms Falk has recently been appointed to that position. I also have an assistant commissioner to support me.

Having said that, we also have undertaken over the last 15 or 16 months, building on some work that had already been started, processes for dealing with Information Commissioner reviews, which are the largest amount of the functions or the work that comes into the office under the Freedom of Information Commissioner's responsibilities, in a way which emulates some of the work we have been doing in the privacy arena—that is, trying to conciliate matters of dispute in the first instance rather than trying to move immediately into more formal processes of writing lengthy decisions to try to bring the parties together to see where the points of difference are and to see if we cannot achieve an outcome where the information that is being sought by an applicant under an FOI request is being provided through a way that does not require a formal decision to be made by me. So there are a number of efficiencies that we have been introducing that have improved our turnaround time in our workload.

I would also build on what the Attorney has said in terms of the responsibilities under the FOI Act. The FOI Act actually invests the functions under that act in the Information Commissioner. So the Information Commissioner is the one who actually holds ultimate responsibility for decisions under the FOI Act, hence the terminology of Information Commissioner we have used. I think that that sits comfortably with the model we have. I would also hasten to add that from our experience in dealing with the community—and we receive in the FOI space around 2,500 inquiries from individuals about FOI matters—there is an understanding in the community that the Information Commissioner's office is the place to go for FOI matters, FOI inquiries. This is also supported by the activities of government agencies who, when they are working with people who may approach them under the FOI Act for information, do inform them that they have rights to seek review by the Information Commissioner.

Senator RHIANNON: Attorney-General, in May this year at the Senate estimates you said that the 2014 decision to abolish the OAIC was 'a good economy measure—and we have not changed our minds'. In what way, and to what extent, was it a good economy measure?

Senator Brandis: Well, we have changed our minds since, and I am pleased we have.

Senator RHIANNON: Sorry, could you repeat that.

Senator Brandis: We have changed our minds since. I am pleased we have. It is no longer the policy of the government to do so.

Senator RHIANNON: Why did you change your mind?

Senator Brandis: Because we thought better of the 2014 decision.

Senator RHIANNON: Could you expand on that. On what basis? It is a considerable change.

Senator Brandis: Not really. I am not going to comment on decisions in previous financial years that have been reversed. I do not think that is germane.

Senator Brandis: Well, we are reviewing the estimates of the current financial year. A policy was made in a previous financial year, essentially for reasons of economy. That decision was revisited more recently and reversed, and I am glad that it was, and I am really delighted that Mr Pilgrim's position has been regularised.

Senator RHIANNON: The OAIC Canberra office has been closed. Is it intended to reopen it?

Mr Pilgrim: It is not our intention to reopen the office. The functions that we undertake in terms of IC reviews can be sufficiently carried out through the office in Sydney. Obviously we receive most of our information electronically, and our work with the agencies is able to be undertaken in that way. So there is, in my view, not a need to reopen an office in Canberra.

Senator RHIANNON: Is there any loss of roles with that permanent closure?

Mr Pilgrim: All the functions under the FOI Act that were being carried out through an office that was in Canberra are being carried out by me and the staff in the Sydney office.

Senator RHIANNON: Thank you. Is the role of the OAIC on freedom of information matters now effectively confined to its review of refusals of requests for access to information?

Mr Pilgrim: No. That is certainly one of the functions. Under the Freedom of Information Act, I am able to undertake complaints about the administration of FOI matters. Someone could bring in an issue, for example, about the timeliness or otherwise of an agency's handling, and that could be handled under the complaints procedures. As you point out, there is the ability for someone to seek review of an access decision or refusal of access decision under the Information Commissioner review provisions, and that still exists. I have the ability to undertake an own-motion investigation if I believe I need to look at the activities of an agency as well. So those functions are still being undertaken. The whole of the functions under the FOI Act that sit with the Information commissioner are being undertaken.

Senator RHIANNON: I understand some functions were lost and that there was a period when they were not able to occur. What are those functions that were lost, and when is it intended that they will be restored and taken up?

Mr Pilgrim: I think you might be referring to the decision in 2014. We transferred the function of the complaint handling—and I should add there that the complaints that came in under the FOI Act were usually around 50 to 60 a year; they were not the larger component of the workload of the office. They went to the Ombudsman's office. But, since the decision and the budget changes, we have taken those functions back on since 1 July this year. Similarly, the function for reviewing the guidelines and providing advice through that process to government agencies was intended to go, or did go, to the Attorney-General's Department. I have taken those functions back on and, as I mentioned in my opening address, we are currently in the process of reviewing and updating the guidelines for agencies and for applicants.

Senator RHIANNON: Thank you. This might be a question for the Attorney-General or maybe for you, Mr Pilgrim, because it is about your actual appointment. But I noted that in the information—it is in section 14 of the act—about the FOI Commissioner it says:

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Senate

A person may only be appointed as the Freedom of Information Commissioner if he or she has obtained a degree from a university, or an educational qualification of a similar standing, after studies in the field of law.

Do you qualify in that way?

Mr Pilgrim: No, I do not qualify in that way, but I am not being appointed as the Freedom of Information Commissioner; I have been appointed as the Australian Information Commissioner and also the Australian Privacy Commissioner, and those requirements are not part of the statute for those positions.

Senator RHIANNON: I am well aware of that. I was just trying to understand. Attorney-General, has this had something to do with why we now no longer have an FOI Commissioner?

Senator Brandis: No—if I am understanding your question correctly. It was merely a matter of trying to regularise and make more efficient the process.

Senator RHIANNON: So it was about making the process more efficient?

Senator Brandis: Yes, I think so. Mr Pilgrim, who does this every day, would be in a better position than I to describe the functionalities here, but there did appear to be a very significant degree of overlap and duplication in the way in which three different offices were created to do essentially different aspects of what, if it is not the same job, deals with issues arising in the same area of policy.

Senator RHIANNON: What I am trying to understand is this. Mr Pilgrim, you were appointed as Acting FOI Commissioner five times. I think that is accurate.

Mr Pilgrim: No, that is not correct. I was appointed as the Acting Australian Information Commissioner prior to my permanent appointment recently—not to the FOI Commissioner position.

Senator RHIANNON: You were never the Acting FOI Commissioner?

Mr Pilgrim: No, and I should clarify and add to an earlier answer to a question I made. All the powers of the FOI Act are actually invested in the Australian Information Commissioner, and as Australian Information Commissioner I am able to exercise all the functions of that act.

Senator RHIANNON: In your present position?

Mr Pilgrim: In my present position, yes.

CHAIR: Thanks very much, Mr Pilgrim, for your attendance and for your evidence.

Office of the Director of Public Prosecutions

[16:47]

CHAIR: Welcome. Do you have an opening statement?

Ms McNaughton: I do have a brief opening statement.

CHAIR: Fire away.

Senator Brandis: Before Ms McNaughton makes her opening statement, I indicate to the committee that this is Ms McNaughton's first appearance at Senate estimates in her capacity as the Commonwealth DPP. Ms McNaughton has had a very distinguished career as a prosecutor. She is the eighth occupant of the office of Commonwealth Director of Public

Prosecutions and the first woman to be the Commonwealth Director of Public Prosecutions. On behalf of the government—and perhaps you might join in my remarks, Chair, on behalf of the committee—to congratulate her on this very significant appointment.

CHAIR: I certainly do, Senator Brandis. Welcome, Ms McNaughton. I am not sure whether, after you have finished here, you will appreciate the welcome, but we do appreciate your being here. Congratulations on obviously a distinguished career and on your very significant appointment. I know I can speak for all the committee in wishing you all the best for the future.

Ms McNaughton: Thank you, Chair. I have a brief opening statement. I joined the office as director in May this year, as the eighth director and the first female to hold the position. I have worked as a legal practitioner for 27 years. Since joining the office, I have experienced first hand the commitment, integrity and professionalism of our staff. I am pleased that I have been able to visit all of our 10 offices across the country and have met almost all of my staff in person. It is clear that the office undertakes some of the most complex criminal prosecutions in this country. I have also met with many of our partner agencies, our frontline law enforcement partners, national security agencies and regulators.

It is evident to me that, while we each have differing roles, we are all very much an important part of Australia's criminal justice architecture and collectively we contribute to a fair, safe and just society. I look forward to continue to advance the work of the office, not only from a legal perspective, but also by continuing the modernisation of the system and processes that support our prosecution service. Thank you.

CHAIR: Thanks very much, Ms McNaughton. Could I just inquire as to your senior colleagues. Could you just run us through who is who and what is what?

Ms McNaughton: Certainly. I am joined by Gaby Medley-Brown, Chief Corporate Officer, and Mark Pedley, Commonwealth Solicitor for Public Prosecutions. I also have with me, behind me, Deputy Director James Carter and our CFO, Karel Havlat.

CHAIR: The five of you are the senior people in the-

Ms McNaughton: Not entirely. I also have a senior executive team, made up of our deputy directors. We operate by way of practice groups now nationally rather than regionally. So they are not all here with me today. They run each of the different crime types across the office.

CHAIR: And, apart from yourself, are any others relatively new?

Ms McNaughton: Mr Pedley has come back. He was with our office for many years, he went and did other roles and then he came back last October, I believe.

CHAIR: Okay. But otherwise, your team is—

Ms McNaughton: We have a very steadfast—a team who have been there for many, many years. I am very lucky that I have such a very experienced team.

CHAIR: Thanks very much. That was just by way of a clarification. Senator Wong.

Senator WONG: Ms McNaughton, congratulations on your appointment. It is 'Ms', isn't it?

Ms McNaughton: Yes.

Senator WONG: Thank you. When was the decision made to appoint you?

Ms McNaughton: It was, I think, in April. I started on 5 May.

Senator WONG: Right. Immediately prior to that, what were you doing?

Ms McNaughton: I was at the private bar.

Senator WONG: You were assisting on the Heydon royal commission, weren't you?

Ms McNaughton: That was one of my briefs, yes. I accepted a brief in 2015, yes.

Senator WONG: Right. So you were not there for, what, 18 months or so?

Ms McNaughton: No, I started there in about April 2015 and I finished in December.

Senator WONG: Okay. Was your practice primarily—in which areas of practice were you engaged?

Ms McNaughton: Primarily crime or cognate areas, regulatory matters, and overwhelmingly Commonwealth crime. I also did state crime. I also did professional regulatory matters as well—and royal commission—and also inquest work as well.

Senator WONG: Right. Well, congratulations. I did not realise you were the first woman to be appointed. It has taken some time. So congratulations.

Ms McNaughton: Thank you.

Senator WONG: Thank you, Chair.

CHAIR: Senator Reynolds.

Senator REYNOLDS: Thank you. I also extend my congratulations. It is wonderful to see you here.

Ms McNaughton: Thank you.

Senator REYNOLDS: I just have a couple of questions that relate to the Royal Commission into Trade Union Governance and Corruption. I understand that six matters from the royal commission have been referred to the Commonwealth DPP. I am just wondering if you can give us an update on how many of these have been finalised and how many are still under investigation.

Ms McNaughton: Yes. Can I just clarify for the record that I have declared a conflict in relation to matters coming from the trade union royal commission, given that I was involved. But I can report in relation to them that we have had eight matters completed before the courts. Sorry, the rest of your question was?

Senator REYNOLDS: The latest information I had was six. So you have had eight matters completed?

Ms McNaughton: Yes.

Senator REYNOLDS: And how many are currently outstanding?

Ms McNaughton: I do not think we have—I will just check. I do not think we have any that we have received that are outstanding at the moment.

Senator REYNOLDS: Okay. Can you clarify for us which are the eight matters that have been completed?

Ms McNaughton: Yes. Will the names of the matters suffice?

Senator REYNOLDS: Yes, please.

Ms McNaughton: Michael Greenfield, James Sutherland, Maria Butera, Lisa Zanatta, Mark O'Brien, Chad Bragdon, Tuungafasi Manasi and Luke Collier.

Senator REYNOLDS: Do you have any matters still under investigation?

Ms McNaughton: We do not investigate.

Senator REYNOLDS: I understand there was a referral of Kimberley Kitching for possible breaches of the Commonwealth Criminal Code. Is that not correct?

Ms McNaughton: No, we have not received any brief in relation to that.

CHAIR: That was short and sweet! I assure you that is not the norm. We look forward to seeing you again next time. Good luck with your new role.

Australian Law Reform Commission

[16:55]

CHAIR: We are taking the Australian Law Reform Commission a little bit out of order. Welcome, Professor Croucher. I invite you to make an opening statement, a copy of which you have kindly made available to us together with a lovely photograph of some important people and some not quite so important—Senator Brandis being the not quite so important one. I can say that; you cannot!

Prof. Croucher: I do have a brief opening statement. I wanted to take this opportunity to record in *Hansard* and before the Senate Legal and Constitutional Affairs Legislation Committee that last year, 2015, marked the 40-year anniversary of the Australian Law Reform Commission. The establishment of the ALRC had bipartisan support at its foundation in 1975, something which is still evident today. The landmark occasion last year was celebrated in Sydney at an event in the ceremonial court of the Federal Court and was attended by a wonderful array of eminent and esteemed past and current commissioners, staff and ALRC friends. At that event, we heard reflections on the achievements of the commission and its outstanding body of work from the Attorney-General, Senator the Hon George Brandis QC; from the Chief Justice, the Hon Robert French AC, a former ALRC part-time Commissioner; and from our foundation chair, the Hon Michael Kirby AC CMG. I also launched an online archive that captures many of the stories, reflections and contributions of our illustrious alumni. This archive is available on the ALRC website and represents a significant unlocking of the ALRC's history and celebration of the lively and outstanding contributions to law reform made by so many over the past four decades.

Over its 40-year history, the ALRC has produced 86 law reform reports and, as at June 2016, 85 per cent of recommendations had been wholly or partially implemented, a figure which attests to the quality and relevance of the ALRC's work. I have brought two photographs taken at the anniversary to table today as part of marking this significant event.

Senator PRATT: Firstly, congratulations on your anniversary as an organisation. That is a significant milestone. I have certainly been appreciative of much of the work that the Law Reform Commission has done. In March you published the report, *Traditional rights and freedoms—encroachments by Commonwealth laws*. Is the commission aware of any action that has been taken in response to that report?

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Prof. Croucher: Once our reports are tabled, it is then a matter for government. From the inception of the work on elder abuse, our attentions have been fully occupied on that.

Senator PRATT: In other words, you are not aware of any further action? Perhaps Senator Brandis might answer that.

Senator Brandis: I think the importance of the rights and freedoms report—which I mentioned earlier in the day, I think, is potentially a seminal report—will be felt for years and, indeed, decades to come. What it did was map the entire body of Commonwealth law to identify respects in which traditional rights and freedoms have been eroded, compromised or limited some way, whether it be the standard or onus of proof, whether it be the right to a lawyer, whether it be the right to silence, whether it be Henry VIII clauses or whether it be a variety of legal devices. The report will inform all government thinking, certainly, all Liberal government thinking—and, I would hope, future Labor government thinking too—about the importance of respecting traditional rights and freedoms.

The reason I sent the reference to the ALRC was that I was concerned that it had almost become the norm in Commonwealth legislative drafting to attenuate or reverse traditional freedoms—certainly, that it had become so common as to become a matter of routine. I do not think any of us would question that there may be circumstances where there is a strong policy case to be made for attenuating a traditional right or freedom. We were discussing one of those earlier in the day, namely, the government's proposed legislation for the post-sentence detention of serious terrorist offenders. But we should always start from the proposition that that is the exception, not the rule, and the onus lies on those who wish—

Senator PRATT: Thank you—

Senator Brandis: I have not quite finished my answer.

Senator PRATT: To be fair, it does not actually go to my question-

Senator Brandis: Yes, it does.

Senator PRATT: You are highlighting the principles of the issues in the report. I was asking—

Senator Brandis: You asked me what we are going to do about it.

Senator PRATT: Yes.

Senator Brandis: I am in the process of telling you. The post-sentence detention report is an example of where a case has been made—and I will have to argue the case publicly—why a traditional right, that is, to release at the end of a sentence of imprisonment, should be attenuated. But that is an exception. The immediate answer to your question is, every bill that the Office of Parliamentary Counsel drafts will have to be drafted having regard to these recommendations. We will see, and are beginning to see, the influence of this report in every single bill that any minister introduces into the parliament.

Senator PRATT: Could I ask the Commission, in relation to the other piece of work you have going—that is the elder abuse inquiry—how many staff do you have working on that currently?

Prof. Croucher: I am leading that inquiry with an advisory committee. The number of staff I have on it are six legal officers working with me.

Senator Brandis: I wonder if I may be forgiven before we go onto another topic. I have some additional, more specific details in response to your question.

Senator PRATT: No, I think the information you have provide suffices.

Senator Brandis: I want to say this because it is important. On 2 March, I wrote to all of my ministerial colleagues, inviting them to consider whether any action was warranted to ensure that Commonwealth laws that may limit any rights or freedoms were appropriately justified. I received responses from several of those colleagues, each of whom assured me that they had commissioned reviews of legislation within their portfolios against the template of the report for that very purpose. Therefore, those reviews, across a range of departments, are underway at the moment. No doubt, we will see their outcomes in the not-too-distant future.

Senator PRATT: What are the references you are considering giving the Australian Law Reform Commission at the moment?

Senator Brandis: I am considering a number of options at the moment. I have had a discussion with Professor Croucher as to what those options may be and I have had a discussion with my department and staff. We do not foreshadow references until they are announced, obviously.

Senator PRATT: The issue that strikes me—elder abuse is an important issue, but, other than that, it seems like they might be somewhat starved of work at the moment.

Senator Brandis: I do not think that is right, but, in any event, there are a number of options that I have turned my mind to quite recently, actually, and I expect to be in a position to make a significant announcement relatively soon.

Senator PRATT: I want to place on the record that the opposition values the work and the sustainability of the Australian Law Reform Commission, and we do not want to see them starved of work. We can see many important issues that could and should be referred to them.

Senator Brandis: The shadow Attorney-General could always write to me, you know, and propose ideas, but he has not done so. Indeed, any member of parliament can. You, Senator Pratt, are very welcome to write to me to propose areas for potential reform.

Senator PRATT: Thank you—I might take you up on that. Professor Croucher, you have six staff dedicated to the elder abuse inquiry. How is that inquiry progressing?

Prof Croucher: It is progressing very well and to the timetable that we have publicised. We released the issues paper for the inquiry on 15 June to coincide with Elder Abuse Awareness Day. Since that time, we have received over 200 submissions, which is a considerable number and far more than we anticipated and which signifies both the importance of the issue community-wide and the active engagement with stakeholders. With all that weight of contribution, we have scheduled to release the discussion paper on 12 December, with submissions due towards the end of February, to allow, obviously, for the summer break and for the impact that will have on all the key people. With the completion of that work, we will be in a position to report to the Attorney by the end of May, which is the reporting date.

Senator HINCH: Professor Croucher, Foreign Minister Bishop has told me—as have several members of Border Force—that a number of passports have been withdrawn from people who are suspected of wanting to go overseas to fight for ISIS, in the national interest. I

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also think that it is in the national interest to withdraw the passports of convicted sex offenders who are going on child-rape holidays to Cambodia, Vietnam, Malaysia, the Philippines and Myanmar. I want your advice. I am wondering whether that could be done under existing laws and resolutions or whether new law would need to be instituted.

Prof Croucher: Thank you for your question, but it is not one that I feel I can answer. It is not a matter upon which the Australian Law Reform Commission has undertaken work and, if such work were to be required of us, it would come under terms of reference from the Attorney.

Senator HINCH: I was just hopeful. Thank you.

Family Court of Australia Federal Court of Australia Federal Circuit Court of Australia

[17:09]

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CHAIR: Welcome, ladies and gentlemen. Would any or all of you like to make an opening statement?

Ms Lagos: No, not on behalf of the Federal Court, thank you.

Dr Fenwick: No.

Senator WONG: I noticed that you were all acting in your roles.

Ms Lagos: If I could clarify: I am only acting because the Chief Executive Officer and Principal Registrar of the Federal Court, Warwick Soden, is actually on leave.

Senator WONG: Has that cascaded down through the organisation and is that why other people are acting, or are there other reasons for that?

Ms Lagos: In so far as the Federal Court, my acting role is only until he returns from leave, which is at the end of the month.

Senator WONG: A number of people at the table identify themselves as acting as well. Can I understand why that is?

Mr Brocklehurst: In terms of my role, there is currently an appointment process underway for the Chief Executive Officer of the Family Court, who will also undertake the role of Principal Registrar. During that period of time, I am acting as the CEO. My background is that I was executive director corporate for both courts in the last couple of years. While that process is underway, I am acting CEO and John FitzGibbon is acting principal registrar.

Senator WONG: So we have an acting CEO and an acting principal registrar at the Family Court, and we have an acting CEO, for the reasons outlined, in the Federal Court. We have an acting CEO in the Federal Circuit Court, correct?

Dr Fenwick: Yes.

Senator Brandis: We will, very shortly, be announcing a permanency at the Family Court.

Senator WONG: How long has the Family Court had an acting CEO?

Mr Brocklehurst: From 1 July this year.

Senator Brandis: You may actually not recall, because you have not been attending this committee until quite recently, but there was an arrangement for some years that I thought was very unsatisfactory: the Family Court and the Federal Circuit Court had a shared CEO. That was an arrangement that went back as far as Mr McClelland, as he then was, when he was the Attorney-General. That has come to an end, I am pleased to say, and each of the Federal Circuit Court and the Family Court are going to have their own CEOs, as, in my view, they always should have.

Senator WONG: Thank you. Mr Brocklehurst, I think you have been acting since July; is that right?

Mr Brocklehurst: That is right.

Senator WONG: And Mr FitzGibbon has been acting principal registrar since when?

Mr Brocklehurst: Since July as well.

Senator WONG: Dr Fenwick, you have been acting CEO of the Federal Circuit Court since when?

Dr Fenwick: Since 1 July.

Senator WONG: Is everyone 1 July?

Dr Fenwick: Yes, that is right.

Senator WONG: Except for you, Ms Lagos, because yours relates to someone being on leave?

Ms Lagos: Yes, just a period of leave.

Senator PRATT: We want to raise this evening some issues around funding of Australia's court systems, in particular the Family Court. I note the Chief Justice of the Family Court, Diana Bryant, in March this year was quoted as saying:

What I'm trying to do is ... say to the government as a whole: if you are really serious about deaths of children, because that's what this is about ... we really do need to look at funding the courts properly.

With a modest amount ... you could make a really big difference to the system.

I want to ask our witnesses here today to characterise for us some of the funding pressure that they are under.

Senator Brandis: You presumably want to do it one court at a time. Which one do you want to start with?

Senator PRATT: Could we start with the Family Court, please.

Mr Brocklehurst: The resources have been allocated as per the process in terms of the court changes from 1 July. The court is like any other agency, effectively. There are tight funds across all agencies, so we need to deal with the resources we are provided. The chief justice did raise an issue whereby if there were additional funds available in areas such as additional registrars or family consultants they possibly would be able to be utilised.

Senator PRATT: Family consultants?

Mr Brocklehurst: Family consultants and registrars, but that was in recognition of an environment of tight resources across all agencies.

Senator PRATT: Justice Bryant said that judges are faced with the dilemma of what contact orders to put in place between parents and children or whether contact between

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parents and children should be cut. She characterised how difficult it is to not want to make a mistake in making orders that provide for ongoing contact with children when they are unclear about whether such orders would put children at risk and, on the other hand, the difficulty of wanting to balance that to protect the relationship between a parent and a child, especially if it is going to take a long time for a matter to get heard. Would better resourcing and funding help the court address the evidence base for such issues?

Senator Brandis: I will answer that, Senator. The government would love to have more money but, as you know—though you may not want to acknowledge it—when the coalition was elected in 2013 we inherited the worst set of public finances in Australian history at the time—

Senator WONG: They are actually worse now, just so we are clear. They are much worse now.

Senator Brandis: so there was no spare money. As the Attorney-General I would love to have more money in the portfolio. I am sure every one of my ministerial colleagues would love to have more money in their portfolio, but unless we are going to further increase debt, which we should not do, or further increase tax, which we should not do, then economies have to be made. What I have tried to do in leading this portfolio over the last three years and more is ensure that to the greatest extent possible the economies have been designed in ways that have the least impact on the vulnerable. When we come to the family law system, although your questions are about the Family Court it is very important to remember that the Family Court is not and has not for years now been the principal family law court of the land, because something in the order of 90 per cent of family law matters are disposed of in the Federal Circuit Court. So issues of resourcing of the Family Court cannot really be discussed in isolation from the issue of the Federal Circuit Court. I am sure you are going to pursue that, Senator. The whole system is a two-court system, not a one-court system.

Senator PRATT: Thank you, Senator Brandis. I appreciate that. Justice Bryant quantified this over the forward estimates as some \$20 million in order to see some of these needs met within the Family Court system. You say, Senator Brandis, that this is a question of priorities. Surely, given the big tax cuts that you have put on the table for corporate Australia, \$20 million is not too big an ask?

Senator Brandis: I am not an economic minister, so I should tread carefully here, but when you say the big tax cuts for corporate Australia the purpose for which that corporate tax reform was designed was to boost the economy and to boost prosperity so that in fact we would have more people in employment, we would have more prosperous companies and we would have more, not less, tax collected. The government decided very deliberately, going into the election, to begin with the smallest companies, which are effectively family businesses or sole traders, and to prioritise them and then, over a period of years, extend the tax relief to larger corporations. So when you talk about corporate tax relief what you are really talking about, at least in the near term—

Senator PRATT: I do not need a lecture on economics thank you, Senator Brandis.

Senator Brandis: is small business and family business tax relief.

Senator PRATT: Senator Brandis, will you consider better funding for the Family Court in order to prevent these conflicts?

Senator Brandis: I do not want to raise any false hopes. As I said, I wish there were more money in my portfolio—every minister does—but we are governed by the laws of both arithmetic and prudence, and by prudence I mean the need not to inflate the debt that we pass on to future generations. The Prime Minister said not long ago this is as much a moral issue as anything else. It is not morally right for people of this generation to pass on the burden of greater debt and, therefore, greater taxation and, therefore, more constrained life choices to the next generation or the generation after it.

Senator PRATT: I will just remind you what Justice Bryant said, which was:

 \dots if you are really serious about deaths of children, because that's what this is about \dots we really do need to look at funding the courts properly

I do not have any further questions.

CHAIR: Does that require an answer?

Senator Brandis: When we say 'funding the courts properly', it is not just about funding the courts. It is also about—since you have opened the question, let me address it. The government has introduced—and allowing for the budget constraints that I have mentioned—and I have been part of introducing, significant legal assistance to additional funding for legal assistance to prevent family violence.

On 12 May this year, along with the Minister for Social Services and Senator Cash, I announced that the government would allocate \$30 million to legal assistance and family relationship services—that is, services provided through my portfolio—as part of the \$100 million announced by the government in this year's budget for initiatives to support the third action plan of the National Plan to Reduce Violence against Women and their Children.

On 16 May I wrote to my state and territory counterparts and to peak sectoral bodies seeking their views on where this funding could be invested to have the greatest impact. Those responses have been received. Together with relevant recommendations from other sources—most particularly the final report of the COAG advisory panel on family violence, Women's Legal Services Australia's Safety First in Family Law plan and the Victorian Royal Commission into Family Violence—the government is considering the best allocation of those funds. That will be announced in the near future. So that is an additional \$100 million, which we are spending directly on family violence; not additional funding to the courts but additional funding to address the problem at source.

Senator HINCH: My question is to Mr Brocklehurst, and I will just preface it by saying that you probably have the toughest court in the land. Emotions run high, and when the custody of children is involved then it is a very tough time for all concerned. But, in my experience, I think that the reputation—the image—of the Family Court in Australia right now is the worst it has been in about the past 30 years, and I am wondering if you have a theory as to why. My emails before I got elected, and even more since, run hot with horror stories out of the Family Court.

Senator Brandis: Before the witness answers, Senator Hinch, I understand that-

Senator HINCH: Sorry, Senator Brandis. My question was not to you.

Senator Brandis: Sorry, Senator Hinch. All questions-

Senator HINCH: Well, ask the chair, because I—

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Senator Brandis: Senator Hinch, can I just say something to you.

Senator HINCH: Mr Chairman, my question was to Mr Brocklehurst. It was not to you, Senator Brandis.

Senator Brandis: Senator Hinch, let me explain. All questions are to me. All questions are to the minister in the chair but, by convention, the minister will ordinarily invite the public servants to answer them. But—this is the way this process works—if the minister chooses to take the question, that is entirely his right and at his discretion.

Senator HINCH: My apologies, Senator Brandis. I will ask you the question, then: why do you think the Family Court is in such a dire state?

Senator Brandis: I was not trying to take the question off the witness either, and I want him to answer your question, but I was going to ask you if you could be a little more specific about the complaints you receive, because there are a lot of issues in the Family Court, obviously, but I think it might be more useful to the witnesses—and indeed, frankly, to me as the minister—if you were able to particularise the main areas of complaint that you have or that you hear about.

Senator HINCH: Mr Brocklehurst, are you happy with the standard of advice that you get from child welfare agencies?

Mr Brocklehurst: That question is probably more relevant to or better answered by the acting principal registrar of the court, so I will get Mr FitzGibbon to come up.

Mr FitzGibbon: My background—just in answering your question, Senator—is that I have been at the court for 30 years as a registrar. I have sat since 1999, dealing with the interim interlocutory duty lists. I am the notional judge manager of the Magellan list, which are the cases with the very serious sexual, physical or emotional abuse of children. I do so in Melbourne, but I have sat around the nation and I have been deputy principal registrar. So I have quite a length of experience and exposure to the sorts of issues and matters you raise.

Insofar as the workload of the Family Court now is concerned, it is, I think, a perception of the public that they lump the Federal Circuit Court and the Family Court together. They see us as one, and we are not. As the Attorney correctly points out, we deal with 15 per cent of the filings in the Family Court: the most complex, complicated cases and matters that are not within the jurisdiction of the Federal Circuit Court judges. The Magellan list is a good example of work.

Coming to your question about the advice from state welfare agencies, we have a protocol and arrangement which was initiated—I was there when it commenced—with the former Chief Justice Nicholson in the mid-nineties. We identified cases with those very serious matters which were required to move faster through the court system, and that is how, ultimately, the Magellan list, as it is known, came about. It is a series of arrangements and protocols between the court, the state welfare agencies and the various legal aid bodies, funded by government, to enable a system whereby we aim to get from filing to completion in six months. That is very difficult to meet.

Returning to your question, that triggers an arrangement whereby the state agencies undertake an exhaustive report—what is called a Magellan report. My experience—and I have sat in the Magellan list now for six or seven years—is that they are of a very high standard. They are a summary of their file and their investigation. I can only comment most definitively about those within Victoria. They are closely monitored and scrutinised, and they are very important documents. There is a process—which in due course or on another occasion I will be very happy to outline to you—about how the pathway operates and the gathering of evidentiary material to ultimately, if need be, move to a trial process before a judge. It is about gathering all of the relevant evidence as quickly as possible. If there is a need for a forensic exercise to be undertaken, that is there for that to occur.

Senator HINCH: One of the common complaints, especially with women, is that—to use a crude expression—they feel they are going to get dollared to death: if they get into the Family Court, it gets so expensive, the lawyers make a lot of money out of it, but they do not get the answers they are looking for. Is there any way that can be assuaged?

Mr FitzGibbon: The costs that are charged to clients are not the subject of control by the court. There is a schedule, which is attached to the rules of court, which is reviewed annually. It sets a minimum fee for lawyers. I cannot comment in any great depth, but costs agreements are entered into. Separate to that, there are rights that parties have if they wish to complain about the costs and the charges levied on them and how that is done—through the law societies and professional bodies. The court itself, apart from where the regulations set certain fees for filing of certain documents and so on, does not charge. Our child dispute services are cost free. There are some modest fees—most are means tested of course, so if people satisfy the means test they are not required to meet those costs. But the private sector is a different matter altogether. I do agree: litigation is a very costly exercise.

Senator HINCH: I will illustrate another area. This is not a typical case, but it is so frustrating. In a case recently, an estranged wife was raped by her husband. She left the husband. They got to the Family Court to settle the custody battle over the children. He claimed that he could not afford a lawyer, so he represented himself. His wife was there. The questions were not even directed through the judge—this is a victim being questioned by her alleged attacker. That is not justice and that is not right.

Mr FitzGibbon: I will say two things. I would be interested—and I think the Federal Circuit Court would be interested—to know from which particular court this came. There are a range of provisions within the act, and internally we have a range of guidelines, protocols and best practice, to deal with those situations. If that has gone awry, we would certainly want to know. We would look at it. We take these matters very seriously. Overall, we receive complaints for about one per cent of all cases, all filings—judicial complaints, complaints about behaviour or about the way matters are conducted—and we investigate them all.

Senator HINCH: Compulsory conciliation has sped things up greatly, but it is still dreadfully slow. You are talking two and three years, are you not?

Mr FitzGibbon: You were referring to a trial where a witness who might be a victim was being cross-examined by the alleged perpetrator. There are a range of options that might avoid and obviate that. If that has occurred to someone who is a constituent or someone who has been referred to you, the detail is certainly something we would look at. I would like to think—and I am reasonably confident—that that is not an endemic problem either in the Family Court or in the Federal Circuit Court of Australia. It is something to which we are very attuned. We have a joint courts committee on family violence and all of these things. The Family Court commenced it in the mid-1990s and it is revised and reviewed regularly. It is an ongoing and active process we engage in.

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Senator HINCH: I am pushing for a Senate inquiry into the Family Court and child welfare agencies, so I suspect we will talk again.

Senator WATERS: I too have some questions about processes in the Family Court, particularly as they pertain to domestic violence cases-including the issue of crossexamination, amongst others. First, are you acting registrar?

Mr FitzGibbon: I am the acting Principal Registrar of the Family Court.

Senator WATERS: Have you in that capacity, or has anyone else as part of the Family Court, engaged with Women's Legal Services Australia about their plan 'Safety First in Family Law'?

Mr FitzGibbon: We have. There are a number of agencies we have links with and consult with, as does the Federal Circuit Court, I think-I cannot talk definitively about that. The acting principal registrar, Sia Lagos, and Dr Fenwick can no doubt talk about that. They are amongst the various agencies with whom we work, across a range of protocols, principles and guidelines that are applied, with professional staff, counter staff, guidelines and benchmarks for judges.

I am conscious of that recent report. In fact, the Chief Justice may have been provided with a copy some little time ago. They are things about which we take onboard, always, and listen to and see what we can do to achieve. We have a process going at the moment-which I initiated for the registrars who deal at the lower level with these cases-about looking at our process, our models, the best-practice guidelines and benchmarks. Nothing is ever immutable, in either court, in so far as how we think they are dynamic. And they have to be considered and reviewed and revisited regularly to make sure that whatever we have in place is working appropriately and we consult widely.

Senator WATERS: That sounds very positive. Are you able to provide me with a little more specifics on the particular recommendations in that five-point plan?

Mr FitzGibbon: I just received it today, at 12.30 pm.

Senator WATERS: I see. I thought you said you were engaging with them on the plan.

Mr FitzGibbon: I would be happy to, if there were something to take on notice for you; I apologise, but I received it just this afternoon-at 12.36 pm, I recollect.

Senator WATERS: So your engagement with Women's Legal Service has been on general matters not on this plan, specifically.

Mr FitzGibbon: Not in my role, at least at this point in time, no.

Senator WATERS: Are you aware whether anybody else in the court has engaged with this plan and with Women's Legal Service on the details of this plan?

Mr FitzGibbon: I would have to check, if I may take it on notice, and come back to you on that.

Senator WATERS: Thank you very much.

Mr FitzGibbon: That is from the Family Court's perspective; I do not know about the Federal Circuit Court.

Senator WATERS: I am not sure how relevant it would be, but by all means—

Mr FitzGibbon: Seventy-five per cent of the cases are dealt with in the Federal Circuit Court and most filings are initiated there and commenced there—

Senator WATERS: Is that right? In that case, yes, please.

Mr FitzGibbon: so that we only deal with a small percentile, but we complement each other with the processes.

Senator WATERS: In that case, I will also ask your colleagues—Dr Fenwick, have you had any engagement with the Women's Legal Service, specifically about this Safety First in Family Law plan?

Dr Fenwick: I am also not aware of any specific formal approach or consultation.

Senator WATERS: Ms Lagos, is this not relevant for your jurisdiction?

Ms Lagos: Not relevant in the Federal Court.

Senator WATERS: I am pleased to see that you received it today and it certainly has, what seems to me, some very sensible reforms. Can you outline for me what the process will be, from hereon in, for the court to turn its mind to these sorts of reforms?

Mr FitzGibbon: I think the most formal process will be there is a continuing joint committee of the two courts, which is chaired by two judges and which has a reporting mechanism to the Chief Justice and the chief judge. This report will be considered in the overall construct of their work but also looked at insofar as it may be applicable to the current court processes—whether there is a means or way in which that can be implemented or consider, if it is, how it might be done or what the practical problems or difficulties are in how it might be.

We would always look and see if there is an opportunity within the current process and operations without any, necessarily, extra cost or added cost or significant cost to do so, simply in the practical manner of things. There may well be other longer term things, which we would then consider and, if we needed to, we would prepare, I would imagine, a proposal or a budgetary proposal about where there might be a case made for funding to enable certain things to occur. We would certainly look at what could be done immediately, within a very short time line, to at least commence the process of implementation.

If they are things that are accepted, the Chief Justice has a policy advisory committee of the highest level, and I think there is already a tacit acknowledgement and acceptance that the things in the tenets underlying those sorts of recommendations are shared as a concern, and we wish to ensure that all parties in the court process have their needs addressed appropriately.

Senator WATERS: You write that the Chief Justice was at the launch of this plan. I was at that same launch. It was in June of this year, in Melbourne. She spoke very passionately and very well about these issues. So I am surprised that you have only seen the plan today. Do you know if there has been any consideration by that policy advisory committee—or any other architecture of the court—given the Chief Justice's particular interest in launching this very plan five-odd months ago?

Mr FitzGibbon: I cannot tell you definitively but could be quite certain there will be. There are various arms of the court that must have regard to these things. The policy aspect is that a chief is given her imprimatur, from the Family Court of Australia's perspective, to it and wishes to have them implemented—I apologise; I am at cross-purposes with you, I am told. I was talking about the report as against the five-step plan, which I think is Safety First in Family Law.

Senator WATERS: Yes.

Mr FitzGibbon: I apologise. I was at cross-purposes with you about a more detailed report that underpins it as against the actual five-step process, which has been seen previously.

Senator WATERS: Yes. The five-step process was launched in June by the Chief Justice, amongst others. I am interested in what has happened since then. Has the court turned its mind to implementing any of these suggestions?

Mr FitzGibbon: It is an ongoing process, as far as I am aware. The risk assessment is already—there have already been processes in place for this assessment. The Family Court also has been doing some study and work about a new evaluation model, which the Chief Justice has given support to for the cases in the Family Court. This is a model to be utilised by family consultants when parties are referred to engage in a process, from the earlier stages, under section 11F of the act, children's and parents' issues assessment.

It may be child inclusive. The arrangements always have to have a flexibility whereby parties themselves are not compelled to see or confront or deal with each other as a matter of necessity. It is arranged with the unique needs of the family or the individuals. An assessment is taken and a questionnaire asked—I think it is eight questions—about triggers and indicators about family violence and the level of it.

Senator WATERS: How long has that been in place, that new evaluation model?

Mr FitzGibbon: It has only just had the imprimatur of the chief to move forward after two periods of evaluation, over about the last 12 or 15 months—by Dr Ben Jones, a family consultant who is based in the Melbourne registry.

Senator WATERS: Is that being implemented yet or not?

Mr FitzGibbon: She has just made the request, following the evaluation, to move forward with it. It will, I expect, commence shortly in a more formalised setting than has been. At the moment, it has been a controlled evaluation process to see if it has been useful and the evaluations, before proceeding, to be very careful.

Senator WATERS: How does this new evaluation model differ from the previous process, as pertaining to family consultants in the domestic violence—

Mr FitzGibbon: It is a more targeted and consistent process.

Senator WATERS: Let me finish so we do not get at cross-purposes again.

Mr FitzGibbon: I am sorry.

Senator WATERS: I am interested in just domestic violence cases and the family consultant's role, in relation to those cases. What are the new features of this evaluation model compared to the processes that used to be employed?

Mr FitzGibbon: I would have to take that on notice, because I would need to look at and compare—there are a number of guidelines for the various stages of engagement by family consultants with clients. These are from the early counselling through to what is done for

preparation of a forensic family report, under section 62G. There are different stages. In order to give you an informed comparison, we would need to take that on notice and distinguish that for you.

Senator WATERS: I will look forward to that, particularly which phases the new evaluation model will apply to, given that, as you said, there are so many different phases, apparently, with different guidelines applying to each phase.

Mr FitzGibbon: Not necessarily different guidelines but the considerations—because the process in the outcome is to be different. We go from what may be just a very limited memorandum assessment, to get a sense of what the presenting issues are—

Senator WATERS: Yes, depending on the facts of the situation.

Mr FitzGibbon: through to a report for a trial where the evidence is distilled, much clearer and a much broader picture is considered in a forensic way by a family consultant having regard to everything. They can then be called as a witness to be cross-examined and to make recommendations to the court as against a very limited snapshot of the family.

Senator WATERS: I understand; it is a sliding scale. Thank you. Given that the court's now got this plan to hand—you received it today—you will come back to me with further detail on how you will consider implementing it, although you have outlined that process with the joint committee and you have flagged the Chief Justice's Policy Advisory Committee. Any further detail would be very welcome.

Minister, Senator Scullion, what response does the government intend on making to that same five-point plan? I understand the Attorney has left the room, so with the information you have available, are you aware whether the government is across that plan and if there are any reform proposals being considered?

Senator Scullion: The question you are asking is when we expect the government to respond to that report—or to actually implement the plan?

Senator WATERS: Either. Have you seen it? Is it on anybody's radar? Are you considering it? Might there be some reforms to come?

Senator Scullion: Is there anyone at the table who can assist me in that?

Ms Harvey: We in the department are certainly aware of the five-point plan and have been considering it as we provide advice to the government. For example, the Attorney mentioned earlier the \$30 million that was announced during the election around the third action plan. That is one of the things that we considered in the advice on that that we provided to government.

Senator WATERS: What stage is that at—

Senator Scullion: I am also advised-

Senator WATERS: at the minute? Sorry, Minister.

Ms Harvey: I understand that the third action plan is fairly close. I do not have details about when that will be announced.

Senator WATERS: So you are saying that, if any of these reforms will be implemented by government, that would show up in the third action plan, which is yet to be released?

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Ms Harvey: I was not being that specific. I was saying we did take that into account in formulating that advice. That was around the \$30 million around legal assistance. There is clearly a range of things that are covered in the five-point action plan which fall outside of legal assistance.

Senator WATERS: There is in fact quite a lot that falls outside any action plan, because many of them are statutory reforms. Has there been any input, any process on foot aside from the third action plan, that might actually lead to some legislative reforms that could give effect to any of these five steps?

Ms Harvey: We have certainly considered the steps that are in there, but any changes to the Family Law Act would be a matter for the government, so I cannot provide any further advice on that.

Senator WATERS: I know I am not allowed to ask you what advice you are providing; I am aware of that. But I am trying to understand whether this has been put through a pathway except for the third action plan, which is all well and good, albeit always underfunded and without any legal backing. Is there any other process that this information has been put into that might end up in something—if that makes any sense?

Ms Harvey: Are you talking in terms of whether there is going to be a formal government response to it, for example?

Senator WATERS: That would be one example. Or is there a special division that considers these matters? I have never worked in the Public Service so I am not using the right rhetoric.

Ms Harvey: Certainly we are considering it. I would not say that we have put forward a formal response to it per se, but it is one of the things that we are taking into account as we consider broader policy and other changes.

Senator WATERS: Do you expect that there will be a formal government response?

Ms Harvey: I do not know.

Senator WATERS: I am comforted that it is at least on the department's radar. Hopefully the Attorney is also being made aware of the very simple and very effective reforms that are outlined in the plan.

Mr FitzGibbon: Senator, may I clarify something for you, for the record? The question on notice—I want to clarify that it is limited to what I can provide to you for the 15 per cent of cases which the Family Court do. There are quite separate arrangements and processes in the Federal Circuit Court, who run the filing registry. So it is not that we do not complement each other but we have separate administrations and a separate chief justice and chief judge. I would not want you to think that I could provide a response from the Family Court which would cover all of the family courts work between the two courts.

Senator WATERS: Perhaps Dr Fenwick could also take the same question on notice so that I can get a complete picture.

CHAIR: Senator Waters, your time has expired.

Senator WATERS: I was not aware that there was a time limit.

Senator WONG: We would quite like to move to the AAT.

Senator WATERS: Sorry, Chair, I was not aware that there was a time limit. I apologise. Could I beg some more time?

Senator WONG: We have all been sticking to 15 minutes.

Senator PRATT: We have all been subject to this time limit all day.

Senator WONG: So you will have to come back.

Senator WATERS: I have not been in this committee; I have been in other committees.

Senator WONG: You have missed a treat.

Senator WATERS: Chair, could you put me back on the list if there is some more time? I have some more questions.

CHAIR: Senator Waters, my procedure in all of the committees I have ever chaired is that I give an equal time to every senator and we keep coming back, so as long as you have questions we come back to you—but it turns out that in this instance nobody else wants to ask a question, so you can continue now.

Senator WATERS: Thanks very much. I have some questions about cross-examination of alleged perpetrators in domestic violence situations, which I think Senator Hinch was asking about earlier, and they go to the Family Court rules. I am not too sure whether the Circuit Court will also have an input here, but certainly the Family Court. There was a recommendation in the Productivity Commission's access to justice report, which recommended that alleged perpetrators not directly cross-examine their alleged victims in cases of domestic violence. I understand that the government did respond to that recommendation. Is it the government's intention to implement that recommendation?

Mr FitzGibbon: I am sorry, I do not know, I would have to say, in that regard as to what the government's intent might be.

Senator WATERS: Ms Harvey, is that one for you?

Ms Harvey: You are asking about cross-examination?

Senator WATERS: Yes, the government's response to the Productivity Commission's access to justice report. They responded in particular to the recommendation about not directly cross-examining alleged victims by the alleged perpetrators. Can you refresh my memory on what the government's response was and could you advise whether there is an intention to implement that PC recommendation?

Ms Harvey: The government's response acknowledged that cross-examination of victims of family violence in family law courts by the alleged perpetrators of violence can be traumatic. It was also noted that the department convened a round-table discussion which was held earlier this year to bring together a range of different stakeholders to talk about that topic. That was held in March. That brought together a range of people in the family law system to talk through the different issues.

It is an issue that is complex because of the different nature of family law as a civil proceeding as opposed to state laws around criminal proceedings, where there is different involvement of the victim. For example, in a criminal trial, they would be a witness; in a family law matter, they would be a party to the proceeding and there for the entirety. So some of the issues that were considered were around legislative change, for example, and that of

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course would then require additional legal assistance to fund the parties who would be appearing in the matters.

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There are other things that are perhaps useful in this regard. You might be aware of the Family Violence Bench Book that was commissioned. Part 1 of that was released earlier this year. There is a part in there around court room proceedings and fair hearings and safety; to bring those matters to the attention of judicial officers so that they can use the provisions that are available—for example, in the Family Law Act or other pieces of legislation.

Senator WATERS: Is it your view that there would need to be an amendment to the Family Court rules or, indeed, to the Family Law Act in order to preclude direct cross-examination of victims by alleged perpetrators?

Ms Harvey: I would have to consider whether it could be done simply by rules alone. I do not know; I would have to take on notice whether it would be a rule change or a more legislative change. It is a fairly significant change to the way that trials would run in the Family Court.

Senator WATERS: It was a round table in March, was it?

Ms Harvey: It was.

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Senator WATERS: So the round table considered this; it might have ended up in the bench book. What is the process now for amendment to either the court's rules or the Family Law Act that relates to this cross-examination point? What is the process that would be followed and is that process being followed in order to achieve that change?

Ms Harvey: Certainly, it is something that we are continuing to consider about what options might be available and what those options might look like.

Senator WATERS: What is the time frame on that consideration?

Ms Harvey: I do not have a current time frame.

Senator WATERS: There is no deadline you are working to, so it sounds like it could take an awfully long time.

Ms Harvey: It may take some time. It is a complicated issue.

Senator WATERS: Perhaps this is one for you, Dr FitzGibbon. How many people were unrepresented in the Family Court last year?

Mr FitzGibbon: We have just done that figure. It varies in different stages. There are figures that stretch across filing at first instance, the appellant division, and certainly the annual report does, as far as it is able, set out those figures for you. I would be able to refer you to them.

Senator WATERS: I can check that if that is in the annual report. Does the annual report specify whether those matters have domestic or family violence allegations? I am particularly interested in the number of unrepresented litigants where there are domestic violence issues.

Mr FitzGibbon: I would need to look at that more carefully. I would not want to give you a definitive answer about that percentile. We are certainly aware in terms of notice of risk—it is assisted by a figure of 3.20 in the report, on page 3: 'Proportion of litigants representation status, finalised cases'. So it is those tables throughout there, and family violence is all

addressed. It is page 56, 57 and onwards of the annual report, which was tabled about a week or so ago, I think.

Senator WATERS: I will look up those figures and I might submit some further questions on notice to get some more details. Are you were at the impending reduction in funding of 30 per cent to the community legal centre sector, due to kick in in July next year?

Mr FitzGibbon: Not insofar as the broader picture is concerned.

Senator WATERS: So you have not had any engagement on behalf the court with the community legal centre sector?

Mr FitzGibbon: Not in the capacity in which I am. I have been doing this since only 1 July. Otherwise I have been sitting in court.

Senator WATERS: Has your predecessor engaged with the CLC sector in relation to those funding cuts?

Mr FitzGibbon: I do not know about that directly. To that extent I cannot give you a definitive answer about the extent to which we consult very widely or we have input with them, but most likely not.

Senator WATERS: Have you formed a view as to whether that will impact on upon the court's work?

Mr FitzGibbon: I do not know. I think there is always a demand from advice and assistance. For the Family Court work I think it is more limited as to what they can do and provide in terms of representation in very complex cases. They do their very best but it is very complex.

Senator WATERS: Hence my question: are you concerned that there will be 30 per cent less funding that could contribute to even more unrepresented litigants in your jurisdiction?

Mr FitzGibbon: I could not venture an opinion about whether it would change things significantly are not. It is a different cohort of those clients who file and present to the Family Court of Australia with very complex matters, and informed by not just family violence but psychiatric disorders and drug abuse and a range of things that can impact and impair on how their case proceeds and moves. It is a very difficult area, including that advice and assistance. Those agencies that are engaged do their very best to provide advice to them—

Senator WATERS: They will have to do their very best with 30 per cent less funding. That is my point. You have not turned your mind to the impacts of that?

Mr FitzGibbon: I cannot answer. I am afraid it is for the government.

Senator WATERS: If you could keep an eye on that.

Mr FitzGibbon: We do not fund them.

Senator WATERS: No, I know. Neither does the government any more, or at least not as much as they used to. Is the court considering any early resolution of small property disputes, via a legally assisted dispute?

Mr FitzGibbon: That would be a matter for the Federal Circuit Court, because we deal with the more complicated—

Senator WATERS: Dr Fenwick, is the court considering any early resolution of small property disputes under \$100,000, as can often be—

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Dr Fenwick: I am not aware of that initiative. I do not quite know what you are referring to.

Senator WATERS: So you are not considering a fast-track process for those much smaller property claims?

Dr Fenwick: I am not aware of such an initiative.

Senator WATERS: In relation to the length of time for family court cases—obviously I understand that every case is different—are they taking longer in recent times or is the court getting more efficient? How long is a piece of string when it comes to an average family court case where there are domestic violence issues?

Mr FitzGibbon: There is a comparative table and the CEO can give you an answer about that aspect.

Mr Brocklehurst: In terms of the timing, filing to the first day of trial is 16.7 months, of those that go to trial. Filing to finalisation is 12.3 months.

Senator WATERS: What is finalisation if it is before the trial?

Mr Brocklehurst: The reason for the 12.3 months is smaller is that many of them settle before trial.

Senator WATERS: What is the period of time from filing to judgment date? Or the time from the trial to the judgment?

Mr Brocklehurst: I might take that final one on notice. I do not have that.

Senator WATERS: And I am interested in whether that amount of time has increased in recent years or decreased—just the trends there. Can you reflect on why the length of time, because my understanding anecdotally and through communication with the sector is that domestic violence cases seem to take a particularly long time, given the complexity?

Mr Brocklehurst: Mr FitzGibbon would need to discuss that.

Senator WATERS: I am interested in the cause of the delay. I am sure it is a mixture of things. Is it the court? Is it underfunding? Is it the parties? Is it the complexity?

Mr FitzGibbon: You have identified some of them. The cause is no single factor in my experience. There are extraneous factors. On occasion there are delays to get experts who can prepare particular reports to assist the court. There may be police investigations, inquiries and proceedings. There is a whole range of things of which the family violence element is one important presenting aspect of the case amongst a range of other matters. But we endeavour to keep very close tabs on matters moving along a pathway, and also upon when they are finalised, if judgements are reserved, and the time lines for those. So I do not have a sense that there has been any really significant increase nor decrease. It can vary from the size of the Family Court of Australia than it is for the Federal Circuit Court of Australia, with different processes. The Federal Circuit Court services all of the regional circuit areas as well, so delays vary around the nation, depending upon the nature of the work, its locale and so on.

Senator WATERS: Do you track specifically the length of time for those domestic violence cases—

Mr FitzGibbon: Not that I am aware of, in terms of a specific case that is noted as such and then followed. Part of that will be part of the overall evidence in a case.

CHAIR: Thank you to the officers of the three courts. We appreciate your attendance. We will resume with the Administrative Appeals Tribunal.

Proceedings suspended from 18:05 to 19:04

CHAIR: I will reconvene this hearing of the Senate Legal and Constitutional Affairs Legislation Committee inquiring into the 2016-2017 budget. These are the estimates proceedings. Just before we start, I indicate we are now dealing with the Administrative Appeals Tribunal. I just want to indicate to the minister and the department that there has been a request made for a spillover in this committee, which the committee is happy to do and is required to do. It will be at a time to suit the convenience of the committee members to make sure they can get there, and it will be at a time, too, that is convenient to the minister. I want to advise the minister—he is not here, but Senator Scullion can pass this on—that the secretariat will be in touch with the minister to find a suitable time for the spill-over. I can only indicate it will not be this Friday or any time next week, as I will not be available because of parliamentary commitments. We will negotiate with the minister a time convenient to him, and one that suits the rest of the committee as well.

Administrative Appeals Tribunal

[19:06]

CHAIR: With that, I welcome the Administrative Appeals Tribunal. Thank you very much for coming along tonight and providing your evidence; apologies for the lateness of the hour. I will start with Senator Wong.

Senator WONG: Thank you. I want to ask some questions about the protocol which exists in relation to appointments to the AAT. Who can assist me with that—in terms of some of the administrative work associated with that?

Ms Leathem: I think that would be a matter for the Attorney-General's Department.

Senator WONG: No, because actually the protocol is between the AAT and the Attorney-General's Department. I intend to ask the Attorney-General's Department questions when we get to that outcome, but I do want to ask you, because under the protocol which has been in place since 2015—I did have some questions about that, but that might be best addressed to the department—the president of the tribunal supplies the Attorney-General with a range of information in relation to positions. Did that occur?

Ms Leathem: My understanding is there were discussions between the President and the Attorney-General to develop the protocol.

Senator WONG: No, that wasn't my question. There is a protocol. We have got a copy of a protocol from 2015. Under the protocol, the president is supposed to supply the Attorney-General with the tribunal's assessment of what positions need to be filled, advice about which members whose terms are expiring have sought reappointment and the president's recommendations regarding reappointment. Do you know what I am talking about?

Ms Leathem: I do, yes.

Senator WONG: Were you, or was anyone in your staff, involved in preparing that material under the protocol?

Ms Leathem: It was not my staff involved in preparing that, although there is an executive officer to the president.

Senator WONG: Are they here?

Ms Leathem: No, they are not here today.

Senator WONG: Well, they will need to attend on—why are they not here?

Ms Leathem: I am sorry, I did not anticipate that question but I am happy to answer questions that I can about the protocol document to the extent that we can.

CHAIR: I am sorry, just excuse me, Senator Wong; I will just stop that. I omitted to ask the tribunal, if you had an opening statement to make.

Ms Leathem: We have a short opening statement, if that is all right.

CHAIR: I apologise, Senator Wong; I should have done this before. At this late stage, could I ask you to make an opening statement.

Ms Leathem: Thank you. The tribunal did last appear before the committee in February 2015, so it is opportune to update you on some matters that have occurred since that time. Senators will be aware that amendments set out in the Tribunals Amalgamation Act commenced on 1 July 2015, bringing together the AAT with the former Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal. The amalgamation was a huge task, and considerable efforts were made to ensure the amalgamation was as seamless as possible for those who had cases before the tribunals and for new applicants. The successful amalgamation can be attributed to the hard work of members and staff from the AAT and the former tribunals, and staff from the Attorney-General's Department.

The first 15 months of the amalgamated tribunal has seen considerable strategic planning, organisational development and progress in relation to harmonisation and integration. We have established new governance arrangements, developed a five-year strategic plan, integrated corporate functions, made significant progress in our plan to move to one location in each city that processes all types of applications, and begun the work of integrating and harmonising our case processes and service delivery. We have also built an integrated website internet payroll system and accounting system. We have made it possible for applicants to apply online for any type of decision that they want reviewed in the AAT and we have undertaken a comprehensive user feedback survey.

These activities represent only a sample of the work that has been undertaken and for which I am very grateful to our hard-working members and staff. Looking ahead, we will continue to work towards the goals in our strategic plan. Our priorities for the next 12 months include the continued integration of our registry services, progressing our digital services strategy and pursuing a program of legislative harmonisation to further improve the experience of our users and the functioning of the administrative decision-making system.

CHAIR: Thank you very much, Ms Leathem, and I apologise for that. And I apologise again to you, Senator Wong, for interrupting the start of your questioning. I take it neither of the other officers want to say anything.

Senator WONG: Was anybody at the table for the AAT involved in preparing information on the vacancies, both appointments and reappointments, for the AAT leading up to the May announcements?

Ms Leathem: I can inform that there was obviously, through the internal processes, consultation by the president with division heads. We assist that as the administrative staff of the tribunal, but recommendations effectively come from the president. We help collate that information.

Senator WONG: I just want to ask about that bit before we get to—it might be that we have to see if the president will attend and we can ask the president the questions, but I actually want to first get to the process. Were you involved in that, or were your staff involved in that?

Ms Leathem: There would have been an information gathering-

Senator WONG: Please—'would have' is not helpful evidence.

Ms Leathem: I was not personally involved. It is coordinated by the president.

Senator WONG: Sure, but you can presumably give evidence because you have information about what staff did—yes?

Ms Leathem: Yes.

Senator WONG: Okay, so why don't we talk about that. Tell me what staff did as part of preparing information for the president so that the president could consider what recommendations should be made. And can we get some timing?

Ms Leathem: So we would meet-

Senator WONG: I really request that you do not use the word 'would' because it is very difficult for the committee—it is very conditional.

Ms Leathem: The tribunal collates information about workload and appointments data, so we maintain records about all of the appointments that we have. Clearly at the time of amalgamation that involved pulling together the information about what had been appointments to the former tribunals.

Senator WONG: Just remind me of the date of amalgamation again?

Ms Leathem: It was 1 July 2015.

Senator WONG: Thank you; please go on.

Ms Leathem: The tribunal maintains a list of all of the members and their appointment terms, including when those might expire. That information is provided in assisting the president to form any recommendations he might make. There is also a process of providing information about workloads, so what work we have on hand, and what the caseload requirements may be. That includes information such as in different locations throughout Australia and the caseload in the different divisions of the tribunal and whether or not there might be a requirement for full-time or part-time members and what classification or categorisation of membership might be required. So there is factual information gathered and provided in relation to the members that we have and the workload that we have on hand.

Senator WONG: That is very helpful. I want to go through each of those points. You describe something as 'appointments data'. Can you tell me what that means?

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Ms Leathem: That simply means it is a list of all of the members that we have appointed to the Administrative Appeals Tribunal, and information about when their term of appointment may expire and what assignment they might have, which means which division or which work they were able to undertake within the tribunal.

Senator WONG: So that is essentially a dataset of everybody you have, when their term expires and what they are doing, to try to get some sense of (a) how many vacancies you might have and then (b) the secondary question, which is future workload. Is that a reasonable summation?

Ms Leathem: Correct.

Senator WONG: And that appointments data is kept on a database that the tribunal holds?

Ms Leathem: It is simply an Excel spreadsheet.

Senator WONG: Who has access to that?

Ms Leathem: That is accessible by the president, the president's executive officer, myself and my executive assistant.

Senator WONG: So it is a reasonably contained group?

Ms Leathem: Yes. It is not generally available, although on our website there is a list of appointments that are available, which includes the date of expiration of terms.

Senator WONG: What information in the database is different from or additional to the information that is publicly available?

Ms Leathem: At the moment there would be more detailed information about their parttime or full-time status—for example, the divisions in which they might be assigned to undertake work. It is more detailed in that sense.

Senator WONG: In the lead-up to an appointments round, I assume you do—what is the best phrase?—a data retrieval at a particular point in time from this appointments data?

Ms Leathem: If I might put it this way, each of the division heads would have a better picture about the members within their division and the workload needs, so they will be taking a particular look at that part of the jurisdiction and what the workload needs would be.

Senator WONG: I am just trying to get a sense of where this all starts. I think you said it starts with the appointments data, so I assume you get an indication that there needs to be an appointment round, and one of the first steps is to go the Excel spreadsheet and essentially retrieve the information that is required about who is coming up. Would that be right?

Ms Leathem: Correct. We keep a list of what the upcoming appointments are.

Senator WONG: And that is what you get out of the spreadsheet?

Ms Leathem: We would collate the information based on what appointments are coming up, so we can tell at any point in time—

Senator WONG: This is the chicken-and-egg thing here. That is what I am a little confused about, so I wonder if we can clarify that. How do you know what appointments are coming up?

Ms Leathem: The spreadsheet tells you the date of expiration, so it is very easy for us to sort by the ones which are most—

Senator WONG: And what triggers you sorting that?

Ms Leathem: We keep a running watch. We monitor the appointments. So I am aware, for example, how many appointments are expiring at any point of time in the cycle.

Senator WONG: The end point of all of this is the president supplying the Attorney-General with some information, so I am trying to understand—I am going to give you a chance to go back through the process—what precipitates the first step. Is it the president being told by the A-G, 'I'm going to make a whole bunch of appointments'? Do we do this every three months? Is it the Attorney-General's Department telling you, 'Look, we're probably going to be looking at some appointments in a couple of months time or six months time; you better start that process.' What commences the process of ascertaining the data around vacancies and workload?

Ms Leathem: There is regular and frequent communication between the tribunal and the Attorney-General's department, who obviously play a role in helping coordinate this process. The president will also write to the Attorney-General alerting him to upcoming appointments that might need to happen.

Senator WONG: I am trying to understand where the process began for the appointments of May 2016. Are you, or is anyone from the department, able to tell me how that was commenced? Was there a letter from the president? Were there communications from the Attorney-General? Can I start first by saying I assume the department is aware of the protocol.

Mr Anderson: Yes, the department is aware of the protocol. What commenced the process for the May appointments was that the president wrote to the Attorney, providing an assessment of appointment needs. That was on 11 December 2015.

Senator WONG: Can you please table that letter.

Mr Anderson: We will take that on notice. We do not have that here.

Senator WONG: You do not have that here?

Mr Anderson: No, we do not have that here.

Senator WONG: This has been a matter of some controversy in the media on a number of occasions. Do you have matters associated with the May 2016 appointments here or not?

Mr Anderson: We have a range of information we can provide.

Senator WONG: So the president wrote—what was the date?

Mr Anderson: It was 11 December 2015.

Senator WONG: In that letter, what did the president indicate about the numbers of appointments required, workload, those sorts of issues?

Mr Anderson: I do not have the precise number of appointments that he recommended be made. The president writes about reappointments that he recommends, and of course there is information about them.

Senator WONG: I do not want to talk about it in the abstract; I want to know what was recommended. Is it not possible for someone to get the letter here?

CHAIR: Mr Anderson, is this in the nature of advice from the president to the Attorney? **Mr Anderson:** Yes, it is.

Senator WONG: Let us be clear. It is expressing a view about the number of appointments that is sought. I just want the number. I do not need to know everything else; I want to know the number.

CHAIR: I am sure someone can tell you the number. Keep going.

Senator WONG: Just give me the number.

Mr Anderson: We will have to take that on notice. We do not have the document here.

Senator WONG: Can someone find it? We have lots of time.

Mr Anderson: We will see if we can find that before the end.

Senator WONG: I appreciate that.

Mr Anderson: We may or may not be able to do that.

Senator WONG: Apparently, as the chair said, we will be returning, so I am sure we can do it then, if we are not able to get it tonight. We are going to be recalling the committee, so I suppose we can do it then if you are not able to assist tonight.

CHAIR: Yes, that is a matter of course. Get it if you can; if you cannot, you will do it on notice or at some other time.

Senator WONG: No, because we are recalling the committee, so we would be asking for this outcome to return.

CHAIR: That is fine.

Mr Anderson: I am not sure at this time of night whether we will be able to find that out.

CHAIR: Do you mean to say you do not have your staff sitting back in the department waiting for us to ask them a question?

Senator WONG: I am sure they were very interested in the Maldives discussion earlier today!

CHAIR: It is much more interesting than this.

Senator WONG: So the president wrote on 11 December. You cannot tell me in relation to how many positions.

CHAIR: I think that has been said.

Senator WONG: Is that right?

Mr Anderson: That is correct.

Senator WONG: So what happened then?

Mr Anderson: I will ask my colleague. He has a bit more information.

Dr Smrdel: I do not have precise dates for you, but what happens next is the department would brief the Attorney—

Senator WONG: We keep doing 'would'-did you or didn't you?

Dr Smrdel: I do not have the letter, so it is hard to say.

CHAIR: Again, can I just say to witnesses: you speak as you want to speak, and do not let any senator bully you into speaking in a way that you would not normally speak.

Senator WONG: I am not seeking to bully you; it is just if you say 'would' it becomes difficult to ascertain whether it did or did not occur.

CHAIR: That is a matter for a for a further question, not for telling the witness they cannot use the word.

Senator WONG: Did you or did you not?

Dr Smrdel: The department did brief the Attorney, attaching the president's letter.

Senator WONG: Are you able to give me an approximate date for that?

Dr Smrdel: I would need to take that on notice.

Senator WONG: Did the brief to a process of making appointments?

Dr Smrdel: The brief attaches the president's letter in a form where the Attorney can agree to the recommendations of the president or substitute his own preference for the position, or alternatively, as provided for under the protocol, there is an option to advertise the position for filling.

Senator WONG: I do not want to put you in a difficult position in terms of what the advice was, but is it a reasonable summation to say you get the letter and the advice is in accordance with the protocol?

Dr Smrdel: Sorry, the department's advice?

Senator WONG: Yes.

Dr Smrdel: That is correct.

Senator WONG: Were there any names in the president's letter?

Dr Smrdel: In terms of his recommendations?

Senator WONG: I am not clear what the letter is.

Dr Smrdel: The president identifies which appointments will be expiring, which of the members are seeking reappointment and which members he recommends for reappointment.

Senator WONG: So the letter of 11 December 2015 sets out, from the president, which appointments will be expiring and in relation to which individuals he is seeking reappointment.

Dr Smrdel: That is correct.

Senator WONG: In the president's letter, was there a reference to any additional positions being created?

Dr Smrdel: I would need to take that on notice.

CHAIR: We might leave it there.

Senator WONG: I have plenty more on this.

CHAIR: I am sure you do. There is some confusion. My throwaway line to the President of the Human Rights Commission that we will be here until midnight was a term of speaking. For those who are worried that we might be here till midnight, I can assure that this committee will finish at 11 pm. So do not fret, those who thought we might be here until midnight. Ms Leathem, just a matter of clarity: I thought you said twice that you keep this spreadsheet and it is continuously updated.

Ms Leathem: As new appointments, for example, are made or reappointments are made then we would input the new term of appointment or new assignments as well.

CHAIR: That is what I thought you had said.

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Senator LAMBIE: What I have done is I have structured 20-odd questions so they are yes or no. If you feel like you need to add content, can we wait till the end, because I really need to get through the questions, and then we will come back or I will take the answers on notice, please. I would like to direct your attention to section 35 of the AAT Act, which allows nonparties of AAT matters and decision to access, free of charge, information and documents associated with those mattes and decisions. Can you indicate yes or no: am I correct in saying that section 35 of the act allows nonparties of AAT matters to access, free of charge, information and documents associated with those AAT matters and decisions?

CHAIR: Did you understand the question?

Ms Leathem: I am just reading the section here. Yes, it does allow people to access free of charge. Is that the question?

Senator LAMBIE: Yes. Thank you. Am I correct in saying-

Ms Leathem: Sorry, my colleague is—

Senator LAMBIE: Sorry.

Ms Connolly: If documents are copied for people then we do charge a photocopy fee, so they are not actually completely free of charge.

Senator LAMBIE: Am I correct in saying that journalists, for the purpose of the act, are deemed nonparties and can use, and have used, section 35 of the act free of charge and without the privacy constraints found in FOI laws to access, free of charge, information and documents associated with AAT matters and decisions?

Ms Leathem: Yes, I believe they are nonparties if they are not part of the proceeding.

Senator LAMBIE: Thank you. Am I correct in saying that former members of the Australian Defence Force who have appealed Veterans' Affairs matters in the AAT under section 35 of the AAT Act could be the subject of an application by a journalist who requests access to highly personal and private medical records of which only a small part was used in the AAT's decision-making process?

Ms Leathem: Yes.

Senator LAMBIE: Am I correct in saying that a former ADF member has in the last year been placed in a position where, because of an AAT commissioner's ruling under section 35, in order to stop a journalist from gaining access to highly personal medical records and client-lawyer legally privileged documents, the Australian Defence Force member was forced to spend tens of thousands of dollars and hire a barrister to contest the release by the AAT to the media of hundreds of highly personal medical records and client-lawyer privileged documents?

CHAIR: I am sorry; the registrar cannot answer whether someone was forced to spend tens of thousands of dollars. That is beyond the registrar's information. Can I urge you to be certain you understand the question before you answer.

Ms Leathem: It is difficult to understand such a long question.

CHAIR: There are several parts to it.

Ms Leathem: I confine myself to the process if possible.

CHAIR: Senator Lambie, perhaps you could break that up into smaller bits so they can say yes or no.

Senator LAMBIE: Yes, that is fine. Am I correct in suggesting that, if a person working for a media organisation tried to access documents containing personal medical records and client-lawyer privilege documents, under FOI processes it is more than likely that the request for the former ADF member's medical records would be denied under privacy and client-lawyer privilege protections?

Ms Leathem: I could not answer that question; it is a hypothetical. I would need to look at the circumstances of each matter.

Senator LAMBIE: In your view, does section 35 of the AAT Act offer the same level of protection to personal medical records and lawyer-client privilege documents as the FOI Act and its processes?

Ms Leathem: I could not venture an opinion on that.

Senator LAMBIE: Why is that?

CHAIR: Hang on, Senator Lambie. In opening these proceedings, I specifically advised witnesses that they are not able to give opinions. Also, you are not able to give advice on the law. I think the question offends both those. Whilst the registrar says she cannot, the questions are inappropriate in estimates as well.

Senator LAMBIE: All I want to know is: does section 35 of the AAT Act offer the same level of protection to personal medical records and lawyer-client privilege documents as an FOI request? That is all I want to know.

Ms Leathem: But that is asking for a legal opinion.

Senator PRATT: But don't you manage your own FOI applications as well, so you can compare the two?

Ms Leathem: They are actually the subject of decisions by members of the tribunal. So that is the jurisdiction—and members exercise those decision functions, not the registrar.

Senator LAMBIE: So would it be true that any former members of the ADF or veterans who appeal their Department of Veterans' Affairs matters to the AAT have placed themselves at risk of a journalist or another nonparty to their matters under section 35 of the act cheaply accessing sensitive personal and legally privileged information?

Ms Leathem: It would be considered by the member on the facts of the case.

Senator LAMBIE: Can you provide me with the number of veterans who have taken their matters to the AAT over the last 10 years and who are therefore exposed to no-cost searches and fishing expeditions from journalists or people who are not party to those veterans' matters?

Ms Leathem: Senator, are you asking just for the number of veterans matters in the last 10 years?

Senator LAMBIE: Yes-

Ms Leathem: We can take that on notice and get you that statistical information.

Senator LAMBIE: who have been exposed to no-cost searches and fishing expeditions from journalists.

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Ms Leathem: I do not know that we would be able to search that data at all. We would certainly be able to tell you the number of veterans' matters that we have dealt with over the last 10 years.

Senator LAMBIE: Were you aware of the fact that former ADF members' private medical records and lawyer-client privilege documents could be the subject of free information searches from members of the Australian media through the AAT?

Ms Leathem: I am only aware of the particular matter that you have issued a press release on.

Senator LAMBIE: Is it a fair state of affairs? Do you consider that section 35 of the AAT Act is a legal loophole for journalists to bypass the costs and carefully monitored nature of FOI searches should they decide to target veterans who appeal the DVA matters through the AAT?

Ms Leathem: That is a matter of policy.

CHAIR: That is asking for an opinion, and it is not allowed.

Senator LAMBIE: How many applications have been made for information under section 35 of the AAT Act in the last 10 years?

Ms Leathem: Again, I would be happy to take that on notice.

Senator LAMBIE: Thank you. How many of these applications under section 35 for access to information by nonparties have been approved by AAT commissioners?

Ms Leathem: I am not sure that we would have that data. We could certainly tell you the number of applications that have been made and possibly the finalisation as to whether they were affirmed or—

Senator LAMBIE: While you are doing that, could you also name those AAT commissioners who did grant access to nonparties for information considered by the AAT?

Ms Leathem: Sorry, are you asking for the names of members of the tribunal?

Senator LAMBIE: Yes.

Ms Leathem: Who have been involved in the decisions?

Senator LAMBIE: I am asking for the names of the AAT commissioners who did grant or have granted access over the past 10 years to nonparties for information that has been considered by the AAT when it comes to Veterans' Affairs matters.

CHAIR: Can I try to help here: are there such things as AAT commissioners?

Ms Leathem: No, they are members of the tribunal. We do not have commissioners.

Senator LAMBIE: Okay, so your members.

Ms Leathem: Again, I am not sure that we would be able to produce—we would certainly be able to identify the number of matters. Whether or not we would actually be able to identify the members, I am not entirely sure. Again, we are happy to take that on notice.

Senator LAMBIE: Do you know if any of the AAT members have any formal or informal political associations?

Ms Leathem: I could not answer that question.

CHAIR: I can.

Senator LAMBIE: Is there a register? Do they have to have a register of interests?

Ms Leathem: Appointments are made by the government not the tribunal.

Senator LAMBIE: Are AAT members required to fill out registers of personal interests and can members of this committee access those registers of personal interests?

Ms Leathem: My understanding is that, as part of the appointment process, they are required to complete a declaration, but the department may have more detailed information about that. We are not directly involved.

Dr Smrdel: Prior to their appointment as AAT members they need to provide a private interest declaration as well as a CV for the government to consider their appointment.

Senator LAMBIE: What about on an ongoing basis? Is that just before their appointment or does that need to be done on a yearly basis?

Dr Smrdel: It is just before appointment.

Senator PRATT: What about if a conflict of interest arises?

Dr Smrdel: The private interest declaration explores a number of issues that prospective members need to turn their mind to. The issues including criminal records, bankruptcy and involvement with a company that goes into receivership—issues along those lines—but then there is a general catch-all as to whether there are any matters relating to issues, such as taxation or conflict of duties, that would cause embarrassment to that person or the government.

CHAIR: I think Senator Lambie also asked you if that conflict of interest statement provided at the beginning is available to the public.

Dr Smrdel: No. That is a document purely considered by the cabinet.

Senator LAMBIE: So the committee could not access the private interest declaration either?

Dr Smrdel: No. It is cabinet-in-confidence material.

CHAIR: Senator Lambie, I hate to keep interrupting but I am trying to assist. If during the course of a member's work as an AAT member an issue comes up where he has a conflict of interest—I think that is what you are saying, Senator Lambie—what happens then?

Ms Leathem: If there is a conflict of interest or a perceived conflict of interest then the member would not be constituted to deal with those matters.

CHAIR: But you rely on the member to say 'I cannot do this because I have a-

Ms Leathem: There is an ongoing obligation on a member to identify and disclose.

Senator LAMBIE: Before veterans appeal their matters to the AAT are they made aware of the fact that their personal and sensitive medical documents and their lawyer-client privilege information can be accessed, free of charge, by non-parties including journalists?

Ms Leathem: We do not have contact with veterans before they lodge an appeal so I could not comment on whether they are provided with that information.

Senator LAMBIE: You do not feel that you should let them know that when they are going through the AAT there is open slather on their medical documents and their lawyer privileged documents?

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Ms Leathem: We provide information to applicants when they make contact with the AAT. There are fact sheets that are available and material on our website. I am not aware that there is anything explicitly about the issue that you have referred to.

Senator LAMBIE: I draw your attention to an article in *The Canberra Times* on 27 August 2014 titled, 'Public servants, defence personnel face rough justice on tribunal challenges'. I am sure that you would be aware of it. It is an article by Noel Towell essentially raising serious questions about the impartiality and fairness of decisions made by AAT commissioners. It referred to a veteran barrister by the name of Mr Allan Anforth and said:

The veteran barrister, who has acted in hundreds of public sector compensation cases, said he believed Tribunal members did their best to be impartial but Mr Anforth said he was worried that unconscious prejudice might be playing a part in too many cases.

I would like to know if there have been any independent studies carried out on the decisions made by AAT members to ensure that this unconscious or other prejudice is not still at work in the AAT in 2016.

Ms Leathem: It is the role of the Federal Court to review decisions if they were appealed against members of the tribunal. We provide training and induction to members on a range of issues, including objective decision-making. That is probably as much as I can say about that.

Senator LAMBIE: So you do not do independent studies to see—

Ms Leathem: We are not an organisation that conducts research of that nature. We just conduct the reviews of decisions, and the superior courts are available.

Senator LAMBIE: So what happens when you have an AAT member who has knocked back 95 per cent of veterans' appeal cases that have gone up to them?

Ms Leathem: Sorry, Senator. I have misunderstood your question. We do have an appraisal process for members. Throughout the cycle, we have a professional development framework in a cycle, and the division head and the president are involved in looking at that process. One of the factors that they would look at, for example, is rates of appeal from particular members—if that addresses the kind of issue that you are referring to.

Senator LAMBIE: No, it does not. What I want to know is: when you have these veterans going up for a decision, and you have a 95 per cent unsuccessful rate, does that not ring alarm bells to you people?

Ms Leathem: We are dealing with the matters that come before us.

Senator LAMBIE: We have 95 per cent of these cases knocked back. Does that not ring alarm bells to you people? That is what I am asking you.

Ms Leathem: So you are saying that the outcomes of those appeals—

Senator LAMBIE: Yes, a 95 per cent unsuccessful rate. That is what I am asking you. Would that not—

Ms Leathem: If you give me a moment, I will have a look at the outcome data for the veterans' appeals jurisdiction.

CHAIR: Again I do not want to intervene, but—

Senator LAMBIE: Yes, I will put that on notice, but can you break it down state by state, please. Surely you would have it state by state.

CHAIR: Senator Lambie, I just think the registrar is at cross-purposes with you. You are talking about appeals to the Federal Court, are you?

Senator LAMBIE: No, the AAT.

Ms Leathem: We can provide you with outcome data for matters that are dealt with by the AAT.

Senator LAMBIE: Yes, that is what I am looking for.

CHAIR: Okay, that is what Senator Lambie is asking.

Senator LAMBIE: Yes, please, and broken down by state. If I could have them for the last five years, that would be wonderful. Thank you.

CHAIR: Senator Lambie, your time has expired, but we can come back to you if you have more questions for the AAT.

Senator REYNOLDS: I just have a few questions. Good evening. I came in at the end of Senator Wong's questions, I think, about the number of members who have been appointed. I am not sure whether you mentioned how many members there are in total. Could you just let me know how many there are.

Ms Leathem: Certainly. We currently have 311 members of the AAT. Of those, 85 are full time and 206 are part time.

Senator REYNOLDS: How many have been appointed-

Senator WONG: Sorry—85 and 206?

Senator REYNOLDS: 206, I think. That makes 311.

Senator WONG: So it is not 300?

Ms Leathem: We also have, in addition to that, 20 judges, so they are not just members of the AAT. They are cross-appointed.

Senator WONG: So 85 full time?

Ms Leathem: Eighty-five full time and 206 part time.

Senator WONG: Thanks.

Senator REYNOLDS: How many appointments has the current Attorney-General made since assuming office?

Ms Leathem: Since 1 July 2015, I understand that 120 members of the former MRT and RRT transitioned into the tribunal on 1 July, and 116 members of the former SSAT transitioned into the AAT on 1 July. In addition to that, there were 56 new members appointed, and 83 existing members were reappointed since 1 July 2015.

Senator WONG: Sorry, do you mind repeating?

Ms Leathem: No; 56 new members have been appointed and 83 existing members reappointed.

Senator WONG: Since 1 January?

Ms Leathem: Since 1 July 2015—

Senator WONG: 1 July?

Ms Leathem: which was the amalgamation date.

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Senator REYNOLDS: In total, how many of those 311 members are women?

Ms Leathem: We have 157, or just over 50 per cent.

Senator REYNOLDS: Of the new appointments made by the Attorney-General—I think that is 56—how many of those are women?

Ms Leathem: If you give me a moment, I will see if I can break that down for you. I am sorry, I have them listed by name but—

Senator REYNOLDS: I am happy to take that on notice.

Ms Leathem: That would be great.

Senator REYNOLDS: Since the amalgamation, have you had any complaints about the quality of the transferring members or any of the new appointments?

Ms Leathem: No concerns have been brought to my attention.

Senator REYNOLDS: How is the amalgamation going?

Ms Leathem: I am sorry, Senator, you may have missed my opening statement where I— **Senator REYNOLDS:** I am sorry; I did. I came in late. I was at another meeting.

Ms Leathem: That is all right.

Senator REYNOLDS: If you have made the opening statement I will go back to it. But is it good or bad or a bit of both?

CHAIR: It is pretty good.

Senator REYNOLDS: Pretty good?

Ms Leathem: We are pleased with how things are going. We have had an increase in lodgements in the first few months of this year which obviously means we have an accumulating backlog which will be a challenge for us into the future. We have some significant plans to try to further integrate our registries. At the moment they largely operate along divisional lines mirroring the former tribunals, so we are very much focused in the next 12 months in trying to make some progress on integrating those staff.

Senator REYNOLDS: So that is the next step. I apologise if you did this in your opening statement—and if you did just point me to it and I will have a read of it from the *Hansard*—but what have been the benefits, in your mind so far, of amalgamation, and then looking forward.

Ms Leathem: Obviously, we are all engaged in merits reviews but one of the terrific things so far is that we have a lot of expertise collectively amongst the members and staff. So there is a really good opportunity for more collaboration, cross-fertilisation and cross-training. We are also in a position where, instead of having separate corporate services, we have now been able to combine those to deliver services. And, critically, we have made good progress in our accommodation consolidation so that we are now in a single location in Sydney and shortly we will be in Adelaide, Perth and Brisbane, and hopefully in Melbourne next year. Being physically co-located makes a big difference to being able to collaborate and work together.

Senator REYNOLDS: Thank you, Chair, that is all I have.

CHAIR: I will take a couple of minutes from Senator Reynolds's time. Can you tell me the pay range for permanent members, part-time members and judges who form the tribunal?

Ms Leathem: It is a complicated picture because we have people who have transitioned and who are on different Determinations to some of the members who have been appointed. If I might refer to: Determination 2015/18, which is the judicial and related officers remuneration and allowances; Determination 2015/20, which is remuneration and allowances for holders of part-time public office; and there is also Determination 2015/21, which is remuneration and allowances for holders of full-time public office. Our members, depending on when they were appointed, what division and what category of membership they may be in, determines what their salary rate is or, alternatively, if they are part time, what their daily rate is.

CHAIR: I certainly do not want to know the names and the salaries, but could you give me a range of, say, the lowest and the highest of each of the categories you mentioned?

Ms Leathem: For example, if you look at the annual fees for part-time members there is a table of what they get for one day a week, two days a week, three days a week or four days a week depending on whether they are a deputy president, senior member level, senior member level 2 or a member 1, 2 or 3. I am not sure if you want me to run through all of the different categories or just the highest of them.

CHAIR: Is this publicly available?

Ms Leathem: It is published on the Remuneration Tribunal's website, so it is available. We can certainly make a copy of it.

CHAIR: To save time, can you perhaps make that available to me on notice?

Ms Leathem: Sure.

CHAIR: For the purposes of the next question, can you perhaps give me the highest category of a full-time member? I assume that means working five days a week, does it?

Ms Leathem: For the Deputy President—that is, a non-judicial member, a non-judge member—the salary is \$327,540, effective from 1 January 2016. The salary for member level 3, which is the lowest level, is \$133,440.

CHAIR: Both of those would be a five-day—

Ms Leathem: They are full-time roles. There are daily rates for part-timers.

CHAIR: Is full-time five days a week, less holidays and long service leave and those sorts of things?

Ms Leathem: Yes, that is correct.

CHAIR: What is the daily rate for part-timers? I assume part-timers continue in their other professions or callings when they are not working on the AAT. Is that correct?

Ms Leathem: There are some part-timers who are pro-rata, so they might work three or four days regularly for the AAT. There are others who are more sessional, so they might only do the work that is allocated to them by the tribunal, depending on what particular case load we might have at any given time. They would be paid a daily rate, as opposed to the pro-rata rates which are set out separately in the remuneration determination.

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CHAIR: Okay. I will not waste your time now. If you could let me have those, we can look at them at our leisure.

Ms Leathem: Absolutely.

CHAIR: Can you also, either now or on notice, give me the breakdown of AAT members based in each state and territory of the Commonwealth?

Ms Leathem: Yes, we can do that.

CHAIR: Are they only in capital cities?

Ms Leathem: That is right. We have offices in each capital city except Darwin. We have members working out of each of those locations, but not in regional areas, although they may do circuits from time to time, if needed.

CHAIR: That is done mainly on the basis that most of the work comes from city based applicants?

Ms Leathem: That is correct. We do also offer videoconferencing and telephone conferencing and hearings, if that is more convenient to people.

CHAIR: Alright. Thanks for that.

Senator WONG: First—in relation to the questions that my colleague Senator Reynolds was asking—as I understand it, you are telling us that, from 1 July 2015 until now, 56 new members have been appointed. Is that right?

Ms Leathem: That is the information I have, yes.

Senator WONG: Was the last letter of appointments which you are including in that figure from the May 2016 appointments?

Ms Leathem: I believe they were announced in May. Some of them may not have commenced until July.

Senator WONG: Sorry—I am talking about the announcements in which 37 new members were announced. So, through the whole year, only 19 new members were announced, and then 37 were announced the day before the election was called. Is that right?

Ms Leathem: I do not actually have it broken down that way, but that sounds-

Senator WONG: Well, 56 minus 37 is 19. I think I am right.

Ms Leathem: Yes, that sounds right.

Senator WONG: Who decides how many new members there need to be?

Ms Leathem: The government.

Senator WONG: Okay. Mr Smrdel, was the decision to create 37 new positions in the lead-up to the election a decision the Attorney made?

Mr Anderson: Senator, I will take that one. The advice that the President provides to the Attorney makes recommendations about reappointments. It makes recommendations about whether members should be cross-appointed to divisions. It makes recommendations about whether some members should be promoted. But it also makes recommendations about the creation of new positions, so the—

Senator WONG: But you are not able to tell me, because you cannot find the letter and you have no information, whether that letter did in fact recommend new positions? Or can you do that now?

Mr Anderson: I can tell you that that letter did actually recommend that there be some new positions created.

Senator WONG: You told me you could not do numbers; so let's do numbers.

Mr Anderson: What I told you was that I did not have a copy of the letter.

Senator WONG: Okay, tell me about the letter. Shall we do that?

Mr Anderson: Certainly. In respect to the actual details of the letter itself, as you appreciate, it makes specific recommendations that then form the basis of what the Attorney considers taking to cabinet for decisions on appointments, so disclosing precise details of the contents of the letter can disclose—

Senator WONG: You are the one that brought it up. What I would like to know is how many positions were recommended for re-employment—I do not need to know names—and how many positions were recommended to be created.

Mr Anderson: I am loath to actually go to the number of positions that were recommended for creation.

Senator WONG: On what basis?

Mr Anderson: As I have said, this is—

Senator WONG: This is an estimates committee. On what basis are you claiming that you cannot provide that information?

Mr Anderson: As I have said, the president of the tribunal gives advice to the Attorney, which forms the basis of matters the Attorney takes to cabinet. You could look at the appointments that were made—

Senator WONG: I am sorry, that is not a reasonable basis on which you can refuse to answer the question.

Senator PRATT: No.

CHAIR: That is not for Senator Wong to determine.

Senator PRATT: It is just a number.

Senator WONG: I refer you to the statement which was outlined at the outset. I am not asking you what went to cabinet. I am asking a very simple process question. I am even agreeing that it be de-identified. I am simply asking how many positions did the president of the tribunal recommend to the Attorney under the protocol for these very highly paid, taxpayer-funded positions. How many did he recommend ought be reappointed, and how many new positions did he recommend ought be created?

Mr Anderson: As you know, I am an official. I cannot actually make a claim of public interest immunity in respect of the contents of the letter. All I can—

Senator PRATT: There is no harm to the public interest in disclosing it.

CHAIR: I think Mr Anderson is saying he will take it on notice and refer it to the minister.

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Senator PRATT: It is a number.

Senator WATT: What ground would that be for claiming—

CHAIR: You will find out when the minister-

Senator WATT: Surely we can ask him that question—what ground would there be for claiming public interest immunity?

CHAIR: That is not a question for the Deputy Secretary.

Senator WATT: It is.

Senator WONG: It is properly a question for the minister.

CHAIR: It is a question for the minister.

Senator WATT: For the minister, yes.

Senator WONG: While the minister is taking advice on that, can I ask the Deputy Secretary this—in answer to my question about the number of positions created, you sought to justify it, if I may use that term, by reference to the letter. So maybe you should do that. Are you going to tell me how many new positions were recommended in the letter?

CHAIR: I thought you said you did not know, and you did not have a copy of the letter, so you would try and get it.

Senator WONG: His evidence is different now.

CHAIR: I am not sure that that is right. It is for Mr Anderson to respond.

Mr Anderson: I have not changed my evidence. I was not in possession of the letter when you first asked me the questions.

Senator WONG: You have it now?

Mr Anderson: I have now seen a copy of the letter.

Senator WONG: Thank you—I am asking you to provide it.

Mr Anderson: I am saying that I would like to reserve that as a matter for the Attorney. I think that if you looked at the numbers in the letter, that might enable someone to then compare that to numbers of appointments made and to ascertain the advice that the President has given to the Attorney about appointments, which was a matter for cabinet.

Senator WONG: Let's leave aside the reappointment issue if you are worried about that. I just want to know how many he is saying should be created.

CHAIR: These are matters for the minister. While I have every regard for Senator Scullion, he is clearly not the Attorney-General. This is a bit unfortunate that these questions arise when, from the beginning of the day, the Attorney has let it be known he would not be here between six and 8.30 because of important matters of the nation. I do not want to go any further than that. He will be here at 8.30, and it might be appropriate if you saved your questions to Mr Anderson on this aspect until the Attorney is here.

Senator WONG: As I understand, Mr Anderson, you want to refer to the minister?

Mr Anderson: That is correct.

Senator WONG: Notwithstanding that this is from the President to the Attorney-General under a protocol for appointments to a publicly funded tribunal—that the Chair has asked many questions about—and notwithstanding that I am not asking questions about names, you

want to refer to a minister whether you can disclose the numbers recommended for reappointment, and/or the numbers of new positions created?

Mr Anderson: That is correct.

Senator WONG: You are entitled to do that, so I will wait till the Attorney comes for him to consider that.

You agree with me, don't you, that the decision to create 56 new positions is a decision of the government?

Mr Anderson: That is correct, Senator.

Senator WONG: And I am asking for the timing of the decision. When was the decision made to create 37 new positions?

Mr Anderson: I am sorry, Senator. As Dr Smrdel indicated before, we do not have the precise timing.

Senator WONG: It is some point between December 2015 and May 2016. Is that correct? **Mr Anderson:** Correct.

Senator WONG: And the government makes a decision. Is that a decision of the cabinet or a decision of the minister?

Mr Anderson: It is a decision of the cabinet—

Senator WONG: To create new positions?

Mr Anderson: It is a decision of the Attorney as to the number of appointments to put forward to the cabinet and a decision of the cabinet as to the number of appointments to make.

Senator WONG: Under the protocol—and my copy is marked; I think you both agree there is one and you are familiar with it—can you tell me: is this publicly available?

Mr Anderson: I do not believe it has actually been published.

Senator WONG: Why not? I would ask that you table it. I think the library dug it out for me, so it must have been tabled in a previous hearing. Can we have it tabled? I would table this copy, Chair, but I have got marks all over mine.

CHAIR: What document is this?

Senator WONG: It is a protocol about appointments to the AAT between the President and the Attorney-General. As I said, I would table mine but it is has got markings on it.

CHAIR: I am sure Mr Anderson will be able to get that on notice.

Senator WONG: Can you table a clean copy?

Senator Scullion: If you would like to table the document, Senator, you can table your document.

Senator WONG: This is your document. This is not a controversial document. The officials have given evidence about this document. I understand other senators have looked for it and not been able to find it. I am not sure how the library found it for me but they did, and I thank them very much for that. But I think for the purposes of this hearing it might be good if we could have a clean copy tabled. I am happy to table mine but it has my marks on it.

CHAIR: Mr Anderson can take on notice to supply that later.

Senator WONG: Are you able to get a clean copy for tabling?

Mr Anderson: Senator, I am not aware of it actually having been published. I hear what you say about it.

Senator WONG: I will table this. Can we just confirm that this is in fact it? Please excuse the markings, Chair, if they are not able as a matter of courtesy to give me a clean copy.

CHAIR: For the record, this is a document entitled 'Protocol: appointment to the Administrative Appeals Tribunal 2015' and at the bottom it is labelled 19 of 19.

Senator WONG: That is just my brief number. That is why I said it is my copy.

CHAIR: Senator Wong, you can assure us that this has come to you by legal means from the library?

Senator WONG: I think that is right. I think this is a document about which evidence has already been given. If we give a copy to the officials they can confirm whether we are working off the same document. Dr Smrdel already gave evidence about it and so did the deputy secretary. Deputy Secretary, you do not have a clean copy you can assist us with?

Mr Anderson: Senator, my concern is just that the protocol as far as I am aware has never been published.

Senator WONG: I have been advised it was provided from the Parliamentary Library.

CHAIR: Would you like to check whether the Parliamentary Library would have access to it, Mr Anderson?

Mr Anderson: I accept what the senator has said, that that is where she got her copy, but if we could see a copy of the document she is referring to, that would be great.

Senator WONG: Lucky I did not write anything too rude on it, eh! Can we just pause my time. Is that possible, Chair?

CHAIR: We will just pause the clock. Are there any other questions you or your colleagues might have?

Senator WONG: I have questions on the document, if I can come back to that when-

CHAIR: It looks like the document is here now.

Mr Anderson: Senator, I can confirm that is the protocol.

Senator WONG: Thank you very much; I appreciate that. In relation to the round of appointments that we are discussing—the ones that resulted after the president wrote in December 2015 and culminated in the appointments of May 2016—can you tell me: was a selection committee established as per paragraph 4 of the protocol?

Dr Smrdel: No selection committee was established.

Senator WONG: Can you tell me why?

Dr Smrdel: The protocol in paragraph 2 also provides the Attorney with the ability, after the president has written to him, for the Attorney to indicate that he will choose a suitable person who is appropriately qualified himself.

Senator WONG: So paragraph 2(b), the Attorney has the power under this. Paragraph 1 says that the president writes to the Attorney-General with the assessment of what positions need to be filled, advice about reappointment and recommendation about reappointment and,

you have told me also—and it is silent on this—whether new positions ought be created. Is that correct?

Dr Smrdel: I think what I said earlier was not so much about new positions being created but whether the vacancy should be publicly advertised.

Senator WONG: No, that was not the discussion I had with the deputy secretary. He will not give me the letter precisely because he says it reveals cabinet considerations, because then I can compare the letter with the numbers in what was announced. I thought we had agreed that the letter went to (a), (b) and (c)—that is, which positions, advice and recommendations. I suppose (a) could cover new positions; is that right?

Mr Anderson: The letter does make a recommendation about new positions.

Senator WONG: You just do not want to tell me how many?

Mr Anderson: That is correct.

Senator WONG: Excellent. The Attorney is then able to say which one of these will not require public advertisement. Is that correct?

Mr Anderson: Correct.

Senator WONG: You are saying to me: in relation to all positions, the Attorney came to the view that none of them required public advertisement.

Mr Anderson: In relation to that selection process, that is correct. Either the president's recommendations are agreed to or the Attorney may suggest a suitable other person for appointment.

CHAIR: Under paragraph 5.

Senator WONG: Under 2(b).

Dr Smrdel: Under 2(b), Senator.

CHAIR: Or paragraph 5.

Senator WONG: I will get to that. You can ask questions about that if you want. Of the 76 appointments that were announced in May 2016, did any of them go through a selection committee process?

Dr Smrdel: No, Senator.

Senator WONG: Not one of the 76 appointments announced the day before the election was announced went through the process set out in this protocol, which includes a selection committee and advertising?

Mr Anderson: That is correct. But, of course, a number of those were actually matters that had been recommended by the president.

Senator WONG: You keep saying that but we do not know, with respect. That is hardly a defence, given that we do not know the numbers we are talking about. It might be a defence if that is in respect of all of them but, if it is only in respect of a couple of them, how are we supposed to know?

CHAIR: Your time has expired, Senator Wong. I will come back to you.

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Senator LAMBIE: In relation to section 35 of the AAT Act, is the tribunal bound or at least guided by the same principles found in an FOI application or the Privacy Act when making a decision on whether to release information and what information to release?

Ms Leathem: That is a matter for the member who is determining that particular decision.

Senator LAMBIE: Can you explain why the decision to release highly sensitive records of people like veterans does not follow the guidelines of the FOI Act or the Privacy Act?

Ms Leathem: Again, that is the independent decision-maker: the member makes that determination.

Senator LAMBIE: Have your AAT members been aware of the great psychological harm which may occur to vets if sensitive personal medical records under lawyer-client privilege are released to members of the media or to ex-spouses?

Ms Leathem: I could not speculate about what our members are aware of.

Senator LAMBIE: Have there been any formal complaints about the release of personal documents to media and other non-interested parties?

Ms Leathem: Not to my knowledge, but I would like to take that on notice.

Senator LAMBIE: When you go up to an AAT, you go through the process and then the AAT member hands down an AAT decision. In that decision is the reason why he made that decision, without putting all the medical evidence in it, without putting all the lawyer-privileged information in it—and he does that obviously for a reason: because it goes into the public domain. Is that correct? It is very short. It puts bits and pieces of medical evidence in, not the whole works and jerks. If you have a psych report, he just says the main facts that are in there that made him come to a decision.

Ms Leathem: It is a matter for the member to determine what is appropriate to include in the reasons for their decisions. There is no single set of reasons; it is determined based on the facts, applying the law.

Senator LAMBIE: So if one AAT member has made that decision and has released that AAT decision out to the public, who gives another AAT member the right to come over the top at some stage later and release everything, when quite clearly the first AAT member saw it as not in the best interest to release that information out to the public?

Ms Leathem: I am not in a position to comment on a decision of a member of the AAT.

Senator LAMBIE: Do you agree that, under section 35, ex-spouses, family members and media are able to access documents that were part of an AAT decision but never referred to in that decision?

Ms Leathem: Again, an application can be made and a member would have to make a decision as to whether they should be released under that section.

Senator LAMBIE: I have been listening to what has been going on with Senator Wong. Is it the case that appointments to the AAT are effectively politicised because a politician on an independent panel makes the decision on who is to serve and make decisions on the AAT?

Ms Leathem: The tribunal does not make the determinations; the government makes the appointments.

Senator LAMBIE: Do you agree that, as the law is written, a member has the right to make those decisions?

Ms Leathem: Sorry, Senator, I did not understand the question.

Senator LAMBIE: I was going back to, under section 35, ex-spouses and family members. Do you agree that under section 35, as the law is written, an AAT member has the right to make those decisions?

Ms Leathem: My role as the registrar is not to make determinations under the legislation. Again, it is the members' role to do that.

Senator LAMBIE: Who is overseeing these decisions?

Ms Leathem: The Federal Court.

CHAIR: Thanks, Senator Lambie. Senator McKim?

Senator McKIM: I do have some questions, but I am happy for Senator Wong to continue her line of questioning if she has a few more.

CHAIR: If you do not, I will go to the government, whose turn it is.

Senator McKIM: That is a matter for you, Chair.

CHAIR: It is up to you.

Senator McKIM: I appreciate that.

CHAIR: You do not want the call?

Senator McKIM: Not at this stage, no.

CHAIR: Can I just ask what the budgeted cost of the AAT is in the current budget period 2016-17?

Ms Leathem: We have total appropriation for the AAT in 2016-17 of \$164.574 million. That does include an allocation of \$19.492 million for the National Disability Insurance Scheme. That is under review at the moment in relation to that appropriation. We also have \$4.667 million for the Immigration Assessment Authority, which is a separate authority within the tribunal at the moment. There is a capital budget of \$22.418 million.

CHAIR: I want to come back to those, because you have confused me.

Ms Leathem: Sorry.

CHAIR: Let me continue along the line. The offices out of which the AAT operate are all leased premises in various capital cities, are they?

Ms Leathem: With the exception of Hobart, where we are collocated with the Federal Court. We are also in the Federal Court's building in Brisbane, but we will be exiting that lease and moving into commercial premises shortly.

CHAIR: Perhaps I should be asking Mr Anderson this: when you are in the Federal Court's building, do you pay a notional rent?

Ms Leathem: Yes, there is rent that is paid.

CHAIR: I am sorry, you said NDIS. Could you just explain that a bit more?

Ms Leathem: The Administrative Appeals Tribunal has jurisdiction to review a range of decisions associated with the National Disability Insurance Scheme.

CHAIR: I see.

Ms Leathem: As part of that scheme coming online, there was an allocation of funding to the tribunal to undertake that review function.

CHAIR: Does that mean that the AAT members deal with matters arising under the National Disability Insurance Scheme?

Ms Leathem: In instances where, for example, there has been already an internal review about somebody's plan. If somebody is unhappy with the plan then there is a right, for example, to seek review by the AAT in relation to that.

CHAIR: The other subcategory you mentioned—my colleague just wants to ask you a couple of questions about that.

Senator REYNOLDS: Can you just tell us how many matters have come forward in relation to the NDIS so far?

Ms Leathem: If you give me a moment I will just find the workload in each division. I think this is broken down by years; what period of time are you interested in?

Senator REYNOLDS: The last two years.

Ms Leathem: In 2015-16 to this date—September—we have had seven applications. Sorry, in 2016-17 to 30 September we have had 14 applications. In the same period last year we had seven. So it has increased, if you like, but they are obviously still very small numbers. In the financial year 2015-16 we had a total of 48 applications in relation to the NDIS.

CHAIR: There was another subcategory you mentioned.

Ms Leathem: The Immigration Assessment Authority.

CHAIR: Can you just explain how that works, because haven't we rolled the immigration tribunal into the AAT? And then are we setting it up again within the AAT?

Ms Leathem: The IAA was established in April 2015 under part 7AA of the Migration Act. It is an independent authority within the Migration and Refugee Division. It commenced operations in September 2015, and the first cases were received in October 2015. It consists of the president and the division of the Migration and Refugee Division, but it also has senior reviewers and reviewers who undertake that work. It has a defined jurisdiction. So, it is dealing with decisions of the Minister for Immigration and Border Protection refusing to grant fast-track applicants' protection visas. Specifically, that cohort is unauthorised maritime arrivals who entered Australian between 13 August 2012 and 31 December 2013 who were not taken to an offshore processing country and who have been permitted by the minister to make a protection visa application. We understand that about 25,000 people are expected to fall within this definition. So, it is a time-limited agency, if you like, that will process that cohort.

CHAIR: So, once the illegal boat arrivals are washed through the system that unit will no longer have a reason to be.

Ms Leathem: That is right. It has a finite cohort of matters it will be dealing with.

CHAIR: Is it only in relation to illegal maritime arrivals?

Ms Leathem: Unauthorised maritime arrivals.

CHAIR: Appeals against the immigration minister's decisions on bikies being sent back to New Zealand—that doesn't go to that unit?

Ms Leathem: No, the Administrative Appeals Tribunal.

CHAIR: Do you have statistics on the number of applications made to that special subunit?

Ms Leathem: I do.

CHAIR: That is the first question. And the second is, of appeals to the AAT, from the minister's decision in other matters.

Ms Leathem: We can tell you in relation to the IAA. The first cases were referred in late October 2015. As of 30 September 2016 the IAA had been referred 886 cases, with 461 still on hand. In relation to other parts of the Migration and Refugee Division, there obviously are many categories of work there. Is there a particular type of matter you would like some information about the case load on?

CHAIR: I was really just after the lump sum of AAT appeals from the minister's decision in any category, but if you have them in some categories or special categories and that is readily available—I do not want you to take too much time looking for this. Well, give me what you have, would you?

Ms Leathem: Again, it is a complicated picture, because there are decisions of the immigration minister that do go to the General Division, as opposed to the Migration and Refugee Division. So we would need to provide you with a more detailed breakdown of the particular types.

CHAIR: Why wouldn't they all go to the migration division?

Ms Leathem: That is the way in which the amalgamation transitioned. Matters such as what they call cancellations—501 I think is the section of the act—were dealt with in the former AAT, which is now the General and Other Division. They were not dealt with in the former migration or refugee review tribunal. So, effectively the legacy arrangements have continued in the amalgamated tribunal, which is why they are in different divisions.

CHAIR: I am pleased to see that you are confident in knowing what is happening within the AAT. It is a bit confusing for us outsiders.

Senator McKIM: Speak for yourself!

CHAIR: Sorry—I will only speak for me, then. Others are much better educated than I, according to other witnesses! But thank you very much, Ms Leathem.

Senator WONG: We have established that Senator Brandis did not utilise a selection committee and advertising process which the protocol contemplates and instead used the provision in the protocol which enables him to avoid all of those selection processes and just choose a suitable person. Since the protocol was established in 2015, has the Attorney ever utilised a selection committee process?

Would you like me to repeat it? Chair, I appreciate that Senator Brandis's staff is advising, but I have asked a question.

CHAIR: Senator Brandis's staff is advising the minister, which is appropriate, seeing as the minister, as competent as he is in his own field, would be a little at sea, I suspect, in—

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Senator Scullion: The reason there is a bit of whispering—and we are trying to get some clarification of this—is that regarding the answer to the question of whether it was advertised or not we have some conflicting information.

Senator WONG: Whether what was advertised?

Senator Scullion: We have some information but we want to be absolutely accurate on that. The Attorney, when he returns, may be able to assist. But until then I think it would be useful to take that particular question on notice, or put a question mark around it. We will clarify that as soon as we—

Senator WONG: Okay. That was not the question, though.

Senator Scullion: Sorry. Well, that was what that was about. I was trying to clarify that particular—

Senator WONG: And the department's advice is that no selection committee was established in relation to any of the 76 positions. So, my next question—not about advertising—is whether or not, in relation to any appointment to the AAT by this Attorney-General, there has been a selection committee process established.

Mr Anderson: There has been only that one batch of appointments, in May.

Senator WONG: So the answer is no.

Mr Anderson: That is correct.

Senator WONG: Was the department asked to advise on whether the 76 and in particular the 37 new appointments were appropriately qualified?

Mr Anderson: No, we were not.

Senator WONG: So, you provided no advice as to whether or not any of the 37 new appointments were appropriately qualified?

Mr Anderson: We gave no advice on the individual appointments.

Senator WONG: Where did the names come from? Did the department generate a list of names?

Mr Anderson: No, we did not.

Senator WONG: No list of names was generated by the department?

Mr Anderson: That is correct.

Senator WONG: So the list was generated in the Attorney-General's office?

Mr Anderson: I would have to take that on notice.

Senator WONG: Well, do you know where the list was generated?

Mr Anderson: No, I do not. I can only say that it did not come from the department.

Senator WONG: In relation to declarations, I think in answer to Senator Lambie you indicated that the normal conflict of interest form or declaration that accompanies cabinet appointments is completed for each AAT appointment. Is that right?

Mr Anderson: That is correct.

Senator WONG: Did you see those?

Mr Anderson: I did not.

Senator WONG: Did the department?

Dr Smrdel: The department saw them. The process of progressing the private interests declaration is done by the department.

Senator WONG: Were the political affiliations of the individuals concerned disclosed as part of that process?

Mr Anderson: The forms themselves do go to cabinet. They are part of the cabinet process. So I am not sure what I can actually discuss.

Senator WONG: Okay. Was the department aware before the appointment that Ms Brandon-Baker was Mr Morrison's former chief of staff?

Mr Anderson: I do not believe that we were aware.

Senator WONG: Were you aware that Mr Denis Dragovic was a former Liberal candidate? And did you give any advice about whether that constituted a conflict?

Mr Anderson: We did not give any advice on whether that was a conflict.

Senator WONG: Were you aware that Mr John Sosso was a former Bjelke-Petersen government adviser, and did you give any advice in relation to whether that was a conflict?

Mr Anderson: It is a matter for the individuals who are themselves being proposed for appointment as to what they declare on their conflict of interest declaration. The department did not give any advice about those matters.

Senator PRATT: Who considers whether it is indeed a conflict or not?

Senator WONG: Okay, I will do it that way. Did Mr Peter Vlahos disclose that he was a former Liberal candidate for the seat of Chisholm?

Mr Anderson: As I indicated before, I am loath to go the contents of individual declarations because there are some matters that are put before cabinet for each individual.

Senator WONG: I understand that. Did Mr Michael-

Senator Scullion: Chair, with this line of questioning, I can only recall in question time as part of an answer to a similar question that political affiliation has never been taken as part of a declaration of interest in these sorts of appointments in the past. I wonder why this line of questioning would be appropriate, given that.

Senator WONG: I can ask and you do not have to answer.

Senator Scullion: Indeed you can, Senator. I just thought that it was made clear, if I can recall, in answer to one of your questions in the Senate.

CHAIR: And I am aware of a former Senate colleague of mine, a Labor senator, who was appointed to the AAT. I think this Labor senator was just one of many. I do not know whether she declared her appointment at the time. It was done during the term of the Gillard-Rudd government. I am sorry, Senator Wong—I should not have interrupted you.

Senator WONG: Thank you. I am happy to go through them: Mr Michael Manetta, former SA Liberal candidate; Saxon Rice, former Queensland LNP member; Justin Meyer, former Liberal Party donor, William Stefaniak, former ACT Liberals leader; Anne-Marie Elias, New South Wales Liberal staffer; Dr Bennie Ng, Mr Abbott's head of social policy—

CHAIR: Is there a question?

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Senate

Senator WONG: I am going to do all of them and then ask a question, or I can keep going doing every one.

CHAIR: Can you indicate the question first?

Senator WONG: Was the department aware of these people's political appointments, and were they declared prior to cabinet appointing them?

CHAIR: I think Mr Anderson answered that previously.

Senator WONG: Ms Helena Claringbold, Tony Abbott's electorate staffer; Mr Michael Cooke, former adviser to Mr Abbott; Brendan Darcy, former adviser to Kevin Andrews; David McCulloch, former adviser to Liberal Attorney-General Daryl Williams and Liberal MP Mr Fletcher; Nicholas McGowan, former Liberal candidate for Jagajaga; Bruce MacCarthy, Liberal member for Strathfield, Karen Synon, former Liberal senator, and Gary Humphries, former ACT Liberal senator. Were all of their political affiliations disclosed and did they constitute a conflict of interest? These are people who did not go through any selection process that was publicly advertised. They were announced the day before an election.

CHAIR: You have asked your question and Mr Anderson had already answered it before you had asked it.

Senator Scullion: A very significant figure in all this, of course, is the President of the AAT, a former Labor minister. I am surprised that that was not on the list in the question as well.

CHAIR: Who is that, Senator Scullion?

Senator Scullion: Duncan Kerr.

CHAIR: Duncan Kerr—a Labor member of the federal parliament for many years. Senator Wong, do you want to include that in the list you have just read out?

Senator WONG: I think everybody is aware of that.

CHAIR: So he is the current president? Wow!

Senator WONG: I would stake him in terms of his ability. There were 76 appointments the day before the election.

Senator Scullion: I can assist with part of the answer to that question. Many of the 76 appointments announced in May were in fact reappointments—

Senator WONG: Thirty-seven were not, 39 were—we have already established that.

Senator Scullion: A number of them had already been through the advertising and selection processes—the same sort of processes that have been included under previous governments.

Senator WONG: Of the 37 new appointments, given you have just given that answer, how many went through an advertising process? There were 39 reappointments and there were 37 new appointments. Of the new appointments, the evidence is that none of them went through a selection committee process. If the evidence is changing I would like to understand how.

Senator Scullion: I will have to take that on notice.

Senator WONG: Thank you. Mr Anderson, you said that Senator Brandis's media release of 6 May 2016, the day before the election, where he announced all of these people including a lot of people with Liberal Party affiliations were the only appointments. Were there not some appointments announced at other times? Or are they really the only ones? Because Mr Justin Meyer, also a Liberal Party donor, has been appointed. When was his appointment announced? Can I give you a range of names and you tell me when they were announced: Justin Meyer Liberal Party donor; Liberal adviser Anne-Marie Elias; Dr Bennie Ng; Helena Claringbold; Michael Cooke? When were these actually announced: Brendan Darcy; David McCulloch former Liberal adviser; Mr Bruce MacCarthy former member New South Wales Legislative Assembly?

CHAIR: Mr Duncan Kerr, former Labor member.

Senator WONG: I think he was a Federal Court judge and everybody knew who he was.

Senator Scullion: If we not sure about these at the moment we can take those on notice.

Senator PRATT: Or you could look up the table of statutory appointments.

Senator WONG: Can someone tell me when?

Ms Leathem: I have a list of some appointments.

Senator WONG: I appreciate that, thank you.

Ms Leathem: There were some that commenced, and I could not tell you the date of anything except when the appointment was effected. On 26 February 2016 we had: Dr Irene O'Connell, Mr Donald Morris, Professor David Ben-Tovim, Dr Timothy Boheme, Dr Bernard Hughson, Dr Harry Schwarz, Dr Peter Sydney Wilkins.

Senator WONG: What is the date of those?

Ms Leathem: It says 'made 25 February 2016.'

Senator WONG: So are they part of the May 2016 press release?

Ms Leathem: No, they were earlier dates.

Senator WONG: So these were between February and May?

Ms Leathem: That is correct.

Senator WONG: Are you able to provide us with that list?

Ms Leathem: Yes, certainly we can provide the list. There are also some other appointments. Some of these are reappointments, not just new appointments.

Senator WONG: I am listening.

Ms Leathem: On 14 March 2016, Mr Andrew Cameron; 21 March 2016 is Jan Redfern; 1 March 2016, the Honourable Dennis Cowdrey; Mr Donald Davies, 1 March; I have already said Jan Redfern, 21 March; 25 March 2016, Mr Bernard Joseph McCabe; Mr Jim Walsh. Those last two are reappointments.

Senator WONG: Are you able to just table this?

Ms Leathem: It is a publicly available list.

Senator WONG: I am actually trying to understand when the announcements were made.

Ms Leathem: I am sorry, I could not answer that question at all.

Senator WONG: We had the announcement on the day before the election with the list.

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Ms Leathem: My apologies, I could not answer that.

Senator WONG: Right. It appears from the publicly available information that there were other appointments made. We may just not have been able to find a press release. I am just asking: were they announced?

Senate

Mr Anderson: Clearly we will have to take this on notice just to make sure that we have got it right.

Senator Scullion: I understand that all the announcements were made and were put on media releases and are available on the attorney's website.

CHAIR: We could have saved ourselves some time.

Senator PRATT: Were any appointments made without an announcement?

Mr Anderson: We will take that on notice as well.

Senator WONG: Sorry?

Mr Anderson: There was a question from Senator Pratt as to whether any appointments were made without any announcement. I do not believe so I do not believe so but we will take that on notice to be sure.

Senator WONG: Your evidence was that the names were not generated in the department and you are not sure where they were generated from. Was that your evidence?

Mr Anderson: That is correct.

Senator WONG: When did you first see the names? When did the department first see the names?

Mr Anderson: As Dr Smrdel indicated earlier, we do not have some of the dates to hand of the process.

Senator WONG: Right, fair enough on the dates but how did you become aware of the names? Let us just focus on the 76 that were announced that day before the election. How did you become aware of those names?

Dr Smrdel: Formally we received the names via the submission I adverted to earlier to which we attached the president's letter. It was done in a form where the Attorney could agree to the reappointment, suggest his own preferred candidate or suggest whether something should be publicly advertised. I neglected to say in my earlier evidence that the Attorney did indicate that some appointments should be publicly advertised. That has not happened as yet, but certainly the Attorney did indicate that. That all comes back to us in the returned submission. We then act upon that. What I am not entirely sure about is whether there was any advance email notice ahead of that, but certainly our formal notification comes through the returned submission.

CHAIR: We might leave that there and we—

Senator WONG: The returned submission-

CHAIR: We can come back to that later.

Senator WONG: Can I just ask one question, Chair, if I may? The returned submission from the Attorney's office to you—is that how that works? Is that what you meant?

Dr Smrdel: That is correct. Our submission, to which we attached the president's letter, went up to the Attorney. The submission was in a form where the Attorney could indicate reappointment—there were a significant number of reappointments—or the Attorney's preferred candidate or whether he wanted the appointment publicly advertised. The Attorney marks that submission and returns it to the department.

Senator WONG: That is where these names come from?

CHAIR: No, it was one more question, Senator Wong. We can come back to it, as you know, as late as you want, up to 11 o'clock. Who is the current President of the AAT?

Ms Leathem: The Hon. Justice Duncan Kerr.

CHAIR: That is the Duncan Kerr who was a Labor member of this parliament for 12 or more years—is that the same Duncan Kerr?

Ms Leathem: Yes, that is correct.

CHAIR: Quite a good man. How long has he been the President of the AAT?

Ms Leathem: It predates me, but it is a five-year appointment, so it would have been 2012.

CHAIR: Early or late 2012?

Ms Leathem: May, I think, from memory.

CHAIR: That is very interesting. Who was the Attorney-General when he was appointed? Can anyone help me with that? Mr Anderson, you may have been in your current position then? Dr Smrdel? Let me help: would it have been Mr Dreyfus by any chance?

Mr Anderson: We are just trying to remember the dates. We cannot say which Attorney it was.

CHAIR: It was May 2012. I guess we could google who the Attorney was in 2012?

Senator WATT: Is there any relevance to this?

CHAIR: It is as relevant as Senator Wong's questions.

Senator WATT: Her questions were about appointments made this financial year.

CHAIR: They are still being paid. Their remuneration is in this year's-

Senator WATT: Add him to the list of targets: Triggs, Gleeson, Kerr.

CHAIR: You mention Mr Gleeson. That is interesting. Can anyone tell me when Mr Gleeson was appointed?

Senator WATT: The target of the day!

Senator PRATT: You might save that for questions for the department.

CHAIR: There is a question. Can anyone tell me, first of all? There is either a yes or no. If someone says yes, I will ask you what time it was. My recollection is that he was appointed on the eve of the 2013 election.

Senator McKIM: You are in the wrong line here, Chair. This is the AAT.

Senator WATT: How is that relevant to the AAT?

CHAIR: Can anyone confirm that?

Senator McKIM: This is the AAT, Chair. It is not the AGD. They come later.

Senator WATT: Or the S-G.

CHAIR: 'Can anyone tell me?' is the first question. Surely someone can say yes or no.

Mr Anderson: The Solicitor-General was appointed in early 2013.

CHAIR: Early 2013—okay. As my colleagues have pointed out, that is just by the way. Let me get back to Mr Kerr—

Senator McKIM: Justice Kerr.

CHAIR: who, I must confess, I think was a good appointment and a fine manparticularly for a Labor politician, a very good man. When you were talking before about the president making recommendations to the Attorney, that is then, of course, Mr Kerr that is making those recommendations.

Ms Leathem: Justice Kerr, yes.

CHAIR: Justice Kerr—okay. Does Justice Kerr actually sit in session in the AAT, or is it mainly an administrative role, organising everyone else?

Ms Leathem: He does a lot, obviously, of administration and leadership, but he also hears matters in the tribunal. He is a Federal Court judge as well, so I understand he does Federal Court work.

CHAIR: So he does Federal Court work as well. Is he a part-time member of the AAT?

Ms Leathem: No, he is full time, but many previous presidents of the tribunal also held office as judges of the Federal Court. So, from time to time, they do Federal Court work in addition to their responsibilities at the AAT.

CHAIR: Senator Wong was very interested in the political affiliations of some appointments. I am trying to remember. There was a Labor senator—I think it was Ruth Walker or someone. Can anyone help me? Is she still an AAT member?

Ms Leathem: I am not familiar with that name, Senator.

CHAIR: Well, I am not either.

Ms Leathem: But with 311 appointments that does not necessarily-

CHAIR: I apologise to this particular AAT member for not-

Ms Leathem: I am informed she is not a current member. She is not in our annual report.

CHAIR: Okay. What was her name, just out of curiosity.

Ms Leathem: I am sorry, Senator. I looked for Ruth Walker.

CHAIR: Okay. I am not even—

Senator McKIM: Just pull a name out of the air! It is just random.

CHAIR: Well, when you open up this line of inquiry to political affiliations, are you aware of the political affiliation of another recent appointee who, as I understand, was a political adviser to the Premier of Victoria? Are any of you aware of that political description in the conflict of interest statement? You are not?

Mr Anderson: The department is not aware.

CHAIR: I wish the Attorney were here, because I am quite sure he would know all of the very great number of Labor-affiliated persons who have been appointed to the AAT currently—some, I believe, by Senator Brandis. I am just curious to follow this line of

questioning to see what this is all about. Ms Leathem, you mentioned a list of people who, as I recall, were appointed earlier this year—I think it was February. The particular part that comes to my mind is that they were all doctors. Is that right?

Ms Leathem: There were a number of doctors. There was also a professor. Can I say that, of those, five were reappointments, so in most instances those doctors had already been part-time members of the tribunal.

CHAIR: Okay. And they are doctors of?

Ms Leathem: It varies, but we do have medical doctors who are involved in workers compensation matters from time to time, as well as some of the other types of matters we deal with that involve medical evidence.

CHAIR: Okay. Was the professor I think you mentioned a new appointment or a continuing one?

Ms Leathem: He was a reappointment.

CHAIR: Do you know what area his professorial competence was in?

Ms Leathem: I would have to take that on notice, I am afraid. I am not familiar with Professor David Ben-Tovim's background.

CHAIR: All right.

Senator REYNOLDS: I just have two questions, just as follow-up to the last questions from my colleagues. Can you tell me if there were any protocols under the previous government, the Labor government, for appointments to the AAT?

Ms Leathem: I was appointed in April 2015, so I could not comment in relation to that.

Senator REYNOLDS: Do you mind taking that on notice or just seeing whether someone else here has the corporate memory to hand to advise what the previous protocols were and also, obviously, how the appointments were made? I think that would help clarify some of the line of questioning here if we could get that information.

CHAIR: Mr Anderson, how long have you been in this role?

Mr Anderson: Since 1 March this year. We can take it on notice.

CHAIR: Are any of your senior staff aware if there was a protocol under which existing members of the tribunal, to make it current, were appointed—

Senator REYNOLDS: For new appointments in particular.

CHAIR: before Senator Brandis became the Attorney?

Mr Anderson: Not aware, Senator. We can take that on notice.

CHAIR: Can you tell me when this protocol that has been tabled came into being?

Dr Smrdel: We do not have a precise date. The information I have before me says that it was settled on 6 November 2015 but I am not sure whether the protocol was ultimately approved by the Prime Minister. I am not sure whether 6 November actually captures the Prime Minister's approval date or just when it was settled between the Attorney and the president.

CHAIR: That is fair enough.

Dr Smrdel: I will take that on notice.

CHAIR: Do you know what applied before this protocol? Was there a previous protocol?

Dr Smrdel: The process that applied beforehand would have been the more general Australian Public Service Commission *Merit and transparency* guidelines processes—

Senator REYNOLDS: So no specific ones for the AAT like there are now?

Dr Smrdel: That was a general one for statutory office holders, so the AAT one is a specific protocol.

Senator REYNOLDS: Thank you.

CHAIR: So, it is only in recent times that there was a specific one for the AAT, to your knowledge?

Dr Smrdel: To my knowledge, yes.

CHAIR: Could you get us on notice a copy of the previous protocol? Would that be possible—bearing in mind that a lot of the current members were appointed on the basis of the previous protocol?

Dr Smrdel: The *Merit and transparency* guidelines are on the APSC website, but we can provide a copy of that.

CHAIR: Okay. Do you know how this protocol came into being?

Dr Smrdel: In terms of the exact providence, it would be helpful if the Attorney were here, but it arose, from my understanding, in discussions between the Attorney and the president.

CHAIR: That is President Kerr?

Dr Smrdel: President Kerr; that is correct.

CHAIR: You probably do not know, but what you are suggesting is that it arose out of a discussion between the Attorney and the president. Can you tell me anything more about it; how it came into being?

Dr Smrdel: The Attorney would be in a better position to provide the answer. My understanding would have been as a result of the amalgamation volume of appointments, the size of the tribunal had considerably expanded. The number of appointments that would be becoming vacant at any given time would have been quite large, and so the need for a protocol would have been seen as a good thing; a specific protocol for the AAT at that time.

Senator REYNOLDS: Dr Smrdel, under the APS guidelines—given that they are guidelines—have you any indication of how often they are actually followed. Are they always followed in these processes?

Dr Smrdel: I cannot comment in terms of other statutory office positions, but in relation to the AAT appointments, in my experience, when the Attorney progressed appointments prior to the protocol coming into effect it would have been with reference to the APSC guidelines.

Senator REYNOLDS: Reference to but not necessarily strict adherence to? My recollection is in previous times in governments, they are not always strictly adhered to.

Dr Smrdel: They are guidelines—

Senator REYNOLDS: I guess that is my point: they are guidelines.

Dr Smrdel: and there are exceptions to following the guidelines strictly promulgated within the guidelines themselves.

Senator REYNOLDS: Thank you.

CHAIR: Welcome back, Attorney. You've missed all the fun!

Senator Brandis: What has been happening?

CHAIR: One of my colleagues has raised questions about your appointments, indicating a lot of them had Liberal Party associations. From my knowledge, they are also very fine jurists.

Senator Brandis: Sorry; which agency are we dealing with?

CHAIR: AAT appointments. I wanted to ask if there were appointments that you are aware of that have Labor Party affiliations. I seem to recall—

Senator Brandis: Not by me!

Senator WONG: Never a truer word, mate!

CHAIR: that some former adviser to a Victorian Labor premier was. I have been told that Justice Kerr, a former Labor parliamentarian, is actually President of the AAT, but are you aware of any others?

Senator Brandis: I am, but I do not have regard to a person's political affiliations when I appoint them to anything, nor when I was the arts minister did I have regard to a person's political affiliations when I appointed them to bodies in that portfolio. However, I am aware of some people's affiliations because they are a matter of public record. Probably the most senior person who I have appointed knowing of their political affiliations was Justice Robert McClelland, who the cabinet appointed to the Family Court on my recommendation, and he of course was a Labor Party former Attorney-General. I would have to check, but I think there have been other people who I knew were associated with the Labor Party and I am sure that there were people associated with the Liberal Party. Politics never comes into it, but ordinarily I would not know of a person's political affiliations and I never inquire.

CHAIR: If you had been here earlier, you would have heard Senator Wong go through a list of names—most of them I had never heard of, I might say with respect to them—alleging that they were members of the Liberal Party.

Senator Brandis: Mercifully, I was not here to hear these good people slighted.

CHAIR: I asked Mr Anderson this, but he was not aware. Did you appoint the Solicitor-General? If you did not, when was he appointed?

Senator Brandis: Mr Gleeson? He was appointed as Acting Solicitor-General, I think, by Attorney-General Roxon, and he was confirmed as Solicitor-General shortly before the 2013 election by Mr Dreyfus.

CHAIR: Okay. A lot of comments have been made about your appointments.

Senator PRATT: Can I actually have the call?

CHAIR: I am doing what I do as a matter of courtesy to all of you and let you finish a couple of questions. You have had that courtesy all the way through these hearings.

But a lot of comments have been made about your appointments just before the 2013 election-

Senator Brandis: To the AAT?

CHAIR: Yes—and I think you mentioned something about this yesterday. Perhaps you could repeat that.

Senator Brandis: Do you want me to address the issue generally?

CHAIR: Yes, please.

Senator Brandis: There was developed between Justice Kerr, the President of the AAT, and me a protocol. The idea of having a protocol that would govern appointments came, to the best of my recollection, from President Kerr. There was a period of quite a long time during which the protocol was in negotiation between his chambers—or him, effectively—and my office. Eventually we agreed to a protocol, and the protocol was to supersede any other. I do not think there had been a prior protocol to the best of my recollection, but the protocol was to be the instrument that governed all appointments to the AAT. That was finally settled. There was a bit of delay. I remember there the issue—for which I take responsibility, of course—between the government and the AAT for a period of time was delay in filling vacancies. I wanted the protocol finalised so that vacancies would be filled under the protocol. It was eventually agreed to in the latter part of last year if my memory serves me correctly, and the vacancies that accumulated were filled. Justice Kerr was perfectly happy with the protocol. So was I. There was no area of controversy about it.

The area of tension, I will confess, is delay in filling appointments. After the protocol was finalised, the backlog of vacancies was filled. I heard some comment just on my way into the room about a large number of appointments shortly before the end of the last parliamentary term. That is right, because there were a lot of vacancies and Justice Kerr wanted them filled.

CHAIR: Okay. My time has expired, and so I will pass on to another senator. For your benefit, though, the protocol has been tabled in this hearing, and we have all been able to—

Senator Brandis: If it has been tabled—assuming it is the actual document I have in mind—then it can speak for itself.

CHAIR: Okay. Thanks. I was going to Senator McKim, but I am reminded that it is time for supper.

Proceedings suspended from 21:01 to 21:18

CHAIR: We will resume on the AAT.

Senator McKIM: I want to start by asking about a couple of comments in the President's overview of your 2015-16 annual report. Justice Kerr says that the financial year was commenced with fewer than anticipated members transferring to the AAT from the MRT and RRT. Can you explain why that was?

Ms Leathem: My understanding is that prior to amalgamation, there were 150 members in the MRT RRT in the previous financial year; 120 members transitioned in on 1 July from the MRT RRT.

Senator McKIM: Were the other 30 simply terminated, told their services were not required or did they exercise an option not to come across?

Ms Leathem: That process, as I understand it, was managed by the Department of Immigration and Border Protection.

Senator McKIM: The Department of Immigration and Border Protection?

Ms Leathem: It was not part of the Attorney-General's responsibility at that time.

Senator McKIM: Is that passing strange or is that just me?

Senator Brandis: No. It was not passing strange and I can explain to you why that, in fact, was the procedure. I am sorry, you have me at a disadvantage because I was not here for the earlier discussion.

Senator McKIM: I have just indicated I have not raised this issue.

Senator Brandis: Thank you, Senator. That gives me the opportunity to explain it to you. This was the biggest reform of Australian administrative law in 40 years. The consolidation into a single merits review tribunal, under the AAT, of all of the different sectoral merits review tribunals, and it was a major achievement of my department and of Justice Kerr, who oversaw it, to accomplish it, I might say.

Senator McKIM: And the immigration department, by the sound of it.

Senator Brandis: There were other tribunals, like the MRT—the Social Security Appeals Tribunal is another—that were administered within other portfolios and the members of those merits review tribunals came into the AAT and, therefore, in doing so, came into the Attorney-General's portfolio.

Senator McKIM: Okay.

Senator Brandis: At the time the cabinet decision was made to do this and to set this process up, you can imagine amalgamating several merits review tribunals into a single body was quite a big administrative task.

Senator McKIM: I accept that it is a big job.

Senator Brandis: One of the principles the cabinet adopted was that I would consult the ministers in the portfolios where the incoming merits review tribunals had previously lain, so that is why other ministers had a degree of involvement.

Senator McKIM: Where was the former Social Security Appeals Tribunal?

Senator Brandis: It was in the Department of Social Security.

Senator McKIM: And did the Department of Social Security handle that transition?

Senator Brandis: Yes. As to how they handled it, I suppose you would need to ask them, but from my point of view, as the minister assembling all of this, they were no different from any other department from whom a merits review tribunal was coming over.

Senator McKIM: Okay. I will not press this any further past this question, Attorney, but wouldn't it have been sensible to allow the agency that was going to assume responsibility to manage the transition, or be the lead agency for the transition, rather than the agencies from whence those bodies came?

Senator Brandis: Up to a point, I agree with you, and up to a point that is what happened, but if you put it that way, I think, with respect, it underplays the extent to which this was a collaborative process.

Senator McKIM: Through you, obviously, Attorney, I wonder if the department could shed any light on what happened to the 31 members of the former MRT and RRT who did not make the transition.

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Senator Brandis: I doubt it. I assume they did not want to come over.

Mr Anderson: We would have to take that on notice.

Senator McKIM: I will put it on notice—to the extent that the department is able. I may yet follow-up with the immigration department in a different forum. I wanted to then go to another matter that Justice Kerr raised, and it overlaps with the matter I have just raised, he talks about the increase in the total number of applications on hand as at 30 June 2016, and then says, particularly, in the Migration and Refugee Division. So, obviously through the Attorney—and I will preface this by saying this matter has been raised with me by stakeholders in the sector that settles and supports refugees in Australia and supports those seeking asylum in our country as well—that the delays are very impactful in a lot of cases. Is it fair to say that the Migration and Refugee Division has a significantly longer median time to finalise than any other division in the AAT?

Ms Leathem: We do publish our finalisation timeliness statistics.

Senator McKIM: Yes, that is what I am sourcing the question from. I was after you to explain the relativities. I am aware that the times are very long in the Migration and Refugee Division but are its times the longest of all the divisions in the AAT?

Ms Leathem: There are some variations. There are matters within the General and other divisions of the AAT that also can take quite a long time to finalise.

Senator McKIM: I am asking about median times in the divisions.

Ms Leathem: Let me just turn to the finalisation rates. We have timeliness about the finalisation of matters within 12 months of lodgement. If you look comparatively, in 2015-16 you have 79 per cent of General and other divisions matters finalised in that time, 60 per cent of matters in the Migration and Refugee Division in that timeframe and almost 100 per cent within the Social Services and Child Support Division.

Senator McKIM: That is finalisation rates?

Ms Leathem: That is the finalised within 12 months of lodgement.

Senator McKIM: A lot fewer matters by percentage are finalised within 12 months in the Migration and Refugee Division compared to the General Division and the Social Security and Child Support Division.

Ms Leathem: We have a cumulative finalisation at 80 per cent of matters in 12 months, but it is 60 per cent in the Migration and Refugee Division.

Senator McKIM: Are there any divisions where the finalisation rate is lower than 60 per cent?

Ms Leathem: No, there aren't.

Senator McKIM: So it is the lowest in the AAT?

Ms Leathem: Correct.

Senator McKIM: We have already established that there are 31 members of the former tribunals, the MRT and the RRT, who for whatever reason did not survive the transition in professional terms. Would you accept, Attorney, that on the face of it it appears as if you do not have enough members in the Migration and Refugee Division?

Senator Brandis: I don't want to accept that without having a close look at the figures and a look at the case flow, so I will take it on notice. Obviously, it is a useful observation that you make, and you may well be right, but without necessarily accepting it let me look at the figures and, look at the case flow and have a talk to Justice Kerr and the division head.

Senator McKIM: So you will take that on notice, Attorney. Thank you, I appreciate that. Going through the annual reports and reading through the Migration and Refugee Division section, it says:

The volume and the timeliness of finalisations in the Division were significantly impacted by the reduced number of experienced members available to preside on migration and refugee cases during 2015-16.

Senator Brandis: I am sure that is right. Can I also make this observation: as you would expect, when you are amalgamating several quite large bodies that have operated independently of one another previously and putting them under one pre-existing body, in this case the AAT, you can imagine—you have been the minister in a government, Senator, so you would probably know better than many people—that there was resistance by some to the idea of being effectively absorbed into a larger body. There were some who thought that they would have preferred to have maintained the autonomy of a fragmented judicial review or merits review system. There were some turf wars.

I cannot speak highly enough of how well Duncan Kerr managed this. It was something that was first attempted, I think, by the Keating, if not the Hawke, government and they failed to accomplish it. It was tried again during the Howard government and it was not accomplished. Like a lot of things, it was not attended to during the Gillard or Rudd governments. It was re-presented to me by my department when I first became the Attorney. I found in Duncan Kerr a ready, competent and cooperative collaborator, and within two years it had been done. I want to give him so much credit for accomplishing this.

Senator McKIM: I am sure he will appreciate that. I am not going to ask you to go through this sort of war and peace of the amalgamation.

Senator Brandis: I am just giving you the context.

Senator McKIM: I understand that and, having overseen reasonably significant mergers while I was a minister, I accept that that is—

Senator Brandis: That is why I said it to you.

Senator McKIM: the likelihood that that was the case. The annual report does explicitly say there are 16 fewer full-time members in the Migration and Refugee Division that were available to deal with applications in the reporting period compared to 2014-15. Can I confirm perhaps with you, Ms Leathem, that that is a comparison of the total number of members in the MRT and the RRT in the 2014-15 year or was that an AAT number? I am not sure when the amalgamation happened.

Ms Leathem: In our estimation, it is not a simple number because some are full-time and some are part-time, but it has been estimated there are 16 less full-time equivalents in that division available to do work compared to the preceding financial year.

Senator McKIM: I probably was not clear in my question, but was the preceding financial year an AAT year?

Ms Leathem: No, that was in the MRT and RRT.

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Senator McKIM: When we learn in Justice Kerr's overview that there were fewer than anticipated members, we can perhaps not speak to the anticipation but the actual number of FTEs were reduced by 16 in the transition. Is that an accurate description?

Ms Leathem: My recollection is there were a large number of appointments that finished on 30 June, and the appointment process did not appoint all of the positions that were anticipated at that time.

Senator McKIM: Have representations been made either to the department or the Attorney-General's office that more appointments ought to be made under the process that you outlined for Senator Wong?

Ms Leathem: I understand the president has been in regular communication with the attorney about membership needs because we have further appointments, of course, coming up.

Senator McKIM: Are you able to offer the committee any comfort based on the figures I quoted earlier and your acceptance that the finalisation rates within the Migration and Refugee Division are the lowest in the AAT? Given that there were fewer than expected members who made the transition, are you able to offer the committee any comfort that an appropriate request has been made to either the attorney or the department around boosting the number of members in the Migration and Refugee Division?

Ms Leathem: The president certainly communicated what he believes is required for the tribunal to undertake its work in the future.

Senator McKIM: Could I confirm that that has been communicated? Does that go to the attorney or to the department?

Ms Leathem: We also communicate with the department. There is an AAT team within the department which is involved in those conversations.

Senator McKIM: I will just pay the attorney the courtesy of allowing him to resume his seat.

Senator Brandis: What was the question?

Senator McKIM: I will not put words in Ms Leathem's mouth, but I did ask her whether she was able to offer the committee any comfort that communication had been made with you around the need for more members to be appointed within the Migration and Refugee Division of the AAT. She was able to offer some comfort. I should do you the courtesy of saying that, while you were not here earlier, in response to questions from Senator Wong there was an outline of the communication process between the AAT, you and the department. I wanted to ask you whether you have received any communications to the effect that more members ought be appointed to the Migration and Refugee Division. If so, how do you respond to that request?

Senator Brandis: The way I respond is: Justice Kerr and I are in frequent communication with one another about membership. In fact, we spoke as recently as late last week about the upcoming vacancies and the need to ensure there was not any further delay in appointing these vacancies. When we speak—and we speak often, and he speaks with my senior advisers even more frequently—we tend to speak about the vacancy rather than the division. Sometimes the division is mentioned—I do not want you to think that the division is not

mentioned because it is often is, but, because the whole point of this fusion is to create a unitary, organic though divisionalised body, the conversation tends to be about, you know: 'We've got this vacancy coming up in Brisbane; we've got a vacancy at this level in Sydney; and there are two vacancies in Melbourne—blah blah blah.' So we tend more to talk about the level of the vacancy than the division, but we sometimes talk about the division too.

Senator McKIM: I have just got one more question in this line of questioning, Chair, if I might. Attorney, from your use of the word 'vacancies', ought I to take that to mean that you are simply from now on going to appoint to fill vacancies—in other words, is the loss of the 16 FTE members in the transition, is that the new normal now? Are you ruling out making appointments in addition to filling vacancies—appointments that are intended to address what we have just heard is actually a very low finalisation rate after 12 months in the migration and refugee division?

Senator Brandis: Let me answer your question this way. People are appointed to this tribunal for a set number of years—three, five or seven years. The former Prime Minister Mr Abbott had a very strong view—not just about this tribunal but about government bodies generally—that people who had served a term should not be reappointed unless there was a strong case to do so, because his view was that there should be refreshment.

Senator McKIM: But he is not the Prime Minister anymore.

Senator Brandis: The current Prime Minister, Mr Turnbull, does not particularly have that view, and I do not mean any disrespect to Mr Abbott but, frankly, nor do I. So my disposition is to reappoint people unless they have served for a very long time and it is time that they moved on. I will check the statistics, but I am reasonably confident that certainly since the time the protocol came into operation, which was roughly the time that Mr Turnbull became Prime Minister, the vast majority of appointments have been reappointments. So, when I use the term 'vacancy', I mean a position, a member's tenure, expiring, and I use it in both the case where consideration may be given to their reappointment and in a case where a new person might be appointed.

CHAIR: We might have to leave it there and come back to you, Senator McKim, if needs be. Senator Pratt.

Senator PRATT: Senator Brandis, you will have received some correspondence from me last night identifying some questions that you were asked in yesterday's Finance and Public Admin estimates, although I think I may have referred to the wrong committee in that correspondence. But I am sure that you will understand the matter that I am referring to. You told Finance and Public Admin yesterday that you would have to check whether Mr Tavoularis was paid commercial rates or a discounted rate for his legal representation to your family. Given that some time has passed now, have you managed to find an answer to that question?

Senator Brandis: No.

Senator PRATT: Are you aware of the correspondence I sent your office last night?

Senator Brandis: It was drawn to my attention very late last night, after 11 o'clock, and I have not made that inquiry, no.

Senator PRATT: Are you prepared to answer those questions?

Senator Brandis: No.

Senator PRATT: So you will not declare whether you received discounted, free or-

Senator Brandis: Mr Tavoularis did not act for me. I have no professional relationship with him whatsoever.

Senator PRATT: Did you arrange for him to-

Senator Brandis: And he has never acted for me in any matter.

Senator PRATT: Did you arrange for him to act for other members of your family?

Senator Brandis: I am sorry; I am not prepared to discuss the affairs of my family—full stop.

Senator PRATT: No, no. I am not interested in affairs-

CHAIR: Well, Senator Brandis, I am not going to allow the question.

Senator Brandis: Thank you.

CHAIR: Whether you want to answer it or not, it has got nothing to do with estimates.

Senator PRATT: Senator Brandis, I am not interested in any of the legal matters of interest to your family. What I am interested in is whether you have received services from someone—

Senator Brandis: I have received no services from Mr Tavoularis.

Senator PRATT: or a family member has received services from someone.

Senator Brandis: I have received no services from Mr Tavoularis at any time in my life.

Senator WONG: Did you use your position as Attorney-General to get mates rates for a member of your family?

CHAIR: What an outrageous question.

Senator WONG: That is the question.

Senator Brandis: You are-

CHAIR: I would not answer it.

Senator Brandis: I am restraining myself, Mr Chairman.

CHAIR: I would not answer it.

Senator Brandis: You have ruled the line of questions out of order.

CHAIR: I will not allow the question.

Senator Brandis: I will not be entertaining them.

Senator PRATT: I am not interested in the-

CHAIR: In fact, Senator Wong, I really think you should apologise for that.

Senator WONG: On what basis?

Senator Brandis: I do not think Senator Wong has the capacity to apologise, Senator. I think you are wasting your breath.

Senator WONG: I am happy to if the question is answered. This has been asked in the chamber.

Senator Brandis: The question will not be answered. It has been ruled out of order.

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Senator PRATT: I am merely trying to identify whether there is a conflict of interest here for the Attorney-General.

Senator Brandis: There is no conflict of interest, as I have said more than once.

Senator PRATT: I am not interested in even what the services Mr Tavoularis may have provided would be.

Senator Brandis: Move on to your next question. Move on to your next topic, Senator, because I will not be addressing the affairs of my family to you or to anyone.

Senator PRATT: I am not interested in the affairs of your family.

Senator Brandis: Yes, you are.

Senator PRATT: I am simply interested in whether you have received services at a discounted rate in your family.

Senator Brandis: I have received no services from Mr Tavoularis.

CHAIR: Senator Brandis has answered that three times-that I can count.

Senator Brandis: I have never engaged Mr Tavoularis. I have never been his client at any time in my life.

CHAIR: Can I just pause there. We have a lot of complaints about having a spillover because we do not have time to investigate all the matters before this committee. Yet, you have asked that question three times and you have been given the answer three times by the Attorney.

Senator PRATT: I can only assume on that basis that he did not pay a commercial rate for those services.

CHAIR: By asking the same question over and over, it is not going to get you a better answer. It is just wasting the time of this committee and making us all come back for a spillover at some time in the future.

Senator Brandis: Well, it will be in the distant future, I must say, Senator, because I do not have any available time for several weeks.

CHAIR: Senator Brandis, you were not here immediately after the dinner break. Unfortunately, a lot of the questions were then asked—you were involved in other important government business. But I did indicate to the room that there had been a request made for a spillover, which, of course, the committee will always accept. The time and the date of the hearing is something that will be worked out. I did indicate to your substitute that the secretariat would be in touch with your office to try and find a date convenient to you and your department, and that coincides with dates available to all members of the committee.

Senator Brandis: Thank you—

CHAIR: You were not here, so I thought I should repeat that. So there will be a spillover, but some time down the track. I did also indicate that I will not be here this Friday or next week, so regardless of you—

Senator Brandis: It would have to be pretty close to Christmas, if not in the new year.

CHAIR: The secretariat will work with your office on that. Senator Pratt, again.

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Senator PRATT: I can restrain myself from discussing legal services with Mr Tayoularis. but I am interested to know if you have a personal relationship with him.

Senator Brandis: With Mr Tavoularis? I do not know Mr Tavoularis very well. I know him well enough to know that he is a very well-respected solicitor in Brisbane. Anybody in the legal profession in Brisbane, if you said to them that he was not a perfectly suitable appointment to this position, would laugh in your face because he has an extremely good reputation. I would not call him a personal friend. I do not know his wife's name. I have never been to his home. He has never been to my home. I have never dined-had lunch with him one on one. So I would not regard him as a personal friend. I would regard him as an acquaintance. Whether he briefed me when I was at the bar, I cannot remember. Most people did, so perhaps he-

Senator Wong interjecting-

Senator Brandis: He probably did. So I do not know him particularly well. I know him better by reputation than personally, let me put it that way.

Senator WATT: Have you been to LNP fundraisers with him?

Senator Brandis: Not that I am aware. Like most people in the legal profession, I dare say he is a Liberal voter. But I was made aware by questions, I think, in the chamber that Mr Tavoularis had some years ago donated money to the LNP in Queensland. I was not aware of that fact at the time he was appointed.

Senator PRATT: Indeed, he did—15 August.

Senator Brandis: But I am glad he did. The more professional people who donate money to the free enterprise side of politics the better, as far as I am concerned.

Senator PRATT: Can you rule out whether any of your other appointees have made donations?

Senator Brandis: I cannot because I do not know. As I said earlier on, I do not inquire into people's politics when I make appointments-

Senator PRATT: How did you come up with such a long list of Liberal Party candidates? Senator Brandis: to boards or tribunals.

Senator PRATT: You must only have friends there!

Senator Brandis: There are some people whose politics I know because they are a matter of public record like Justice Robert McClelland. I did not appoint him because he was a former Labor politician; I appointed him because I thought he would be a good judge, and he has turned out to be a very good judge. Politics, for me, never comes into it.

Senator McKIM: Just for clarity, and thanks for your previous answer, in the future are you suggesting to the committee that you are only going to appoint to fill vacancies-that is, to fill positions that become vacant due to the expiry of the current term-or are you still leaving open the possibility of making extra appointments to, for example, the Migration and Refugee Division, to address the less than expected number of members who came over from the MRT and RRT, and the fact that the Migration and Refugee Division has, by some margin, the lowest finalisation rates after 12 months than the AAT?

Senator Brandis: I just want to make sure you understand what you are saying. Is your proposition that there are a number of vacancies that have remained unfilled—

Senator McKIM: No, that is not—

Senator Brandis: I am honestly not quite following this.

Senator McKIM: Thanks for asking for clarification. I will put it this way: does there need to be a vacancy in order for an appointment to be made or can your appoint in the absence of a vacancy to address an organisational issue that I have just raised?

Senator Brandis: Additional people?

Senator McKIM: Yes.

Senator Brandis: I would want to check whether there is a statutory ceiling on the number of members. Is there a statutory ceiling? I do not think there is a statutory ceiling, and that is the effect of my advice as well. I would always, of course, want to consult the president and he would want to consult that division head. There is also the issue of potentially shifting people from one division to another. But I would not rule out what you say, no.

Senator McKIM: So you would not rule out making additional appointments?

Senator Brandis: I would not rule it out.

Senator McKIM: Thank you, that is what I was seeking. Also, the annual report makes it clear that there have been no appointments to the Administrative Review Council since 2012.

Senator Brandis: I will check that.

Senator McKIM: No, I am not asking you to check it. It is in the annual report of the AAT.

Senator Brandis: I think the reason for that is that there was a proposal in the 2014 budget to abolish the Administrative Review Council.

Senator McKIM: But it still exists.

Senator Brandis: It still exists on paper, but it is no longer a cost to the budget because it has not been constituted.

Senator McKIM: I want to quote from Justice Kerr's overview in the annual report-

Senator Brandis: Is this page 4?

Senator McKIM: Yes, the first column and the second half of the second paragraph.

Senator Brandis: The council's most recent report?

Senator McKIM: I will just let you read it. Its statutory functions were unable to be discharged. It is shoddy if it still has statutory functions and you are not funding them to discharge them. That is a tad on the shoddy side.

Senator Brandis: I take your point. You have to go back to the 2014 budget when all ministers were asked to find economies. My department recommended to me that one of the economies we could find was the abolition of the Administrative Review Council because there was a view taken that its law reform function could be dealt with by other elements of the government, but we merely did not constitute it so as to save that money from the budget. You may think that that was a relatively small saving. You may be right, but that is what happened.

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Senator McKIM: I have no idea. Thank you, but, Attorney, the reference to statutory—**Senator Brandis:** Yes.

Senator McKIM: to me at least, implies that it is a creature of the parliament. Aren't you slighting the parliament by—in the normal course of events, if you wanted to abolish something, you would bring in an amendment bill and you would—if it was a statutory organisation, and you would seek to abolish it through the parliament. You would not simply, by pressure on the jugular, cut off its blood-flow entirely, which, it sounds like, is what you have done.

Senator Brandis: I note what you say. I wish I had more money in the portfolio so that all of these—

Senator McKIM: Every minister of every Westminster government-

Senator Brandis: I wish I had more money in the portfolio so I could have more money for judges, more money for legal aid, enough money for a fully constituted Administrative Review Council.

Senator McKIM: More money for community legal services.

Senator Brandis: Community legal services, all of that.

Senator McKIM: Thank you, Attorney. I will just make the observation that keeping the Commonwealth's administrative law system under review, monitoring developments in administrative law and recommending improvements that might be made for the system is actually good long-term strategic planning work, and—

Senator Brandis: I note your observation-

Senator McKIM: Okay.

Senator Brandis: But to be honest with you, we achieved in 2015 the greatest reform to Australian administrative law since 1975, without the benefit of the views of the Administrative Review Council. In fact, the history of administrative law in Australia—if you will pardon the slight pun—is a tale of two Kerrs: from the Kerr report, written by the great Sir John Kerr in 1971, which set out the vision of a unified system of merits review unique in the world, to the culmination of that in a single merits review system under Justice Duncan Kerr in 2015. From John Kerr to Duncan Kerr, that is the story.

Senator McKIM: That is very punny of you, Attorney.

Senator Brandis: I do not think it is a pun. I do not think it would be described as a pun.

Senator McKIM: Last question, on another matter—and it was raised a little bit earlier. I will just give you the courtesy—and this may be a question to Ms Leathem. The Immigration Assessment Authority was to fast-track decisions around—and I think you have given evidence earlier tonight, Ms Leathem—there were about 25,000 people in the cohort with the parameters that you mentioned. I understand it is early days. What sort of clearance rates would you be expecting from the Immigration Assessment Authority into the future? Are the clearance rates still ramping up or do you think you have reached a sort of a plateau in clearance rates where it will just be a sort of a linear clearance rate from now on in, in the main?

Ms Leathem: No. It is very early days, I would have to say, in the referrals. As at 30 September 2016, the Department of Immigration and Border Protection had made decisions in respect of 1,706 persons, which is about 6.8 per cent of that cohort that we mentioned. Not all of those obviously are referred to the AAT. It depends on what decision is made. But, so far, 52 per cent of those decisions by the department have been referred to the IAA for review. So we are clearly seeing an escalation in the referral rates over that last few months and we expect that will continue to ramp up.

Senator McKIM: So the 25,000 is not the amount of cases you have had referred. That is the size of the cohort that you are estimating may—

Ms Leathem: Correct. That is what Immigration tells us is the total potential pool.

Senator McKIM: I think you have said that the clearance rate is still increasing. Is that accurate? Because it is early days?

Ms Leathem: At this stage we have had 886 matters referred to us. We have 461 cases on hand. So that means we have finalised 48 per cent of those referred.

Senator McKIM: In what period of time?

Ms Leathem: The first ones came in late October 2015.

Senator McKIM: Okay. So you have cleared 461 cases in a year, effectively?

Ms Leathem: We have had 886 referred to us, and 461 have been finalised.

Senator McKIM: So 461 since October last year?

Ms Leathem: No. Can I clarify. We did not receive referrals—we got a very small number of referrals in October. They have been increasing over time.

Senator McKIM: What I am trying to see if you can provide to the committee—I will be blunt: how long is it going to take you to clear the 25,000? What are you aiming for?

Ms Leathem: That really depends on the rate at which the department is able to process their matters. That is something that we are involved in ongoing discussions with them about. If you look, for example, at the way in which the processing has happened in the first seven months, you will see that it is significantly slower than the department had initially anticipated. It has increased significantly since May 2016. In the 12 months to 30 April 2016 we only got 72 referrals, and in the five months since then we have received 814 referrals. So it shows you that there has been an escalation in those.

Senator McKIM: So the constraining factor at the moment is the rate of referral, not the capacity of the authority to process?

Ms Leathem: At this stage that is the case. We will have to have discussions with the department about resourcing in relation to those matters as more come through if they want them dealt with in a timely manner.

Senator McKIM: Does the immigration department fund the authority?

Ms Leathem: There has been an allocation of money provided to the tribunal specifically to deal with those particular matters.

Senator McKIM: How much is that?

Ms Leathem: I will find that for you. In this financial year \$4.667 million was provided for the Immigration Assessment Authority.

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Senator McKIM: What governs future allocations? Is it negotiated on a year by year basis or is there an MOU or—

Ms Leathem: There is an MOU. My understanding is that there has been funding agreed until 2017-18 but beyond that there will need to be discussions with the department.

Senator McKIM: Does it continue at the same rate—the \$4.667 million?

Ms Leathem: I will have to check whether I have the forward estimates in relation to that.

Senator McKIM: I am happy for you to take that on notice.

Ms Leathem: I have just been handed those numbers. In 2014-15 it was \$4.663 million; in 2015-16, \$4.699 million; in 2016-17, \$4.749 million.

Senator McKIM: It sounds like it is going up at about CPI.

Ms Leathem: Yes.

CHAIR: I thank the AAT for your attendance today and appreciate your advice to the committee. We will now move to the Australian Criminal Intelligence Commission and at the same time the Australian Institute of Criminology.

Australian Criminal Intelligence Commission Australian Institute of Criminology

[21:58]

CHAIR: Welcome. If you want to make an opening statement, please do that.

Mr Dawson: Thank you, Chair. I would like to take up your offer to make an opening statement. The Australian Criminal Intelligence Commission appears before you for the first time because legislation giving effect to the merger of the former agencies known as the Australian Crime Commission and the CrimTrac agency was passed by this parliament with bipartisan support. It amended the Australian Crime Commission Act to incorporate the law enforcement information-sharing functions previously performed by the CrimTrac agency with the existing intelligence and special investigatory functions of the former ACC. The new agency, the ACIC, is uniquely equipped to address Australia's national criminal intelligence efforts, coupled with some investigative and information delivery functions. The ACIC, as it is known now, will work closely with a broad range of national and international partners to achieve its purpose, taking account of criminal threats to Australia, the national security threat and the terrorism threat level, coupled with its stakeholder needs. The ACIC will create a national intelligence picture of crime, targeting particularly serious and organised crime, and deliver information capability and services to frontline policing, law enforcement and related agencies.

A key objective of the merge is to ensure there is no disruption to the information capabilities and services currently provided by each agency to police and law enforcement. It is essential that the ACIC continues to target serious and organised crime, threats of most harm to Australians, and the national interest. Additionally a critical priority for the ACIC in the short term will be to fill cross-agency information technology gaps that previously have been found to be incompatible with some IT systems—which do of course impact on resourcing and over time will be replaced by a more integrated capability. With the nation's law enforcement agencies the aim—and we are on the pathway to this—is to use a single data entry point to feed in and out of the ACIC's present IT capabilities, where research operational

data and intelligence will ultimately provide a larger data view of law enforcement information, including threats. The more agile these systems become, the more quickly our police and national security agencies will be able to prevent, detect and disrupt significant threats.

A third agency has been the subject of progression. In September this year the Minister for Justice introduced legislation to this parliament to merge the Australian Institute of Criminology and the ACIC. This is still before the parliament. The change, in terms of the Australian Institute of Criminology, is intended to establish an Australian crime and justice research centre as an independent branch within the ACIC. This merger is intended to bring together both national criminal intelligence and research capabilities under one banner. Having a unified resource of this type would enrich the national understanding of criminal activity, including serious organised crime and terrorism, allowing police, justice agencies and policymakers at all levels of government to adopt a more effective, efficient and evidence based response to crime.

We have co-located within the Canberra precinct a new ACIC headquarters in Barton. The majority of additional leased area utilised surplus Commonwealth space under a subleasing arrangement with the Attorney-General's Department. This project is due for completion in several months, in early December this year. There are subleasing arrangements for vacant space at the former CrimTrac premises in Dickson, and that has been secured with effect from 1 January 2017. It is important that that it provides secure accommodation, with both secret and top-secret examination facilities that are close to our partner agencies. Ongoing costs for the relocation of the ACIC will be offset by savings that we have achieved through rationalising our accommodation in other cities, such as Sydney and Brisbane. We have achieved ongoing rent reductions.

The key deliverables for the period ahead include the continued progression of building the national criminal intelligence system, or NCIS; a biometric information service; the Australian firearms information network; an interim order reference solution project; and a number of other allied projects. Additionally, other important initiatives include assessment and targeting of organised crime groups under a number of ACIC board approved determinations; a serious and organised crime effort to assist in the government's visa strategy, a primary objective of which is to reduce the threat to Australia through processes under the Migration Act and to address those persons who fail the character test as defined under section 501 of the Migration Act. The ACIC's response also contributes to assisting in the national security partner arrangements in response to foreign fighter threats under our Project Ridgeline.

Furthermore, we have a capability through the fusion of datasets which bring together subject matter experts, investigators, analysts, data and tools across a range of government agencies at both national and state and territory level to enhance their understanding of the national picture of organised crime and particularly to also discover previously unknown organised criminal activity.

CHAIR: Just excuse me a moment, Mr Dawson.

Senator WATT: I do not mean to be rude to Mr Dawson but I am conscious of the time. I wonder if it would be possible for him to table the remainder of his opening statement.

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Senator Brandis: Chair, may I speak to the point of order. I know senator Watts is a new Senator but he is perhaps unfamiliar with the fact that it is a custom of these committees to enable agency heads to read statements so that they can give the committee and through it the public, because we are broadcasting, an account of the work of their agencies. They should not be interrupted and I ask Senator Watts to pay Mr Dawson the courtesies of which perhaps he is unaware.

CHAIR: Thank you, Senator, and I thank Senator Watts too. I think Mr Dawson, from my look at his notes, is almost finished in any case. This is a new agency. It is a combination of other agencies. I am certainly appreciating that you are answering my questions before I ask them so it will save time in the long run. On that basis that you do not have much more, perhaps we could hear you finish, Mr Dawson.

Mr Dawson: I have two more paragraphs. To advise the committee, there is also an implementation which the new agency has been tasked, which is to implement a cyber security strategy following the provision from the Commonwealth of some \$16 million over four years for the ACIC to strengthen the ACIC's capability to combat the increasing threat of cyber crime to the nation and provide cyber analytical capability to assist particularly partner agencies.

Finally, we are also broadening out a national wastewater analysis pilot capability to improve the nation's understanding of the use of illicit drugs and the amount of drugs which may be consumed across the Australian population, which would permit not only law enforcement but policy agencies to measure the impact of particular initiatives on the illicit drug markets.

Senator Brandis: Chair, before you turn to questions, can I draw to your attention the fact that we have got a little over 50 minutes left. The Australian Criminal Intelligence Commission and the Australian Institute of Criminology were pencilled into the program for 45 minutes. The Australian Security Intelligence Organisation, whose officers are still waiting, was pencilled into the program for an hour and I imagine, given the importance of ASIO, that senators would have a lot of questions for them.

CHAIR: I could update you, Senator, but was there a point you were going to make?

Senator Brandis: I was just wondering whether everyone after the Australian Criminal Intelligence Commission could be excused rather than being forced to wait here pointlessly till 11pm or if, out of abundant caution, we think we might finish the Australian Criminal Intelligence Commission in less than 45 minutes that if ASIO could be asked to stay but all the public servants be allowed to go home to their families?

CHAIR: I am very conscious of that, Senator Brandis, and, as you know, we particularly organise the program so the agencies from out of town can be over and done with by three o'clock. That has not happened. Under the standing orders of the Senate, I am not able to curtail questions while any senator has questions. My impression is there will not be a lot of questions for this agency. With ASIO, there is only one senator who has indicated she wishes to ask questions, and I assume that will not be long. So we may well be able to get half an hour of the department but that is anyone's guess. I thank Mr Dawson for that opening statement and congratulations on the new entity. I did have some association with the Australian Crime Commission as chair of the parliamentary committee some time ago. I just

want to ask one question, effectively. Can you give us an update, as much as you can reasonably do—not impinging on any operational matter—on the fight against outlaw motorcycle gangs and drugs? There are two questions. Before I get to that one, did you say that you are doing a wastewater study?

Mr Dawson: Yes, we are.

CHAIR: Can you explain what that means?

Mr Dawson: The wastewater analysis complements other forms of research, such as what the AIC, the Australian Institute of Criminology, have done with the urinalysis of persons in police detention. That has been ongoing for quite some time. A more recent initiative has been to engage scientists from a number of universities across Australia who do sampling of wastewater through the public utilities, and that provides a far more stringent evidence base than a household survey. We test across about 14 different illicit drugs, which would range from the opiates, such as heroin, to amphetamine-type substances—cannabis and others, which gives quite an accurate picture of the volume of drugs that are ingested in that particular catchment area, and that provides both law enforcement but also education, rehabilitation and other policy type matters so that we can get ahead of the play as opposed to look at the downstream—without wishing to use a pun there—to get a better, fresh understanding of where the current issues are emerging, as opposed to something that previously may have been years in the knowledge.

CHAIR: Incredible—you live and learn! Thank you. Broadly, are we winning or losing with outlaw motorcycle gangs?

Mr Dawson: There are some 38 established outlaw motorcycle gangs in Australia. They have in the order of 4,600 members and associates that add to the top of that. They are obviously some of our highest priorities, particularly for police around the country. The ACIC hosts what is known as the Australian Gangs Intelligence Coordination Centre. That comprises five or six agencies that assist the ACIC. The Australian Federal Police, state and territory police, the Australian Border Force, AUSTRAC and a number of other agencies all contribute their respective intelligence sources. We then provide a lot of product, as we call it, to particularly frontline police. If they have a request for intelligence sets, we provide them with a full gangs list. There is now a digital online national gangs list. If any police officer around the country is stopping or speaking to a person—or searching premises and they come across a person—they suspect to be an outlaw motorcyclist, they can get ready access to that. One of the other major pieces of work that we are doing is working with some of the immigration efforts in terms of those persons that may be identified that are noncitizens of Australia or may be suitable for consideration by the minister or the secretary of that particular area of government.

CHAIR: Thank you for that. As a Queenslander, I take pride in that Queensland is leading the way in addressing outlaw motorcycle gangs.

Senator Brandis: And, although it is not immediately germane to Mr Dawson, you should also take pride, Senator Macdonald, as a North Queenslander, in the knowledge that the Commissioner of the Australian Federal Police, Commissioner Colvin, is a Rockhampton person.

CHAIR: I did not know that.

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Senator WATT: Mr Dawson, I am not sure whether your agency provides any advice to government about issues to do with firearms, firearms trafficking, that kind of thing.

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Mr Dawson: Yes, we do have some involvement.

Senator WATT: It may be that some of these questions need to go to Senator Brandis's department rather than to you, but there have obviously been some reports today that the government is or was considering removing the ban on the Adler A110 lever action shotgun in response to concerns from Senator Leyonhjelm. Has your agency or the department prepared any documents as part of the National Firearms Agreement review recommending a relaxation of restrictions on that weapon?

Mr Dawson: Yes, we have previously provided some documentation.

Senator WATT: To the Attorney?

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Mr Dawson: To the Minister for Justice.

Senator WATT: So your agency has prepared and provided documents to the Minister for Justice contemplating a relaxation of restrictions on the importation of that weapon?

Mr Dawson: Not necessarily in relation to the specifics of your question, but I can recall some documentation regarding the Adler shotgun in particular and the magazine capacity of that. That is from my recall now, and I may be corrected. I do not have the document with me, but that was some 12 months ago.

Senator WATT: Right, and did that put forward a position on whether that ban should be relaxed or anything like that?

Mr Dawson: No, my recall is that that was specifically and expressly about the capacity for that particular model weapon to be able to be fitted with additional magazine capacity beyond a five-round, a seven-round or further. We have a firearms expert within the ACIC and his advice and the advice of others was taken on board and that was subsequently provided.

Senator WATT: Ms Jones, has your department prepared or provided any documents as part of the national firearms agreement review that contemplated a relaxation on importation of that weapon?

Ms K Jones: I will ask Deputy Secretary Close to answer that, but the department has been involved in developing advice to the minister and involved in negotiations around the national firearms agreement.

Senator WATT: Just to be clear, that is to the Minister for Justice as opposed to the Attorney?

Ms K Jones: That is correct.

Senator Brandis: The way portfolios are allocated, Mr Keenan has responsibility for this area of policy and he has lead responsibility for the Australian Federal Police and the Australian Criminal Intelligence Commission.

Senator WATT: Thank you, Senator Brandis. Ms Close, do you care to elaborate on what Ms Jones has said?

Ms Close: Yes, Senator. The department is leading implementation of two recommendations which arose during the Martin Place siege review. The first

recommendation is in respect of the Commonwealth states and territories looking at simplifying the regulation of the legal firearms market in Australia through an update of the technical elements of the national firearms agreement. The second recommendation is that Commonwealth states and territories give further consideration of measures to deal with illegal firearms. We have been working through those with states and territories and providing that advice to the Minister for Justice.

Senator WATT: How recently did you last provide advice on that topic?

Ms Close: This week.

Senator WATT: This week?

Ms Close: Yes, the reason being that we have the Ministerial Council on Law, Crime and Community Safety meeting on Friday this week, so it was in preparation for that.

Senator WATT: Have you or your department been asked to prepare any documents advocating that the ban on that weapon be removed?

Mr Bouwhuis: I might, perhaps, clarify. The ban has always been in place while the NFA is being negotiated, and that has been a clear and consistent position which the government has had all along. I can track back press releases for a number of years. But the government's consistent position throughout the negotiation of the NFA has been that the import ban would be in place until the NFA agreement is reached and the states and territories reach agreement, so I am not sure what the change in position that you are alluding to is exactly.

Senator WATT: I suppose there has been some reporting today, and it is a little bit unclear about whether the government's position has changed or not. Are you aware of any discussions that have occurred with state governments about a potential relaxation of that ban?

Mr Bouwhuis: Just to be clear, my understanding is that there has not been any change in policy, and I could quote you back press releases which the minister issued back in 2015 basically to the effect which the minister outlined in parliament today that the import ban is basically just in place until the NFA is agreed. Once the NFA is agreed and implemented then presumably the import ban would be lifted. That has been the consistent policy throughout, and I could table those press releases if that would assist the committee.

Senator WATT: Sure.

Senator Brandis: I can confirm that the position that Mr Keenan stated in the House of Representatives today is the position of the government. That has not changed.

Senator PRATT: When were weapons of that type first banned?

Mr Bouwhuis: I think the ban came in around 2015, but I have to go back and check the dates on that. But I can do that relatively quickly, if you wish.

Senator WATT: I understand the update to the National Firearms Agreement is now quite overdue. Is there any reason for that delay?

Ms Close: It has taken some time to negotiate with the states and territories on the final wording of the National Firearms Agreement.

Senator Brandis: That is right, and as I think somebody said before, this is an agenda item for the meeting of the Law Crime and Community Safety Council in Melbourne on

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Friday. The Commonwealth has taken the lead here. We have had a series of discussions with the state and territory governments, and if there is delay it does not lie at the feet of the Commonwealth.

Senator WATT: Has the department had any discussions with its counterparts in any state governments in the last month or two around a potential relaxation? Is there any pressure coming from any state government to look at a relaxation of that ban?

Senator Brandis: I do not think we will be answering that question, and you should not by the way take that as being confirmation of the proposition you are putting, because it is not. But, given that we are in discussions with the states and territories, and given that we have settled policy, I do not think it would be in the interests of the Commonwealth to be, as it were, offering a running commentary on the state of play with the states and territories. But there is no change to the Commonwealth's position.

Senator WATT: Senator Brandis, are you aware of any conversations that have occurred between Senator Leyonhjelm and the Prime Minister, or any ministers, about a potential relaxation of this ban?

Senator Brandis: I do not disclose personal conversations. But the answer to your question is that I am not aware. But if I were, I would not tell you, because I do not disclose personal confidences. But, on this occasion, I am not aware.

Senator WATT: Have you had any discussions, or are you aware of any ministerial level discussions that have occurred, with the New South Wales government around a relaxation of this ban?

Senator Brandis: No, Mr Keenan, as I said before, runs this area of policy. The Commonwealth's position is as I have indicated, and that position is strongly held and has not changed.

Senator WATT: Are you aware of reports as recently as three hours ago that the New South Wales Deputy Premier, the Leader of the National Party there, is supporting a relaxation of this ban?

Senator Brandis: I am not aware of those reports, no.

Senator WATT: What would the Commonwealth's view be if that were to be the position of the New South Wales government?

Senator Brandis: I am not going to comment on hypotheticals. I have told you what the Commonwealth's position is.

Senator WATT: Is there anything in the coalition agreement with the National Party about relaxation of gun laws or maintenance of gun laws?

Senator Brandis: That is a private document, so I do not comment on it. But, not that I am aware.

Senator PRATT: Would you personally support the relaxation of this particular law?

Senator Brandis: I support the policy of the government.

Senator LAMBIE: I have some questions about the Adler. Is it true that you can let off seven shots in about 10 seconds?

Senator Brandis: We need to find a person with that level of expert knowledge.

Mr Dawson: The advice I have is that for a five-round discharge—and that is the weapon I am aware of that was tested—it is able to be discharged in just over four seconds.

Senator LAMBIE: Okay, well that is even worse. Regarding the attachments that go on it, how many attachments can you actually put on this weapon and what sort of attachments are we talking about?

Mr Dawson: The advice I have received from our firearms expert is that, like a number of different weapons, there is a capacity to add extra rounds through a longer magazine capacity. That is quite a familiar addition that can be done to quite a number of different firearm types. The advice I have is that the Adler shotgun is capable of being equipped with a number of different magazine rounds, whether it be five, seven or greater.

Senator LAMBIE: Are we looking at 20 or 30 rounds as well? What do they usually come in—20? The military ones come in about 20, so I am gathering that that would be standard. Would it be that easy to be able to access those magazines?

Mr Dawson: Whether it is from the factory or whether it is manufactured privately outside of the manufacturer's details would be a matter that would have to be considered, but I would be happy to take your question on notice if you wanted more specific information.

Senator LAMBIE: Yes, I would like more specific information, and whether or not they have come across any illegal attachments. With some of those I have seen 30 or 40 rounds in other weapons—they are illegal attachments. It would be great if you could do that. Is there any reason why we do not run an amnesty, like we did after Port Arthur, where you can pass in your weapons and have amnesty, and clear the streets up? Have we ever had a national amnesty where you can pass your weapons in, no questions asked, and walk?

Mr Dawson: There have been proposals for that. I know from the state and territory jurisdictions that they also run amnesties. The department may wish to respond in terms of any national amnesties, but I am much more familiar with the state and territory amnesties, which are, in most states and territories, enduring.

Senator Brandis: I mentioned before the meeting on Friday of the Law, Crime and Community Safety Council. The possibility of an amnesty is an agenda item for discussion at that meeting.

Senator REYNOLDS: Thank you for your informative opening statement. Could you tell me a little bit more about Project Ridgeline? I have not heard of that one before.

Mr Dawson: Project Ridgeline is a project that the ACIC, formerly the Australian Crime Commission, is and does conduct in a partnering arrangement with ASIO to do a number of pieces of work around the criminal intelligence data that we collect and also in identifying potential persons who may be what may be called lone actors. We run that as an assessment through our data. We are working closely with ASIO in regard to that. It specifically is looking at intelligence holdings and any information sets that might assist us and our partner agencies in looking at such threats.

Senator REYNOLDS: Is it bearing fruit?

Mr Dawson: Yes, it is.

Senator REYNOLDS: Could you tell the committee a little bit more about what work you are doing the Serious Financial Crime Taskforce, and is this building on the success of Project Wickenby?

Mr Dawson: Yes it is. We have a role in the current Serious Financial Crime Taskforce. Executive Director Blanch actually sits on that. He was there very recently. With the committee's concurrence I will invite him to respond as he will have firsthand knowledge of that.

Mr Blanch: The Serious Financial Crime Taskforce, of which we are a member, also includes the ATO, AUSTRAC, ASIC, AFP and ABF. At the moment it has capitalised on the work of Wickenby. It has enabled us to assess the volume of numerous financial crimes, including offshore tax evasion, primarily. The Panama papers is probably a good example of that. The volume is significant and it has really given us the intelligence to work together and respond to that immediately.

Senator REYNOLDS: Can you tell us a little bit more about the work you are doing with the Panama papers.

Mr Blanch: At the moment, it is very new information.

Senator REYNOLDS: There is a lot of it.

Mr Blanch: There is a lot of it. There are 200,000 names that came out of it—not all Australians; that is around the world. There are very complex structures that are sitting offshore. They are not all illegal. That is the work we are currently doing: to understand and provide a picture of that intelligence to the Serious Financial Crime Taskforce.

Senator REYNOLDS: Thank you. Are you also the right person to talk a little bit more about the National Gangs List?

Mr Blanch: I can, yes.

Senator REYNOLDS: Thank you. Could you perhaps give us an update about what it is actually for and any progress you are making with it.

Mr Blanch: The National Gangs List was part of the AGICC. It is a national coordination of what were previously quite disparate lists around the country that were held by the states and territories about membership of the OMCGs. It is about bringing that together so we can provide a better intelligence picture of who is in these OMCGs, where they reside and the effectiveness of the laws against the OMCGs and what they are doing in relation to displacement.

Senator REYNOLDS: Do you now have integrated data from all the states and territories?

Mr Blanch: We have. Correct.

Senator REYNOLDS: Thank you. I am conscious of time. Mr Dawson, can you just tell us about the merger of the ACC and CrimTrac. Are you seeing benefits? Is that enhancing the work that you are able to do?

Mr Dawson: Yes, it is. In my opening statement I made reference to the law enforcement datasets that CrimTrac were discharging, and they range from the National Police Reference System. To give effect to and optimise that and understand the scale of that, there are some 65,000 police around the country, and they have utilised that single dataset. That is only one

of many within CrimTrac. The National Police Reference System had over 42 million searches in the last reporting year. We also have the Australian Firearms Information Network, the National Child Offender System, the national DNA database and the Australian fingerprints system. All those sorts of very core law enforcement datasets were not previously part of the Australian Crime Commission in terms of our capability to fully optimise that. So we are right in the middle of a proof of concept in building the National Criminal Intelligence System. This is a very important system in order to federate these searches, not only within Australia but also with some of our international partners, because if we are able to put them in a single searchable capacity-my technical people do not like me saying 'Google for cops', but that is the lay term I use-there is a much greater enhanced search engine for both frontline police officers and, importantly, investigators and intelligence analysts. Previously there was a manual system where upwards of 80 per cent of the law enforcement datasets were not searchable in a federated way. So the merger has brought the obvious benefits there by bringing them under the one roof, and it will be a process in which we will be integrating that. Certainly Executive Director Lee Walton could expand on more of the technical side of it, but that is the primary advantage in bringing the CrimTrac agency together.

Senator REYNOLDS: I would like more information on it, but in deference to time perhaps we could take that on notice.

Mr Dawson: Any specific part of that?

Senator REYNOLDS: There are a number of areas there. Given the large amount of data that you have there, obviously data integrity is very important in terms of who accesses it, if you have 65,000 police around the country having access to part or all of it. Could you provide more information to the committee about how you address privacy issues and also the access that 65,000 people have and how you regulate and control it, and also the \$14 million that you said you have for cybersecurity. Is that just to enhance the protections for this system from external attacks or access?

Mr Dawson: No, there was an amount of \$16 million over a four-year period.

Senator REYNOLDS: Sorry, \$16 million.

Mr Dawson: That covers, particularly, the criminal intelligence elements of it. The Australian Federal Police also receive an amount. The role of the ACIC is to recruit particularly high-end cyberspecialists. So, we are already populating that particular area with some 12 FTE, and there is a body of work in the years ahead to increase both our capability from hardware but also the right people who can actually provide a better picture of intelligence on those matters. And we also have some other systems that complement that.

Senator LAMBIE: Attorney, does Australia have federal laws like in Queensland that make it illegal to associate with organised criminals?

Senator Brandis: Well, we have strong laws in relation to organised crime, and those laws include offences like being an accessory, for example. Let me just check the particular section numbers of the Crimes Act or the Criminal Code. But allowing for the fact that criminal law is primarily a state matter, there has been since I think 1914 a Commonwealth Crimes Act and more recently a Commonwealth Criminal Code, and with the expansion of the federal jurisdiction there are a lot of criminal matters that were previously only within the purview of the states that are now also offences against Commonwealth law.

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Senator LAMBIE: So if you rolled out pretty much, with a bit of tweaking, the same laws as what Campbell Newman put through Queensland, do you think that would make your job or their job to target organised criminals and gang members easier?

Senator Brandis: If I may say so, it is a bit like the issue raised earlier in the day about ice. I actually do not think the problem lies in the absence of explicit criminal laws against organised crime at the federal or the state level. We try to give our police and our criminal intelligence agency the resources and capabilities they need to take advantage of those laws. They are always kept under review. One area on which this government has been very, very active is Proceeds of Crime legislation, which helps track down the masterminds at the source. Perhaps Mr Dawson might care to add some observations about that. But all of the legal muscle that we can give our police in order to fight organised crime, I can assure you, we give them.

Mr Dawson: I may add, on that invitation, that the focus of the ACIC is also increasingly towards those criminals who impact Australia from outside Australia. On our assessment, of the most serious cohort of criminals impacting on Australia, some 70 per cent either are domiciled overseas or are Australians who have very strong international connections. So we, together with our partners, are increasingly focusing not just on the domestic crime situation, because for matters such as illicit drugs and any other sort of commodities and also the movement of illegal money flows we are increasingly working with not only the Australian agencies but also our international partners, such as the Drug Enforcement Administration, the Federal Bureau of Investigation and the National Crime Agency in England. Those sorts of agencies we have a very strong relationship with, and that continues to build. That is why we have also put criminal intelligence analysts overseas as part of the funding we received from the Commonwealth out of the Proceeds of Crime account. That all complements efforts that are being made within Australia itself.

Senator LAMBIE: But isn't it the strength of those laws—the VLAD, I believe they are called—the level of intelligence that police get when those organised crime laws are put into place? You actually are able to gather a lot more intelligence by putting those laws in place.

Mr Dawson: Our role in that, as the Attorney has outlined, for those jurisdictions that have the primary role for addressing crime within the state or territory—we supply intelligence packages. If there is an association between, for instance, a bikie with another, that forms part of our National Gangs List, which was referred to earlier. We supply intelligence reports to, for instance—in your state—the Tasmanian police, to advise them of what the current intelligence is, such as whether there is a Rebels bikie, for instance, who is connected with suspicious or illegal activity. That has resulted in successful prosecution of these sorts of criminals who have appeared in the courts in states such as Tasmania and who have been involved in international drug trafficking. That is an example of the way in which we contribute to that effort.

Senator LAMBIE: But even internationally, the FBI are used to working with RICO laws, which are very similar to the VLAD laws, which have been very successful. That is why they are still over there. I am just trying to get to the bottom here. We obviously know that ice cannot be hit on in one area. We know our kids have to be detoxed. We know we have to put tougher laws in to stop these drugs from circulating. So, if we are not hitting all the areas then we are not going to be successful. As well as that, Attorney-General, you want to roll out a

Healthy Welfare Card. I am not sure how I am supposed to clean up the people on that if you cannot tighten up the laws and stop those drug dealers. I can tell you now, when Campbell Newman introduced those laws in Queensland, within six months we had a massive number of bikies coming down to Tasmania to the point where I had four different bike gangs situated in one main street in Tasmania.

Senator Brandis: Well, I think you make my point for me—that these were state laws and they worked in the state of Queensland. I mentioned the Law, Crime and Community Safety Council. The question of gang laws has been discussed between the Commonwealth and the state and territory attorneys-general. But there is nothing to stop any state parliament passing the same law as the Queensland parliament passed.

Senator LAMBIE: Why can't we grow a backbone and make the law up here and just put it right across the nation? Wouldn't that be showing true leadership up here, to make some tough decisions?

Senator Brandis: Well, if you are talking about the VLAD laws, then there might be a section 51 issue as to whether there was a Commonwealth head of power for a law of that kind.

Senator LAMBIE: As I said, it needs tweaking, and you can pass that. When it comes to identifying who is an organised criminal gang, you can give that back to the courts to determine and they can determine that. I think that was one of the biggest problems he had. I will give it to Campbell Newman. He did not quite get it right.

Senator Brandis: There is absolutely no issue or impediment for any state or territory to pass laws of this kind. It is not the kind of law that ordinarily the Commonwealth passes. And, as I said, there may be an issue, because the Commonwealth Crimes Act and Criminal Code are limited in scope by section 51, so there are some offences with which they deal and other offences that they do not deal with. They are not a comprehensive criminal code, because the Commonwealth government is not a government of unlimited powers.

CHAIR: If there are no other questions—

Senator PRATT: I will put mine on notice.

CHAIR: Thank you to the Australian Criminal Intelligence Commission, and good luck in your new form.

Australian Security Intelligence Organisation

[22:44]

CHAIR: We now call ASIO and I welcome Mr Lewis and Ms Hartland. Do you wish to make an opening statement?

Mr Lewis: Yes, I would like to make a few opening remarks. Before proceeding, could I just note the tabling last Thursday of the ASIO annual report. Turning to the security environment, I would like to update you on some of the national security issues facing ASIO, our organisation, and the nation. I think senators have found this useful in previous appearances. We last appeared before this committee in May and things have changed or moved along since then. At that time I spoke about the very real and concerning threats to Australia's security from terrorism and espionage, both of which continue to be of significant concern. Unfortunately we continue to see instances, both here in Australia and overseas, that

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demonstrate why terrorism and espionage remain a real threat to our country and I would like to make a few remarks about each of those threats.

On terrorism: on the ground in Syria and Iraq that conflict is remaining as a very volatile situation but it is quite clear that coalition military operations are having a significant effect on ISIL and the so-called caliphate; to the point where ISIL's influence in the territory in the Middle East is diminished. We are seeing this now playing out each night with the operations in Mosul. Importantly, the violent events in the Middle East continue to significantly influence the security environment here in Australia, which is the most important thing from our point of view. As we are seeing, the global phenomenon of terrorist attacks is continuing, with a growing number of attacks perpetrated by lone actors or by small groups of likeminded individuals who either have been or are continuing to be radicalised to the point where they are willing to undertake acts of violence. While attacks by lone actors or small groups remain the most immediate and the most likely threat in Australia, the large-scale coordinated terrorist attacks—such as those that we saw last year in Paris and Brussels, and early this year in Jakarta—cannot be ruled out here in Australia.

Since appearing before this committee in May, there have been three further counterterrorism disruptions, that is operations conducted by ASIO and our various law enforcement agencies partners, to halt terrorist planning and to stop attacks in the final stages of execution. We have achieved some considerable success with disruption operations and I note that over the last two years that intelligence and law enforcement agencies acting in very close corporation have disrupted in 11 planned attacks in this country, several of those in the final hour or two before they were to be launched. Notwithstanding these successes, in the same time frame, that is the two years, there have been four attacks launched and three of those attacks resulted in fatalities. The latest of those non-fatal attacks occurred on the 10th of last month, quite recently, in Minto in south-west Sydney. In the Minto case, the courageous intervention of a local community member prevented the attack from being deadly. One of them was quite badly injured, as you know.

Our role as Australia's security intelligence service is anticipatory and protective in nature. Working closely with our partner agencies, we are expected to, and in the majority of cases thus far we have managed to, detect and disrupt attacks and planning before the attacks occurred. However, as I said before and I have said on several occasions both publicly and to this committee, while my organisation and our partner agencies in Australia and overseas continue to work very hard and we are focused on the issue, I can offer no guarantee against the possibility of future attacks here in Australia. Lone actors or small groups of like-minded individuals could mount low-capability attacks in Australia with little or no forewarning. An attack of this nature requires minimal preparation and presents significant investigative challenges to security and law enforcement agencies.

The four terrorist attacks in Australia over the past two years involved two terrorist using knives and two using basic firearms. And while recognising the injuries and the tragic loss of life suffered by victims in those attacks, we are aware that the outcomes could have been much worse. When we look at Nice in France and Orlando in the United States, it is clear that these attacks can have devastating impact, even though it is only perpetrated by a single attacker. These brazen acts of violence are generally inspired by the work of groups such as ISIL, which justify, encourage and glorify their attacks by targeting innocent civilians.

Focusing back here now in Australia, there remains a small number of Australians who continue to be radicalised and inspired by the rhetoric of terrorist groups, particularly ISIL. In spite of military reverses and severely reduced life expectancy of terrorist fighters in Syria and Iraq, the inspiration and the radicalisation continues. There are at least 61 Australians in Syria and Iraq that have been confirmed killed as a result of their involvement in the conflict. This statistic of 61 is potentially as high as 68. In fact, of the 68 that are likely to be dead, 11 of those were killed since I last gave evidence to this committee in May.

There are approximately 110 Australians who ASIO currently assess are still fighting or engaged with terrorist groups in Syria and Iraq. That number has been pretty stable for a while. Furthermore, ASIO is investigating around 190 people here in Australia who are actively supporting extremist groups in Syria and Iraq through recruiting, fundraising and in some cases seeking to travel to join these groups themselves. This number includes our investigation into about 40 Australians who have returned from the conflict zone. Of further concern are up to 70 children of Australians, that we are aware of, who have been exposed to extremist groups in Syria or Iraq. These children either travelled to the conflict zone with their Australian parents or, indeed, have been born there.

As ISIL's territory continues to contract, it is expected that many of those Australians that are supporting ISIL in Syria and Iraq will be killed or captured. We also expect a number, including women and children, will return to Australia either voluntarily or due to deportation from neighbouring countries. We, ASIO, in concert with other Australian agencies, are continuing to work to identify the issues that these individuals might pose on their return and ensure that appropriate treatment plans are in place. The long-term impact of returnees will be a security issue for this country, for our intelligence and our law enforcement agencies for many years to come. It is important to emphasise that those individuals returning to Australia who have committed a criminal terrorist attack can expect to be prosecuted to the full extent of the law. Where evidence may be limited, individuals may be placed under control orders or directed towards deradicalisation strategies. Either way, these people will be subject to action against them in order to protect Australia's national security.

ASIO remains committed to preventing travel by would-be fighters as the best outcome for the Australian community. To date, ASIO has issued adverse security assessments recommending the cancellation or refusal of more than 190 passports of Australians linked to extremist groups and involved in the conflict in Syria and Iraq. We have also identified threats posed by non-Australians linked to the conflict, and have issued over 20 adverse security assessments resulting in the Department of Immigration and Border Protection cancelling or refusing Australian visas to these individuals. Finally on terrorism: let me be absolutely clear that the threat of terrorism in Australia is real and present in our community. It requires vigilance by both the Australian community in the broad and governments at all levels to continue to combat it.

Chair, just a couple of words on espionage—the second threat. ASIO continues to balance our finite resources between the immediate threats posed by terrorism with the existential, more insidious and strategic threats posed by espionage. In contrast to the more visible threat of terrorism, espionage investigations are much less visible to the public but certainly no less important, presenting, as they do in their most extreme form, an existential threat to the state.

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Although the sensitive nature of this subject area means I cannot provide detail about ASIO's ongoing work in preventing espionage, I will say that the threat to Australia and its interests is ongoing, it is pervasive and it is more significant that many in our community would realise. Australia is of intelligence interest to foreign intelligence services from many reasons: we are an advanced economy with strong niche research areas, vast natural resources, extensive financial services, and what we say and do in the world matters. Australia has significant investment in defence capability, and this ensures that we will be an espionage target well into the future.

Since my last appearance in May, the matter of foreign investment has received a very high level of public interest and media attention. ASIO provides advice to the government on security threats that might be posed by the lease or purchase of Australian assets of strategic or national significance. As part of the Foreign Investment Review Board process, the Treasury may refer an application to ASIO or, when ASIO is aware of potential threats through our own investigation activities and analysis, we can become engaged. ASIO works closely with other agencies to ensure national security implications are addressed as part of the FIRB's broader national interest test consideration.

The global reporting of cyber attacks continues, and it is naive to think that such attacks are not also being squarely aimed at our national interests. ASIO is working closely with the government and industry to ensure that we are alert and agile in countering the threat and that the necessary infrastructure and systems are in place.

I will conclude my opening comments here by noting the extraordinary work that is being done by ASIO officers, the generally unsung protectors of our community. I should not let pass this opportunity to acknowledge my officers, together with those outstanding members of our federal and state police forces, officers from other Australian intelligence agencies and, indeed, our international partners. Finally, I want to register my thanks to the Australian community for the ongoing support that we receive. I welcome your questions.

CHAIR: Thank you, Mr Lewis. Can we get a copy of that statement? It will be in *Hansard*—or do I see that it is handwritten?

Mr Lewis: It is bit untidy, but I could get it tidied up for you.

CHAIR: We can get it off *Hansard* just as quickly.

Mr Lewis: Hansard would be cleaner, I suspect.

CHAIR: Thank you very much for that statement, and for your team and what you do. As you say, they are the unsung heroes. I guess that, of necessity, we do not know much about them or what they do, but we can appreciate the enormously difficult work that you do to keep Australia safe. So, on behalf of the parliament and the people of Australia, thank you again. Senator Lambie, I think you were first.

Senator LAMBIE: Wouldn't charging Australians who support ISIS with treason and putting the guilty in jail be a much better strategy than just stopping them from travelling?

Mr Lewis: It is not really a question that I can answer, because it is a matter, really, of prosecution. That would require certain evidentiary levels, and, as I think I mentioned the last time I was answering some questions for you, our work is anticipatory. I think I said that in the opening statement. Our work is anticipatory, and quite often the cases that we have would not be sufficiently developed to bring a prosecution. They may become so later on, but at the

time when my officers are dealing with the sort of caseload that we are, the vast majority of the cases are not yet ready for a prosecution.

Senator LAMBIE: Isn't leaving those people free to travel domestically in Australia causing a huge risk?

Mr Lewis: If you are asking about the issue of the cancellation of passports and, therefore, keeping individuals here, that has been addressed on a number of occasions by this committee in the past. Is that the point of that question?

Senator LAMBIE: No, I am actually talking about the people that you have got on watch.

Mr Lewis: The 190 cases of people of interest who are under investigation?

Senator LAMBIE: That is correct. You obviously cannot watch them 24/7. You are not attached to them. I am just asking: isn't that causing a huge risk? The next question would be to the Attorney-General about why they are not using treason and sedition laws. I believe Mr Hastie has brought this up as well.

Senator Brandis: There are laws in the Commonwealth Crimes Act, I think, in relation to treason and sedition. They are quite complex offences. As you know, you have to prove beyond reasonable doubt every element of an offence. The essence of treason and sedition laws is an attack on the Australian state. I am obviously speaking in generality here: if a person were, for example, intending to travel to Iraq and Syria via Turkey to participate in a civil war against the Syrian government, let us say, on behalf of ISIL or against the constituted government of Iraq on behalf of ISIL, then that would not obviously be an attack on the Australian state, so a case like that would not be an obvious case of treason. There are other offences with which such a person could be more readily and immediately charged.

Senator LAMBIE: Isn't it true, though, that showing support for a hostile foreign power, whether you are overseas or on your own home soil, comes under treason or sedition?

Senator Brandis: It can in certain circumstances, but there are more-specific conditions in the Commonwealth Criminal Code dealing with terrorism—facilitating and financing terrorism or participating in a terrorist act—which are more immediately obvious in cases of the kind of which we speak. Of course, this government has in the last parliament introduced further laws in relation to foreign fighters, as they are sometimes referred to, the so-called 'declared area' offence, which makes it a crime for an Australian to be in a declared area in a foreign conflict zone, subject to certain exceptions. It is quite a fine art that prosecutors exercise every day to find the criminal offence that is best tailor made to the particular facts of the case. There are far more obvious offences against Australian criminal law to deal with people of this kind.

Senator LAMBIE: Let's have a look at *The Courier Mail*, which says there is a \$4 million bill to track one terrorist. It is costing us \$4 million because you will not charge them under treason or sedition laws.

Senator Brandis: No, that is not right. Where there is sufficient evidence or grounds to arrest a person for a crime against Australian law, that is a matter for the police to arrest and charge them and for the Commonwealth DPP, who appeared here earlier in the day, or her staff to give advice as to whether or not there was a good prospect for a successful prosecution.

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Senator LAMBIE: I am just trying to work out how you spend \$4 million and you still have not charged a terrorist. How do you spend that amount of money?

Senator Brandis: Perhaps Mr Lewis might be better than me to answer that question. Intelligence and criminal investigation is a very complex matter, and sometimes it is expensive. Perhaps Mr Lewis could add to those observations.

Mr Lewis: If I am not mistaken, the figure that is quoted in *The Courier Mail* was one perhaps advanced by senior Federal Police officers at the table yesterday. I think that is where it came up. I cannot comment on the quanta of money, but it is, I do know, a very expensive—certainly expensive in terms of staff—effort to monitor control orders, which I think is what that article is all about. The control orders are often brought in because thresholds for prosecution have not been reached. There is a reasonable belief that an individual is posing a threat to the community and so a control order may be imposed on that individual. I really cannot comment beyond that. Quite clearly, if we are going to make a prosecution, you need to satisfy; you need to produce the evidence to make the prosecution. That is a police matter.

To the extent that we can assist, ASIO can assist, with a prosecution we do. But often the information we have is intelligence and it either would not necessarily meet an evidentiary standard or, if it did meet an evidentiary standard, it may well have been collected in such a way that the sources of the information need to be protected, so it cannot be used. I cannot comment further than that.

Senator Brandis: Can I also tell you, Senator Lambie, that there are currently 38 prosecutions on foot in Australia for terrorism offences, and I think that is in addition to 11 prosecutions that are currently on foot under the Crimes (Foreign Incursions and Recruitment) Act, which is the offence specifically designed to deal with foreign fighters. I do not want you to think because we are not charging people with treason or sedition we are not prosecuting them. That is some 50-odd prosecutions for domestic terrorist offences or foreign terrorism offences on foot, in Australia, right at the moment.

Senator LAMBIE: They have been charged; is that what you are telling me?

Senator Brandis: Yes.

Senator LAMBIE: What is the average jail time they have received from that?

Senator Brandis: I would not be in a position to tell you what the average jail time is. The criminal code terrorism offences carry sentences of, usually, a minimum of seven years and a maximum of life imprisonment. Where any particular sentence falls within that sentencing range depends on the facts of the case, obviously.

Senator LAMBIE: Do you think I could have, on notice, the outcomes of those 38 prosecutions and what happened to those people?

Senator Brandis: These are current prosecutions. These are prosecutions that have not yet gone to trial.

Senator LAMBIE: These are test cases.

Senator Brandis: No. They are not test cases, they are prosecutions. The criminal trial has not yet happened. What I could find for you—I am sure the officers will be readily able to find them—is the number of convictions for terrorism related. Here we are—it has been

drawn to my attention. So there we are: there have been 32 convictions since 2001. There are currently 38 prosecutions awaiting trial for terrorism offences, and I am told the 11 foreign fighter prosecutions are within the 38. So there are 38 current prosecutions on foot and 32 convictions for terrorism offences since 2001.

Senator LAMBIE: On notice, could I have the outcomes of those convictions? I just want to see what sort of jail time they are doing and what has happened to them.

Senator Brandis: What you would like us to tell you is, in relation to the 32 convictions since 2001, what the sentences were in each one.

Senator LAMBIE: Yes, please.

Senator Brandis: Yes, we will certainly do that.

Senator McKIM: Mr Lewis, I want to revisit a matter I raised with you in February last year. That is the Tehrik-i-Taliban, the TTP, an organisation that claimed responsibility for the Peshawar school shooting in December 2014. I asked you why, at that time, it was not listed as a proscribed terrorist organisation and you said you would have a look at it. It is still not listed. We are the only one of the Five Eyes countries that have not listed it. Can you please explain why?

Mr Lewis: Last February, if that is indeed when it was—I do recall our discussion about this—I explained to you the process by which organisations are identified for listing and that that process had not been completed or, indeed, we had not arrived at a position where we drew a conclusion with regard to the organisation you raised. That, still, has not changed. That remains the case.

Senator McKIM: Since then they have been linked to bombings in Lahore that killed 75 people on Easter Sunday this year. As I said in my preliminary question, we were the only one of the Five Eyes countries that has not listed this organisation as a proscribed organisation, or what is the equivalent in the other countries. Is there something that is holding this up? Is it a resourcing issue for ASIO? Are there complexities that you do not wish to go into here for reasons of national security?

I raised this with you six months ago. 'Nothing's changed' is it what you have said to me today—or, at least, that you have not changed your view. I presume you have not changed the fact that you have not advised the Attorney to list the organisation. Are you able to provide any further information to the committee that would just explain what would appear to be, on the face of it, an anomaly: we are the only one of the Five Eyes countries that has not listed this organisation as a terrorist or a proscribed organisation?

Mr Lewis: I understand the point of your question. I cannot comment on the judgements made by the other Five Eyes countries. We make our own judgments here, quite clearly. It is very common that we do share information about agencies between the Five Eyes countries, but I am not in a position to talk to you about the detailed consideration that we make on the various organisations that are not on the list, of which there are a number. There are a number of organisations that are always under consideration for adding to the list. The list is, of course, public; you are aware of which organisations have been listed. The ones that have not or that are under contemplation is not something that we discuss publically. But, having said that, the circumstances about the TTP have not changed since I spoke to you last, from our point of view.

Senator McKIM: In the context of whether or not you would advise the minister to list them?

Mr Lewis: That is right, and we have not advised the minister that he should take any further action.

Senator McKIM: To the best of your knowledge, were they responsible for the bombings in Lahore that killed 75 people on Easter Sunday?

Mr Lewis: I do not know. I would have to check our holdings on that.

Senator McKIM: Could you or the Attorney suggest any way forward here. I raised this issue six months ago. I was basically fobbed off—and I do not mean that critically. I did not place it on notice, because it was clear that you did not want me to. I have raised it again. There has been no rationale given at all to this committee as to why this organisation has not been listed. On the face of it, they claimed responsibility for the Peshawar school shooting. That was an extremely serious terrorist action. I am just wondering whether you can assist here Attorney—

Senator Brandis: I can assist.

Senator McKIM: On the face of it, it just seems like an anomaly.

Senator Brandis: Although, ultimately, it is for the minister to sign off on these listings, I—and, I think, any prudent minister—would always follow the judgement of intelligence specialists. ASIO and other members of the Australian intelligence community do keep these issues under review constantly. However, given that you have raised the issue and Mr Lewis and I have heard you what have to say, ASIO will have another look. We will conduct another assessment of this organisation, with a view to assessing it against the statutory listing criteria.

Senator McKIM: I appreciate that.

Mr Lewis: I hope you understand that there are many organisations in the world that are not proscribed. We are not in the businesses of responding to each one of those that has popped up. We are constantly keeping the situation under review, as the Attorney said. When an organisation meets a certain threshold for proscription, then we will go forward and recommend that to the Attorney. You can assume that silence means that that organisation has not met a threshold. I am happy to have a look at it, but we cannot enter into some sort of extended discussion about which organisations are and which organisations are not proscribed. The ones that are proscribed you can read on a list—that is a public list.

Senator McKIM: The ones that are not proscribed—

Mr Lewis: We cannot get into a running dialogue about those organisations.

Senator McKIM: I am aware of that. I have tried to address this as sensitively as I could. Nevertheless, I accept the commitment that both you and the Attorney have given, and we will see whether that emerges or not on to the publicly available list of proscribed organisations.

Your opening statement focused quite significantly on the dangers to the country of groups like ISIS, or Daesh, or groups in places like Syria and Iraq that you referenced specifically. But I want to ask you whether you can, in very broad terms, evaluate the current threat to national security posed by radical anti-Islamic groups in Australia. We know of an arrest recently of someone who has been linked to Reclaim Australia. In the same way that in general terms you spoke about the threat to national security of groups in Iraq and Syria, could you give a broad overview of your organisation's assessment of the threat to national security of radical anti-Islamic groups here in Australia?

Mr Lewis: Sure, I can make some remarks about that. As you would know, lawful advocacy, protest and dissent remain an essential part of our culture. That goes without saying. We do have, as you have mentioned, a recent case in Victoria of a particular anti-Islamic individual who was prosecuted. That particular group are of interest to us. It is certainly the case that violence has been and, I anticipate, may well continue to be offered by these groups as they confront one another—the Islamic and pro-Islamic group on the one side and the anti-Islamic groups on the other. To the extent that there is a possibility of violence, or there is indeed violence being offered, that is of interest to us. That is business for ASIO: the inciting of, what is essentially, political violence. So, yes, it is a real problem, and it is something that we are very, very acutely aware of. I have people working on that particular issue.

CHAIR: I will go back to Senator Lambie, if you do have any more questions. I am not encouraging you, but I did indicate I would allow a couple.

Senator LAMBIE: Actually, I have about 20 questions here, so how do you want to this?

Senator McKIM: I don't. Well, you are up.

Senator LAMBIE: The last time we spoke before a Senate committee you disclosed that you were watching 190 Australians who were labelled as supporters of Islamic State. Tonight you are saying there are still 190? When was the last estimates? February, was it?

Mr Lewis: It was May, the last time I mentioned that figure.

Senator LAMBIE: May was it? It has been a long year. You are still watching about 190. Does that include the radicalisation that is going on in the jails? You can correct me if I am wrong, but that seems to be on the rise.

Mr Lewis: The 190 is right across the community. I cannot break it down to where people are. We had this discussion last time I appeared before this committee. The 190 is across the community.

Senator LAMBIE: The radicalisation in the jails that is on the rise—I understand they belong to the states. Do you know what they are doing about that issue, Attorney? Obviously they are not doing a good job, because it is on the rise.

Senator Brandis: As you know, all of the prison facilities in Australia, other than those in the Northern Territory, are conducted by state governments. The Northern Territory ones are obviously conducted by the Northern Territory government. The Commonwealth does not conduct any prisons. We are not like the United States where there are federal prisoners. When people are charged and prosecuted for terrorism offences, even if they are charged and convicted under Commonwealth law, they are, nevertheless, tried in state courts and imprisoned in state prisons.

But the Commonwealth does fund a number of initiatives to address radicalisation and extremism in Australian prisons. That is in addition to the programs that various state governments run, which differ from state to state and the details of which I am not in a position to give you tonight. We fund a radicalisation and extremism awareness program, which provides frontline staff with skills and awareness to recognise specific behavioural changes amongst prisoners which may indicate radicalisation to violence. We fund Corrective Services NSW for a program called the Proactive Integrated Support Model-PRISM-which is a disengagement model that aims to target inmates who are at risk of radicalisation. That began in March of this year, and from that time, has progressed to referring and engaging with a number of offenders through a centralised team that oversees the assessment and intervention with at-risk inmates across New South Wales. Since 2010, we have contributed \$1.6 million to the Community Integration Support Program in Victoria, which is a community-led and driven initiative which aims to rehabilitate imprisoned terrorists by offering a holistic approach to rehabilitation, including both pre- and post-release components. That involves, among other things, social and religious engagement with participants, and it seeks to rehabilitate and reintegrate convicted terrorists and prisoners assessed as holding radical beliefs. So there is a program available to all states-the radicalisation and extremism awareness program-and substantial contributions of Commonwealth funding to support state programs in both New South Wales and Victoria. I think I am right in saying that all of the convictions for terrorist offences, of the 32 I mentioned before, have been in New South Wales and Victoria. Therefore, those are the two states in which terrorist offenders are incarcerated.

Senator LAMBIE: Who are the hostile foreign powers that attract the loyalty of Islamic Australians? Can you name the individuals?

Mr Lewis: I am sorry, could you repeat—

Senator LAMBIE: The foreign powers that attract the loyalty of Islamic Australians.

Senator Brandis: Are you talking about terrorist organisations?

Senator LAMBIE: Yes, I am—or individuals. It does not really matter. They do not have to be organisations; they can be run by leaders. I just want to know who attracts the loyalty of Islamic Australians. You must have their names. Can you name the individuals of those groups?

Mr Lewis: I am sorry, I do not understand the question.

Senator LAMBIE: What I am asking is, when these Australians-

Senator PRATT: Which organisations or groups are they coalescing around or attracted to?

Mr Lewis: The Australians who are of interest to us, who we believe to have been radicalised, or who have—

Senator LAMBIE: No, I want to know who they are loyal to—which overseas extremists are these Australian individuals—

Mr Lewis: What organisations are they affiliated with?

Senator LAMBIE: Yes, what they are affiliated to. They are foreign powers in my eyes. What foreign powers are they, whether it be Daesh, or it must be a mixture.

Mr Lewis: They are certainly not foreign powers by my definition, but the organisations with which they are affiliated, or claim affiliation, or are inspired by—overwhelmingly, it is ISIL. To a much lesser extent, there is JN in its current new format, Jabhat Al-Nusra, in Syria.

Those two, and the various sorts of franchisees of the remnants of the al-Qaeda organisation and its various guises, would be the focal point of allegiance of these folks.

Senator LAMBIE: And who would be the leaders, these days, of those groups?

Mr Lewis: Well, the leader of ISIL, apparently, is al-Baghdadi, and the leader of JN—I am not sure; it moves around a bit. I am not quite sure who is running that now. But al-Baghdadi is one of the characters that you frequently see on the television—well, you do not see him so much these days, but earlier on he was quite prominent.

Senator LAMBIE: So are the majority of leaders Sunni or Shia?

Mr Lewis: Those organisations I just mentioned are all Sunni, so that answers your question.

Senator McKIM: Mr Lewis, I just want to follow up on my last question. Would you say that the threat to national security from radical anti-Islamic groups in Australia is growing at the moment?

Mr Lewis: Yes, off a very low base. It has come off a low base. But it has presented, really, probably in the last 18 months or so. So, yes, it is, but I would not describe it as going up in any vertical way. But it has come off a low base and it is now more present than it was.

Senator McKIM: Mr Lewis, thank you for staying around so late in the evening. This is my final question. What does public commentary around Islam being not welcome in Australia mean for ASIO's job in fighting violent extremism—the sort of commentary that you hear from time to time from public figures?

Mr Lewis: I have made this point publicly in the past: we are, as an organisation, very dependent on engagement with the Islamic community. And, to the extent that there is commentary in the community about members of the Islamic faith being unwelcome here, the politics of that is one thing, but the practical implication for us is that it can make engagement with the Islamic community more difficult and, ipso facto, that makes our job more difficult.

Senator McKIM: Thank you.

CHAIR: I thank my colleagues for assisting, in that, due to an unfortunate timing series, ASIO could not be brought on earlier. Thank you to ASIO for giving us the benefit of your great work and advice. I also thank the secretariat staff and Hansard, particularly, who have had a very long day and have stayed even longer today to help the committee through the difficult timings we have had. My appreciation goes to my colleagues as well and to you, Minister, and your staff. As I have said, the secretariat will liaise with your office about a suitable time for the spillover, and that will have to be coordinated with the availability of members of the committee as well.

Committee adjourned at 23:28